

CENTER FOR MODERN TORAH LEADERSHIP

Center for Modern Torah Leadership



חרות ואחריות

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"Taking Responsibility for Torah"

CHOK, MISHPAT AND OBERGEFELL Rabbi Aryeh Klapper, Dean

In *Numbers* 24:5, Bilaam blesses the Jewish people: "How goodly are your tents, O Jacob." The Rabbis understood him to be praising the Jews for ensuring that the openings of their respective tents did not face each other, thus preserving modesty. Soon after, the Rabbis depict Bilaam as inverting his blessing by sending Midianite seductresses out to tempt the Jews into sexual exhibitionism. Bilaam does this because he understands that Jewish modesty is like Samson's hair: shorn of this virtue, we lose our superpowers and become vulnerable. Why did G-d use Bilaam to bless the Jews, if by doing so He enabled Bilaam to learn how best to attack us?

Imagine pre-snake Adam and Eve walking into the Jewish camp. They would not praise the Jews for their modesty, and they would have no idea why the tents' openings did not face each other. For Bilaam to praise the Jews' virtue, even in the context of his deep and unremitting hatred, he had to be capable of understanding that modesty was a relevant evaluative category.

What would it take for Bilaam to have this capacity? Unlike the prelapsarian original couple, he would have to be conscious of his own sexuality, and experientially aware that sexuality could be associated with shame. He might nonetheless choose exhibitionism for himself, and for his culture. He might decide that sexual shame is the root of neurosis and dedicate himself to its cultural eradication. But he would understand what he was eradicating. Perhaps there would even be moments when he regretted his victory.

My tentative suggestion is that the Torah teaches us here that there is a value in making our moral premises intelligible even to our enemies; this is part of our mission to be the light

of the nations. I want to be clear that this value is not pragmatic, and that we are not safer, or less likely to be hated, if we are understood. Like Bilaam, the world may use its understanding of our virtue to learn how best to undermine us. It is simply part of our job to enable as much as we can of humanity to make informed moral choices.

I suggest further that perhaps we can understand the Seven Noachide Commandments as intended not to provide a formal code of behavior, but rather to identify a set of moral premises. Perhaps our mission is particularly to make those premises universally intelligible. Making premises intelligible is not accomplished through rational argumentation. Rational arguments *depend* on mutually intelligible premises.

For example: The prohibition against eating flesh taken from live animals may make sense only to those who have the capacity to empathize with animals, or at least to believe via analogy to their own experience that animals have a self that can feel pain. With those givens, we can argue as to whether causing pain in this way is justified, or whether we should prohibit the meat rather than the action of obtaining it. But that argument makes no sense to someone who sees no resemblance between animals and ourselves, or is generally incapable of empathy.

What we can do is to live lives that inspire admiration and that make much better sense when framed in terms of those premises. When the intelligibility of our premises erodes, when the society we live in reacts to our premises with bewilderment, every halakhically committed community needs to ask itself: Have our lives inspired admiration, and if not, why? Have we lived in accordance with our premises, or

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have we self-contradicted in ways that make it impossible for anyone to understand them without cynicism?

Asking this question requires us to be able to think of ourselves as separate from the broader society our community inhabits. This is legitimately challenging for Modern Orthodoxy, which sees value in being part of American society. When halakhic premises become unintelligible to the society outside our community, they will likely become, or have already become, unintelligible within our community.

One core premise: let us identify it with the Noachide commandment against forbidden sexual relationships, or *arayot*—that is no longer intelligible to many Americans is that sexuality can be evaluated in nonutilitarian terms, that a sexual act can be **wrong** even if no one gets hurt. We have replaced sexual morality with sexual ethics. Conversations on topics such as chastity, masturbation, and adultery are wholly changed from what they were even two decades ago, and tracts from back then can seem less contemporary than prehistoric cave art.

There are many reasons that traditional rationales in the area of sexuality have moved rapidly from self-evident to unintelligible. Here are two: (1) Effective birth control and in vitro fertilization have broken the connection between intercourse and procreation. It is no longer self-evident to speak of intercourse as potential recreation, or as inevitably associated with the risk of pregnancy. (2) Many human beings with homosexual orientations have told compelling personal stories of pain and alienation.

In the secular world, the natural reaction to a premise's social unintelligibility is the repeal of any laws that depend on it. In the Orthodox world, where immediate repeal is rarely a viable option, one reasonable reaction is what I call "*chokification*," or the declaration that laws that once depended on the now-unintelligible premise should be regarded as either beyond human comprehension or else as arbitrary rules intended to train us to obedience. Chokification generally has two consequences: It forestalls attempts to change the law while discouraging any attempt to extend the law's reach by applying it to new situations. Over time, as reality diverges more and more from the law's original situation, the law will become less and less relevant practically.

A trend toward chokification of the halakhic prohibitions against homosexuality has been evident in Modern Orthodoxy for some time, and as in the general society, it is

more pronounced among the young. This suggests that rationales seen as self-evident in the past are no longer intelligible to them. My suspicion is that this is true as well for a significant percentage of the Charedi world.

The question is whether chokification is an effective long-term strategy, or only a holding pattern. Even if it is sometimes an effective long-term strategy, the case of homosexuality may be harder, as the laws generated by the original premise are now seen by many within our community as deeply wrong ethically rather than only incomprehensible. Perhaps chokification can help hold the halakhic line only if it is rooted in unshakeable belief that this law, as is, represents the will of G-d. In other words, chokification is perfectly compatible with calls for social change. R. Shalom Carmy, for example, argues in *First Things* that Orthodoxy must repent for past mistreatment of people with homosexual orientations. Such mistreatment has no warrant in *Halakhab* and likely results from the basest of motives.

However, chokification is less compatible with calls for dramatic legal change. Such calls can reasonably be seen as resting on the belief that one knows why the law is as it is, and sees the law not as a *chok* but rather as a **mistaken mishpat**. Furthermore, it must be challenging to tell people that they are religiously obligated to follow a mistaken *mishpat* until the law is changed, even if that law causes them great suffering.

My own sense is that effective and authentic responses to homosexuality must be able to claim that the law as understood within past Halakhic tradition was in fact the Will of G-d, and further that an interpretation of that law which is genuinely continuous with that tradition has religious significance today. Until such responses are developed, chokification is likely the best strategy. But while it may be reasonable to welcome *Obergefell*'s outcome as a civil rights advance, or to acknowledge that outcome as a necessary response to a shift in public sensibilities, we should recognize that a deep and likely very important religious understanding has been lost. That understanding had been perverted to justify cruelty, and it may take a long time to reclaim it. But any celebration cannot be unmixed.

Obergefell represents our failure to make our premises intelligible even to our best friends; unambivalent celebration of *Obergefell* represents our failure to keep them intelligible even to ourselves. This should at the least generate a serious *cheshbon hanefesh* (spiritual accounting). *Shabbat Shalom!*

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