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"Taking Responsibility for Torah"

CAN HALAKHAH SPEAK TO THE EXPERIENCE OF NOT BEING HETEROSEXUAL?

By Rabbi Aryeh Klapper

Discussions of homosexuality and Torah tend to focus on the (im)possibility of legitimate couplehood, in the same way that discussions of heterosexuality traditionally focus on challenges within marriage.

In recent years there has been useful pushback on this with regard to heterosexuality and increasing awareness that Torah must speak to and account for the experiences of singles, whether their singleness is voluntary or involuntary, whether they have previously been coupled, and whether or not they expect or hope to become coupled.

"Speaking to experience" does not imply or require either leniency or stringency. It does require being sensitive to how halakhah affects those experiences; to how halakhic options might affect those experiences; and to how those experiences shape the subjective challenges and opportunities of halakhah.

To at least some extent, it requires acknowledging that many or most singles who generally aspire to full observance and identify with the observant community will nonetheless not succeed in keeping these halakhot fully, and that many of them do not relate to full observance in this area as a live option. This raises the policy question of the extent to which we should invest in making partial observance holistically meaningful, rather than insisting that some aspects of halakhah "work" only as "package deals".

I'm not speaking here of how the Ribono Shel Olam keeps score, but of the extent to which partial observance gives this-worldly satisfaction. For example: Do we want Jews who drive to shul on Shabbat to maximally bask in the bliss of their *neshomoh yeseirah*, or is it more important to us that they feel a huge gap in their Shabbat experience? (I recognize that at least with regard to Shabbat these goals can be complementary rather than competing.)

My strong sense is that at the very least we are responsible to create maximal meaning for involuntary singles, *kal vachomer* for permanent involuntary singles.

It seems to me that the 'singles critique' applies with even greater force in the areas of homosexuality and bisexuality. We need to talk about the overall social-emotional-spiritual experience of people in halakhically observant communities who identify as having a homosexual orientation. We need to speak to the experiences of voluntary and involuntary singles, of various ages, of couples who self-conceive of as acting within halakhah and without, and who are conceived of by others as living within an observant community or without, etc. In all these areas we need to carefully consider the halakhic and

experiential differences between biological males and females.

As a preliminary illustration, consider the effect of the laws of *negiah* on the involuntarily single bisexual. *Negiah* is a subset of the prohibition *Do not draw near to reveal ervah/nakedness* (Vayikra 18:4). It prima facie bars hugging anyone to whom one might be sexually attracted and with whom one cannot licitly have sex. (We'll leave aside the question of whether this prohibition is Biblical or Rabbinic. The verse directly relates only to relatives, but the Rabbis applied it to all prohibitions classified as *ervah*). This leaves heterosexual singles able to hug and be hugged by any member of their sex. But it seems to leave single bisexuals unable to hug anyone but close relatives and spouses. (We'll leave aside for now the question of why *negiah* is permitted for which relatives, and to what extent.)

I think it's a reasonable presumption that being halakhically unable to receive a hug from any friend is a psychologically unhealthy situation. "Speaking to experience" requires understanding and acknowledging this.

One naturally arising halakhic response is to pull out categories such as "*ones Rachmana patrei*". This is usually translated as "The Merciful exempts from punishment those who transgress as the result of coercion/force of circumstances) to excuse people's violations". But "exempts from punishment" seems to presume that the prohibition is still in force. Perhaps in some circumstances it can be used prospectively, and in the sense of "exempts from obligation/prohibition" rather than "exempts from punishment". However, the extent and limits of that application would need to be worked out carefully and rigorously. My sense is that this has not yet been done well, and I'm not yet convinced that it would yield a useful result here.

A second difficulty with the *ones* approach is that *ones* is usually defined by immediate specific circumstances, and here we are speaking more of an ongoing "state of *ones*".

A third difficulty, which a 2023 SBM Fellow raised forcefully, is that it forces people to see themselves as living in a permanently *bediavad* state, in constant recognition that from a religious perspective, an important aspect of their overall human experience is at best excusable rather than a source of religious value and/or holiness.

This is in a sense the sort of issue often raised by people whose physical health prevents them from fasting on Yom Kippur, or whose mental health prevents them from doing certain positive mitzvot; but the comparisons by themselves show why this approach may not effectively speak to experience, as people with homosexual orientations generally do not

experience themselves, and do not wish to experience themselves, as unhealthy or disabled.

Another sort of halakhic response is to have halakhah simply treat the majority case as universal (*lo plug rabanan*). We can say that, on the assumption that most biological males are attracted exclusively enough to biological females, and vice versa, the prohibition of *negiah* applies exclusively to heterosexual contact.

I am not sure this approach is halakhically viable according to Rambam's position that the prohibition against "drawing near" is Biblical. But let us assume with Ramban that it is Rabbinic, and further assume boldly that we can apply here the principle that Rabbinic decrees do not apply to uncommon cases. We would in effect be requiring halakhah *davka* not to speak to the experiences of those who identify as having homosexual or bisexual orientations by relegating them to the uncommon and therefore legally invisible. We should at least acknowledge that cost.

I have proposed a hybrid model in which *negiah* is permitted between two people of the same biological sex unless both of them are known to have a non-heterosexual orientation, and in which heterosexuality remains the default assumption about any individual. This allows halakhah to speak to individual experience, but does not integrate diverse individual experiences into public experience unless they "out" themselves.

One reasonable critique of my proposal is that it requires and entrenches heterocentrism = the public presumption that everyone is heterosexual. I suggest that this is at least a reasonable cost and possibly a desideratum, and very different from the erasure of private experience inherent in the *lo plug rabanan* approach. But I've received quite a bit of pushback already, and I encourage you to email me with your thoughts either way.

The underlying issue is whether public halakhah should deal with the reality of sexual orientation identity diversity by treating all variations equally, or rather by maintaining a default norm and then seek to ameliorate any negative effects of marginalization.

That is to some extent a pragmatic question: I've argued thus far at least in the case of *negiah*, and likely *yichud* as well, the default assumption of heterosexuality can prevent marginalization. But it is also a moral question. To what extent is it important for us to establish heterosexual coupling as the standard Jewish human aspiration, even at the cost of marginalizing Jews for whom that aspiration is practically out of bounds?

Another way of asking this is: Can we speak to specific experiences of sexuality, as I've tried to do above, without first establishing a clear overall hashkafic perspective on sexuality that includes those specific experiences?

My first take is that starting from such an overall perspective would be much better. But at the same time, I contend that we have not really even begun to formulate such a perspective, so a certain degree of muddling through is inevitable.

Here's why I think we are at the philosophic starting line despite millennia of tradition: a whole set of moral, legal, and

practical connections/dependencies that until recently were thought of as obviously intrinsic are now seen as accidental.

These include, but are not limited to:

1. Heterosexual intercourse and procreation, meaning that now
 - a. Heterosexual intercourse does not ineluctably involve the possibility of procreation
 - b. Procreation does not require heterosexual intercourse.
2. Biological sex and gender identity
3. Biological sex and sexual orientation
4. Gender identity and sexual orientation
5. Sexual orientation and sexual orientation identity
6. Genetic relationship to a child and the expected social parenthood of that child
7. Sexual relationship with a planned coparent
8. Sexual diversity and marriage
9. Sexual homogeneity and the invisibility of sexual interest

In other words: We used to take it as given that human personalities embodied with female sex organs and reproductive systems would identify as female, seek to partner sexually with a biological male and become pregnant from and parent only with that male, and that human personalities embodied with male sex organs and reproductive systems would identify as male, seek to partner sexually with and impregnate a biological female, and parent only with that biological female.

These broken connections may result from

1. technological progress, meaning that we can DO things that we previously could not, such as IVF;
2. changes in empirical knowledge, factual belief, or human society, such as our understanding of genetics;
3. changes in moral, philosophical, and theological opinions, such as giving greater significance to women's bodily autonomy

Another way of putting this is that as Moderns, we are

- a. intellectually sensitive to the difference between correlation and causality, and
- b. intellectually convinced that "from almost-always-is to ought there is no inference"

We must consider carefully which if any of these changes can be approached through Torah separately, and which require addressing several together or the whole package as a unity.

I hope I've made clear my strong preference for addressing the whole package as a unity. But I acknowledge that consistency with the goal of restoring some of these broken connections or dependencies may require making terribly hard legal decisions in areas such as solutions for married couples where one spouse is incapable of reproduction. Those decisions may prove too hard for us, at least for a while, and yet I cannot envision a consistent Torah approach that does not require some such restorations. So we may need to act on some matters piecemeal even while acknowledging the profound *bediavadness* of doing so.

Shabbat shalom!