

OF PEARLS AND FISH: AN ANALYSIS OF JEWISH LEGAL TEXTS ON SEXUALITY AND THEIR SIGNIFICANCE FOR CONTEMPORARY AMERICAN JEWISH MOVEMENTS

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Analyzing *halakhic* texts provides insights into the past and present regulation of sexuality under *Halakhah*.¹ This Article argues that halakhic conceptions of sexuality in Jewish texts, which promote the expression of heterosexual desire through marriage, form the basis of modern strategic readings of sacred texts that disenfranchise women in the process of divorce and reject homosexuality as a permissible sexual identity. Located in the family,² where struggles between authority and the expression of sexuality commonly occur, these two issues illustrate how changes in American social norms may, or should, affect the interpretations and implementation of Halakhah by the rabbinical authorities of the modern Jewish movements.

Because Orthodox, Reform, Conservative, and Reconstructionist Judaism each approach Jewish texts and traditions differently, however, their decisions are tempered by their varying theological assumptions about the divine authority of sacred works. Nonetheless, each movement's approach to sexuality has practical effects on the lives of American Jews who follow Halakhah. Consequently, Part II analyzes halakhic texts from past and present rabbinical perspectives that exemplify the laws regulating sexuality, focusing on the rabbinic preference for heterosexual desire as properly expressed in marriage. This Article examines the underlying

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¹ This Article employs the term Halakhah, that is, the Hebrew word for Jewish law, to signify the corpus of Jewish texts that introduces and expands laws rather than those works that engage in exegesis of certain sacred texts. The plural of Halakhah is *Halakhot* and the adjective is halakhic. In this Article, halakhic is generally equivalent to sacred because many Jewish movements consider Jewish legal texts to have some relationship to God and to holiness, although the degree differs substantially.

² Of course, the effects of power dynamics in the family depend on the individuals involved; within the family unit, the woman may in fact have more influence. This Article, however, looks at Jewish legal positions, that is, the "official" regulations that do not reflect reality in every family.

normative assumptions of differences between men's and women's sexuality. In this context, the discussion of heterosexuality also addresses the modern Jewish attitudes regarding the purpose of marriage between a man and a woman from traditional and liberal perspectives.

Parts III and IV explore the influence of halakhic conceptions of sexuality on divorce and homosexuality. These issues have been chosen because they are matters regulated by Jewish legal institutions. Part III addresses the legal intricacies of divorce in the Jewish tradition and the difficult situation of the *agunah*, a woman whose husband has refused to grant her a *get*, or a Jewish writ of divorce. The issue of divorce is located in a larger textual discussion of the position of women in marriage. The section explains how, in the rabbinic materials, the assumptions underlying the halakhic regulation of a woman's sexuality conflict with contemporary social norms. This Article also explores the respective American Jewish movements' responses to this issue. Part IV begins with an analysis of halakhic verses that prohibit homosexual sex in contrast to those texts that suggest the possibility for alternative genders and sexualities. It also addresses the halakhic and social implications of these texts for modern Jewish movements, examining the official reactions of traditional and liberal Jewish movements to the increased visibility and participation of gay, lesbian, bisexual, and transgender Jews ("GLBT Jews") in their respective Jewish communities. It also incorporates GLBT Jews' articulations of their relationships to, and with, the larger Jewish communities in the search for positive Jewish identity.

Part V concludes with an analysis of whether the modern American Jewish movements are consistent in their manner of interpreting and implementing halakhic texts in their respective developments of Halakhah. While the modern Jewish movements are actively responding to the difficulties posed by topics such as divorce and homosexuality, Orthodox, Reform, Conservative, and Reconstructionist Judaism approach each controversial matter strategically, in accordance with their respective theological beliefs. It is important, then, to recognize both how these contemporary authorities apply halakhic texts, as well as how their decisions considerably affect the many people today who value Jewish legal traditions. This Article argues that the Reconstructionist approach to halakhic texts is the most consistent in terms of its internal logical reasoning, even though it departs furthest from the traditional rabbinical constructions of sexuality.

I. MODERN JEWISH MOVEMENTS: A PARALLEL LEGAL SYSTEM IN AMERICA

The focus of this work is on modern American Jewish movements and their dependence on, or departure from, past halakhic texts in their development of contemporary Halakhah. Specifically, this Article analyzes

how older halakhic texts regulated marriage, divorce, and homosexuality and how these texts formed the basis for the dominant paradigm of heterosexual marriage in Judaism. Halakhah regulates life in a way that is different from, but just as important as, secular law. The scope of this Article is restricted to Jewish law. Religious law is important to individuals and to society in its own right. While secular law may sometimes act as a reference point, religious law can, and does, stand alone as a parallel system. Indeed, breaking these religious laws can lead to sanctions for the offender.

Just as other religions contain a variety of perspectives, Jewish beliefs and practices are not monolithic. It is important to identify the major streams of Judaism in America and their varying attitudes towards the sacred texts, as their theological perspectives certainly shape their positions on contemporary gender issues.

The most traditional movement is Orthodox Judaism, which upholds the divine and immutable authority of the Hebrew Bible and the Oral Law, including the *Midrashim*, the *Mishnah* and *Gemara* of the *Talmud*, works of the *Rishonim* and *Aharonim*, and decisions by rabbinical scholars today.³ For Orthodox Jews,⁴ “Halakhah is the essence” of Jewish belief, and their “version [of Jewish law] is the only correct interpretation of Judaism.”⁵ There do exist “liberals in the [Modern] Orthodox camp who recognize the human factor and espouse the need for Halakhic development” and reject the opinions of rabbis who do not “[allow] for [any] economic, sociological, or psychological factors in Halakhah,”⁶ as well as those who disallow this approach. It is important to note the possibility for internal disagreement, as it has a considerable impact on the implementation of halakhically-based decisions.

³ 17 ENCYCLOPEDIA JUDAICA 1486-94 (1971).

⁴ There are two distinct movements within this traditional version of Judaism: Modern Orthodoxy and Ultra-Orthodoxy. Although Orthodox Jews claim to represent “Torah-true” Judaism, Modern Orthodoxy more accurately reflects one response to the *Haskalah*, or Jewish Enlightenment of the eighteenth and nineteenth centuries. *Id.* This was a period when Jewish leaders advocated limited secularization with the expectation that fundamental beliefs in one God and Halakhah as promulgated by the rabbis would remain constant. *Id.* Jewish leaders encouraged Jews to leave the ghettos of Europe and take advantage of the rights the state accorded to them by enjoying secular cultural pursuits and learning the national languages of the countries in which they lived. This endorsement eventually led to Jewish reformers advocating changes in Jewish liturgy and practice, both in Orthodoxy and Reform Judaism. Ultra-Orthodoxy, in part, was another reaction to that freedom, and Jews in Ultra-Orthodox sects continue to reject the secular world. *Id.*

⁵ GILBERT S. ROSENTHAL, CONTEMPORARY JUDAISM: PATTERNS OF SURVIVAL 65-66, 84 (1986).

⁶ *Id.* at 63.

In contrast, Reform Judaism promotes a more pluralistic attitude. Ethical teachings of the Jewish tradition guide Reform theology, and thus "Halakhah is valuable, but is not to be accepted on blind faith as coming from Heaven."⁷ In this context, Jewish practice changes more readily in response to modernity because the goal is to maintain guiding principles, such as compassion, rather than enforce specific laws that are now considered to compromise moral actions.⁸ This does not mean, however, that Jewish law is totally irrelevant.⁹ Decisions by the Central Conference of American Rabbis, the national organization for Reform rabbis, as well as other Reform thinkers, take into account halakhic norms and their historical background, even as these Reform rabbis are willing to consider non-halakhic factors, especially values, that militate against traditional arguments.¹⁰

Conservative Judaism's views lie between the religious ideologies of Reform and Orthodox Judaism. Conservative Judaism recognizes Jewish texts and traditions as authoritative and, to a limited extent, divine in origin, but also realizes the need for change "when specific *mitzvot* [commandments] seem to be outmoded or arbitrarily unethical."¹¹ These Jews emphasize the binding nature of Jewish practice while using historical and philosophical insights into the development of Judaism to evaluate the modern application of Halakhah.¹² The Rabbinical Assembly, the professional organization to which Conservative rabbis belong, has granted the Committee on Jewish Law and Standards "the responsibility for recommending revisions in religious practice on the basis of Halakhic interpretation."¹³

⁷ *Id.* at 147. Indeed, Reform Jews do not have one standard conception of God; rather "Reform believes in a varied interpretation . . . with wide latitude for naturalists or mystics, supernaturalists or religious humanists." *Id.*

⁸ 14 ENCYCLOPEDIA JUDAICA, *supra* note 3, at 23.

⁹ The Columbus Platform in 1937 "assumed a considerably more affirmative approach toward traditional observance and practice" than had been historically present in Reform Judaism. DAVID RUDAVSKY, MODERN JEWISH RELIGIOUS MOVEMENTS: A HISTORY OF EMANCIPATION AND ADJUSTMENT 312 (1967).

¹⁰ 14 ENCYCLOPEDIA JUDAICA, *supra* note 3, at 26.

¹¹ ROSENTHAL, *supra* note 5, at 211.

¹² "Conservative Judaism admits that change and renewal, as people . . . gain new ethical sensitivities, or no longer share a particular observance's social assumptions, are necessary." MARC LEE RAPHAEL, PROFILES IN AMERICAN JUDAISM: THE REFORM, CONSERVATIVE, ORTHODOX, AND RECONSTRUCTIONIST TRADITIONS IN HISTORICAL PERSPECTIVE 101 (1984).

¹³ RUDAVSKY, *supra* note 9, at 342.

Originally an offshoot of Conservative Judaism, and now a Jewish movement in its own right, Reconstructionism does not recognize the divine origin of Jewish texts or traditions. The ancient works of Judaism instead represent “man’s attempt to discover God as the power of self-fulfillment or salvation.”¹⁴ Halakhah is not binding: “Jews should voluntarily choose to observe those customs that are personally meaningful and socially valuable for group survival.”¹⁵ This community uses Jewish laws and traditions as guidelines for a religiously evolving civilization. From this perspective, ethical issues in Judaism can be readily solved outside, while still referencing, the halakhic framework. Unlike Orthodox Judaism, where authority is decentralized, or Reform and Conservative Judaism, where decision-making is generally by official committee (while granting individual rabbis some freedom), Reconstructionism encourages “congregational committees, under rabbinic leadership” to determine community practices.¹⁶

A. Analyzing Halakhah

This Article analyzes those halakhic works that are most representative of rabbinic legal positions¹⁷ on issues of sexuality, especially those texts that modern Jewish legal authorities continue to refer to today. It evaluates Halakhah in a variety of time periods. The Hebrew Bible, mostly written (though not standardized) by the first century C.E., serves as the basis for explanations in later texts, and this Article examines biblical laws in the historical context of the Ancient Near East. From the third century, the *Mishnah* is a concise collection of legislation, organized by topic, whose authors often refer to the biblical verses as support for their halakhic innovations. Many works of halakhic *Midrash*, texts that generally follow the order of the Bible, also come from the first centuries C.E. The *Tosefta*, a body of legal literature contemporaneous with the *Mishnah*, but not included in its final redaction, extends the Mishnaic rulings. Rabbis from the *Mishnah*, *Midrash*, and *Tosefta* are called *Tannaim* and material from this time period is called *tannaitic*. There are two Talmuds that consist of the *Mishnah* and commentary on the *Mishnah*, called the *Gemara*. The

¹⁴ ROSENTHAL, *supra* note 5, at 255.

¹⁵ *Id.*

¹⁶ RAPHAEL, *supra* note 12, at 186.

¹⁷ It is important to note that all of these sources are collected works, meaning that redactors gathered, edited, and re-edited the sources and previous editions. This Article interprets the positions as they appear in modern printed editions, with the acknowledgement that other, hidden voices may have shaped the texts. *See, e.g.*, RICHARD ELLIOTT FRIEDMAN, WHO WROTE THE BIBLE? (1987); 15 ENCYCLOPEDIA JUDAICA, *supra* note 3, at 15.

Jerusalem Talmud, also known as the *Yerushalmi*, was set down around the fourth century C.E. in the land of Israel. The Babylonian Talmud, also known as the *Bavli*, was compiled from the third century until the sixth century C.E. in Babylonia. Most of the people from this period are called *Amoraim*.

Most of the sources from later than the sixth century date from the eleventh century C.E. onward. Rabbi Shlomo Yitzchak, otherwise known as Rashi, wrote his commentary on the Torah during this time. Rabbi Moses ben Maimon, also known as *Rambam* or Maimonides,¹⁸ compiled halakhic rulings in the *Mishneh Torah*. Finally, in the fifteenth century, Joseph Caro wrote the *Shulchan Arukh*. He evaluated three major works of legal rulings written in earlier centuries, including the *Mishneh Torah*, and chose what he considered the most definitive rulings. This Article also includes halakhic scholars who lived from the Renaissance until modern times.¹⁹

While this analysis covers a broad spectrum of works, an examination of every text relating to sexuality in the Jewish tradition is neither practicable nor feasible. Because the major movements of Judaism use the full corpus of sacred texts in their contemporary interpretations of sexuality, however, it is important to evaluate these halakhic texts in their proper historical contexts. This Article analyzes those texts that best illuminate the consequences of Jewish understandings of sexuality for contemporary Orthodox, Reform, Conservative, and Reconstructionist Judaism.

B. Sexuality

Scholars have historically differentiated between sex and gender. Sex suggests a person's biological makeup—whether she or he has female or male reproductive organs, respectively—and gender refers to a societal construction that expects certain behaviors from women and men in a culturally assembled context. Sexuality, to a limited extent, is the bridge between these two terms: “the physical and emotional grounding of an individual's capacity to love, [including] the physical and psychological dimensions of the human person.”²⁰ Certainly, “sex, sexuality, and reproduction are all closely woven into the fabric of living things. All relate to the propagation of the race and the survival of the species. Yet there can

¹⁸ Rabbi Moses ben Maimon was born in Spain and lived in Egypt during the twelfth century. 11 ENCYCLOPEDIA JUDAICA, *supra* note 3, at 754-55.

¹⁹ These more recent texts are called *responsa* because each *responsum* generally responds to a legal problem in Jewish law.

²⁰ Michael A. Hayes, *Sexuality and Spirituality: Embattled Enemies or Kissing Cousins?*, in RELIGION AND SEXUALITY 240, 244 (Michael A. Hayes et al. eds., 1998).

be sex without sexuality, and reproduction need not [but can] be sexual.”²¹ While different cultures may recognize a variety of sexualities and genders, most societies, including the Jewish community, assign gendered sexual scripts to men and women. Babies are not born with innate knowledge of these expectations; rather they “are given an assigned gender based on anatomical appearance . . . [which] is significant because it tells *others* how to respond.”²² Learned over time, expressions of sexuality reflect a sexual identity strongly tied to a person’s perceived sex and gender. When this Article refers to sexuality, this means the full range of bodily and emotive responses to sexual arousal, including a variety of sexual activities that may sometimes culminate in sexual intercourse. This definition of sexuality does not consist only of sex; it also refers to all the reactions a person has when attracted to another. These are, however, modern, secular conceptions that are certainly not incorporated in ancient texts and are not necessarily included in modern Jewish legal approaches. Sexuality is a tool for analysis and critique.

II. HALAKHIC CONCEPTIONS OF (HETERO)SEXUALITY

Halakhah overwhelmingly prescribes one legitimate option of sexual expression for Jews: heterosexual intercourse between a man and a woman legally married to each other. The rabbis and redactors of halakhic texts, in their legislation about marriage and other relationships between Jews, work from the normative assumption of heterosexual desire and behavior for men and women. As they note similarities and differences with regard to men’s and women’s sexuality, the rabbis set the standards for the physical expression of desire. Their laws reach far beyond marriage and divorce to include everyday interactions between men and women. For example, rabbis instituted laws of modesty to control perceived sexual tension and presumably to aid people in avoiding sexual sins, namely sexual relations outside of marriage. Today, halakhic constructions of sexuality are the repositories of the rabbis’ assumptions concerning sexuality. Their interpretations’ continuing authority contributes to the emphasis on marriage between men and women and on procreation in the Jewish community.

This section argues that the rabbis of the texts identify particular characteristics of sexuality and that these attributes support the halakhic ideal of heterosexual marriage for the expression of sexual desire. They differentiate between the sexual roles of men and women in detailed

²¹ *Sex*, in ENCYCLOPÆDIA BRITANNICA ONLINE (2005), <http://search.eb.com/eb/article-9109533>.

²² BRYAN STRONG ET AL., HUMAN SEXUALITY: DIVERSITY IN CONTEMPORARY AMERICA 121 (4th ed. 2002).

discussions in order to reinforce that heterosexual model. The extent to which men and women develop and exhibit these sexual feelings, in the rabbis' opinions, differs substantially²³ and subsequent legislation reflects that assumption, albeit with a double standard. The rabbis explain that men actively pursue and engage in sexual intercourse as evidenced by their easy, likely arousal by women, their overt expression of desire, and their dominant position during sexual intercourse. On the other hand, they contend that women suppress explicit articulation of their sexual desires, unless they are vigorously seducing men and leading the entire Jewish

²³ Indeed, differences begin and are established early. The rabbis contest when sexual desire and desirability begin in boys and girls. On the surface, it appears that the legal distinction would correlate with the age of responsibility and eligibility for marriage: around twelve years old for a girl and thirteen years old for a boy. There is, however, halakhic awareness that no one can quantify sexual development on the basis of age, simply because children physically mature at different rates. In a legal commentary from the last century, Rabbi Abraham Yeshayashu Karelitz explained that the regulation of a girl's sexual expression was "a measure against erotic thought and distraction and should not apply to girls too young to have such an effect. One would suppose it applies only where temptation lurks, i.e., that it is not a matter of age but of physical form and appearance." GETSEL ELLINSON, II WOMAN AND THE MITZVOT: THE MODEST WAY 191, 350 (Raphael Blumberg trans., 1992) (quoting *Hazon Ish*, *Orah Hayyim* 16, letter 8).

This position finds support in many of the earlier halakhic sources. In the Babylonian Talmud, for example, *Berakhoth* 24a addresses the question of whether a man may recite the *Shema* in bed in front of his children and other minors. *Id.* at 191 n.54. R. Hisda said that a man may do so "until a young girl is three years and one day old and until a young boy is nine years and one day old," after which age it is likely he will be aroused by those children. HEBREW-ENGLISH EDITION OF THE BABYLONIAN TALMUD: BERAKOTH 24a (Isidore Epstein ed., Maurice Simon trans., Soncino Press 1972) [hereinafter BERAKOTH]. The dialogue continues: "Others say until a young girl is eleven years and one day old and until a young boy is twelve years and one day, each up until when 'your breasts were established and your hair had grown.'" *Id.* (author's translations).

The signal for when a child has reached adulthood, therefore, is not age alone but rather the onset of puberty, a phenomenon of which the rabbis were well aware. They realized that puberty affected the two sexes differently: "[T]he two indicators [of puberty], the first of which applies to both boys and girls, whereas the second is gender-specific, are the appearance of pubic hair and the growth of a girl's breasts." CHARLOTTE ELISHEVA FONROBERT, MENSTRUAL PURITY: RABBINIC AND CHRISTIAN RECONSTRUCTIONS OF BIBLICAL GENDER 143 (2000). Fonrobert includes several textual references with regard to the physical onset of puberty: mNid 6:11; mNid 5:9, 6:1, 6:11-12; tNid 6:2-7; mNid 5:8; tNid 6:4 (mNid refer to *Mishnah Niddah*, and tNid refers to the related *Tosefta*). See generally HEBREW-ENGLISH EDITION OF THE BABYLONIAN TALMUD: NIDDAH (Isidore Epstein ed., Israel Slotki trans., Soncino Press 1989) [hereinafter NIDDAH]. Practically, this varying development had few effects on the application of modesty conventions. Girls and boys who have not reached puberty by age twelve or thirteen, respectively, or for some authorities, even younger children, are held to the same standards of modesty as are men and women who have reached physical maturity, because their adherence to these laws serves to educate them about the proper ways of relating to members of the opposite sex. According to the rabbis, boys and girls, clearly differentiated in their youth, grow up to be adult men and women with distinctive sexual expressions and responsibilities.

community to sin. Expressed within those roles are halakhic admonitions and advice meant to prevent illicit sexual relations that come about from sexual tension between men and women seeking to express their desires. The rabbis limit contact between unmarried men and women, but for men, Torah study is promoted as a way, in part, to prevent extramarital sexual intercourse. Their regulations address nearly every possibility of sexual arousal, prohibiting those actions that might contribute to a permissive atmosphere. Recognizing the limitations of those guidelines, Halakhah decrees that matrimony, by satisfying sexual desires with the goal of procreation, is the natural and proper resolution of sexual tension.

The next section explores contemporary reactions to this halakhic structure; all of the modern Jewish movements have, within the last ten years, if not before, affirmed the central role of marriage in Jewish practice, emphasizing in particular its role in procreation, and have only recently reevaluated the position of the traditional heterosexual family in Judaism. Together, the halakhic construction of sexuality and the situating of that heterosexual paradigm in the modern context provide the background for the analysis of divorce and homosexuality in Jewish tradition.

A. Male Sexuality

Encouraging marriage is the halakhic way of regulating men's sexual needs that would otherwise lead to aggressive and unchecked pursuit of intercourse. First, this section explains the rabbis' concern for men's sexual desires and the possibility of Torah study as the solution to this problem. Second, it explores how the rabbis viewed and regulated sexual intercourse within marriage. It is crucial to note that the rabbis write from their own experiences and observations, and thus their laws reflect heterosexual male perceptions of sexual identity.

For the rabbis of the texts, male sexual desire threatened men's physical lives as well as the basic structure of society. Halakhah considers men more likely to seek satisfaction of their sexual desires. The male is always at the mercy of his *Yetzer HaRa*, the evil inclination that, with women, "present[s] a particular threat to male sexual self-control."²⁴ Men are easily aroused: Babylonian Rabbi Sheshet²⁵ exclaims, "[A]ll who see a woman's little finger, it is as if he is seeing her secret place."²⁶ Lest one

²⁴ Michael Satlow, *"Try To Be A Man": The Rabbinic Construction of Masculinity*, 1996 HARV. THEOLOGICAL REV. 37, 89.

²⁵ Rabbi Sheshet lived during the late third century in Babylonia. GUNTER STEMBERGER, INTRODUCTION TO THE TALMUD AND MIDRASH 92 (Markus Bockmuehl ed. and trans., 2d ed. 1996).

²⁶ HEBREW-ENGLISH EDITION OF THE BABYLONIAN TALMUD, *supra* note 23, at 24a (author's translation).

think that this statement is merely an aberration, the redactor(s) included this rabbi's statement again in *Shabbat* 64b.²⁷ The rabbis also realized that visual stimulation was not the only action that causes arousal, concluding, for instance, that "a woman's voice constitutes an erotic stimulus."²⁸ In the Babylonian Talmud, *Ketuboth* 64b offers evidence for this strong desire and its inevitable relief, in a sinful sexual liaison if not within the context of marriage:

R[abbi] Hiyya bar Yosef²⁹ said to Shmuel,³⁰ what is the difference between a rebellious husband and a rebellious wife? He said to him [i.e. Shmuel said to Rabbi Hiyya bar Yosef]: Go [and] learn from the market of prostitutes: who hires who? Another explanation: his [urge/desire] is [lit. formed] external, [and] hers is internal.³¹

This text suggests that, because men take the initiative in illicit sexual relations, the "male sexual drive is stronger than the female sexual drive."³² This passage does not confer its approval on men who hire prostitutes, but

²⁷ ELLINSON, *supra* note 23, at 79.

²⁸ *Id.* at 100, 355 (citing the *Kol Bo* 45, a halakhic work from before the fourteenth century).

²⁹ According to Stemberger, this third century rabbi, a second-generation member of the *Amoraim*, "migrated from Babylonia to Palestine." STEMBERGER, *supra* note 25, at 87.

³⁰ Probably from the first generation of *Amoraim*, Shmuel lived in the third century in Babylonia. *Id.*

³¹ MICHAEL SATLOW, TASTING THE DISH: RABBINIC RHETORICS OF SEXUALITY 286 (1995) [hereinafter SATLOW 1995]. I verified Satlow's translation using the text from the HEBREW ENGLISH EDITION OF THE BABYLONIAN TALMUD: KETUBOTH 24a (Isidore Epstein ed., Samuel Daiches trans., Soncino Press 1989) [hereinafter KETUBOTH]. See also Ketuboth 24a, Ma'agar Sfirat HaQodesh/Store of Holy Texts, <http://kodesh.snunit.k12.il/b/1/13201.htm> (last visited Oct. 16, 2005) [hereinafter Store of Holy Texts]. Because the halakhic texts examined in this Article are Jewish holy texts originally written in Hebrew or Aramaic and because English-translated editions of the texts may not be easily accessible to readers, I have provided two separate sources for the same halakhic texts. In writing this Article, I read, translated in the first instance, or verified translation of halakhic texts by examining them exclusively in Hebrew or Aramaic, relying mostly on the original versions of the halakhic texts located online at the Store of Holy Texts. In the process of editing, I have reviewed the Soncino Press editions, which have the texts in both languages, and verified the Store of Holy Texts' Hebrew/Aramaic editions. Consequently, in each place where I cite a halakhic text, or a chapter within that work, I have provided these two parallel sources in an effort to best accommodate my audience's needs as dictated by their knowledge of Hebrew and Aramaic.

³² SATLOW 1995, *supra* note 31, at 286.

rather shows that the rabbis feared male sexual desire was so strong that most men, even moral men, would engage in immoral sex.³³

For the creators of Halakhah, all of these factors come together to threaten men's physical lives as well as the basic structure of society. According to a story in *Sanhedrin* 75a in the Babylonian Talmud,

[a] man once cast his gaze upon a woman and became so aroused that his life was imperiled. Upon examining him, physicians pronounced that his only hope was to have intercourse with her, but the rabbis said that they would let him die before permitting such a thing. It was then suggested that she stand before him naked, but the rabbis' response was the same. When it was suggested that she talk to him from behind a wall, they were again opposed.³⁴

This man's intense reaction to seeing a woman indicates the strength of these feelings and the danger that ensues when he cannot relieve them. The doctors advocate what they consider most reasonable: erotic contact between the two. The word used for intercourse has the root *baal*, which also means "to be master of" or "to take possession of." Here, the woman is the object of this "taking." The rabbis, perhaps using the word "baal" for this reason, see the woman as literally an object of his affections of which he alone requests possession:

And why did he not marry her? It would not have satisfied him. As R. Yitzchak said, "Since the day the Temple was destroyed, the desire for intercourse has been transferred to sinners: Stolen waters are sweet and bread eaten in secret is pleasant" (*Prov.* 9:17).³⁵

³³ Importantly, the prostitutes to whom this section refers are female. The use of the word "*zonot*," that is, the feminine plural for prostitutes, underscores the direction of that male desire toward women and heterosexual sex. The passage does not leave room for sexual intercourse to happen between people of the same sex within the halakhic framework. This omission probably indicates the inconceivability for legitimate homosexual desire or homosexual identity for at least some of the rabbis. Of course, this does not mean that men and women did not engage in homosexual activity.

³⁴ ELLINSON, *supra* note 23, at 49. Ellinson's translation was verified with the HEBREW ENGLISH EDITION OF THE BABYLONIAN TALMUD: *SANHEDRIN* 75a (Isidore Epstein ed., Jacob Shachter trans., Soncino Press 1994). See also *Sanhedrin* 75a, Store of Holy Texts, <http://www1.snunit.k12.il/kodesh/bavli/snhd075a.html> (last visited Oct. 16, 2005).

³⁵ ELLINSON, *supra* note 23, at 79. Given that the other rabbis in related sections of this discussion are *Tannaim*, I surmise that Rabbi Yitzchak lived in the early third century and agree with Stemberger that he was one of Rabbi's contemporaries. STEMBERGER, *supra* note 25, at 79.

In this passage, the rabbis do not consider the possibility that this relationship might involve two willing partners. The physicians and rabbis disagree whether sexual contact between this man and woman would actually relieve *his* desire or promote more aggressive, sinful sexual behavior by him, considering that “some people’s sexual pleasure depends on the experience being adventurous and illicit.”³⁶ A man’s sexual desire wrongly channeled leads to inappropriate sexual contact outside the approved framework of marriage; the rabbis respond to this challenge by legislating conditions for contact between men and women.³⁷

So far, this section has shown that Halakhah presumes that strong male sexual desires for women, so intense that they potentially threaten an unmarried man’s ability to function normally in the world, necessitate resolution through expression of those feelings. It has also indicated that the rabbis considered it likely that sexually unsatisfied men would seek out illicit sexual liaisons in order to relieve their feelings. This is not, however, limited to unmarried men. Within the context of a heterosexual marriage, this trend of male aggression in matters of sexuality continues: Halakhah proposes that men initiate intercourse, perhaps recognizing that men’s desires are stronger. In other words, “a man requests sexual relations” outright by “showing his wife extra affection and love before nightfall, speaking to her of love and embracing her.”³⁸ In *Baba Metsia* 83a/84b, a discussion of marital sexuality and its connection to procreation “sports unusually graphic representations of maleness and the question of maleness as figured through the body”:

[t]here are those who say that this they said to her: “As the man, so is his virility.” And there are those who say that thus did they say to her: “Love compresses the flesh.” . . . Said Rabbi Yohanan,

³⁶ *Id.* at 50 n.16.

³⁷ Not surprisingly, the above passage ignores masturbation as a means to resolution, probably because it is forbidden. Masturbation is roundly condemned in the ancient sources, including multiple places in the Babylonian Talmud. *See* NIDDAH, *supra* note 23, at 13a, 13b; *Even HaEzer* 23:1-3, in SHULCHAN ARUKH (Shneur Zalman ed., Kehot Publication Society 2002). *See also* Walter Jacobs, CCRA Responsa: ARR/153. Masturbation (1979), <http://data.ccarnet.org/cgi-bin/respdisp.pl?file=153&year=arr/>. The most important factor regarding this prohibition was the problem of *hash-hatat zera*, or the “destruction of seed,” that could have been used to procreate. *See* DAVID M. FELDMAN, BIRTH CONTROL IN JEWISH LAW: MARITAL RELATIONS, CONTRACEPTION, AND ABORTION AS SET FORTH IN THE CLASSIC TEXTS OF JEWISH LAW 109 (1998). In any case, masturbation seemingly allows men to satisfy their desires outside of the marital context; this concept troubles the rabbis because, in their opinion, it does not resolve the problem. For example, the man above craved a particular woman, and autoeroticism would not have satisfied his desire.

³⁸ Hannah Rockman, *Sexual Behavior among Ultra-Orthodox Jews: A Review of Laws and Guidelines*, in JEWISH EXPLORATIONS OF SEXUALITY 191, 199 (Jonathan Magonet ed., 1995) [hereinafter JEWISH EXPLORATIONS].

“Rabbi Ishma’el the son of Yose’s member was like a wineskin of nine *kav*; Rabbi El’azar the son of Rabbi Shim’on’s member was like a wineskin of seven *kav*.” Rav Papa said, “Rabbi Yohanan’s member was like a wineskin of three *kav*.” And there are those who say: like a wineskin of five *kav*. Rab Papa himself had a member which [sic] was like the baskets of Hipparenum.³⁹

This text links male sexual desire for his wife to the size of a man’s penis. The mere occurrence of this narrative suggests that rabbis had little difficulty illustrating how men were quite explicit about their sexual desires within marriage.

Assuming that mere contact with women erotically stimulated men, Halakhah prescribes marriage for every man for the relief of sexual urges. Generally the mandate that “marriage per se is a requirement of the law, and even its deferral must be justified”⁴⁰ is connected to the duty of procreation. However, the texts go further than procreation. Maimonides explains that an unmarried man may continue studying Torah “providing his sexual drive does not get the better of him; if it does he is required to marry even if he already has children, in order that he not come to thoughts of sin.”⁴¹ Later rabbis codified this principle in the Middle Ages.⁴²

While they recognized that the institution of marriage controls male sexuality, the rabbis generally encouraged moderation for unmarried and married men by the active limiting of sexual thoughts through dedicated religious study. As Feldman summarizes R. Abraham ben David, “the husband’s intention [regarding sex] is a meritorious one if . . . he wants to avoid ‘thoughts of sin.’ . . . [M]oderation in sex, food, and drink should be *his* goal.”⁴³ Halakhah situates Jewish textual study in opposition to the expression of sexuality, whether marital or otherwise. Because men were considered easily aroused, a *responsum* suggests that

³⁹ DANIEL BOYARIN, *UNHEROIC CONDUCT: THE RISE OF HETEROSEXUALITY AND THE INVENTION OF THE JEWISH MAN* 95 (1997). Boyarin’s translation was verified with the HEBREW ENGLISH EDITION OF THE BABYLONIAN TALMUD: BABA MEZIA 84a (Isidore Epstein ed., Salis Daiches trans., Soncino Press 1994) [hereinafter BABA MEZIA]. See also Mezia 84a, Store of Holy Texts, <http://www1.snunit.k12.il/kodesh/bavli/bbam084a.html> (last visited Oct. 16, 2005).

⁴⁰ FELDMAN, *supra* note 37, at 27.

⁴¹ *Id.* at 32 (citing the MISHNEH TORAH: ISHUT 15, 3). See generally MISHNE TORAH: RAMBAM (Moshe ben Shaltiel ed., Ma’or Publication Society 1975).

⁴² FELDMAN, *supra* note 37, at 32 (noting that this principle can be found in the *Tur* and the *Shulhan Arukh, Even HaEzer* 1, 4).

⁴³ *Id.* at 69 (stating that ben David is a “contemporary and official critic of Maimonides’ Law Code”).

if a man knows [that traveling next to women] will lead to erotic thought, he should avoid travel then unless essential. If he must reach work, he should strive to divert himself with Torah thought. As *Rambam* advises, "If it will lead to erotic thought, he should turn his heart from banalities to Torah, that 'lovely hind and graceful doe'" (*Prov.* 5:19).⁴⁴

The above example may also emphasize Halakhah's realization that there are appropriate and inappropriate contexts for the expression of sexual feelings; however, it is important to note that the avoidance of erotic thoughts associated with women without the intention of marital sex is seemingly accomplished by religious study.

Interestingly, though, the explanation given by Rabbi Simon ben Azzai⁴⁵ for the justification of his continued bachelorhood implies that he transfers his erotic thoughts, explained as "love," to Torah study, rather than negating those feelings completely. He defends himself: "What can I do? My soul is in love with [the study of] Torah. It is possible that the world will be perpetuated by others."⁴⁶ Ben Azzai's connection of his love for Torah with the commandment to have children is significant because it highlights the relationship between sexual desire and procreation. He rejects the obligation to reproduce by choosing to continue his Jewish learning; this refusal is perhaps recognition of the mechanics of procreation. More likely, it is a declaration that he, unlike other men, can direct his erotic feelings toward the texts and therefore does not present a risk to the society at large: he will not lose control of his emotions and pursue illicit sexual relations. Furthermore, the root *hšk*, meaning "to be in love with," which Ben Azzai used to denote his love of Torah, is not unique in this context. Later halakhic works use similar sexual vocabulary to show their approval of this lifestyle choice: "One whose soul is in love with the Torah and studies it as Ben Azzai did, and cleaves unto it all his days commits no sin thereby."⁴⁷ The word "cleaves," from the root *dbk*, implies marital sex, as it is the same root used in *Genesis* 2:24 in the explanation of marriage: "Therefore a

⁴⁴ ELLINSON, *supra* note 23, at 64-65 (citing Moshe Feinstein, IGROT MOSHE: EVEN HAEZER, 14) (quoting *Hilkhot Isurei Biah* 21:19).

⁴⁵ For Ben Azzai's biographical information, see STEMBERGER, *supra* note 25, at 74.

⁴⁶ FELDMAN, *supra* note 37, at 31. The translation of the Hebrew here is my own. See also HEBREW ENGLISH EDITION OF THE BABYLONIAN TALMUD: YEBAMOTH 63b (Isidore Epstein ed., Israel W. Slotki trans., Soncino Press 1994) [hereinafter YEBAMOTH]. This text may also be transliterated as "Y'vamo"; see also Y'vamo 63b, Store of Holy Texts, <http://www1.snunit.k12.il/kodesh/bavli/ibmu063b.html> (last visited Oct. 16, 2005).

⁴⁷ *Id.* at 31-32 (author's translation). See generally *Mishneh Torah Ishut* 15:3, *supra* note 41. See also *Mishneh Torah: Ishut* 15:13, Store of Holy Texts, <http://kodesh.snunit.k12.il/i/4115.htm> (last visited Nov. 6, 2005).

man/husband leaves his father and his mother and cleaves (*dabak*) with his woman/wife and they become one flesh.”⁴⁸ The language makes it clear that Ben Azzai satisfies his sexual desires by having an intimate connection with Torah.⁴⁹

The rabbis’ discussion of male sexuality continues into a detailed exposition of marital intercourse. Indeed, Maimonides advises in the *Mishneh Torah*, *Deot* 4:19 that “[s]exual expression [in marriage] for the relief of physical pressures is both morally and physically salutary.”⁵⁰ While some would argue that Maimonides’s suggestion is not necessarily halakhic because there are no punishments associated with its breach, such moral judgments may eventually gain the force of law because they are contained within legal texts.

Thus, aggressive in his pursuit of erotic fulfillment, a man takes control during the actual sex act. As *Niddah* 31b, from the Babylonian Talmud, explains: “And why does the man lie face downward [during sexual intercourse] and woman face upward towards the man? He [faces the elements] from which he was created and she [faces the elements] from whom she was created.”⁵¹ This explanation of positions in sexual intercourse reinforces the man’s higher status as compared to the woman’s inferior status: she is below him literally and figuratively. This does not imply that, in reality, women did not have active roles during sex, but only that the Halakhah encourages the man’s control of the act of penetration.

A discussion of sexual positions in the *Shulchan Arukh* illustrates how this explanatory section of the *Niddah* was later used to delineate what constituted proper marital sexual intercourse:

He underneath and she above him is considered an impudent act; both at the same level is considered a perverted act. It is told of Rabbi Eliezer that he used to have cohabitation with such awe

⁴⁸ *Genesis* 2:24 (Biblia Hebraica Stuttgartensia (Rudolf Kittel et al. eds., 1997)) (author’s translation).

⁴⁹ Unfortunately, writers after Maimonides condemned Ben Azzai for his choice. FELDMAN, *supra* note 37, at 32. This disapproval does not, however, take away from the role that studying Jewish texts fulfills for men.

⁵⁰ *Id.* at 70 (paraphrasing R. Isaac Aboab).

⁵¹ JUDITH R. BASKIN, *MIDRASHIC WOMEN: FORMATIONS OF THE FEMININE IN RABBINIC LITERATURE* 15 (2002). Baskin’s translation was verified with *Niddah* 31b, *supra* note 23. See also *Niddah* 31b, Store of Holy Texts, <http://www1.snunit.k12.il/kodesh/bavli/nidh031b.html> (last visited Oct. 16, 2005).

and terror that it appeared as if a demon was forcing him to do it.⁵²

This halakhic text emphasizes that the proper position in marital sexual intercourse set out in *Niddah* can sufficiently gratify a man's sexual appetite. Rabbi Eliezer was able to release his great sexual feelings, like a "demon,"⁵³ by following the rabbinical rules of cohabitating properly with, it is assumed, his wife. However, in the *Mishneh Torah*, *Issrei Biah* 21:9, Maimonides challenges this limitation on sexual positions: "But a man's own wife is permitted to him and, with her, he is allowed to do as he pleases. He may cohabit with her whenever he pleases, kiss her wherever he pleases, and cohabit naturally or unnaturally."⁵⁴ Nonetheless, even this permission for liberality in the sexual act reinforces the halakhic ideal: male control of marital sex. Halakhah grants the husband the prerogative to have sexual relations with his wife, albeit within the limits discussed below.

While attitudes toward sexual orientation are addressed in Part V, at this point it is important to note that the rabbis look with favor on heterosexual intercourse within marriage. There are instructions for the expression of sexual desires within marriage, and, as shown *infra*, sex is seen favorably with regard to the wife's marital rights and to the general purpose of procreation. However, there is a dearth of instruction or encouragement for male (or female, for that matter) homoerotic behavior. This omission emphasizes the primacy of heterosexuality: the legal advice to men assumes that the man engaging in sexual relations does so with a female partner, his wife.

B. Female Sexuality

Because they were male, the rabbis were able to regulate male sexuality based on understandings of their own sexual identities, as shown by the bulk of personal evidence used to support the laws. The regulating c

⁵² EVELYN KAYE, *THE HOLE IN THE SHEET: A MODERN WOMAN LOOKS AT ORTHODOX AND HASIDIC JUDAISM* 124 (1987) (citing SOLOMON GANZFELD, *CODE OF JEWISH LAW: A COMPILED OF JEWISH LAWS AND CUSTOMS* (1963)). Kaye does not detail what section and verse of Ganzfeld's book she references.

⁵³ This "demon" may also be an expression of Rabbi Eliezer's *Yetzer HaRa*, or as discussed, *supra* note 24, his "evil inclinations."

⁵⁴ FELDMAN, *supra* note 37, at 89. Feldman suggests that "unnaturally" could have three meanings—"dorsal," "retro," and "a tergo"—and reflect a concern for semination outside procreation. *Id.* at 155 n.63. Chapter 8 of Feldman's work discusses this topic more generally. Although I am unsure what would consist of cohabitating "unnaturally," Maimonides clarifies his position by stating that "the way of piety is not to be frivolous about this but to approach it with holiness and not deviate from the natural," which means, I assume, the standard sexual position suggested by the other sources. *Id.* (quoting *Issrei Biah* 21, II).

female sexuality, however, was a different process altogether; to construct female sexual identities as reflected by female experiences, the rabbis had to rely on anecdotal evidence from female relatives. As a result, Halakhah reflects male opinions of what sexual practices and feelings women ought to have, especially with regard to how female sexual expression should fit into the patriarchal legal structure perpetuated by the rabbinical system. Therefore, "discussion of women's sexuality is primarily confined to strategies of control of women's sexuality" as "recorded by a small elite group of male religious leaders."⁵⁵

Certainly, the rabbis affirmed that both sexes had strong desires, noting that "all sexual prohibitions, whether involving intercourse or foreplay, apply equally to the man and woman involved."⁵⁶ As they did for men, the rabbis prohibited certain activities that would lead to the sexual arousal of women, stating that "a woman, like a man, is enjoined to avoid every act that will lead to her own sexual arousal, such as reading pornographic literature."⁵⁷ This text indicates that Halakhah strongly discourages any activity that arouses women outside of marital intercourse. However, the rabbis believed that sexual stimulation occurred less frequently in women; the majority rule was, for example, that "a woman may gaze upon a handsome man, and likewise, most authorities hold that she may hear a man sing [because] the sages gauged that women are not aroused by this."⁵⁸ Additionally, Rabbi Ovadiah Yosef writes: "Here is proof that we do not fear women will have erotic thoughts [when looking at a man's penis]. The reason is that they are not prone to sexual arousal."⁵⁹ This is an extreme statement, considering the level of visual stimulation. Certainly women can become sexually aroused; other halakhic texts warn of that possibility. However, the extreme character of this comment indicates the extent to which women were seen as resistant to arousal.

Halakhah presents two constructions of female sexuality. The seductress who arouses herself and threatens to lead men to sin is held in opposition to the married woman who shows modesty regarding her sexuality and sexual desire, reserving it only for her husband. First, the problem of the seductress stems from the rabbinical concern that "she violates a prohibition against 'approaching intercourse' [and] she leads men to sin."⁶⁰ Initially, it seems this concept of female sexuality acknowledges

⁵⁵ SATLOW 1995, *supra* note 31, at 13.

⁵⁶ ELLINSON, *supra* note 23, at 46.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 85-86 (citing *Yabia Omer*, Part I, 6:5).

⁶⁰ *Id.* at 46.

women's power to arouse and to be aroused. Unfortunately, the attitude of Halakhah is less flattering: "[R]abbinic literature portrays women not only as sexually attractive to men, but also as more sexually avid and as less able to control their overwhelming desires"⁶¹ once aroused. In other words, although it is harder to sexually excite women, once sexual feelings are initiated, women cannot control themselves.⁶² Judith Baskin terms this character flaw "light mindedness,"⁶³ words that conjure images of weakness and fallibility. In contrast, the extramarital sexual feelings of men are viewed as outside forces that threaten him, and he is advised that Torah study will negate those thoughts and prevent his acting wrongly. For a woman, the texts equate her inability to control sexual arousal with a defect in her character. The rabbinic "solution" places the physical burden of controlling sexual stimulation on women. Women are instructed to monitor their appearance and limit their interactions with men. By dressing modestly and avoiding being alone with men, women reduce the risk that either sex will inadvertently cause the arousal of another. Unlike men, women are not given advice on how to curb their sexual desires, for example, with sacred study—the rules of modesty provide a sufficient check on female sexuality.

With marriage, however, the Halakhah desexualizes the married woman outside the narrow context of marital intercourse. On one hand, the law insinuates that, to a limited extent, marriage restrains women's sexual desires as it does for men: by providing a channel for sexual expression. Indeed, with marital sex serving as an outlet for sexual expression, the rabbis believed that women were not even aroused by examination of their vaginas. *Taharat mishpachah*, also called the "Laws of Family Purity," encompasses a set of practices that restrict a married couple's physical contact during the wife's menstrual period.⁶⁴ The woman checks herself with her fingers in order to ascertain when her period has begun and then ceased. *Niddah* 13a, in Ellinson's words, rationalizes that "we do not fear that a woman's vaginal self-examination for menstrual blood will sexually stimulate her."⁶⁵ The authors and redactors of *Niddah* 13a, it seems, misunderstand the reason for a woman's ability to examine herself without arousal. More likely, she performs this practiced task with an attitude that reflects the seriousness of this duty rather than for satisfying sexual desires.

⁶¹ BASKIN, *supra* note 51, at 30 (quoting SATLOW 1995, *supra* note 31, at 158-59).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 15 ENCYCLOPEDIA JUDAICA, *supra* note 3, at 703.

⁶⁵ ELLINSON, *supra* note 23, at 85-86.

However, many rabbis, including Rabbi Ovadiah Yosef,⁶⁶ interpreted this theory to mean that the threshold for a woman's stimulation is incredibly high—so much so that only intercourse with her husband arouses her—in direct contradiction with the image of woman as seductress. In effect, that conclusion acknowledges one possibility for sexual fulfillment: heterosexual sex in the context of marriage. While this position contradicts the existence of laws against women masturbating (why prohibit an act that will not provide any satisfaction?), even those rules support the norm of marriage because, without masturbation, a married woman can only relieve her sexual desires lawfully by having intercourse with her husband.

This high threshold for a woman's sexual arousal contributes to the halakhic perception of the woman's role in initiating and engaging in sex. She is "essentially passive, [for] a female depends on male potency for everything, including the production of progeny"⁶⁷ and sexual fulfillment. A male's penis makes him the more important actor in sex: "to penetrate was to reaffirm, perhaps even assert, this power. To be penetrated was perceived as being as women were perceived, that is, weak and dominated."⁶⁸ A woman does not make the first obvious move; rather, she prepares subtly by wearing nice clothes and acting more lovingly than usual. Granted, as will be explained in more detail *infra*, the husband is obligated to fulfill the wife's right to sexual pleasure, but he initiates that contact when he wants to have sex and believes his wife will acquiesce.

This does not mean that women were unable to subvert the system and control when they had sex with their husbands. Halakhah very strictly condemns marital rape: "Never may you [the husband] force her."⁶⁹ There is an instance, repeated in both the Babylonian and Palestinian Talmuds, when a wife rejects her husband's advances in accordance with *taharat mishpachah* because she is menstruating, but the next day tells him that she is available to him.⁷⁰ The confused husband runs to his rabbi who encourages him to believe her.⁷¹ Charlotte Fonrobert reads this instance as giving the woman control over her sex life and also

⁶⁶ *Id.*

⁶⁷ BASKIN, *supra* note 51, at 18.

⁶⁸ Michael Satlow, "They Abused Him Like A Woman": *Homoeroticism, Gender Blurring, and the Rabbis in Late Antiquity*, 1994 J. HIST. SEXUALITY 2, 5 [hereinafter Satlow 1994].

⁶⁹ FELDMAN, *supra* note 37, at 74 (citing Rabbi Moses ben Nahman).

⁷⁰ FONROBERT, *supra* note 23, at 26.

⁷¹ *Id.*

as a symptom of the rabbis' or the redactors' anxiety about women making legitimate *halakhic* arguments to their own advantage. In such instances, women's discourse is curtailed by repeatedly framing it as an issue of their believability, even in a case such as this where a rabbi rules in favor of the woman.⁷²

In reality, a wife undermines the halakhic system by manipulating the rules to her advantage, giving herself some element of control. Normally, *taharat mishpachah* constitutes a halakhic control on marital sexuality by establishing limits on intercourse, ostensibly as a way to increase the couple's sexual pleasure, but here the woman co-opts that regulation. Halakhah, however, responds to this possible usurpation by avoiding legislation that might shift the balance of marital power toward her. While marital rape is condemned, there are no legal "consequences for husbands who do not respect their sexual partners."⁷³ Such injunctions are "ethical guidelines,"⁷⁴ subject to the level of restraint the husband can achieve. In contrast, "although the wife has the right in principle to refuse sex on any occasion, her consent can be understood through silence and necessarily ambiguous signs."⁷⁵ She does not actively seek out or directly turn down intercourse because she could be subject to legal action, even divorce, if she rebuffs her husband's advances outright. This possibility will be discussed in Part III, *infra*. However, it is important to see that rabbinical understandings of female sexuality form the basis for laws regulating divorce.

Although Halakhah strongly recommends that the proper position of marital sexual intercourse is as described in *Niddah*,⁷⁶ and although this suggests that the man controls penetration, there are also halakhic possibilities for the woman's active participation. Hannah Rockman recounts:

The Talmud relates how Rabbi [H]isda . . . personally instructed his daughters how to prepare for sexual relations: When he wants to hold the pearl [a euphemism for the breast] with one hand and the little fish [vagina] in the other hand, offer the pearl to him, but

⁷² *Id.*

⁷³ BASKIN, *supra* note 51, at 108.

⁷⁴ *Id.*

⁷⁵ BOYARIN, *supra* note 39, at 171.

⁷⁶ See *supra* notes 50-54 and accompanying text.

don't offer the little fish to him until he is aroused. Then offer it to him.⁷⁷

The woman actively controls the progression of intercourse, although it could be said that she restrains her husband's initiative. The text's circumlocution seemingly considers a woman's body as property. However representative of actual body parts, the "pearl" and "fish" are objects that people own. Whether the language actually reflects a rabbinic perspective of women as property, it is significant that the man is compared to an owner who determines what happens with his chattel. Like the situation of a man who forces his wife, there are no legal penalties for a husband who, during intercourse, does something his wife does not want; his wife cannot appeal to a rabbinic authority for intervention:

A woman once came before Rabbi and said, "Rabbi! I set the table before my husband, but he overturned it." Rabbi replied: "My daughter! The Torah has permitted you to him—what then can I do for you?" A woman once came before Rab and complained, "Rabbi! I set a table before my husband, but he overturned it." Rab replied: "Wherein does it differ from a fish?"⁷⁸

The woman "set[s] the table," that is, ambiguously signals that she is sexually aroused and wants sex in a certain manner, but the husband proceeds in an ostensibly aggressive way, possibly ignoring the normal conventions for intercourse.⁷⁹ The woman complains but has no recourse; again, the text refers to her as a fish, the property of her husband.⁸⁰ This

⁷⁷ Rockman, *supra* note 38, at 199.

⁷⁸ Babylonian Talmud, *Nedarim* 20b, in BASKIN, *supra* note 51, at 107. I verified Baskin's translation. See HEBREW ENGLISH EDITION OF THE BABYLONIAN TALMUD: NEDARIM 20b (Isidore Epstein ed., H. Freedman trans., Soncino Press 1994); see also *Nedarim* 20b, Store of Holy Texts, <http://www1.snunit.k12.il/kodesh/bavli/ndri020c.html> (last visited Oct. 16, 2005).

⁷⁹ While it is clear that "overturns" means having sex in a non-standard manner, Boyarin argues that the man insisted that he be on the bottom and the woman on top during sex. However, Boyarin admits that there is not a consensus for this definition; in a footnote, he mentions that it could refer to anal intercourse. I disagree with the rest of his analysis of this passage; he argues that the rabbis mean that the couple can engage in any positions during sex. The rest of the texts do not bear this out. Daniel Boyarin, *Women's Bodies and the Rise of the Rabbis: The Case of Sotah*, in *JEWS AND GENDER: THE CHALLENGE TO HIERARCHY*, STUDIES IN CONTEMPORARY JEWRY XVI 88, 93, 98 (Jonathan Frankel ed., 2000).

⁸⁰ Boyarin argues, based on the Talmudic discussion surrounding this text, that the fish represents intercourse, not the woman's body. I disagree because I think it is possible to read those texts in a way that analogizes a woman's body to a possession. For example, Boyarin refers to preceding text with a similar theme: "Anything that a man wishes to do [together] with his wife, he may do, analogous to meat that comes from the shop. If he

relationship maintains the heterosexual connection between the two, albeit with an uneven balance of power with regards to the legalities involved.

Still, the rabbis recognize that a woman ought to have and enjoy sex with her husband. Halakhah legally enjoins a husband to respect his wife's right to *onah*. One of the three marital requirements of the husband to his wife, *onah* mandates the wife's pleasure. The husband's duty varies depending on his occupation:

With regards to *Onah*, said in the Torah: those who are men of leisure, every day; those who are workers, twice; those who are donkey-drivers, once; those who are camel-drivers, once every thirty days; those who are sailors, once every sixth months, in the words of Rabbi Eliezer.⁸¹

In this way, the system respects a wife's sexual needs, while recognizing the realities of the working world in antiquity. Ostensibly the central point of *onah* is not procreation but the wife's enjoyment; however, to "reward" the husband, this pleasure is connected with successful procreation, the birth of a son. "If the woman emits her semen first she bears a male child; if the man emits his semen first she bears a female child, for it is said, 'When a woman brings forth seed and bears a male.' (*Lev. 12:2*)."⁸² The traditional interpretation of *onah* "always describe[s] [it] in terms of the man's sexual obligation to his wife."⁸³

Here, however, the man receives two benefits from his duty, gaining both temporary sexual satisfaction and a tangible prize, a son.⁸⁴

wishes to eat it with salt, he may; roasted, he may; boiled, he may; braised, he may. And similarly fish" *Id.* at 92. Boyarin appears to say that the methods of cooking are the variety of positions added to intercourse. It is also possible to read the different methods of cooking as varying methods of intercourse done to the "meat" of a woman.

⁸¹ KETUBOTH, *supra* note 31, at Ch. 5. See also Ketuboth, Store of Holy Texts, <http://www1.snunit.k12.il/kodesh/bavli/ctub05.html> (last visited Oct. 16, 2005).

⁸² BASKIN, *supra* note 51, at 21 (quoting *Niddah* 31a).

⁸³ BOYARIN, *supra* note 39, at 171-72 n.58.

⁸⁴ In Genesis, God commands men several times to "be fruitful and multiply." *Genesis* 1:28; 9:1,7; 35:11. Halakhah does not directly include women in this obligation, stating, "'Increase and multiply, fill the earth and subdue it,' [which] is interpreted to apply to one whose business it is to subdue rather than to be subdued." FELDMAN, *supra* note 37, at 53-54 (construing *Yebamoth* 65b). I verified this translation. See YEBAMOTH, *supra* note 46, at 65b. See also *Yebamoth* 65b, Store of Holy Texts, <http://www1.snunit.k12.il/kodesh/bavli/ibmu065d.html> (last visited Oct. 16, 2005). Therefore, the connection between procreation and sexuality is apparent primarily in texts about men's sexuality, especially about their penises. This emphasis on the male role in procreative sex once more highlights the passivity of women in initiating and engaging in intercourse because "in the ancient world, virility and the physical parts that made it possible were accorded enormous reverence," whereas women were the medium by which that process happened. BASKIN,

This text creates a causal relationship between a husband's ability to give pleasure to his wife and the subsequent sex of his legitimate children—and in the process manages to devalue a female child as the result of an unsatisfactory performance. To be sure, another tractate of the Talmud states:

Rabbi Benjamin bar Yapat said in the name of R. Eleazar, all who make themselves holy at intercourse will have male children, as it is written, "For I the Lord am your God: you shall sanctify yourselves and be holy, for I am holy . . ." (Lev 11:44).⁸⁵

This Talmudic text makes it obvious that, just as the pursuit of holiness is looked upon favorably, so, too, are male children preferred, and that this result is directly related to the man's performance during sex.

Lest this explanation not be considered seriously, the rabbis even tell about their personal experiences in order to verify the connection:

When Rabbi Ishma'el the son of Yose and Rabbi El'azar the son of Rabbi Shim'on used to meet each other, an ox could walk between them and not touch them. A certain matron said to them, "Your [sons] are not yours." They said, "Their [penises] are greater than ours." "If that is the case, even more so!" There are those who say that this they said to her: "As the man, so is his virility." And there are those who say that thus did they say to her: "Love compresses the flesh."⁸⁶

The discussion between the woman and the rabbis is about whether the men's physical size, including both their girth and penis size, would interfere with intercourse. While it could be argued that penis size is only meant physically and not sexually, the men's argument connects the two: sexual desire increases penis size and does not get in the way of successful intercourse that both produces sons and relieves sexual tension. The emphasis on heterosexuality comes from the need for a male and female in marriage to achieve the optimum sexual satisfaction and to physically have

supra note 51, at 18. Of course, men need women to act as the vessel for developing children, leading once more to the necessity of heterosexual marriage. The reality is that without women, men cannot fulfill their procreative responsibilities, even if they supposedly contribute more to that process.

⁸⁵ BASKIN, *supra* note 51, at 20 (quoting Babylonian Talmud, *Shevuot* 18b). See also HEBREW ENGLISH EDITION OF THE BABYLONIAN TALMUD: SHEVUOTH (Isidore Epstein ed., A.E. Silverstone trans., Soncino Press 1987).

⁸⁶ BOYARIN, *supra* note 37, at 95 (quoting *Baba Metsia* 84a). The text inserted into Boyarin's translation are my corrections as a result of verification with *BABA METSIA*, *supra* note 39. See also *Baba Metsia* 84a, Store of Holy Texts, <http://www1.snunit.k12.il/kodesh/bavli/bbam084a.html> 25 (last visited Oct. 16, 2005).

legitimate children: “[J]ust as marriage has two essential functions, the procreational and the relational, so the marital act has these two essential functions.”⁸⁷ According to Halakhah, that requires the union of a man and a woman. Overall, the text devalues the women’s orgasm by making it the requirement through which a man acquires certain perks, rather than asserting that her orgasm fulfills the requirement of onah.

Boyarin is correct to assert that, regarding onah, “by coding male sexuality as a form of service to women, a mystifying protection of male access to women’s bodies is secured.”⁸⁸ On the surface, it recognizes that women, supposedly unable to initiate sex, need some form of legalized access to sex. However, the husband’s requirement to have sex a certain number of times with his wife confirms the legality of his sexual access to her, and in sources on divorce, is turned around: the woman is required to have intercourse with her husband or risk being called a *moredet*, a rebellious wife.⁸⁹ Halakhah bends over backwards to ensure the wife’s sexual access to her husband both to acknowledge the woman’s need to have her sexual desires satisfied and also to make certain that men have legal access to intercourse within marriage. Interestingly, if a husband refuses to have sex with his wife, the woman can approach the rabbinical court and the rabbis can force him to divorce her. In contrast, if a man makes the same complaint to the court, “a wife could be divorced without her marriage settlement,” or, if she would not agree to the divorce, the man could request permission to divorce her anyway.⁹⁰ In any case, onah only partially ensures the right of the wife to have her sexual needs fulfilled; the husband’s right to satisfy his sexual desires is never in question.

C. Marriage in Judaism Today

Given this halakhic framework that promotes the relief of sexual tension through heterosexual marriage, it is important to analyze how the American Jewish movements have responded to these texts. Perhaps not surprisingly, all but one of the four major movements advocate the centrality of heterosexual marriage in Jewish tradition. Procreation within the marital context makes Jewish continuity and existence possible. As Rabbi Eugene Borowitz explains, “the imperiled situation of the Jewish community as a minority [especially after the Holocaust] makes family

⁸⁷ FELDMAN, *supra* note 37, at 129.

⁸⁸ BOYARIN, *supra* note 39, at 171-72 n.58.

⁸⁹ SHLOMO RISKIN, WOMEN AND JEWISH DIVORCE: THE REBELLIOUS WIFE, THE AGUNAH AND THE RIGHT OF WOMEN TO INITIATE DIVORCE IN JEWISH LAW, A HALAKHIC SOLUTION 7-9 (1989).

⁹⁰ BASKIN, *supra* note 51, at 93.

unity a particularly important instrument of our survival.”⁹¹ For Orthodox, Conservative, and Reform Judaism, the connection of human sexuality to procreation in a sanctified male-female relationship serves to maintain the existence of the Jewish people. Reconstructionist Judaism, on the other hand, recognizes the equal legitimacy of heterosexual and homosexual marriages and challenges the opinion of the other groups that this position threatens Jewish continuity. This section examines these positions in order to establish the foundation of these movements’ attitudes toward sexuality, which inform their stances on the modern issues of divorce and homosexuality.

Orthodox Judaism promotes marriage for a number of reasons. First and foremost, matrimony is a traditional Jewish institution: Halakhah provides the basic marital framework through the *ketubah*,⁹² and Jews, with few exceptions, are obligated or at least highly encouraged to follow those dictates. This outline for marital life “include[s] the powerful group of laws clustered around the concept of *taharat mishpachah*, “‘family purity,’ laws of modesty, [and] restrictions on the social mixing of the sexes.”⁹³ While “[t]hey amounted to a discipline of self-imposed segregation, and they are among the Jewish laws most at odds with the assumptions of a liberal, open society,”⁹⁴ those laws have also been praised as maintaining the stability of the Jewish family and providing a system of “boundaries in marital, familial, and sexual relationships” for the members of a household that promotes respect and rejuvenates monthly the couple’s sex life.⁹⁵ Underscoring all of this discourse, however, is the realization that the “integrated [and religious] Jewish home” functions as “the best guarantee of the survival of the Orthodox Jewish family,” especially after the Holocaust and with the advent of high levels of assimilation.⁹⁶ Orthodox Judaism reinforces the traditional views of sexuality exemplified in the sacred texts by connecting them to the perception of a modern Jewish need for an increased religious population.

⁹¹ EUGENE BOROWITZ, *EXPLORING JEWISH ETHICS: PAPERS ON COVENANTAL RESPONSIBILITY* 279 (1990).

⁹² Marriage contract. 10 *ENCYCLOPEDIA JUDAICA*, *supra* note 3, at 926.

⁹³ JONATHAN SACKS, *TRADITION IN AN UNTRADITIONAL AGE: ESSAYS ON MODERN JEWISH THOUGHT* 102 (1990).

⁹⁴ *Id.*

⁹⁵ Debra Renee Kaufman, *Better the Devil You Know . . . and Other Contemporary Identity Narratives: Comparing Orthodox to Reform Judaism*, in *PLATFORMS AND PRAYER BOOKS: THEOLOGICAL AND LITURGICAL PERSPECTIVES ON REFORM JUDAISM* 221, 225 (Dana Evan Kaplan ed., 2002).

⁹⁶ Gershon Kranzler, *The Changing Orthodox Jewish Family*, in *DIMENSIONS OF ORTHODOX JUDAISM* 359, 367 (Reuven P. Bulka ed., 1983).

Reform Judaism, usually at odds with Orthodoxy, generally agrees with the primacy of marriage between a man and a woman in Jewish tradition. The liberal attitude towards marriage generally emphasizes marital sexuality and subsequent procreation as significant in Jewish tradition.⁹⁷ Indeed, heterosexuality is normative: "[M]arriage was [and is] the only acceptable social setting for the sexual relationship."⁹⁸ Unlike Orthodox Judaism, however, the Reform movement acknowledges that the traditional laws of Jewish marriage have sustained the "stability of the Jewish marriage [that] was procured at the cost of subordinating a woman's life to that of her husband"⁹⁹ and actively pursues a policy of equality between spouses, sexual and otherwise. The emphasis on marriage is coupled with serious revisions of unequal institutional qualities in a way that leaves room for more liberal interpretations.¹⁰⁰ Only recently did Reform Jews question the primacy of heterosexuality in their version of Judaism and advocate for the acceptance of homosexual and non-traditional families on the basis of a different approach to Jewish tradition. It appears that experts of the Reform movement incorporate the more desirable values that heterosexual marriage embodies and eschews those values expressed in Halakhah with which they disagree.

Similarly, Conservative Judaism believes in the sole legitimacy of heterosexual marriage. By currently disavowing the authenticity of homosexual commitment while also pressing for a more equal relationship between husband and wife, the Conservative Movement continues its position between Orthodoxy and Reform Judaism with regard to Jewish practice. Marriage between a man and a woman represents the ultimate connection between people and God. In addition, "sexual experience is a major source of pleasure and well-being for men and women, and its successful functioning [only in marriage] is a proper objective."¹⁰¹ One official publication on sexuality does not explicitly delineate characteristics of male and female sexuality; rather the emphasis is on principles appropriate for both sexes, like modesty, respect, and honesty.¹⁰²

⁹⁷ BOROWITZ, *supra* note 91, at 265.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ For instance, while the Reform marriage ceremony emphasizes the religious nature of matrimony, "Reform Jews have generally discarded the use of Chupah, the Aramaic Marriage Contract [which articulates sexual and other rights], and the custom of breaking the glass at the end of the marriage ceremony . . . [and encouraged] the double-ring ceremony." WILLIAM B. SILVERMAN, BASIC REFORM JUDAISM 205 (1970).

¹⁰¹ ROBERT GORDIS, LOVE AND SEX: A MODERN JEWISH PERSPECTIVE 251 (1978).

¹⁰² ELLIOT N. DORFF, THIS IS MY BELOVED, THIS IS MY FRIEND: A RABBINIC LETTER ON INTIMATE RELATIONS 9-11 (1996).

Concerning the promotion of equality in marriage, the Conservative Movement adopted a new ketubah in 1987 that, to a limited extent, uses more egalitarian language and protects the woman's right to a divorce should the marriage dissolve.¹⁰³ Conservative Judaism also recognizes the significant impact the family has on the continuation of Jewish tradition, and, like Reform Judaism, has only just begun to challenge traditional concepts of marriage in the movement. This middle-of-the-road position emphasizes sexuality as a central feature of heterosexual marriage, but does not go so far as to challenge the assumptions upon which this element is based. With respect to the halakhic texts, then, the Conservative Movement modernizes Jewish understandings of sexuality and sexual expression without abandoning traditional parameters.

Although recently Orthodox, Conservative, and Reform Judaism have initiated dialogue on the changing structure of the family, these Jewish movements continue to discuss issues of sexuality within a "compulsory heterosexuality" framework, that is, where heterosexuality is preferred and supported by a society.¹⁰⁴ For instance, the recent changes in Reform Judaism that permit gay and lesbian rabbis do not address the fundamental preference of Jewish society for heterosexual marriage, because even "appeals to [the traditional] passages constitute a major strategy in *contemporary* efforts to enforce compulsory heterosexuality."¹⁰⁵ In contrast, Reconstructionist Judaism has accorded equal respect to both heterosexual and homosexual relationships by stating its support for equal access of homosexuals to civil marriage.¹⁰⁶ This position subverts the religious system by undermining the "modes of constructing and policing relationships between gender roles, obligatory heterosexuality, and the

¹⁰³ *A New Ketubah Text* (Elliot Dorff trans., 1987), in PROCEEDINGS OF THE COMMITTEE ON JEWISH LAW AND STANDARDS OF THE CONSERVATIVE MOVEMENT: 1986-1990, at 241, 241-43 (2001) (The couple agrees that, "should either contemplate dissolution of their marriage, or following dissolution of their marriage in the civil courts, each may summon the other to the Beit Din of the Rabbinical Assembly and the Jewish Theological Seminary of America, or its representative, and that each will abide by its instructions so that throughout life each will be able to live according to the laws of the Torah.").

¹⁰⁴ Judith Plaskow defines this paradigm as a "complex web of ideologies and institutions through which people learn and are made to be heterosexual." Judith Plaskow, *Sexual Orientation and Human Rights: A Progressive Jewish Perspective*, in *SEXUAL ORIENTATION & HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* 29, 36 (Saul M. Olyan & Martha C. Nussbaum eds., 1998).

¹⁰⁵ *Id.* at 38.

¹⁰⁶ RECONSTRUCTIONIST RABBINICAL ASSOCIATION, RESOLUTION IN SUPPORT OF CIVIL MARRIAGE FOR SAME-SEX COUPLES (2004), available at <http://www.therra.org/resolution-Mar2004.htm> [hereinafter RRA Resolution].

constraint of female sexuality.”¹⁰⁷ Reconstructionist Judaism thus stands in opposition to the other movements.¹⁰⁸

III. THE ROLE OF SEXUALITY IN JEWISH DIVORCE

As stated in Part I, this section analyzes how halakhic conceptions of sexuality, and more specifically female sexuality, have influenced the development of Jewish divorce law. It also analyzes the responses of the modern American Jewish movements to the legal inequalities for women inherent in the legal system of Jewish divorce. Legally, marriage in the Jewish tradition formalizes a man's acquisition of rights to a woman's sexuality. Divorce undoes that process by allowing him to repudiate his rights to sexual intercourse with his wife. The older halakhic texts set out, and today's legal authorities maintain, a halakhic framework that establishes and dissolves this contractual association between husband and wife. Only a man traditionally has the legal power to effectuate and terminate this contract. The rabbis recognize marriage as the proper forum for the sexual expression of men and women, deriving the legitimacy of matrimony from their opinions about heterosexual desire. However, despite mandating marriage for both sexes, it is women who are left without any meaningful exit from the contract.

This section argues that the husband's official disavowal of the rights to sexual intercourse with his wife forms the basis of the process of divorce. By examining the provisions regarding sexuality that the husband agrees to in the *ketubah*, this section describes the requirements for a divorce. It also explores the circumstances, set out by the rabbis, whereby divorce is proper or even encouraged. These halakhic texts, combined with an analysis of the stipulations of the *get*,¹⁰⁹ provide further evidence for the centrality of sexuality in divorce. Because only a man can bring about a divorce, his refusal to grant the *get* has the added effect of precluding the woman's assumption of rights to her own sexuality. A woman who has not yet received a *get* from her husband is called an *agunah*, literally a chained woman, because she is still legally married to this man and is not free to remarry. In modern times, Jewish movements have realized that this disparity causes immense suffering on the part of women who do not have the freedom to move on with their lives after the factual termination of their marriages. Reform, Reconstructionist, Conservative, and Orthodox legal authorities advocate different solutions to remedy the situation of the chained woman. However, their suggestions do not resolve the central

¹⁰⁷ Plaskow, *supra* note 104, at 37.

¹⁰⁸ Indeed, the Reconstructionist approach to marital sexuality greatly influences the movement's positions on the issues discussed *infra*.

¹⁰⁹ Writ of divorce; the plural is *gittim*.

difficulty. The unjust situation derives from the ancient locations of sexuality in marriage and divorce contracts, and it is this problem, in conjunction with the man's unilateral control, that must be solved.

A. The Marriage Contract

While there are sacred elements to Jewish matrimony, a man and a woman formally marry through contract. The earliest Jewish legal traditions on marriage "categoriz[e] it as a commercial transaction by which sexual chattel is acquired."¹¹⁰ The Hebrew Bible refers to a bride price, or *mohar*: "If a man seduces a virgin [*betulah*; sometimes understood as a young woman] who is not engaged and lies with her, he will marry her for the marriage/bride price, as a wife."¹¹¹ Lest one think that this transaction is only a fine for this particular case of his sleeping with the woman, the verse continues: "If her father really refuses to give her to him, he will pay the marriage/bride price of a virgin."¹¹² When the young woman is no longer a virgin, ostensibly her father does not receive the bride price of a virgin and loses potential income. Therefore, if a man has sex with a woman and refuses to marry her, he must pay damages that are equivalent to the financial amount her father would have received had she married as a virgin. While it is not certain what the actual amount of the bride price was, as it depended on the sexual status of the woman about to be married, it is clear that when money changed hands, the transaction, that is, the man's acquisition of the woman, was complete.

The Mishnah upholds this method of financial exchange to ensure the legal formality of the marriage. According to Judith Wegner, the rabbis

focus[ed] on such matters as the impact of virginity on bride-price, circumstances when a man can or cannot expect his bride to be a virgin, the bridegroom's right to redress if his bride is not intact, and the father's right to financial compensation from a man who violates his minor daughter.¹¹³

Regarding the third specification, Wegner notes that "having paid for his bride's virginity, an aggrieved bridegroom, just as any buyer of goods that fail to meet specifications, can bring suit."¹¹⁴ These general topics, however,

¹¹⁰ RACHEL ADLER, *ENGENDERING JUDAISM: AN INCLUSIVE THEOLOGY AND ETHICS* 172 (1998).

¹¹¹ *Exodus* 22:15 (Biblia Hebraica Stuttgartensia, *supra* note 48).

¹¹² *Id.*

¹¹³ JUDITH ROMNEY WEGNER, *CHattel OR PERSON? THE STATUS OF WOMEN IN THE MISHNAH* 20 (1998).

do not evoke the directness of the comparison of women to property. *Mishnah Kiddushin* 1 directly compares the woman to objects that can be owned:

(1) The woman is acquired in three ways and acquires herself [or her autonomy] in two ways. She can be acquired by money, by deed, and by sexual intercourse. . . . She acquires herself [autonomy] by a get and the death of her husband [literally master]. . . . (2) A Hebrew slave is acquired by money or by deed and acquires himself by years [of working] or by the Jubilee or by [paying] his reduced price [that is, buying his freedom]. . . . (3) A Canaanite slave is acquired by money, by deed, or by usucaption. . . . (5) Mortgaged property is acquired by money, by deed, or by usucaption. . . .¹¹⁵

Before discussing the resemblance of the treatment of women to that of property, it is important to point out that the language for the wife and husband in this passage is not parallel and suggests a power differential. The woman is called *isha*, but the man is not called *ish*. Instead, “the word for husband is *ba'al*, the general term for an owner, master, possessor of property, bearer of responsibility, or practitioner of skill.”¹¹⁶ This terminology points to the legally uneven relationship: the man owns the woman’s sexuality. She can only take possession of her own sexuality through the get or her husband’s death. Other aspects of the Mishnah reiterate that unequal relationship.¹¹⁷

¹¹⁴ *Id.* at 22.

¹¹⁵ See HEBREW ENGLISH EDITION OF THE BABYLONIAN TALMUD: KIDDUSHIN 1:1-5 (Isidore Epstein ed., H. Freedman trans., Soncino Press 1990). See also *Kiddushin*, Store of Holy Texts, <http://www1.snunit.k12.il/kodesh/mishna/kidu01.html> (last visited Oct. 16, 2005).

¹¹⁶ ADLER, *supra* note 110, at 171.

¹¹⁷ Wegner gives further contours to the Mishnah’s treatment of the wife as property:

First the [sages] use the same technical term *q-n-y* (‘to acquire ownership’) as for other forms of property. Second, the same three modes of acquisition apply to wife, Canaanite slave, and real property. . . . Intercourse is the specific form of usucaption that applies to a wife. Third, after setting out the list, the Mishnah’s framers drop the subject of property; espousal of wives occupies the entire tractate. Obviously the sages list all these kinds of property along with the wife to suggest both a formal and a substantive analogy between acquiring a wife and acquiring chattel.

WEGNER, *supra* note 113, at 43. Wegner cautions that “the inclusion of the wife does not necessarily imply that she is the husband’s property in all respects,” seeing as how a wife retains her independence with regard to the property she brings into the marriage. *Id.* The ownership is specific to her sexuality; the man does not own her but sexual access to her body. The right to sexual intercourse with his wife regulates the expression of his sexual

The *Gemara* of the Babylonian *Talmud* continues this trend of considering the woman's sexuality as a commodity in its commentary on the above *Mishnah*, *Mishnah Kiddushin* 1.¹¹⁸ The rabbis of this time period call the process through which formal acquisition occurs *kinyan*. According to Adler, "monetary acquisition (*kinyan kesef*) is . . . the one approved method [in the Talmud] for appropriating wives," although usucaption does not necessarily invalidate the marriage.¹¹⁹ However, Moshe Meiselman contends that there are "two types of contracts: the *kinyan issur*, a contract whose basic purpose is to effect a change in personal or ritual status, and the *kinyan mamon*, a contract whose basic purpose is to effect a monetary change."¹²⁰ Marriage, in his opinion, is the former, rather than the latter; the physical act of giving of an object marks the change in personal status.¹²¹ Adler disagrees, stating that, "while the purchase of the bride may have dwindled to a mere formality in the rabbinic transformation of marriage, her acquisition is no formality."¹²² Adler argues that the distinctions between types of *kinyan* are irrelevant, as "[w]hat all the legally acceptable transactions have in common is that they are *unilateral* acts . . . [that, according to the laws in *Kiddushin*,] the man must take, and the woman must be *taken*."¹²³ Certainly the woman's status is changed from unmarried to married. However, it is impossible to ignore that her personal transformation is effected through a financial transaction.

Another talmudic innovation delays payment of the monetary amount. The *kinyan* still occurs in a symbolic form by representing the real price, but the actual amount stipulated in the *ketubah* is not transferred. In the Babylonian *Talmud*, Rabbi Judah explains in *Ketuboth* 82b: "At first they wrote for a virgin 200 *zuz* and for a widow 100 but the men grew old and did not marry women [because they could not afford to] until Simon ben Shetah enacted that all the groom's property is responsible for the *ketubah*."¹²⁴ As Judith Hauptman points out, though, "once the *ketubah* was

desire; without this structure, as discussed *supra*, the rabbis fear the man will seek out other, though certainly heterosexual, outlets for satisfying his desire.

¹¹⁸ ADLER, *supra* note 110, at 174.

¹¹⁹ *Id.*

¹²⁰ MOSHE MEISELMAN, JEWISH WOMAN IN JEWISH LAW 96 (1978) (citing *Hidushei ha-Ramban* to *Kiddushin* 16a).

¹²¹ *Id.* at 96-97.

¹²² ADLER, *supra* note 110, at 176.

¹²³ *Id.*

¹²⁴ *Ketuboth* 82a, *supra* note 31. See also *Ketuboth* 30, Store of Holy Texts, <http://www1.snunit.k12.il/kodesh/bavli/ctub082b.html> (last visited Oct. 16, 2005).

transformed into . . . a way of providing a woman with some assets to tide her over into her next marriage, then . . . as a deferred payment, [it] was no longer a gauge of her sexual intactness."¹²⁵ Still, the marriage transferred rights to the woman's sexuality. While it is now more accurately a "negotiated relationship between a woman who is subordinate and a man who is dominant," the ketubah nonetheless affirms the principle of *kinyan*.¹²⁶

Today, there are two phases to the agreement: *kiddushin* and *nissu'in*. The former, also known as '*erusin*, "sufficed to make the man and the woman legally bound so that sexual connection by her with another man was adultery punishable as such, and to dissolve the bond a bill of divorce was required."¹²⁷ This method of betrothal officially transfers the rights to woman's sexuality to her future husband. Moreover, *kiddushin* literally means sanctification, which is "a major rabbinic means of drawing boundaries and demarcations, a legal and ritual creation of the universe out of undifferentiated chaos."¹²⁸ In this way, marriage essentially sets aside a woman for a particular man. The marriage is formalized when *nissu'in* occurs, i.e., when the bride goes to her new husband's home. Interestingly, *nissu'in* is also called "taking" or *likkuhin*,¹²⁹ which implies male control;

¹²⁵ JUDITH HAUPTMAN, REREADING THE RABBIS: A WOMAN'S VOICE 66 (1998).

¹²⁶ *Id.* at 74. Several centuries later, Maimonides codified this process of acquisition. In *Hilkhot Ishut* 1:3, he explains:

Once a woman is acquired and thus betrothed, even if she has not had intercourse and has not entered her husband's house, she is still the wife of a man [a married woman], and one, who is not her husband, who has intercourse with her, is liable for the death penalty from the *bet din* [rabbinical court], and if her husband wants to divorce her, she needs a get.

MISHNEH TORAH: HILKHOT ISHUT, *supra* note 41, at 1:3. See also Mishneh Torah Hilkhot Ishut 1:3, Store of Holy Texts, <http://www1.snunit.k12.il/kodesh/mtr/aisu001.html> (last visited Oct. 16, 2005).

The Rambam uses the same language for acquisition and betrothal. Because the infraction is sexual, it is the act of intercourse between a man and a woman betrothed to another man which presumably violates her husband's rights. Of course, Maimonides recognizes that, through the ketubah, the man is obligated to fulfill the requirement of *onah*, but even that entitlement affirms the man's right to have sexual intercourse with her. Overall "the conception of marriage as a unilateral acquisition of property, analogous to the acquisition of slaves, animals, or fields, rather than embodying commitments on the part of two participants, dominates legal thinking in rabbinic texts" throughout the centuries. ADLER, *supra* note 110, at 157.

¹²⁷ GEORGE HOROWITZ, THE SPIRIT OF JEWISH LAW: A BRIEF ACCOUNT OF BIBLICAL AND RABBINICAL JURISPRUDENCE WITH A SPECIAL NOTE ON JEWISH LAW AND THE STATE OF ISRAEL 256 (1953).

¹²⁸ ADLER, *supra* note 110, at 172.

¹²⁹ HOROWITZ, *supra* note 127, at 265.

the man literally takes the woman home to become his wife.¹³⁰ It is with this framework in mind that this Article presents the halakhic texts on divorce.

B. Halakhic Texts on Divorce

The rabbinic process for divorce essentially reverses the marital contract. The man gives a get, specifically written for this transaction, to his former wife in front of witnesses and members of the *beit din*.¹³¹ *Deuteronomy* 24:1 serves as the biblical basis for this procedure: “[I]f a man takes a wife and marries her, but she does not find favor in his eyes—because he finds in her something sexually unappealing—he writes for her a document of cutting off/divorce and gives it into her hands and sends her from his house.”¹³² Because, in this verse, the man “takes” the wife, the rabbis interpret that action to mean that only a man can affect the kiddushin at the beginning of the marriage. Likewise, because it says “he writes for her,” it follows that the husband is the only one who can end the relationship.

The text of the get, established in the Mishnah, explicitly releases the rights to the woman’s sexuality. *Mishnah Gittin* 9:3 states: “[T]he body of the get says you are permitted to every man . . . that you may go and marry any man you wish.”¹³³ With the ketubah, the man legally acquires sexual access to his wife; with the get, he relinquishes that access by permitting her to remarry and to have sex with her new husband. In fact, the man is forbidden to stipulate any conditions on this right. Otherwise, he would not actually surrender his access to her. This failure to surrender access infringes upon both the woman’s right to choose another husband and also her future husband’s right to her sexuality. Without the get, the woman is still married to her husband; he continues to be the only man with whom she may have sex and with whom she may have children. Any sexual relationship she has with another man is adulterous, and any child from that liaison is a *mamzer*.¹³⁴

¹³⁰ Today, this “taking” is symbolized by the bridal canopy, the *chuppah*, and the *yichud*, the time the couple spends alone immediately after the marriage.

¹³¹ Rabbinical court. Generally, the rabbinical court has three rabbis.

¹³² *Deuteronomy* 24:1 (Biblica Hebraica Stuttgartensia, *supra* note 48).

¹³³ *Mishnah Gittin* 9:3. (The Schottenstein Edition) (citing Yisroel Simcha Schorr & Hersh Goldwurm eds., Mesora Publications, Ltd. 1993). See also *Mishnah Gittin* 9:3, Store of Holy Texts, <http://www1.snunit.k12.il/kodesh/mishna/giti09.html> (last visited Oct. 16, 2005).

¹³⁴ Technical term for illegitimate. 11 ENCYCLOPEDIA JUDAICA, *supra* note 3, at 840.

The Mishnah sets out acceptable reasons and avenues for divorce for both husband and wife. Regarding *Mishnah Gittin* 9:10, Judith Wegner explains that “the common denominator is that all three [rabbis’] views treat the wife as chattel” and uphold divorce as the “disposition of a man’s exclusive right to a woman’s sexual function.”¹³⁵ Each authority in this text defines the husband’s rights with regard to his wife slightly differently. Wegner describes each tannaitic position:

The Shammaites perceive the essence of marriage as a husband’s exclusive right to his wife’s sexuality; so he can divorce only if some other man has had sexual relations with her. This approach treats the wife as chattel when her sexual function is in issue, but it protects her when she is without moral fault. The school of Hillel, by contrast, permits her husband to divorce her for the least infraction Her role is to serve him generally. . . . Aqiba goes further still; he treats the wife as no person at all, permitting the husband to discard her without even the flimsiest excuse.¹³⁶

The husband essentially has many legitimate reasons for divorce available to him, and the possibilities reflect his status as an unsatisfied purchaser. In addition, there are instances when the rabbis encourage the man to exercise his power and divorce his wife. Rabbi Meir, in *Tosefta Sotah* 5, criticizes

the conduct of a wicked man [who] is untroubled by his wife’s going out with hair uncovered or a sleeveless blouse, being overly familiar with her male or female servants, going out to spin in the market place, bathing and acting frivolously with other men¹³⁷

He suggests that “in such cases it is a mitzvah to divorce her.”¹³⁸ Those actions by the wife violate *Dat Yehudit*, the proper behavior of a religious woman, because each incident has sexual overtones. The rabbis consider hair and uncovered arms liable to arouse, while intimate contact with other men suggests promiscuity. Interestingly, Getsel Ellinson explains that the fear of the woman spinning in public is also sexual because “she holds the thread to draw attention to her private parts.”¹³⁹ If the wife obstinately

¹³⁵ WEGNER, *supra* note 113, at 47.

¹³⁶ *Id.*

¹³⁷ ELLINSON, *supra* note 23, at 125-26.

¹³⁸ *Id.* at 126.

¹³⁹ *Id.* at 127. This is ironic considering that women skilled in spinning and weaving were highly regarded, especially since their work likely improved their families’ financial status.

refuses to accept the husband's divorce, the man simply receives permission from the *beit din* or, according to some traditions, from one hundred rabbis, and he could remarry without giving the get. Access to his sexuality was not at stake; with rabbinic approval, he was free to remarry.

In contrast to her husband, a wife can only ask for a divorce on four grounds under Halakhah:

- (1) When her husband is afflicted by physical conditions or undertakes an occupation deemed unendurable for the wife
- (2) When her husband violates or neglects his marital obligations
- (3) When there is sexual incompatibility or
- [4] when there has been wife beating.¹⁴⁰

All of these rationales have sexual implications. The woman's legitimate complaints were limited to protests over her husband's sexual performance or problems with her sexual desire for him. The rabbis had compassion for the woman who was not sexually attracted to her husband. For example, Maimonides rules:

A woman who refuses to have intercourse with her husband is called *moredet* [rebellious]. One asks for her reason. If she says, 'I dislike him and am unable to have sexual relations with him freely,' one compels the husband to divorce her. She is not like a prisoner to live with one whom she detests.¹⁴¹

It is important to note that the court can only "compel" the husband to give her the get, even if she requests it for sexual reasons. The husband is the only one who can terminate the marriage, and he must do it willingly. Such willingness could mean that the husband freely terminated the marriage or, as Maimonides permitted, that an injunction allowed others to beat the man until he agreed.¹⁴² Without a get, the woman cannot lawfully remarry and have legitimate children.

Later authorities, however, questioned whether even these reasons are valid: is the woman believable when she makes claims about her sex life? In the thirteenth century, Rabbi Shlomo ben Aderet worried that "such a law would make it possible for a woman to form a liaison with another

¹⁴⁰ ADRIENNE BAKER, *THE JEWISH WOMAN IN CONTEMPORARY SOCIETY: TRANSITIONS AND TRADITIONS* 55 (1993).

¹⁴¹ MISHNEH TORAH: HILKHOT ISHUT 14:8 (Moshe ben Shaltiel ed., Ma'or Publication Society 1975); ELIEZER BERKOVITS, *JEWISH WOMEN IN TIME AND TORAH* 49 (1990).

¹⁴² MISHNEH TORAH: GERUSHIN 2:20 (Moshe ben Shaltiel ed., Ma'or Publication Society 1975).

man and then demand that her husband be compelled to divorce her.”¹⁴³ An illicit sexual liaison threatens her husband’s claim to her that, in turn, is the basic foundation for the legal institution of marriage. The Tosafot¹⁴⁴ and other Halakhists, however, decide her claim on the basis of evidence; that is, rather than determine that she is not sexually involved with another man, they investigate whether her complaint of sexual dissatisfaction is true.¹⁴⁵ Her current husband’s right to her sexuality overrides the other factors.

Overall, “whenever a man owns, acquires, or disposes of a woman’s sexuality, the law treats the woman as chattel for that purpose,” especially “for rules governing marriage [and] divorce.”¹⁴⁶ With regard to terminating the marriage, the man acts unilaterally, but the woman is dependent on her husband to relinquish his legal right to her sexuality. If he refuses, she is an *agunah*. She is without control over her own sexuality and unable to remarry. The ancient laws for divorce created this inequitable legal status for women and, as shown below, the contemporary Jewish movements maintain the possibility of this status in modern Jewish law.

1. A Contemporary Halakhic Problem: the Agunah

Today, the situation most likely to cause a woman to become an *agunah* is the husband’s flat-out refusal, either out of spite or in anticipation of monetary gain, to give his wife a *get*. All of the modern Jewish movements acknowledge that this state of affairs negatively impacts the woman’s quality of life; she is unable to move on from the failed marriage and begin life anew. On the whole, though, their respective solutions do not address the issue of sexuality, which constitutes the major problem with Jewish divorce. This failure is a problem because the root cause of the *agunah*’s unfortunate situation comes from the quasi-ownership of the woman’s sexuality and the inability (or unwillingness) of the community or its leaders to change the laws.

On the least complicated level, Reform Judaism in America “turn[s] the whole business over to civil authorities” by the “declar[ation] that civil divorce alone suffice[s] to dissolve its marriages.”¹⁴⁷ The Reform Movement repudiates the halakhic system of divorce to negate the inequalities in the process, namely, those problems that derive from the husband’s sole ability to terminate marriage. This course of action follows

¹⁴³ BERKOVITS, *supra* note 141, at 50. This is also known as the *Rashba*.

¹⁴⁴ 15 ENCYCLOPEDIA JUDAICA, *supra* note 3, at 1278.

¹⁴⁵ BERKOVITS, *supra* note 141, at 50 (citing *Ketubot* 63b s.v. *abal amra*). See also KETUBOT, *supra* note 31.

¹⁴⁶ WEGNER, *supra* note 113, at 45.

¹⁴⁷ ADLER, *supra* note 110, at 201.

essentially a similar pattern as the Reform attitude to marriage, in which Reform rabbis “permit an exchange of rings and vows by the two parties, in contrast to Talmudic law,”¹⁴⁸ thereby making the marriage more equal as well. This approach to marriage and divorce, however, only works when Jewish laws are not seen as externally binding. Other Jewish movements continue to view the woman who uses this approach as an adulteress and any children from that type of adulterous relationship as *mamzerim*. The Reform Movement thus rejects the approach of the halakhic texts when Halakhah undermines equality.

On the other hand, Reconstructionism combines the traditional framework for marriage and divorce with a better understanding of the role of sexuality in the process. In a case with an agunah, according to Blu Greenberg, “the Reconstructionist *beit din* simply will give her a *shtar piturin*, a document that declares her free to remarry, even though she has no get, nor has her marriage been annulled.”¹⁴⁹ This approach recognizes that the consequences of a woman remarrying without a get threaten Jewish stability by driving people away from Judaism. The stigma placed on her and her children makes it difficult for her to remarry according to Jewish tradition, thus discouraging her from remaining a member of the Jewish community. Significantly, the *shtar piturin* reinforces the court’s right to grant the woman the ability to remarry. The *beit din*’s control of her sexuality is taken away from her husband, rather than being recognized as always having been her own. The woman’s sexuality is still treated like a commodity, but in this instance, the court exercises compassion.

The Conservative Movement, with its emphasis on maintaining Jewish legal tradition, has suggested three possible solutions to the agunah problem. In the 1950s, Rabbi Saul Lieberman advocated the introduction of a clause into the ketubah that would serve as a contractual prenuptial agreement. It stipulated that, if the couple divorced, the husband and wife would go before an official Conservative *beit din* and “authorize[] the b[e]it din to impose such terms of compensation as it may see fit for failure to respond to its summons.”¹⁵⁰ There were several problems with the Lieberman clause, as it came to be known.¹⁵¹ First, though “there was an effort to enforce [these] rules” in secular American courts, such clauses were found “to run afoul of the principle of separation of church and

¹⁴⁸ RUDAVSKY, *supra* note 9, at 295.

¹⁴⁹ BLU GREENBERG, ON WOMEN AND JUDAISM: A VIEW FROM TRADITION 135 (1998).

¹⁵⁰ IRVING A. BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY 96-97 (1993).

¹⁵¹ *Id.*

state.”¹⁵² Also, it “was rejected by the Orthodox as being halakhically invalid because of [the] indeterminate nature” of its stipulations.¹⁵³

Next, the Conservative Movement tried the “Berkovits t’nai in 1968” that stated that “if our marriage should end in a civil divorce and within six months thereafter I give you a get, our marriage will remain valid and binding; if, however, six months have passed and I do not give you a get, then our marriage will have been null and void.”¹⁵⁴ This was not acceptable to traditionalist authorities because “marriage is an unconditional commitment and conditional marriages and divorces thereby are rendered invalid by consummation of the marriage.”¹⁵⁵ Most recently, Conservative rabbis have been in favor of a solution that recognizes the power of the rabbinical courts to give legitimacy to marriage in the first place, and “if the rabbis remove their sanction because of certain conditions no longer operating, the original act of kiddushin (betrothal) is voided,”¹⁵⁶ meaning the marriage was not valid and the woman does not need a get. Again the Orthodox movement disallows this option “on the grounds that the power to annul marriages was used only in limited instances and in post-talmudic times the power to annul marriages has been constricted.”¹⁵⁷ Here, too, the Conservative Movement does not challenge the traditional framework that treats woman’s sexuality as a commodity. Its methodologies address the inequalities of divorce by instituting procedures undertaken by the husband and by the rabbinical court; the man must come before the beit din or the court acts to help the woman. The woman lacks legal control over her sexuality until she receives the writ of divorce.

With a similar approach as Conservative Judaism, Orthodoxy does not challenge the underlying halakhic framework of marriage and divorce; Halakhah, after all, is immutable in their authorities’ opinion. The Orthodox Movement has looked for ways to increase the power of their rabbinical courts, again using the beit din to assert its authority over the marriage and essentially convince the husband to give the get. According to Seymour Cohen,

¹⁵² Seymour J. Cohen, *The United States Constitution and the Jewish Community: The Recalcitrant Husband and the Chained Woman (Agunah)*, in 21 JEWISH LAW ASSOCIATION STUDIES VIII: THE JERUSALEM 1994 CONFERENCE 25 (Edward A. Goldman ed., 1996).

¹⁵³ GREENBERG, *supra* note 149, at 136.

¹⁵⁴ *Id.* at 136-37.

¹⁵⁵ *Id.* at 137 (citing MIESELMAN, *supra* note 110, at 103-08).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 138.

the Rabbinical Council of America [a national Orthodox rabbinical organization] has urged its membership to use . . . the premarital agreement to be signed by both husband- and wife-to-be in which the husband agrees to [financially] maintain and support his wife [by providing a certain amount of money] until the marriage has been terminated.¹⁵⁸

In addition, “both parties stipulate that, in case of disagreement, they agree to have their dispute adjudicated by a specified person acceptable to both parties,” ostensibly an Orthodox *beit din*.¹⁵⁹ This prenuptial agreement supposedly makes the halakhic stipulations for marriage and divorce, including the husband’s obligation to support his wife financially and his responsibility to give her a *get* when the marriage is terminated, legally enforceable in the secular courts. Sexuality is simply not an issue; perhaps this attitude reflects the Orthodox opinion that *kinyan* for marriage is really “ritualistic.”¹⁶⁰

It is impossible to overlook the fact that the halakhic texts on marriage and divorce treat a woman’s sexuality as her husband’s property. The solutions proposed by the four modern movements of Judaism have tried to address the legal inequalities created by the husband’s unilateral power to effect divorce, but they have ignored the issue of what property he commands. Certainly their efforts should be admired and regarded as necessary. Nonetheless, “[w]here women’s sexuality is seen as an object to be possessed, and sexuality is confined to heterosexual marriage and perceived as an impulse that can take possession of the self, the central issues surrounding sexuality will necessarily be issues of control.”¹⁶¹ These issues of control are the result of the underlying fact that marriage and divorce involve the legal transfer of a woman’s sexuality. When the solution persists in regarding woman’s sexuality as a commodity, the modern Jewish movements in effect maintain the inequalities because the woman must still rely on the *beit din*’s benevolence for her sexual freedom. It is crucial to resolve this issue in a way that treats each woman as a complete person, rather than property.

¹⁵⁸ Cohen, *supra* note 152, at 35.

¹⁵⁹ *Id.*

¹⁶⁰ MEISELMAN, *supra* note 120, at 96.

¹⁶¹ Judith Plaskow, *Toward a New Theology of Sexuality*, in *TWICE BLESSED: ON BEING LESBIAN OR GAY AND JEWISH* 141, 142 (Christie Balka & Andy Rose eds., 1989).

IV. THE ROLE OF TRADITIONAL CONSTRUCTIONS OF SEXUALITY IN MODERN JEWISH APPROACHES TO HOMOSEXUALITY

By calling into question the very substance of halakhic texts, GLBT Jews challenge the heart of traditional Jewish gender expectations: Jewish man meets Jewish woman, they establish a middle-class home, and they have at least two children who grow up to marry Jews of the opposite sex and have their own children. Jewish society's inherent privileging of that ideal does not allow GLBT Jews full access to and support within Jewish communal life. This tension becomes all the more complex due to the great esteem in which many Jews, including GLBT Jews, hold their legal and communal traditions. This Part begins with an analysis of several Jewish texts that address homosexuality,¹⁶² either halakhically or socially. It then explains how the modern movements of Judaism use those writings in their conceptions of homosexuality and of the roles of GLBT Jews in their communities. It examines significant passages on homosexuality in order to illuminate the major difficulties homosexuality poses to the normative assumptions underlying the Jewish legal system's regulation of sexuality. Because modern arguments are based on interpretations of halakhic texts, it is important to identify and explain how these legal materials functioned in their own historical and philosophical contexts. It is with knowledge of this historical framework that modern Jewish movements evaluate the claims of GLBT Jews, approaching the issue from distinct theological positions concerning the authority of sacred works for contemporary Jews. At stake is an understanding of how shifting social conceptions of sexuality can affect the interpretation and implementation of Jewish law as well as an awareness of the impact Jewish legal decisions about homosexuality can have on the lives of GLBT Jews.

A. Male Homosexual Desire

The main proscription against male homoerotic sex comes from the Hebrew Bible, *Leviticus* 18:22:

¹⁶² As discussed in Part II, *supra*, the halakhic materials presume a heterosexual norm in sexual relationships. However, Jewish texts on homosexuality usually address prohibitions on homoerotic behavior, not relationships. It is important to recognize that the ancient works never address "homosexuality [as] a sexual orientation"; rather, the primary concern is with certain sexual practices. Rodney Mariner, *The Jewish Homosexual and the Halakhic Tradition: A Suitable Case for Treatment*, in *JEWISH EXPLORATIONS*, *supra* note 38, at 83, 85. In the past, homosexual intercourse was seen as deviation from that standard model of behavior, and therefore not within the rabbis' contemplation as a category that required regulation. This analysis assumes that some Greco-Roman men and women, Jewish and non-Jewish, did partake in homosexual activities; the rabbis of that era would hardly condemn what was not occurring.

With a male you are not to lie (after the manner of) lying with a woman, it is an abomination [to'evah]", and 20:13, "A man who lies with a male (as one) lies with a woman—abomination [to'evah] have the two of them done, they are to be put-to-death, yes death, their bloodguilt is upon them!"¹⁶³

The biblical description of homosexual sex, "after the manner of lying with a woman," represents a standard male method of expressing sexual desire through intercourse. Forbidden homosexual intercourse stands in opposition to legitimate heterosexual intercourse. Surrounding these verses are lines about other prohibited sexual contact including incest, bestiality, and intercourse with a menstruant, which constitute a group of prohibitions collectively called *arayot*. The Bible does not mention female homosexual contact; only male homoerotic activity triggers the death penalty,¹⁶⁴ in part because the verses surrounding the prohibitions are solely addressed to men.

The biblical authors set up homoerotic and nonconsensual sexual acts in opposition to heterosexual, legal sex in order to define and maintain a behavioral and cultural line between Israelite society and the surrounding peoples. The problem with homosexual sex is that, in Rachel Adler's words, it "violat[es] the categories and statutes that define the various social actors."¹⁶⁵ Contemporary expressions of sexuality could be understood within a framework different from the biblical perspective because, of course, the historical context has evolved.

¹⁶³ EVERETT FOX, *THE FIVE BOOKS OF MOSES: GENESIS, EXODUS, LEVITICUS, NUMBERS, DEUTERONOMY* 599, 607 (1995).

¹⁶⁴ The prescription for capital punishment does not mean, however, that the death penalty was implemented in Biblical times for homosexual sex or even for other activities called *to'evah* (abomination).

¹⁶⁵ ADLER, *supra* note 110, at 129. Several scholars have expanded on this approach. Rebecca Alpert suggests that "*to'evah* is actually a technical term used to refer to a forbidden idolatrous act [and] that the references in Leviticus are specific to cultic practices of homosexuality, and not sexual relationships as we know them today." Rebecca T. Alpert, *In God's Image: Coming to Terms with Leviticus*, in TWICE BLESSED, *supra* note 161, at 52, 68. Rodney Mariner argues that the contexts of these Biblical verses point to "non-consensual sodomy" or "where 'consent' . . . is at best dubious," inferring from this that the proscriptions do not address loving homosexual relationships but rather coercive sexual acts. Mariner, *supra* note 162, at 86-87. Phyllis Bird argues that that *to'evah* "belongs to the language of separation and distinction from the nations that came to expression during the exile and was applied retroactively to earlier stages of Israelite history." Phyllis A. Bird, *The Bible in Christian Ethical Deliberation concerning Homosexuality: Old Testament Contributions*, in *HOMOSEXUALITY, SCIENCE, AND THE "PLAIN SENSE" OF SCRIPTURE* 142, 152 (David L. Balch ed., 2000). The biblical approach to homosexuality actually reflects ancient Near Eastern attitudes attested in the archaeological record, especially in Egyptian and Mesopotamian sources. *Id.* at 156-57.

The rabbis were most concerned about male homosexual activity because it involved penetration. This action violates the rabbinic conception of heterosexual intercourse that “an active male penetrates a passive female” and means that the penetrated male “sacrifice[d] [his] ‘maleness’” and acted female.¹⁶⁶ Indeed, “to penetrate was to reaffirm, perhaps even to assert, this [male] power . . . [whereas,] to be penetrated was perceived as being as women were perceived, that is, weak and dominated.”¹⁶⁷ Additionally, homoerotic intercourse not only defied gender expectations but also defied the procreative paradigm. The earliest examples illustrate the developing legitimacy of that claim: Pseudo-Phocylides, an Alexandrian Jew from around the first century, argues that “anal intercourse between men is ‘against nature’” and Josephus criticizes homosexual activity as causing the “confusion of sexual roles.”¹⁶⁸ These positions reflect Greek and Roman conceptions of sexuality, and suggest that Greco-Roman influence was later incorporated into rabbinic thought.¹⁶⁹

Male homoerotic activity so distorted the expected gender roles for sexual intercourse that even the potential for erotic contact between men was troublesome. The rabbis recognized that a male could sexually arouse and could be sexually aroused by another male. In *Mishnah Kiddushin* 4:14, for example, Rabbi Yehudah forbids two bachelors from sleeping underneath the same blanket.¹⁷⁰ The proscription presumably could be intended to prevent unintentional sexual arousal, which could culminate in homosexual intercourse. However, in the *Mishnah Torah*,¹⁷¹ Maimonides, while extensively referring to this scenario, cites *Hilkhot Issurei Bi'ah*, 22:2 (the Laws of Forbidden Sexual Relations) for the assertion that Jewish men were not likely to become aroused in this manner.¹⁷² Later authorities also negated any possibility of sexual arousal because “homosexuality was so rare among Jews that such preventative legislation was considered unnecessary.”¹⁷³ Consequently, the perception that men, especially Jews, were naturally attracted to women was perpetuated.

¹⁶⁶ SATLOW 1995, *supra* note 31, at 316; Satlow 1994, *supra* note 68, at 15.

¹⁶⁷ Satlow 1994, *supra* note 68, at 2.

¹⁶⁸ *Id.* at 7-8.

¹⁶⁹ *Id.* at 1.

¹⁷⁰ MISHNAH KIDDUSHIN, *supra* note 115, at 4:14. See also Mishnah Kiddushin 4:14, Store of Holy Texts, <http://www1.snunit.k12.il/kodesh/mishna/kidu04.html> (last visited Oct. 16, 2005).

¹⁷¹ A code of Jewish Law from the twelfth century.

¹⁷² Norman Lamm, *Judaism and the Modern Attitude to Homosexuality*, in CONTEMPORARY JEWISH ETHICS 375, 381 (Menachem Marc Kellner ed., 1978).

¹⁷³ *Id.* For example, see KIDDUSHIN, *supra* note 115, at 82a.

B. Female Homosexual Desire

Although the Torah does not specifically mention female homoerotic acts, the rabbis forbade them based on their interpretations of *Leviticus* 18:3, which states that “[w]hat is done in the land of Egypt, wherein you were settled, you are not to do; what is done in the land of Canaan, to which I am bringing you, you are not to do; by their laws you are not to walk.”¹⁷⁴ Just as the prohibition of male homosexual acts was intended to define boundaries between Israelite and non-Israelite, this statement is also about separating Jews from their neighbors in a more general sense. It was not until later, however, that the rabbis connected lesbianism to this separation and thus derived the proscription for lesbianism. *Sifra, Aharei Mot* 9:8¹⁷⁵ “describes these ‘doings’ [in the biblical verse cited above] as including lesbianism.”¹⁷⁶ *Sifra*, as *Midrash*, is a halakhic work that “stands in direct relationship to a fixed, canonical text, [Leviticus].”¹⁷⁷ Its prohibitions are reflective, then, of a different exegetical tradition, in which female homosexual activity ostensibly serves as a threat to the general society. This danger is thus in contrast to male homosexual desire, where “rabbinic anxiety about male penetration is crucial.”¹⁷⁸

Lesbianism receives comparatively more comprehensive treatment in the Babylonian Talmud. *Shabbat* 65a/b and *Y’vamos* 76a conclude that “sexual intimacy between women does not render the individual women concerned ‘unfit’” for marriage.¹⁷⁹ The rabbis in these texts allow a woman to maintain whatever current sexual status she has—virgin or widow, for instance—because they do not consider lesbian sexual expressions to be sex: “[I]n terms of definitions, it is significant that sexual acts between women are not considered a violation of the law because no act of intercourse takes place—in other words, it is the male experience[,] which defines what is a sexual act.”¹⁸⁰ Although certainly discouraged, then, this female homosexual activity does not have the same grave implications as

¹⁷⁴ FOX, *supra* note 163, at 597.

¹⁷⁵ This text was “edited no later than the fourth century CE.” Elizabeth Sarah, *Judaism and Lesbianism: A Tale of Life on the Margins of the Text*, in JEWISH EXPLORATIONS, *supra* note 38, at 95, 96.

¹⁷⁶ Mariner, *supra* note 162, at 84.

¹⁷⁷ STEMBERGER, *supra* note 24, at 235 (quoting G. Porton, *Defining Midrash*, in THE STUDY OF ANCIENT JUDAISM 55, 60 (J. Neusner ed., 1981)).

¹⁷⁸ SATLOW 1995, *supra* note 31, at 187.

¹⁷⁹ Sarah, *supra* note 175, at 97.

¹⁸⁰ BAKER, *supra* note 140, at 166.

male homoerotic contact because no penetration of a penis into a vagina occurs. To a certain extent during this period, men—fathers, husbands, brothers, or other male relatives—legally controlled women’s sexuality, and women, whether or not they engaged in lesbian sex, were still under their male relatives’ power. Men were still able to use their legal authority to encourage or require marriage for their female relatives, regardless of these women’s sexual preferences.

Further, *Hilkhot Issurei Bi’ah* 21:8 confirms the prohibition from ancient works: “[W]hat they used to do [in Egypt] was that men used to marry men and women used to marry women [but] there is no specific negative commandment about it and no sexual intercourse is involved.”¹⁸¹ He specifically reminds his audience, “it is forbidden for women to mutually masturbate [lit. ‘rub each other’].”¹⁸² Moreover, the difficulty with lesbian sex is not simply grounded in the Jewish desire to distance itself from foreign, non-Jewish practice. Mutual masturbation or any other sexual acts between women challenge the notion that a woman can and should only fulfill her sexual desires through intercourse with her husband, and vice versa. While Maimonides does not explicitly raise a concern that a woman will be sexually satisfied from intimate contact with another woman, he refers to the need to “prevent women who are known for such lesbianism from coming in to [a man’s wife] and [to] prevent her from going out to them,”¹⁸³ implying that women would seek out these relationships.¹⁸⁴

C. The Case of the “Androgyne” and “*Tumtum*”

The paradigm for appropriate avenues of sexuality, however, was problematic when it was unclear whether or not the person in question was male or female. In *Mishnah Bikkurim* 1:5, tannaitic Rabbi Eliezer ben Jacob the Elder¹⁸⁵ places the *tumtum* and androgyne in the same category of woman: “[T]he administrator, the agent, the slave, the woman, the *tumtum*, and the androgyne can bring the first fruits but they cannot say the blessing

¹⁸¹ Alan Unterman, *Judaism and Homosexuality: Some Orthodox Perspectives*, in JEWISH EXPLORATIONS, *supra* note 38, at 71 (quoting *Hilkhot Issurei Bi’ah*).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See STEMBERGER, *supra* note 25, at 68. Stemberger explains that Rabbi Eliezer ben Jacob the Elder is known for teachings on Temple; this leads me to conclude that the Rabbi Eliezer discussing the first fruits for sacrifices is probably that *tannaitic* figure.

because they cannot say ‘that you gave me, G-d.’”¹⁸⁶ Tumtum is a halakhic technical term for someone whose biological sex is indeterminate. Later in Chapter Four of the Mishnah Bikkurim, the rabbis discuss how the androgyne is like both a woman and a man.¹⁸⁷ There is considerable confusion regarding this person’s status as a sexual being. Michael Satlow explains the halakhic tradition concerning these people of uncertain sexuality, noting that “when an androgynos is sexually passive in vaginal intercourse, the act is not a capital crime,”¹⁸⁸ that is, not homoerotic, because the androgyne is acting like a woman, and the intercourse is essentially heterosexual. However, “only when [the androgyne is] passive in anal intercourse does the act come perilously close to male homoeroticism, and is thus prohibited.”¹⁸⁹ The case of the androgyne is important because it points to the possibility that there exists another avenue for sexual expression. There are people who do not fit the paradigm, and yet they are able to express their sexual identities. Granted, the rabbis try to fit the androgyne in the heterosexual model; but the Halakhah remains confused, sometimes equating this person with women and other times with men.

In the case of the tumtum and androgyne, Maimonides is considerably stricter:

[The offender] is free from the death penalty for vaginal intercourse with an androgyne. The *tumtum* is a doubtful case and so for sexual intercourse with a *tumtum*, or for vaginal intercourse with an androgyne, one would be punished by a rabbinical beating. An androgyne is allowed to marry a woman.¹⁹⁰

The risk that a person with a penis might choose to be sexually active as a woman, thereby accepting the “weaker” position, is unbearable. Maimonides arguably goes against earlier texts and recommends punishment, even though a sanction is not biblically based, because the uncertainty threatens established sexual norms and challenges the traditional, fixed assignment of sexual authority in a relationship.

¹⁸⁶ This translation from the Hebrew is the author’s. See also 3 MISHNA – SEDER ZERA’IM: BIKKURIM 1:5, 10-11 (Pinhas Kehati, ed., Eliner Library Dep’t for Torah Education and Culture in the Diaspora 1994). See also Bikkurim 1:5, 10-11, Store of Holy Texts, <http://www1.snunit.k12.il/kodesh/mishna/bicu01.html> (last visited Oct. 16, 2005).

¹⁸⁷ 1 HERBERT DANBY, THE MISHNAH 98 (1933).

¹⁸⁸ SATLOW 1995, *supra* note 31, at 187.

¹⁸⁹ *Id.*

¹⁹⁰ Unterman, *supra* note 181, at 71, quoting *Hilkhos Issurei Bi’ah* 1:14-15.

As demonstrated above, the positions against homosexuality in the biblical and rabbinic halakhic works reflect the way in which the biological realities of heterosexual sex suggest the unnaturalness of homoerotic activity. The rabbis' condemnations, however, lay the foundation upon which criticism of the modern Jewish movements is grounded.

D. Modern Approaches to Homosexuality within the Jewish Community

The halakhic ideal of heterosexual marriage pervades the positions on homosexuality of most of the modern movements of American Judaism. Both Orthodox and Conservative Judaism accept the textual position on the grounds that Halakhah is flatly authoritative in this matter. In contrast, Reform Judaism and Reconstructionism reject the Halakhah that ostracizes GLBT Jews and welcome them into the community. Only the Reconstructionist Movement eschews the heterosexist ideal completely.

1. Traditional Approaches: Orthodox and Conservative Judaism

As described in Part I, Orthodox Judaism regards the Hebrew Bible as the ultimate authority of Jewish law, but in fact assigns great, if not greater, weight to post-biblical texts, especially halakhic works. As expected, then, the expression of a homosexual identity through homoerotic intercourse is completely forbidden as a sin and an abomination among the Orthodox community. For example, Rabbi Alan Unterman explains the situation directly:

The commitment of the Orthodox community to Torah is not a consciously selective one, but relates to a whole tradition, parts of which may seem obvious and relevant and parts obtuse and irrelevant. . . . It does not seem [that there needs to be] tacit approval for [the] lifestyle [of GLBT Jews] from the Halakhah than among other dissatisfied sinners.¹⁹¹

He continues emphatically, "[a]s long as gays are simply regarded as males and females, homosexual acts are prohibited to them."¹⁹² This statement leaves open the possibility that sexual identity may one day not be classified along male or female lines, and the abolishment of this dichotomy will allow a different approach to the appropriateness of different, non-heterosexual expressions of sexuality.

Moreover, Rabbi Jonathan Sacks, the current Chief Rabbi of England, believes that "the ideals of heterosexuality and above all fidelity,

¹⁹¹ *Id.* at 72.

¹⁹² *Id.*

summed up in the concept of marriage, are not merely part of Biblical ethics. They are written into the entire fabric of the Biblical vision.”¹⁹³ Homosexuality has no place in his model for Jewish life. Sacks’s argument does not account for other institutions regulating sexuality, such as polygamy and levirate marriage that are no longer practiced today but were important parts of biblical narrative and law. Finally, Rabbi Michael Gold summarizes the possible reasons for this legal stance, stating that “procreation is impossible” and “homosexuality . . . threatens the Jewish ideal of family life, of marriage and children, articulated in the Torah.”¹⁹⁴ These reasons speak to the social standard of heterosexuality for the Jewish community and point to applications of Jewish Law that reinforce that paradigm. It is important to note that some Orthodox thinkers advocate a more inclusive stance. They liken those who disregard the proscription on homosexuality to those who break the laws of *Shabbat* or *kashrut*: they may still participate and even be leaders in communal Jewish life to a limited extent, but their sins remain inappropriate and discouraged by the rabbinical leadership.

Orthodox Judaism, however, has not been able to ignore the presence of active GLBT Jews in their communities and therefore strives to correct their sexual activity, much like a rabbi would encourage wayward Jews to keep the laws of Shabbat. In 1974, Rabbi Norman Lamm articulated four responses to homosexuality.¹⁹⁵ He rejected three of them, namely, sanctioning gay people,¹⁹⁶ stopping all social critiques of homosexuality, and recognizing the authenticity of a gay alternative lifestyle. As a fourth option, Lamm suggested that this preference for sexual intimacy with a person of the same gender represents psychological imbalance, “in orienting ourselves to . . . homosexuals as patients rather than criminals, we do not condone the act but attempt to help the homosexual.”¹⁹⁷ In other words, Lamm views GLBT Jews as ill patients in need of cure. Halakhically, this argument means that the homosexual is a person who cannot control his or her sin, that is, who is compelled to engage in homosexual acts, and someday might repent—even as that person continues to bear responsibility for those actions. This approach is supposed to engender compassion for the gay person. On a practical level, however, the Orthodox leadership strongly

¹⁹³ SACKS, *supra* note 93, at 169.

¹⁹⁴ MICHAEL GOLD, DOES GOD BELONG IN THE BEDROOM? 139 (1992).

¹⁹⁵ Lamm, *supra* note 172, at 384.

¹⁹⁶ Lamm argues that “criminal laws requiring punishment for homosexuals are simply unenforceable in society” and will probably encourage those acts in prison, stigmatizing those who ought to be learning from their crimes. *Id.* at 386.

¹⁹⁷ *Id.* at 395.

and publicly condemns homosexual activity. Despite this, openly GLBT Jews are hesitantly welcomed into some Orthodox communities, but they are usually under pressure to undergo therapy and marry in hopes of one day being cured of their "illness."

This official position does not necessarily reflect the lives of all Orthodox GLBT Jews. Orthodox Rabbi Steve Greenberg,¹⁹⁸ in an article published under a pseudonym, explains, "[g]ay feelings are hardwired into our bodies, minds, and hearts . . . I do not believe that G-d would demand that I remain loveless and celibate [and] I have chosen to seek a committed love, a man with whom to share my life."¹⁹⁹ His statement challenges the fundamental belief that all men and women are heterosexual as well as the primacy of heterosexual marriage in Jewish law. Greenberg speaks to the halakhic concerns as well: "If the Torah expressly forbids only this one form of sexual fulfillment, could we articulate a possible "halakhic" form of gay loving that excludes anal intercourse but permits a loving physical and emotional relationship between two men or two women?"²⁰⁰ This solution respects the letter of the law, which he recognizes is "unchangeable" in the framework of Orthodox Judaism, but welcomes a different, more modern understanding of sexuality at odds with the rabbinic and halakhic views. While GLBT Orthodox Jews reject their rabbis' interpretations of homosexuality, it often comes with a high cost in regards to their membership in the Orthodox Jewish community.

The official position of Conservative Judaism on homosexuality is strikingly similar to the Orthodox stance. This is surprising considering that this movement generally encourages change within the halakhic system; in fact, it approached the transformation of women's roles in Judaism from a perspective that used innovations in Halakhah in response to modern challenges to traditional gender roles. The arguments against giving legitimacy to GLBT Jews, however, appeal to the unchanging authority of the text. Rabbi Joel Roth "acknowledges that homosexuality cannot be considered *inherently* abominable, but asserts that the Torah simply *attributes* the quality of abominableness to homosexuality, placing the prohibition beyond the reach of any extra-legal concerns that would favour

¹⁹⁸ Greenberg also appears in *Trembling Before G-d*, a film that illuminates some of the complexities of being a religious Jew and gay in a successful "portrayal of the anguish faced by Jews who want to remain Orthodox but see themselves as homosexual." Avi Shafran, *Dissembling Before G-d* ¶ 1, <http://www.jlaw.com/Commentary/dissembling.html> (last visited Oct. 12, 2005).

¹⁹⁹ Yaakov Levado, *Gayness and God: Wrestlings of an Orthodox Rabbi*, TIKKUN, Sept./Oct. 1993, at ¶¶ 55, 57. Later, it became known that the author was Rabbi Steve Greenberg. See Steve Greenberg, *Gayness and God*, <http://www.indogayforum.org/authors/greenberg/greenberg31.html>.

²⁰⁰ *Id.* ¶ 46.

its abandonment.”²⁰¹ By relying on the influence of the text, Roth asserts that Jewish law cannot change or adapt to accommodate respect for homosexuality because its legal wrongness remains squarely based on halakhic texts. Because the Torah forbids anal intercourse, “Roth’s last word to the gay person is that ‘Jewish law would have you be celibate.’”²⁰² Conservative synagogues have traditionally had control over their own religious practices, so in effect this means that individual communities can decide whether to welcome GLBT Jews into their congregations.

Because the Conservative Movement has more flexibly defined standards of practice as compared to those of Orthodoxy, there is considerable and vocal disagreement over the status of GLBT Jews. According to Rabbi Elliott Dorff, “the results of Roth’s reasoning [are] ‘unbelievably cruel’” because they are essentially a “position of extreme and formalistic fundamentalism” which disregards the innovation possible in halakhic discourse.²⁰³ Moreover, Rabbi Hershel Matt questions “whether . . . the ancient and modern significance and consequences of homosexuality are the same and whether homosexuality today is inherently idolatrous, immoral, and destructive of Jewish existence.”²⁰⁴ Conservative rabbis like Matt believe that there is a potential for halakhic adaptation to modern conceptions of sexuality, and they encourage that change on an institutional level. The changes in Jewish law are also part of a larger understanding of how the shifting nature of the family leaves the possibility for same-sex families to be equal to traditional nuclear families.

Institutionally, however, “the Committee on Jewish Law and Standards determined that commitment ceremonies should not be performed and that sexually active homosexuals should not be admitted to the Movement’s rabbinical and cantorial schools.”²⁰⁵ This latter position essentially forces GLBT Jews to choose between their religious calling to serve the religious needs of the Jewish community as a rabbi or cantor and their needs for human companionship and personal fulfillment. As the rabbis’ disagreement persists, the disqualification of GLBT Jews from ordination at the Jewish Theological Seminary and from admittance into the Rabbinical Assembly still has a profound effect on the opportunities of GLBT people within the Conservative Movement. Benay Lappe, a former student of the Jewish Theological Seminary, explains, “I have always seen

²⁰¹ Mark Solomon, *A Strange Conjunction*, in JEWISH EXPLORATIONS, *supra* note 38, at 80.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ GOLD, *supra* note 174, at 143.

²⁰⁵ DORFF, *supra* note 102, at 40.

the seminary's refusal to ordain openly gay and lesbian rabbis as profoundly misguided, obviously rooted in homophobia, and certainly not a prejudice that should be honored."²⁰⁶ There is a "don't ask, don't tell" policy in force.²⁰⁷ The institutions' negative stance on homosexuality likely extracts a high emotional toll on GLBT Jews who realize that the stance of these schools institutionalize homophobia in the Conservative Jewish community at large.

Lappe emphasizes another element that makes the situation more complex: the relationship of Conservative Judaism to other Jewish movements and Jews worldwide. Since the Conservative Movement revised its policies towards women, it has had to reaffirm its commitment to Halakhah in order to maintain its authenticity. Homosexuality, then, "is the final remaining issue that keeps the movement from being lumped together with the Reform movement. It is what makes possible whatever legitimacy the movement is granted by the rabbinate in Israel."²⁰⁸ This facet is particularly significant with regards to establishing a context for the Conservative decisions about GLBT Jews. The Conservative Movement has not yet determined the most coherent manner in which to apply its theology, and so it is remaining faithful to the traditional Jewish legal stance on homosexuality.

2. *Liberal Approaches: Reconstructionist and Reform Judaism*

In contrast to traditionalists who privilege Jewish texts in their interpretations of homosexuality, liberal streams of Judaism weigh ethical considerations against contextual and historical factors in developing their

²⁰⁶ Benay Lappe, *Saying No in the Name of a Higher Yes*, in *LESBIAN RABBIS: THE FIRST GENERATION* 197, 204 (Rebecca Alpert et al. eds., 2001) [hereinafter *LESBIAN RABBIS*].

²⁰⁷ Lappe spent her six years of rabbinical school "in the closet," and soon "it was nearly impossible to keep [her] lesbian head above water, so to speak, with such an enormous tide of homophobia and sexism washing over [her] every day." *Id.* at 206. Even though the rabbinical school has a policy of "don't ask, don't tell," the dean interrogated Lappe: "[H]e went even further and told [Lappe] that he would not ordain [her] if [she] continued to refuse to answer him" on whether or not she was a lesbian. *Id.*

Similarly, in another article in *LESBIAN RABBIS*, the experiences of an anonymous lesbian rabbi are referenced. She notes that, while she was in rabbinical school, she was "still not ready to stand up to the Conservative Movement and its Rabbinical Assembly and state that [she was] a lesbian." *In Hiding*, in *LESBIAN RABBIS*, *supra* note 206, at 226, 233. She states: "I have neither the security nor the courage to add my name to this page. . . . I will help bring about the day when no one will have to feel alone or torn during rabbinical school, and that no one will have to hide who they are." *Id.*

²⁰⁸ Lappe, *supra* note 206, at 215.

responses to homosexuality. For instance, Mark Solomon rejects “this prohibition [as] not divine, but all too erringly human.”²⁰⁹ He explains:

Whether the prohibition of homosexual intercourse [in Jewish texts] is motivated by a loathing of pagan cultic practices, disapprobation of the rape of defeated enemy warriors, or simply revulsion at the idea of a man being ‘womanised’ in a society where women were regarded as necessarily passive and submissive, it certainly has no claim whatever on the conscience of any gay person today[.]²¹⁰

and ought not on any Jew as well. Because progressive Jews believe that people wrote the Torah, perhaps as a response to Divine inspiration or will, they claim an imperative to change the Jewish understanding of homosexuality. Progressive “supporters reexamine the entire history of Jewish teaching from biblical times through the present in the light of contemporary scientific and humanistic teachings about human sexuality and homophobia,” and this approach gives a Jewish framework in which to give legitimacy to homosexuals.²¹¹ They see the denial of legitimacy inappropriate, as “[m]ost gays would reject the patronizing implications of being regarded as ill,” especially since most psychology and psychiatry groups have stated that homosexuality is not a mental illness.²¹² Within the halakhic framework, Rabbi Harold Schulweis similarly points out that “in the Talmud, a deaf-mute was considered to be retarded, mentally incompetent, and imbecile not able to serve or witness or to be counted in the *minyan* or able to affect marriage and divorce. But that ruling was based on empirically false data,” just like the notion of homosexuality as a disease instead of a sexual orientation.²¹³ Progressives affirm the legitimacy of homosexuality when they argue that, “[f]or a gay it is part of the nature G[-]d gave him [or her] and must be used in His service.”²¹⁴ With this new understanding of human sexuality, then, it is possible to recognize different sexual orientations as equally valid and develop a vocabulary in which to analyze them.

²⁰⁹ Solomon, *supra* note 201, at 82.

²¹⁰ *Id.*

²¹¹ Yoel H. Kahn, *Judaism and Homosexuality: The Traditionalist/Progressive Debate*, in *HOMOSEXUALITY AND RELIGION* 47, 66 (Richard Hasbany ed., 1989).

²¹² Unterman, *supra* note 181, at 74.

²¹³ Harold Schulweis, *Morality, Legality, and Homosexuality* (1992), http://www.vbs.org/rabbi/hshulw/morality_bot.htm.

²¹⁴ Lionel Blue, *Godly and Gay*, in *JEWISH EXPLORATIONS*, *supra* note 38, at 117, 121.

With that attitude, the Reconstructionist Movement has rejected the Halakhah that forbids homosexual activity. The Reconstructionist Rabbinical College welcomed GLBT Jews as students in 1994, and the movement "issu[ed] a significant statement in support of gay and lesbian rabbis and teachers, and the performance of gay marriages, and encouraging synagogues to be 'welcoming congregations.'"²¹⁵ Rebecca Alpert explains that "same-sex marriage is understood as a religious value because it provides economic justice, creates stable, committed relationships, and fosters support for childrearing."²¹⁶ In other words, Reconstructionist Judaism does not see homosexuality as a threat to the Jewish family and thus Jewish survival; indeed, GLBT Jews enhance the Jewish community's perception of what it means to be a successful Jewish family.

The Reform Movement has only within the past few years permitted equal participation for gays in its various institutions and ceremonies, but its history of supporting rights for homosexuals extends back to 1977 when the Central Conference of American Rabbis ("CCAR") "encourage[d] legislation which [would] decriminalize[] homosexual acts between consenting adults and prohibit discrimination against [gays and lesbians]."²¹⁷ GLBT Jews attended the rabbinical and cantorial schools through the 1980s "in the closet" and then "came out" after ordination. In 1990, the CCAR supported equal rights for gays and lesbians even as they affirmed the Jewish ideal of heterosexuality, and they also openly welcomed GLBT rabbis into their ranks. GLBT synagogues are also members of the Union of American Hebrew Congregations. Although not every synagogue is welcoming to GLBT members, there have been significant improvements in the attitudes of Reform Jews towards them.

For the Reform Movement, the issue of same-sex marriage has been most troubling because, even outside of the halakhic system, the Jewish community upheld the Jewish principle of heterosexual marriage. The alteration of Jewish law and principles could not occur completely apart from Jewish tradition, as evidenced by the Responsa Committee of the CCAR in 1997, which affirmed the halakhic construction of marriage:

[K]iddushin: that concept whether understood according to its traditional terms or its Reform interpretation, is a legal institution whose parameters are defined by the sexual boundaries that Jewish law calls the *arayot*. Homosexual relationships, however

²¹⁵ See Sue Levi Elwell & Rebecca T. Alpert, Introduction, *Why a Book on Lesbian Rabbis?*, in LESBIAN RABBIS, *supra* note 206, at 24.

²¹⁶ Rebecca T. Alpert, *Religious Liberty, Same-Sex Marriage, and Judaism*, in G-D FORBID: RELIGION AND SEX IN AMERICAN PUBLIC LIFE 124, 127 (Kathleen Sands ed., 2000).

²¹⁸ Judaism and Homosexuality: Reform Judaism, http://www.religioustolerance.org/hom_jref.htm (last visited Dec. 12, 2005) (quoting Central Conference of American Rabbis, Resolution Adopted by the CCAR: Rights of Homosexuals (1977)).

exclusive and committed they may be, do not fit within this legal category; they cannot be called kiddushin.²¹⁸

The issue here is not whether homosexual partners can have legitimate, sanctioned relationships but whether they can have a religious marriage; in fact, Reform Judaism announced its support of civil commitments in 1996.²¹⁹ In June 1998, the CCAR's Ad-hoc Committee on Human Sexuality concluded that "kiddushah [holiness—the same root as kiddushin] may be present in committed, same gender relationships between two Jews, and that these relationships can serve as the foundation of stable Jewish families, thus adding strength to the Jewish community."²²⁰ The organization formalized this decision in March 2000, stating that "the relationship of a Jewish, same gender couple is worthy of affirmation through appropriate Jewish ritual [though] we support the decision of those who choose [not] to officiate at rituals of union."²²¹

Within a Jewish framework, these two movements address homosexuality much like they do with other laws from Judaism: by looking at the ethical implications of any decision and deciding whether it reflects "Judaism" accurately or needs further innovation. More eloquently, as Tikva Frymer-Kensky says: "Perhaps this is another instance in which the path upon which our ancestors set out now leads in a direction that invalidates and hurts members of the community and that the path must be redirected to be more appropriate to our vision of ourselves and God."²²²

E. Consequences of these interpretations for GLBT Jews and for the Jewish community

This Part has shown that interpretations of sacred texts about sexuality have a large impact on Jewish responses to homosexuality. The modern Jewish movements respond to homosexuality through the context of their respective positions on the authority of Halakhah by affirming their

²¹⁸ Moshe Zemer, *Progressive Halakhah and Homosexual Marriage*, in GENDER ISSUES IN JEWISH LAW: ESSAYS AND RESPONSES 166 (Walter Jacob & Moshe Zemer eds., 2001).

²¹⁹ See RRA Resolution, *supra* note 106.

²²⁰ AD-HOC COMMITTEE ON HUMAN SEXUALITY, REPORT TO THE CCAR CONVENTION (1998), available at http://www.google.com/search?q=cache:KKUagRFFz_YJ:www.ccarnet.org/hs.html+&hl=en.

²²¹ CENTRAL CONFERENCE OF AMERICAN RABBIS, RESOLUTION ON SAME GENDER OFFICIATION, (2000), available at <http://data.ccarnet.org/cgi-bin/resodisp.pl?file=gender&year=2000>.

²²² Tikva Frymer-Kensky, *Toward a Liberal Theory of Halakha*, 10 *TIKKUN* 77 (1995).

commitment to either uphold traditional laws or encourage innovations with respect to Jewish ideals. Although it is important to realize how the Jewish texts have functioned historically, it is also useful to understand how Jews use these legal principles in making modern-day decisions that affect so many gay, lesbian, bisexual and transgender Jews. The Orthodox and Conservative leadership appeal to the authority of sacred texts in discouraging GLBT Jews from expressing their sexual orientations, while the Reconstructionist and Reform Movements welcome GLBT Jews into their communities and encourage them to celebrate their lives, however untraditional, with everyone.

As long as Orthodox, Conservative, and some Reform Jews, regardless of their attitudes towards Halakhah, fail to show compassion, GLBT Jews will seek out their own communities in the search for acceptance. The first GLBT synagogue, Beth Chayim Chadashim, was founded in Los Angeles in 1972, and, in 1974, Congregation Beth Simchat Torah in New York was organized as a response to the strong alienation these Jews felt in the mainstream heterosexual Jewish community. Although traditionalists decry these places of worship as breaking apart the Jewish community and are "reluctant to grant religious or communal recognition to [GLBT] Jews,"²²³ GLBT Jews argue that these communities provide them a safe space to be Jewish and GLBT. "[B]ecause the [GLBT Jew] has not felt comfortable in existing religious institutions . . . these synagogues perform a vital religious function"²²⁴ by accepting different sexual orientations as well as Jewishness. Once this homophobia subsides, whether by halakhic innovation or evolving compassion, it is likely that GLBT Jews will return to Reform, Conservative, and Orthodox synagogues because they feel accepted and welcomed as part of the community and do not feel pressured to fulfill heterosexual expectations. In preparation, Jewish communities should reevaluate their understanding of the familial structure's role with respect to Jewish survival and recognize that gay, lesbian, bisexual, and transgender Jews value and contribute to the Jewish experience as both Jews and as GLBT persons. It is important for modern day American Jewish society to encourage that involvement, as it benefits everyone.

V. CONCLUSION

The view of sexuality expressed in halakhic texts recognizes the legitimacy of heterosexual marriage only because it is based on the normative assumption of heterosexual desire. Examinations of these materials confirm that Jewish law distinguishes between the characteristics

²²³ Kahn, *supra* note 211, at 58.

²²⁴ *Id.* at 65.

of men and women's sexuality, portraying the man as rightfully sexually aggressive and the woman as sexually passive. As a result, because Halakhah promotes heterosexual norms and standards for heterosexual expression, it establishes laws on marriage and divorce that disfavor women and marginalize GLBT Jews. Modern American Jewish movements are thus left with the task of developing approaches to these issues that reflect both the legal tradition as well as contemporary sentiments.

The respective theological frameworks of the modern Jewish movements considerably shape communal positions on these issues, but do not preclude deviations from established patterns of interpretation. Reform, Orthodox, and Conservative Judaism are not always consistent in their respective halakhic decisions, i.e., they do not apply their theories of Halakhah consistently. Reform Jewish leaders contend that Jewish principles guide their movement's rabbinical rulings. The sole acceptance of a Jewish marriage only between a man and a woman, however, does not fit that paradigm, considering that Reform halakhists eschew the need for a specifically Jewish divorce. It is inconsistent to advocate certain standards for relationships, along with their attendant legal structures, such as kiddushin, while acknowledging that the solution to another problem of sexuality requires the repudiation of the institution of Jewish divorce. In addition, Orthodox thinkers claim that their halakhists give preference to certain texts for specific historical reasons; but it is clear that extra-halakhic reasons sometime play a role. Orthodox authorities go to great lengths to find ancient commentaries of comparatively lesser importance which support their positions. With regard to homosexuality, the representatives of official institutions in Conservative Judaism refer to the authority of the Jewish texts much like their Orthodox counterparts; their rhetoric calls into question the fundamental legitimacy and practical applicability of their approach to Halakhah.

All these inconsistencies have the secondary effect of devaluing men's and women's sexuality in discussions of marriage, divorce, and homosexuality. While the non-Orthodox positions mentioned above recognize sexual desire in both men and women, the movements themselves are noticeably quiet in defining the characteristics of sexuality. This silence suggests that the underlying assumptions, such as men's aggressive and woman's passive sexual natures, implicitly sway halakhic decision-making, at least with regard to these three issues. Additionally, the refusal to articulate acceptance or repudiation of traditional stereotypes undermines attempts to reconcile these matters within the halakhic system. It is, for instance, erroneous for Conservative Jewish leaders to claim that changes to the legal stipulations of the ketubah with regard to divorce will alter Jewish attitudes toward sexuality by granting a woman more control over the expression of her sexuality. The solution actually shifts responsibility for the woman's sexuality to the court system, thereby devaluing her ability to make choices concerning the expression of her sexual desire. Because

contemporary attempts by the modern Jewish movements have focused on the husband's unilateral power, legal authorities have overlooked the profound imbalance on which the marriage is established, namely, the treatment of women's sexuality as a commodity. To resolve this problem, interpreters of Halakhah must address this underlying assumption. Otherwise, any legal suggestions leave the woman at the mercy of both her husband and the religious courts when she tries to reassert control over her sexuality in a divorce.

Additionally, by applying current knowledge about sexual orientation, contemporary Jewish movements have the opportunity to take into account modern understandings of homosexuality. The Reform and Reconstructionist Movements already embrace GLBT Jews as people with a different and legitimate sexual orientation; the Conservative Movement is currently embarking on that path at the writing of this Article. Orthodoxy persists in labeling homosexual activity morally wrong, but that too is slowly changing through grassroots advocacy in Jewish communities in America. In Orthodoxy, the maintenance of traditional assumptions about sexuality devalues sexual desire that does not fit the paradigm, including the sexual orientation of GLBT Jews and the expressions of sexual desire in which the woman is more aggressive and the man is more passive.

It appears that only Reconstructionist Judaism is consistent in its position on sexuality. This movement continues to regulate divorce and homosexuality within a developing halakhically-based system, but the approach to the issues as well as attendant solutions reflect an understanding of sexuality that values men's and women's sexual desire, whether it is homosexual or heterosexual in nature. By allowing a woman to grant a *get* and encouraging men and women to be married to partners of the same or different genders in order to form Jewish families, Reconstructionist Judaism affirms the legitimacy of sexuality defined differently from traditional constructions through the articulation and implementation of a changing conception of sexuality. Contradicting positions on sexuality also undermine community; consistency adds legitimacy not only to men's and women's expressions of sexuality but also to the religious community as a whole whereby all Jews feel valued rather than alienated. If the modern Jewish movements are to continue to regulate sexuality, it is important that they show consistency in their rulings; without it, mixed messages might destabilize the entire halakhic system and the Jewish communal world.

This critique, however, ought not to forget that these issues directly affect people's lives. There are religious women that remain trapped in marriages because their husbands refuse to give them *gittim*. Gay, lesbian, bisexual, and transgender men and women, members of all the Jewish movements, continuously face homophobia and discrimination in their communities. With each decision, halakhic authorities use their significant influence to promulgate old and new interpretations of Jewish law. It is with

this in mind that this Article calls for more research into the connection between halakhic conceptions of sexuality and gender issues. Such a study could bring about a reckoning between these older assumptions about sexual expression as reflected in ancient laws and contemporary theories of human sexuality and contribute to the intellectual and spiritual growth of the Jewish community.

