

Safe, Sane, and Attentive:  
Toward a Jewish Ethic of Sex and Public Health

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## **Abstract**

*Safe, Sane, and Attentive: Toward a Jewish Ethic of Sex and Public Health* offers a new framework for a Jewish ethic of sex and public health that is derived from mishnaic ritual purity literature. Mishnaic texts characterize ritual impurity not as a moral stain, but as a troublesome-yet-mundane condition that is a predictable consequence of common forms of social interaction. While ritual impurity has potentially serious social and ritual consequences and its management and prevention should be taken seriously, the contraction of impurity is not an occasion for shame or disgrace, and the risk of contracting impurity does not warrant avoiding regular social interaction.

The present study argues that sex is not a *sui generis* phenomenon; rather, it is species of social interaction, and that STIs should be understood, in turn, as predictable risks of certain forms of social interaction. This study thus argues that these parallel features of purity discourse are valuable resources, for both Jews and non-Jews, for thinking about the ethics of managing STIs, and it articulates a Jewish ethical framework that is textually grounded, socially responsible and sexually aware. It offers a religious and unapologetically normative approach to sexual ethics that is attentive to the empirical particularity of sex and sexual health as concrete phenomena and prioritizes the needs and experiences of sexual and gender minorities.

Methodologically, the dissertation advances an innovative approach to drawing contemporary ethical claims from classical text. Instead of drawing a one-to-one correspondence between contemporary sexual ethics and texts that explicitly discuss sex, this study asks which phenomena within the social world of classical texts function in

ways that are fruitfully comparable to the ways sexuality functions in contemporary social situations.

*For Sarah, who keeps me vulnerable and thereby keeps me kind.*

*And for Kathryn, who by her example as a Christian taught me how to be a  
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## **INTRODUCTION**

### **Why Talk About Sex?**

To think well about sex is to illuminate far broader matters of social morality. As something that is at once a foundational part of our social and personal existence that permeates our culture, and yet is deeply taboo, sex sheds light on the fundamental issues of any institution when it engages with it. And because the topic of sex exercises our emotions and passions in a way few other topics can, it tends to lay bare our basic assumptions and prejudices, both on a personal and on an institutional level.

Sexuality is also a perennially interesting and challenging subject for religious ethics in particular. Religious institutions tend to be concerned with maintaining social and communal boundaries, but sexual inclinations and urges are fundamentally idiosyncratic, anarchic things. Sexual urges and encounters are also sources of sensations, emotions, and interpersonal connections whose intensity tends to be matched only by religious experiences. And, like our understandings of the numinous, our understandings of why we have the particular sexual responses we do can be murky and mysterious. We know it to be linked to both the creation of life (through procreation) and to death (through contagion and the danger of childbearing), and we know it can overpower our rational self-control in ways that are frightening. Sex, in short, is directly connected to many of the same basic curiosities and anxieties that animate our religious lives, but it is connected to these things in a way that often challenges the systems and orders through which religions attempt to explain and manage them.

Perhaps it is not, therefore, a surprise that systems of religious ethics have struggled to deal with sex in ways that adequately account for its empirical realities. In

this, Judaism is no exception. While *halakhic* discourse has addressed practical questions of sex and sexuality throughout its existence, Jewish sexual ethics as a modern discipline is a fairly recent phenomenon—not only because the same is true with regard to the academic discipline of Jewish ethics generally, but also because modern and contemporary sexual ethics grapples with questions that would have been unthinkable to the framers of *halakhic* discourse. It is thus unsurprising that the field as it currently stands is full of holes. While Conservative and Orthodox *poskim* (*halakhic* decisors) continue to field questions about practical sexual matters, the academic analysis of what is occurring in their answers is, at best, limited. Further, there exists a frustrating divide in what little academic writing exists on the subject: voices that are willing to address specific, practical questions tend to be conservative and relatively uninformed by feminist and queer thought; conversely, voices that are attentive to feminist and queer thought tend to be far less interested in precisely those specific, practical questions, preferring to focus on broader, more theoretical questions of gender and sexuality writ large—that is to say, they are about gender and sexuality more broadly construed, and only incidentally about sexual ethics as such.<sup>1</sup>

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<sup>1</sup> Rachel Adler, for example, in *Engendering Judaism: An Inclusive Theology and Ethics* (Boston, Ma.: Beacon Press, 1998), focuses largely on re-reading texts in order to come up with a portrait of a holy and egalitarian sexuality that lays a *groundwork* for thinking about sexually charged relationships in general but does not answer questions about how to navigate particular sexual situations, or manage problems that might arise in even the most egalitarian of contexts. Similarly, Judith Plaskow (with co-author Donna Berman), even in *The Coming of Lilith: Essays on Feminism, Judaism, and Sexual Ethics, 1972-2003* (Boston, Ma.: Beacon Press, 2005), a book that is in part *about* sexual ethics ends up offering very little in the way of specific normative guidance. This gap becomes even starker when we add engagement with *halakhah* to the equation. Relatively progressive figures in post-*halakhic* traditions, like the Reform and Reconstructionist movements, have shown a willingness to be practical and broadly normative (if not necessarily systematic) about their sexual ethics, but since they do not see themselves as bound in any significant way by the *halakhic* tradition, their path towards affirming unconventional sexual behavior is much easier. More recently, Jewish feminists like Danya Ruttenberg, editor of and contributor to *The Passionate Torah: Sex and Judaism* (New York: NYU Press, 2009) have begun to give some serious attention to Jewish sexual ethics from a perspective that is both *halakhically* engaged and interested in

In this dissertation, I aim to articulate a practical approach to Jewish sexual ethics that is feminist, queer, and sex-positive, and thus to begin filling the gap I have observed above. In doing so, I utilize resources from classical rabbinic texts, modern and contemporary Jewish ethical and hermeneutical reasoning, and modern and contemporary queer and feminist theory (Jewish and otherwise), as well as relevant scientific and social-scientific data on sex and sexuality in order to elucidate a way to think about sexual ethics that is grounded in and attentive to the claims both of Jewish text and tradition and of the needs and questions of real-world actors and communities. In particular, I am committed to giving women, gender minorities, and sexual minorities the fair and attentive hearing they are long overdue in much tradition-based treatment of sexual ethics.

The central concept in my approach to sexual ethics is risk management. This is not, in and of itself, a new approach—as I show in chapter two, much of the extant contemporary literature on Jewish sexual ethics is framed in terms of the risks inherent in sexual activity. Where I break from this tradition, however, is in how I conceive of “risk.” I argue that it is important to understand risk in sexuality not as a thing that one either does or does not incur, but rather as a complex web of intersecting risks that one must consistently weigh and manage. Further, risk in sexuality is not one-sided: *not* engaging in a given sexual activity may, for many people, incur social and psychological

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navigating specific practical problems. As yet, however, this promising work has appeared as collections of shorter essays rather than as any kind of systemic, book-length treatment.

One exception to this trend is Jennie Rosenfeld’s dissertation, *Talmudic Re-Readings: Toward a Modern Orthodox Sexual Ethic* (Ph.D diss, City University of New York, 2008). Rosenfeld reads Talmudic and Hasidic texts through a lens of critical theory to move toward an ethic of sanctifying sexual experiences while “owning one’s actions” (330). Together with David S. Ribner, Rosenfeld is also the author of *Et Le’ehov: The Newlywed’s Guide to Sexual Intimacy* (Jerusalem, Israel: Gefen Publishing House, 2011) a sex manual aimed at Modern Orthodox married couples that is groundbreaking in its candor and relatively expansive attitude toward sexual pleasure.

risks that are, if not as immediate or grave, nevertheless as real as the risks that come with engaging in that activity. I argue that sexual expression and the opportunity for sexual fulfillment—regardless of one’s gender, sexual orientation and preferences, ability, age within the general boundaries of adulthood, and relationship status—is a good *in and of itself* and deserves to be weighed on equal terms with other goods towards which one may strive, including the benefits of sexual abstinence. Further—and based upon the above—I argue that persons who engage in sexual practices outside the bounds of what mainstream Jewish voices might consider ideal are *not* necessarily falling prey to their *yotzrei ha-ra* (evil inclinations). They may rather be engaging in a conscious process of moral reasoning, albeit one that weighs risks and benefits in a different way, privileges different goods, and has different goals than mainstream Jewish ethics might choose.

In this dissertation, I use sexually transmitted infections (STIs) as a case study for examining the broader set of questions raised at the intersection of sex and public health—questions concerning sexually transmitted infections, unwanted pregnancy, and the host of more amorphous concerns, including social and psychological concerns, raised by the phrase “risky sexual behavior.” I have chosen to focus on STIs for a number of reasons. STIs sit at the intersection of individual sexuality and public concern and have been studied extensively. Further, as I discuss in more detail in chapter four, because STIs are issues of public concern that are transmissible by specific forms of social and physical contact, they offer a strong parallel to the rabbinic framework of ritual purity I engage later.



## I. Hermeneutical, Theoretical, and Moral Commitments

### *1. Foundational Claims*

I contend that in order for Jewish sexual ethics to be practically and theoretically adequate it must be reshaped in three significant ways. First, and most critically, I argue that sexual relations are not *sui generis*; rather, they are a class of social relations. The ways we behave sexually reflect and affect the ways we behave in other social situations, and the sorts of risks and benefits we encounter in sexual relations are the same sorts of risks and benefits we encounter in other kinds of social relations. Further, sexual relations are not neatly separable from other forms of social relations—business transactions, casual conversations, professional relationships, and friendships can all be sexually charged, while primarily sexual interactions are almost always colored by non-sexual social relationships, interactions, and norms.

My contention that sexual relations are a class of social relations has some significant implications for the way my project will unfold. To begin with, it means that my sexual ethic is, at root, a communally oriented one.<sup>2</sup> Ultimately, when I ask whether a given behavior is morally acceptable, I am asking whether it is consistent with creating and sustaining a certain kind of community. While the particular values I articulate as central to this sort of community are consistent with liberal, individualist accounts of ethics—acceptance of a diversity of individual orientations and preferences, a bounded

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<sup>2</sup> Although not “communitarian” in a traditional sense, as it is unavoidably—and productively—influenced in a deep way by liberal thinking, in particular that of Martha Nussbaum in *Sex and Social Justice* (Oxford, UK: Oxford University Press, 2000), *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton, NJ: Princeton University Press, 2006), and *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (Oxford, UK: Oxford University Press, 2010), and of Marilyn Freedman in *Autonomy, Gender, Politics* (Oxford, UK: Oxford University Press, 2003).

but robust sense of bodily autonomy, and a high premium placed upon consent—they also serve a higher value of respect for all persons, one that demands with Scripture that we love all our fellows, sexual partners included, as we love ourselves. Understanding sex in terms of social relations also considerably broadens the range of textual resources with which one can think through questions of sexual relation. As I shall treat in greater detail in chapter three, professional Jewish ethics has tended to rely on a small and specific collection of rabbinic texts that deal explicitly with sexual acts for its work on sex and sexuality. These texts have been overused for this purpose, and they are limited in scope. If, however, we situate sex within a broader context of social interaction, a whole world of texts covering multiple aspects of interpersonal relationships opens to us as resources for thinking about sex and sexuality.

The second way in which sexual ethics must be reshaped is a shift in focus, from the permissibility of discrete acts or types of partner to the character of agents' relationships to one another and to their community. Sexual ethics is best understood in terms of the intersection of sexual acts, their social contexts, and their consequences. A given act may be permissible in certain social contexts, with certain individuals, in the presence of certain other actions, and be entirely impermissible where one or more of those qualifications are absent.

Finally, sexual ethics must attend to empirical particularity. This means attending to the empirical realities of actual human sexual behavior, rather than to an abstract ideal of sexuality. Sex is a real act that real, embodied people perform, and if we want to have an adequate and practically helpful account of how people *ought* to interact sexually, we need to begin with an understanding of the ways people already interact sexually. This is

not to commit the classic “is-ought” fallacy, in which we assume something ought to be a certain way because it already *is* a certain way. Rather, it is to say that practical sexual ethics should have concrete goals, and that those goals will be much more humane and reachable if they are articulated in a way that accounts for actual people’s behaviors, needs, and values. To simply say “don’t do that” without giving a careful account of what people are actually doing and why they might be doing it is unlikely to meaningfully affect people’s behavior.

In the case of an ethics that is in any way text-based, attending to empirical particularity also means attending to the particulars of what the relevant textual tradition actually says—or does not say!—on the subject, rather than trading in abstract ideals about a tradition’s supposed “sex-positive” or “sex-negative” character. Textual traditions, much like human behavior, are multivalent, complex, and often frustrating, and they more than occasionally say things we as contemporary readers may not like. This does not mean that we must abandon our attempt to articulate from these texts rules by which we can live in our own particularity. It does mean, however, that we must do the work of wrestling with and accounting for what we find troubling in our texts.

## *2. Theoretical Commitments*

Within the above parameters, I aim to articulate a practical approach to Jewish sexual ethics that is queer, feminist, sex-positive, and *halakhically* engaged. By “queer,” I mean, broadly, that I understand the universe of potentially neutral or good sexual acts, preferences, and orientations to extend well beyond the limits set by conventional sexual mores; narrowly, I mean that my sexual ethics is particularly attentive to the needs and

experiences of those within the queer (Lesbian, Gay, Bisexual, Transgender, Intersex, and so on) community and is informed by my own experience as a queer person. By “feminist,” I mean that I understand women as a class, in general and within Judaism in particular, to have been historically marginalized and disempowered relative to men as a class, and to continue to be so in many ways. I see gender-based marginalization and disempowerment as morally wrong, and I seek, through my work here, to play a part in its continuing correction.

My categories of “sex-positivity” and “*halakhic* engagement” requires more extensive unpacking. By “sex-positive,” I mean that I take as a foundational premise the claim that sexual acts are, by themselves, morally neutral and that, all other things being equal, sexual fulfillment is a good that contributes in a substantial way to a person’s flourishing. It is for this reason that I will refer to sexual “needs” as distinct from sexual “desires.” I do not, in doing this, mean to say that one requires sex to live in the same way that one requires food, water, or oxygen, nor do I intend to erase the asexual community. What I do mean when I refer to “sexual needs” is that for people who are not asexual, sexual fulfillment is usually a very important component of their psychological and social well-being. One can surely live without sex, even if one is not asexual, as the experience of those whose religious vocations demand celibacy, for example, demonstrate. But it is often difficult and painful to do, especially outside the context of such a vocation, and the hunger for absent sexual fulfillment can be extraordinarily destructive.

Furthermore, the ability to pursue sexual fulfillment in a way that is coherent with one’s identity is a form of self-expression that is integral to one’s overall mental health.

This is why Rabbi Steven Greenberg, in response to Orthodox puzzlement as to why Jewish law should give special treatment to sexually active gays and lesbians when it does not do so for people who violate other areas of *halakhah*, such as dietary law, retorts that “Nobody throws himself off a bridge because he or she is deprived of cheeseburgers.”<sup>3</sup> While Greenberg is not referring to simple sexual fulfillment *per se*, he is claiming that the ability to live authentically as a sexual (or asexual) being is a fundamental and inextricable part of one’s broader integrity and sense of self.

The category of “*halakhic* engagement” is a complex one. In the most basic sense, I understand *halakhah* as, in Rachel Adler’s words, “potential legal systems through which Judaism could be lived out.”<sup>4</sup> More specifically, I understand the term *halakhah* to have two senses: first, *halakhah* refers to a system of religious and legal authority. Here, an entity authorized by a tradition and/or community—a Rabbi, a rabbinic court, a specific commentarial tradition—has for all practical purposes some definitive say about the proper interpretation of the Jewish canon and its practice by members of the community it binds. Second, *halakhah* refers to a specific discipline of reading and reasoning. This is a discipline that is performed in a community consisting of readers, texts, and oral traditions, the collective character of which in turn conditions the character of the discourse that emerges. Its practice also conditions the members of the community to engage with texts, traditions, and one another in ways that reflect those hermeneutical commitments.

I am committed to *halakhic* values and *halakhic* discipline, and I take Written and Oral Torah’s authoritative status and claims seriously, but I do not necessarily see any

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<sup>3</sup> Steven Greenberg, *Wrestling With God and Men: Homosexuality in the Jewish Tradition* (Madison, WI: University of Wisconsin Press, 2004) 12.

<sup>4</sup> Adler, *Engendering Judaism*, 21.

currently recognized *halakhic* authority as in fact authoritative. Rather, I locate the source of *halakhic* authority—*halakhah* in the first sense—in the communal accountability and disciplines of reading and reasoning formed by the practice of *halakhah* in the second sense. This allows, on my view, for the formation of a structure of authority that is external to and greater than any individual text or any individual person, and yet can be responsive and accountable to the voices and particularities of any individual text or person, as well as to the collective whole. I thus define “*halakhic* engagement” as the form of thinking of a person or community whose virtues have been formed through the practice of *halakhah* in its second sense, and who are answerable to the structure of accountability created by such practice.<sup>5</sup>

The implications of my insistence on a *halakhically* engaged methodology in this project and of my critique of current Jewish discourse on sexuality cut in two directions. On the one hand, I believe that discourse on sexuality within normatively *halakhic* Judaism must be reframed. On the other hand, I believe equally strongly that non-*halakhic* Jews—and non-Jews!—would benefit significantly from thinking about sex in a more *halakhic* way, at least in terms of how they read and reason. And because sexual relation is ultimately about social relation, disciplining ourselves to be more just and attentive in our sexual lives can help us learn to be more just and attentive in the rest of our lives.

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<sup>5</sup> I am grateful to Emily Filler, Mark Randall James, and especially Deborah Barer for helping me work out the contours of this category. Mark Randall James also provided much of the wording for my eventual definition of “*halakhic* engagement.” This view of *halakhah* is influenced, in different ways, by a number of *halakhic* thinkers, including Rachel Adler (1998), Eliezer Berkovits, *Not In Heaven: The Nature and Function of Halakhah* (Jerusalem, IL: Shalem Press, 2010), David Weiss Halivni, *Revelation Restored: Divine Writ and Critical Responses* (Boulder, Co.: Westview Press, 1997), Gordon Tucker “Halakhic and Metahalakhic Arguments Concerning Judaism and Homosexuality (Rabbinic responsum, CLJS 2006), and especially Tamar Ross, *Expanding the Palace of Torah: Orthodoxy and Feminism* (Lebanon, NH: Brandeis University Press, 2004).

## II. Prospectus

In chapter one of this dissertation, I flesh out my commitment to attending to the empirical particularity of my subject matter. I offer a brief social history of STIs, in which I observe that these infections have consistently been viewed as diseases of the other and treated together as a single, monolithic entity rather than as a group of distinct infections with different levels of severity and virulence. I then present a more or less by-the-numbers account of the current epidemiology of several common STIs and more and less effective treatment and prevention strategies. I also offer a brief general portrait, drawn largely from sociological and psychological data, of the basics of contemporary sexual behavior in the United States, and a more speculative sketch, drawn largely from ethnographic accounts, of sexual behavior in both Orthodox and non-Orthodox U.S. Jewish communities.

In chapter two, I give an account of the ways Jewish tradition has dealt with questions of sex and sexuality throughout its history, and of Jewish sexual ethics as it currently stands. I look at sexual subject matter in the Hebrew Bible, the rabbinic literature, and the medieval and early modern *halakhic* codes. I then examine literature in contemporary Jewish sexual ethics, which I organize according to a typology of “cautious” versus “expansive”—a typology which does not organize itself neatly along denominational lines. While “cautious” voices consider sex, like the body itself, “morally neutral and potentially good” (in the words of ethicist and Conservative Rabbi Elliot Dorff),<sup>6</sup> in practice they think about sex largely in terms of its risks and believe that only

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<sup>6</sup> Elliot N. Dorff, *Matters of Life and Death: A Jewish Approach to Medical Ethics* (Philadelphia, Pa.: Jewish Publication Society, 1998) 24.

in the context of a committed, monogamous relationship can those risks be managed and sex's potential for goodness unlocked. "Expansive" voices, on the other hand, think about sex primarily as an expression of the holiness of the created human body and human connection; for them, risk is a secondary consideration. While expansive voices can and do have contexts for sexual expression that they prefer over others, the range of sexual expression in which they find holiness is much broader than that of "cautious" voices.

In chapter three, I argue that rabbinic texts whose subject matter is explicitly sexual may not be the most useful resources for scholars who wish to do constructive work on contemporary problems in sexual ethics. Rather, I suggest, we would do better to look for texts whose subject matter has a comparable social function to the contemporary problems on which we are working. In the case of sexually transmitted infections, I argue that ritual impurity, as it is treated in the Mishnah, is one such analogue. The Mishnah treats ritual impurity as a commonplace, morally neutral form of contagion that is a manageable but ultimately unavoidable consequence of certain common and unavoidable forms of intimate social interaction. Further, there are several different types and degrees of impurity, each of which have different levels of severity and virulence and require different courses of treatment. I demonstrate these functional parallels through a close reading of Mishnah Zavim, which deals with ritual impurity caused by irregular genital discharges.

In chapter four, I apply the parallels I note in chapter three to contemporary questions of STI transmission, prevention, treatment, and risk management. I reiterate and expand my foundational claim that sex, rather than being *sui generis*, is a species of social interaction, and discuss the complexity of balancing risk and benefit in sexual



interactions. I discuss the functional similarities between *Zavim*'s account of ritual impurity and the empirical realities of STIs, and argue that the model of risk management found in *Zavim* can help us articulate a more nuanced, humane, and effective model of STI management today.

In my concluding chapter, I derive from this analysis a set of five responsibilities—respect for persons, acceptance of risk, self-awareness, communication, and mitigation of risk—that are incumbent upon all sexually active persons and the communities and institutions in and among which they live. Finally, I note that one potential pitfall of the model for which I have argued in this dissertation, particularly given my stated feminist and liberationist commitments, is its significant reliance on expert knowledge and authority. I offer some speculative suggestions of how certain features of the body of rabbinic texts I work with may help move us toward checks on the power of experts that allow for a more humane and balanced model of expert authority.

## CHAPTER 1

### **Risky Business: At The Intersection of Sex and Public Health**

To propose a new account of a particular ethical concern, as I do in this dissertation, is to assert that there is some problem that extant ethical frameworks do not adequately address.<sup>7</sup> The complex set of risks and benefits of sexual interaction and their impacts on public health and public wellbeing together constitute one such problem. Many extant accounts of sexual ethics, especially many religious ones, fail to appreciate the scope and impact of risk involved in sexual interaction, different kinds and levels of risk in various sexual contexts, and the constellation of benefits of different sexual interactions, as well as non-sexual risks and benefits that factor into people's sexual decision-making. The purpose of this chapter, then, is to give an account of this complex set of risks and benefits (chapter two will examine how extant Jewish ethical frameworks fail to adequately address this set). In short, I mean here to paint a portrait of the problem which I address in subsequent chapters.

In this chapter I explore relevant data concerning the risks and benefits of sexual interaction in some detail. First, I examine data surrounding the transmission, treatment, and prevention of sexually transmitted infections (STIs). Second, I take a closer look at whether and how often people, Jews and others, engage in high-risk sexual behavior. Third, I look at concrete strategies for risk mitigation. Fourth, I examine data surrounding questions of sexual diversity, sexual fulfillment, and the relationship between sexual

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<sup>7</sup> For a fuller discussion of the ways traditions manage epistemological crises, see Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1988), in particular pp. 361-369.

fulfillment and psychosocial health. Finally, I take some initial steps towards painting a more complete picture of the landscape of risks and benefits of sexual interaction.

While sexual interaction also carries risks of unwanted pregnancy, intimate partner violence, and various psychological and social disturbances, for the purposes of this project I have chosen to focus on STIs, for a number of reasons. First, STI transmission is a clear and explicit site of interaction between sexuality and public health: it is, in other words, the most obvious area where sexual behavior and sexual health become communal issues. In fact, the public implications of STIs are a clear demonstration of the social character of sex. Second, because there exists a large body of data on the subject, questions of cause and effect are relatively clear. The public health community knows what causes STIs, and they know which interventions are more and less effective at arresting their spread. Third, as I discuss in more detail in chapters three and four, STIs, because they are issues of public concern that are transmissible by specific forms of social and physical contact, offer a felicitous parallel to the rabbinic framework of ritual purity I engage later.

Any sexual behavior comes with risks, and many sexual behaviors that are generally considered deviant come with more obviously heightened ones. However, fulfillment of sexual needs—by which I mean here "forms of sexual expression in the absence of which one is sexually unfulfilled"—comes not just with risks, but with benefits as well. Further, *not* fulfilling sexual needs comes with its own set of risks that are perhaps softer but no less real. These apply both to individuals and to their communities. In either case, there exist highly effective risk-mitigation strategies. And because, as I argue, there are real benefits to fulfilling and real risks to *not* fulfilling one's

sexual needs, there will always be people who engage in sexual behaviors that their community explicitly condemns. I argue that communities *at least* have a responsibility to those people to make available effective medical and psychological resources for mitigating the risks both of engaging in deviant sexual behaviors and of unfulfilled sexual needs. Because these strategies often depend on open, widespread, and frank communication and guidance to do their best work, such provision will in practice require communities to seriously reevaluate the way they approach sexual ethics.

### I. Sexual Risks: Sexually Transmitted Infections, and Why They Matter

We must take risks of sex, especially sexually transmitted infections, quite seriously. The Institute of Medicine (IOM) characterizes sexually transmitted infections as “hidden epidemics of tremendous health and economic consequences.”<sup>8</sup> Contrary to the widespread perception of sex as a private matter and of STIs as a personal shame or a punishment for individual bad behavior, sexual health, especially where infectious disease is concerned, is a matter of significant communal impact and public concern. In addition to morbidity and mortality that occurs as a direct consequence of some infections, such as untreated syphilis or HIV, STIs can have serious secondary complications, including several kinds of cancers and complications such as pelvic inflammatory disease, ectopic pregnancy, epididymitis, prostatitis, and infertility. STIs can lead to pregnancy complications and can be transmitted from mother to infant, leading in turn to a host of congenital problems for the newborn.<sup>9</sup> STIs can also facilitate

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<sup>8</sup> Institute of Medicine (IOM), *The Hidden Epidemic: Confronting Sexually Transmitted Diseases*, Thomas R. Eng and William T. Butler, eds. (Washington, D.C: National Academies Press, 2009) 1. <https://www.nap.edu/catalog/5284.html>

<sup>9</sup> See IOM (2009) 46, Table 2-3, for a more comprehensive list of sequelae.

the transmission of other STIs, compounding the problem—for example, an active herpes infection can facilitate the transmission of HIV.<sup>10</sup>

STIs have socio-economic costs, as well. The IOM estimates that, if sexually transmitted HIV/AIDS is factored in, the overall economic impact of STIs in the United States in 1994 was on the order of \$17 billion.<sup>11</sup> Furthermore, STIs do not affect everyone equally, and the greater weight of their impact falls far more heavily on groups that are already disadvantaged. Women, for example, tend to be affected far more seriously by the complications of STIs than do men, for a number of reasons. Being penetrated exposes one to greater risk of transmission than does penetrating someone; furthermore, STIs are harder to detect and more likely to remain asymptomatic in women for a longer period of time, delaying diagnosis and treatment<sup>12</sup> as well.

Racial and economic minorities also bear a greater STI burden. This is mainly linked to disparities in access to healthcare and social services of any kind. But racial and economic minorities also face social barriers to sexual and reproductive healthcare in particular because STIs, as I discuss below, have historically been associated with minority groups such that persistent conditions of sexually transmitted disease are figured as these groups' natural state. Even when these groups have had access to care, they have often been treated unequally or even actively harmed, as in the case of the infamous Tuskegee syphilis study.<sup>13</sup>

Finally, sexually transmitted infections—as we shall see in greater detail below, in the discussion of their social history—have served as yet another weapon with which

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<sup>10</sup> See *idem*, 49-56.

<sup>11</sup> *Idem*, 60-61.

<sup>12</sup> *Idem*, 35.

<sup>13</sup> The classic treatment of the Tuskegee syphilis study is James H. Jones's *Bad Blood: The Tuskegee Syphilis Experiment*, 2nd Edition (New York: Free Press, 1993).

those with more power have subjugated those with less power. Because of their direct connection to behaviors that society often disapproves of and would prefer not to discuss, STIs can serve as a convenient excuse for moral and material neglect—a sort of microcosm of cosmic justice whereby those who misbehave are appropriately stricken, obviating any cause to engage with them or attend to their needs. STIs are also a convenient metric by which to define out-groups as “other,” a means to justify ill-treatment of underclasses. Sometimes they are the means of ill-treatment itself, as was the case with the Tuskegee syphilis study. The faces of poor people, women, and racial and sexual minorities are mapped onto pathogens—syphilis has the body of a beautiful woman, as in many World War II-era propaganda posters; AIDS is the “gay disease.”

Thus, in an ironic way, early 20<sup>th</sup>-century social hygienists who campaigned against what was then referred to as venereal disease (VD) were right to call it a “social disease”—but not in the way they thought. In addition to the more concrete morbidities that they engender, sexually transmitted infections feed the worst features of our social structures and our social selves. As long as we treat them as afflictions of a vicious “other,” we allow STIs to feed our own vices of prejudice, domination, apathy, and greed.

### 1. *History*

Sexually transmitted infections in humans appear to have existed for as long as humans have had sex. The Ebers Papyrus, the Hebrew Bible, and the ancient Greek and Roman physicians all describe a condition, characterized by a non-ejaculatory discharge of fluid from the genitals, that modern medicine would recognize as gonorrhea. (The term

“gonorrhea” was coined by Galen; Arateus of Cappadocia described such discharge in women and distinguished it from normal vaginal discharge, and Soranus of Ephesus called such discharge “gonorrhea” in both men and women.)<sup>14</sup> Juvenal’s Second Satire mentions anal warts and links them to an overindulgence in receptive anal intercourse, and Celsus describes penile warts.<sup>15</sup>

For much of modern Western history, however, the paradigmatic STI was syphilis. There are two main theories regarding the origin of syphilis in Europe. The pre-Columbian view argues that syphilis was endemic in Europe prior to Columbus’s contact with the new world, and that military and political disruptions contemporary with Columbus’s voyages were responsible for its broader spread. The Columbian view, by contrast, argues that syphilis was endemic to the new world and was introduced to Europe by Columbus’s crew.<sup>16</sup> In any case, what most historians take to be the first recorded outbreak of syphilis (which the Italians referred to at the time as the *morbis gallicus*, or “French disease”) occurred in Italy in 1496, following Charles VIII’s invasion of 1494. The sexual nature of its transmission was suspected as early as 1497, when the physicians Gilino of Ferrara and Widman of Tübingen independently advised men to avoid sexual contact with infected women.<sup>17</sup> Andrew Boord, writing in 1547,

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<sup>14</sup> Michael Waugh, “History of Sexually Transmitted Infections” in *Sexually Transmitted Infections and Sexually Transmitted Diseases*, ed. Gerd Gross & Stephen K. Tying, Springer Science and Business Media 2011, 4; “On Gonorrhea,” *The Extant Works of Aretaeus the Cappadocian*, Ed. & Trans Francis Adams (Sydenham Society, London, 1898) II:5

<sup>15</sup> J. David Oriel, *The Scars of Venus: A History of Venereology* (London: Springer-Verlag, 1994) 155.

<sup>16</sup> Waugh, 4.

<sup>17</sup> Claude Quétel, *A History of Syphilis*, Judith Braddock and Brian Pike, trans. (Baltimore, MD: Johns Hopkins University Press, 1990), 22-23.

states: “It may come when one pocky person doth synne in lechery the one with the other. All the kyndes of the pockes be infectiouse.”<sup>18</sup>

Over the next few centuries, a number of writers made moves toward advancing the common understanding of syphilis, identifying stages of the disease, noticing patterns of transmission, and suggesting treatments, which included guaiacum wood, cauterization of the primary sore, and, most famously, various formulations of mercury. It was also believed that men could cure syphilis by having sex with a virgin.<sup>19</sup> During this period, medical opinion on venereal disease was of two schools: the monist view, which held that syphilis and gonorrhea were manifestations of the same underlying disease, and the dualist view, which held that they were separate diseases.<sup>20</sup> However, it was not until after the scientific revolution—and especially the wide adoption of germ theory in the mid-to-late 19<sup>th</sup> century—that the medical community started to gain a real working understanding of the causes and effective treatments of syphilis and other STIs, a process that culminated in the discovery of the *Treponema palladum* spirochaete in 1905, the development of Salvarsan as an effective treatment for syphilis in 1910 (and the subsequent discovery of penicillin), and, finally, the development of an accurate test for syphilis in 1949. Gonococcal organisms were positively linked to gonorrhea infection in 1882, and chlamydia was recognized as a separate infection from gonorrhea in 1950. The *Chlamydia trachomatis* bacterium was positively identified in 1959.

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<sup>18</sup> Andrew Boord, *The Breviary of Helthe*, 2nd edition (1557/1547) fol. 81 m., accessed March 12, 2017, [http://eebo.chadwyck.com.proxy.its.virginia.edu/search/full\\_rec?SOURCE=config.cfg&ACTION=ByID&ID=99842241](http://eebo.chadwyck.com.proxy.its.virginia.edu/search/full_rec?SOURCE=config.cfg&ACTION=ByID&ID=99842241).

<sup>19</sup> See, for example, Cristian Berco, “Syphilis, Sex, and Marriage in Early Modern Spain,” *Journal of Early Modern History* 15 (2011), 223-253, and Winfried Schleiner, “Infection and Cure through Women: Renaissance Constructions of Syphilis,” *Journal of Medieval and Renaissance Studies* 24:3 (1994), 499-517.

<sup>20</sup> Waugh, 6. Waugh attributes the beginning of the monist/dualist divide to Paracelsus, who referred to “morbus Gallicus” (“the French disease”) as “French Gonorrhea” and divided it into “simple” and “virulent” states.



A new and frightening chapter in the story of sexually transmitted infections began in the second half of the twentieth century. Human Immunodeficiency Virus (HIV) probably emerged in its current form around 1930 in sub-Saharan Africa, and spread for decades without being recognized; the first known cases of human infection (via retrospective analysis of a tissue sample) date to 1959 in Kinshasa, in what is now the Democratic Republic of Congo.<sup>21</sup> Acquired Immune Deficiency Syndrome (AIDS), the syndrome resulting from untreated HIV infection, was first recognized in the U.S. in the summer of 1981, when a small group of young, apparently healthy gay men suddenly began dying of *Pneumocystis carinii pneumonia* (PCP); another small group of young gay men began displaying oddly aggressive cases of Kaposi's Sarcoma, a rare skin cancer. By the end of that year, 270 cases of severe immune deficiency among gay men had been reported; of these gay men, 121 had already died. In 1982, doctors reported that a handful of infants began displaying similar symptoms of immune deficiency following blood transfusions.

The retrovirus responsible for what came to be called AIDS was independently isolated by Dr. Robert Gallo of the National Institutes of Health and Dr. Luc Montaigner of the Pasteur Institute in France in 1983, but it was not until the middle of the decade—and not, tellingly, until after people who were not gay men, sex workers, or drug users also began to sicken and die—that national response efforts began to gain significant ground. The FDA approved the first antiretroviral drug, azidothymidine (AZT), in 1987; it was subsequently approved for pediatric AIDS in 1990. By 1994 AIDS had become the leading cause of death for all Americans between the ages of 25 and 44. In the late 1990s,

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<sup>21</sup> Paul M. Sharp and Beatrice H. Hahn, "Origins of HIV and the AIDS Pandemic" *Cold Spring Harbor Perspectives in Medicine* 1:1, (Sep 2011): 1-22.

however, the “AIDS cocktail” of multiple antiretroviral drugs became the standard of care, and HIV infections, despite concerns about the development of drug-resistant strains, became chronic and survivable for most people who had access to high-quality clinical care.<sup>22</sup>

## 2. *Social History*

The dominant discourses surrounding sexually transmitted infections have overwhelmingly been ones of otherness. Even in antiquity, sexually-linked maladies seem to have carried some association with people and behaviors outside the bounds of social acceptability, as demonstrated in Juvenal’s satires. During the European syphilis outbreak in the 15<sup>th</sup> and 16<sup>th</sup> centuries, while astrological explanations garnered the greatest popular support, other voices understood syphilis, like many other diseases, to be a sign of divine displeasure. Gilino of Ferrera, who also connected the disease to sex with an infected individual, wrote that “the Supreme Creator, now full of wrath against us for our dreadful sins, punishes us with the cruelest of ills, which has now spread not only through Italy but across the whole of Christendom.”<sup>23</sup> It was also associated with the Jews and Arabs who had recently been expelled from Spain in 1492, many of whom had taken refuge in Italy.<sup>24</sup> By 1526, writers had begun to connect its origin to Columbus’s voyages to the new world. As Parascandola notes, “the Italians called syphilis the French disease, while the French called it the Neapolitan disease. The Japanese blamed the Chinese, the Russians the Poles, and the Persians the Turks for the spread of the pox.

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<sup>22</sup> “Secretary’s Minority AIDS Initiative Fund: A Timeline of HIV/AIDS,” accessed June 26, 2015, <https://www.aids.gov/hiv-aids-basics/hiv-aids-101/aids-timeline/>.

<sup>23</sup> Gilino of Ferrera, *De more queen gallicum nuncupant*, quoted in John Parascandola, *Sex, Sin, and Science: A History of Syphilis in America* (Westport, CT: Praeger, 2008) 3.

<sup>24</sup> Sander Gilman, *The Jew’s Body* (New York: Routledge, 1991), 96; Parascandola 4-5; Quétel, 33.

Placing the blame on American Indians removed the stigma from Europe entirely, assigning responsibility to an external ‘Other’ (the Indian).”<sup>25</sup>

Otherness was understood not only in terms of race and ethnicity, but also in terms of class, and especially gender. Women, and prostitutes in particular, were understood as potential sources of infection and as dangerous to men. We have seen already that in 1497 Gilino of Ferrara and Widman of Tübingen advised *men* to avoid contact with infected *women*; in the same year the town Council of Aberdeen, in Scotland, “ordered all ‘loose women’ to desist from ‘the sins of venery.’”<sup>26</sup> By the modern era, syphilis, both in Europe and in the U.S, was strongly associated with marginalized racial and ethnic groups—Jews and colonized peoples in Europe,<sup>27</sup> and, in the U.S., immigrants and especially African-Americans. Progressive Era (1890-1920) responses to VD devoted considerable energy to eradicating prostitution, painting “loose women” as a threat to public health. The rhetoric of the dangerous woman intensified during the two World Wars. Parascandola notes of posters aimed at enlisted men during WWII that, “when personified, venereal disease was always portrayed as a woman in these posters, [for example, a poster featuring a] female figure with the face of death marching arm-in-arm with Hitler and Tojo.”<sup>28</sup> HIV/AIDS was famously characterized as

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<sup>25</sup> Parascandola, 5.

<sup>26</sup> Idem, 8.

<sup>27</sup> See Philippa Levine, *Prostitution, Race, & Politics: Policing Venereal Disease in the British Empire* (London: Routledge, 2003), and Gilman, *The Jew’s Body*. Interestingly, in the 19th and early 20th centuries, there existed a dual picture in which syphilis was figured as a Jewish disease while at the same time, Jews were often painted as being immune to syphilis. This supposed immunity was often linked to the practice of circumcision, but not always—there was also speculation about the Jew being constitutionally immune to syphilis as well. See Gilman, as well as Mitchell B. Hart, *The Healthy Jew: The Symbiosis of Judaism and Modern Medicine* (Cambridge, UK: Cambridge University Press, 2007), and Todd Samuel Presner, *Muscular Judaism: The Jewish Body and the Politics of Regeneration* (New York: Routledge, 2007).

<sup>28</sup> Parascandola, 116. This poster bears the caption “VD: Worst of the Three.”

the “gay plague” (its original medical name was Gay-Related Immune Deficiency), and it continues to conjure strong associations with race, class, and sexual orientation.

If the origins of STIs lay outside the dominant culture, the threat of STIs to that culture was nevertheless understood as a moral check on members’ baser impulses. The Italian outbreak of 1492 and the subsequent rapid spread of syphilis throughout Europe were quickly figured as manifestations of divine wrath. Shortly after penicillin was established as an effective treatment for syphilis, a 1949 article in *Science Daily* quoted John Stokes, a syphilis expert at the University of Pennsylvania, who worried that “if extramarital sexual relations lead neither to significant illness nor unwanted parenthood, only a few intangibles of the spirit remain to guide children of the new era from an outmoded past into an unbridled future.”<sup>29</sup> Even Thomas Parran, Franklin D. Roosevelt’s surgeon general who spearheaded an anti-syphilis campaign that advocated widespread testing, treatment, and a straightforwardly medical approach to the issue, balked at recommending widespread condom use for fear of a “trend...toward a single standard unhappily in the direction of the old male standard of promiscuity.”<sup>30</sup> During the early years of the AIDS epidemic, critics understood AIDS as a warning against homosexual behavior; Moral Majority executive Ronald S. Godwin, who criticized federal spending on AIDS research because it was “a commitment to spend our tax dollars on research to allow these diseased homosexuals to go back to their perverted practices without any

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<sup>29</sup> R.A. Vonleherer and J.R. Heller, Jr., “The New Attack on Venereal Disease”, *Science Illustrated*, January 1949, 29-30, 99, accessed May 27, 2015, <http://blog.modernmechanix.com/the-new-attack-on-venereal-disease/#more>.

<sup>30</sup> Allan M. Brandt, *No Magic Bullet: A Social History of Venereal Disease in the United States Since 1880* (Oxford, UK: Oxford University Press, 1987), 159.

standards of accountability.”<sup>31</sup> Godwin added that he was “upset that the Government is not spending more money to protect the general public from the gay plague.” More recently, a significant part of the opposition to widespread vaccination of pre-teens against cancer-causing strains of Human Papillomavirus (HPV) has been the (demonstrably incorrect<sup>32</sup>) perception that it will encourage youth to initiate sexual activity earlier.

These constructions of sexually transmitted infections seem constant even as the character of public discourse around them has changed. In the United States, for example, Progressive Era reformers and physicians called for an end to the “conspiracy of silence” (as Prince Morrow of the American Society for Sanitary and Moral Prophylaxis put it) surrounding venereal disease and its consequences, arguing that only candid sex education could help stem the infectious tide. They also sought to dismantle the double standard of sexual behavior, by which women were understood as chaste creatures whose virtues lay in their sexual purity, while men’s sex drive was well-nigh unstoppable and men were understood to “[require] sex in order to maintain their physical and psychic health,”<sup>33</sup> instead arguing that proper social hygiene, health practices, and moral standards obligated *both* men and women to preserve their virginities until marriage.

Even as these reformers consciously challenged what they perceived as dangerous and outdated norms, however, VD remained a threat originating from outside the ranks of

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<sup>31</sup> Dudley Clendinen, “AIDS Spreads Pain and Fear Among Ill and Healthy Alike,” *New York Times*, June 17, 1983, accessed May 27, 2015, <http://www.nytimes.com/1983/06/17/us/aids-spreads-pain-and-fear-among-ill-and-healthy-alike.html>. Also quoted in Brandt, 183.

<sup>32</sup> Leah H. Smith, J.S. Kaufman, Erin C. Strumpf, and Linda E. Lévesque (2014) “Effects of human papillomavirus (HPV) vaccination on clinical indicators of sexual behavior among adolescent girls: the Ontario Grade 8 HPV Vaccine Cohort Study” *Canadian Medical Association Journal* 187:2 (February 2015): E74-E81, accessed May 27, 2015, doi: [10.1503/cmaj.140900](https://doi.org/10.1503/cmaj.140900).

<sup>33</sup> Brandt, 26.

good society. In particular, it was associated with lower socioeconomic classes, as Brandt notes:

In 1908 the Massachusetts Association of Boards of Health published a circular for young women, warning them of the consequences of premarital sex. "Among the most serious dangers which threaten young women, especially those of the wage-earning class," noted the pamphlet, "is the danger of sexual relations outside of marriage to which they are led by such harmless pleasures as dancing."<sup>34</sup>

And if Progressives and social hygienists sought to eliminate the sexual double standard, they nevertheless approached the matter in a way that continued to code women as other. Men were still understood as needing to control their physical drives, while women (wealthy women, at any rate), who were still largely painted as asexual, were exhorted to demand a higher standard of restraint from men for the sake of their own protection. Further, this attempt at leveling only applied to “proper” women. Prostitutes were another matter entirely. As Brandt puts it, “an ‘innocent’ woman could only get venereal disease from a ‘sinful’ man. But the man could only get venereal disease from a ‘fallen woman.’”<sup>35</sup> The epithet “social disease,” coined by Morrow, even claimed an identity between VD and the “social evil” of prostitution.<sup>36</sup>

The ultimate irony of dominant cultures’ framing the sources of infectious disease—especially sexually transmitted infection—as “other” is that the discourse of otherness only becomes necessary when the infection threatens the dominant culture itself. The urge to make a problem alien arises as a result of that problem’s presence *within* the community attempting to externalize it.

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<sup>34</sup> Idem, 29.

<sup>35</sup> Idem, 31-2.

<sup>36</sup> Idem, 32.

### 3. *Current Epidemiology*

In the United States as of 2015, STI rates have reached a crisis point. According to the Centers for Disease Control's (CDC) 2015 Sexually Transmitted Disease Surveillance national report, total combined cases of chlamydia, gonorrhea, and primary and secondary (P&S) syphilis—which were at historic lows for gonorrhea in 2009 and syphilis in 2000 and 2001<sup>37</sup>—reached the highest rates yet measured.<sup>38</sup> Rates of all three infections increased between 2014 and 2015, with syphilis showing the most precipitous increase, by 19 percent.<sup>39</sup> Rates of congenital syphilis (which occurs when someone who is pregnant passes a syphilis infection to the fetus) increased for the first time since 2008, by 27.2 percent in 2013-2014 and 6 percent in 2014-2015. Gonorrhea rates also rose sharply—by 12.8 percent—since 2014; in addition, antibiotic resistant strains of gonorrhea are a serious and worsening problem.<sup>40</sup>

If these overall numbers are dispiriting, breaking them down by sex, race, socioeconomic class, and sexual orientation paints an even more disheartening picture that reveals significant disparities. STI rates among Blacks, Hispanics, Native Americans and Alaska Natives, and Hawaiians and other Pacific Islanders are higher across the board than they are for whites.<sup>41</sup> Blacks, for example, suffer 9.6 times the rate of gonorrhea and 5.2 times the rate of syphilis as whites, disparities that become even starker when broken down by sex: Black women suffer 8.8 times the rate of syphilis as

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<sup>37</sup> Centers for Disease Control and Prevention, *Sexually Transmitted Disease Surveillance 2015* (Atlanta: U.S. Department of Health and Human Services, 2016) 1-2.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Idem*, 2.

<sup>40</sup> *Idem*, 1-2.

<sup>41</sup> *Idem*, 69-75.

white women, while Black men suffer 5.1 times the rate as white men.<sup>42</sup> Men who have sex with men (MSM) make up the overwhelming majority of syphilis cases<sup>43</sup>, and the estimated rate of gonorrhea in MSM as compared to women and heterosexual men ranged between 10.7 and 13.9 times higher during a 2010-2013 study period.<sup>44</sup> These disparities are compounded by high poverty rates in the disproportionately affected groups.

Globally, STI rates are also increasing. In 2008 the World Health Organization (WHO) reported a total increase of 11.3% in combined cases of chlamydia, gonorrhea, syphilis, and *Trichomonas vaginalis* from 2005, with a 4.1% increase in chlamydia, a 21% increase in gonorrhea, an 11.2 % increase in *Trichomonas vaginalis*, and a steady rate of syphilis infection. While the particular patterns of disparity found in the U.S are not reproduced globally, the only WHO regions that did not see an increase were the European and Eastern Mediterranean regions, which are wealthier overall.<sup>45</sup>

The WHO also estimates that in 2013 there were 35 million people living with HIV/AIDS, of whom 1.5 million died that year of AIDS-related illnesses.<sup>46</sup> Sub-Saharan Africa continues to be hardest-hit by the HIV epidemic, with 70% of all new HIV infections in 2012, although the annual number of new HIV infections in adults has declined 34% since 2001.<sup>47</sup> In 2012, approximately 25 million people, 2.9 million of whom are children were living with HIV/AIDS in Sub-Saharan Africa, with 1.6 million

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<sup>42</sup> Idem, 69-71.

<sup>43</sup> Idem, 2.

<sup>44</sup> Idem, 76.

<sup>45</sup> World Health Organization, *Global Incidence and Prevalence of Selected Curable Sexually Transmitted Infections—2008* (Geneva, CH: World Health Organization, 2012).

<sup>46</sup> “World Health Organization Global Health Observatory Data,” accessed June 8, 2015, <http://www.who.int/gho/hiv/en/>.

<sup>47</sup> Joint United Nations Programme on HIV/AIDS, *Global Report: UNAIDS Report on the Global AIDS Epidemic 2013* (Geneva, CH: UNAIDS 2013), 12.



new infections, 230,000 of which were in children. By comparison, approximately 1.3 million people in North America, 19,000 of whom were children, and 860,000 people in Western and Central Europe, 1600 of whom were children, were living with HIV/AIDS in 2012. North America saw 48,000 new infections and Western and Central Europe saw 29,000 new infections in that year.<sup>48</sup> As is the case domestically, MSM, adolescent girls and young women, intravenous drug users, and sex workers are particularly high-risk populations. Prisoners and migrants also face high transmission risks.<sup>49</sup>

#### *4. Social Risk Factors*

I have noted above that there are significant disparities in STI rates among specific sub-populations: racially, sexually, and socioeconomically disadvantaged groups tend to have higher rates of STIs. These disparities cannot be explained through sexual risk behavior alone. Studies indicate, for example, that African Americans, who have a number of STIs at higher rates than whites, also use condoms at notably higher rates than do whites: “African American women are almost twice as likely to use condoms compared to women of other races. In addition, African American men are more likely to have used condoms during their last episode of intercourse compared to either European American or Hispanic men.”<sup>50</sup> Factors such as access to care and social stigma play significant roles. As the Institute of Medicine’s 2009 report on STIs notes, “fundamental social problems such as poverty, lack of education, and social inequality indirectly increase the prevalence of STDs in certain populations. In addition, lack of openness and

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<sup>48</sup> “UNAIDS 2013 Global Fact Sheet,” accessed June 28, 2015, <http://www.unaids.org/en/resources/campaigns/globalreport2013/factsheet>.

<sup>49</sup> Joint United Nations Programme on HIV/AIDS, *The Gap Report 2014* (Geneva, CH: UNAIDS 2014).

<sup>50</sup> IOM 2009, 148.

mixed messages regarding sexuality create obstacles to STD prevention for the entire population and contribute to the hidden nature of STDs.”<sup>51</sup> Sexual abuse is another route of STI transmission that is outside the victim’s control.<sup>52</sup>

The IOM further notes that those populations with the poorest access to health services are the same populations that have the highest STI rates.<sup>53</sup> Insurance coverage for STI screening services can be spotty, and the availability of funding and staff for community clinics that are likely to serve marginalized populations remains tenuous. This is especially true in a political climate that seeks to restrict funding for and access to reproductive health clinics. This occurs most visibly in the name of anti-abortion activism, but the reasons for these restrictions also have to do with anti-poverty and anti-sex stigma, as well as opposition to contraception. Even assuming access to regular clinical care, rates of routine STI screening in primary care settings remain well below recommended levels.<sup>54</sup> Furthermore, people in economically tenuous situations may, quite understandably, give lower priority to reproductive healthcare than to more immediate concerns: “even if a person in poverty perceives himself or herself to be at risk for an STD, he or she may not practice preventive behaviors if there are other risks that appear more imminent or more threatening or both.”<sup>55</sup>

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<sup>51</sup> Idem, 73.

<sup>52</sup> Idem, 79-80.

<sup>53</sup> Idem, 75.

<sup>54</sup> IOM 2009, 95; Janet T. St. Lawrence et al., “STI Screening, Testing, Case Reporting, and Clinical and Partner Notification Practices: A National Survey of US Physicians” *American Journal of Public Health* 92:11, (2002): 1784-1788, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447329/>; R.L. Cook, H.C. Wissenfeld, M.R. Ashton, M.A. Krohn, T. Zamborsky, and S.H. Scholle, “Barriers to Screening Sexually Active Adolescent Women for Chlamydia: A Survey of Primary Care Physicians” *Journal of Adolescent Health* 28 (2001): 204-210, <https://www.ncbi.nlm.nih.gov/pubmed/11226843>; Susan G. Millstein, Vivien Igra, and Janet Gans, “Delivery of STD/HIV Preventive Services to Adolescents by Primary Care Physicians,” *Journal of Adolescent Health* 19 (1996): 249-257, doi:[10.1016/S1054-139X\(96\)00092-4](https://doi.org/10.1016/S1054-139X(96)00092-4).

<sup>55</sup> IOM 2009, 75.

Lack of frank and accurate public discourse about sex, sexuality, and sexual health also stymie the successful management of STIs. As noted above in the discussion of their social history, STIs have consistently been portrayed as the fruits of immoral or antisocial sexual behavior. This, combined with the view that sex is a fundamentally private matter, means that openly discussing the ubiquity of sex and its attendant risks has not been considered appropriate for polite conversation or thorough public discussion. This is particularly true for adolescents—a group for whom solid education and preventive care is especially important. As the IOM notes:

[C]onversations regarding healthy sexual behaviors and STDs do not take place when parents deny that their children are sexually active or that adolescents have sexual drives...Because many parents do not talk about sex with their children, children are more likely to learn about sex through clandestine and secretive exchanges with peers that result in a massive amount of misinformation.<sup>56</sup>

It is also true even between sexual partners, since “the kind of communication that is necessary to explore a partner’s sexual history, establish STD risk status, and plan for protection against STDs is made difficult by the taboos that surround sex and sexuality.”<sup>57</sup> These taboos also affect healthcare providers. As noted above, rates of STI screening in primary care settings are far below where they ought to be, a fact that can be at least partly attributed to providers’ lack of comfort asking about their patients’ sex lives—or, conversely, patients’ discomfort with discussing their sex lives with their providers, especially if they worry that the details of their sex lives will cause providers to stigmatize them.<sup>58</sup> Furthermore, at least until quite recently, medical training has

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<sup>56</sup> Idem, 90.

<sup>57</sup> Idem, 91.

<sup>58</sup> Idem, 95.

offered relatively little about sexuality, since it “continues to reflect the predominant opinion of society that sexual health issues are private issues.”<sup>59</sup>

Failing to speak openly and accurately about STIs also means that they are often treated as a single category, with the consequence that some STIs are ignored. HIV, for example, has in the past few decades become the paradigmatic STI—understandably so, since it is almost certainly fatal if untreated. Between the advent of effective antiretroviral drugs that have changed HIV from a certain death sentence to a chronic, survivable condition and the recent advent of pre-exposure prophylaxis (PrEP) drugs, HIV/AIDS has become less threatening. Yet, the defanging of HIV/AIDS (in the affluent West, at least) does not eliminate the threat of other STIs—for example, frightening new strains of antibiotic-resistant gonorrhea. This would not be the first time gonorrhea in particular has been overlooked in favor of other infections: Brandt notes that during the New Deal-era anti-syphilis campaigns, “while massive testing for syphilis was undertaken in the 1930s, little interest in the other major venereal disease, gonorrhea, was expressed by public health officials...Syphilis made headlines, while gonorrhea, four times more prevalent than syphilis, receded deeper into the public consciousness.”<sup>60</sup>

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<sup>59</sup> Idem, 99.

<sup>60</sup> Brandt, 154.

## II. Who's Doing What? Risky Sex at Large and Within Judaism

In order to articulate realistic prescriptions about what people *should* do to better manage STI risk, it is important to know what people *are* doing. I have claimed that there are and will continue to be people who behave in ways that extant interpretations of the tradition do not condone, and that these people need, in practice, better guidance than a simplistic “don’t do that.” Such a claim is merely hypothetical, however, unless I can point to concrete cases. While most studies of sexual behavior rely on self-reported data, which has clear problems with regard to reliability, these studies nevertheless can give us some idea of the relative prevalence of various behaviors.

### *1. Sexual Risk Behavior in the General U.S. Population*

Certainly within the general U.S. population,<sup>61</sup> it is clear that significant numbers of people have sex in contexts other than that of a monogamous marriage. Many people begin to have sex as legal minors. According to the CDC’s 2011 Youth Risk Behavior Surveillance Report, 47.4% of high school students nationwide have ever had sexual intercourse, 15.3% have ever had intercourse with four or more persons, and 33.7% were currently sexually active (that is, had had sexual intercourse within 3 months of taking the survey). Of the latter group, 60.2% reported that either they or their partner used a condom during their last instance of sexual intercourse, and 9.5% reported using both a

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<sup>61</sup> The following data will be U.S. based unless otherwise noted.

condom and another form of birth control during their last instance of sexual intercourse.<sup>62</sup>

Adults engage in a significant amount of sexual activity outside marriage, and report a varied sexual repertoire. According to a 2008 report from the Guttmacher Institute (based on data from the 2002 National Survey of Family Growth), 22% of single women, 9% of cohabiting women and 2% of married women have had two or more partners in the past year.<sup>63</sup> According to data collected in 2009 for the National Survey of Sexual Health and Behavior (NSSHB), “more than half of women ages 18-49 had masturbated in the previous 90 days though rates were highest among those 25-29 and progressively lesser in older cohorts.”<sup>64</sup> Nearly half of unpartnered women ages 18-24, and smaller but still significant percentages of unpartnered women ages 25-39 engaged in vaginal intercourse within the past 90 days; those numbers nearly double for partnered women, including those who were partnered but not married.<sup>65</sup> Unpartnered women reported engaging in mutual masturbation (masturbating with a partner) during the past 90 days at a rate of 13.6% between the ages of 18 and 24, 19.2% between the ages of 25 and 29, 16.5% between the ages of 30 and 39, and between 3.2% and 3.5% between the ages of 40 and 59. Rates were considerably higher among partnered women,

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<sup>62</sup> Centers for Disease Control and prevention, “Youth Risk Behavior Surveillance Report,” *Morbidity and Mortality Weekly Report* (2012) (at 24-28).

<sup>63</sup> Laura Duberstein Lindberg and Susheela B. Singh, “Sexual Behavior of Single Adult American Women,” *Perspectives on Sexual and Reproductive Health* 40:1 (March 2008): 27-33, accessed June 19, 2015, doi: 10.1363/4002708. Additionally, nine out of ten single women ages 20-44 are “sexually experienced” (that is, have ever had vaginal intercourse), and 70% of those women who are sexually experienced are currently sexually active (that is, have had vaginal intercourse in the past three months).

<sup>64</sup> Debra Herbenick, M. Reece, V. Schick, S.A. Sanders, B. Dodge, and J.D. Fortenberry, “Sexual Behaviors, Relationships, and Perceived Health Status Among Adult Women in the United States: Results from a National Probability Sample,” *Journal of Sexual Medicine* 7 Suppl 5 (2010): 277-290 (at 280), 10.1111/j.1743-6109.2010.02010.x.

<sup>65</sup> Idem, Table 4. Over 90% of the sample identified as heterosexual. 46, 35.9 and 20.5 %, respectively, of unpartnered women ages 18-24, 25-29, and 30-39 engaged in vaginal intercourse within the past 90 days.

including those who were partnered but not married.<sup>66</sup> A large proportion of unpartnered women gave and received oral sex, as did a much larger proportion of partnered women.<sup>67</sup> 3.2% of unpartnered women and 20% of partnered women ages 18-24, 1.3% of unpartnered women and 13.0% of partnered women ages 25-29, 3.5% of unpartnered women and 16.3% of partnered women ages 30-39 reported anal intercourse within the past 90 days.<sup>68</sup>

According to the same data set, over 60% of men 59 years of age and younger reported solo masturbation within the past 90 days.<sup>69</sup> Unpartnered men reported engaging in mutual masturbation during the past 90 days at a rate of 16.2 % between the ages of 18 and 24, 10.7 % between the ages of 25 and 29, 18.9 % between the ages of 30 and 39, and between 6.3% and 16.1% between the ages of 40 and 59. As with women, rates were considerably higher among partnered men, including those who were partnered but not married.<sup>70</sup> As with women, a significant minority of unpartnered men engaged in vaginal intercourse<sup>71</sup> within the past 90 days; those numbers more than doubled for partnered men (again, including those who are partnered but not married.)<sup>72</sup> A significant minority of unpartnered men also gave and received oral sex—for example, 18.1% of unpartnered men ages 18-24 and 39.2% of men ages 25-29 reported receiving oral sex in the past 90 days—and partnered men gave and received oral sex at much higher rates—for example,

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<sup>66</sup> Idem, Table 2.

<sup>67</sup> Idem, Table 3. For example, 32.4% of unpartnered women ages 18-24 reported receiving oral sex in the past 90 days, and for example, 70.5% of women ages 18-24 and 80.3% of women ages 25-59 who were living together but not married reported receiving oral sex in the past 90 days.

<sup>68</sup> Idem, Table 4.

<sup>69</sup> Michael Reece, D. Herbenick, V. Schick, S.A. Sanders, B. Dodge, and J.D. Fortenberry, “Sexual Behaviors, Relationships, and Perceived Health Status Among Adult Men in the United States: Results from a National Probability Sample.” *Journal of Sexual Medicine* 7 Suppl 5 (2010): 291-304 (at 293), 10.1111/j.1743-6109.2010.02009.x.

<sup>70</sup> Idem, Table 2.

<sup>71</sup> As with the data on women, over 90% of the sample identified as heterosexual.

<sup>72</sup> Idem, Table 4.

71.9% of men ages 18-24 who were living with their partner but not married reported receiving oral sex in the past 90 days.<sup>73</sup> 0.7% of unpartnered men and 11.1% of partnered women ages 18-24%, 9.5 % of unpartnered men and 17.6 % of partnered men ages 25-29, 15.6 % of unpartnered men and 13.5 % of partnered men ages 30-39 reported insertive anal intercourse within the past 90 days.<sup>74</sup>

According to NSSHB data, 25.7% of adult (18 years of age and older) men and 21.8% of adult women used condoms during their most recent incidence of penile-vaginal intercourse (PIV). Respondents were more likely to use a condom during PIV if they had had few previous sexual encounters with their partner, if they were having sex with someone who was not a relationship partner, or if another form of birth control was in use.<sup>75</sup> (Similarly, the Guttmacher institute reports that single women used condoms more consistently than married or cohabiting women—19.4% of single women reported “always” using condoms in the past year, versus 2.7% of married women and 4% of cohabiting women).<sup>76</sup> Younger respondents and black/Hispanic respondents were more likely to have used a condom during their latest encounter than other groups.<sup>77</sup> Overall condom use during anal intercourse was similar: subjects reported using a condom for 20.3% of their last 10 episodes of anal intercourse (receptive or penetrative), with men reporting more frequent condom use than women (25.8% vs 13.2%).<sup>78</sup> Among men who have sex with men (MSM), according to the CDC, 62% of self-reported HIV-positive

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<sup>73</sup> Idem, Table 3.

<sup>74</sup> Idem, Table 4.

<sup>75</sup> Stephanie A. Sanders, M. Reece, D. Herbenick, V. Schick, B. Dodge, and J.D. Fortenberry,, “Condom Use During Most Recent Vaginal Intercourse Event Among a Probability Sample of Adults in the United States.” *Journal of Sexual Medicine* 7 Suppl 5 (2010): 362-373, doi: [10.1111/j.1743-6109.2010.02011.x](https://doi.org/10.1111/j.1743-6109.2010.02011.x).

<sup>76</sup> Lindberg and Singh, Table 4.

<sup>77</sup> Sanders et al., “Condom Use During Most Recent Vaginal Intercourse Event,” 362-373.

<sup>78</sup> Reece et al, “Condom Use Rates,” 266-276.



men and 57% of self-reported HIV-negative or unknown status men reported having had unprotected anal sex with a male partner in the past 12 months.<sup>79</sup>

Of particular note is that in this sample, even though awareness of HIV-positive status among MSM increased from 56% in 2008 to 66% in 2011,<sup>80</sup> 33% of men who were HIV-positive but *unaware*<sup>81</sup> of that status had unprotected anal sex with an HIV-negative/unknown status partner in 2011, up from 30% in 2008.<sup>82</sup> 67% of HIV-negative/unknown status men reported having been tested for HIV in the past 12 months. Of that group, 4-7% remained unaware that they were HIV-positive.<sup>83</sup>

The sexual behavior and sexual risk profiles of women who have sex with women (WSW) remains severely understudied compared to that of WSM, MSW, and MSM. As Linda M. Gorgos and Jeanne Marrazzo note, “many early studies of risk behavior among WSW were based on convenience samples or on women attending STI clinics and are not necessarily generalizable to all WSW.”<sup>84</sup> Further, “studies examining STIs among WSW frequently use differing methods to reflect female-to-female sexual contact.”<sup>85</sup> Nevertheless, some data suggests that risk behaviors are prevalent enough to warrant concern among at least some subsets of WSW and WSWM. For example, a study of French women found that 19% of WSW and 30.4% of WSWM (women who have sex

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<sup>79</sup> CDC, “HIV Testing and Risk Behaviors among Gay, Bisexual, and other Men Who Have Sex With Men in the United States.” *Morbidity and Mortality Weekly Report* (November 29, 2013): Table 1, accessed June 17, 2015, [http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6247a4.htm?s\\_cid=mm6247a4\\_w](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6247a4.htm?s_cid=mm6247a4_w).

<sup>80</sup> Ibid.

<sup>81</sup> Ibid, regarding how “unaware” is defined: “Respondents with a confirmed positive HIV test result in [the National HIV Behavioral Surveillance System (NHBS)] who reported having previously tested positive for HIV were considered to be aware of their infection. Those with a confirmed positive HIV test result in NHBS, who reported previously testing negative, not knowing their last test result or never testing, were considered unaware of their HIV status.”

<sup>82</sup> Idem, Table 2.

<sup>83</sup> Idem, Figure 3.

<sup>84</sup> L.M. Gorgos and J.M. Marrazzo, “Sexually Transmitted Infections Among Women Who Have Sex With Women” *Clinical Infectious Diseases*, 2011:53 (Suppl 3): S84-91 (at S88), doi: 10.1093/cid/cir697.

<sup>85</sup> Idem, S86.

with women and men) had two or more female partners in the past 12 months. 37.8% of WSW and 63.9% of WSWM (as compared with 18.4% of WSM) had had sex with someone who was “without importance”; 21% of WSW and 22.1% of WSWM (compared with 2.9% of WSM) had had sex with someone they had met online. Among women with several lifetime partners,<sup>86</sup> 45.1% of WSW and 57.2% of WSWM (as compared to 24% of WSM) have had two “parallel sexual relationships.” Finally, even among WSW, over 80% had had at least one male partner.<sup>87</sup> At the same time, however, a study specifically comparing low-risk subgroups of WSW, WSWM, and WSM found that although lesbian and bisexual-identified WSWM engaged in some risk behaviors (multiple partners, having sex while drunk or high, having sex with MSM) at higher rates than heterosexually-identified WSM, both groups also reported more correct and consistent condom use, STI and HIV testing, and appropriate risk perception than did heterosexually-identified WSM.<sup>88</sup>

There is a common (though erroneous) belief that it is very difficult or impossible for female-bodied people to sexually transmit pathogens to other female-bodied people. In one study, when a woman participating in a focus group was asked about using condoms (for example, on shared sex toys) during sex with other women, she responded, “...we’re girls, and the only thing we need to worry about is pregnancy, and we know

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<sup>86</sup> The term “lifetime partners”—not to be confused with “lifelong partners”—refers to the total number of sexual partners during one’s lifetime.

<sup>87</sup> N. Chetcuti, N. Beltzer, N. Methy, C. Laborde, A. Velter, and N. Bajos, “Preventative Care’s Forgotten Women: Life Course, Sexuality, and Sexual Health among Homosexually and Bisexually Active Women in France.” *Journal of Sex Research* 50:6 (2013): 587-597 (at table 2), doi: 10.1080/00224499.2012.657264. Also see Catherine H. Mercer, Julia V. Bailey, Anne M. Johnson, Bob Erens, Kaye Wellings, Kevin A. Fenton, and Andrew J. Copas, “Women Who Report Having Sex With Women: British National Probability Data on Prevalence, Sexual Behaviors, and Health Outcomes.” *American Journal of Public Health* 97:6 (June 2007): 1126-1133, doi: 10.2105/AJPH.2006.086439.

<sup>88</sup> A.S. Koh, C.A. Gomez, S. Shade, and E. Rowley, “Sexual Risk Factors Among Self-Identified Lesbians, Bisexual Women, and Heterosexual Women Accessing Primary Care Settings” *Sexually Transmitted Diseases* 32:9 (Sept. 2005): 563-569 (at 568), <https://www.ncbi.nlm.nih.gov/pubmed/16118605>.

that STDs can only be transferred [between] men and women... That's what we're told, that two women are safe... That's what I've heard. So, you just... don't think about it.”<sup>89</sup>

According to another study, WSW who reported never having sex with men were “significantly less likely to have undergone a pelvic examination. They also had their first Pap test—which screens precancerous cellular changes in the cervix, most of which are caused by HPV—at an older age, had fewer Pap tests in the previous 5 years, and reported a longer interval between their 2 most recent Pap tests.”<sup>90</sup> Among WSW who had not had a Pap smear in 2 years or more, 22% believed it was not necessary because they were not sexually active with men, and 10% had been told by a physician or another health care provider that a Pap smear was unnecessary for the same reason.<sup>91</sup> Yet this same study found HPV DNA even in women who had never had intercourse with men.<sup>92</sup> Another study found that the risk of chlamydia infection among WSW and WSWM was comparable to that for WSM.<sup>93</sup> WSW experience bacterial vaginosis at notably high

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<sup>89</sup> Jeanne M. Marrazzo, Patricia Coffey, and Allison Bingham, “Sexual Practices, Risk Perception and Knowledge of Sexually Transmitted Disease Risk Among Lesbian and Bisexual Women” *Perspectives on Sexual and Reproductive Health* 37:1 (2005): 6-12. (at 8), doi: [10.1363/psrh.37.006.05](https://doi.org/10.1363/psrh.37.006.05).

<sup>90</sup> J.M. Marrazzo, L.A. Koutsky, N.B. Kiviat, J.M. Kuypers, and K. Stine, “Papanicolaou Test Screening and Prevalence of Genital Human Papillomavirus Among Women Who Have Sex With Women” *American Journal of Public Health* 91:6 (June 2001): 947-952 (at 949), <https://www.ncbi.nlm.nih.gov/pubmed/11392939>. Also see D.J. Aron, N. Markovic, M.E. Danielson, J.A. Honnold, J.E. Janosky, and N.J. Schmidt, “Behavioral Risk Factors for Disease and Preventive Health Practices Among Lesbians”, *American Journal of Public Health* 91:6 (June 2001): 972-975, <https://www.ncbi.nlm.nih.gov/pubmed/11392943>; Barbara G. Valanis, Deborah J. Bowen, Tamsen Bassford, Evelyn Whitlock, Pamela Charney, and Rachel A. Carter, “Sexual Orientation and Health: Comparisons in the Women’s Health Initiative Sample” *Archives of Family Medicine* 9:9 (Sept/Oct 2000): 843-853; and Bonnie D. Kerker, Farzad Mostashari, and Lorna Thorpe, “Health Care Access and Utilization among Women Who Have Sex With Women: Sexual Behavior and Identity” *Journal of Urban Health* 83:5 (2006): 970-979, doi: [10.1007/s11524-006-9096-8](https://doi.org/10.1007/s11524-006-9096-8). This last is especially interesting for its finding that “behavior-identity concordance is an important factor in healthcare utilization...for example, among WSW, women who identified as lesbian were more likely to have had timely Pap tests and mammograms [than] those who identified as heterosexual” (976). If this result is borne out in other studies, it would seem to be yet another indicator that the closet is a dangerous place, indeed.

<sup>91</sup> Marrazzo et al., Table 4.

<sup>92</sup> Idem, 950. Also see Julia V. Bailey, Jayne Kavanagh, Charlie Owen, and C.J. Skinner, “Lesbians and Cervical Screening,” *British Journal of General Practice* 50 (2000): 481-482.

<sup>93</sup> Devika Singh, David N. Fine, and Jeanne M. Marrazzo, “*Chlamydia trachomatis* Infection Among Women Reporting Sexual Activity with Women Screened in Family Planning Clinics in the Pacific

rates,<sup>94</sup> and at least one study demonstrates significant prevalence of Herpes Simplex Virus 2 among WSW as compared to heterosexual women who reported never having a same-sex partner.<sup>95</sup>

## 2. Sexual Risk Behavior Among Observant Jews

While it stands to reason that STI transmission would be a concern in any community, including those communities for which a *halakhically* engaged treatment of sexual ethics would have immediate relevance, there is not a great deal of available data on sexual behavior among observant Jews. I have turned up no quantitative data and minimal small-scale qualitative data on the subject, so any evidence for my claims about unconventional sexual behavior within the observant Jewish community can be only speculative. I would argue, however, that the lack of hard data underscores the need for my project. Anecdotal experience—my own and others’—indicates that observant Jews *are* interested in sex, but the nature of contemporary rabbinical and academic discourse on the subject currently manifests a significant disconnect between the rhetoric of sex and any firm knowledge of its phenomenal reality within the observant community. The absence of data—whether due to a lack of interest in or a fear of discovering that reality, or to difficulty in obtaining such data—compounds the problem.

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Northwest, 1995 to 2005” *American Journal of Public Health* 101:7 (Jul. 2011): 1284-1290, doi: [10.2105/AJPH.2009.169631](https://doi.org/10.2105/AJPH.2009.169631).

<sup>94</sup> Marrazzo et al., “Sexual Practices”, 6.

<sup>95</sup> 45.6% among heterosexual-identified women who had reported ever having sex with another woman, 35.9% among bisexual-identified WSW, and 8.2% among lesbian-identified WSW (by comparison, the prevalence of HSV-2 among women who reported never having a same-sex partner was 23.8%. F. Xu, M.R. Sternberg, and L.E. Markowitz, “Women Who Have Sex With Women In the United States: Prevalence, Sexual Behavior, and Prevalence of Herpes Simplex Virus Type 2 Infection” *Sexually Transmitted Diseases* 37:7 (Jul 2010): 407-413, doi: [10.1097/OLQ.0b013e3181db2e18](https://doi.org/10.1097/OLQ.0b013e3181db2e18).

While quantitative data regarding the sexual behavior of Orthodox Jews are scant, what data (largely qualitative) exist suggest a substantial conflict between the extent and quality of ethical guidance given, and the questions, thoughts, feelings, and needs of a substantial part of the community. Jennie Rosenfeld and Koby Frances have each interviewed several young, single, Modern Orthodox adults; difficulty maintaining the standards of *shmirat negiah* (the prohibition against touching members of the opposite sex) is a recurring theme throughout their work. Rosenfeld writes,

One woman, who was strictly observant in dating and relationships, would go to a bar and get completely drunk every few months so that non-Jewish men could dance with her and kiss her and she could feel like she was still a woman. When the hang-over lifted she was back to the observant life, her drunken acts having been done by “someone else.” Another woman lay completely still as her boyfriend caressed her body; she had mentally detached herself from her physical body and just wasn’t present for the encounter. A Modern Orthodox male can have casual sex with a stranger but cannot hold his girlfriend’s hand because the former is dissociable and the latter is not. And these stories represent only the experiences of the few with whom I spoke.<sup>96</sup>

As Rosenfeld notes, her subjects’ shame at having violated their community’s *halakhic* and ethical norms is so paralyzing that they are unable to associate their actions with their self-understanding as moral agents and instead understand some other part of their identity to be acting under *ones*, or compulsion. Ironically enough, precisely this dissociation leaves them open to even greater risks: “When one is dissociating, one may perform acts which, in addition to being against *halakhah*, are also unsafe or dehumanizing. And in the refusal to believe that they are in a space of transgression, many individuals end up violating more stringent laws than they would were they to take control of their own actions by letting them into the conscious mind and subjecting them

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<sup>96</sup> J. Rosenfeld, *Talmudic Re-Readings*, 177-8.

to the same standards of decision making to which they subject any other action they take.”<sup>97</sup>

Along similar lines, Frances presents extended interviews with a small group of men from Orthodox backgrounds, all of whom have experienced and continue to experience significant conflict between their religious identities and their sexual selves. For one young man, his increasingly permissive sexual practice coincided with a slackening of his religious observance in other areas as well. At the time of his interview, he had begun seeking out casual hookups—“Last year my big break was having sex and this year my new milestone is having casual hookups with two girls where we had sex even though it wasn’t a very serious relationship. Now I kinda take it where I can get it.”<sup>98</sup> He continues to keep the laws of Kashrut and Shabbat “the way it was given to me”<sup>99</sup> but has largely given up regular prayer, *tefillin*, *tzitzit*, and wearing a yarmulke. Another subject struggled with voyeurism even as he was “part of a shtark chevrah [strict social circle] of guys you know, I never missed a tefilah [regular prayer]. I never missed tefilah in my life...with the exception of one or two Maarivs [evening prayers]...”<sup>100</sup> This subject also had intercourse with a prostitute during his *yeshiva* studies.<sup>101</sup> And another subject, a young Rabbi, felt a certain grim pride in the fact that even though he had trouble making sense of *halakhic* restrictions on sexuality, “everyone else fools around with their girlfriends, and I don’t.”<sup>102</sup> Several of Frances’s subjects struggled with shame around their inability to stop masturbating and viewing pornography. As is the case with

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<sup>97</sup> Idem, 178.

<sup>98</sup> Yaakov (Koby) Frances, *A Qualitative Study of Sexual-Religious Conflict in Single Orthodox Jewish Men*, (Ph.D Diss., City University of New York, 2008) 95. Frances paraphrases his subjects’ words into a narrative in his own words, interspersing direct quotes in the subject’s own voice.

<sup>99</sup> Frances, 88.

<sup>100</sup> Idem, 160.

<sup>101</sup> Idem, 164.

<sup>102</sup> Idem, 74.

Rosenfeld's subjects, several of them also had difficulty acknowledging their agency in their sexual encounters: "I wonder if other people in this community also try to psychologically absolve themselves from the responsibility of their sexual acts by saying things like 'it just happened'...I tell myself that I must have 'this drive issue.' Otherwise it doesn't make sense because I'm not a shallow, thoughtless person. I think that my sexual drive 'dictates my decisions' more than it does with my peers."<sup>103</sup>

Sociologist of religion Simon Theobald, on the other hand, sees significant agency in Orthodox Jews' sexual transgressions. Theobald claims that there may be a substantial subset (at least) of the Orthodox population that is surepetitiously engaging in risky sexual behavior—that is, casual encounters and transactional sex, in addition to premarital sex— and that the phenomenon of online discussion forums has significantly facilitated both these activities and discussion of them. "Orthodox Jews," he argues, "use the *relative* anonymity of the internet as a tool to develop alternative safe(r) spaces in which they re-claim and create a counter-narrative of diverse sex and sexual practices. Issues that are 'embarrassing,' that cannot be shared with friends or family, are discussed instead online."<sup>104</sup> By "lurking" on various discussion forums (that is, reading the forums without participating in the discussion), Theobald has unearthed several narrative accounts of a diverse range of sexual behaviors that violate Orthodox norms:

[Craigslist] is awash with 'personal' advertisements from members of the Orthodox community who are seeking male-to-male, female-to-male and female-to-female sexual contact, although the predominant pattern seems to be men looking for women, in which the term 'strictly platonic' becomes code for illicit sexual affairs...

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<sup>103</sup> Idem, 122.

<sup>104</sup> Simon Theobald, "'It's A Tefillin Date': Narratives of Orthodox Jewish Sexuality in the Digital Age," in *Ashgate Research Companion to Contemporary Religion and Sexuality*, eds. Stephen J. Hunt and Andrew K.T. Yip (Farnham, Surrey, GB: Ashgate Publishing, 2012) 296.

The pornographic [www.frumporn.com](http://www.frumporn.com) site, containing pictures and videos that again bear some of the trappings of Orthodox life, uses the imagery of the faith to create a humorous and sexual counter narrative of the faith; a sexual, sensual, and liminal *Yiddishkeit*. The use of Yiddish orthography and terminology in these videos problematises any easy attempt to dismiss their authenticity...

Craigslist offers many examples of queer *frum* [Orthodox] Jews seeking queer casual encounters: “frum women looking for the same—w4w” says “Hey I am a 21 year frum married, pregnant women at my 7 month who is looking to have some fun and play with another frum women if u are under age 25 please reply with a picture must be shaved clean and attractive, please NO MAN!!! I posted this 1ns already and all of them where man! If u are a lonely man who liked to play other don’t try me!”<sup>105</sup>

Theobald sees this phenomenon as a case where Orthodox Jews consciously create “queer” spaces or “safe” spaces in which they are able to redefine Orthodox sexual expression without risking rabbinic or communal judgment, a mode of lay resistance to official norms that occurs within some form of safe space.

A small study by Michelle Friedman et al. found that of their sample of 380 Orthodox married women, “less than a quarter reported no physical or sexual contact prior to marrying their current spouse.” Of those women among the sample who were raised Orthodox, only about a third “reported abstaining from any premarital physical contact with their husbands.”<sup>106</sup> Friedman, et al., note that married Orthodox women in particular suffer from a lack of open discourse and of friendly authority figures who are both medically and *halakhically* informed. Nearly half of the respondents believed that they could have been better prepared for marital sexuality: “Women wished they had learned more about ‘women’s body parts, women’s sensitivities, orgasm, different

<sup>105</sup> Theobald 297-8. All spelling, grammar etc. sic.

<sup>106</sup> Michelle Friedman, Ellen Labinsky, James Schmeidler, and Rachel Yehuda, “Observant Married Jewish Women and Sexual Life: An Empirical Study” *Conversations* 5 (October 2009), accessed December 10, 2014, <http://www.jewishideas.org/articles/observant-married-jewish-women-and-sexual-life-empi>.



positions.”<sup>107</sup> And within their marriages, “fully half of all women answering our survey have wondered whether performing certain sexual acts during the course of their observant, married life, might constitute a violation of Jewish law...Of the 50 percent who acknowledged *halakhic* concerns, only a small portion (12 percent) asked a Rabbi for guidance. Of the remaining 88 percent who did not seek religious consultation, almost half refrained from the religiously questionable sex, while the rest enacted their desire without permission.”<sup>108</sup> Friedman, et al. also report a fairly high rate of sexual difficulties (lack of interest in sex, for instance) among their sample—so much so that “nearly half our sample cited such difficulties as causing them to avoid sex altogether.”<sup>109</sup>

### 3. *Sexual Behavior Among Non-Observant Jews*

Although the sexual behavior of Orthodox Jews is clandestine and difficult to measure, it would make sense to hypothesize that the sexual behavior of non-Orthodox Jews would mirror rather closely that of the population at large, and might, if anything, be more permissive. This certainly seems to be the case as far as attitudes toward LGBT people are concerned: an overwhelming majority of American Jews currently support same-sex marriage—83%, according to one survey, as compared to 73% of religiously unaffiliated Americans.<sup>110</sup> Another study indicated that Jewish lesbians were more likely

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<sup>107</sup> *Idem*, 5.

<sup>108</sup> *Idem*, 7.

<sup>109</sup> *Idem*, 9.

<sup>110</sup> Robert P. Jones, Daniel Cox, and Juhem Navarro-Rivera, *A Shifting Landscape: A Decade of Change in American Attitudes about Same-sex Marriage and LGBT Issues* (Washington, DC: Public Religion Research Institute, 2014), 11. It should be noted, however, that the survey’s sample of Jewish Americans was relatively small. The study also did not distinguish Orthodox Jews from non-Orthodox Jews.

to be out than lesbians in other ethnic groups surveyed.<sup>111</sup> Data on actual sexual behavior and Jewish religiosity seem scant, but a study using cross-national data from the U.S. Demographic and Health Survey indicated that Jews were, overall, significantly likelier to admit to having had premarital and extramarital sex.<sup>112</sup> According to a study of the influence of parental religiosity on teen sexual behavior, while Jewish teenagers were less likely to have had sex before the age of 18 than Catholic, Black Protestant, Mainline Protestant, or Evangelical Protestant teenagers, they were more likely to have used contraception at first sex than any other group, including religiously unaffiliated teenagers.<sup>113</sup>

There are, then, at least two indications of the importance of this project. On the one hand, Jews for whom *halakhah* has a significant role in their life need better, more open, and more detailed *halakhically*-engaged ethical guidance about sex and sexuality. On the other hand, non-*halakhic* Jews, who seem to assume that the *halakhic* tradition has nothing of value to offer them when it comes to that same guidance, might be helped to see that it has, in fact, much to offer.

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<sup>111</sup> Jessica F. Morris, Craig R. Waldo, and Esther D. Rothblum, "A Model of Predictors and Outcomes of Outness Among Lesbian and Bisexual Women" *American Journal of Orthopsychiatry*, 71:1 (Jan 2001): 61-71 (loc. 67).

<sup>112</sup> Amy Adamczyk and Brittany Hayes, "Religion and Sexual Behaviors: Understanding the Influence of Islamic Cultures and Religious Affiliation for Explaining Sex Outside of Marriage" *American Sociological Review* 77(5) (2012): 723-746. Obviously, willingness to report non-marital sexual behavior is not the same as *incidence* of non-marital sexual behavior.

<sup>113</sup> J.S. Manlove, E. Terry-Humen, E.N. Ikramullah, and K.A. Moore, "The Role of Parent Religiosity in Teens' Transition to Sex and Contraception" *Journal of Adolescent Health* 39:4 (Oct 2006) 578-587 (at tables 2, 3).

### III. Mitigation Strategies

In a now-memetic scene in the 2004 comedy film *Mean Girls*, a high-school gym teacher tells his students: “If you do touch each other, you *will* get chlamydia and die.” (The teacher then laboriously misspells “chlamydia” on the blackboard.) The scene lampoons black-and-white, scare-tactic approaches to STI prevention as ineffective, ill-informed, and hypocritical. As the rest of the movie makes clear, most of the characters, the gym teacher included, are engaging in premarital and extramarital sex anyway. This portrait is borne out by the scientific data: abstinence-only sex education does not prevent people from engaging in premarital sex, nor does it reduce rates of unplanned pregnancy or STI transmission.<sup>114</sup>

Just because abstinence-only education is ineffective, however, does not mean that STI transmission is an intractable problem. Indeed, several highly effective technical interventions already exist; they become even more effective when used in combination with one another. Vaccines for hepatitis A and B have been in use since 1995 and 1982 respectively, and a vaccine for the four strains of HPV most commonly linked to genital cancers and genital warts has been available since 2006. A new formulation of this latter vaccine that prevents five additional strains of HPV was approved by the FDA in 2014.<sup>115</sup>

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<sup>114</sup> See, for example, Pamela K. Kohler, Lisa E. Manhart, and William E. Lafferty, “Abstinence-Only and Comprehensive Sex Education and the Initiation of Sexual Activity and Teen Pregnancy,” *Journal of Adolescent Health* 42 (2008): 344-351, doi: 10.1016/j.jadohealth.2007.08.026; Kathryn F. Stanger-Hall and David W. Hall, “Abstinence-Only Education and Teen Pregnancy Rates: Why We Need Comprehensive Sex Education in the U.S.,” *PLOS ONE* 6:10 (October 2011): e24658, doi:10.1371/journal.pone.0024658; and Helen B. Chin et al., “The Effectiveness of Group-Based Comprehensive Risk-Reduction and Abstinence Education Interventions to Prevent or Reduce the Risk of Adolescent Pregnancy, Human Immunodeficiency Virus, and Sexually Transmitted Infections: Two Systemic Reviews for the Guide to Community Preventive Services,” *American Journal of Preventive Medicine* 42:2 (2012): 272-294, doi: 10.1016/j.amepre.2011.11.006.

<sup>115</sup> “FDA Approves Gardasil 9 for Prevention of Certain Cancers Caused by Five Additional Types of HPV,” Food and Drug Administration, accessed April 13, 2015, <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm426485.htm>.

Male and female condoms, when used regularly and correctly, are highly effective at preventing the spread of fluid-transmitted infections and reduce the risk of infections transmitted by skin-to-skin contact.<sup>116</sup> Pre-exposure prophylaxis (PrEP) can, when used consistently and in combination with regular testing, be up to 92% effective in stopping the transmission of HIV,<sup>117</sup> and an HIV-positive individual whose viral load has been reduced to undetectable levels can become practically non-infectious.<sup>118</sup> Suppressive therapy can also reduce the transmission risk from a person who has herpes simplex virus (HSV)-1 or HSV-2.<sup>119</sup>

Effective behavioral interventions also exist. At the individual level, a number of studies have indicated that workshops (especially those guided by cognitive-behavioral theory) aimed at practicing the sorts of interpersonal skills necessary to alter sexual behavior precipitate significant changes, at least in the short term.<sup>120</sup> Clinician counseling, when practiced as a component of clinical management of STIs, also appears to have some significant effects,<sup>121</sup> as do couple-based interventions. This last seems to work particularly well with couples in which one member is HIV-positive and the other is not.<sup>122</sup> At the community level, effective interventions often target high-risk groups and position individuals from within those high-risk groups as educators, mentors, and role

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<sup>116</sup> “Condom Effectiveness: Fact Sheet for Public Health Personnel,” Centers for Disease Control and Prevention, accessed March 17th, 2017, <https://www.cdc.gov/condomeffectiveness/latex.html>.

<sup>117</sup> “Pre-Exposure Prophylaxis (PrEP),” Centers for Disease Control and Prevention, accessed April 13, 2015, <https://www.cdc.gov/hiv/risk/prep/index.html>

<sup>118</sup> See, for example, Susan M. Schader and Mark A. Wainberg, “Insights into HIV-1 Pathogenesis through Drug Discovery: 30 Years of Basic Research and Concerns for the Future,” *HIV & AIDS Review* 10:4 (December 2011): 91-98.

<sup>119</sup> “2015 Sexually Transmitted Diseases Treatment Guidelines: Genital HSV Infections,” Centers for Disease Control and Prevention, accessed March 17, 2017, <https://www.cdc.gov/std/tg2015/herpes.htm>.

<sup>120</sup> IOM 2009, 134

<sup>121</sup> *Idem*, 135

<sup>122</sup> *Idem*, 135

models.<sup>123</sup> Effective community-based interventions also target structural and environmental conditions that might be barriers to behavior change.<sup>124</sup> In short, effective behavioral interventions, whether at the individual level or the community level, appear to have in common the fact that they teach people what *to do* sexually, rather than merely focusing on what *not* to do. Particularly effective ways of teaching people what to do include practicing positive behaviors and providing exemplars and role models for those behaviors.

School-based programs are difficult to evaluate, since measuring actual rates of STIs among minor students involves significant legal and ethical challenges. Even when we turn to self-reported data, results are mixed. Nevertheless, school-based programs can be effective if they are well-designed and well implemented:

[A 1994 review of] 23 studies of school-based sex and AIDS and STD education programs...found that some but not all programs were effective and that programs having the following six characteristics had a clear impact on behavior:

1. narrowly focused on reducing sexual risk-taking behaviors that lead to HIV or other STDs or unintentional pregnancy;
2. utilized social learning theories as a foundation for development;
3. provided basic, accurate information about the risks of unprotected intercourse and methods of avoiding unprotected intercourse through experiential activities designed to personalize this information;
4. included activities that address social or media influences on sexual behaviors;
5. reinforced clear and appropriate values to strengthen individual values and group norms against unprotected sex; and
6. provided modeling and practice in communication and negotiating skills.

The authors concluded that, contrary to the concerns of some individuals and groups, such educational programs do not increase sexual activity

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<sup>123</sup> Idem, 137

<sup>124</sup> Ibid.

among students. Studies of specific programs found that programs that included instruction on contraception either delayed the onset of sexual intercourse or had no effect on onset.<sup>125</sup>

Condom distribution programs, in schools as well as in other organizational contexts, also appear to significantly increase condom use. A 2010 meta-analysis of 21 U.S and international studies from 1997-2007 concluded that structural-level interventions that “increased the availability of condoms, or increased accessibility to condoms, as a distribution strategy were efficacious in increasing condom use behaviors.”<sup>126</sup> Such programs were effective among diverse populations, and became even more effective when combined with “additional individual, small group, or community-level activities.”<sup>127</sup>

The catch to all this, of course, is that these interventions—technical and social alike— are only as effective as the correctness and consistency of their implementation. Teaching interventions, like mechanical and biomedical ones, *also* depend on this correctness and consistency. A program that is effective in a study will do little good if it is not actually implemented and funded. Public health approaches—educational interventions, policies, resource distribution initiatives, and so on—that recognize the multifactorial nature of STI risk, the reasons people may avoid preventive measures or treatment, and the reasons people engage in relatively higher-risk activities (multiple partners, serial monogamy, casual sex, and so on) can help lower transmission rates, especially if they focus on making services more easily available to the people who need them most.

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<sup>125</sup> Idem, 140.

<sup>126</sup> M.R. Charania, N. Crepaz, C. Guenther-Gray, K. Henny, A. Liao, L.A. Willis, and C.M. Lyles, “Efficacy of Structural-Level Condom Distribution Interventions: A Meta-Analysis of U.S. and International Studies, 1998-2007.” *AIDS and Behavior* 15 (2011): 1283-1297 (at 1293), doi: 10.1007/s10461-010-9812-y.

<sup>127</sup> Idem, 1293-4.

To the extent that normative values-based approaches, religious and otherwise, have a place in STI prevention and mitigation (and I shall argue in very strong terms that they do), their focus ought to be twofold. First, they must facilitate open conversations about sexuality, sexual risks (understood broadly), and STI status. In practical terms, this means normalizing regular testing, disclosure of STI status, and use of appropriate preventive measures. Second, they must understand that disparities in social stigma and in access to and quality of care are also fundamentally moral issues. The sexual drive is near-universal, and to force some communities to suffer more than others in consequence of its expression is unconscionable.

#### IV. Sexual Benefits: Why Sexual Decision-Making Isn't Just About Risk

STI risk, of course, is not the only factor or even the primary factor that most people consider when they decide whether, how, with whom, and how often to have sex. I have spent several of the previous pages recounting in detail only one of many sets of risks entailed by sexual interaction. But sex is about more than risk. Sex and sexuality are significant factors in how we come to understand our bodies, our identities, and our social worlds. As the IOM's 2009 report on STIs puts it, "sexuality reflects and integrates biological, psychological, and cultural factors that must be considered when delivering effective health services and information to individuals. Sexuality is an integral part of how people define themselves."<sup>128</sup> Yes, sex is risky. However, it also benefits us, as individuals and as members of communities, in important ways.

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<sup>128</sup> IOM 2009, 87.

The most obvious benefit of sex is that it feels good. Pleasure is a good in and of itself, delivering benefit at least twice over—in the immediate experience and later on, in the form of pleasurable memories. We humans are pleasure seekers, and the drive to experience pleasure can easily override even a clear knowledge of likely undesirable consequences. It does not take engaging in risky sex to realize this. Take, for example, the near-universal experience of overeating a delicious food, despite knowing full well from having done exactly the same thing on numerous prior occasions that gastric distress will follow. That our drive to experience pleasure is this strong, even in the face of near-certain *displeasure* as a consequence of our desired activities, certainly tells us something about how poor we humans are at long-term planning. But it also seems to tell us something about the importance of pleasure to our social, psychological, and moral well-being.

Sex feels good for someone who is having it, and it also feels good for the person or persons with whom that person is having it. When one engages in partnered sex, one is giving pleasure as well as receiving it. The ability to give pleasure to someone else is yet another way sexual pleasure delivers benefit. This is self-reinforcing—for most people, it is pleasurable in and of itself to give pleasure to others, and so this compounds the direct and immediate pleasure one derives from a sexual encounter. And because sexual pleasure is usually a case of mutual benefit—one can give pleasure to another person by doing something that is pleasurable for oneself—it is also salutary for one's moral development, because it trains one to associate one's own pleasure with the pleasure of others.



Sexual expression and sexual satisfaction in general seem to have concrete, measurable benefits for individuals. While little causal data are available on the subject of the effects of particular sexual behaviors and of sexual satisfaction overall, a number of correlational studies point in intriguing directions regarding sexual satisfaction or lack thereof, and particular sexual behaviors. For example, a 2010 study showed “substantial connections” between sexual satisfaction and relationship satisfaction, mental health, and physical health for women in both same-sex and mixed-sex relationships,<sup>129</sup> and a 2004 study recorded an inverse correlation between the prevalence in men of depressive symptoms and their degree of sexual satisfaction.<sup>130</sup> A nationally representative study of U.S women indicates that vibrator use is positively associated with “health-promoting behaviors” and “positive sexual function”; in particular women who use vibrators “were significantly more likely to [have] had a gynecological exam in the previous year [and to have] looked closely at their genitals in the previous month.”<sup>131</sup> A parallel study of men and vibrator use yielded similar results.<sup>132</sup> Additionally, higher frequency of ejaculation seems to have some protective effect against certain types of prostate cancer.<sup>133</sup>

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<sup>129</sup> Diane Holmberg, Karen L. Blair, and Maggie Phillips, “Women’s Sexual Satisfaction as a Predictor of Well-Being in Same-Sex Versus Mixed-Sex Relationships” *Journal of Sex Research* 47:1 (2010): 1-11.

<sup>130</sup> Alfredo Nicolosi E.D. Moreira, Jr., M. Villa, and D.B. Glasser, “A Population Study of the Association Between Sexual Function, Sexual Satisfaction and Depressive Symptoms in Men” *Journal of Affective Disorders* 82 (2004): 235-243.

<sup>131</sup> Debra Herbenick, Michael Reece, Stephanie Sanders, and J. Dennis Fortenberry, “Prevalence and Characteristics of Vibrator Use by Women in the United States: Results from a Nationally Representative Study,” *Journal of Sexual Medicine* 6 (2009): 1863. doi: 10.1111/j.1743-6109.2009.01318.x

<sup>132</sup> Michael Reece, Debra Herbenick, Stephanie A. Sanders, Brian Dodge, Annahita Ghassemi, and J. Dennis Fortenberry. “Prevalence and Characteristics of Vibrator Use by Men in the United States.” *Journal of Sexual Medicine* 6 (2009): 1872. doi: [10.1111/j.1743-6109.2009.01290.x](https://doi.org/10.1111/j.1743-6109.2009.01290.x).

Some more examples: a study of sexual satisfaction among U.S university students indicated links between orgasm frequency, sexual self-comfort, little to no sexual guilt, and self-esteem to psychological sexual satisfaction; interestingly this study demonstrated little difference between its male and female respondents. (Jenny A. Higgins, Margo Mullinax, James Trussell, J. Kenneth Davidson, Sr., and Nelwyn B. Moore, “Sexual Satisfaction and Sexual Health among University Students in the United States,” *American Journal of Public Health*, Sept. 101:9 (2011): 1648-9, doi: [10.2105/AJPH.2011.300154](https://doi.org/10.2105/AJPH.2011.300154)). A 2006 study of girls ages 16-19 reported that “approach motives” for initiating sex—that is, motives that “focus on obtaining positive outcomes such as one’s own physical pleasure” as opposed to “avoidance motives” that

Sexual fulfillment, then, is a source of a number of goods—physical, psychological, social—for the individual. However, since much sexual activity happens in the context of direct encounters with other people, the pursuit of sexual pleasure also has the potential to train us as social actors. Partnered sex seeks a pleasure that is at once fundamentally bodily *and* fundamentally social. One seeks both the direct physical pleasure of arousal and orgasm *and* the physical, social, and psychological pleasure of experiencing arousal and orgasm in response to the bodily, social, and psychological stimuli of another person's pleasure. Partnered sex creates pleasure out of connection. What is more, partnered sex often causes us to seek out things that, in other contexts, might frighten or repel us. It creates pleasure not only out of connection, but also out of vulnerability. Usually we encounter our sexual partners literally naked, and we penetrate or are penetrated by their bodies in some way. Where we might normally avoid bodily fluids, here we often seek them out. Sex also forces us to confront the unknown and the apparently inexplicable: How will I perform? Will my partner like me? Why does an activity that worked wonderfully for a previous partner do nothing for my current one? And why on earth am I turned on by *that*?

Partnered sex, then, draws pleasure out of paradox. It draws intensely personal sensation out of fundamentally social interaction, it attracts us to things that might normally repel us, and it forces us to act in response to situations that do not comport

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“focus on evading negative outcomes such as one's own sexual frustration”—and positive sexual self-concepts “were both associated with more sexual experience but not with more intercourse partners,” as well as with “increased sexual satisfaction during the most recent intercourse experience.” (Emily A. Impett and Deborah L. Tolman, “Late Adolescent Girls' Sexual Experiences and Satisfaction,” *Journal of Adolescent Research* 21:6, (Nov. 2006): 628-646, doi 10.1177/0743558406293964).

<sup>133</sup> See, for example, Jennifer R. Rider, Kathryn M. Wilson, Jennifer A. Sinnott, Rachel S. Kelly, Lorelei A. Mucci, and Edward L. Giovannucci, “Ejaculation Frequency and Risk of Prostate Cancer: Updated Results with an Additional Decade of Follow-Up,” *European Urology* 70:6 (December 2016): 974-982, doi: [doi.org/10.1016/j.eururo.2016.03.027](https://doi.org/10.1016/j.eururo.2016.03.027).

with our preconceived narratives of how people ought to work. At the same time, it also drives home the power of our narratives, personal and shared, to create physical sensations, condition social interactions, and color our understandings of previous and future experiences. And it is a potent demonstration of what happens when different narratives are forced to confront one another. In short, partnered sex is an especially intense training ground for social interactions writ large.

Within this framework, different kinds of sexual experiences may have different kinds of benefits. Much has been written, and deservedly so, about the social and moral virtues of sex within marriage, from religious and secular perspectives alike.<sup>134</sup> Sex within a long-term, committed relationship can express and reinscribe closeness and companionship; it can help a person feel secure in their desirability, and it can create a safe environment for exploring new and potentially frightening interests. Sexual expression in such a context forces both parties to confront the realities of change over time: changing bodies, changing interests, changing responses. It also forces a patient, extended sharing of one's vulnerabilities, quirks, and even vices with another person; that person in turn engages in an extended sharing of their own vulnerabilities, quirks, and vices in a way that forces one to confront the fact that they have chosen to love someone who is imperfect. As Eugene Rogers notes, "the community from which one can't easily escape is morally risky. It tends to expose the worst in people. The hope is that the

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<sup>134</sup> See, for example, Stanley Hauerwas, "Sex in Public: How Adventurous Christians are Doing It" in *The Hauerwas Reader*, John Berkman and Michael G. Cartwright, eds. (Durham, NC: Duke University Press, 2001) 481-504; Dorff, *Love Your Neighbor and Yourself: A Jewish Approach to Modern Personal Ethics* (Philadelphia, PA: Jewish Publication Society, 2003). For a more secular example, see the massive *oeuvre* of Dr. Ruth Westheimer, including the chapter on "Courtship, Marriage, and Commitment" in *Sex for Dummies*, 3rd Edition (Hoboken, NJ: Wiley Publishing, 2007), 57-70.

community exposes the worst in people in order that the worst can be healed.”<sup>135</sup> Along similar lines, Stanley Hauerwas has noted that “marriage...is a heroic task that can be accomplished only by people who have developed the virtues and character necessary for such a task.”<sup>136</sup> The hope is that marriage itself becomes a school for developing such virtues and character, a school in whose curriculum marital sexuality plays a central part.

Non-marital partnered sex, however, potentially fulfills different goals than does sex within a marriage or a long-term, committed relationship. Sexual encounters with people other than a long-term partner can help one develop a sense of one’s sexual self. They can help one figure out what one likes and dislikes, what qualities one prefers in a partner, and the patterns of one’s sexual response with different partners. These encounters can also be schools for developing sexual and social virtue, in different ways and for different reasons than sex within long-term, committed relationships. Precisely because of their potentially shorter duration, more casual encounters can force direct, honest communication. Someone with whom one has not had a long-term sexual relationship will not be able to intuit one’s needs and desires; one must say what one wants in order to have a chance at getting it. Conversely, such encounters also offer practice at responding well to another person’s bluntly stated needs and desires. They can, in short, shape us into better partners—better, because we have had a chance to practice the sorts of messy bodily and social interactions that are part and parcel of being partners.<sup>137</sup>

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<sup>135</sup> Eugene Rogers, “Sanctified Unions: An argument for gay marriage”. *The Christian Century*, June 15 2004, 26-29 (at 28).

<sup>136</sup> Hauerwas, 499.

<sup>137</sup> This function is recognized by sex advice columnist Dan Savage’s “Campsite Rule,” which addresses relationships where there is a large age gap: “Older folks who mess around with younger folks have a special duty, [and] it is to leave ‘em in better shape than they found ‘em. You don’t make babies, you don’t give ‘em diseases, you don’t lead ‘em to believe that anything lasting is going to come of this. You answer

Sex that precedes the establishment of long-term, committed relationships can also help determine whether one is sexually compatible with one's partner. I do not wish to figure sexual compatibility as fixed, commodifying, or inappropriately selfish—all relationship involves compromise. However, it is important to recognize that some sexual preferences are fundamentally incompatible. I think many would agree, for example, that someone who is exclusively homosexual should not commit to a long-term sexual and romantic relationship with a member of the opposite sex. Similarly, I maintain that someone who is unable to sustain a monogamous relationship should not knowingly commit to someone who would prefer a monogamous relationship, nor should someone who is repelled by bondage knowingly commit to someone who is only sexually fulfilled when they are tied up on a regular basis. In many cases actual sexual encounters are the best way to figure out these points of compatibility, as well as finer, more subtle ones.

Despite not being partnered sex *per se*, masturbation, in addition to fulfilling goals for the individual who masturbates, can also work towards the ultimate success and satisfaction of partnered sex. For example, even people in committed relationships masturbate—whether because their partner is sexually unavailable at a given moment, because they want a different sort of sexual experience than their partner gives them, or as a means of waking themselves up or putting themselves to sleep. Masturbation can also provide one with critical information about one's own patterns of sexual response—information which, in turn, can be of significant import in establishing a sexually satisfying relationship with a partner. As Rebecca Alpert puts it, “solitary sex [can] lead one in the direction of understanding how achieving mutual sexual pleasure enhances the

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their questions, correct any misconceptions they may have about sex, show them where the clit is, make sure they know that birth control is their job too.” “Savage Love: Boys 2 Men,” June 16 2005, <http://www.thestranger.com/seattle/SavageLove?oid=21841> accessed June 10, 2015.

prospects of achieving these other goals as well, on the principle that self-love leads to love of others.”<sup>138</sup>

## V. Toward a Better Picture of the Risks and Benefits of Sexual Interaction

In this chapter, I have demonstrated why sexually transmitted infections are a matter of public concern, and I have described them in both historical and current contexts and in both biological and cultural terms. I have given an account of the social and behavioral factors that influence STI transmission, and I have given as accurate an account of sexual risk behavior as possible given the limitations of the available data. I have described the interventions, whether biomedical, behavioral, or social, that are most effective in arresting the transmission and mitigating the consequences of STIs. Finally, I have given at least some account of the benefits—biomedical, psychological, and social—of satisfying sexual interaction, and I have argued that a variety of kinds of sexual interaction can serve a variety of purposes in the lives of individuals and within communities.

All this means that sexuality is morally complex. Many factors inform sexual decision-making, and not all of those factors are immediately connected to sex. Furthermore, evaluating risk in sexual behavior is not as simple as saying, “less sex with fewer people is less risky.” This is true *if* the risk parameters are limited to questions of STI transmission and the like. However, if we also think about “loss of sexual satisfaction,” “potentially committing to a partner with whom one is not sexually

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<sup>138</sup> Rebecca T. Alpert, “Reconsidering Solitary Sex from a Jewish Perspective” in Ruttenberg, *The Passionate Torah*, 182-190 (at 189).

compatible,”<sup>139</sup> or “loss of opportunities to understand and develop myself as a sexual being” in terms of risks, then the calculus becomes more complicated than a simple evaluation of “short term pleasure versus long-term risk.” Sexual risks and benefits, in short, are deeply socially located and influenced, and they in turn influence broader social structures. Those of us who wish to arrest the spread of STIs would do well to understand this; if we fail to do so, I believe our efforts will be futile. We cannot hope to change people’s behavior if we do not appreciate the myriad and complex factors that influence their decision-making.

I have asserted in the introduction to this dissertation that sex is a species of social interaction rather than a *sui generis* category. Here, I begin to explore the implications of that assertion, implications that I continue to develop in the following chapters. For, if sex is not *sui generis*, neither is it monolithic; not all instances of sexual interaction have the same meaning, just as different instances of other social interactions have different meanings. I have argued that different kinds of sexual interactions with different partners (or with no partners at all) can fulfill different needs in a person’s life and condition a person towards different personal and social virtues. Were I speaking of any other sort of social interaction, we would take this claim for granted. We understand that our relationships with our parents play different roles in our lives than do those with our spouses, which in turn play different roles than our relationships with our friends. Furthermore, we would rightly reject the suggestion that we limit ourselves to only one of those types of relationship.

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<sup>139</sup> A situation which we might reasonably expect to be more likely to lead to classically risky sexual behavior down the road.

With sex, however, we have difficulty applying the same logic. For example, objections to “casual sex”—that is, sex that occurs in a short-term relationship—especially within Jewish discourse, are often framed in terms of condemning the instrumentalization of others. For example, in the May 19, 2015, episode of the liberal Orthodox sexuality podcast “The Joy of Text,” Rabbi Dov Linzer and sex therapist and educator Dr. BatSheva Marcus cite BT Nedarim 20b, which proscribes having sex, even within marriage while drunk or angry and inveighs against “[drinking] from one goblet and [thinking] of another.” They argue that, even bracketing *halakhic* prohibitions against premarital sex, partnered sexual expression ought, on a purely ethical level, to be limited to long-term, committed, monogamous relationships on the grounds that sex should only occur in the context of genuine care and mutual understanding:

*Rabbi Linzer:* What’s not okay is not the type of acts that you do, but how you relate to the other person—are you using the person as a way for your own type of, you know, sexual gratification, just as a means towards that, or are you actually connecting and relating to the other person? ... Sex has to come in the context of caring about the other person, and connecting to the other person, not using the other person. And that does happen a lot—I’m sure it happens *in* marriage, but I’m sure it happens a lot outside of marriage, that a lot of those non-committed relationships, by their very nature, one party might, you know, be having a very different understanding of that relationship, and really using the other person, not really committed or caring, in the sexual act and in the broader context about that person—and it’s partly about caring about, are they getting gratification and satisfaction during the act, but it’s also about that sense of emotional connection to the other person.<sup>140</sup>

Or, if we prefer the language of Jewish philosophy, we might note Daniel Landes’ claim that Arthur Waskow’s appeal<sup>141</sup> to “the ‘fluidity’ of ‘sensual pleasure and loving companionship’ [represents] the triumph of the 1980s I/It zeitgeist. The other in a

<sup>140</sup> Jewish Public Media, “The Joy of Text”: “The Premarital Episode,” May 19, 2015, <http://jpmmedia.co/what-happens-outside-of-marr/>, accessed March 16, 2017. Quotation begins at 33:50.

<sup>141</sup> In “Eden for Grown-Ups: Down-to-Earth Sexuality” in *Jewish Ethics and Morality: A Reader*, ed. Elliot N. Dorff and Louis E. Newman (Oxford, UK: Oxford University Press, 1995), 289-299.



relationship is reduced to an object of desire only to be discarded as one's own 'life pattern' mysteriously changes."<sup>142</sup> But there is nothing about "casual" sex *per se* that precludes genuine respect for one's partner as a human, genuine affection for one's partner, or clear and open communication before, during, and after the act. Indeed, if these things occur, even in short-term relationships, the encounter is anything *but* casual. Conversely, there is no guarantee that these desirable things will characterize a long-term, monogamous relationship.

Furthermore, ethicists, especially religious ethicists, do not generally assume that instrumental, disrespectful, or non-communicative treatment of short-term acquaintances will inevitably occur in other social circumstances. We do not assume, for example, that it is acceptable to treat a barista poorly just because they are not one's longtime friend. Of course, we recognize that some *will* treat baristas poorly, and we may even acknowledge that a large part of the reason some people *do* treat baristas poorly is that they have no long-term relationship with them nor a sense of personal accountability to them. We do not, however, address that fact by saying that it is only acceptable to purchase coffee from people with whom we have long-term, intimate relationships. Rather, we expect people to recognize that treating baristas poorly is wrong, and for them to overcome the temptation to excuse callous disregard with a claim of relative unfamiliarity.

Why is it, then, that sexual ethics—and, for the purposes of my project, Jewish sexual ethics in particular—has neglected these social parallels? To understand this, we must make a more thorough examination of the ways Jewish tradition has engaged and continues to engage questions of sex and sexuality, and the ways it has read and currently

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<sup>142</sup> Arthur Waskow and Daniel Landes, "Down To Earth Judaism: Sexuality: A Discussion" in *Jewish Explorations of Sexuality*, ed. Jonathan Magonet (New York: Berghahn Books, 1995), 221-238 (at 232).

reads the textual sources for that engagement. For that examination, we turn to the next chapter.

## Chapter 2

### Jewish Sexual Ethics as it Stands Now, and What it is Missing

In a 1993 article, Alan Unterman, writing on Judaism and homosexuality from an Orthodox perspective, characterized “traditionalist Jewish space [as] claustrophobic for homosexuals, and gay space [as] agoraphobic for Jewish traditionalists.”<sup>143</sup> Unterman’s statement is a fair summation of the condition of Jewish ethical discourse on sexuality in general, and his terminology of “agoraphobia” vs. “claustrophobia” is especially helpful. Jewish ethics has long tended to function in terms of limits. The set of actions an observant Jew may take is bounded by divine commandments: straightforwardly so where *mitzvot lo’taaseh*—negative commandments, in which one is explicitly instructed *not* to do a given thing—are concerned, but also by *mitzvot aseh*—positive commandments—since being required to take a particular action precludes alternatives to that action (for example, strictly observing the positive commandment to keep the Sabbath precludes going to the racetrack on Saturday afternoon). Such boundaries serve to fix the universe of possible occurrences in the observant world, and they further serve to delineate a relatively clear picture of what Jewish life looks like.

Sexual variation troubles these boundaries. If acts within the well-ordered Jewish life are done at particular ordained times, with particular people, and with particular intention, the anarchy, variety, and strangeness of human sexual desire present a significant challenge to the project of keeping actions within these particular categories. In this vein, contemporary Jewish ethics has largely accepted that sexuality is a more or

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<sup>143</sup> Alan Unterman, “Judaism and Homosexuality: Some Orthodox Perspectives” in Magonet, 67-74 (at 67).

less positive thing. It has accepted that it is, for most people, a need that, while not as essential as basics like food, water, warmth, sanitation, and shelter, is nevertheless very deeply compelling and has a direct and significant effect on their happiness, health, and psychological and moral functioning. What it has not worked out is a way to rationally treat the fundamentally *non-rational* character of sexual particulars.

One might interject, at this point, that the proper way to treat these non-rational particulars is exactly to fully subject them to a rational order. If sexual desire is volatile and unpredictable in potentially dangerous ways, and if the mark of a well-ordered Jewish life is submission to commandments that bound every part of one's life, then the well-ordered Jewish life ought to obviate much of that volatility by simply precluding many of its routes of expression. While this might prove, to borrow Unterman's language, claustrophobic for those whose default forms of sexual expression fall outside these boundaries, the observance of commandments is rarely an entirely comfortable or easy undertaking, and it does not follow from the existence of stress or discomfort that the disciplinary enterprise is therefore not worthwhile.

What this chooses to ignore, however, is the complexity of sexual needs, desires, and decision-making. Prohibiting relatively riskier routes of sexual expression does *not* eliminate sexual risk within acceptable outlets, nor, given the strength of sexual desires for many people, does it actually eliminate the prohibited activities—though it *does* often remove them from respectable discourse and, thus, from the possibility of more nuanced and effective modes of regulation. Furthermore, there is a difference between worthwhile difficulty and unlivable strictures, and strictures that preclude a person from the possibility of sexual fulfillment are, quite often, unlivable.

Boundaries, when they work properly, help one live a well-ordered life. When they fail, they do so either by failing to provide adequate structure and order to one's personal, social, and spiritual worlds, or by being so rigid that the life one lives within them is inimical to one's flourishing. Boundaries, then, must find an optimal balance between rigidity and flexibility. Jewish law and Jewish practical ethics seek, at a basic level, to provide properly tempered boundaries such that the Jew can live a well-ordered—and holy—life. But in the realm of sexuality, they largely do not succeed.

This chapter outlines the state of Jewish conversation on sexual ethics, both academic and religious. Section one offers a very brief overview of the various ways the classic texts and commentaries within the Jewish tradition have treated sex and sexuality, with a particular focus on *halakhic* discourse around sexuality. Section two gives a more detailed account of the current state of discourse within Judaism on sexuality. Finally, section three addresses three main areas: first, given the tradition's precedent and the current state of discussion, what is it actually possible for an ethicist to do in the arena of sexual ethics? Second, what aspects of sexual ethics are shortchanged by the tradition as an entirety and specifically in the academic treatment of Jewish sexual ethics? Finally, what methodological and hermeneutical techniques and assumptions are needed in order to correct these omissions?

### I. A (Very) Brief History of Sex in the Jewish Tradition

Much has been written on the treatment of sex and sexuality within Jewish tradition. What is clear from this body of scholarship is that the tradition is complex,

varied, and even contradictory in its understanding of sexuality.<sup>144</sup> There exist significant streams of thought that might be characterized as affirming the body and sexuality, especially relative to other contemporary views; however, there exist equally significant streams of thought that evince a strong and notable anxiety or caution about sexuality.

### *1. Sex in the Hebrew Bible: Lineage, Purity, Covenant—and Pleasure?*

Broadly speaking, sex appears in the Hebrew Bible in five contexts: legislation regarding permitted and forbidden sexual behaviors, prophetic analogies for appropriate and inappropriate religious behavior, narratives in which sex is important to the plot (for example, establishing lineage, precipitating a conflict, or establishing a key character trait), general moral instruction (such as in Proverbs), and, in the idiosyncratic case of Song of Songs, apparently celebrated for its own sake.

Sexual legislation in the Hebrew Bible tends largely to be concerned with maintaining ritual purity or maintaining particular structures of family, lineage, and identity. Thus, the rules in Leviticus 15 governing purification after emission of semen, menstruation, or another genital discharge are all meant to stop the transmission of ritual impurity from person to person or from person to object. I discuss the particulars of ritual purity in great detail in chapter three; for now, it is important to note that the contraction of ritual impurity does not in itself constitute a transgression. It is expected that even the most righteous person will encounter impurity in the course of day-to-day life. It is only when a person who has become impure fails to take the necessary steps to arrest its

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<sup>144</sup> My account of the history here roughly follows those of Daniel Boyarin, *Carnal Israel: Reading Sex in Talmudic Culture* (Berkeley, CA: University of California Press, 1993), Michael Satlow, *Tasting The Dish: Rabbinic Rhetorics of Sexuality* (Providence, RI: Brown Judaic Studies, 1995), and David Biale, *Eros and the Jews: From Biblical Israel to Contemporary America* (Berkeley, CA: University of California Press, 1997).

transmission or comes in contact with the sanctuary while impure that ritual impurity becomes a moral issue.<sup>145</sup>

The catalogues of forbidden sexual relations in Leviticus 18 and Leviticus 20 are about maintaining boundaries. This works on several levels. First, the regulations serve to clarify the boundary between the Israelites and other peoples. The catalogue in Leviticus 18 is prefaced by a general injunction against doing “the deeds of the land of Egypt, where you dwelt,” and “the land of Canaan, whence I will bring you” (Lev. 18:3). In contrast to the people among whom they previously dwelt and among whom they will subsequently dwell, the Israelites are to distinguish themselves by performing God’s specific laws: “You shall perform *my* ordinances, and keep *my* statutes, to conduct yourselves by them; *I* am Adonai, your God” (Lev. 18:3). On this level, the fact that there *are* specific restrictions seems just as important, if not more so, than the particular content of those restrictions. Moving into that particular content, however, we see another layer of boundaries develop: the rules about who one may or may not have sex with serve to establish clear categories of people and of appropriate relations to members of those classes, and to ensure that the categories are maintained down familial lines. Similarly, the ritual purity regulations serve to establish clear boundaries between holy and secular spaces. Thus, the external boundary—between the Israelites and other peoples—depends on the maintenance of internal boundaries within Israelite material and social space.

Sexual tropes are often pivotal in Biblical narratives precisely because of their role in defining boundaries and cementing lineages and identities. Thus, for example, it is critical for Tamar, in Genesis 38, to find a legitimate way to have sex with (and be

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<sup>145</sup> See Jonathan Klawans, *Impurity and Sin in Ancient Judaism* (Oxford, UK: Oxford University Press, 2000), 21-42.

impregnated by) Judah so that she can establish her place in his familial dynasty—and so that the dynasty can be perpetuated on legitimate and upright terms. When, in Numbers 25, Zimri flaunts his liaison with the Midianite princess Cozbi in front of the entire Israelite camp, he breaks both spatial and ethnic boundaries. And when King David has sex with<sup>146</sup> Bathsheba and kills her husband, Uriah, in order to marry her, it becomes emblematic of the ways he has strayed from the boundaries of his covenant with God and his people. Conversely, when a protagonist breaks a sexual rule without negative consequences—or even with positive results—this may serve to demonstrate that the protagonist or their situation are out-of-the-ordinary. Leviticus forbids marrying one's half-sister (Lev. 18:11), as well as being married to two sisters at the same time (Lev. 18:18). Yet Abraham's wife, Sarah, is his half-sister, and Jacob marries the sisters Leah and Rachel; all of these marriages produce pivotal Israelite forbears, and, even more critically (especially since the relationships in Genesis predate the giving of the Law), the subsequent interpretive tradition upholds them as model relationships.

Sex in the prophetic literature is largely a metaphor for inappropriate covenantal behavior. This is perhaps most clearly expressed in the book of Hosea, wherein the eponymous prophet receives direct instruction from God to “go, and get yourself a wife of harlotry (*znunim*), and children of harlotry—for the land has committed great harlotry (*zanoh tizneh*), and whored away from Adonai.” Repeatedly in the prophetic books, the covenant between God and Israel is figured as a marriage contract, with Israel, which has fallen into idolatry, played as the adulterous wife, and God figured as the cuckolded husband. This extended metaphor can become very explicit: in Ezekiel 23, the figure of Oholibah, who is directly named as an analogue to Jerusalem, is said to have engaged in

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<sup>146</sup> Or, quite possibly, rapes her.



concubinage with the Egyptians (among other idolatrous nations), “whose loins are like the loins of asses, and whose seed is like the seed of horses” (Ezek. 23:20). Each time, the formula is similar: because the wife (Israel) has proven sexually (ritually) unfaithful, the husband will withdraw his physical protection and leave the wife open to attacks from her lovers (other nations) unless she returns and remains faithful to him.

Sexual rhetoric in the book of Proverbs centers around the dangers of the “strange woman.” The strange woman transgresses boundaries: “she is riotous and rebellious; her feet do not stay in her own house” (7:11).<sup>147</sup> She also causes others to transgress boundaries: harlots and alien women are “deep ditches” and “narrow pits” (23:27) that cause men to fall from their proper and intended paths—to break the boundary of the earth’s surface and fall, both literally and figuratively, into the wrong holes. The strange woman is a trap who lies in wait for unsuspecting male prey, who “catch[es] him and kiss[es] him” (7:13) in public and lures him home—across the boundary of another man’s house—to her bed. But the man is undone by his own actions. Though he penetrates two boundaries he ought not—another man’s doorway and another man’s wife—the affair is his ruin, and it is he who will be penetrated in the end: “he goes directly after her, like an ox to slaughter he goes...until an arrow pierces through his liver” (7:22-23).

Boundaries also figure into the Song of Songs in interesting ways.<sup>148</sup> The sealed garden, which only the beloved can enter, is a recurring image. And like the strange woman in Proverbs, the Shulamite also goes wandering about the city, looking for her beloved. Here, however, the perspective is hers. Two episodes of searching demonstrate that her free movement is not appreciated by all. In chapter three, despite being briefly

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<sup>147</sup> “Feet” in the Bible are often a double entendre, referring to the genitals.

<sup>148</sup> My thanks to Ashleigh Elser for this observation.

waylaid by the watchmen on the city's walls—the guardians of the city's boundary—she finds her beloved, and again, like the strange woman, brings him back to a house that is not his—here, specifically, to her mother's house. In chapter five, however, things do not go so smoothly. This episode comes directly after one of the most intensely erotic moments in the Song, where the beloved approaches the Shulamite's room, asking her to open the door:

2. I slept, but my heart was awake—  
     Listen! My beloved is knocking!  
 “Open, my sister, my friend,  
     My dove, my flawless one!  
 “My head is drenched with dew,  
     My locks with the drops of night.”

She draws the moment out, to great erotic effect:

3. I had shed my clothes—should I dress again?  
     I had washed my feet—should I now soil them?  
 4. My beloved's hand reached for the opening,  
     and on the inside, I moaned for him.  
 5. I arose to open to my beloved,  
     My hands dripping with myrrh,  
     My fingers flowing with myrrh  
     On the bolt-handles.

By the time she finally breaches the boundary and opens the door, however, the beloved has absconded into the night:

6. I opened to my beloved,  
     but he had turned away and gone,  
     When he spoke, I felt like I would die!  
 I sought him, but I couldn't find him,  
     I called to him, but he didn't answer me.

She seeks her beloved in the city at night, calling his name. As in chapter three, she is waylaid by the watchmen on the city's walls. But this time, she is not so lucky:

7. The watchmen—they found *me*,  
     as they went about the city.  
 They beat me, they bruised me,  
     they snatched my shawl from off me,  
     Those watchmen of the walls.

The beating she experiences is disturbing and traumatic. What is most noteworthy, however, is that she seems not to have been deterred. Her joy in her lover and in their bodies seems strong enough to survive the violent enforcement of a restrictive boundary; indeed, she is not even shamed into keeping that joy silent:

8. Swear to me, O daughters of Jerusalem,  
     If you find my beloved,  
     here's what you'll tell him:  
     That I am sick with love!

There remains spirited debate among biblical scholars as to the Song of Songs' provenance and as to how proto-feminist or affirming of female sexuality it truly is.<sup>149</sup> Whatever else it is, though, it is idiosyncratic among biblical texts. It is the only example of a first-person female perspective in the Hebrew Bible, and it is a perspective that seems to have at least some form of a positive experience of its own sexual pleasure. There is no indication that the lovers are married. It is also unclear whether penis-in-vagina intercourse actually takes place. Since the lovers' marital status is unclear, some may read this as an affirmation of the restriction of sexual intimacy to the bounds of marriage. However, given the intense eroticism of the text, and the clear joy both parties experience from this erotic exchange, one might also read this as an acknowledgment that

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<sup>149</sup> Cf., among others, Renita J. Weems, "Song of Songs" in *Women's Bible Commentary: Expanded Edition*, Carol A. Newsom and Sharon H. Ringe, eds. (Louisville, KY: Westminster John Knox Press, 1998), 164-168; J. Cheryl Exum, "Ten Things Every Feminist Should Know about the Song of Songs," in *The Song of Songs: A Feminist Companion to the Bible*, 2nd. series, Athalya Brenner and Carole R. Fontaine, eds. (Sheffield, UK: Sheffield Academic Press, 2000), 24-35; Carey Ellen Walsh, *Exquisite Desire: Religion, the Erotic, and the Song of Songs* (Minneapolis, MN: Fortress Press, 2000) and Donald C. Polaski, "'What Will Ye See in the Shulammitte?' Women, Power, and Panopticism in the Song of Songs," *Biblical Interpretation* 5 (1997), 64-81, for a sense of the contours of this debate.

sexual pleasure *beyond* penis-in-vagina intercourse is both real and legitimate. Regardless of the particular acts that do or do not actually occur, however, the Song of Songs is perhaps most noteworthy for the following reason: it is the only place in the Hebrew Bible where the *experience* of sex, and not its structural, political, covenantal, or familial consequences, is placed at the center of the story.

## 2. Sex in Rabbinic Sources: Ambivalence, Self-Mastery, and Bawdy Humor

It is in rabbinic sources that one sees a more starkly binary view of sex begin to take shape. The view of sex and sexuality we find in these sources is, in a word, ambivalent. On the one hand, there are voices that seem quite affirming of sex and sexuality, especially by comparison to many dominant streams within Christianity. As Daniel Boyarin has argued, “rabbinic Judaism invested significance in the body which in [Greek-speaking Jewish formations, including much of Christianity] was invested in the soul...Sexuality is accordingly not just a subheading under ethics but situated at the core of alternate individual and collective self-understandings.”<sup>150</sup> On the other hand, there is an equally strong sense in many sources that seems to evince anxiety and caution about sex and sexual desire, particularly as expressed or aroused by women and other marginalized actors.<sup>151</sup>

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<sup>150</sup> Boyarin, *Carnal Israel*, 5-6.

<sup>151</sup> Based on a source-critical reading, Michael Satlow traces the overall ambivalence toward sexuality of the rabbinic corpus to a difference between Palestinian and Babylonian sources (*Tasting the Dish*, especially chapters 6, 7, and 8). Boyarin, by contrast, sees rabbinic anthropology as deeply and fundamentally corporeal; to the extent that when he recognizes ascetic threads in rabbinic literature, he ascribes them to Hellenic influence (*Carnal Israel*, 35)—which, along with Satlow, he sees as more pronounced within Palestinian source material. But, unlike Satlow, he limits this tendency to Tannaitic Palestinian sources (idem, 47) whereas Satlow maintains that significant differences along these lines endure between Palestinian and Babylonian Amoraic material, as well.

On the first, sexually affirming view, sex is important, even holy, both because it is integral to procreation *and* because it is pleasurable.<sup>152</sup> Thus, for example, a husband has a sexual obligation, or *onah*, to his wife; failure to perform this is considered legitimate grounds for divorce. This obligation is understood as a biblical commandment, based on Exodus 21:10-11: “If he takes himself another wife, he shall not diminish [his first wife’s] food, clothing, or sexual rights.”<sup>153</sup> If he does not do these three things for her, she shall go freely, without payment.” Furthermore, husbands owe their wives a specific schedule of sex, the particulars of which are dependent on his occupation. According to Mishnah Ketubot 5:6, “one who is at leisure [owes his wife sex] daily; laborers, twice weekly; donkey drivers, once weekly; camel drivers, once every thirty days; sailors, once every six months.” The same Mishnah forbids a husband from taking a vow to abstain from sex with his wife that lasts longer than a week.<sup>154</sup> The Talmudim expand discussion of this issue in different directions. The Yerushalmi takes up the question of occupation, asking whether it is the length of time one spends away from home in one’s work or the difficulty of the work that conditions the frequency of a man’s obligation to his wife, while the Bavli focuses on the obligations of scholars and the proper balance between devotion to one’s wife and devotion to Torah.<sup>155</sup> Interestingly, wives do not have the same sexual obligations toward their husbands; nevertheless, the *moredet*, the “rebellious

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<sup>152</sup> Michael Satlow argues that the recognition of sexual pleasure, particularly female sexual pleasure, as a good of sex, is nearly unique to Babylonian source material; Palestinian source material, conversely, tends to discuss the goods of sex almost exclusively in terms of procreation. See *Tasting the Dish: Rabbinic Rhetorics of Sexuality*, pp. 290-294.

<sup>153</sup> The Hebrew word *onah*, translated here as “sexual rights,” literally means “obligation,” but the rabbinic tradition has generally interpreted it specifically to refer to sexual obligations. See Satlow, 265-8. Also see B. Yevamot 62b: “R. Yehoshua b. Levi said, any man who knows that his wife fears heaven, and he does not visit her [euphemistic here for sexual relations] is called a sinner, as it is said, ‘you shall know that all is well in your tent, when you visit your dwelling [understood here as including your wife,] you shall not sin’ (Job 5:24).”

<sup>154</sup> Also see Mekhilta Mishpatim 3.

<sup>155</sup> Y. Ketubot 5:8 and B. Ketubot 61b-62b, respectively. See Satlow’s discussion of these *sugyot*, 269-278.

wife” who refuses sex to her husband, incurs various penalties. M. Ketubot 5:7 states that a *moredet* suffers a reduction in her ketubah money; the Talmudim understand the *moredet* specifically as withholding sex, among other things, and expand on the economic penalties she incurs.<sup>156</sup>

The husband’s obligation to engage in regular sexual relations with his wife seems to signal an awareness of the importance of sexual fulfillment in maintaining a stable home, an awareness that crops up in other sources, as well. In Bavli Pesachim 72b, Raba states that “a man is obligated to make his wife happy through a *davar mitzvah*” [literally, a thing that is commanded; understood as sex within the context of the discussion].<sup>157</sup> And B. Shabbat 152a offers a poignant reminder of the consequences of sexual dysfunction within a relationship: R. Shimon b. Halaftah laments his impotence by declaring that “the maker of peace at home is idle.”<sup>158</sup> Along these lines, a number of sources are quite lenient regarding the particular sexual acts that may occur within the context of marital sexuality. Perhaps best known is the passage from B. Nedarim 20b, which states that “anything a man wants to do with his wife, he does,” making an analogy to kosher meat: as long as the meat comes from a kosher source, one may prepare it and eat it in any (kosher) manner that one wishes. The sage then relates two similar stories; in each, a woman comes before a Rabbi and says, “Rabbi, I set a table for him, and he turned it over!” In the first story, Rabbi Yehudi Ha-Nasi responds, “My daughter, Torah has permitted you to him! What, then, can I do for you?” In the second,

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<sup>156</sup> See Y. Ketubot 5:10 and B. Ketubot 64b.

<sup>157</sup> The same phrase is also found in a baraita in B. Bava Batra 10b. The association between marital sex and female happiness is also found in B. Moed Katan 8b and in the wedding blessings in B. Ketubot 8a.

<sup>158</sup> I am grateful to Rabbi Jason Rubenstein for bringing this text to my attention.

Rav responds, referencing the sage's initial analogy to meat or fish, "How is this different from a fish?"

Even non-marital sexuality, in some texts, is treated more matter-of-factly than one might expect. While adultery remains biblically prohibited and marriage remains the sole officially sanctioned context for sexual activity, most other forms of non-marital sexuality fall into the intermediate category of *bi'ilat znut*, literally, "promiscuous intercourse," a category that also includes some non-procreative activities. Roughly, where pre-marital sex is concerned, *bi'ilat znut* refers to that set of sexual acts that make a woman ineligible to marry a priest.<sup>159</sup> In Sifra Emor 1:7, R. Eliezer, regarding the stipulation in Leviticus 21:7 that a priest must not marry an *isha zonah*, a promiscuous woman, argues that the term applies to "even a single man who has intercourse with a single woman not for the sake of marriage." Both Talmudim quote this baraita, but while the Yerushalmi treats it as an authoritative tannaitic source, the Bavli does not reference its tannaitic origin. Further, as Satlow puts it, "the dictum is almost always cited in the Bavli as counter-normative, and is frequently directly refuted. Pre-marital sex *per se* does not, in the Bavli, qualify as *bi'ilat znut*."<sup>160</sup>

Despite an overriding rhetoric of self-mastery, modesty, and holiness of thought, these texts can also display a sense of sexual humor that is, at times, downright bawdy. The "Fat Rabbis" sugya in B. Bava Metzia 84a features a story in which a woman, seeing the immense bulk of R. Ishmael b. R. Jose and R. Eleazar b. R. Simeon, asserts that they could not have fathered their own children. Interpreting her words as a comment

<sup>159</sup> As explicated in *Sifra Qodashim* 7.

<sup>160</sup> Satlow, 121-2. See Y. Yevamot 6:5, 7:5, 13:1; B. Yevamot 59b, 61b, 76a, B. Sanhedrin 51a, B. Temurah 29b, 30a.

about their correspondingly large penises, they respond, “[Our wives’] are bigger than ours!” The sugya then offers a comparison of the penis sizes of various sages:

R. Yohanan said, the penis of R. Ishmael b. R. Yose was like a bottle 9 *kabs* in volume. R. Papa said, the penis of R. Yohanan was like a bottle of five *kabs*—some say, three *kabs*. As for R. Papa, his penis was like the raffia baskets of Harpania.<sup>161</sup>

On the second, sexually cautious view, however, sex, especially sexual temptation as embodied by women, is a source of anxiety and a thing to be eschewed, or at best very tightly controlled. While, as Satlow puts it, “both men and women were thought to be sexually desirous, [only] men...were thought capable of controlling this overwhelming desire.”<sup>162</sup> Thus, for example, M. Kiddushin 4:12 and 4:14 enjoin men against being secluded with women; these restrictions are also found in the Tosefta and are elaborated in the Talmudim.<sup>163</sup> Stories of sages who are confronted by sexual temptation are common throughout the rabbinic literature. For example, Avot de Rabbi Natan A16 recounts a series of stories in which sages, while imprisoned by Rome, are sent beautiful women by their captors. In one striking episode, when Rabbi Akiva—who, when sent two beautiful women, is reported to have “[sat] between them, spit, and not turn[ed] to them”—is questioned as to why he did not have sex with the women, he replies, “What could I do? Their odor came over me from the meat of carrion, torn animals, and creeping things.”<sup>164</sup>

<sup>161</sup> I follow Boyarin’s interpretation of this sugya. See *Carnal Israel*, 203-4.

<sup>162</sup> Satlow, 158.

<sup>163</sup> See T. Kiddushin 5:9-10 and 5:14, Y. Sotah 1:3, B. Kiddushin 80b-81b.

<sup>164</sup> *Avot de Rabbi Natan* A16:63. Jonathan Wyn Schofer, whose translation I borrow here, explicates this text in great detail in *The Making of a Sage: A Study in Rabbinic Ethics* (Madison, WI: University of Wisconsin Press, 2005), 106-111. Another iconic story of a holy man resisting sexual temptation is found in *Sifre Numbers* 115, as well as in B. Menachot 44a. Here, when he is about to engage in a long-planned dalliance with a famous prostitute, his *tzitzit* (ritual fringes that hang at the waist) rise up and slap him in the face, causing him to cease and desist. (It seems implied that the fringes take the place of the erection he



Even in its preferred context—in a marriage to a righteous Jewish woman—sexual expression is, on this second view, ideally limited and under strict control. Thus, for example, a story in B. Nedarim 20a is what Daniel Boyarin calls a “locus classicus for ascetic sexual practices:”<sup>165</sup>

They asked Imma Shalom,<sup>166</sup> the wife of Rabbi Eliezer, “Why do you have such beautiful children? She said to them, “He does not have intercourse with me at the beginning of the night, nor at the end of the night, but at midnight, and when he has intercourse with me, he unveils an inch and veils it again, and appears as if he was driven by a demon.”

The appeal to the eugenic value of sexual asceticism is found in several places in rabbinic literature. It was commonly accepted in the ancient world that the circumstances of a child’s conception would influence their physical formation, and the rabbinic world was no exception.<sup>167</sup> Directly prior to the dialogue cited above, R. Yohanan b. Dahavei argues that congenital birth defects come as a result of improper marital behavior. B. Pesachim 112b includes a statement that having sex by candlelight will result in epileptic children. Indeed, both the Bavli and the Yerushalmi forbid sex during the day or by candlelight on grounds of modesty as well as those of eugenics.<sup>168</sup>

Here, to the extent that sex is desirable, it is because of its procreative value. Thus, texts that reflect this second view tend, for example, to connect wives’ sexual rights not to sexual pleasure but to the joy surrounding the birth of sons.<sup>169</sup> There is also a significant concern with male self-arousal, one that in later texts becomes explicitly

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was, presumably, expecting.) The prostitute is so awed by his control that she eventually converts to Judaism and marries the holy man, who is now able to enjoy her legitimately.

<sup>165</sup> Boyarin, *Carnal Israel*, 47.

<sup>166</sup> Lit. “Mother Peace”.

<sup>167</sup> For more on this, see Satlow, 302-314, and especially Rachel Neis, *The Sense of Sight in Rabbinic Culture: Jewish Ways of Seeing in Late Antiquity* (Cambridge, UK: Cambridge University Press, 2013).

<sup>168</sup> B. Niddah 16b-17a, Y. Niddah 2:3,

<sup>169</sup> See B. Shabbat 30a, Y. Ketubot 5:8, B. Moed Qatan 8b, Y. Moed Qatan 1:7.

connected to a concern with “wasted seed”—in itself understood as a biblical prohibition. M. Niddah 2:1 states that “every hand that makes frequent examination [of the genitals, for possibly impure discharge]: in a woman, it is praiseworthy, but in a man it should be cut off.” The concern here seems to be that checking for discharge will tempt one into masturbation—and note the similarity to the rule about secluding oneself with women, in that one must avoid activities peripheral to the thing that is actually forbidden so that one’s desire does not overcome one. The Bavli on this Mishnah goes into a long, multi-part excursus in which it warns against touching the penis even while urinating, inveighs in strong terms against the wasteful emission of semen, and unequivocally condemns deliberate masturbation: for example, “R. Eliezer said, why is it written, ‘your hands are full of blood?’ (Isaiah 1:15) These are they who have illicit intercourse with their hands.”<sup>170</sup>

These two streams can be found within the same textual unit. For example, B. Kiddushin 81b tells the story of R. Hiyya bar Ashi, whose fight in the name of holiness against sexual temptation creates distress for his wife:

Rav Hiyya bar Ashi had a habit: every time he fell on his face, he would say, “May the Merciful One save me from the Evil Inclination.” One day his wife heard him. She said, “Since it has been several years that he has separated himself from me [sexually], what is the reason that he said this?” One day he was studying in his garden. She dressed herself up [and] passed repeatedly before him. He said to her, “Who are you?” She said, “I am Heruta and have just returned today.” He propositioned her. She said, “Bring me that pomegranate that is on the top branch.” He leapt up, and then brought it to her.

When he came to his house, his wife was lighting the oven. He went to it and sat inside it. She said, “What is this?” He said, “What happened was thus and thus.” She said to him, “It was I.” [He paid no attention to her, until she brought him signs.] He said to her, “I

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<sup>170</sup> B. Niddah 13a-b. Satlow’s excursus on this sugya’s redactional structure and the exact point at which the concern over wasted seed was linked to the Mishnah’s prohibition on self-arousal is worth perusing (pp. 246-262).

nonetheless intended something forbidden.” [All the days of his life that same righteous man fasted until he died of that very death.]<sup>171</sup>

Rav Hiyya bar Ashi is clearly framed here as a deeply righteous man, and the prayer practice that introduces the text is structured along the same lines as sage stories that convey the particular sage’s practice as a positive example. Yet in the next line, we hear from his wife, and learn that he has not had sex with her in several years—a situation which, as we may deduce from her subsequent actions, makes her unhappy. When she overhears his prayers, she concludes that Rav Hiyya’s situation is not like that of R. Shimon b. Halaftah’s in Shabbat 152b—the “maker of peace in the home” is not idle, and her husband’s “evil inclination” has not gone away. She disguises herself and offers her husband the moniker “Heruta”—which, as Gail Labovitz notes, shares a root with *herut*, or freedom<sup>172</sup>—successfully enticing him to have sex with her as she could not when presenting as his wife. But even after she later reveals the ruse to her husband, explaining that his actions were entirely licit, he is overcome with guilt at his failure to overcome temptation—a temptation, evidently, that he feared enough to desist even from the sexual activities in which he was not only allowed, but actually commanded, to engage. He responds with even greater physical self-abnegation, eventually fasting to the point that he dies of starvation. Here, Hiyya’s asceticism in the name of avoiding temptation and his failure to attend to his wife’s sexual needs are juxtaposed, and there is no easy resolution.

Despite the ambivalent view of sex and sexuality we find in the rabbinic corpus, however, there are some constants. First, whether a given text tends toward an affirmation of sexuality or an anxiety about it, sexual situations, in almost all cases, are

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<sup>171</sup> I borrow Gail Labovitz’s translation, as used in “Heruta’s Ruse” in Ruttenberg, *The Passionate Torah*, 234. The bracketed lines do not appear in some manuscripts of the Bavli.

<sup>172</sup> Labovitz, 238.

opportunities for the cultivation of discipline, piety, or holiness. Sex in its proper, marital context is an opportunity to fulfill mitzvot, to establish a well-ordered home and produce children to bring up in piety, and to shape one's desires in a holy direction. Illicit sexual temptation, conversely, is an opportunity to redirect one's mind to Torah, to master base physical urges, and to reaffirm one's commitment to mitzvot. Second, even where sexual variation is acknowledged or even treated leniently, the ideal context for sexual expression remains within a Jewish marriage, and the ideal and defining expression of sexuality is penis-in-vagina (PIV) intercourse, with procreative intent. Finally, as with the rabbinic corpus in general, rabbinic discourse on sexuality is conceived and redacted by men, for men, and about men. Women are the focus of this discourse only inasmuch as they present interesting problems for discussion, whether those problems be textual or empirical. Their presence is auxiliary.

### *3. Medieval and Early Modern Sources: Systematizing Law, Extending Control, Evidence of Resistance*

Sexual desire in medieval legal sources tends to be seen as dangerous and problematic, even as its inevitability and, indeed, necessity are recognized. Many of the Talmudic positions that are more anxious about sexuality are emphasized over and against their more relaxed and affirming counterparts in the legal writings of the period. Individual rabbinic rulings codified or strengthened various rabbinic restrictions, and legal codes—most notably, Moses Maimonides' 12<sup>th</sup>-century *Mishnah Torah*, Judah ben Samuel of Regensburg's *Sefer Hasidim* (late 12<sup>th</sup>/early 13<sup>th</sup>-century), and Jacob ben Asher's 14<sup>th</sup>-century *Arba'ah Turim*, or *Tur*, which became the basis for R. Yosef Karo's

authoritative early modern legal code, the *Shulchan Arukh* (1563)—made these restrictions broadly normative for generations to come.

Individual rulings tended to attempt to standardize sexual practice, often in restrictive directions. In the notable case of Rabbeinu Gershom's *takanah* (rabbinic legislation) against polygyny at the turn of the 11<sup>th</sup> century, this directly forbade an act that the Talmud clearly permitted. Legal codes tended to further normativize the tradition's more anxious voices. The *Mishnah Torah*, for example, admits that all sexual acts are permitted within marriage, "so long as he does not emit semen in vain." Within the same stipulation, however, it cautions that "it is nevertheless a matter of piety for a man not to turn his head to frivolity in this, but to sanctify himself at the time he has sexual relations...he should not stray from the ways of the world, for this act is only for the sake of procreation."<sup>173</sup> The *Tur*, and subsequently the *Shulchan Arukh* codify and extend the prohibitions on being alone with women, or even looking at them, for fear of arousing lustful intentions. One memorable passage states that "even if one gazed at a woman's little finger with the intent to have pleasure from it, it is as though he had gazed at her genitals."<sup>174</sup>

This is not to say that the more affirming voices from rabbinic literature are not also preserved in the legal codes. They are: the *Tur* and the *Shulchan Arukh*, for example, preserve the marital obligation, including its frequency, depending on profession. The *Tur* states that one who works at home is obligated every night, and the *Shulchan Arukh* says the same of a peddler. And, as we saw above, the *Mishnah Torah* preserves freedom of sexual activity within a marriage. However, the fact that these texts take the form of

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<sup>173</sup> *Mishneh Torah, Issurei Bi'ah* 21:9.

<sup>174</sup> Literally, her "house of obscenity." *Tur, Even ha-Ezer* 21; *Shulchan Arukh, Even ha-Ezer* 21:1.

univocal codes rather than interpretive argumentation gives an authoritative finality to the statements. It also means that the affirmative material is now of a piece with the anxious material, and the latter tends to color the former.

Thus, sexual affirmation in these texts is framed in terms of procreation and damage control. The codes affirm that marriage is desirable, and even commanded, over and above celibacy. The reasons for this, however, seem to have to do with procreation on the one hand, and controlling the male libido on the other. Thus, *Shulchan Arukh Orach Hayyim* 1:3-4 urges all men to marry as early as 13, certainly by the age of 18, and no later than the age of 20, at which point the court can force him to marry so that he fulfills the commandment to be fruitful and multiply. However, it continues, a man like the famously ascetic sage ben Azzai, who “always desires Torah, and it is cloven to him all his days, and he does not marry a woman—he has no guilt on his hands, for the *yetzer ha-ra* has no power over him.”<sup>175</sup> Marriage is thus at once a constructive good *and* a means of damage control. It is desirable in order to fulfill the positive *mitzvah* of procreation, but it is also indispensable as a means of controlling an otherwise destructive sexual impulse.

Even a forbidden act, such as masturbation, may function as damage control *in extremis*. In *Sefer Hasidim* no. 176, a person inquires whether he may masturbate as an outlet for sexual frustration, lest he instead be driven to commit adultery, have sex with a menstruant, or engage in any other forbidden partnered activities:

It happens that someone—whose *yetzer* threatens to overpower him, and who fears lest he sin by sleeping with another man’s wife, or a menstruate, or by any of the remaining forbidden sexual activities—asks whether he may discharge seed in vain: will he not sin thereby?

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<sup>175</sup> Trans. my own.

The response at this time: He may masturbate, if you say that it is better he should discharge seed in vain than sin with a woman. But he is then obliged to atone, by sitting on ice in winter or by fasting 40 days in summer.

The text thus allows for one form of nonmarital sexual expression—masturbation—as the lesser of two evils, but insists that this indulgence be contained and counterbalanced by punishing discipline.

On the other hand, there are also medieval sources—usually non-legal ones—that are relatively affirming of sex and sexual pleasure within the proper context. The thirteenth-century mystical text *Iggeret Ha-Kodesh*—traditionally attributed to Nachmanides, although he probably was not the actual author—is notable for its assertion that “the sexual intercourse of man with his wife is holy and pure when done properly, in the proper time and with the proper intention,”<sup>176</sup> and that, indeed, properly accomplished sexual intercourse is a path to achieving a form of divine communion. The *Iggeret* preserves the eugenic concerns found in some Talmudic sources; it prescribes the proper timing, diet, and intentions for conceiving a wise, healthy, and pious son. It also asserts, however, that mutual pleasure is an important part of proper sexual intercourse, even going so far as to assert that the woman’s orgasm should precede the man’s<sup>177</sup>—she, as it were, “comes first.” The text affirms the essential goodness of the body, sex organs very much included, as part of God’s creation (though somewhat damaged after Eden), and inveighs in strong terms against Maimonides’s relative prudishness:

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<sup>176</sup> *The Holy Letter: A Study in Medieval Sexual Morality*, ed. and trans. Seymour J. Cohen (New York: Ktav, 1976) 40.

<sup>177</sup> *Idem*, 78, 144. This, too, however, might also have a eugenic cast, as it was thought more broadly in the medicine of the time that the woman’s orgasm was necessary for conception and the production of a “good” child. See Aline Rousselle, *Porneia: On Desire and the Body in Antiquity*, trans. Felicia Pheasant (Eugene, OR: Wipf and Stock, reprint, 2013), 27-8.

Understand, therefore, that unless it involved matters of great holiness, sexual union would not be called “knowing.” The matter is not as [Maimonides] of blessed memory said in his *Guide to the Perplexed*.<sup>178</sup> He was incorrect in praising Aristotle for stating that the sense of touch is shameful for us. Heaven forbid! The matter is not like the Greek said. It smacks of imperceptible heresy, because if the accursed Greek believed the world was created purposely, he would not have said it. We the possessors of the Holy Torah believe that God, may He be praised, created all, as His wisdom decreed, and did not create anything ugly or shameful. For if sexual intercourse were repulsive, then the reproductive organs are also repulsive.<sup>179</sup>

The *Iggeret* clearly thinks of sexuality in terms of discipline. It limits proper sexuality to marriage, maintains the central import of procreation as a result of sex, and it counsels moderation in the amount of sex one has.<sup>180</sup> The central role it accords to sexual pleasure, however, is noteworthy indeed.

Lay sources also indicate resistance to the hardening of sexual regulations evident in the legal codes. (This is not to say that resistance did not occur before the medieval period, merely that here is where we first have significant written evidence of such resistance.) Folk songs and poetry from this period—both Sephardic and Ashkenazi—are replete with erotic imagery, depicting promiscuous heterosexuality as well as homoeroticism.<sup>181</sup> A poem by Samuel Ibn Nagrillah (993-1056, Spain) entreats a young male beloved:

He who said: “Give me, please, the honey of your words”—  
I answered: “Give me honey from your tongue.”  
He became angered and said with wrath: “Shall we sin  
To the living God?” I replied: “On me, sir, be your sin.”<sup>182</sup>

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<sup>178</sup> *Guide* 2:36.

<sup>179</sup> Cohen, 40-43.

<sup>180</sup> *Idem*, 68-9.

<sup>181</sup> For more on love of boys in particular in medieval Jewish poetry, see Norman Roth, “‘Deal Gently With the Young Man’: Love of Boys in the Medieval Hebrew Poetry of Spain.” *Speculum*, 57:1 (1982), 20:51.

<sup>182</sup> Quoted in Roth, 35.



And a 16<sup>th</sup>-century German folk song appears, as David Biale puts it, “to deliberately contradict the Rabbis”.<sup>183</sup>

Singing and jumping,  
Cheerfulness at all times,  
Is certainly permitted.  
Promenading, courting  
Embracing and playing.  
Turn all my suffering to joy.  
As long as it takes place honorably  
No one can forbid it.<sup>184</sup>

Legal material itself also reveals popular resistance to sexual regulations within legal codes. In particular, courts often dealt with cases in which an engaged couple had engaged in sex prior to the marriage, so much so that legal authorities went out of their way specifically to forbid it<sup>185</sup>—a stipulation that found its way into the *Shulchan Arukh*.<sup>186</sup>

#### 4. *Jewish Modernity: Confronting the Enlightenment and Maintaining Distinctiveness*

As the Enlightenment worked its way through European society, the Jewish world was also forced to contend with the social changes it heralded. Matters of Jewish ritual, hermeneutics, day-to-day practice, and above all self-definition fell under scrutiny as Jews debated whether and how much to engage or even assimilate with European culture, and confronted questions raised by Enlightenment Era philosophical, political, and scientific thought, as well as by the material changes to their worlds wrought by the scientific and industrial revolutions.

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<sup>183</sup> D. Biale, 68.

<sup>184</sup> Quoted in D. Biale, 68; trans. from Israel Zinberg, *A History of Jewish Literature*, Vol. 7, trans. Martin Bernard (Cleveland, OH: Press of Case Western Reserve University, 1977) 90.

<sup>185</sup> D. Biale, 70-1.

<sup>186</sup> *Shulchan Arukh, Even ha-Ezer* 55:1.

Sexual and marital practices were not spared this scrutiny. Indeed, one aspect of pre-Enlightenment Jewish culture that was a favored target of the *maskilim* (Jewish reformers) was early, arranged marriage. Recall that the *Shulchan Arukh* advises men to marry as early as 13 years of age, and certainly no later than 20,<sup>187</sup> and it would seem that this was indeed standard practice. A northern European Jew at the time could expect to be married by the age of 15 or 16, perhaps even earlier if they came from a family of high status; the marriage was very likely to have been arranged.<sup>188</sup>

*Maskilim* attacked this system as backwards, degenerate, and harmful—harmful both to the individuals who married young, and to the vitality of the Jewish people as a whole. A number of memoirs of the period, written by men who grew up in traditional homes and later became *maskilim*, discuss sexual difficulties they experienced at the beginning of their marriages, problems they attribute to marrying before they were physically or mentally ready to do so; some complained of lasting psychological trauma as a result.<sup>189</sup> *Maskilim* also condemned the practice on communal grounds: early marriage, they claimed, harmed economic development, producing stunted young men who were only good for Torah study and who were dependent on what income first their parents, and then their wives, could supply.<sup>190</sup> These reformers disapproved of the commercial role of the *shadchan*, or marriage broker. They were also galled by the presence of women in the marketplace, where, they worried, the women were "subject to dangerous sexual temptation."<sup>191</sup> Reformers called, instead, for marriages enacted later, on the basis of choice and companionship, and for domestic structures in which women

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<sup>187</sup> *Orach Hayyim* 1:3-4.

<sup>188</sup> D. Biale, 153.

<sup>189</sup> D. Biale, 154-5.

<sup>190</sup> D. Biale, 159.

<sup>191</sup> D. Biale, 160.

would no longer work to support their scholarly husbands, who would in turn take on their proper roles as breadwinners. As Biale puts it, "both marriage and women had to be decommercialized since both were morally degenerate: [the goal of the *maskilim*] was a kind of bourgeois respectability that might only be attained by restricting women to hearth and home."<sup>192</sup>

Within traditional Jewish circles, there were also voices calling for more internal reflection and reforms—what Biale calls a “nascent Orthodox Haskalah that prepared the ground for the more secular German Jewish Enlightenment of Moses Mendelssohn.”<sup>193</sup> Some writers argued that the adolescent years should be reserved for Torah study, while others claimed that early sexual activity led to physiological weakness.<sup>194</sup> Perhaps the most fascinating figure here is Rabbi Jacob Emden, a prominent 18<sup>th</sup>-century German Rabbi. Emden was the author of an intriguing responsum in which he suggests that the ancient institution of *pilagshut* (concubinage)—wherein a woman has an exclusive, non-marital sexual relationship with a man, either instead of or in addition to his having a wife—be re-legitimized. There were, Emden argued, several possible contexts in which someone might prefer such a relationship:

And if couple preferred to be in a *pilagshut* form of relationship because it suited them better, perhaps because the man already has a wife but needs someone who would help out with the family and be his lover as well because his wife is not always able to be with him sexually...and the woman too, prefers this form of relationship to marriage so that if the man mistreats her she can simply leave the relationship instantly, without the hassles of acquiring a [writ of divorce] from him...in any event, both parties might prefer the *pilagshut* relationship to a marital one.<sup>195</sup>

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<sup>192</sup> D. Biale, 161.

<sup>193</sup> D. Biale, 152.

<sup>194</sup> D. Biale, 163-4.

<sup>195</sup> Rabbi Yaakov Emden, *She'elot Ya'avetz* 2:15, trans. in Gershom Winkler, *Sacred Secrets: The Sanctity of Sex in Jewish Law and Lore* (Northvale, NJ: Jason Aronson, Inc.), 99-142 (loc. 125-6)

Emden also employs a rhetoric of damage control, similar to the tone the *Sefer Hasidim* takes on masturbation—except, in this case, Emden argues that the method of damage control, unlike masturbation, is actually licit:

And the truth is that [the *pilegsh* option of relationship] is permissible and no prohibition was ever enacted against it, even as a safeguard. It is only out of lack of knowledge that it is considered as forbidden...the prohibition is non-extant, not even as a safeguard. On the contrary, [the option of] *pilagshut* itself is a safeguard around the Torah because it can keep one far from the commission of such wrongs as irresponsible sexuality and prostitution, and sexual liaisons with [non-Jewish women] and sex [with one's wife] during the menstrual phase, and the wasting of seed [through masturbation] by men who are not married, and also by those who are married, during the period when their wives are not available to them.<sup>196</sup>

Emden's position in this responsum, perhaps unsurprisingly, did not become normative *halakhah*. And it is not, even to contemporary eyes, without its problems—women, for example, still fare worse than men in that a man may have both a wife and a *pilegsh*, while the reverse is not true for a woman. Nevertheless, it stands as a tantalizing reminder of the diversity of normative positions on sexuality that can be discerned within a common body of textual tradition. It also stands as a noteworthy example of a legal work that acknowledges that sexuality may not be one-size-fits-all, and that tries to carve out normative space for such an acknowledgment.

Jewish tradition boasts a great range of diverse sources from across its history, and I have given only a brief overview here. While these texts are not univocal in any way, nevertheless there emerge some distinct trends. Chief among them is some level of ambivalence: sex is something that is necessary for most people to live a good life (in terms of both procreative value and pleasure) and is even deeply connected to holiness,

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<sup>196</sup> Idem, 135.

but is at the same time very dangerous and must be disciplined and restricted to proper containers of time, space, and social location. Sex, here, is something that has both great benefit and grave risk. There are, however, signs of awareness that the risks associated with sexuality do not come only from its misuse but from its *disuse* as well.

## II. Current Discussion: An Analysis of Ethical Rhetorics

### 1. *The Context*

If my brief overview of Jewish discourses on sex and sexuality until the 20<sup>th</sup> and 21<sup>st</sup> centuries accomplishes nothing else, it should at least show us that, on the one hand, Jewish sexual norms have been far from univocal, and that on the other hand, conflicts between dominant articulations of those norms and non-Jewish sexual culture are nothing new. Of course, the line between “Jewish” and “non-Jewish” culture, ideas, and practices is far less clear than the the previous sentence would indicate, but the *rhetoric* of “inside” versus “outside” culture proves just as influential, if not more so, for the shape of Jewish discourse than does the actual provenance of a given idea, trope, or practice. From the Bible onward, part of what it has meant to be Jewish or even proto-Jewish has been to navigate how, as a minority culture often living within a larger one, to define one’s own cultural identity as distinct from those around one. Since sexual and marital practices are a foundational part of how a culture is built and managed, they will naturally be a major part of this process of navigation.

In that sense, then, late modern and contemporary discussions of sex and sexuality within Judaism are not unique. What has changed about these discussions, however, is that the range of voices writing in some authoritative way from within a Jewish context

has broadened considerably. Women have become Rabbis, maharats, *halakhists*, Talmudists, theologians, and ethicists in numbers that, while still far from proportional, are nevertheless huge by comparison to the generations that came before. Sexual minorities—openly lesbian, gay, bisexual, transgender, queer, intersex, and asexual (LGBTQUIA) Jews in particular—have been more recently finding their ways into these ranks as well. Further, different patterns of career specialization within the modern academy mean that a qualification of “Talmudist,” “*halakhist*,” “theologian,” or “ethicist” need no longer be synonymous with that of “Rabbi.” The ability to focus more deeply on one aspect of the broad field covered by rabbinical training, as well as the ability to approach these aspects from a perspective not necessarily conditioned by specific patterns of rabbinical training have allowed new and valuable insights to emerge from the study of Jewish texts, beliefs, and lived practices. In short, the line between Rabbis and non-Rabbi experts on Jewish text and practice has blurred considerably.

The pace of scientific and technological advancement, and, as a result, the speed and intensity of engagement with extra-Jewish voices, tropes, and ideas have also increased dramatically during the past hundred or so years. Although the necessity of confronting the outside culture in one way or another has been with Jews since time immemorial, the sheer volume of external ideas and the rate of change in our collective understanding of the empirical world is unprecedented and as such raises unprecedented questions about the relationship between our textual and ritual traditions and the world as we now know it.

Finally, modernity, and the particular shape of its lures of assimilation and subsequent backlash, engendered the denominational divides of Judaism as we know

them today. These denominations, and the ways in which they have chosen to encounter and interpret the vagaries of the technological age in dialogue with Jewish textual and ritual traditions, also sketch out rough lines of difference in approach to sexual matters. I do not mean to make the obviously false claim that intra-Jewish ideological division is unique to the contemporary period. However, the fact that contemporary denominational divides center around Judaism's relationship with modernity and with non-Jewish culture means that these contemporary divides tend to map more clearly onto differences in sexual norms than do the reasons for other cases of intra-Jewish division throughout Jewish history.

## 2. *Organizing The Voices*

In examining contemporary Jewish thought on sexuality, I explore writings from the academic study of Jewish ethics and popular writings from both *halakhic* and non-*halakhic* movements. I have organized the voices I explore primarily by the general tenor of their argument. Thus, I have a section on “sexually cautious voices,” as well as one on “sexually expansive voices.” I also organize by tone rather than by denomination. While it is true that Orthodox voices on the whole are likely to be more cautious than Conservative ones, which in turn are likely to be more cautious than Reform voices, this trend is not absolute. Further, some voices do not fit neatly into any denominational camp, either in terms of affiliation or in terms of which sources they engage, of which practices they perform, or of their approach to *halakhah* or hermeneutics. Nor is it accurate to categorize these voices in terms of whether or how much they engage with contemporary non-Jewish sexual discourses and norms. *All* contemporary Jewish discourse on sex and sexuality engages with non-Jewish discourse on sex and sexuality in

some form; even communities, such as the more insular Hasidic sects, that choose to withdraw almost entirely from the secular world engage with that world reactively, and they justify their continued withdrawal in terms that show a significant awareness of the shape of the world from which they choose to withdraw.

I have chosen to organize these voices according to the rubric of “cautious” versus “expansive,” rather than, say, “permissive” versus “restrictive,” because I am less interested in analyzing which particular activities a given writer forbids or permits—something which is likely, in any case, to be constrained to a considerable extent by the tradition of *halakhah* a writer holds or does not hold as authoritative—than I am in the *ethical rhetoric* by which a given writer supports their position. While it is true that nearly all voices that could be categorized as “restrictive” also fall into my category of “cautious,” the converse is not true—some writers who might well be characterized as relatively “permissive” also fall into my category of “cautious.” So, for example, I place a figure like Conservative Rabbi and ethicist Elliot Dorff mainly in the category of “cautious voices,” even though he is among the more permissive of the writers I examine here in terms of what he actually allows, because his rhetoric fits more squarely into the languages of purpose and risk (about which more below) that I identify as characteristic of such cautious voices.

I have also chosen the categories of “cautious” versus “expansive” over those of “sex-positive” versus “sex-negative.” This is because, in addition to the latter terms’ being unhelpfully polemical, one characteristic held in common among nearly all contemporary and roughly mainstream Jewish writing about sex (thus, inclusive of Modern Orthodoxy as well as much of the Chabad movement, though not necessarily of



the more insular Haredi sects) is that they are invested, at least rhetorically speaking, in the claim that Judaism as a tradition has a relatively positive view of sex, sexuality, and the body. The rhetorical force of this claim is mainly apologetic. On the one hand, it serves to distinguish Jewish sexual teaching—especially more conservative teaching—from what they see as the dominant conservative Christian discourse on the topic, such that sexual restraint (which these Jewish voices understand as preferable) is not conflated with what these voices understand as sexual repression. Their aim is thus to paint religious Jews as more reasonable and enlightened than their conservative Christian brethren. On the other hand, it serves to demonstrate that “religious” teaching on sexuality is not monolithic, and it provides a potential incentive for people whose sexual politics are more relaxed to embrace Judaism. However, for some expansive voices this rhetoric is explicitly revisionist; their embrace of sexually affirming streams is framed in terms of reworking the tradition to foreground marginalized voices, or of reclaiming suppressed aspects of it for the same purpose.<sup>197</sup>

There is also a strong trend common to both cautious and expansive voices of framing their particular Jewish position in opposition to what they perceive as the dominant set of secular cultural values around sexuality. For cautious voices, these secular values are generally portrayed as permissive, instrumentalizing of others, shallowly focused on immediate pleasure, and uninterested in genuine relationship or long-term commitment. Jewish values, by contrast, are said to sanctify sex by locating it within a context of command, covenant, and deliberate relationship. Expansive voices tend to frame secular values—or, for them, dominant, corporate, or patriarchal values—

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<sup>197</sup> Tamar Ross’s taxonomy of revisionism within Jewish feminism, in part III of *Expanding the Palace of Torah* (2005), is useful here.

as objectifying and commodifying bodies and sexuality, especially women's bodies and women's sexuality. If they identify restrictive elements in non-Jewish sexual discourse, they are likely to frame them as dominating or prudish. Here, Jewish values counter secular discourse by affirming the sanctity and worth of each embodied human person, elevating sex from the merely transactional to the humane and relational.

A brief formatting note: I examine, in this section, a wide range of thinkers writing at various points during the past seventy-five years or so. Additionally, I examine works written by the same thinker at various points during their career. It is my contention that the rhetorics I identify in the following pages remain, by and large, fairly consistent over the course of this period, even as the range of permitted activities and the diversity of voices consulted may change over that same span of time. Nevertheless, it is important to specify if there is a forty-year gap between two writings on a given theme, or if a particular writer said one thing in 1994 and another thing in 2006. Thus, I note the date of a writing in parentheses the first time I mention it; when I use multiple texts from the same writer, I parenthetically note the date for each usage.

### *3. Cautious Voices*

Cautious voices, as a rule, view sexuality as neutral or potentially good, but they hold that the proper or ideal context for sexual expression is marriage. For them, while sexuality can be commanded, beautiful, and holy within the context of Jewish marriage, it is volatile, dangerous, distorted, and amoral or immoral outside an approved container. These voices also tend to assert a direct relationship between the context of sexual interaction and the interpersonal values played out within it. This is true of cautious

voices in both *halakhic* and non-*halakhic* movements. Although cautious voices within *halakhic* movements (certainly within Orthodoxy) need not, in theory, proffer any further ethical reasons for their positions—premarital and extramarital sexual contact, homosexuality, and masturbation are already legally forbidden, biblically in the case of adultery, homosexuality, and masturbation, and rabbinically in the case of premarital and some extramarital sex<sup>198</sup>—it is usually the case that such reasonings are offered anyway. Cautious voices from non-*halakhic* movements, by contrast, have little choice but to appeal primarily to ethical reasoning.

There are two main languages through which these voices, *halakhic* and non-*halakhic*, express their caution: a language of purpose and a language of risk. Purpose language insists that sex must exist within a committed, deliberate, long-term union (almost always a marriage) in order to achieve its potential goodness and, indeed, to have any real meaning at all. Outside of such a context, it is merely an unchecked bodily function, hardly different from the copulation of other animals. Thus, for example, the Reform Rabbi and scholar Eugene Borowitz (1969) asserts that “a direct concern with sexual fulfillment is fundamentally physiological and egotistic, and probably quite impersonal, even though it may care about giving as well as getting sensation.”<sup>199</sup> Similarly, modern Orthodox Rabbi Maurice Lamm (1980) argues that “the act of sex requires the sensitive involvement of both partners. Noninvolvement results in a mechanical orgasm that is ultimately meaningless and demeaning...For Judaism, value in human sexuality comes only when the relationship involves two people who have

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<sup>198</sup> Biblically speaking, adultery occurs when a married woman has sex with someone other than her husband. In this case both parties have committed adultery. If, on the other hand, a married man sleeps with an unmarried woman, adultery has not occurred (although a lesser transgression may have occurred depending on the circumstance.)

<sup>199</sup> Eugene B. Borowitz, *Choosing a Sex Ethic: A Jewish Inquiry* (New York: Schocken Books, 1969) 107.

committed themselves to one another and have made that commitment in a binding covenant recognized by God and society.”<sup>200</sup>

Language of purpose also encompasses the rhetoric of individual fulfillment versus communal obligation common among these sources—a rhetoric which also evinces the posture of opposition to secular values, commonly found in both cautious and affirming sources. Thus, for example, the Israeli modern Orthodox Rabbi Yuval Cherlow (2004) claims that while “the desire for happiness and personal fulfillment constitutes one of the foundations of the modern lifestyle...the marriage relationship is not merely about rights. It is a deeper and more comprehensive relationship which entails responsibilities as well.”<sup>201</sup> He adds that “the Jewish family [represents a great moral ideal] in the face of the warped value system of the Western world in general.”<sup>202</sup>

Among those cautious voices that condemn masturbation, the language of purpose is usually invoked. As Modern Orthodox Rabbi Reuven P. Bulka (1986) puts it, “the spiritual creativity of shared intimacy transmutes what could be perceived as a biological waste into a humanly fulfilling act. Seed that is spilled is essentially sensuality without spirituality, and is categorically condemned.”<sup>203</sup> The Orthodox Rabbi and popular Jewish writer Shmuley Boteach (1999) writes, along similar lines:

We must try to remember that masturbation is not a solitary practice, or a private matter with which public pronouncements on morality are unconcerned. It lessens the necessity for physical closeness that one human being feels for another. It is beyond the realm of the private and personal and is squarely an issue with which others are involved. Every act of masturbation serves as a powerful sexual release that in turn lessens our

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<sup>200</sup> Maurice Lamm, *The Jewish Way in Love and Marriage* (Middle Village, NY: Jonathan David Publishers, 1991) 30-31.

<sup>201</sup> Yuval Cherlow, “Premarital Guidance Literature in the Internet Age”, in *Gender Relationships in Marriage and Out*, ed. Rivkah Blau (New York: Yeshiva University Press, 2004), 131-172, (loc. 149).

<sup>202</sup> *Idem*, 150.

<sup>203</sup> Reuven P. Bulka, *Jewish Marriage: A Halakhic Ethic* (New York: Ktav Publishing, 1986) 109.

vital need for sex with someone else. In the context of marriage, this is disastrous.<sup>204</sup>

Boteach—who is quite frank and lenient in many ways in terms of the activities he permits to married couples—also condemns sexual sadomasochism<sup>205</sup> along similar lines: “Sadomasochism results entirely from the been-there, done-that mentality in which those who have no holiness or modesty in their sexual relationships will try to end the monotony...[its participants] cannot get to know each other more deeply...”<sup>206</sup> Thus, for him, activities which lack either obvious mutuality (even if consent and mutuality are negotiated prior to engaging in the activity) or an obvious, bodily route to direct sexual pleasure cannot be vehicles for fit, holy sexuality, even when practiced by a married couple within basic *halakhic* standards.

For cautious writers who deploy a language of purpose, what is wrong with the sexual acts that they do not permit, from an ethical perspective, is that they are pursued solely or primarily for the sake of sexual pleasure, rather than for the sake of cementing marital stability, building appropriate social structures, performing divine commands (such as procreation), or attaining greater holiness. Sex is a divine gift, worthy of affirmation, when married couples engage in it with these purposes in mind. When these purposes are absent, however, sex is merely a shallow, animalistic appetite.

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<sup>204</sup> Shmuley Boteach, *Kosher Sex: A Recipe for Passion and Intimacy* (New York: Doubleday, 1999) 89-90.

<sup>205</sup> Which, oddly, he seems to equate almost exclusively with the very specific phenomenon of “cock-and-ball-torture,” in which one inflicts various painful sensations on one’s or one’s partner’s penis and scrotum via strikes, weights, piercings, and so forth. He also uses the almost certainly apocryphal practice of “gerbiling” as a rhetorical device. Boteach *Kosher Sex*, 134-7; <http://www.snopes.com/risque/homosexuality/gerbil.asp>.

<sup>206</sup> This last statement is unsupportable. See Staci Newmahr, *Playing on the Edge: Sadomasochism, Risk, and Intimacy* (Bloomington, IN: Indiana University Press, 2011) for a fascinating ethnographic account of a Bondage/Domination/Submission/Sadomasochistic [BDSM] community; of note is the deep friendship shared by many of the community’s members, and the significant and detailed negotiation that occurs prior to enacting any scene.

Risk language, rather than making claims about meaning, focuses on the dangers of sex, whether social, physical, or spiritual. It insists that the only acceptable method of controlling these risks is to restrict sex to marriage. Sex is a neutral, or even good and necessary but dangerous force whose inherent risk can only be mitigated through strict containment; while sex is salubrious and even sanctified within marriage, outside of this context it becomes corrosive and antisocial. Within the arena of risk language, writers from *halakhically* liberal and non-*halakhic* traditions tend to give significant attention to risks such as STIs and unwanted pregnancy, whereas writers from more *halakhically* conservative traditions tend to focus much more on the social and spiritual risks of sex. They cite fears of the breakdown of the “traditional” family, and do so in sometimes apocalyptic terms: Maurice Lamm writes that “the Jewish people will survive only if the Jewish family survives. The Jewish family will survive only if that old, powerful fortress of marriage is preserved in the form in which it has existed since Sinai—the sanctified, immovable, inviolate rock of civilization.”<sup>207</sup> They also worry about the breakdown of the legitimacy of the *halakhic* system. Thus Yuval Cherlow worries that “as *halakhic* forums and discussion groups on the internet proliferate,”—discussion groups that address, among other matters, questions of sexual practice, which are the focus of the quoted essay—“the traditional method of *halakhic* decision-making runs the risk of becoming irrelevant, God forbid.”<sup>208</sup>

Where physical risks are discussed, the specific risks enunciated, not surprisingly, tend more or less to make some reference to the state of professional consensus on sexual, social, and psychological matters at the time they were written. For

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<sup>207</sup> Lamm, 48.

<sup>208</sup> Cherlow, 144.

example, Rabbi Nathan Drazin, writing in 1958, claims that there is a causal relationship between condom use and bipolar disorder,<sup>209</sup> something which has been conclusively shown to be false. Contemporary risk language, where physical risk is concerned, mainly deals with infectious disease and unwanted pregnancy. The specific anxieties about these issues also evolve: in 1998, Conservative Rabbi and bioethicist Elliot N. Dorff advised any HIV-positive individual to remain celibate.<sup>210</sup> However, as the treatment of HIV advanced and the infection became chronic and livable, he softened his stance somewhat, admitting sex with a condom as a “second best alternative.”<sup>211</sup>

Indeed, Dorff’s writings on sexuality are an excellent example of the use of cautious language of purpose and risk within a relatively liberal context. As I have noted above, even though Dorff has made significant *halakhic* arguments in favor of homosexuality and permits masturbation and even premarital sex within the context of a long-term, committed relationship, I place Dorff largely among the cautious voices. This is because his ethical rhetoric clearly employs languages of purpose and risk. The foundation of Dorff’s ethic is a theology of the body, which fundamentally belongs not to oneself, but to God: “God trusts me to take care of my body...I have the right to reasonable use of my body, but I do not have the right to destroy it because it is not mine”<sup>212</sup> (2009). In particular, the implications of God’s ownership regarding care for and endangerment of, or risk to, the body come into play especially strongly in the domain of sexual ethics—we are advised to be especially risk averse in our sexual behavior. Thus, sex is best expressed within marriage, or at least a long-term, committed, monogamous

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<sup>209</sup> Nathan Drazin, *Marriage Made in Heaven*, (London and New York: Abelard-Schuman, 1958) 57-71.

<sup>210</sup> Dorff, *Matters of Life and Death*, 116.

<sup>211</sup> Dorff, “A Jewish Perspective on Birth Control and Procreation,” in Ruttenberg, *The Passionate Torah*, 152-168 (at 158).

<sup>212</sup> Dorff, “A Jewish Perspective on Birth Control and Procreation,” 152.

relationship. For Dorff, “casual and promiscuous encounters, while not as egregious as adultery and incest, are [to] be avoided, since they involve little or no love or commitment and carry substantial health risks”<sup>213</sup> (1998).

Even as Dorff (1998) makes room for sex within committed, monogamous nonmarital relationships, he characterizes it as “not fulfilling the Jewish ideal.”<sup>214</sup> He states that “Jewish norms in sexual matters, like Jewish norms in other areas, are not all-or-nothing phenomena.”<sup>215</sup> Similarly, while he permits masturbation, this is framed in terms of it being a better alternative to nonmarital, partnered sexual expression, rather than in terms of it having a positive value of its own. For teens in particular, partnered sexual expression is strongly discouraged; this is couched overwhelmingly in risk language. He writes (1996) that “teenagers need to refrain from sexual intercourse, for they cannot honestly deal with its implications or results—such as the commitments and responsibilities that sexual relations normally imply for both partners, including, especially, the possibility of children and the risk of AIDS and other sexually transmitted diseases.”<sup>216</sup>

Thus, cautious voices, even where they accept nonmarital sexuality in certain contexts, nevertheless treat it as a less-good version of the ideal of marital sexuality. Furthermore, the contexts in which they accept nonmarital sexuality tend to resemble marriage in everything but rite. Outside an appropriate container, sex, even when it is seen as fundamentally good, has risks that heavily outweigh any possible benefits.

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<sup>213</sup> Dorff, *Matters of Life and Death*, 111.

<sup>214</sup> *Idem*, 112.

<sup>215</sup> *Ibid.*

<sup>216</sup> *Idem*, 117.



#### 4. *Expansive voices*

Almost all expansive voices within contemporary Jewish discourse on sexual ethics also belong to the canon of Jewish feminist thought. Feminist innovation within Judaism required radical re-workings of Jewish texts, laws, rituals, customs, and socio-cultural attitudes, and because many of the issues that affect women's roles in Jewish life have to do with the body, it was inevitable that many of the thinkers engaging those questions would also engage questions of sex and sexuality directly. Expansive writers, such as Arthur Green and Arthur Waskow, who have not made their names primarily as Jewish feminists, nevertheless are generally considered at least to be feminist allies, and reference feminist tropes implicitly, if not explicitly, within their own work.

Along these lines, expansive re-evaluations of sexuality tend to have one of two foundations. They may be based directly in feminist (and, more recently, queer) claims. Thus, for example, Jewish educator Melanie Malka Landau's work toward redefining "good sex" rests on the fundamental claim that "the desirable relationship between men and women is not about exchanging male dominance for female dominance; rather, it is about transforming the relationship beyond power dynamics to a dance of giving and receiving."<sup>217</sup> Judith Plaskow (2005) argues that "any feminist reworking of [the sexual laws in] Leviticus would have to address the ways in which many of its premises...produce and support the sexual injustice that a sexual ethic should address and correct."<sup>218</sup> Expansive voices may also make a broader "times have changed" argument: the realities of people's lives are different than they were when *halakhah* was codified, and sexual ethics must account for these changes—changes which prominently include

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<sup>217</sup> Melanie Malka Landau, "Good Sex: A Feminist Jewish Perspective," in Ruttenberg *The Passionate Torah*, 93-106 (at 102).

<sup>218</sup> Plaskow and Berman, 173.

women's demands for political, social, economic, and bodily liberation. Thus, Reconstructionist Rabbi and scholar Arthur Green opens his influential essay, "A Contemporary Approach to Jewish Sexuality" (1976), with the claim that "we are postmodern rather than premodern Jews...it is in the areas of sexuality and the place of women that this discrepancy between fully *halakhic* traditionalism and the neotraditionalism of these 'new Jews' is most clearly seen."<sup>219</sup> And David Teutsch, writing in 2011, argues that "family and sexual ethics must adapt to changing social, political, and technological conditions."<sup>220</sup>

Expansive voices tend to view sexuality as something that is fundamentally good. This view tends to flow from an appreciation of the holiness and wholesomeness of the God-given body, in all its functions. As Judith Plaskow puts it, "We believe that we honor the image of God by honoring the body...We affirm that each human being must be taught that the awakening of sexual feeling and the desire for sexual activity are natural and good, and that an understanding of how to express sexuality must also be taught."<sup>221</sup> Like many among the cautious voices, expansive voices are likely to give greater weight to the sexually affirming stream of textual tradition; however, where they do engage the cautious stream of tradition they are likely to do so in critical terms, focusing on the ways in which the tradition is more cautious about women's sexuality than about men's. Another way to put it is to say that expansive voices, as much as or more so than cautious ones, are likely to claim the sexually affirming stream of tradition as their own.

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<sup>219</sup> Arthur Green, "A Contemporary Approach to Jewish Sexuality" in *The Second Jewish Catalog: Sources and Resources*, Michael Strassfeld and Sharon Strassfeld, eds. (Philadelphia, PA: Jewish Publication Society, 1976), 96-99 (at 97).

<sup>220</sup> David Teutsch, *A Guide To Jewish Practice, Vol. 1: Everyday Living* (Wyncote, PA: RRC Press, 2011) 162.

<sup>221</sup> Plaskow and Berman, 176.

Expansive voices differ most notably from cautious voices in their belief that sexuality is not only a good, but that it can achieve goodness and holiness within a variety of expressions. Thus Judith Plaskow affirms “human sexuality in all its fluidity, complexity, and diversity.”<sup>222</sup> Homosexuality, masturbation, and premarital sex all find approbation and even potential blessing here. One might call this a different kind of invocation of meaning language—or, perhaps, an inversion of the meaning language used by cautious voices. While cautious voices tend to claim that sex can only have real, deep meaning when it is restricted to a narrow set of expressions, expansive voices are likely to claim that sexuality’s full universe of meaning can only be recognized when its fluidity and diversity are given freer expression. Nor are all these writers non-*halakhic* or post-*halakhic*. Sara N.S. Meirowitz, who identifies as an observant Jew, mounts a defense of non-marital sex in an observant context, asking, “can only long-term relationships have sexual holiness? I posit that traditional Judaism has a thing or two to learn from more radical feminist and Jewish scholars who see that holiness in sexual relationships can come from recognizing the spark of divinity in one’s partner and creating respectful norms.”<sup>223</sup>

Especially notable among these expansive voices is Jennie Rosenfeld, whose important dissertation, “Talmudic Rereadings: Toward a Modern Orthodox Sexual Ethic,” combines ethnographic accounts of the sexual frustrations of Modern Orthodox singles with a careful, yet “against the grain” reading of a variety of Talmudic and later *halakhic* sources. Rather than attempt a *halakhic* argument in favor of traditionally forbidden sexual practices, Rosenfeld instead searches for “cracks and fissures within the

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<sup>222</sup> Ibid.

<sup>223</sup> Sara N.S. Meirowitz, “Not Like a Virgin: Talking About Nonmarital Sex” in Ruttenberg (2009), 169-181 (loc. 177).

text [where] there is some tension at play"<sup>224</sup> in order to articulate what she refers to as an "ethics of sin." Even though an Orthodox person might act in a way that violates *halakhah*, Rosenfeld argues, they can and must find a way to "violate the law and simultaneously manifest one's knowledge of G-d through ethical behavior."<sup>225</sup> Rosenfeld thus passionately articulates the ethical value specifically of sexual pleasure, even as expressed through masturbation and non-marital sex, while nevertheless acknowledging its illicit character. Rosenfeld is a Modern Orthodox writer, and the range of activities she is willing to contenance even within this framework is less broad than many other expansive voices and even some of the more liberal cautious voices. However, her fundamental understanding of sexuality and sexual pleasure as valuable for their own sake and the relative absence of simple languages of risk and purpose from her work place her squarely within the expansive camp.

These voices often reinterpret or reframe Jewish ethical, ritual, theological, or *halakhic* concepts to accommodate or account for their empirical and moral claims about sexuality, and especially to articulate heretofore taboo or forbidden activities in explicitly Jewish terms. Thus, sex educator and historian Hanne Blank suggests that "people practicing BDSM [Bondage/Domination/Submission/Sado-Masochism] might conceptualize negotiations—who takes on what role(s), what acts are and are not acceptable, what parameters of sexual activity are to be part of their interactions with each other— as a form of *ketubah*, or marriage contract, specifying what each partner is obligated to bring to the relationship and what each can expect in terms of support and

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<sup>224</sup> J. Rosenfeld, *Talmudic Re-Readings*, 36.

<sup>225</sup> *Idem*, 58.

help if things go poorly.”<sup>226</sup> Rabbi Jay Michaelson finds queer theological meaning in the differently-gendered aspects of God as articulated in *kabalistic* tradition.<sup>227</sup> And Rabbi Rebecca Alpert connects masturbation, understood as a practice of self-care and self-love, to the Jewish values of caring for and protecting the God-given body; further, she argues that it provides a training ground for understanding the importance of privacy and thus is an arena for practicing *tzniut*, or modesty.<sup>228</sup>

While expansive voices do not tend to talk in terms of risk-benefit language, preferring to speak in terms of fulfillment, expression, and relationality, it is important to note that they do not ignore risk. While these voices believe in the fundamental goodness of sexuality and the body, they also recognize that sexuality can cause harm. However, good sex versus harmful sex tends not to be as much a matter of taxonomy as it is for cautious voices. Rather, it is a question of the quality of relationships in a given case. Sexuality becomes dangerous and distorted through the breakdown of respectful relationships and through the misuse of power. Furthermore, expansive voices are somewhat more likely to foreground the positives of sexuality and treat the risks as more of an appended caution—perhaps, in part, in direct reaction to the heavy and, to them, disproportionate foregrounding of risks they observe among cautious voices.

Along these lines, expansive voices are not universally or uniformly permissive, much as cautious voices are not uniformly restrictive. While there is a general consensus among these voices that homosexuality, premarital sex, and masturbation are not only permitted but are potential areas for sanctification, significant disagreements arise around

<sup>226</sup> Blank, “The Big O Also Means Olam” in *Yentl’s Revenge: The Next Wave of Jewish Feminism*, ed. Danya Ruttenberg (Seattle, WA: Seal Press, 2001), 194-205 (at 201).

<sup>227</sup> Jay Michelson, “On the Religious Significance of Homosexuality; or, Queering God, Torah, and Israel” in Ruttenberg (2009), 212-228.

<sup>228</sup> Rebecca T. Alpert, “Reconsidering Solitary Sex from a Jewish Perspective,” in Ruttenberg (2009), 182-190.

questions of monogamy, pornography, and sex work. (It is not accidental that these disagreements closely mirror similar ones within the broader feminist movement.) Hanne Blank, for example, is strongly supportive of the legitimization of sex work, arguing that it can be a form of female sexual self-determination and framing its practice by those who choose it as a way to effect *tikkun olam*.<sup>229</sup> Martha Acklesburg, by contrast, argues that women's participation in sex work is largely a consequence of economic coercion.<sup>230</sup>

There is a diverse range of permitted, tolerated, discouraged, and forbidden behaviors, interpretive approaches, and theologies found among these writers. Despite this, there are certain constants that are true of the vast majority of contemporary Jewish writing on sex and sexuality. First, regardless of the expansiveness or caution of the writer's position, almost all writers emphasize, at least rhetorically, the sexually affirming pole of the rabbinic tradition—either as a descriptive claim (for example, a claim that compared to Christianity, Judaism has affirmed the goodness of sexuality) or as an aspirational one (a claim that as we move forward, we should choose to emphasize the sexually affirming voices within the Jewish tradition.) Normativizing one strand of rabbinic thought over another<sup>231</sup> thus is not solely the purview of expansive voices interested in reforming sexual mores; in rhetorically claiming the sexually affirming side of rabbinic tradition as dominant, cautious voices too have their own brand of revisionism. Second, when these writers appeal to traditional Jewish texts to ground their

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<sup>229</sup> Hanne Blank, "The Sex of Work, the Work of Sex" in *Jewish Choices, Jewish Voices: Sex and Intimacy*, Elliot N. Dorff and Danya Ruttenberg, eds. (Philadelphia, PA: Jewish Publication Society, 2010) 91-97.

<sup>230</sup> Acklesburg, "Sex Work: Whose Choice?" in Dorff and Ruttenberg, *Jewish Choices, Jewish Voices: Sex and Intimacy*, 105-110.

<sup>231</sup> Tamar Ross, in *Expanding the Palace of Torah*, pp. 107-9, commenting on similar tendencies in feminist Jewish treatments of rabbinic text, calls this "golden thread" revisionism (in the case of ignoring the fear or ascribing it to Hellenistic contamination), or "multiple thread" revisionism (in the case of minimizing or downplaying it.)

arguments, they all appeal to texts that have some sort of explicitly sexual primary subject matter. That is, the primary subject matter of texts, and not the texts' form of argument or the way the texts' subject matter functions within the larger world they describe, is the determining ground for which texts apply to which problem. (Expansive voices are likely to use a broader range of sources when it comes to drawing on rituals and general concepts, however.) Finally, although they are used in different ways and given different levels of importance, the concepts of risk and meaning seem to be operative in some form across the entire canon.

### III. What Do We Learn From This? Lacunae, Dead Ends, and Possibilities

This section addresses three main areas: first, given the tradition's precedents and the current state of discussion, what is it actually possible to do in this arena? Second, what holes need filling, both in the tradition as an entirety and specifically in the academic treatment of Jewish sexual ethics? Finally, what methodological and hermeneutical techniques and assumptions are needed in order to fill the holes identified?

To address the question of what is possible, it is clear from the previous discussion that the Jewish tradition on sexuality is nothing if not complicated. Nevertheless, we can identify some presumptions, permissions, and outright prohibitions. Premarital sex is frowned upon to a greater or lesser extent, depending on the community, but may not be forbidden, especially for men. Along similar lines, non-monogamy is frowned upon—and *adultery* is absolutely forbidden—but there are counter traditions, such as R. Emden's responsum on *pilagshut*, suggesting that, especially for men, there may be open doors. Male masturbation and male homosexuality are explicitly prohibited,

and their female equivalents neglected to a greater or lesser degree, though liberal movements have made significant interpretive strides on these questions, especially that of homosexuality. As far as particular acts are concerned, context matters—in general, it seems safe to say that penis-in-vagina (PIV) intercourse that occurs within a marriage and is open to procreation is the ideal, but even if certain acts, like male-female anal sex, tend to be frowned upon, there also exist counter traditions that legitimize them for the sake of fulfilling the marital obligation.

The weight of these rules depends upon a given Jewish community's approach to *halakhah*, ethics, and the nature of the relationship between the two. In non-*halakhic* and post-*halakhic* communities that do not consider *halakhah* binding, prohibitions against particular expressions of sexuality hold at most the weight of precedent and exhortation. Religious authorities and thinkers who concur with the *halakhic* tradition on these matters may urge their congregants to behave in particular ways, but their urgings lack the weight of command: in this vein, a 1995 Reform responsum from the Central Committee of American Rabbis [CCAR] on the question of long-term non-marital relationships rather glumly notes that “while we would neither sanction nor sanctify such relationships, we are cognizant that they will continue to exist, as they have throughout Jewish history.”<sup>232</sup> Religious authorities and thinkers who disagree with the *halakhic* tradition on these matters, meanwhile, have a relatively clear path to articulating alternative guidelines.

Jewish communities that view *halakhah* as binding in any way, however, face a more difficult task if they face ethical difficulty with the sexual standards of the *halakhic* tradition. While prohibitions on lesbianism, female masturbation, premarital sex, and certain kinds of (male) non-monogamy perhaps afford a certain amount of interpretive

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<sup>232</sup> <https://ccarnet.org/responsa/nyp-no-5756-10/> accessed September 24, 2015.



leeway for the adventurous *posek*, the prohibitions on male masturbation and male homosexuality are understood as unambiguous, *de oraita* (Biblical) commandments not subject to interpretive modification.

This is not to say that change is impossible. Rabbinic tradition, even if it is not always willing to officially admit to doing so, does occasionally reverse even biblical commandments. Indeed, that polygyny is officially forbidden among Ashkenazi Jews is the consequence of a *takkanah*—an act of rabbinic legislation—by the medieval Rabbeinu Gershom. This, granted, forbade something that the written Torah permitted—a type of innovation that has generally been more palatable to the *halakhic* tradition than has its converse. However, the rabbinic power of interpretive ingenuity—or, where necessary, audacity—ought not be underestimated. Rabbis within the American Conservative movement, which views *halakhah* as binding but flexible in response to the realities of contemporary life, have issued *teshuvot* that give blessing to monogamous, committed gay couples. The *teshuvah* that won the movement’s official sanction allows for this by offering a narrow reading of Leviticus 18:22 that only prohibits male-male anal intercourse.<sup>233</sup> Other *teshuvot* from the movement’s fifteen-year debate on the matter argue that what the Torah prohibits does not and cannot account for gay and lesbian relationships as they exist today<sup>234</sup>, or that the interplay of the Torah’s *aggadic* (narrative) and *halakhic* (legal) texts demonstrate within the Torah’s own process of legal reasoning a form of interplay between legal edicts and testimony about the real-life needs of people commanded to live by those edicts that anticipates and indeed accommodates the needs

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<sup>233</sup> Eliot N. Dorff, Daniel S. Nevins, & Avram I. Reisner, “Homosexuality, Human Dignity, and Halakhah.” (CLJS Responsum, 2006) 20.

<sup>234</sup> Bradley Shavit Artson, “Judaism and Homosexuality: A New Response for a New Reality (n.p.: 1991), [http://www.ajula.edu/Media/Images/SCM/ContentUnit/4381\\_9\\_7827.pdf](http://www.ajula.edu/Media/Images/SCM/ContentUnit/4381_9_7827.pdf), accessed March 15, 2011

of gays and lesbians to share in the joys of life as sexual beings.<sup>235</sup> Orthodox Rabbi Steven Greenberg has argued that the biblical prohibition should be understood in terms of sexual violence and that Leviticus 18:22 should be translated: “And a male you shall not sexually penetrate to humiliate; it is abhorrent.”<sup>236</sup>

As for the the question of what holes need filling, this overview makes at least some lacunae clear. There is a real need in Jewish sexual ethics to address the needs of people who are not, to borrow a phrase that will appear frequently in the next chapter, the “ideal rabbinic subject”—that is to say, who are not classically learned, scrupulously observant, heterosexual, married, Jewish, cisgender men. Specifically, there is a need to do so in a way that is *halakhically* engaged, medically sound, literate in queer and feminist discourse, and serious about being normative. There is also need to address behaviors that deviate from the *halakhic* tradition’s historic norms, and to do so in a way that does not cast them as less than morally ideal, thereby casting those who do them as less-than-ideal Jews. Indeed, these two needs are of a kind. As Hanne Blank puts it:

Frankly, I have no problem with the idea of wanting to make sexuality more holy, more thoughtful and more responsible. In fact, I advocate it on a regular basis. But I do have a problem with the fact that Judaism only promotes this concept for certain kinds of sexuality, and therefore for certain kinds of people.<sup>237</sup>

Sexuality is diverse, idiosyncratic, and often a significant and stable part of identity. Thus, sharply restricting the acceptable avenues of sexual expression or the paths to achieving *kedusha* (holiness) in one’s sexuality means, in practice, restricting the set of people who can reconcile their sexuality and their religious commitments in a socially, spiritually, and psychologically livable way to those whose sexualities happen to have

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<sup>235</sup> Tucker, “Halakhic and Metahalakhic Arguments Concerning Homosexuality.”

<sup>236</sup> Greenberg, *Wrestling With God and Men*, 206.

<sup>237</sup> Blank, in Ruttenberg, *Yentl’s Revenge*, 199.

been formed in alignment with the tradition's narrow norms. It also means that only those people have full access to the tradition's resources of practical moral guidance as to how they live their sexual lives—guidance which should be an important resource for people of *all* sexualities, since sex is a social activity that has social consequences.

The extant Jewish literature on sexuality also usually exhibits a significant gap between content and general rhetoric, especially where its characterization of rabbinic text is concerned. As I have noted above, professional Jewish ethicists, as well as *halakhic* and non-*halakhic* Jewish popular writers tend to claim the relatively body- and sex-positive stream of the tradition as representative of Jewish thought about sexuality as a whole. Importantly, this emphasis on rabbinic affirmation of sexuality remains the case as a *rhetorical* claim about Jewish sexual ethics even where the *content* of these writings may seem to contemporary readers at odds with such a claim. That is, even where these writers restrict sexual behavior—in part, precisely on the grounds of various associated risks—their overall rhetoric of sexuality in Judaism remains affirming. Indeed, the contemporary tradition is correct to stress the importance of sexuality for a person's and a community's psychosocial wellbeing. It errs, however, in two ways: first, in treating sexuality as a *sui generis* phenomenon, and second, in neglecting the rabbinic recognition that sex and sexual desire are powerful and often-dangerous forces that *ought* to generate a healthy caution. Attending to this other pole of the rabbinic tradition's sexual dialectic is important both from the perspective of hermeneutical responsibility and from the perspective of ethical and empirical accountability. From a hermeneutical perspective, to ignore or minimize the rabbinic fear of sexuality is to commit a kind of revisionism that belies the texts' particular voices and complexities. In fact, the rabbinic tradition's fear of

sexuality is no less real, palpable, or present in the canon than is its affirmation of sexuality. The dialectic between anxiety about and affirmation of sexuality functions as a genuine dialectic, not as a weaker voice serving as a foil to emphasize a stronger one, nor as a secondary limit upon a generally positive tendency.

Even bracketing this hermeneutical argument, however, from an ethical and empirical perspective a certain fear of sex is eminently sensible. Sex *is* risky, as this dissertation's focus on sexually transmitted infection alone should demonstrate. Sexual interaction puts us in a position of intense and obvious physical and psychological vulnerability. And precisely because, on the one hand, sex is a form of sociality and is inevitably conditioned by other forms of sociality, and because, on the other hand, the vulnerability exposed in sexual interaction is especially intense and obvious, people who are already marginalized or oppressed in other social arenas may experience that oppression especially strongly and violently in the sexual sphere. Sexual impulses, furthermore, are powerful, even overpowering, and can easily impede our ability to make good judgments, as most people who have ever been teenagers can surely understand. Sex, in short, is awesome—in both negative and positive senses—and the sages were quite right to foreground both its joys and its dangers.

To address the third question, about hermeneutics, it is worthwhile to consider what I have examined thus far, and how. In this chapter, I have briefly summarized and explicated the major Jewish sources on sexuality so that the reader may have a clear basic picture (if such is possible with a sprawling, unruly, millennia-old tradition) of the shapes of the conversations and norms around sex and sexuality within the universe of text and tradition we call Judaism. I do so, however, with a serious caveat: nothing I have said in

this chapter is, by itself, some kind of proof that Judaism is or is not “sex-positive,” or that it uniformly “thinks” any one thing about any given sexual activity or aspect of sexuality. While we can glean clues about attitudes toward sexuality or about how sexual concerns were or were not woven into Jewish (or proto-Jewish) religious discourse at the time a given text was written or redacted, it is critical to remember that sex is usually not the ultimate subject of discussion. Rather, the ultimate subject of discussion—especially if the source is, as most of them are, linked to the rabbinic tradition—is how to read, interpret, and live out God’s Torah. For example, the first issue I discussed in the section on rabbinic sources—that of the husband’s sexual duty to his wife—becomes a question initially because of the ambiguity of the word *onah* in the Exodus text. The word literally translates to “obligation,” but to what specific obligation does it refer? Only after this interpretive question comes up for discussion can the verse generate a rabbinic ruling.<sup>238</sup> Put another way, Jewish sources, even those that *seem* to be about sexuality, are ultimately about *textuality*.

The centrality of text in any rabbinic material means that these textual concerns themselves will substantially determine how that material configures the shape of any empirical phenomenon that may come up for discussion. Thus, anyone wishing to utilize rabbinic text for guidance in matters of contemporary practical ethics—as, indeed, the contemporary discipline of academic Jewish ethics as a whole has decided to do—must look past the simple denominative sense of the words they read in those rabbinic texts to the ways those words are structured. One must seek texts in which either the topics under

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<sup>238</sup> See Mekhilta Mishpatim 3, a text contemporary with the Mishnah quoted above, for an explication of this interpretive issue.

discussion, or even the formal patterns of the text itself, have substantial relevance to one's questions.

This means that those texts which appear at first to address the very topic on which one seeks guidance may turn out, upon further examination, not to be the best sources of guidance for one's actual questions. Such, I argue, is the case for sex and sexuality. Explicitly sexual texts are not the best analogues for how sex, as a form of social interaction, functions in our contemporary world. Other texts, however, might provide better models. In the following chapter, I argue that ritual purity texts are one such set.

## Chapter 3

### Textual Models: Exploring Rabbinic Purity Discourse

#### I. Content, Form, and Function: Approaching the Texts

I argued in the previous chapter that it is simplistic, at best, to claim that the Jewish tradition (if one can even refer to it in the singular) is either “sex-positive” or “sex-negative.” Rather, different streams of tradition, at different points in history, demonstrate different trends in their approach to sex and sexuality. I further argued that to recover a nuanced and workable sexual ethic from Jewish tradition requires more than simply identifying and mapping these trends. Such a recovery requires a different hermeneutical approach, one which is attentive to the complex character of the various trends within Jewish traditions, of the equally complex character of its contemporary ethical subject, and of the specific claims and needs of the activity of articulating normative ethics.

This is true of Jewish tradition in general, and it is true in particular of rabbinic text. As Emily Filler has noted, extensive reference to and use of classical rabbinic sources is almost omnipresent in Jewish ethics.<sup>239</sup> Yet too often, these texts are used as though they contain simple, one-to-one analogues to the problems with which contemporary ethicists grapple. As the ethicist Louis Newman, who provides perhaps the most extensive internal critique of what we might call the “prooftexting” of rabbinic sources by contemporary Jewish ethicists, puts it, “virtually all exegetes employ a model

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<sup>239</sup> Emily A. Filler, “Classical Rabbinic Literature and the Making of Jewish Ethics: A Formal Argument.” (Paper presented at the annual meeting of the Society for Jewish Ethics, Seattle, WA., January 9-12, 2014), 1. But cf. Michal S. Raucher, “Ethnography and Jewish Ethics: Lessons from a Case Study in Reproductive Ethics” (*Journal of Religious Ethics* 2016, 44:4): 636-658 for a feminist critique of this near-ubiquity.

of textual interpretation which assumes first, that texts themselves contain some single determinate meaning and second, that the exegete's role is to extract this meaning from the text and apply it to contemporary problems."<sup>240</sup> Such assumptions, Newman insists, are, "questionable, if not altogether untenable."<sup>241</sup> Similarly, within the discipline of rabbinics, Elizabeth Shanks Alexander, Beth Berkowitz, Mira Balberg, and Charlotte Fonrobert, among others, have all argued convincingly that it is problematic to try to straightforwardly deploy the content of rabbinic texts in the service of contemporary ethical-normative claims. To do so, they note, is to miss a defining characteristic of rabbinic text: it is primarily about the Rabbis and their world.

Beth Berkowitz offers a particularly strong exposition of this problem. In *Execution and Invention: Death Penalty Discourse in Early Rabbinic and Christian Cultures*, Berkowitz examines the modern reception history of particular rabbinic texts that deal with the topic of capital punishment. American Jewish writers, according to Berkowitz, "want to know: What is the traditional Jewish perspective on capital punishment?"<sup>242</sup> She identifies a tradition, beginning in the late nineteenth century, of reading Talmudic texts on criminal justice as models of humanitarianism. Using a passage from Mishnah Makkot 1:10—"R. Tarfon and R. Akiva declare that, had they been members of the Sanhedrin, a sentence of death would never have been passed"—as his central proof-text, an obscure Rabbi and lawyer by the name of Samuel Mendelsohn "goes so far as to say that the Talmud's ethics were not only progressive by modern

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<sup>240</sup> Louis E. Newman, "Woodchoppers and Respirators: The Problem of Interpretation in Contemporary Jewish Ethics." In Elliot N. Dorff and Louis E. Newman, eds., *Contemporary Jewish Ethics and Morality: A Reader* (Oxford, UK: Oxford University Press, 1995), 141.

<sup>241</sup> Ibid.

<sup>242</sup> Beth A. Berkowitz, *Execution and Invention: Death Penalty Discourse in Early Rabbinic and Christian Cultures* (Oxford, UK: Oxford University Press, 2006), 49.



standards, but even more progressive than modern standards.”<sup>243</sup> This proof-text continues to appear in abolitionist writings through the twentieth century, usually omitting, as Mendelsohn did, the very next phrase: “Rabbi Shimon ben Gamliel said, they would thereby have increased bloodshed in Israel.” There is also a counter-tradition, which Berkowitz grounds in mid-twentieth century Israel thought but which is also evident in American thought, with such writers as Walter Jacob and David Novak arguing that “the Rabbis were fundamentally in favor of the death penalty despite several statements to the contrary.”<sup>244</sup>

Such writers—both those who are in favor of capital punishment, and those who are against it—Berkowitz argues, miss the actual trees for an impressionist painting of a forest. First, each side is likely to underrepresent texts that complicate their case; abolitionist readers, for example, tend to ignore the final clause of M. Makkot 1:10, while readers who advocate for capital punishment similarly tend to minimize texts that express opposition not just to frequent executions but to any executions at all. Even where writers represent this intertextual debate more fairly, they tend to focus largely on the texts about *whether* capital punishment should occur, at the expense of those texts that describe the rabbinic rituals of execution themselves. “Looking at what happens *after* conviction,”

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<sup>243</sup> Berkowitz, *Execution and Invention*, 30, referring to Samuel Mendelsohn’s *The Criminal Jurisprudence of the Jews* (New York: Sepher-Hermon, 1991). Berkowitz notes that these characterizations of the rabbinic stance as either abolitionist or pro-death penalty (and as, in either case, notably enlightened in its stance on the matter) have significant rhetorical force in both intra-Jewish disputes and in discourse between Jews and non-Jews. Mendelsohn, for example, is addressing both Jewish critics of the Talmud who saw Rabbinism as an irrational distraction from the “pure” ideals of the Hebrew Bible, and “Christian supersessionist criticisms of rabbinic Judaism that it represent[ed] a desiccated form of religion in comparison with its biblical heritage and that heritage’s apparent Christian successor.” (Berkowitz, 28) The parallel to the set of rhetorical claims common among contemporary Jewish writers (which I have described in chapter 2) that the rabbinic tradition is deeply and disciplinedly sex-positive, as opposed to “sex-negative” Christianity and/or “depraved” secular values, should be clear. It would seem that the practice of making sweeping claims about the stance of “the Rabbis” on contemporary ethical problems may be as much a rhetorical response to the challenges of modernity as it is a hermeneutical commitment for its own sake.

<sup>244</sup> Berkowitz, 61.

Berkowitz writes, "...makes it possible to move beyond either/or thinking about rabbinic criminal execution [to] explore the rabbinic death penalty as a social, political, and religious practice."<sup>245</sup> Such exploration, she argues, yields the conclusion that rituals of execution are ultimately about rabbinic discourses of power and the power of rabbinic discourse, "not just about criminals and courts but about the power of the Rabbis to redeem any Jew."<sup>246</sup>

Berkowitz's observations ring true for more than just death penalty discourse. As I argued in chapter two, while contemporary Jewish ethicists may try to characterize rabbinic discourse as being affirming of sex and sexuality, a closer look at the texts that specifically engage sexuality reveals that within these texts discourse on sex actually has more to do with establishing social, familial, and religious boundaries—and the Rabbis' authority to define them—as well as setting the stage for stories of exemplary sagely conduct, than it does with sex for its own sake. The claim that rabbinic text is somehow sexually affirming is not only debatable, it is beside the point, because the text is not primarily about sex or sexuality. Rabbinic text is about rabbinic text, rabbinic character, and rabbinic authority; it is about sex and sexuality mainly inasmuch as those topics provide interesting cases or ways to think through a textual issue—and to affirm rabbinic claims of authority.

At the same time, a religious commitment to Jewish ethics ultimately demands a serious engagement with foundational Jewish texts. Any approach to this engagement, however, should have the following virtues: First, it should try to stay true to the text as such without either revising or apologizing for its more problematic content. Second, it

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<sup>245</sup> Idem, 63.

<sup>246</sup> Idem, 70.

should demand an attentiveness to context, form, and style that is good practice for any reader. Third, it should help articulate a particularly Jewish way of doing ethics. Ideally, such a particularly Jewish mode should nevertheless be able to helpfully contribute to non-Jewish ethical discourses.

One possibility, articulated by Emily Filler, is to use rabbinic—and biblical—texts in a formalist way: rather than drawing ethical conclusions about their content, one uses the ways rabbinic texts work through issues as models for ways of thinking about contemporary issues. Filler contests the assumption that there is a way of deploying classical texts to do ethical work that is fundamentally stable across religious traditions.<sup>247</sup> Rather, she argues, the very structure of classical Jewish texts nudges the reader not only into interpreting those texts differently than one would interpret texts from other traditions, but also into a different mode of ethical reasoning. For her, “as much as anything, it is the *way* this content appears which defines [classical texts]—and defines the way they work (or do not work) in Jewish ethics.”<sup>248</sup> Features of classical texts, such as the Gemara's preservation of pitched and polyvocal debate or narrative Midrash's recognition of multiple possible meanings or interpretations of a biblical word or phrase,<sup>249</sup> not only militate against univocal methods of interpretation; they trouble the assumption that the Jewish ethicist should seek singular, discrete, text-based solutions to contemporary ethical problems to begin with.

Filler's approach has the three virtues I have listed above. Additionally, it encourages the writer to think outside of the often narrow canon of texts heretofore employed by academic Jewish ethicists on their topic of choice. If the form, rather than

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<sup>247</sup> Filler, 4.

<sup>248</sup> *Idem*, 5.

<sup>249</sup> *Idem*, 5

the content, is primary, any subject matter may be arranged in such a way that it is a potential source of guidance for a given problem. This method is a valuable tool for the contemporary Jewish ethicist, and further, I think that Filler is likely correct when she claims that a primary focus on the form, rather than the content, of classic texts “can aid Jewish ethicists in employing these texts in ways...which are more distinctively *Jewish*.”<sup>250</sup> By this, I think Filler means that a) the classical texts which are substantially formative of rabbinic Judaism and upon which Jewish ethicists rely a great deal are often ultimately *about* formal matters of law or hermeneutics more so than they are about their apparent subject matter, and b) there is something characteristically Jewish about the particular modes of interpretation and discourse found in rabbinic text. When contemporary ethicists attend to the texts' emphasis on form and participate in the particular modes of discourse demonstrated by those texts, they are performing "distinctively Jewish" ways of doing ethics.

That said, I do not believe that a strictly formalist approach is the *only* hermeneutical method available to the practical ethicist that possesses the virtues I have enumerated. Just because one cannot assume a one-to-one correspondence between the content of a Rabbinic text and a contemporary ethical problem does not mean that the content is *completely* alien to contemporary concerns or that it cannot do any useful work for a particular problem. When Berkowitz examines rabbinic descriptions of the ritual of capital punishment, she asks, in a Foucauldian mode, “What work does this ritual of execution do? How is capital punishment mobilized? What is the political significance of

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<sup>250</sup> Idem, 2. For some examples of how this methodology might be put into practice, see Moses Pava, *Jewish Ethics in a Post-Madoff World: A Case for Optimism* (New York: Palgrave MacMillan, 2011) and several of the essays in William Cutter, ed., *Midrash and Medicine: Healing Body and Soul in the Jewish Interpretive Tradition* (Woodstock, VT: Jewish Lights Publishing, 2011).

[the rabbinic] reluctance to execute and concern to preserve the body?”<sup>251</sup> Berkowitz is asking, in other words, about the *social function* of execution rituals in the world of rabbinic discourse. How do these rituals generate and maintain rabbinic power? What do they reveal about the limits of that power? More broadly, what do the particulars of these rituals—the specific forms of execution they mandate, the ways they manage space and time, silence and speech—tell us about the workings of a world of complex and multilayered interactions between person and person, person and state, person and expert authority as the Rabbis understood it?

Berkowitz asks these questions in the capacity of a text scholar and historian, but I contend that this type of inquiry into the functional details of cases within rabbinic text—an approach I shall refer to as “functionalist”<sup>252</sup>—can be equally useful for the practical ethicist. If we want to work with Rabbinic content, and we accept the claim that the ultimate subject matter of rabbinic text is the Rabbis and their world, the next question should be, “How do the specific phenomena the Rabbis discuss function within the world of rabbinic text?” Along these lines, when one employs rabbinic text to address a contemporary problem, the way that problem functions in its contemporary context may serve as a guiding rubric by which to examine rabbinic texts. Texts which may initially appear unrelated to the contemporary problem may prove, upon more careful examination of the work their subject matter does, to address questions that are highly germane, because their subject matter may actually function similarly to that of the problem at hand. Thus, sex in rabbinic text has, as a rule, different social functions than

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<sup>251</sup> Berkowitz, 63.

<sup>252</sup> My use of the terms “functionalist” and “functionalism” ought not be confused with the school of thought in philosophy of mind that specifically defines *mental states* according to their function rather than their structure. Similarly, Filler’s account of formalism ought not be confused with the theory of legal formalism, according to which legal rules should be applied to cases without regard for social or political concerns.

does sex in the contemporary world, as I have discussed in chapter two—but there may be *other* matters discussed in other rabbinic texts that function similarly to aspects of contemporary sexuality.

Such a functionalist approach makes it relatively difficult to make generalizing claims about “what or how the Rabbis thought,”<sup>253</sup> because it is necessarily case-based and because its primary objects of inquiry are the details of particular phenomena in their textual context. It is not concerned with making sweeping moral claims on behalf of the Rabbis; rather, it does its moral work by first identifying the ways the Rabbis construe certain phenomena as functioning socially, ritually, and morally, and then carefully comparing those construals of function to social, ritual, and moral aspects of the contemporary problem under discussion. If the subject matter of the rabbinic text, or “source,” and that of the contemporary ethical problem, or “target,”<sup>254</sup> turn out to reproduce similar structures of social interaction or authority, or if they illuminate similar aspects of types of interaction people engage in or of the world they inhabit, then that particular source is likely to be a fruitful basis for constructive work on that particular target.

This comparison of the social, ritual, and moral functions of the rabbinic source and the contemporary target, in turn, provides a basis for the ethicist to ask how the

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<sup>253</sup> This is a pitfall to which the formalist approach can still be vulnerable. For example, one formal feature of rabbinic texts that may be quite appealing for ethicists, and which I myself have invoked (Rebecca J.E. Levi, “A Polyvocal Body: Mutually Corrective Discourses in Feminist and Jewish Bodily Ethics” *Journal of Religious Ethics* [(43:2, 2015): 244-267] is the polyvocal character of rabbinic discourse. However, the actual extent of this polyvocality is a matter that is very much in dispute among scholars of rabbinics, especially with regard to *halakhic* midrash—see, for example, Natalie B. Dohrman, “Reading as Rhetoric in Rabbinic Texts” in Craig A. Evans, ed., *Of Scribes and Sages: Early Jewish Interpretation and Transmission of Scripture*, Vol. 2 (London and New York: T&T Clark International, 2004), 90-114, and Azzan Yadin, *Scripture as Logos: Rabbi Ishmael and the Origins of Midrash* (Philadelphia, PA: University of Pennsylvania Press, 2004)—but even with regard to the Talmud: see Boyarin, *Socrates and the Fat Rabbis* (Chicago: University of Chicago Press, 2009).

<sup>254</sup> I am grateful to Elizabeth Shanks Alexander for suggesting the “source” and “target” framework.

contemporary situation might improve practically and morally. Such a comparison might suggest that particulars of the rabbinic analogue's function may be an improvement upon the ways we currently conceive of and address the contemporary problem. It may also be the case that problems in the functioning of the rabbinic analogue may serve to elucidate comparable problems in the contemporary situation. In addition, this approach acknowledges Filler's caution against using a single set of interpretive techniques across different canons for which they may not be equally suited. It also shares her concern with *how* content is deployed, rather than simply asking *what* the content is.

Employing this approach, I find that the ways in which Tannaitic texts explore questions of ritual purity provide a relevant and illuminating lens through which to approach questions of contemporary sexual ethics and public health. I argue that ritual impurity, for the Rabbis of the Mishnah, is best understood as a form of contagion that is an undesirable but ultimately inevitable consequence of social intercourse which, in turn, is desirable in its own right in spite of its risks. Ritual impurity, furthermore, is not a monolith; within the class of "ritual impurity," there exist numerous types and degrees of impurity, each of which has different consequences and different mitigation protocols applied by the Rabbis. Throughout, the consequences of transmitting impurity are not trivialized, but neither are they treated as something that is uncommon or shame-worthy. The moral implications of ritual impurity thus do not lie in the simple matter of being or not being impure; rather, they lie in the way persons discipline themselves so that they may best mitigate the consequences of being social actors in a world where impurity is an inevitable consequence of social interaction.

Sex is a species of social intercourse that is fundamentally important to the flourishing of most people, and there is no foolproof method of preventing all sexually transmitted infections. Thus, STIs, as I argued in chapter one, also represent a form of contagion that is an ultimately unavoidable consequence of certain forms of social interaction that are desirable in their own right, in spite of their risks. Like ritual impurity, STIs are also not monolithic; they vary in severity, virulence, and potential routes of transmission. Therefore, rabbinic methods of managing the social risks of impurity may translate quite well to contemporary questions about how sexual agents and public health systems ought to act in the face of STI risk.

“The Rabbis,” writes Berkowitz, “are not a simple resource for either side of the contemporary death penalty debate. They *are* a resource, however, for better understanding the workings of authority, its strategies of persuasion, and the role that violence plays in those strategies.”<sup>255</sup> Rabbinic purity discourse and contemporary questions of sex and public health raises different functional questions than does rabbinic discourse on the rituals of execution, but Berkowitz’s broader caution about how to employ rabbinic discourse as a contemporary reader rings as true here as it does there. The Rabbis are not simple resources for any side in contemporary debates about sexual ethics, Jewish or otherwise. But they may be invaluable, if complex, resources for understanding the workings of socially transmitted contagion—an understanding that, in turn, may help us develop better ways to manage the risk of contagion while continuing to act as the fundamentally social beings that we are.

In this chapter, I first give a brief overview of the evolution of ritual purity from Biblical to rabbinic texts. Second, I then treat in greater detail ritual purity as it is framed

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<sup>255</sup> Berkowitz, 20.



in the Mishnah, using Mira Balberg's work on the subject as my guide.<sup>256</sup> Third, I offer a close reading of texts from masechet Zavim (the tractate concerning genital discharges) in Seder Tohorot (the Order of Purities) in order to draw out a specific set of ways to think about impurity which I apply in greater detail in the following chapter. Finally, I address some concerns about power, authority, and the construction of expertise that my use of this model raises.

## II. A Brief Overview of Impurity from the Tanakh to the Talmud

It is now generally held among biblical scholars that impurity in the Hebrew Bible is organized according to two main categories, each of which finds its exemplar within Leviticus. Impurity in the Hebrew Bible is either ritual or moral.<sup>257</sup> Ritual impurity is fairly easy to contract and relatively easy to remedy. It is temporary, mainly comes from contact with bodies of some kind, and, importantly, is not etiologically related to sin. Moral impurity, conversely, arises as the direct result of committing a sin. Ritual impurity is individually contracted, is shared only when the contractor comes into certain defined types of contact with others, and is an immediate problem only in the sanctuary, but moral impurity affects the entire community, regardless of who within the community committed the sin. While ritual impurity's effects are immediate, limited, and temporary,

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<sup>256</sup> Mira Balberg, *Purity, Body, and Self in Ancient Rabbinic Literature* (Chicago, IL: University of Chicago Press, 2014).

<sup>257</sup> This concept was worked out variously by David Zvi Hoffman, Jacob Milgrom, and Tikva Frymer-Kensky, and then further developed by Jonathan Klawans. See Hoffman, *Das Buch Leviticus*, 2 vols. (Berlin, DE: M. Poppelauer, 1905-1906); Milgrom, "Sin-Offering or Purification-Offering?" *Vetus Testamentum* 21 (1971), 237-239, and *Leviticus 1-16. A New Translation with Introduction and Commentary*, vol. 3 of *The Anchor Bible* (New York: Doubleday, 1992); Tikva Frymer-Kensky, "Pollution, Purification, and Purgation in Biblical Israel", in *The Word of the Lord Shall Go Forth*, ed. Carol Myers and M. O'Connor (Winona Lake, IN: Eisenbrauns, 1983), 399-414; and Klawans, *Impurity and Sin in Ancient Judaism* (Oxford, UK: Oxford University Press, 2000).

moral impurity's effects are often delayed, usually permanent, and cumulative, polluting and disfiguring the community, land, and sancta over time.

### *1. Ritual and Moral Impurity in the Hebrew Bible*

Ritual impurity in the Pentateuch is a state of being that is incompatible with the presence of holy things and is a consequence of some kind of physical contact with a discrete source of impurity. Such sources may be external, such as the carcasses of reptiles, rodents, some other impure animals, permitted animals that died naturally,<sup>258</sup> or human corpses.<sup>259</sup> They may also be generated by the human body, like scale disease,<sup>260</sup> semen,<sup>261</sup> menstrual blood,<sup>262</sup> childbirth,<sup>263</sup> or genital discharge.<sup>264</sup> Finally, priests who perform certain purificatory rituals, such as the burnt offering for the day of atonement,<sup>265</sup> contract ritual impurity as a consequence of some aspect of the ritual.

Contracting any of these impurities does not, in and of itself, carry moral opprobrium. All of these sources are things that one would expect to encounter regularly in the course of their everyday life. Indeed, most are unavoidable, and, as Tikva Frymer-Kensky points out, to avoid some sources of impurity is to violate other commandments: "Avoidance of intercourse and childbirth [is] an avoidance of the explicit command to procreate. Similarly, corpses must be disposed of properly even though contact with the corpse results in major pollution."<sup>266</sup> Along these same lines, priests conducting certain

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<sup>258</sup> Leviticus 11:1-47.

<sup>259</sup> Numbers 19:13-22.

<sup>260</sup> Leviticus 13:1-14:32.

<sup>261</sup> Leviticus 15:16-18.

<sup>262</sup> Leviticus 15:19-24.

<sup>263</sup> Leviticus 12:1-8.

<sup>264</sup> Leviticus 15:1-15, 15:25-33.

<sup>265</sup> Leviticus 16:27-8.

<sup>266</sup> Frymer-Kensky, in Myers and O'Connor, *The Word of the Lord Shall Go Forth*, 403.

commanded rituals, as noted above, contract impurity from those very rituals. Impurity from these sources is contagious: someone who touches the person or clothing of a person who has had direct contact with certain sources of impurity, for example, contracts a weaker and shorter-term case of ritual impurity.<sup>267</sup> It is also temporary: contact with external sources of impurity results in a standardized purification period, and impurity from internal, bodily sources lasts only as long as the condition is active, plus a standardized purification interval—and purification rituals eliminate the acquired impurity.<sup>268</sup>

Moral impurity, by contrast, is a state of defilement that is a consequence of severe transgression. Klawans identifies five ways in which moral impurity differs from ritual impurity: first, it is a consequence of “grave sin”—usually sexual sin, bloodshed, or idolatry. Second, unlike ritual impurity, moral impurity is not contagious by way of direct or indirect contact. Third, while ritual impurity is a temporary status, the defilement or injury of moral impurity is durable or even permanent; it also affects not just the malefactor(s) but, eventually, the land itself. Fourth, while ritual impurity can be remedied with specific purificatory rituals, moral impurity, if it can be remedied at all, calls for punishment or atonement. Finally, there is a lexical difference: the word “impure” (*tamei*) is used for both phenomena, but terms like “abomination” (*toevah*) and “pollute” (*tanaf*) are used only in reference to moral impurity.<sup>269</sup>

These two categories of impurity are generally distinct, but can at times be blurred. Most obviously, deliberate failure to observe proper quarantine and purification

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<sup>267</sup> See, for example, Lev 15:10-11.

<sup>268</sup> This three-fold categorization of ritual impurity—that it is not sinful, comes from natural sources, and results in temporary contagion—is from Klawans, 23-25.

<sup>269</sup> Paraphrased from Klawans (2000), 26.

procedures when one has contracted ritual impurity—not properly purifying oneself after contact with a corpse,<sup>270</sup> or entering the sanctuary while impure,<sup>271</sup> for example—is a grave sin. The Levitical dietary laws also complicate these categories: for example, as Klawans notes, “the carcasses of prohibited fish and birds are not considered to be ritually defiling, but eating them is nevertheless forbidden.”<sup>272</sup> And, moving beyond the Pentateuch, prophetic rhetoric at times seems to conflate ritual and moral impurity: Ezekiel 36:17, for example, compares the moral pollution engendered by the Israelites’ perfidy to “the impurity of a menstruating woman (*niddah*).”<sup>273</sup>

Ezra and Nehemiah also use the language of *niddah* to express disapproval of Canaanite religious practices (which fall firmly into the category of acts that generate moral impurity) and of intermarriage,<sup>274</sup> and it is in this rhetoric that Christine Hayes identifies a third category of impurity, that of “genealogical impurity.” Hayes argues that this category has its roots in the Pentateuch, regarding the lineage of the High Priest, who “must preserve his holiness by observing an extreme form of genealogical purity, marrying a virgin from within the priestly clan. Violation of the marriage prohibition is said to desecralize, or profane, the priest’s seed, or offspring.”<sup>275</sup> In Ezra and Nehemiah, however, the terminology shifts from that of profanation (*challal*) to that of defilement (*ga’al*, which is synonymous with *tamei*).<sup>276</sup> Furthermore, Ezra<sup>277</sup> extends this concept

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<sup>270</sup> Lev. 19:20, Num. 19:13.

<sup>271</sup> Lev. 7:20-21, 15:31, 22:3-7.

<sup>272</sup> Klawans, 31.

<sup>273</sup> Klawans (30-31) argues that this prophetic rhetoric is distinct because it “is part of an eschatological vision”: by comparing God’s salvific and purificatory power to a ritual that humans can do to purify a temporary state of impurity, the prophet underscores the miraculous nature of God’s act of purification and the permanence of the condition of moral impurity absent God’s extraordinary help.

<sup>274</sup> See Ezra 9:1-3, 9:10-12.

<sup>275</sup> Christine E. Hayes, *Gentile Impurities and Jewish Identities: Intermarriage and Conversion From the Bible to the Talmud* (Oxford, UK: Oxford University Press, 2002), 27. On a priest’s obligation to marry a virgin of priestly descent, see Lev. 21:14-15. Also see Milgrom 2000, 1819-1820.

<sup>276</sup> See, for example, Nehemiah 13:29.

beyond the priesthood to lay Israelites, promoting "an apparently universal ban on intermarriage for the novel reason that marital union with a Gentile profanes (i.e renders nonholy) the holy seed of even ordinary Israelites."<sup>278</sup> Thus, per Ezra-Nehemiah, the offspring of a union between holy Israelite seed and profane gentile seed are genealogically profane (for a lay Israelite) or genealogically impure (for a priest.)

## 2. *Purity Discourse in Tannaitic Literature*

Tannaitic literature bases its categories and sources of impurity on those enumerated in the Pentateuch. As in the Pentateuch, ritual impurity is a fact of life and largely unavoidable; it is, as Mira Balberg puts it, default.<sup>279</sup> Also as in the Pentateuch, it is temporary and communicable, and not to be confused with moral defilement. Indeed, as both Klawans and Balberg note,<sup>280</sup> susceptibility to ritual impurity can be something of a privileged status: Gentiles are not susceptible to contracting ritual impurity (although, as I note in subsequent sections, they can be a *source* of ritual impurity even though they cannot themselves contract impurity). However, though the Tannaim retain the Pentateuchal sources of ritual impurity, they greatly expand their scope, in effect introducing multiple new avenues of possible impurity transmission. I discuss this expansion at greater length in the next section.

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<sup>277</sup> See Ezra 9:1-2.

<sup>278</sup> Hayes, 28.

<sup>279</sup> Balberg, 36.

<sup>280</sup> See Balberg, ch. 5., and Klawans, ch. 4.

### 3. *Impurity in Amoraic Literature and Beyond*

The distinction between ritual and moral impurity remains generally consistent in amoraic literature, although there is some acceptance, as in tannaitic literature, that ritually defiling afflictions, such as skin blemishes, may result from sin.<sup>281</sup> It is also in the amoraic period that the practical focus of ritual impurity discourse narrows dramatically toward one family of impurity, that of menstrual impurity (*niddah*). Out of all the tractates in the Mishnah's Order of Purities (Tohorot), only Niddah receives its own gemara (though material from the other tractates appears as intertext throughout the gemaras.) While medieval *halakhic* regulations moved the question of *niddah* squarely into the realm of personal sexual and marital law—sex with a menstruant being a biblical prohibition<sup>282</sup>—Charlotte Fonrobert argues that the Talmudic discussion of *niddah* encompasses and indeed conflates the realm of sexual practice and the realm of impurity. In post-Temple *halakhah*, of course, purity rules lost their import for daily Jewish practice. Impurity, however, remained a critical legal and rhetorical framework, and menstruation remained the only practical site for some form of impurity, even if the impurity now only functions as incompatible with the sexual union rather than with the sanctuary. Thus, the frameworks and languages of impurity and of sexual unavailability merged.<sup>283</sup>

As in the Bible, the body in rabbinic literature is both a source of impurity and a vehicle for its transmission. And, as Klawans notes, Tannaitic literature continues to

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<sup>281</sup> Klawans, 102-3.

<sup>282</sup> Lev. 18:19.

<sup>283</sup> See Charlotte Fonrobert's discussion of this merging in *Menstrual Impurity: Rabbinic and Christian Reconstructions of Biblical Gender* (Palo Alto, CA: Stanford University Press, 2002), 20-39. Also see Michael Rosenfield, *I am Impure/I am Forbidden: Purity and Prohibition as Distinct Formal Categories in the Laws of Niddah* (PhD diss, Jewish Theological Seminary of America, 2011) for a more extended examination of the relationship between impurity and sexual unavailability within *niddah*.

compartmentalize ritual and moral impurity. The Rabbis also seem to assume, even more strongly than the Bible does, that contact with ritual impurity is a constant of day-to-day life that one should simply expect to encounter. It is this fact—the mundane quality of ritual impurity—that is of particular interest to my project, and it is to this that I now turn.

### III. Impurity In Social Intercourse: Balberg's Model

Now that I have discussed what ritual impurity *is* in Biblical and rabbinic literature, I move on to the question of social function. Beth Berkowitz asks of death penalty discourse in rabbinic text: “What work does this ritual of execution do?”<sup>284</sup> Similarly, I ask, “What work does impurity discourse do in the social world of the Mishnah?” This emphasis on the Mishnah's "social world" is particularly important, for Tannaitic literature is not simply a record of an oral interpretive tradition. The precepts, laws, and arguments preserved in the Mishnah also presume certain characteristics of the world in which those arguments take place. They presume the existence of a certain set of political, ritual, economic, interpersonal, and familial structures, and these assumptions in turn dictate the shapes and meanings of physical and social phenomena that occur within them. Thus, particular phenomena, and in turn the discourse about those phenomena, function in ways that are conditioned by the contours of the world of interpersonal interactions described in the Mishnah.

Mira Balberg, in *Purity, Body, and Self in Early Rabbinic Literature* offers a model of ritual impurity that pays sustained and explicit attention to social function. Balberg argues that “a central dimension of the rabbinic reconstruction of the [Biblical]

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<sup>284</sup> Berkowitz, 63.

purity system is unparalleled attention to questions of subjectivity, and more specifically, to the ways in which persons relate to themselves, to their bodies, and to their material surroundings.”<sup>285</sup> Purity discourse, in other words, becomes a framework through which to construct and understand “the *self*, the individual subject of the law”<sup>286</sup> in the context of a complex and shifting web of relationships to material, social, and legal entities. Although Balberg is attentive to the social function of impurity, she notes that her work is neither what she calls a “sociohistorical”<sup>287</sup> study, which would be “concerned with questions of actual observance of purity laws in ancient Jewish societies,”<sup>288</sup> nor is it strictly “textual-conceptual,” that is, concerned with “how notions of purity and impurity are interpreted in different ancient Jewish texts.”<sup>289</sup> Rather, Balberg is concerned with exploring “the *discourse* of impurity that the Rabbis construct in the Mishnah,”<sup>290</sup> with the rabbinic framework of impurity which “consists of both concrete and applicable everyday practices and hypothetical or idealized ways of conduct, and in the subject that this framework, with its multiple discursive and practical components, creates.”<sup>291</sup> In other words, she is interested in the texts’ *world-building*: the ways in which the rabbinic discourses of purity and impurity imagine and build models of socio-legal subjects and the complex environments they interact with and inhabit.

For Balberg, the critical shifts between Biblical and early rabbinic models of impurity are twofold. First, the main focal point of the discourse is shifted from “the

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<sup>285</sup> Balberg, 4-5.

<sup>286</sup> Idem, 5.

<sup>287</sup> Idem, 6.

<sup>288</sup> Idem, 6.

<sup>289</sup> Idem, 7.

<sup>290</sup> Idem, 7.

<sup>291</sup> Idem, 7-8.



sancta and the Temple”<sup>292</sup> in the Bible to “the *self*, the individual subject of the law”<sup>293</sup> in the rabbinic literature. Second, the rabbinic model greatly increases the emphasis on “the contraction, conveyance, and management of impurity”<sup>294</sup> as compared to sources of impurity in and of themselves. In the Biblical impurity system, because impurity usually requires direct contact with either a primary (e.g., a corpse) or secondary (e.g., someone who has touched a corpse) source of impurity, “impurity generally transpires as a *noticeable event* [that is] discernible and traceable to a particular point in time.”<sup>295</sup> Because the contraction of impurity here is a “noticeable event,” it is therefore generally assumed that the person who contracted the impurity did, in fact, notice the event: “Whoever is impure...is presumably *aware* of whatever brought about this impurity and is capable of saying at what point, more or less, this impurity transpired.”<sup>296</sup> This discreteness that the Priestly system assumes about the event of transmission is possible because impurity has to do with a limited set of “very specific factors [and with] those in their immediate vicinity.”<sup>297</sup>

In short, the axis of the Priestly system of impurity is the *source*. Other moving parts in the system are understood in terms of their proximity to and specific interactions with this central source. In the case of moral impurity, this source is a person or group of people who have committed a polluting sin and the ethical task is to remove the behavior and, if necessary, the perpetrators from the community. In the case of ritual impurity the source is a person, animal, object, or substance whose moral status is irrelevant to their

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<sup>292</sup> Idem, 5.

<sup>293</sup> Ibid.

<sup>294</sup> Idem, 4.

<sup>295</sup> Idem, 27.

<sup>296</sup> Ibid.

<sup>297</sup> Ibid.

ritual status, and the ethical task is to ensure that the source and those affected by it do not contaminate the sanctuary.

The Mishnah, by contrast, makes webs of transmission its focal point, and, in doing so, shifts the locus of ethics from the *source* of impurity to the *subject* who navigates these webs of transmission. While the Mishnah shares with the Priestly system a fairly limited set of primary sources of impurity, the Mishnaic system greatly expands the Bible's possible routes of impurity transmission. This expansion is accomplished in two ways: by "duplicating" impurity such that "even something twice-removed from the source contracts impurity as if it touched the source itself,"<sup>298</sup> and by expanding specific biblical modes of transmission. Thus, to take an example of duplication, liquids "have the power to duplicate impurity ad infinitum...if impure liquids have contact with any object, they make this object impure as if it had direct contact with the source that initially made the liquids impure."<sup>299</sup> Food also has powers of duplication, as do inanimate objects that have come in contact with a corpse. Thus, in this system, a single chain of transmission can span up to five degrees of removal from the primary source (or "father") of impurity. Additionally, the transmission of impurity no longer requires direct physical contact with the source. As a result, the subject may not be aware of where in the physical world impurity dwells, and the moment of its contraction is no longer a discrete, noticeable event.

The Mishnah expands Biblical modes of transmission both by redefinition and by invention. First, it greatly widens the effect of extant Biblical modes by reworking the definition and scope of a narrowly understood term. Thus, from the biblical stipulation

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<sup>298</sup> Idem, 30.

<sup>299</sup> Idem, 30.

that being in a tent with a corpse conveys a certain kind of impurity, the Mishnah develops the discrete and far-reaching category of "overhang":

...the rabbinic perception of overhang, which turns the biblical tent into a *wholly abstract category*, actually turns almost every kind of copresence with the dead into a form of physical contact. For instance, a person who stands under the shadow of a tree that also shadows a graveyard is rendered impure, even though she herself is completely outside the graveyard.<sup>300</sup>

Similarly, from a Biblical stipulation that someone with a genital discharge can communicate impurity by spitting on a pure person, the Mishnah conjectures that other bodily fluids—saliva, urine, and the like—of someone with an impure genital discharge can also communicate impurity, even when they are wholly detached from their source. In other words, when a person is rendered impure by a genital discharge, they can then render others impure through other bodily fluids, such as saliva; furthermore, saliva from an impure spitter can transmit impurity even when the spitter is not present for the transmission. The Mishnah also introduces a novel mode of transmission, that of “shift,” in which “the source of impurity causes something else to move from its place, even without direct contact.”<sup>301</sup> So, for example, if an impure person were in a small boat with a pure person and shifted their weight such that the boat tipped and caused the impure person to lose their balance, the pure person would become impure because the impure person caused them to move, even without any direct contact between them.

As with the Biblical model, impurity in the Mishnah is not in and of itself a morally loaded category: “The Rabbis [did] not associate ritual impurity with sin and immorality, nor did they associate purity with justice and goodness.”<sup>302</sup> It is not a sin to

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<sup>300</sup> Idem, 33.

<sup>301</sup> Idem, 33-34.

<sup>302</sup> Idem, 179.

contract impurity, nor is someone who does not contract impurity in a given circumstance considered a better or more pious person. Yet the Mishnaic model further complicates any direct association between any given case of impurity and direct moral judgment. Through the expansions of scope described above, the Mishnah shifts the focus of impurity discourse from the source of impurity to the social webs by which impurity is transmitted. Here, the concern with impurity is no longer “restricted only to the sources of impurity themselves or to those who come into direct contact with them, but rather [is] the daily and ongoing concern of *everyone*...impurity in the Mishnah is approached not only as a noticeable event, but also, and perhaps much more prominently, as an *ongoing reality*.”<sup>303</sup>

Because impurity is now an “ongoing reality” that is *everyone’s* concern, and because the focus of Mishnaic purity discourse is no longer focused as much on particular sources of impurity and particular contraction events, the ethics of impurity in the Mishnah have to do with the way one navigates a social world in which these webs of impurity are integrated into the warp and weft of everyday life. One’s way of being must be able to manage social and material flows, any of which may be assumed to carry various types and degrees of impurity. Thus, the Mishnaic system must offer an account of the moral actor—understood both as a physical being (the body, in Balberg’s formulation) and as a social and religious being (the self, in Balberg’s formulation)—that can account for both the details of this complex web of impurity and for the ways that actor is expected to manage them.

Balberg argues that body in rabbinic literature becomes more than just a source of and vehicle for impurity. It also becomes in a very prominent way the location of

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<sup>303</sup> Idem, 27-8.

practices of self-discipline and self-formation. In the practice of maintaining a complex and difficult (though just short of impossible) practice of near-constant attention to purity, the rabbinic subject disciplines himself (the gender of the pronoun is important) and forms himself into an ever more ideal subject.

The Rabbis understand the body to be leaky, or porous. The broader ethical significance, for the Rabbis, of the body's porosity—a concept originated by David Harvey<sup>304</sup> that refers to an entity or system's constant and mutually transformative exchanges of physical substances and information with its environment—is well-explicated by Jonathan Schofer, who argues that the body's porosity—most often represented by its need to excrete feces and urine—serves to remind the sage both of his animal (and thus not divine) nature and of his createdness (by the divine).<sup>305</sup> These apparently contradictory lessons, Schofer claims, “both become part of rabbinic pedagogy and instill complementary sagely values: to lead the student from transgression, to inspire humility, and to manage and care for the body.”<sup>306</sup> The simple act of visiting the privy becomes a site for the cultivation and discipline of sagely attitudes and practices. This is demonstrated in the sequence in B. Berakhot 62a, for example, in which Rabbi Akiva follows his teacher into the privy:

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<sup>304</sup> David Harvey, *Justice, Nature, and the Geography of Difference* (Malden, MA: Blackwell, 1996) and *Spaces of Hope* (Berkeley, CA: University of California Press, 2000). See *Spaces of Hope*, 98-99: “The body is not a closed and sealed entity, but a relational ‘thing’ that is created, bounded, sustained, and ultimately dissolved in a spatiotemporal flux of multiple processes...the metabolic processes that sustain a body entail exchanges with its environment. If the processes change, the body either transforms and adapts, or ceases to exist...What is remarkable about living entities is the way they capture diffuse energy or information flows and assemble them into complex but well-ordered forms.” See also Margrit Shildrick, *Leaky Bodies and Boundaries: Feminism, Postmodernism, and (Bio)ethics* (London: Routledge, 1997), which examines disdain for the porosity and “leakiness” of the body, especially and archetypically the female body as figured by patriarchal systems.

<sup>305</sup> Jonathan Wyn Schofer, *Confronting Vulnerability: The Body and the Divine in Rabbinic Ethics* (Chicago, IL: University of Chicago Press, 2010), 54.

<sup>306</sup> Ibid.

It has been taught, Rabbi Akiva said: Once I entered the toilet after Rabbi Yehoshua, and I learned from him three things. I learned that one does not turn [to ease oneself] east and west but rather north and south. I learned that one does not uncover oneself standing but rather sitting. And I learned that one does not wipe with the right but with the left.

Ben Azzai said to him: You are insolent with your master even to this point?

He said to him: It is Torah, and I must learn.<sup>307</sup>

Ben Azzai subsequently repeats this action with Rabbi Akiva and, when challenged by a different Rabbi, offers the same response Rabbi Akiva gave him: “It is Torah, and I must learn.” So the value of what one can learn from a master in the privy is such that the mode of pedagogy is worth transmitting from generation to generation.

The porosity of the body—its constant vulnerability to exchange with its surroundings—thus points to the importance of purity discourse in particular as a site of sagely discipline. However, this porosity also has particular technical importance for purity discourse itself. The body’s secretion and shedding of various substances provides vehicles for the transmission of impurity, but this shedding works in a curious manner. To the general language of the body’s leakiness or porosity, Balberg adds the term “modularity.” This means that “the individual body can change its qualities and consistency by having other external parts, such as another body, added to it: when the two bodies are connected, they conceptually form (at least in terms of impurity) one shared body, and when they are no longer connected, each of the bodies functions as a separate unit.”<sup>308</sup> This applies to both external *and* internal parts: the Rabbis “refer to such parts that can be removed or added as *hibburim*, ‘appendages,’ ”<sup>309</sup> and they

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<sup>307</sup> Trans. Schofer, *Confronting Vulnerability*, 64.

<sup>308</sup> Balberg, 58.

<sup>309</sup> Ibid.

understand “several bodily components within a *single* body as ‘appendages.’”<sup>310</sup> Hair, nails, and teeth are thus considered appendages, and they share a body’s impurity only so long as they are physically connected to it: thus, the hair of a corpse no longer transmits corpse impurity once it has been removed from the corpse itself. Similarly, saliva, even once it enters the cavity of the mouth (thus exiting the salivary glands) has become detached from the body that created it and can carry a different purity status than the person in whose mouth it resides.

The leakiness and modularity of the Mishnaic body has important implications for the relationship between embodiment and selfhood. Bodily impurity directly affects one only when it is communicated to oneself—but because “the rabbinic body is not of one piece, but consists of various [detachable] components,”<sup>311</sup> not all parts of one’s body are identified with oneself. Rather, “every part of the mishnaic subject’s body is something that he *has*, but not every part of his body is something that he *is*, something that he sees as an inseparable part of himself.”<sup>312</sup> This detachment from selfhood applies not only to the above-mentioned “appendages”—it also applies to the interior of the body. Thus, for example, an impure item inside the body does not convey impurity until it emerges, and a pure item inside the body of one who subsequently contracts impurity remains pure.

Balberg offers two cases to demonstrate this. The first, from M. Mikvaot 10:8, states that if someone swallows a pure ring, subsequently contracts corpse impurity, purifies themselves, and finally vomits up the ring, the ring remains pure. The second (quoted from M. Hullin 4:3, but similar statements are found in other tannaitic texts) states that a fetus

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<sup>310</sup> Idem, 59.

<sup>311</sup> Idem, 62.

<sup>312</sup> Idem, 62.

that dies in utero does not confer corpse impurity on the mother until after it emerges; however, if a midwife reaches in and touches the fetus, she contracts impurity.

Thus, those body parts whose purity status matters are the ones we understand as being constitutive—“the parts that can become impure and that need to be purified are *the parts through which the person’s bodily self is defined*, the body parts that we or others consider to be ‘us.’”<sup>313</sup> And yet those parts that we consider to be us are permeable and ineluctably connected to parts that we do *not* consider to be “us,” and regularly interact and exchange matter with other persons, objects, and substances who are not “us” and which have the potential to render “us” impure. The self is neither socially nor physically sealed or self-contained. Rather, it is always, to borrow a phrase from the bioethicist Margaret Battin, “embedded in potential circumstances of exchange.”<sup>314</sup>

The conditions under which inanimate objects are susceptible to impurity are also dependent upon their interactions with human consciousness. Balberg argues that “the comparability and even interchangeability of inanimate objects and human bodies in the rabbinic impurity discourse derive from a view of both human bodies and artifacts as entities of the same kind, namely, as *material objects invested with subjectivity*.”<sup>315</sup> According to the Mishnaic system of impurity, only objects that are 1) usable to humans and 2) *intended* for such use are susceptible: “only that which *matters* to human beings can partake in impurity.”<sup>316</sup> Thus, to take the case of usability, M. Kelim 13:4 states that while a sharp object (like a chisel) is susceptible to impurity, if it loses its sharp edge—

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<sup>313</sup> Idem, 69.

<sup>314</sup> Battin, Margaret P., Leslie P Francis, Jay A. Jacobson, and Charles B. Smith, “The Patient as Victim and Vector: the Challenge of Infectious Disease for Bioethics” in *The Blackwell Guide to Medical Ethics*, Rosamond Rhodes, Leslie P. Francis, and Anita Silvers, eds. (Malden, MA: Blackwell Publishing, 2007), 269-88 (loc. 275).

<sup>315</sup> Balberg, 75.

<sup>316</sup> Idem, 75.



the facility that makes it usable as such—it is no longer susceptible. And as for intention, M. Kelim 26:7 states that thought—i.e., the intention to put an artifact to use—renders artifacts whose process of manufacture is complete and which have thereby become usable susceptible to impurity. Food, too, must be “designated for human beings” (Tohorot 8:6)<sup>317</sup> to be susceptible, and that susceptibility must be “activated” by contact with liquids. This activation, in turn, is dependent in complex ways upon the “will” of the humans who interact with the foodstuffs and liquids in question (M. Makshirin 1:1).<sup>318</sup>

The importance, for the Rabbis, of subjectivity and mental state in all aspects of purity points, recursively, to the importance of purity for the Rabbis as a site for mental and physical discipline. The Rabbis, as Balberg puts it, “shape the pursuit of purity as taking place not only in one’s interaction with and management of the physical lived world, but also and perhaps primarily in one’s interaction with and management of oneself, in such a way that the effort to maintain a state of purity also generates a particular kind of self-reflective subject.”<sup>319</sup> Purity practices ultimately function as a kind of *askesis*, a framework and method of self-examination and self-discipline that is meant to shape the practitioner in a specific way.

The two major practices Balberg identifies in this *askesis* of purity are both practices of self-examination: “examination of the day,” which is “an ongoing effort to give oneself an account of all one’s activities and encounters that could have exposed one or one’s possessions to impurity,”<sup>320</sup> and “self-examination of the body,” in which one

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<sup>317</sup> See *idem*, 86.

<sup>318</sup> See *idem*, 92.

<sup>319</sup> *Idem*, 151.

<sup>320</sup> *Idem*, 157.

searches for “signs that will attest to a bodily state that renders one impure,”<sup>321</sup> such as genital discharge of various types. The information uncovered during these examinations must then be interpreted and translated into actionable judgments about purity status, a complicated and confusing procedure that often requires consultation with a Rabbi. This need for rabbinic consultation is particularly notable where “self-examination of the body” is concerned. Here, indeed, the rabbinic complication is self-reinforcing: “the Rabbis created a system of impurity so complicated that their mediation is bound to be necessary for those who wish to maintain a state of purity in accordance with the rabbinic interpretation of biblical law.”<sup>322</sup>

The moral subject envisioned in the purity texts who engages in these practices of self-examination, is thus “a subject distinguished by his self-command and self-control...self-examination is also self-formation.”<sup>323</sup> Also contained in this portrait of a critical and disciplined subject is the notion of self-control, a quality that, for the Rabbis, “is intertwined in the mishnaic discourse of purity and impurity with *self-knowledge*.”<sup>324</sup> Thus, the Rabbis recalibrate the moral significance of impurity. Rather than associating the status of purity or impurity *in and of itself* with direct moral valence, they imbue the *process of monitoring for and mitigating impurity* within complex social webs with a sense of moral and disciplinary purpose. The Rabbis engendered a “subtle but critical shift of focus from the status of ritual purity itself to the quest for ritual purity, which placed an unprecedented emphasis on the process of attaining ritual purity and the self-

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<sup>321</sup> Ibid.

<sup>322</sup> Idem, 158. Also see, for example, Charlotte Fonrobert (2002) on the complexity of the “rabbinic science of blood.”

<sup>323</sup> Balberg, 164.

<sup>324</sup> Idem, 165.

reflective practices it entails.”<sup>325</sup> In asking, not simply, “Who and what is impure?” but rather, “How should one conduct oneself in a world of complex and interconnected vectors of impurity?” they shift the terms of discourse from primarily taxonomic and straightforwardly ritual ones to social and moral ones.

Balberg’s account of impurity breaks the question of “How does impurity function?” into two more basic parts: “What is impurity?” and “How does one respond to impurity?” For the Rabbis, impurity is, on its face, a class of metaphysical conditions that are incompatible with the sanctuary and are communicable through direct or indirect physical contact or co-presence. More fundamentally, it is a commonplace form of contagion that is transmitted through interaction with persons and objects, that is, through social intercourse. Even more fundamentally than that, it is a site for rabbinic subjects to cultivate a certain kind of discipline and for the reinforcement of rabbinic expertise and authority. This last definition begins to answer the question of how one responds to impurity: for the Rabbis, one responds to the ever-present and complex fact of impurity by cultivating a discipline of rigorous self-examination. Because on the one hand, the maintenance of purity is preferable and, on the other hand, impurity is “default” and ultimately unavoidable, this discipline must be practiced daily; it must become a part of one’s regular routine and it must shape the way one encounters the world and how one forms oneself.<sup>326</sup>

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<sup>325</sup> Idem, 179.

<sup>326</sup> Ishay Rosen-Zvi, in “The Mishnaic Mental Revolution,” *Journal of Jewish Studies* 66:1, (Spring 2015): 36-58, presents a significant critique of Balberg’s claim that the purity system is aimed at creating a “self” in the Hellenistic sense of the word. There is, per Rosen-Zvi, no “inner self” that stands at odds with the body or is somehow “thought into being” (54). Rather, the subject that is disciplined into being by rabbinic Halakhah (exemplified for both Rosen-Zvi and Balberg here by purity law) is “constituted by halakhah—its wills, intentions and thoughts—[and] cannot be separated from the halakhic context in which it appears” (54). This subject is a “unique legal subject made for legal control and regulation” (56).

Thus, in answering these questions, we come to another, second-order question: “What kind of moral subject does impurity discourse aim to create?” This, too, in the end, is a question of function. The Rabbis, Balberg argues, aim for a rabbinic subject who is intimately aware, at multiple levels, of the state of his body and his mind at any given time. Such a subject cultivates this awareness through the above-mentioned processes of self-examination; in doing so he develops self-control, and practices what Jonathan Schofer would call “willed subjection”<sup>327</sup> to rabbinic law. The particulars of the rabbinic purity system—impurity’s constant, widespread presence and fiendish complexity—work in a way that seems directed precisely toward the creation of such a subject.

How, then, does impurity discourse function in the rabbinic world? Most fundamentally, it functions as a system of discipline for rabbinic subjects and as an arena in which rabbinic expertise can exercise authority. It also functions, however, as a method of managing a form of social contagion that is consequential, complex, and unavoidable. And in that light, it also provides insight into the subtler dimensions of how living in a world where such contagion *is* unavoidable forms moral actors in ways beyond the Rabbis’ primary concern of the actor’s willed subjection to rabbinic law.

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For my own purposes, however, Rosen-Zvi’s critique does not have too much impact. Rosen-Zvi does *not* argue that purity law does *not* shape the virtuous subject. Rather, his concern is with the ultimate metaphysical character of that subject, something which, for my own project, simply does not matter all that much. If anything, Rosen-Zvi’s construal of the self as not separate in any sense from the body is *more* congenial to the work I am doing.

On this question, see also Jonathan Schofer, “Spiritual Exercises in Rabbinic Culture,” *AJS Review* 27 (2003): 203-25.

<sup>327</sup> Schofer, *The Making of a Sage*, 9.

#### IV. Features and Functions of Mishnaic Impurity: Cases from Mishnah Zavim

Balberg frames Tannaitic impurity as a constant in the daily lives of those who inhabit the rabbinic world. The constant presence of impurity means understanding the nature of the body and the way bodily encounters shape daily life in terms of this ever-present possibility of transmission. Impurity is default, and individuals and communities must mitigate impurity in ways that are attentive to its particular characteristics. To better understand the particular characteristics of at least one type of Tannaitic impurity, I closely examine selected texts from Mishnah Zavim, which deals with irregular genital discharges. This particular sort of impurity has traits that illuminate the ways Tannaitic impurity works more generally, as well as characteristics that make it an especially useful model for thinking through contemporary matters of sexual health.

In what follows, I examine texts from Zavim according to four analytic categories. The first two come from Balberg's work on impurity in the Mishnah more generally, but are deepened and sharpened through my analysis of Zavim; the second two emerge directly from that analysis. First, genital discharges are but one example of the *ubiquity of impurity* in daily life. As I have discussed above, impurity in the rabbinic world, rather than dwelling in discrete sources as in the Priestly texts, travels through shifting webs or circles of contagion, and is transmitted through a greatly expanded set of modes, some of which do not even require physical contact. The result of this is that impurity, in the world of the Mishnah, is a constant and unavoidable presence. Second, as a result of this ubiquity, as well as the Rabbis' near-exclusive focus on ritual rather than moral impurity, the *ethical locus of purity discourse in the Mishnah shifts from the Biblical category of moral impurity to the subject's management and negotiation*

*of the ritual impurity-laden rabbinic world.* Because impurity no longer dwells in discrete, identifiable sources, it is no longer possible to pinpoint these as the central axis of the purity system. Instead, the Mishnah's discussion of moral conduct in the face of an impurity-laden world focuses on the subject's attentiveness to the status of their body and the events of the day as a way to navigate that world.

Third, this impurity-laden world is also one in which *intimate human interaction is inevitable*. Put another way, the world of the Mishnah is a world of social beings who touch each other in multiple ways. As examples from Zavim make clear, it is assumed that people will have regular physical interactions with each other: engaging in household or workplace tasks that cause them to touch, shift, or lean on one another, touching or moving shared items that others will also touch or move, and simply sharing physical space in close proximity. All of these interactions involve recognized routes of impurity transmission, but it is understood that even so, such interactions are inevitable and even desirable in their own right.

Fourth, because of the ubiquity of impurity and the inevitability of intimate human interaction, the *ethical management of impurity is characterized by a multifactorial process of diagnosis and response*. Correct diagnosis enables correct mitigation and, as Balberg has noted, self-examination and self-inventory are integral parts of the rabbinic ethic of impurity. Thus, accurate assessment of one's impurity status and type of impurity is a discipline in and of itself. There are three pivotal components of this process. First, when diagnosing impurity, one must determine *impurity status* (whether someone is impure), *type of impurity* (to which Biblical source one's impurity can be traced), and *degree of impurity* (how severe one's impurity is, and thus whether

one must perform the full Biblical purification ritual or an abbreviated and less onerous one). Second, this differential diagnostic process must account for the *physical and temporal details of the impurity's precipitating event*, as well as the *circumstances of exchange with one's environment* at and around the time of the event. Finally, when responding to a diagnosis, one must consider the *contextual virulence of a given impurity*—that is, by how many routes and into what hosts that particular impurity can spread. *Type* and *degree* of impurity will affect how “contagious” a given impure person is, but so will the specifics of that person's interactions with their fellows and their environment.

### 1. Zivah: The Priestly Background

Bodily discharges, as we have noted earlier, are one of the major sources of ritual impurity in both Biblical and rabbinic schemas. One such category of discharge is *zivah*, or irregular discharge from the penis (regular seminal and menstrual discharges each have their own classes of impurity and their own procedures for purification). Leviticus 15:2-3 describes this phenomenon, distinguishing a discharge (*zivah*) from a seminal emission (*shikvat zera*), and describing two possible ways in which *zivah* might present itself:

<sup>2</sup>Speak to the Israelites and say to them: when any man has a discharge from his penis, (*zav miv'saro*) his discharge is impure.

<sup>3</sup>This shall be the nature of his impurity in his discharge: whether his penis oozes his discharge, or whether his penis is stopped up by his discharge, he is impure.

So the important identifying feature of *zivah* is that it is a non-seminal substance produced from the penis. The mode of expression—whether the substance oozes from the urethra, or whether it is more viscous and blocks the urethra—is immaterial, and there is

no discussion of the actual properties (viscosity, color) of the substance, or of the frequency of its discharge.

The next several verses enumerate the ways in which *zivah*'s impurity may be communicated, and the steps one must take to purify a person or object that has contracted secondary *zivah* impurity:

<sup>4</sup>Any bedding that one with such a discharge (the *zav*) lies on is impure, and any item upon which he sits is impure.

<sup>5</sup>Anyone who touches his bedding shall launder his own garments, and wash himself in water, and be impure until evening.

<sup>6</sup>And anyone who sits on any item upon which the *zav* sat shall launder his own garments, and wash in water, and be impure until evening.

<sup>7</sup>And anyone who touches the flesh<sup>328</sup> of the *zav* shall launder his own garments, and wash in water, and be impure until evening.

<sup>8</sup>And if a *zav* spits on a pure person, the latter shall launder his own garments, and wash in water, and be impure until evening.

<sup>9</sup>And any saddle upon which a *zav* rides is impure.

<sup>10</sup>And anyone who touches anything that has been underneath him is impure until evening, and anyone who carries any such things shall launder his own garments, and wash in water, and be impure until evening.

<sup>11</sup>And anyone who touches the *zav*, and has not rinsed his hands in water, shall launder his own garments, and wash in water, and be impure until evening.

<sup>12</sup>And any earthenware vessel that the *zav* has touched shall be broken, and any wooden vessel shall be rinsed in water.

These routes of communication—directly touching, lying, sitting, leaning, spitting, carrying, and being carried upon—are standardized and expanded in the Mishnah, becoming categories in themselves. Even in the biblical text, however, prior to this standardization, there are certain ways in which this kind of impurity is communicated and specific substances which are susceptible to it. Thus, by conjecture, there are routes of contact which *do not* communicate *zivah* impurity and substances which *are not*

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<sup>328</sup> This is the same Hebrew word (*sar*) that is translated as “penis” in earlier verses. It literally means “flesh”; in earlier cases the context makes it clear that the discharge is genital, whereas here it is not so clear that men would casually touch each other’s penises in such a way that the Bible would consider that *very* specific route of transmission to be a noteworthy concern.



susceptible to such communication. If, for example, a *zav* were to harvest some fruit, it would not seem that someone who subsequently handled the fruit would be rendered impure, as long as the *zav* did not sit or lie on it.

Finally, verses 13-15 describe the process by which the *zav* purifies himself once his discharge has ceased:

<sup>13</sup>When the *zav* is purified of his discharge, he shall count seven days of purity, and he shall launder his clothes and wash his flesh in living water, and he is then pure.

<sup>14</sup>And on the eighth day, he shall take two turtledoves, or two young pigeons, and go before Hashem, at the entrance to the Tent of Meeting, and he shall give them to the priest.

<sup>15</sup>The priest shall take them, one for a sin offering and one for a burnt offering, and the priest shall make expiation for him for his discharge.

Parts of this ritual are reminiscent of the process by which someone to whom the *zav* has communicated secondary impurity mitigates that impurity. Like them, he must wash his clothes and body, but whereas any water is sufficient for the secondary case, the *zav* must wash in “living” or flowing water. In addition, the *zav* must wait seven days after the discharge has ceased before he can perform the ablutions, and he must also make an offering to the priest. In this way, his case is ritually distinguished both from the person who contracts secondary *zivah* impurity, and from the person who has a seminal emission. The latter, like the person who contracts secondary *zivah* impurity and like someone who comes in direct contact with a seminal emission, must simply wash his body and any garments that came in contact with the semen in water (any water) and be impure until evening.<sup>329</sup>

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<sup>329</sup> Leviticus 15:16-18. The *zav*’s process is, in some ways, more comparable to that prescribed for a woman who has a discharge of blood outside of her normal cycle. Interestingly, the root *zav* is also used here, but the full term is *zav damah*, “a discharge of blood.” She, too, must count seven pure days and bring an offering to the priest on the eighth (Lev. 15:25-30). Like the *zav*, she communicates impurity to anything she lies or sits on, and to anyone who touches her or anything she lies or sits on (Leviticus 15:25-27; also

## 2. Zivah in the Mishnah

The rabbinic world is one in which impurity is ubiquitous, to the point where even *zivah*, a form of impurity which by definition results from an *abnormal* penile discharge, is treated as though it were matter-of-fact and commonplace. Because the axis of purity discourse shifts in the rabbinic literature from discrete sources to diffuse and often imperceptible webs of transmission, someone who enters one of these webs may not realize that they have done so until well after the fact, if at all. Rabbinic discourse thus presumes that the transmission of impurity is what could be called a “known unknown.” One may not know whether, at any given time, they have contracted a given impurity, but they must always assume the possibility of such contraction in any given encounter.

Practically speaking, this means that one must assume that possibility most of the time, because the rabbinic world is also one that is populated by social beings who interact with each other and touch each other in a variety of ways. Even as the Rabbis extend the Biblical mechanisms of transmission to include indirect physical contact, they also assume that the average person will regularly act in ways that open them up to these expanded mechanisms of transmissions. Intimate human interaction, for the Rabbis, necessarily places one within multiple webs of impurity, but it is also simply inevitable.

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true of the woman with normal menstrual bleeding—Leviticus 15:19-23). Unlike the *zav*, however, the menstruant is explicitly stated to convey impurity through sexual contact (Leviticus 15:24). There is also no procedure for washing stated for either the menstruant or the woman with irregular bleeding. The requirement for a menstruant or a woman with non-menstrual bleeding to immerse at the end of her cycle is a rabbinic innovation, one which Tirzah Meacham describes as an elision of the categories of *niddah* [normal menstruant], *zavah* [woman with non-menstrual bleeding], and *zav*. See Tirzah Meacham, “An Abbreviated History of the Development of the Jewish Menstrual Laws,” *Women and Water: Menstruation in Jewish Life and Law*, Rahel R. Wasserfall, ed., (Hanover, NH: Brandeis University Press, 1999), 23-39. Finally, neither woman communicates impurity in ways that the *zav* does—riding, leaning, spitting, carrying, or being carried upon.

Mishnah Zavim offers a number of examples of this inevitability. Consider some of the situations described in Zavim 3:2:

If [a *zav* and a pure person] were closing or opening a door [together], [they are both impure.] But the Sages say: only if this one closed it, and the other one opened it.

If one brought the other up from a pit, Rabbi Yehuda said: [they are both impure] only when the one who is pure lifts out the one who is impure.

If they were knotting ropes together, the Sages say: [they are both impure] only if one pulled his way and the other pulled his own way.

If they were weaving [together], whether they were standing or sitting, or if they were grinding grain together, Rabbi Shimon declares the one who is pure to be fully pure, unless they were grinding with a hand-held millstone.

If they were unloading a donkey, or loading it, when the load is heavy the pure one is impure, but when the load is light, he remains pure.

But in all such cases they are pure enough for the members of the congregation, and impure for the purposes of eating *terumah*.

This passage lists several examples of physical interactions through which it is possible to transmit *zivah*. The passage thus takes for granted two things: first, that it is very easy to enter a *zivah*-transmission web, and second, that people will regularly engage in activities that bring them into this web. In the examples described here, the inevitability of intimate physical interaction is underscored by the mundane character of each situation. Any of these interactions could quite plausibly occur during the course of a normal day in a pre-industrial society. Furthermore, five of the six examples—one person lifting another out of a pit, knotting ropes together, weaving together, grinding grain together, or loading or unloading a pack animal—could easily be a regular part of day-to-day subsistence work. Thus, not only the normal course of social relations more broadly but also the normal course of economic relations dictate that these interactions are bound to occur and to occur regularly.

Furthermore, the most consequential forms of contact are not necessarily the most direct or obvious ones. Nor are the sorts of intimate interactions that are inevitable throughout day-to-day social life always planned, desired, or cooperative. Zavim 3:3, for example, mainly consists of a discussion of quotidian situations that are potential vectors for transmitting impurity by *heset*, or shift:

If a zav and one who is pure sat together in a large boat—

What is a large boat? Rabbi Yehuda says, any that cannot be destabilized by the weight of one person—

or if they sat on a plank, or a stool, or on a bed-frame, or on a beam, where these are secured; or if they were in a stable tree, or in a stable booth, or on a heavy ladder, or on an Egyptian ladder secured by a nail, or a gangway, or a rafter, or a door, where they have been plastered with clay, even if they only went up one end, the pure person and his garments remain pure.

Impurity is transmitted by way of *heset* when a pure person and an impure person share some kind of platform, and the impure person indirectly causes the pure person to move. Thus, in all the cases discussed here, the shared platform is presumed to be stable enough that any normal movements made by the *zav* will be insufficient to cause the pure person to move. This is as opposed to the situations described in Zavim 3:1—of which this discussion is actually a continuation—all of which are identical save for the fact that the platforms are unsecured, or, in the case of the boat, small enough that one person's movement will shift those with whom he shares it. Thus, perhaps counterintuitively, the fact of shared space—even intimately, closely shared space is *not* the most salient factor in whether impurity is transmitted. Rather, it is one specific sort of interaction among many—whether or not a shared platform is unstable enough that the *zav*'s movement translates to the pure person—that determines whether impurity is communicated in these situations.

Thus far, all of the interactions described in this Mishnah are, like the cases in 3:2, at least neutral and often cooperative. The end of the Mishnah, however, seems to abruptly shift focus to an adversarial interaction, asking what would occur if a pure person and a *zav* were to engage in fisticuffs:

If a pure person strikes an impure person, he remains pure. If an impure person strikes a pure person, the pure person becomes impure, since if the pure person pulled back, the impure person would then fall.

Here, the Mishnah considers the outcome of two possible permutations of a physical altercation between a pure person and a *zav*. If a pure person were to strike a *zav*, the pure person would remain pure, despite the fact that to hit someone is necessarily to touch them. If, on the other hand, the *zav* were to strike the pure person, the pure person would become impure. So, again, the most intuitively obvious mode of interaction—in this case, the direct physical contact of hitting—is *not* the mechanism of transmission. Rather, the Rabbis assume that anyone who is on the receiving end of a blow will automatically pull back from the force of the blow for the sake of self-preservation. As a result, the *zav* causes the pure person to shift his weight, thus communicating impurity by *midras*, that is, by leaning on the pure person.

The inclusion of a bout of fisticuffs within a group of otherwise neutral or even cooperative interactions demonstrates the Mishnah's expansive understanding of the sorts of intimate interactions that are likely and even inevitable within the course of day-to-day life. A person will be in physical proximity to and engage in physical interactions of many kinds with many different people, at least some of whom are likely to be in a state of impurity, throughout the course of any given day. Not all those interactions may be pleasant or desirable, and some may even be damaging, but all of them are part of the

universe of social interaction, and therefore bear consideration. Furthermore, even within a specific encounter, there are multiple subtypes of interaction that may occur, only some of which are salient to the question of whether or not impurity has been transmitted. The salient subtypes of interaction are not necessarily those that are most intuitively obvious—indeed, they are equally likely to be those types of interaction that one may not even consciously register *as* a form of interaction.

Because all the examples enumerated in Zavim 3:2 and 3:3 occur in day-to-day, real-world settings, they reinforce the ubiquity of impurity in the social world, and tacitly demonstrate the ways in which the Rabbis assume that real-world actors will respond to the ever-present threat of contagion. This response is characterized by a kind of tacit risk balancing—the virtuous actor is expected to maintain purity, but he is also expected to participate in economic and social life, and to take part in activities that practically guarantee contact with sources of impurity. Just as crucially, one who *has* become impure, whether as a primary source (by way of his own *zivah* discharge) or secondarily (by contact with a *zav* or a *zav*'s “appendages”), is nevertheless also expected to participate in those same activities, practically guaranteeing that he will communicate his impurity to others.

It is also important to note that in all of these cases, the impurity status of one's fellow is *not* presumed to be at the forefront of one's mind. In the cases that likely occur in the course of daily labor, it is reasonable to assume that the execution of one's task is at the fore, and that one's primary thoughts regarding one's fellow probably have to do with how the interaction affects one's task. In the case of the *zav* striking the pure person, it certainly does not seem reasonable to assume that the first consideration one would

have is, “hm, I wonder whether the fellow who is about to hit me is a *zav*?” And in the case of opening or closing a door together, this action could take place amidst many types of social encounters, none of which has the primary objective of opening or closing a door. The act is so commonplace as to escape notice, and yet its physics, at least in some cases, dictates that it is a live route of transmission. It is, thus, precisely because of the immediacy of other aspects, the inevitability, and, in many cases, the utterly mundane character of these interactions that it becomes critical to evaluate where transmission does and does not occur.

This process of evaluating which day-to-day, intimate social interactions result in the transmission of impurity is part of the broader management of impurity as an ethical task, both for the individual agent and for the community and especially for the system of ritual expertise within which the agent exists. This system of management also includes complex processes of diagnosis of impurity, and various programs of response whose particulars depend on the particulars of a given diagnosis. A proper differential diagnosis requires one to determine *impurity status* and *type of impurity*, defined at the beginning of this section. Beyond that, one must then determine *degree of impurity*—that is, one must determine how severe a given case of impurity is, and thus how extensive a purification ritual one must perform in order to mitigate it. These determinations, as we shall see, affect not only how one must treat one’s case of impurity, but how virulent that case is. Impurity, in short, is not monolithic. Not all impurities are alike and not all impurities, even within a given *type of impurity* are to be treated the same way.

Zavim 1:1, for example, discusses the criteria a person with a genital discharge must meet in order to be classified as a *zav g'mur*, or a “true *zav*”—that is, as one who

conveys impurity in all the ways described in Leviticus 15:2-15 and is thus liable for the full purification ritual enumerated in that passage.

If a man sees a single discharge of *zivah*: Beit Shammai say, he is like a woman who watches day against day; but Beit Hillel say, he is like one who has had a seminal emission.

If he saw one [emission of discharge], and it ceased on the second day, and on the third day he sees two [emissions of discharge], or one issue with the volume of two:

Beit Shammai say, he is a true *zav*. But Beit Hillel says, he renders impure what he lies or sits upon, and he must immerse in the *mikveh*, but he is exempt from an offering.

Rabbi Eliezer ben Yehudah said: Beit Shammai agree that in that case, he is not a true *zav*, but they differ regarding the one who sees two emissions, or one emission with the volume of two, whose emissions ceased on the second day and who saw a single emission on the third day:

Beit Shammai say, this one is a true *zav*. But Beit Hillel say, he renders impure what he lies or sits upon, and he must immerse in the ritual bath, but he is exempt from an offering.

Whereas the passage from Leviticus states only that anyone who has a discharge that either oozes from or blocks his penis is impure, transmits impurity, and is liable for the ritual, this Mishnah adds qualifications of volume, repetition, and timing. By comparing a minimal quantity of *zivah* discharge to a normal seminal emission, it also reiterates the Biblical distinction between *zivah* impurity and *keri* (seminal) impurity. The latter, while it is also an impurity-causing genital emission, is a different *type of impurity* than is *zivah*, and although it may be used as a point of comparison with certain *degrees* of *zivah*, the two are not identical. While any discharge from the penis causes *some* impurity, the discharge must be of a particular type (abnormal and oozing or forming a blockage), add up to a certain volume and repeat within a certain amount of time to qualify as the true *zivah*, conveying impurity in the manner described and requiring the full ablutions and ritual offering stipulated in the passage from Leviticus. Episodes of discharge that do not meet this threshold invoke less onerous remedies. Either these are comparable (though



not identical) to other impurity-causing events described in the Bible—a single discharge of *zivah* merits the same precautions and treatment as an emission of semen—or they are partial expressions of the full *zivah* status. Thus, *impurity status*—whether or not a person has contracted ritual impurity of any kind—is distinguished from *type of impurity*—which Biblical source caused the impurity—and *degree of impurity*—which deals with differences between particular impurities’ severities, virulences, and prescribed remedies. Mishnayot 1:3-5 further articulate the specific requirements for someone to be declared a *zav g’mur*:

- 1:3. If one saw one [emission of *zivah*] on one day, and two on the next day, or two on one day and one on the next day, or three on three [consecutive] days, he is a true *zav*.  
 1:4. If one saw one [emission of *zivah*] and it then ceased for long enough to immerse and dry off, and after that he saw two, or one with the volume of two, and it [again] ceased for long enough to immerse and dry off, he is a true *zav*.  
 1:5. If one saw one [emission of *zivah*] with the volume of three, which lasted as long as it takes to travel from Gad-Yavan to Shiloah—which is enough time for two immersions and two dryings-off—he is a true *zav*. If one saw one [emission of *zivah*] with the volume of two, he conveys impurity to what he lies on and what he sits on, and he must immerse in the *mikveh*, but he is exempt from an offering.  
 Rabbi Yose said: only in the case that [the emission] was enough for three.

A *zav g’mur*, thus, is someone who 1) has an irregular genital discharge that either 2) recurs discretely twice over a period of between some number of minutes and three days, or 3) recurs discretely once within that timeframe, and one of the episodes produces a volume of discharge equal to two single emissions, or 4) occurs in a single episode whose volume is equal to three and whose duration is as long or longer than a specific period of time. Discharges that do not meet these criteria confer a communicable impurity and oblige one to undertake ritual purification, but do not make one liable for the *zav g’mur*’s offering.

This excursus on the proper differential diagnosis of true *zivah* establishes two important points. First, it establishes that there are multiple degrees of impurity, even within the relatively specific category of “impurities resulting from irregular genital discharge.” Second, by laying out the specific characteristics of and appropriate responses to each type of impurity—including those that could easily be mistaken for each other—it establishes that it is important to correctly identify any given degree of impurity.

In distinguishing among *impurity status*, *type of impurity*, and *degree of impurity*, Mishnayot 1:1 and 1:3-5 also begin to establish that there are multiple components of a proper diagnostic process. Knowledge of the details of one’s specific ritual status is important, and becomes even more so where there are multiple degrees of ritual impurities: the more variations there are of a given *type of impurity*, the easier it becomes to misidentify the degree of impurity—and thus, the appropriate remedy—in any one case. In order to determine the correct *type* and *degree* of impurity, one must attend to the physical and temporal details of the precipitating event of the impurity. Mishnayot 1:1 and 1:3-5 stipulate that the discharge of a *zav g’mur* must reach a certain volumetric threshold within a certain timeframe, and they implicitly, by reference to the Biblical text, distinguish the physical quality of *zivah* discharge from that of seminal discharge. The simple presence or absence of a discharge is not enough to determine degree or even type of impurity. In order to do that, one must learn multiple kinds of information about the discharge.

In addition to attending to the physical and temporal details of the discharge itself, a proper diagnostic process must attend to the circumstances of exchange with the

physical and social environment at the time of the precipitating event. *Zavim* 2:2

demonstrates this attention as it addresses the process of examination for a suspected *zav*.

There are seven lines along which a *zav*, the nature of whose discharge is yet undetermined, is examined: concerning food, drink, what he has carried, whether he has jumped, whether he has been sick, what he has seen, and what he has thought about: did he have sexual thoughts before he saw [an arousing sight], or did he see [the arousing sight] before he had sexual thoughts?

Rabbi Yehuda said: even if he saw beasts, wild animals, or birds going at each other, even if he saw the dyed garments of a woman.

Rabbi Akiva said: even if he ate all he could eat, whether bad or pleasing, or drank any drink.

They said to him: according to your logic, there would never be any *zavim*!

He said to them: the future existence of *zavim* is not your problem!

This Mishnah establishes that attentiveness to the circumstances of exchange are critical for establishing not just *degree* of impurity, but even for establishing the more basic category of *type* of impurity. The processes of examination for a suspected *zav* described here are meant to rule out other potential causes of discharge, since otherwise it would be conceivable that the emission was something other than *zivah*. If, for example, it is possible that the suspected *zav* experienced some kind of stimulus that *might* have triggered a spontaneous ejaculation of semen, that may be enough to cast his status as a *zav* into doubt. Similarly, discharge could be explained as an incidental consequence of eating a certain food, or taking a certain action—in any of these cases, the discharge “will be dismissed as incidental and not as an indication of a pathological condition.”<sup>330</sup> Thus, the physical and temporal qualities of the discharge itself are not the only categories that are determinative of its ultimate character and consequence. The circumstances of the

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<sup>330</sup> Balberg, 145.

subject's exchange with their environment at the time of the precipitating event—where they were, what they perceived, what they thought about, with whom they interacted—all of these are also crucial data points for the diagnostician.

In this context, the rather odd exchange between Rabbi Akiva and the sages at the end of the passage makes somewhat more sense if we read it as highlighting a shift in emphasis between Biblical and Mishnaic purity discourse from avoidance of sources to procedures of diagnosis and management. In the Biblical system, an avoidable source of impurity—here, the *zav*—is at the center of the matter, and it makes little sense to discuss the transmission of impurity in the absence of a discrete and verifiable source. In the Mishnah, however, the process of diagnosis and management is at the center of matters, to the point where the discrete, verifiable source can become almost an afterthought. Put another way, the Biblical system revolves around a set of entities, whereas the Mishnaic system revolves around a set of actions. Here, Rabbi Akiva takes matters even further: so thoroughly has process superseded source in the Mishnaic system that the actual existence of any particular source has, for the rabbinic diagnostician, become trivial.<sup>331</sup>

Both the particular diagnosis and the particular social and physical context in which the subject is located at a given time will also affect the appropriate response to the diagnosis, in terms of the proper treatment procedures and in terms of the subject's potential for transmitting their impurity to others. Accurate assessment of the implications of a given impurity therefore requires attending not only to the source's *absolute virulence*, but also to the circumstances that affect its *contextual virulence*.

Absolute virulence refers to the cumulative power of transmission of a given impurity

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<sup>331</sup> See *idem*, 144-145 for a different reading of this exchange. Balberg argues that *zivah* is associated with deficient masculinity, and so Rabbi Akiva's claim is an attempt to distance the uncontrolled seepage of *zivah* from the picture of the ideal rabbinic subject.

outside of any particular case of transmission, and is determined by factors such as total number of routes of transmission, the degree of secondary impurity communicated by contact with the source, and the directness of contact with the source required for transmission. Contextual virulence, by contrast, refers to a given impurity's power of transmission in a particular case. Contextual virulence, as we shall see, does not always correspond with absolute virulence. A source that is less absolutely virulent may still have routes of transmission that are particular to that source, routes which in a given situation may be more likely to come into play than the potential transmission routes of a more absolutely virulent source. A given impurity may be more virulent than others in one case and less virulent in another.

One significant factor in the contextual virulence of a given impurity is the set of routes by which that impurity can be communicated. In the Mishnah, each source of impurity has its own set of standardized routes; while there is overlap among sources, a given source will be at least somewhat different from others in terms of the set of routes by which it may transmit. Further, the possible routes may vary depending on what the impurity is being transmitted to. Semen, for example, can transmit impurity to persons and objects by direct touch, and to pottery through the air.<sup>332</sup> *Zivah*, *Zavim* 2:4 tells us, has five possible routes of transmission:

The *zav* conveys impurity in five ways, so that a person and their clothing are impure: to what he stands on, what he sits on, what he lies on, what he hangs on, and what he leans on.

And what he lies on conveys impurity to a person so that they in turn convey impurity to garments by standing, sitting, hanging, leaning, touching, or carrying.

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<sup>332</sup> M. Kelim 1:1

The Mishnah goes on to specify *zivah*'s routes of secondary transmission: in addition to direct contact with a *zav*, a lesser degree of *zivah* impurity can be spread by contact with something a *zav* lay upon, and that person in turn communicates impurity (although a lesser degree of it) through one more route than does the *zav* himself. This is an example of what Balberg refers to as a broader “graded system of impurity,”<sup>333</sup> in which the initial source, referred to as the “father” of impurity, has the strongest power to transmit. Someone or something the “father” of impurity touches becomes a “first” of impurity, who has diminished power to transmit; someone or something the “first” touches is a “second” of impurity with even further diminished power, and so on. So in this case, the *zav* is the “father” of impurity, what he lies on is a “first,” a person who touches what he lies on is a “second,” and so on.

Some sources have more absolute power to communicate impurity—that is to say, they are more virulent—than others. The main textual source for this hierarchy of absolute virulence is the first chapter of Mishnah Kelim, which ranks sources according to their routes of contagion—the more routes of transmission, the more virulent the source. M. Kelim 1:3-4 addresses the *zav*'s place in this hierarchy:

1:3 Higher than [a dead reptile, a recovering *metzarah*, an animal that died without kosher slaughter, and one who has sex with a menstruant]: the discharge of a *zav*, and his saliva, and his semen, and his urine, and the menstrual blood of a *niddah*, since they communicate impurity by touching and by carrying. Higher than these: a saddle, since it communicates impurity to what is under a heavy stone. Higher than a saddle: what one lies on, since touching it is equal to carrying it. Higher than what one lies on: a *zav*, for a *zav* communicates impurity to what he lies on, and what he lies on does not convey impurity to what it in turn lies on.

1:4 Higher than the *zav*: the *zavah*, since she communicates impurity to one who has intercourse with her. Higher than the *zavah*: the *metzarah*, since he communicates impurity by entering. Higher than the *metzarah*: a

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<sup>333</sup> Balberg, 28-30.

bone fragment the size of a barley grain, since it communicates seven-day impurity. More virulent than all of them: a corpse, since it communicates impurity by overhang, through which none of the rest communicate impurity.

M. Kelim thus ranks the *zav* as a more virulent source than a number of others, even more than his own bodily fluids, but it ranks a *zavah* (a woman with abnormal genital discharge), a *metzarah* (someone with an impure skin condition), a small bone fragment, and a corpse as more virulent than a *zav*. This ranking, combined with what we learn from Zavim 2:4 about the *zav*'s five modes of transmission and the graded impurity of those persons and objects to which *zavah* impurity is communicated, seems to tell us fairly conclusively that the *zav* is moderately contagious among other sources of impurity.

Zavim 4:6, however, complicates this ranking of virulence. It describes a hypothetical case in which a *zav* and pure food or drink are sitting in the pans of a balance-scale. If the *zav*'s weight causes the food to move, the food is thereby rendered impure:<sup>334</sup>

If a *zav* were in one pan of a set of scales, and food or drink were in the second pan, they are impure; but if a corpse [were in the first pan], anything [in the second pan], save a person, remains pure.

This is a case where greater stringency applies to a *zav* than to a corpse. But greater stringency is also applied to a corpse than to a *zav*. For a *zav* renders impure anything under him that is fit for lying or sitting on, such that it in turn renders persons and garments impure; he also conveys *madaf*-impurity (another term for indirect contact impurity) to whatever lies above him, such that it in turn conveys impurity to food and drink--impurity which a corpse does not convey.

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<sup>334</sup> This is an example of transmission by "shift" (*heset*). There are other modes of transmission by indirect contact: "treading" or "leaning" (*midras*), for example, is invoked in a case where a *zav* and someone who is pure sit together on a boat or ride an animal together, even though they are not physically touching in either circumstance (M. *Zavim* 3:1).

But greater stringency applies to a corpse, because a corpse conveys impurity by overhang, and it conveys seven days' worth of impurity—impurity which a *zav* does not convey.

This direct comparison to corpse impurity complicates a straightforward ranking of impurity sources in terms of their virulence. Even though a corpse can communicate impurity through more routes than can a *zav*, a *zav* can nevertheless communicate impurity in a specific manner that a corpse cannot. M. Kelim 1:4 ranks a corpse as the most *absolutely* virulent *type of impurity*, because it can transmit impurity through “overhang” and makes anyone who touches it impure for seven days, which no other source can do. In other words, it is capable of transmitting a higher *degree of impurity* (seven-day) through a more indirect route of transmission than any other source. M. Zavim 4:6, however, points out that a *zav* can, depending on the circumstance, have greater *contextual virulence* than can a corpse. A *zav* can communicate impurity in a way a corpse cannot: a *zav* can convey impurity by indirect contact to items that lie above him, such that they can then contaminate food and drink. Here, even though the general rule—that a corpse is a more virulent transmitter of impurity than a *zav*—applies, there are circumstances in which a *zav* is the more virulent transmitter.

This excursus on particular cases from Zavim should amply demonstrate Balberg's broader thesis that the rabbinic world is one in which shifting flows of impurity are constantly present. Impurity is by nature a thing in flux, a thing whose existence is defined by the constant activity of transmission. As Balberg puts it, when impurity is transmitted, “[t]his ‘something’ that is being transmitted is, in effect, the *ability to make other things impure*: in the Mishnah, to say that A makes B impure is to say that A gives



B the capacity to affect C.”<sup>335</sup> Because of impurity’s ubiquity, as well as its protean character, the locus of ethics for the Mishnaic actor where purity is concerned is the constant activity of managing and negotiating this impurity-laden environment.

In addition to these broader points, this treatment of Zavim should illustrate some specific features of this impurity-laden world and the program of management required to flourish in it. First, it should show us that impurity is *not* the only feature of this world that is ubiquitous. The rabbinic world, in addition to being impurity-laden, is also a world populated by social actors who touch each other in intimate, varied, and complex ways. Many of these ways are also routes for the transmission of impurity—though not always in the manner one might intuitively expect. Second, it should show us that the process of negotiating this environment, in which impurity is ubiquitous and contact is inevitable, is characterized by a complex diagnostic process that emphasizes detailed analysis of the impurities themselves and the contexts in which they arise. Impurity is fluid, and it is also diverse and in constant dialogue with its physical, temporal, and social surroundings. Properly responding to impurity requires properly diagnosing it, and properly diagnosing impurity depends upon attention to all these variables.

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<sup>335</sup> Balberg, 28.

## V. Problematics of Power: Rabbinic Authority in the Construction of Impurity

In deploying rabbinic ritual purity discourse toward contemporary matters, it is important not to ignore its more problematic aspects. It is hardly a novel observation that rabbinic literature, especially in light of contemporary moral sensibilities, is insular, elitist, and androcentric. As I noted at the beginning of this chapter, rabbinic literature, before it is about anything else, is about Rabbis and the place of Rabbis in the world as they saw it. And since the Rabbis were at once Jews living as an underclass in a world often hostile to them, elites within the Jewish community (or at least, the Rabbis understood themselves as an elite class) who were trying to establish their understanding of Judaism as normative, and men living in a patriarchal world, it follows that rabbinic literature overwhelmingly reflects those biases.

Thus far in this chapter, I have largely bracketed these biases and focused on what a contemporary ethicist may glean from rabbinic literature in spite of them. But to use the literature fully and responsibly, one must on some level engage its failings as well as its strengths. Further, it is my contention (again, hardly a novel one) that the Rabbis' insularity, elitism, and sexism are not so far removed from contemporary discourse—especially discourse around sex and sexual health—as we would perhaps like to believe. Thus, examining the ways these failings function in rabbinic text may provide insight into how similar moral failings function today.

To understand these troublesome features of rabbinic purity discourse, it is perhaps most instructive to begin with the matter of the purity status of Gentiles. Gentiles do not become personally impure as a consequence of touching an impure object or

experiencing a condition, such as scale disease or genital discharge, that would render a Jew impure. At the same time, however, Gentiles convey impurity to people and objects and are not allowed contact with holy things. As Balberg puts it, “whereas a Jew is ‘pure’ in the sense that she attains or maintains a state of purity, a Gentile is pure because she is outside the realm of impurity altogether.”<sup>336</sup> Simultaneously, however, Gentiles “are considered to be *inherently* impure due to the very fact that they are not Jews, and this inherent impurity cannot be gotten rid of until the Gentile actively converts to Judaism...[I]n the rabbinic system Gentiles are both categorically pure and categorically impure.”<sup>337</sup>

The ruling that Gentiles are categorically *pure*—that is, that they are unable to contract impurity—illustrates that the ability to contract impurity is actually a sign of high status within the rabbinic system. Because, as Balberg argues, the rabbinic purity system functions as a school for the cultivation of a self that is disciplined and attentive to the rules of purity and to the bodily states, social interactions, and physical and temporal conditions that affect one’s purity status, a person who is susceptible to impurity is one who has a sense of self that is susceptible to discipline. As Balberg puts it:

The notion that Gentiles are not susceptible to impurity serves the Rabbis not only to demarcate the difference between Jews and Gentiles and not only to define Gentiles as inferior to Jews, but also and perhaps especially to tell Jews something about what they are and what they ought to be: that which turns them into agents, that which allows them to act as willful and conscious subjects and thus partake in the shaping of their world, is their subordination to the Torah.<sup>338</sup>

Yet if the Gentile’s insusceptibility to impurity is a sign that they lack a self that is susceptible to discipline, their simultaneous constant ritual impurity—that is, they are

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<sup>336</sup> Balberg, 123.

<sup>337</sup> Idem, 124.

<sup>338</sup> Idem, 138.

able to transmit impurity to others—demonstrates the results of not disciplining the self. The Gentile, unlike the ideal rabbinic subject, is understood to be uncontrolled and undisciplined—something that is underscored perhaps most strongly by the explicit comparison of the ritual impurity of Gentiles to that of a *zav* in Tosefta Zavim 2:1:

The Gentiles, the convert, and the resident alien are not susceptible to *zivah* impurity, but even though they are not susceptible to *zivah* impurity, they are impure, like a *zav*, in every respect. They burn *terumah* on their account, but they are not liable for rendering impure the sanctuary or its holy things.

Christine Hayes argues that the analogy between Gentiles and *zavim* across the Tannaitic corpus is partial or incomplete: "Sifra perek Zavim 1:1 and T. Zav 2:1 both indicate that *qodashim* (holy things) are not burned after contact with a Gentile, as they would be after contact with a genuine *zav*. We may assume, therefore, that Gentiles are not"—contrary to the explicit statement in the Tosefta—"deemed to defile like biblical *zavim* in every respect."<sup>339</sup> Furthermore, she notes that Tannaitic sources treat the general presumption of Gentile impurity inconsistently: some sources depict Gentiles interacting with Jews in ways that are explicit routes of impurity transmission, yet no mention is made of any actual impurity, while others specifically mention impurity or defilement occurring as a consequence of such interaction. Hayes speculates that the Tannaim distinguished between "sympathetic and hostile Gentiles"<sup>340</sup> and that the major function of the Rabbis' system of Gentile impurity "appears to have been the delineation of (perhaps, a reminder of the need for) a barrier between Jews and Gentiles whose intentions were hostile or threatening in some way."<sup>341</sup> This reading, however, seems to cast a moral inflection upon the state of impurity itself: "hostile" Gentiles transmit impurity, while

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<sup>339</sup> Hayes, 124.

<sup>340</sup> Idem, 143.

<sup>341</sup> Idem, 143.

“sympathetic” Gentiles do not. Such a direct link between contagion and moral intent seems incongruent with the Tannaitic placement of the moral locus of impurity discourse in the careful navigation and management of the impurity-laden world.

Balberg, by contrast, reads the comparison between the Gentile and the *zav* to have important rhetorical implications regarding rabbinic subjectivity, regardless of how completely the Tannaitic system actually cashes out the analogy: “the analogy to persons with abnormal genital discharge has a very different *rhetorical* effect and cultural connotations than would, for instance, an analogy to persons with skin afflictions.”<sup>342</sup> Since her overarching argument about the Tannaitic purity system is that it is a site for the rabbinic subject to practice self-examination and especially self-*control*, it is noteworthy that Gentiles are compared to a man who experiences an *uncontrollable* genital flux. Recall that even in the Biblical treatment of *zivah*, the *zav*’s purification procedure is most comparable to that of a *niddah* and to that of a woman with abnormal vaginal bleeding. In other words, the Bible “groups together all continuous and uncontrollable genital discharges, whether in men or in women, on the one hand, and momentary and (for the most part) controllable genital discharge—which pertains only to men, of course—on the other hand.” So a man with uncontrollable, continuous discharge “is thus a man whose form of impurity is comparable to that of a woman.”<sup>343</sup> The Tannaim, Balberg argues, carry this even further: for them, at least according to some sources, “the *zav* is not just a man comparable to women, but is in certain ways a man *who has turned into a woman*. The Rabbis assert that men with abnormal genital discharges must adopt life habits that are normally prescribed only for women...they

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<sup>342</sup> Balberg, 140.

<sup>343</sup> Idem, 141.

must constantly scrutinize and examine their genitalia in the same way that women do."<sup>344</sup> Thus, by comparing Gentiles to *zavim*, Balberg argues, the Tannaim are essentially "associat[ing] non-Jews with deficient masculinity."<sup>345</sup>

Gentiles are not the only class associated with a lack of self-control in Tannaitic purity discourse. The *Ammei ha-aretz*, "people of the land," a group whose identity is the subject of some debate but who at the very least can be understood as Jews looked down upon by the Rabbis, are primarily identified within the Mishnah by "their notable carelessness regarding impurity, at least according to rabbinic standards."<sup>346</sup> The *Ammei ha-aretz* are assumed to be perpetually impure, not because they *cannot* become pure by virtue of existing outside the rabbinic system (like Gentiles), but because of "their insufficient efforts to maintain a state of purity in their everyday lives."<sup>347</sup> M. Tohorot 7:3, for example, assumes that when workers from among the *Ammei ha-aretz* have been left unattended inside one's home, some significant portion of its contents will be rendered impure—everything inside, per Rabbi Meir, and everything the workers can reach with their hands, per the Sages. This and other passages not only assume ritual impurity on the part of the *Ammei ha-aretz* but also assume, per Balberg, that the *Ammei* cannot resist touching things; M. Tohorot 7:4 describes women from this group as compulsively "touching" or "meddling"<sup>348</sup> with items in a pure house. Such inattention to the rules of purity and inability to resist touching things is also a characteristic of children:

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<sup>344</sup> Idem, 141.

<sup>345</sup> Idem, 145.

<sup>346</sup> Idem, 153.

<sup>347</sup> Ibid.

<sup>348</sup> Translation in idem, 154.

This depiction of the People of the Land as "meddling" with everything they see resonates with a mishnaic ruling that since it is a child's way to touch whatever it sees, whenever a child is found next to dough, the dough should be considered impure.<sup>349</sup> Like children, then, the People of the Land conduct themselves in respect to impurity in a way that can be best described as *mindlessness*.

The intended subject of the Mishnah, as constructed by the Rabbis, is emphatically one who is different from the People of the Land and who strives to maintain a clear dividing line between him and them. The Mishnah prescribes specific guidelines for interacting with the People of the Land in commercial, personal, and neighborly settings, thus presenting these people as markedly different from the person to whom these guidelines are directed and as requiring various measures of caution when approached.<sup>350</sup>

If Gentiles lack the susceptibility to discipline that comes from willed subjection to the Torah, the *Ammei ha-aretz* lack a different sort susceptibility to discipline, a lack that seems to come from some more basic deficiency in executive function. They are compared to children, where Gentiles are compared to women, or at least to woman-like men. In either case, each group is construed as other and compared unfavorably to the self-aware, self-controlled rabbinic subject.

Of course, the fact that femininity is a point of unfavorable comparison and that it is contrasted unfavorably with the rabbinic ideal of self-control also bears examination. As I have noted, rabbinic discourse was created by, for, and about Rabbis, which is to say it was created by, for, and about men. The mishnaic subject who strives towards purity is a male subject. This is clear, Balberg argues, not only because the Mishnah was created "for men by men," but because:

...the purity of women in the Mishnah is always presented as instrumental to the purity of men. Women are never depicted, for instance, as actually consuming food in a state of purity, washing their hands before meals, and so on, but rather only as preparing food in purity, food that will presumably be consumed by men.

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<sup>349</sup> M. Tohorot 3:8.

<sup>350</sup> Balberg, 155.

Moreover, the Rabbis of the Mishnah define women's commitment to purity strictly in terms of the commitment of their male guardians, either their husbands or their fathers...<sup>351</sup> [E]ven though women can potentially strive to develop the qualities of the mishnaic idealized subject, this ideal subject is clearly a male.<sup>352</sup>

The default subject is male, and this default, idealized subject is characterized by a commitment to purity that manifests itself in physical and psychological self-control. Such qualities are thereby cast as *masculine* qualities, an association that is made explicit when we compare texts that deal with women's purity practices. Women are assumed to have inferior self-control, both physiologically (like a *zav*, since menstruation, their paradigmatic impurity, is an uncontrolled genital flux) and psychologically (like the *Ammei ha-aretz*, who are assumed to be unable to resist touching things they ought not touch). Balberg cites a case in M. Tohorot 7:9 in which R. Akiva declares that if a woman is cooking *terumah* in a pot, leaves the pot unattended, and upon her return finds another woman feeding coals to the first woman's fire, the *terumah* is presumed impure, because "women are greedy, and she is suspected of uncovering her friend's pot to know what she is cooking." As the *Ammei ha-Aretz* are assumed to be unable to refrain from touching what they ought not touch, so too are women assumed to be unable to keep from assuaging their curiosity. Both groups are infantilized since, as noted above, the inability to touch what one ought not touch is considered the characteristic of a child.

Similarly, even in a purity system which assumes the default state of the body to be porous and modular, the leakiness of women's bodies is singular because it is a leakiness that defies easy interpretability. Typical female leakage is uncontrolled,

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<sup>351</sup> Idem, 172. See, for example, M. Tohorot 7:4—discussed above with regard to the inattentiveness of the *Ammei ha-Aretz*—where "the Rabbis contrasted a woman who is lax in regard to purity with a woman who is stringent in regard to purity by identifying the former as 'the wife of [one of] the People of the Land' (*eshet am-ha-aretz*) and the latter as 'the wife of a member' (*eshet haver*)."

<sup>352</sup> Balberg, 171-2.



whereas typical male leakage is controlled: the paradigm case for male genital impurity is seminal emission (*keri*)—a single, momentary, theoretically controllable emission—while the paradigm case of female genital impurity is menstruation (*niddah*)—a continuous, protracted, uncontrollable flux. As Balberg puts it, “the seeping and unruly nature of women’s bodies makes them more prone to impurity not only because such bodies are harder to control, but also because such bodies are more difficult to *know*.”<sup>353</sup> That these bodies are more difficult to know is a result not only of the uncontrollability of their seepage but also of its location. Rabbinic discourse characterizes female genital impurity as *bi’vsarah*, “in her flesh,” and male genital impurity as *mi’vsaro*, “from his flesh.”<sup>354</sup> Typical male leakage and impurity is characterized as external, and therefore more immediately knowable or interpretable. Typical female leakage and impurity, however, is characterized as internal. It is therefore in need of professional interpretation. And since knowledge, for the Rabbis, is intimately linked to authority, women’s bodies become simultaneously less governable for the women who actually inhabit them and more in need of governing by sagely authorities.

This governance finds its most complex and developed expression in the rules surrounding menstrual impurity (*niddah*). Charlotte Fonrobert, in her pivotal work *Menstrual Purity: Rabbinic and Christian Reconstructions of Biblical Gender*, argues that the complex taxonomy of bloodstains enumerated in Mishnah Niddah constitutes a “rabbinic ‘science’ of women’s blood”<sup>355</sup> which functions as a kind of scaffold for rabbinic authority structures. Recall that not all genital discharges in men are true *zivah*;

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<sup>353</sup> Idem, 173.

<sup>354</sup> This distinction comes from the same prepositional discrepancy between Lev. 15:2, “When any man has a discharge *mi’vsaro*...” and Lev. 15:19, “When a woman has a discharge of blood *bi’vsarah*...” See Fonrobert, *Menstrual Purity*, 43-56, for a fuller explanation of how the Rabbis developed this prepositional discrepancy into an extensive architectural metaphor for female sexual difference.

<sup>355</sup> Fonrobert, 103.

similarly, not all female genital bleeding is true *niddah*. M. Niddah 2:6-7 set forth a schema of colors that have various implications for purity status:

2:6. Five kinds of blood from a woman are impure: the red, the black, like saffron, like water over earth, and like mixed wine.

Best Shammai say: also like fenugreek water, and like the juice from roasted meat. But Beit Hillel say these are pure.

The green—Akavya ben Mehallel declared it impure, but the sages declared it pure.

Rabbi Meir said, even if it does not convey impurity by way of a stain, it conveys impurity because it is a liquid. Rabbi Yose said, it is not so in either case.

2:7. What is meant by “red”? Like the blood from a wound.

“Black” is like ink; if it is darker than this, it is impure, and if lighter than this, it is pure.

“Like saffron”— the brightest of it.

“Like water over earth”— from the valley of Bet Kerem, and water floats [on top of it].

“Like mixed wine”— two parts water, and one of wine, from the wine of Sharon.

This complex schema reinforces an observation from our reading of *Zavim*: even within a particular family of impurity, there can be multiple variations. Within the realm of female genital bleeding, there is the impurity of the *niddah* (regular menstruation) and that of the *zavah* (irregular genital bleeding), and in each subtype, a number of variations in blood color can lead to a diagnosis of impurity. Where female bleeding is concerned, Fonrobert argues that this complexity—which makes the blood a subject of academic debate among male scholars—“entirely [displaces women] from the scene.”<sup>356</sup> The disembodied blood itself is the topic of conversation.

Fonrobert takes particular notice of the fact that the determination of impurity is made visually. In a rabbinic innovation that differs from biblical law, blood variations are examined and impurity determined by way of stains (*ketem*) on cloth, whether the examiner is the woman herself (in the case of normal menstruation) or a Rabbi (in the

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<sup>356</sup> Idem, 111.

case of a doubt as to the status of the bleeding.) The leakiness and unpredictability of women's bodies—and, more critically here, the internal location of the relevant leaks—makes those bodies less knowable. Given the inscrutability of the bodies—the sources of the blood—the Rabbis focus on visual inspection of stains on an external object, Fonrobert argues, because they “had no direct access to the woman's body itself [and] could establish control based on external evidence more readily and more ‘objectively’ than on the blood flow itself...[T]he inspection of a bloodstain or blood on a testing rag to be judged by a rabbinic expert is another way for Rabbinic discourse to objectify menstrual bleeding.”<sup>357</sup>

Furthermore, the characterization of female leakage as internal gives rise to an extended rabbinic metaphor in which the female body, especially the reproductive body, is characterized as a house. M. Niddah 2:5, for example, explicitly analogizes the female reproductive system as consisting of a “vestibule, a chamber, and an upper chamber.” In addition to establishing that the female body is a body that is meant to be occupied—if the nature of the female body is interior, that body is meant to be dwelt in, and the appropriate occupant is the woman's husband—this metaphor also establishes that the female body is an inanimate object, and thereby subject to *objective* analysis. As Elizabeth Shanks Alexander has put it, “if the woman's body is an inanimate object, she is not uniquely positioned to determine what is happening within it.”<sup>358</sup>

Rabbinic legal expertise concerning the onset of menstruation and the purity of a given bloodstain thus supersedes the sensations and experience of the actual person who is bleeding; indeed, legal categories themselves sometimes seem to supersede physical

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<sup>357</sup> Idem, 115.

<sup>358</sup> Elizabeth Shanks Alexander, “Ancient Jewish Gender and the Rabbis” (draft), p. 20, for publication in *Jewish Origins*, forthcoming.

evidence. Fonrobert and Chaya Halberstam both examine a case in M. Niddah 3:8 in which a woman, suspecting irregular bleeding, brings a dubious bloodstain before Rabbi Akiva:

It happened that a woman came before Rabbi Akiva, and said to him, “I saw a bloodstain.”  
 He said to her, “Perhaps you had an internal wound?”  
 She said to him, “Yes, but it healed.”  
 He said to her, “Perhaps it could have been reopened, and let out blood?”  
 She said to him, “Yes...”  
 Rabbi Akiva declared her pure.  
 He saw his students looking at one another, and said to them, “Why is this matter difficult in your eyes? The sages did not say this to be stringent, but rather to be lenient, as it says: ‘When a woman has a discharge, her discharge being blood in her flesh’ (Lev. 15:19)—*blood*, and not *stain*!

In explicating the Levitical verse as he does, Akiva privileges a specific process of interpreting both the Biblical text and the “text” of the bloodstain over the woman’s observations regarding her physical history. In fact, Halberstam argues, he goes even further: he “effects a radical separation between blood and bloodstain, defusing the evidentiary force of the bloodstain by declaring it utterly meaningless within biblical law, and viable in rabbinic law only in cases of virtual certainty.”<sup>359</sup> In other words, the Biblical law demands actual blood, and since Akiva is operating within rabbinic law—which privileges the stain over actual blood—cases with even a modicum of doubt are judged leniently. Akiva “privileges a mere possibility (perhaps the wound reopened?) over a known fact (it healed).”<sup>360</sup>

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<sup>359</sup> Chaya T. Halberstam, *Law and Truth in Biblical and Rabbinic Literature* (Bloomington, IN: Indiana University Press, 2010), 35.

<sup>360</sup> *Idem*, 34.

Fonrobert reads this as a clear case of the rabbinic system of expertise in blood establishing authority over and against the physical experience of the one who bleeds.<sup>361</sup> Halberstam agrees that this case represents an assertion of rabbinic authority, but in a subtler fashion. Rather than simply separating the blood from the woman and treating it as disembodied evidence, Halberstam argues, Akiva entirely abstracts the *legal* category of *ketem* from the physical reality of a bloodstain on a piece of cloth. Thus, a layperson's—and, significantly, a *laywoman's*—observation of an empirical reality bears only distant relation to the rules she must follow in the social reality created by the Rabbis:

R. Aqiba does not determine that she has an internal wound; he merely inquires into the possibility, and makes a *legal* decision that she is ritually pure. His invocation of the need for leniency implies that he believes that the woman's status as an actual menstruant is *in doubt*; he specifically refuses to decide whether the blood she saw was in fact menstrual or the result of an internal wound. He explains that the mere possibility of an open wound triggers the principle of legal leniency for a rabbinic decree. Thus the woman's logical assumption that seeing blood is objective evidence of menstruation is challenged by R. Aqiba's appeal to uncertainty—and he substitutes legal fact for common-sense probability... Uncertainty about impurity, which would seem to create fear or helplessness, instead creates space for Rabbinic legal creativity and authority... And thus a legal fiction—that a bloodstain cannot be evidence of menstrual bleeding within biblical law—supersedes the judgment and experience of ordinary people.<sup>362</sup>

Knowability is authority; the focus on the doubtfulness of basic empirical knowledge creates a space for its supersession by abstract legal knowledge, which, in turn, establishes spaces of power for the class that has privileged access to that legal knowledge.

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<sup>361</sup> Fonrobert, 112-15. See also her discussion of B. Niddah 57a (pp. 70-82), in which an argument that appears to give some interpretive force to the bleeding woman's physical sensations is systematically neutralized.

<sup>362</sup> Halberstam, 39.

Thus, by examining the ways these three groups—Gentiles, *Ammei ha-Aretz*, and especially women—are rendered as other in the purity texts, it becomes clear, especially from the perspective of purity's use in practical ethics, that the undergirding concern here is the pervasive question of authority. Even as the tannaitic Rabbis reconceptualize and normalize impurity as a day-to-day issue whose management involves a process of self-discipline and self-formation, they do so in a way that maintains a central, indispensable role for rabbinic authority. As Balberg puts it,

Submitting that any way of approaching purity and impurity which is not commensurate with rabbinic teachings and not performed through appeal to the knowledge of the sages is destined to result in a series of mistakes, this tradition not only excludes those who do not comply with the Rabbis from the community of 'Israel', but also excludes them from the possibility of ever being pure. Thereby, the Mishnah distinctly shapes the ability to attain a status of purity as a marker of subordination to the authority of the Rabbis.<sup>363</sup>

The exercise of rabbinic authority becomes inescapably gendered. This is primarily because, as I have discussed, the ideal rabbinic subject is already male. Furthermore, menstrual impurity is a major part of purity discourse—indeed, it is the only form of ritual impurity that retains practical import in modern Judaism—and provides particularly fertile ground for the exercise of rabbinic authority, as Balberg, Halberstam, and especially Fonrobert have shown. Whereas impurity as figured in the Tanakh draws a clear distinction between bodily impurities that require expert diagnosis and treatment, and those that do not, the Rabbis collapse this distinction. This becomes especially apparent with menstrual—that is to say, female-specific—impurity.

These problems of power, expertise, and authority also apply to contemporary questions of sex and public health, especially inasmuch as the Rabbis, as Fonrobert

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<sup>363</sup> Balberg, 153.

argues, set themselves up as sources of medical and scientific expertise. Just so, the role of the medical establishment in defining personal and public health risks and controlling access to their treatment is a well-established source of concern and critique for feminist and queer scholars. I return to this issue in the final chapter.

## VI. Summary: Toward a Synthesis

In this chapter, I explained my methodology for deploying classical rabbinic texts in the service of contemporary moral problems. I argued that an ethicist ought not draw simple, one-to-one correspondences between the subject matter of a rabbinic text and the subject matter of a contemporary problem. Rather, one should look beyond the surface of the rabbinic text and deploy its underlying features—in this case, how the subject matter functions within the world of the text—as lenses through which to gain new perspective on contemporary issues that function similarly.

I then explained why I have chosen Mishnaic purity texts in particular to apply to matters of contemporary sexual ethics and public health. In the Mishnah, ritual impurity is a form of contagion that is an ultimately unavoidable consequence of common forms of social intercourse, something which is also true of sexually transmitted infections. The matter-of-fact attitude with which the Rabbis of the Mishnah treat ritual impurity is instructive for our contemporary social and medical posture toward STIs. Further, as Mira Balberg argues, navigating the webs of impurity that are built into the warp and weft of everyday life functions as an opportunity for the virtuous rabbinic subject to cultivate a discipline of self-examination and self-formation. Indeed, one major difference between Biblical and Mishnaic accounts of impurity is that the ethical locus of

the latter is this discipline of examination, navigation, and management of the impurity-laden world rather than in a separate category of moral impurity.

To analyze the function of ritual impurity in the Mishnah in greater detail, I undertook a close reading of Mishnah Zavim. Zavim provides a demonstration of several crucial features of Mishnaic impurity discourse. First, Zavim assumes that multiple forms of intimate contact with other persons and objects is an inevitable feature of day-to-day life. Second, the Mishnah assumes that the daily discipline of managing and navigating a world in which impurity is ubiquitous and in which intimate, impurity-transmitting contact is inevitable will involve a complex and multifactorial process of diagnosis and response. This process requires particular attention to three sets of factors. First, impurity is not monolithic, and so one must determine not just *impurity status*, but also *type* and *degree of impurity*. Second, determining *type* and *degree* in turn requires attention to the physical and temporal features of the impurity itself, as well as the impure person's circumstances of exchange with their social and physical environment at and around the time of their impurity's precipitating event. Finally, a thorough understanding of how a particular impurity will reproduce itself requires ascertaining not just its *absolute virulence* but also its *contextual virulence*: different types and degrees of impurity may have modes of transmission that are particular to those types or degrees, and so the details of a given case of potential transmission will affect how likely a particular impurity is to actually be transmitted.

In the following chapters, I apply these features of Mishnaic purity discourse to the contemporary problem of managing sexually transmitted infections. I argue that these features, along with the more general fact that, in the Mishnah, social contagion is a



subject of extensive and matter-of-fact discussion, can help us develop an ethic of sex and public health that is honest, humane, and effective.

## Chapter 4

### Navigating Risk, Power, and Obligation: Toward a New Jewish Understanding of Risky Sexual Behavior

In the previous chapter, I argued that straightforward appeals to the content of rabbinic texts were limited in their ability to inform contemporary practical ethics in a way that is attentive both to the realities of the texts' world and to the contemporary problem at hand. More useful, I claimed, was an approach that asked how a given phenomenon *functioned* within a rabbinic text and used an analysis of that function to shed light on a contemporary problem that functioned in similar ways. I further argued that ritual purity discourse was a rabbinic phenomenon, the function of discourse on which can tell us something useful about the function of contemporary discourse on matters of sexual health. Mira Balberg's model of Tannaitic purity discourse, which claims that the Rabbis understood impurity as default and ubiquitous and saw the ever-present risk of impurity as a site for the cultivation of virtue—not by avoidance of all possible sources of contamination, which would be both practically impossible and morally undesirable, but by careful, self-aware, and level-headed management of one's status—elucidates the parameters of this analogy of function.

Using Balberg's model as a guide, I undertook a close reading of several texts from Mishnah Zavim, which deals with impurity from abnormal genital discharges. I identified three major features of Zavim's purity discourse that I consider especially useful for thinking about sex and public health. First, even within the fairly narrow category of "impurity caused by genital discharge," there exist multiple subtypes of impurity, which have different levels of severity and require different courses of

treatment. Second, in large part because of these subtypes, the text is deeply concerned with accomplishing a careful differential diagnosis of the subtype of impurity in play, and gives considerable attention to the process for establishing this diagnosis and to the many variables that determine the eventual subtype of impurity. Finally, the text assumes that its subject must navigate this process of careful diagnosis and management within a social world in which multiple types of intimate social and physical interaction, many of which are potential routes of transmission, are unavoidable and even desirable.

To apply these features to the matter of contemporary sexual health, it is necessary to establish an understanding of the social functions of sex, sexuality, and health. I begin by reiterating and expanding on a claim I have made throughout: sex is not a *sui generis* phenomenon. It is a form of social intercourse that shares features with other forms of social intercourse. To be sure, it has characteristics and carries risks and rewards that are particular to it, but these are not alien to the particular characteristics, risks, and rewards of other forms of social intercourse. Even more important, sex exists with other forms of social interaction within a continuous, dynamic system of desire and control. One does not snap into some other moral framework when one enters a sexual situation; the way one has been conditioned to respond to desire in the presence of others will function in a sexual context as well as in a nonsexual social context. Indeed, responses to desire that have been made habitual may well apply even *more* strongly in sexual situations, both because of the instinctual character of desire and because sexuality is often an integral part of the scaffolding upon which broader social conventions are built.

Sexual interactions—partnered sexual interactions, at least—necessarily involve negotiating among one's own desires and well-being, the desires and well-being of at

least one other person, relationships with and responsibilities to other persons not present in the encounter, and broader social conventions. This is also the case with other kinds of social interaction. If I am sharing a meal with a friend, I must balance my desire to eat the entire contents of the dish with her desire to eat at least some of it (and perhaps her desire to eat all of it as well). I must balance my desire to order more expensive menu items with my financial health. And I must balance my desire to lick the plate with the knowledge that it is broadly considered rude to do so in public.

Sexual interactions carry with them risks of illness or injury—both physical and emotional. As the entire focus of this dissertation should indicate, sexually transmitted infections are a serious public health issue. BDSM practices and even “vanilla” sexual encounters that become exuberant or careless risk physical injury. And the intimacy, emotional significance, and vulnerability inherent in a sexual encounter entail considerable risk of psychological and emotional pain. These risks also occur, however, with other types of social interaction. To take the example of sharing meals again: eating carries risks of contracting food poisoning or parasites and preparing food carries risks of cuts and burns. These risks may even be intensified when one carries out these activities with others. Peer pressures, such as wanting to seem adventurous or not to insult a host, may influence one to eat something whose safety may strike them as suspect; socializing while preparing a meal may distract one such that one is less attentive to matters of knife and fire safety than one might otherwise be.

The social aspects of sharing meals also carry emotional risks: food is invested with all sorts of social and personal significance, and articulating gustatory needs and desires can be quite fraught. Both preparers and consumers of shared meals may

experience significant—and reasonable—anxiety about exposure to physical dangers, pleasing others, and following social conventions. Yet at the same time, when the preparation and sharing of meals goes right, I find that little compares to the sense of intimacy, care, and connection that can occur around the dinner table.

My point here is that something so basic as sharing food—a nearly universal type of social interaction, and one that is arguably the foundation for nearly all other sorts of social interaction—is deeply fraught with many of the same basic risks and anxieties as sexual interaction. Like sexual interaction, eating involves a basic, precognitive bodily drive; as with sexual interaction, the sheer variety of food preparations, methods of eating, rituals, and etiquette found across human experience is an object lesson in the degree to which even basic biological drives vary and are culturally constructed and imbued with meaning. Eating together can both threaten and enhance health, safety, bodily integrity, social standing, and emotional stability. The rituals and etiquette, the social and moral controls that arise around the act of eating function as a means of regulating and balancing those risks and benefits, pleasures and dangers.

Such is also the case with sex and the rules that surround it. And, as with eating, some of the rules create a more helpful balance than others. A rule that states one must eat whatever one's host sets in front of one does well to recognize the material and emotional investment a cook puts into a dish, and provides a convenient universal standard with unambiguous expectations. But such a rule fails to account for the variety of gustatory needs and desires different people experience. To take a stark example, someone with a life-threatening peanut allergy will clearly be ill-served by such a rule. So too, however, will someone who, while immunologically fully capable of eating and

metabolizing peanuts safely, finds them revolting. On the other hand, a rule that asks one to eat what is offered to them that is within their physical and psychological capabilities and to inform their hosts ahead of time if there is an ingredient or preparation that will cause them serious physical or psychological distress might do better at accommodating the needs and strong desires of the eater while still acknowledging the cook's significant material and emotional investment.

What this more flexible rule sacrifices is the first rule's universality and clarity. It requires both parties to negotiate in advance of the encounter, and to make themselves vulnerable by sharing information about needs and desires. To put it another way, to create and maintain humane and effective rules for social interactions—especially those interactions that occur at the intersection of sociality and bodily functions—requires a deep and sustained commitment to discourse. Bodily phenomena, phenomena of desire and the rules that govern these phenomena must all be up for discussion and investigation if communities are to build moral structures that adequately account for the diversity of human experiences and desires, not least because the building of those structures depends on the availability of accurate information about what they are likely to encounter. Even more fundamental for the individual actor, discourse is a critical site of moral self formation. To discuss variation is to practice encountering, relating to, and understanding the unfamiliar; to preclude such discussion is to foster moral stagnation.<sup>364</sup>

Discourse is a constant feature of social interaction, but open, honest, and effective discourse is not so universal. Individuals and communities should strive towards

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<sup>364</sup> Emmanuel Levinas, in *Totality and Infinity: An Essay on Exteriority*, Alphonso Lingis, trans. (Pittsburgh, PA: Duquesne University Press, 1969), and Hans-Georg Gadamer, in *Truth and Method*, Joel Weisenheimer and Donald G. Marshall, trans. (New York: Continuum, 1975 and 1989) have written extensively on the moral value of regular encounter with and relation to the unfamiliar.

openness, honesty, and effectiveness as broad goals for discourse; however, the particular qualities that make for good discourse in one area may be less useful in another. I have claimed throughout this dissertation that many of the features of mishnaic purity discourse may apply to sex, particularly to matters of sexual health—that is, that the features of mishnaic purity discourse can significantly contribute to a discourse on sexual health that is open, honest, and effective. In this chapter, I demonstrate that claim by applying the features of mishnaic purity discourse I identified in the previous chapter to matters of sexual health. I begin by considering the ways the Mishnah thinks about risks of contagion in social situations and using that to rethink the ways we understand risk and benefit in sexual contexts. I then examine cases within the realm of sexual health, using mishnaic tools to analyze particular sources of sexual contagion and to construct more helpful mitigation strategies. Finally, I discuss the ways in which public health structures have used STI management as a tool of oppression, and consider what similar power disparities in the mishnaic textual world can teach us about addressing these injustices.

### I. Reconstructing Sex, Risk, and Responsibility

I have argued throughout this project that we must rethink the nature of sex—that sex is *not* a *sui generis* phenomenon but rather a specific, corporeal form of social intercourse. Religiously speaking, this means that sex does have its own form of holiness, but that is so because it is a form of relation to self and other and thus shares in and develops in its own ways the holiness of relationality. The evidence we have suggests that human sexuality, to paraphrase Judith Plaskow, is fluid, complex, and diverse; it also suggests that sexual fulfillment is beneficial to most people. Moreover, some of the

risks—especially the social and emotional risks—of sexuality are also inherent in *any* act of relation. As Rachel Adler points out, “relationships expose our nakedness. To seek anything from another is tacitly to acknowledge that we cannot attain our desire alone. Divested of our façade of self-sufficiency, we reveal ourselves as vulnerable and wanting.”<sup>365</sup> So if we want to continue employing a rhetoric of body positivity and to view sexual fulfillment as a good, I submit we must accept that it may take a wide variety of practices to allow as great a number of people as possible to have a reasonable chance at achieving that fulfillment.

At the same time, as statistics about STIs and unwanted pregnancies—not to mention sexualized violence—indicate, cautious voices are correct to say that there is also something about sex that is dangerous.<sup>366</sup> There is thus something of value in the risk-benefit frameworks, whether explicit or implicit, employed by these voices of restraint. That said, the particular risk-benefit language that more cautious voices employ is insufficient. We are used to weighting the risk-benefit calculus around sexuality, and in particular around non-normative sexuality—nonmarital, nonmonogamous, fetish and kink, not to mention sexuality as expressed by women, queer and trans people, teenagers, elderly people, people of color, people with disabilities, and people of lower socioeconomic status—heavily in terms of the risks. In these formulations, the benefits of

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<sup>365</sup> Adler, *Engendering Judaism*, 156.

<sup>366</sup> According to the Centers for Disease Control, people in the United States contract an estimated 19.7 million new sexually transmitted infections each year, 50 percent of which occur in people between the ages of 15 and 24. (Centers for Disease Control and Prevention, “CDC Fact Sheet: Incidence, Prevalence, and Cost of Sexually Transmitted Infections.” February 2013. Obtained from <http://www.cdc.gov/std/stats/STI-Estimates-Fact-Sheet-Feb-2013.pdf>, 10-24-13.)

While many infections clear up on their own and others are curable or treatable, still others may lead to dangerous conditions (for example, certain strains of HPV and cervical cancers) or are dangerous or deadly if untreated. Further, because many infections may remain asymptomatic for an indefinite period of time, because treatment can be difficult to access, and because there is still a great deal of shame associated with STIs, people may continue to spread them without realizing it, or delay testing and treatment until it is too late. This all, of course, is in addition to the risk of unwanted pregnancy (in the case of penis-in-vagina sex) and the social and emotional risks inherent in engaging in physical and emotional intimacy.



expressing sexuality are at best minor and short-term whereas the risks are severe and enduring. These formulations also severely sell short the potential benefits of nonmarital sexual activity in their own right, even as they downplay the fact that there remain risks inherent in marital sex.

As we have seen, within its preferred contexts, Jewish tradition *does* recognize the significant and long-term benefits of sexual pleasure for its own sake. It has an awareness that, on some level, lack of sexual satisfaction can constitute a real damage to a person. If we recognize this to be the case, how do our ethical theories and prescriptions account for the fact that adapting or attempting to adapt one's sexuality to certain normatively prescribed constructs is either impossible or unacceptably damaging for some? In order to do this, it seems to me that we must reexamine the ways in which we approach risk-benefit calculations with regard to sex.

### 1. *Weighing Risks: A Fuller Picture*

If we are to talk seriously about balancing and prioritizing risks in sexual decision-making, we also need to confront the risks of *not* pursuing sexual fulfillment. The fact is that for most people sexuality, including the opportunity to express it in some way that is not wholly alien to their particular sexuality, is a crucial part of their identity. Understanding sex as a form of social interaction means understanding it as one important mechanism for developing and maintaining social relationships. Given how critical the maintenance of relationships is to our psychological and moral health, this alone should cause us to think about the ways we regulate or restrict any means of relationship development. At the same time, understanding that sexuality involves deep,

precognitive bodily drives should also warrant caution about how we restrict its expression. Finally, it is important to consider the sheer diversity of human sexual preferences and orientations—and, for many, the strength and durability of those diverse preferences and orientations.

When I speak of sexual fulfillment, and in particular of the diversity of sexual preferences and urges that people experience and that, in most cases, they would do well to have the opportunity to explore, I am not making claims that a particular behavior is “natural” or not. Here, I break with some contemporary writers (especially those connected to the field of evolutionary psychology) who ask, for example, whether monogamy is “natural.”<sup>367</sup>

I do not find “naturalness” to be a helpful or meaningful moral category. It is hardly a new observation that “naturalness” in and of itself is a poor basis for moral judgment. To begin with, the term “natural” is frustratingly vague. Do we mean it in an Aristotelian sense as being the “substance of those things with a principle or process within themselves *qua* themselves?”<sup>368</sup> Or do we mean it, as I do—and as I suspect many other writers on this topic would also—in a more Deweyan sense as being the sum of all

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<sup>367</sup> See, for example, Christopher Ryan and Cacilda Jetha’s work of popular evolutionary psychology, *Sex at Dawn: How We Mate, Why We Stray, and What It Means for Modern Relationships* (New York: Harper Collins, 2010). This book—whose central claim is that monogamy is unnatural for humans—received a significant amount of attention in some “sex-positive” circles. There has been some justified criticism of Ryan and Jetha’s cherry-picking of anthropological and ethological data. Even aside from these factual challenges, the simplistic character of their argument: “hunter-gatherers were and are promiscuous; therefore, monogamy is unnatural, and socio-cultural enforcement of monogamy is harmful and immoral” betrays a shallow grasp of the development of cultural values and the complexity of moral thought—particularly where religion is concerned.

Sadly, this short-sightedness, particularly about religion, is not uncommon among modern and contemporary sexuality writers. Jesse Bering’s otherwise fascinating book *Perv: The Sexual Deviant in All of Us* (New York: Farrar, Straus, and Giroux, 2013) provides a paradigmatic example when he claims (p. 22) that “religious individuals point to Matthew 5:28” when they talk about sex—something that would come as a bit of a surprise to a devout Jew, Muslim or Hindu!

<sup>368</sup> Aristotle, *Metaphysics* trans. Hugh Lawson-Tancred (London and New York: Penguin, 1998), 1015b/119.

phenomena, a dynamic “affair of affairs”?<sup>369</sup> On this view “nature” is a category that is potentially infinitely inclusive. To engage in practical moral judgment, however, is necessarily to engage in acts of differentiation and exclusion. Categories on which we base moral judgments therefore require clearer and more robust limiting principles than the category of “natural” can provide.

That the category of “natural” is morally ambiguous is well demonstrated by the range of behaviors that regularly occur in nature. Any number of behaviors that are unambiguously morally problematic—xenophobia, violent aggression, domination of weaker individuals or groups—are also quite “natural,” insofar as they reliably occur to some extent in nearly every known cultural and social configuration. As Dewey puts it, “Nature has no preference for good things over bad things; its mills turn out any kind of grist indifferently.”<sup>370</sup> It is not therefore obvious that the use of cultural tools to regulate “natural” (in the sense of “instinctive” or “given”) urges and behaviors is in and of itself harmful. Indeed, some of our “natural” instincts, such as the urge to gorge oneself in the presence of an abundance of food, are highly adaptive in feast-or-famine circumstances and highly *maladaptive* in situations of consistent abundance. In cases where such impulses become maladaptive, social and cultural controls on them become quite beneficial. Thus, to argue against a given socio-sexual convention on the grounds that it suppresses “natural” instincts or desires does not by itself tell us whether it is actually harmful to suppress that instinct or desire.

Nevertheless, when these writers ask whether or not a given socio-sexual convention is “natural,” they *do* identify an important aspect of sexuality. Desires and

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<sup>369</sup> John Dewey, *Experience and Nature* (Chicago and London: Open Court Publishing Company, 1926) 97.

<sup>370</sup> *Idem*, 112.

instincts *do* have major components which are “given” and durable, and changing or suppressing those components may be difficult or impossible. When we ask whether monogamy, for example, is “natural,” what we may mean is whether or not it is practically workable or desirable to insist that someone who is strongly and durably inclined toward nonmonogamy (for whatever reason) nevertheless adopt a monogamous lifestyle.

A term that better accounts for this weighing of goods to deal with durable patterns of desire is *livability*. A situation is livable when a balance is achieved between one’s needs and desires (including those needs and desires that arise from pre-cognitive instincts or urges), the needs and desires of individual others with whom one interacts, and the basic structures of the social orders in which one lives, such that no one experiences unbearable hardship. By “unbearable hardship,” I mean burdens that cause enough physical or psychological hardship to substantially interfere with one’s ability to carry out and take reasonable pleasure in one’s activities of daily living, social relationships, and chosen projects, or burdens that cause one to feel a significant and painful disjunction between their understanding of who they are (identity, values, beliefs, and so on) and the roles they are expected to carry out in their social context.

Jennie Rosenfeld gets at a similar idea in *Talmudic Rereadings: Toward a Modern Orthodox Sexual Ethic* in which she argues that an obsessive focus on the *sur-me-ra*, or “turn away from evil” becomes so overwhelming that it actually prevents the one who wishes to turn from evil from *aseh tov*, that is, from accomplishing any active goods. As she puts it:

In avowing that sometimes the sin itself is preferable to being consumed by sinful thoughts, the door is opened for each individual to enter into a

personal cost-benefit analysis of the role of sin in his or her own life. This in no way minimizes or devalues the *halakhah*; the law is still binding in all its original force, however there are moments when the individual needs to see that law within its wider legal context and within their own personal context. How much will it take out of me to observe this law? Will a focus on the *sur-me-ra* eliminate some of the *aseh tov* from my life? Will the consuming thoughts of sin be even more detrimental to me than the sin itself?<sup>371</sup>

Rosenfeld thus claims that each person must weigh whether the avoidance of a given sin will become so all-consuming—in my terms, so unlivable—that it will prevent one from accomplishing other good deeds and thus actually turn the balance of one’s life away from overall productivity and righteousness. I agree with her on the need for this constant and contextual balancing of focus and energy. Further, her juxtaposition of *sur-me-ra* and *aseh tov* contributes another, critical quality to my category of livability. A situation is livable when it contributes to, or at least does not impinge upon, one’s overall ability to do active good; conversely, a situation is unlivable when it impinges upon that same ability.

At the same time, while I recognize that Rosenfeld is constrained by the more normative account of *halakhah* necessary for working within her own Modern Orthodox context, it nevertheless seems to me that to continue to call the act from which one cannot refrain without unlivable obsession necessarily “sinful” is, at some level, to beg the question. If certain acts are necessary in order to make one’s life livable (assuming, of course that these acts do not make *others’* lives unlivable in the process) and thereby help give one the capacity to accomplish active goods, we need at least to seriously question whether or not it makes sense to refer to those acts as sins. Or, put another way, if acts that make it workable for a person to do good and do not impinge on others’ capacity to

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<sup>371</sup> J. Rosenfeld (2008), 250-251.

do the same can be classified as “sinful,” we need to ask whether the category of “sin” continues to make sense.

Thus, while Rosenfeld and I call for similar practices of contextually-mediated balancing of moral and practical risks, I am able to take the implications of those practices a step further than she is. Rosenfeld argues that careful discernment regarding which sins one is reasonably able to avoid contributes to the overall livability and goodness of one’s lived practice. I argue that, in addition to contributing to the overall good of one’s lived practice, the acts one allows oneself as a consequence of this careful process of discernment may be understood as goods in and of themselves.

Livability is not a universally trumping value. Research into pedophilia, for example, seems to indicate that it functions very much like a sexual orientation,<sup>372</sup> such that denying sexual access to children may well be “unlivable” in this sense for at least some exclusive pedophiles. Yet clearly, to *allow* pedophiles sexual access to children would be unlivable for those children and would constitute a dereliction of social and individual duties to protect those who are unable or less able to protect themselves. Thus, there are cases in which what is “livable” for a particular individual or community is so deeply at odds with the basic needs of other individuals or of a broader community, because it would inflict clear and overwhelming harm on others, that it cannot be permitted by a moral society.

In many cases, though, finding a livable balance does not entail such a clear and one-sided weighing of harms, risks, and benefits; rather, it involves a complex balancing

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<sup>372</sup> See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-V-TR* (Washington, DC: American Psychiatric Association, 2013), 302.2: “Adult males with pedophilic disorder may indicate that they became aware of strong or preferential sexual interest in children around the time of puberty—the same time frame in which males who later prefer physically mature partners became aware of their sexual interest in women or men...Pedophilia per se appears to be a lifelong condition.”

of these among multiple interests. Such balancing is not always easy, and “livability” emphatically does *not* exclude hardship, self-discipline, extended and intense efforts, or potentially painful choices. Rather, it is a question of distinguishing between *manageable*, workable hardship, versus hardship that begins to take over one’s life and drown out everything else.

Given the complex balancing that finding livability entails, it is important to understand that “sexual fulfillment” is not a one-size-fits-all proposition. Even the parts of our sexual makeup that are precognitive and pre-social exhibit variation, and sex’s fundamentally social character means that no two persons’ sexual selves will be formed by precisely the same constellation of relationships and other social influences. The range of preferred sexual expression formed by these disparate variables—both social and precognitive or presocial—is vast. This is surely the case for the publicly visible aspects of a person’s sexuality: heterosexual monogamy may be satisfying and sufficient for one person, difficult but workable for another, and utterly stultifying for a third. And even within a relationship model that is generally agreeable to its participants, variation persists and even expands. One member of a couple may require a vibrator to achieve orgasm, while the other requires role-play or pornography to fully immerse themselves in the sexual encounter.

Variation occurs not only in sexual preferences themselves but in the extent to which the opportunity to pursue a given preference is necessary for overall fulfillment. People may have several preferences which an opportunity to pursue would be very nice indeed, but which they could as happily do without, especially if by doing without those preferences they gained something equally or more valuable. Someone may very much

enjoy tying up a sexual partner but consider it well worth depriving themselves of that preference for the sake of maintaining a comfortable and humane relationship with a particular partner for whom bondage, even when consensual, evokes traumatic memories. For a different person, however, practicing BDSM may be so integral to sexual fulfillment that they would be unable to thrive in a relationship with someone who was unwilling or unable to participate or to allow them to practice BDSM outside the relationship.

In cases where a particular preference exists but is not essential for sexual fulfillment, someone could probably exist comfortably within a system of socio-sexual ethics that is more narrow and restrictive. In cases where a particular sexual preference is necessary for sexual fulfillment, however, a person with a sexuality that deviates from prescribed norms will find that restrictive system of sexual ethics unlivable. As both psychological data and the lived experience of sexual minority communities indicate, forcing someone into a role incongruous with their sexual orientation can cause severe psychological harm. The damage done to lesbian, gay, and bisexual people by “conversion therapy” programs is perhaps the clearest demonstration of this.<sup>373</sup> The harm

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<sup>373</sup> See, for example, Robert J. Cramer, Frank D. Golom, Charles T. LoPresto, and Shalene M. Kirkley, “Weighing the Evidence: Empirical Assessment and Ethical Implications of Conversion Therapy,” *Ethics & Behavior* 18:1 (2008): 93-114; Ariel Shilo and Michael Schroeder, “Changing Sexual Orientation: A Consumer’s Report,” *Professional Psychology: Research and Practice* 33:3 (2002): 249-259. While the LGBT community’s experiences are the focus of most extant research into the effects of changing sexual orientation, some research into paraphilias indicates that they, too, function much like sexual orientations insofar as their durability is concerned, especially in cisgender men. See, for example, this review, which compares homosexuality and paraphilia and concludes that, while the two should not be conflated, they are similar in terms of onset (usually childhood) and course (lifelong). James M. Cantor, “Is Homosexuality a Paraphilia? The Evidence for and Against,” *Archives of Sexual Behavior* 41:1 (2012): 237-247.

See also research on the importance of sexual self-disclosure (how open one is to one’s partner(s) about one’s sexual desires and preferences) to overall sexual satisfaction. See, for example, Uzma S. Rehman, Alessandra H. Rellini, and Erin Fallis, “The Importance of Sexual Self-Disclosure to Sexual Satisfaction and Functioning in Committed Relationships” *Journal of Sexual Medicine* 8 (2011): 3108-3115; E. Sandra Byers and Stephanie Demmons, “Sexual Satisfaction and Sexual Self-Disclosure Within Dating Relationships” *The Journal of Sex Research* 36:2 (1999): 180-189.



done by being forced into incongruous roles—or by not being allowed into any role at all—is clearly a risk people take into consideration in the course of their sexual decision-making. It is also a risk that ethicists and community leaders ought to take seriously.

## *2. Responsibility, Discourse, and Good Sexual Citizenship*

Another consequence of understanding sex as a form of social intercourse is that this helps us think about the need to learn how to do sexual interaction well. Too often, sex education focuses almost exclusively on how *not* to have sex, while providing no guidance as to how to engage in healthy sexual behavior. Perhaps we expect that proper sexual interaction is instinctive and will occur on its own without interference; perhaps we assume that detailed instruction will inspire deviant practices. In any case, we seem to assume that people do not require training to engage in sex in a way that is mutually respectful and pleasurable and that includes appropriate risk mitigation. Yet, we have no problem understanding that we require training to engage in *other* forms of social interaction in appropriate ways. For example, as children we are taught how to share toys

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Finally, there is a body of research indicating the importance of sexual satisfaction to overall health and happiness. See, most recently, Kathryn E. Flynn et al., “Sexual Satisfaction and the Importance of Sexual Health Throughout the Life Course of U.S. Adults,” *Journal of Sexual Medicine* 13 (2016): 1642-1650. Flynn et al. measured “satisfaction” according to the PROMIS SexFS 2.0 Satisfaction with Sex Life scale, which “includes five items”—erectile function, vaginal discomfort, lubrication, interest in sexual activity, and global satisfaction with sex life—“to assess how satisfying and pleasurable the person regards his or her sex life in the past 30 days, with no limitation on how the person defines ‘sex life’” (1643) and found that 62.2 percent of men and 42.8% of women (out of an overall sample size of 3500) reported sexual satisfaction as having high importance to quality of life. Also see, for example, E.O. Laumann, A. Paik, and R.C. Rosen, “Sexual Dysfunction in the United States: Prevalence and Predictors,” *Journal of the American Medical Association* 281:6 (1999): 537-44, and Kyle R. Stephenson and Cindy M. Meston, “The Conditional Importance of Sex: Exploring the Association Between Sexual Well-Being and Life Satisfaction,” *Journal of Sex & Marital Therapy* 41:1 (2015): 25-38; the latter focuses specifically on women.

It seems reasonable to assume that if, for a given group of people, the presence of certain activities or relationship structures were integral to sexual satisfaction, the absence of those same activities or structures might have a negative effect on their overall well-being. This is not, of course, to say that it would be the *only* negative effect or the most salient one; merely that the risk of that effect is one of many a person must consider in the course of their sexual decision-making.

and play nicely with others, lessons that ideally include the importance of respecting others' bodily integrity and wishes regarding their immediate space.

In fact, we ought to understand the absence of a broad and detailed conversation on how to engage well in sexual interaction as a genuine risk of an overly restrictive sexual ethic. This is certainly true with regard to the direct consequences of sexual interactions. Incomplete or inaccurate information about pregnancy prevention and STI prevention, testing, and treatment has clear and measurable consequences for public health; as I discussed in chapter one, there are educational interventions we know reduce rates of unwanted pregnancy and STI transmission. Less directly measurable but no less urgent or tangible are the risks of not teaching matters of pleasure and consent comprehensively and well. Youth—and adults—must learn that sex should be pleasurable for everyone involved, regardless of gender, and that what is pleasurable for one person may not be for another. They must learn about the importance of consent, how to ask for consent, and how to clarify their partners' desires in cases where a response may be open to a broad range of interpretation. To not teach about consent is to allow another generation of youth—mostly young men—to believe that sex is a thing that they are entitled to take without considering the humanity and agency of their partners. To not teach about pleasure is to allow another generation of youth—mostly young women—to believe that sex and sexual pleasure is not for them and that their humanity, agency, and desires do not matter.

I argue further, however, that a failure to teach good sexual citizenship also has more subtle and indirect effects on the way we are shaped as social citizens more generally. To teach good sexual citizenship is to teach respect, caring, and clear

communication with one another when we are at our most vulnerable. It teaches us to discuss our desires, strengths, and weaknesses, and to engage the sometimes discomfiting matrix of our similarities and our differences. Once again, the experience of sexual minorities helps elucidate matters. Engaging in sexual interactions with people who share similar sexual preferences or orientations is a way of connecting one's own experiences and self-concept to the experiences and self-concepts of others. Such interaction brings identity and experience out of the wholly internal realm and brings it into relation with the identity of another, while at the same time forcing one to grapple with the ways those who share broader identities and experiences can also be deeply different.

A passage from Nancy Garden's pivotal young adult novel *Annie on My Mind*<sup>374</sup> beautifully articulates such a realization. Here, the protagonist, Liza, describes her first sexual encounter with her lover Annie:

I can feel Annie's hands touching me again, gently, as if she were afraid I might break; I can feel her softness under my hands—I look down at my hands now and see them slightly curved, feel them become both strong and gentle as I felt them become for the first time then. I can close my eyes and feel every motion of Annie's body and my own—clumsy and hesitant and shy—but that isn't the important part. The important part is the wonder of the closeness and the unbearable ultimate realization that we are two people, not one—and also the wonder of that: that even though we are two people, we can be almost like one, and at the same time delight in each other's uniqueness. (146)

Throughout the story, Liza and Annie's mutual paths of self-understanding and self-acceptance progress through their interactions with one another. It is through their growing attraction to and love for each other that each comes to acknowledge the truth about their respective sexual identities, and it is also this growing love and attraction that

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<sup>374</sup> To the best of my knowledge, *Annie on My Mind* was the first English-language young adult novel to feature lesbian protagonists who did not end up dead or "cured" and who, in fact, were actually given a happy ending. Nancy Garden, *Annie on My Mind* (New York: Farrar, Straus, and Giroux, 1992, second edition).

helps each young woman break out of a sense of alienation and muster the courage to share something of her inner world with the other, even—though not without difficulty—in the face of persecution. As Liza describes in the quoted passage, acting out the sexual aspect of their developing relationship crystalizes for her a paradox of relation: she realizes that intimate interaction with others necessarily involves holding commonality and difference in dynamic tension.

It is not accidental that the experience of sexual minorities proves instructive in a number of cases—nor is it accidental that sexual minorities too often find themselves the target of religious and political animus. Sexual minorities threaten the status quo because the facts of their existence belie simple, universalizing claims about sexuality and about relationships. That we can exist, build and participate in functional communities, and do so happily and without undue strife while expressing sexualities that differ as much from each other as they do from the narrow prescriptions for sexual and more broadly social roles that they defy, testifies to the fact that a well-ordered, caring, and yes, Godly society can flourish through diversity. True, such a society requires mechanisms of communication that force people to work through discomfort and confront their desires and our differences—but such mechanisms are, in the end, morally salutary. Queer people are the data points that rend a narrative too many are unwilling to question, let alone discard. That story is not all bad, and it is dear to many. But it also smothers people. It is time to dismantle it.

### 3. *Models for Risk Management in Mishnah Zavim*

The way rabbinic purity law treats risk management provides a productive way towards good sexual citizenship. In the Mishnah, the ethical locus of impurity discourse is not in a separate category of “moral impurity,” nor is it in the simple avoidance of sources of impurity. Rather, it is in the virtuous subject’s constant process of navigation and management of a world in which impurity is ubiquitous and multiple forms of intimate human interaction are unavoidable. Such management accounts for the fact that unaddressed ritual impurity has serious consequences both for the individual who contracts it and for the community they live in. Furthermore, the sort of person who makes it their practice to scrupulously attend to ritual impurity is likely to be the sort of person who disciplines themselves well in all areas and who forms themselves properly as an individual Jew and as a member of the Jewish community. On the other hand, as long as it is continually addressed properly, ritual impurity by itself is not something to be unduly frightened of. On the contrary, it is a fact of life and a predictable consequence of social intercourse—a set of behaviors which can be, depending on how they are carried out, praiseworthy and practiced by virtuous people.

If we read this process of navigating the impurity-laden world through the lens of risk management, we can potentially generate helpful ways to nuance our understanding of social risk. As I noted in the previous chapter, impurity in the world of the Mishnah is what one might call a “known unknown.” A virtuous rabbinic subject probably does not know the impurity status of any given person or object with which they interact, but they *do* know that there is a reasonable chance that person or object will communicate some form of impurity. Nevertheless, they are not enjoined to avoid situations in which they

are likely to enter a web of impurity—on the contrary, they are assumed and enjoined to be active participants in this impurity-laden world. A virtuous subject, then, acts in ways they *know* risk the contraction of impurity on a day-to-day basis, but takes reasonable steps to protect against contracting impurity within the context of their daily affairs and to remedy any impurity they do contract.

There are several cases in Zavim that we can read productively through this lens of risk management. As I noted in the previous chapter, several of the scenarios in which a *zav* may communicate impurity to his fellow occur in workplace contexts (grinding grain, working on ladders or in trees, weaving, unloading a beast of burden) or in mundane contexts that could occur either in work or in recreational social interaction (opening or closing a door, sharing a seat on a boat, riding an animal together.) In all these cases, if the scenario involves a clear mechanism of transmission, such as an unstable weight-bearing element that can communicate “shift” impurity, the *zav* transmits his impurity to the pure person. What is important here, though, is that by offering these scenarios the Mishnah assumes that: a) a *zav* will continue to go to work and to interact in his community, and b) a ritually pure person will also continue to go to work and interact in their community, despite presumably knowing there is a very good chance they will be interacting with a *zav* (or someone who is impure in other ways).

We know that striving toward the regular maintenance of purity is considered a good thing, both practically, given the ritual importance of at least some level of interaction with the sancta, and rhetorically, given that the *Ammei ha-aretz* are disparaged for insufficient attention to matters of purity. Yet there clearly are also day-to-day matters

that seem to supersede avoiding potential sources of impurity. What might those matters be?

In the case of contamination via “workplace incidents,” we can infer that one’s livelihood is a more than sufficient reason to risk contracting impurity. If one avoided the labors that afforded economic sustenance—which in the ancient world would almost invariably have required some kind of physical contact with other humans—every time one suspected one might come in contact with an impure person or object, one would swiftly become destitute. In the case of contamination via incidents that are not necessarily workplace related, the risk being prioritized is less materially clear, but it is still assumed that a *zav* will continue to have social interactions, as will a pure person who risks contracting *zivah*. One continues to interact socially even though one knows one risks contracting impurity, suggesting that the texts, on some level, recognize social isolation to be a risk in its own right. Social intercourse is by nature messy, and interacting with others in the physical world involves confronting the risks—including risks of contagion—found in that world. People, however, are social creatures, and it is not accidental that even many of our religious practices prefer us to be in community when we perform them, a value that is reinforced in *Zavim* 3:2 when it declares anyone who has contracted *zivah* in a “workplace incident” to nevertheless be pure enough “for members of the congregation.” Isolation can be harmful, and I suspect that in assuming that people would knowingly risk contracting impurity in a variety of situations, even when a given interaction might not be strictly economically necessary, the Rabbis recognize this potential harm.

Purity texts, I argue, thus help us grasp the concept I have called livability. They recognize impurity as a live risk of social interaction, but they also recognize that it is not the only risk with which a social being must contend, and they strive to strike a balance that accounts adequately for multiple sets of risks. Even as we see the texts take the ubiquitous character of impurity in stride, we recall that they also prescribe a rigorous and complex system of self-inventory and regular purification, a system meant to be taken seriously and integrated into daily practices. What they do *not* ask, however, is for the subject to cut themselves off from economic sustenance or from social intercourse as part of that discipline of purity. One could imagine that, in some ways, hermetically sealing oneself off from the world would be easier: it would obviate the need to constantly examine one's day and one's body for potential contact with many of the primary sources of impurity. But such isolation would unbearably impoverish one's life. The extended hardship of daily examination is worth the life-giving ability to conduct oneself as the social being one is.

#### *4. Applying Mishnaic Models*

By reframing sex as a form of social intercourse, we can see the parallels between managing the risk of impurity in regular social interaction and managing the risk of public health consequences in regular sexual interaction. STIs, for example—especially depending on type—*do* have serious consequences for the individual and their community. Knowing this, it is a mark of a moral and virtuous person to be scrupulously careful about their STI status, especially when engaging in partnered sex—a practice, furthermore, that is likely to signal and further cultivate that person's respect for their



fellows in other areas of social interaction. At the same time, one can understand that *any* partnered sexual act carries the risk of STI transmission, that some STIs are more serious than others, and that the transmission of pathogens in general is a fact of sexual life and of social life more broadly. So a well-formed sexual subject takes reasonable steps—barrier methods, regular testing, open communication with partners—to avoid STI transmission and immediately seeks medically valid treatment for any STIs that do occur, where necessary altering their sexual behavior in consequence, while at the same time understanding that they act in ways that they *know* risk STI transmission on a regular basis.

Recalibrating our risk-benefit calculus emphatically does not mean becoming indifferent to the risks we have traditionally identified. Unwanted pregnancy and sexually transmitted infections are real and important issues, on the level both of personal *and* public health, and ethicists have a responsibility to continue highlighting them. We must recognize, however, that these are not the only risks associated with sex. Even as we speak broadly about this set of risks and responsibilities, we need to be open to the possibility that in particular cases the matrix of salient and known risks and benefits may be more complex and finely-grained. For example, abstinence culture *also* promotes risky sexual behavior, but the set of risks it effectively tolerates (although it may not actively recognize them) is different—namely, it encourages sexual commitment to a person in the absence of information about one’s sexual compatibility with that person. Simply observing this fact does not in itself comprise a value judgment about whether tolerating one set of risks is better than tolerating another, but it does mean that any putative dichotomy between abstinence and risky sexual practice is a false one.

Non-normative forms of sexual expression may not take the form of long-term, exclusive relationships, but they can still be respectful, ethical, and the locus of meaningful connections.<sup>375</sup> Indeed, the claim that these forms of expression are also subject to ethical responsibility follows from the assertion that they are areas of ethical interaction. People who engage in shorter-term and/or nonmonogamous sexual relationships, for instance, have a duty to recognize the higher risk of STIs that they incur, and to take appropriate risk mitigation measures (use of barrier methods, regular STI testing, disclosure of STI and relationship status to any and all partners)—both as a part of caring for their fellow community members and as a part of carrying out their duties toward their own bodies. They also have the responsibility to take appropriate steps toward mitigating heightened levels of emotional and social risks to themselves and their partners, by fully disclosing to all partners and potential partners their sexual needs and expectations and their other relationships.

Theoretically, an account of sexual ethics that reevaluates risk and benefit in the ways I have described could continue to hold the exclusive expression of partnered sexuality within marriage as an ideal. But any sufficient account of sexual ethics that utilizes risk-benefit language must understand deprivation of psychological and emotional satisfaction as a risk that is as *real*—even if not as grave—as a direct risk to bodily integrity and wellbeing. It must acknowledge that nonmarital expression of partnered sexuality has benefits that are neither trivial nor solely immediate or short term.

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<sup>375</sup> As Sara N.S. Meirowitz (in Ruttenberg, *The Passionate Torah*, 178) writes: “I would contend that the very notion of nonmonogamy as equivalent to promiscuity, with its accompanying judgmental tones, is problematic for a community of nonmarried, sexual adults. As we decided to experiment with different sexual partners, forming more—and less—significant relationships and connections, we should rethink the traditional idea that one long-term partner is the most ethical way to live one’s romantic life...Although it is always important to treat sexual partners with respect for the other’s *tzelem Elohim*, spark of divinity, we no longer must think that one needs to commit to a long-term relationship to forge an intimate connection that is moral and respectable.”

In other words, it must acknowledge that the risk-benefit calculus is more complicated than is generally admitted.

Sexual decision-making is almost never a choice between “risk” and “no risk.” Rather, it is a question of “Which sets of risks would I prefer to shoulder and to what extent?” and “Which risk management strategies are, for me, most livable?” There will always be people who choose to shoulder a greater STI risk in exchange for a lower risk of intractable sexual frustration. Such people are not necessarily acting recklessly or without consideration but may instead be engaged in a process of careful deliberation among multiple intersecting risks. Our attitude towards these risks should help individuals, couples, and communities better understand and manage these risks rather than ignore some risks or shame those who choose to shoulder more obvious ones, like STIs. In the next section, I use features of the Mishnah's impurity discourse to paint a picture of STIs that is more congenial to this aim of compassionate management.

## II. Sources of Impurity

In chapter one, I gave a largely by-the-numbers account of sexually transmitted infections as a public health problem in the contemporary United States. I showed that STIs are a generally controllable but significant issue, and that STI rates generally (though not always) follow predictable patterns: racial minorities, sexual minorities (with the notable exception of women who exclusively have sex with women), and economically disadvantaged populations tend to fare far worse both in terms of infection rates and in terms of access to prevention, testing, and treatment. Furthermore, the extent to which we as a society fail to adequately manage STIs is not, primarily, a technological

problem. We know we have a range of very successful options for both prevention and treatment, although the rise of antibiotic resistant bacteria, gonorrhea in particular, is a notable and deeply worrisome exception. Rather, our problems are largely economic and social: communities lack sufficient access to these effective interventions, and, more insidiously, the social climate around matters of sexual health makes frank and accurate discussion of STI prevention and treatment socially and politically difficult, and makes it shameful to seek out help or even to know and disclose one's STI status.

I have argued that sexual decision-making is about weighing and prioritizing risks. However, one cannot adequately weigh those risks if one lacks sufficient and accurate information. To this extent, the rabbinic treatment of impurity—which was for them, as STIs are for us, a source of contagion that is the inevitable but controllable result of certain forms of social interaction—is instructive in several ways. Generally speaking, the fact that in mishnaic impurity was a subject of regular and matter-of-fact discussion allowed for the examination of precise and quotidian details of its nature, transmission, prevention, and management. More specifically, those details themselves display a number of useful parallels to contemporary STI issues. Thus, I argue, mishnaic impurity discourse offers useful models, at both general and specific levels, for retooling our contemporary discourse on STIs. In this section, I focus on the models that apply *descriptively*—that is, models that I believe help us understand STIs as social phenomena. In the next section, I turn to models that apply *prescriptively*—that is, models that offer more helpful discursive strategies for addressing STIs as a form of unavoidable yet manageable social contagion.

### 1. *General Characteristics of Mishnaic Impurity*

To recall the discussion of the social history of STIs in chapter one, STIs have usually been diseases of "them," the "other"; to the extent communities have considered STIs to be of concern it has been couched in terms of their being a threat originating from "them." Along those lines, while STIs might be considered the "default" status for "them," they were a terrifying deviation from the norm for "us," those with whom one identified. Among "us," the contraction of an STI would be a shameful, singular event, a personal and social crisis.

In the Mishnah, however, impurity, according to Balberg's model, is ultimately unavoidable: "the contraction of impurity is construed as a *default*."<sup>376</sup> As a result, the Mishnah "presents [impurity] as the daily and ongoing concern of *everyone* [within the Jewish community], even of persons who are not currently impure or known to have had contact with a source of impurity. In other words, impurity in the Mishnah is approached not only as a noticeable event, but also, and perhaps much more prominently, as *an ongoing reality*."<sup>377</sup> This is true for everyone in the community. Although it is the case that certain persons, like the *Ammei ha-Aretz*, are assumed to be default carriers of impurity, this is not because it is a more "native" status for them and alien to others, but rather because the *Ammei ha-Aretz* are assumed to take insufficient care regarding the default impurity with which the entire community must deal. This has the immediate effect of reducing the extent to which it is possible to shame someone for having

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<sup>376</sup> Balberg, 35, (emphasis added).

<sup>377</sup> Idem, 28.

contracted impurity—after all, one cannot render alien someone else for something which is recognized to be everyone’s problem and everyone’s concern.

The exclusion of Gentiles from the purity system, however, is an important qualification to the claim that impurity is "everyone's problem." Gentiles, prior to conversion, cannot contract impurity. They are, in important ways, categorically pure because they simply do not exist within the economy of purity, impurity, and sacred space that makes a pure or impure status relevant—and, we will recall from Balberg, relevance is actually a critical category within the universe of purity since only that which *matters* to an agent can become impure. This exclusion strains the parallel with STIs as far as universality is concerned. STIs are a risk for everyone, in every community; they exist and have measurable health consequences regardless of whether they are religiously or culturally relevant to their victims and vectors.

However, as a model for how we understand STI risk as a social phenomenon, the fact that the very ability to contract impurity indicates a privileged status is instructive and even corrective. If impurity is, as I have said, an unavoidable consequence of certain kinds of social relations, the corollary is that someone who can fully participate in the purity economy is someone who engages in those social relations. And, although the partial exclusion of Gentiles from this economy carries problematic implications about who is in and who is out of a privileged group, it is important to note that within purity discourse, it is the *more privileged* classes that can contract impurity. STIs have historically been treated as diseases of the "other." But impurity is not the default condition of the “other”; if anything, a lack of full participation in the system of impurity is a marker of otherness. Entering a social context in which purity becomes a relevant,

applicable risk is, all in all, a praiseworthy and esteemed action. The relationships that make impurity relevant are worthwhile in and of themselves.

That impurity is default, then, means that it cannot be an occasion for panic. Nor can it, in and of itself, be an occasion for shunning or disdain. True, lax or inappropriate engagement with the default reality of impurity can be and is occasion for disdain (though not, interestingly, shunning; the texts assume that anything handled by an *am ha-aretz* is impure, but they also assume one will have at least semi-regular interactions with *ammei ha-aretz*). But the risk of contracting impurity or the fact of having contracted impurity itself is so accepted and commonplace as to be nearly unremarkable. As I discuss further in the next section, this characteristic therefore makes the strategies for managing impurity similarly unremarkable. Impurity is an unavoidable consequence of certain types of social intercourse. It requires awareness and management, but it is no cause for alarm.

STIs can also be described as ultimately unavoidable consequences of certain types of social intercourse. While STI rates can and should be drastically reduced, there is no way to engage in partnered sex that completely eliminates any risk of sexually transmitted infections—a reality acknowledged by the recent shift in emphasis from a language of “safe sex” to that of “safer sex.”<sup>378</sup> The range of different types of infection, some of which are transmitted through fluids and others of which are easily transmitted through skin-to-skin contact; the rapidly evolving character of bacteria and viruses; the variability of human cultural norms, values, and sexual preferences; and the simple fact that humans are error-prone beings mean that STIs will always be a moving target. As

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<sup>378</sup> See, for example, “Safer Sex (‘Safe Sex’),” Planned Parenthood, accessed March 17, 2017, <https://www.plannedparenthood.org/learn/stds-hiv-safer-sex/safer-sex>; and “Safe Sex vs. Safer Sex,” The STD Project, accessed March 17, 2017, <http://www.thestdproject.com/what-is-safer-sex/>.

with mishnaic impurity, STIs cannot be completely avoided—only managed. And as mishnaic impurity discourse shows us, one way to manage something that is so widespread as to be unavoidable is to make it also unremarkable. To manage something a community must be able to analyze it, discuss it, and understand that it is everyone’s risk and everyone’s concern.

## *2. Specific Features of Mishnaic Purity Discourse*

Mishnaic impurity discourse also has specific features that make it helpful for thinking about STIs. Another point we recall from chapter one’s social history of STIs is that we tend to treat STIs as a singular entity: one is either “clean” or “infected,” and we make little or no distinction among different pathogens, infections, or syndromes. Indeed, one particular STI may become metonymic for STIs in general: early and mid-20<sup>th</sup> century campaigns against “Venereal Disease,” for example, were in fact overwhelmingly campaigns against syphilis, even though gonorrhea was actually much more prevalent. Such a monolithic view of STIs, however, is both medically and socially inaccurate, as there are many different infections, some viral, some bacterial, and some fungal, which occur at different rates in different social contexts.

Furthermore, not all infections are created equal. Different infections have different levels of virulence (the likelihood of spread and infection) and different levels of severity (how sick an infection makes one). This is a point often underappreciated, even where the existence of diverse varieties of STI is recognized. Take, for example, the stigma surrounding herpes. There are two major strains of herpes simplex virus; HSV-1 is primarily associated with oral herpes and HSV-2 with genital herpes, although either



virus can colonize either area. Current estimates place HSV-1 prevalence in the United States at around 65%<sup>379</sup> and HSV-2 prevalence in the US in individuals between the ages of 14 and 49 at 15.5%.<sup>380</sup> Worldwide combined HSV-1 and HSV-2 prevalence is around 90%. This means that more people have herpes than do not. (In fact, the actual rate is probably even higher since an infected individual may never experience symptoms or may fail to recognize them as evidence of a herpes infection). And, outside of certain situations, such as an active outbreak in a laboring woman who thereby risks transmitting the herpes infection to the infant, herpes is more of a nuisance than a genuine medical danger. Yet the stigma of herpes is incongruent with both its actual dangers (relatively small) and its prevalence (relatively large).

Mishnaic purity discourse, on the other hand, is quite careful to recognize multiple forms of impurity that have multiple levels of virulence and severity (the latter term I take to mean, where impurity is concerned, how intensive a purification ritual is required). The first chapter of Zavim is almost entirely devoted to distinguishing between a “true *zav*,” who is liable for the full purification ritual detailed in Leviticus 15 and who transmits impurity in all the ways described there, and someone who has a lesser degree of *zivah* impurity, is less contagious and requires a less intensive purification ritual. As noted in chapter three, even within the relatively narrow realm of “impurities related to male genital discharge,” the Mishnah recognizes two types of impurity and multiple degrees of impurity within those types. It further understands that not all of those types and degrees are of equal virulence and severity.

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<sup>379</sup> Corey L. Wald, “Persistence in the Population: Epidemiology, Transmission,” in *Human Herpesviruses: Biology, Therapy, and Immunoprophylaxis*, Arvin A, Campadelli-Fiume G, Mocarski E, et al., eds. (Cambridge: Cambridge University Press; 2007), Chapter 36. Available from: <https://www.ncbi.nlm.nih.gov/books/NBK47447/>

<sup>380</sup> “Genital Herpes Fact Sheet,” Centers for Disease Control and Prevention, accessed February 3, 2017, <https://www.cdc.gov/std/herpes/stdfact-herpes-detailed.htm>.

Outside of *zivah*-type impurities, the variety is even greater, and the question of varying levels of virulence is explicitly discussed in multiple places. M. Kelim 1 ranks sources of impurity according to their virulence: a *metzarah* (someone with an impure skin condition) is a strong vector of impurity,<sup>381</sup> while someone who has sex with a *niddah* (a menstruating woman) is a weaker vector.<sup>382</sup> People and objects can both be sources of impurity, and whether the initial source is a person or an object also affects its virulence: *zivah* discharge and disembodied fluids from a *zav* have fewer possible routes of transmitting impurity than does a *zav* himself.<sup>383</sup> Further, there are intermediate levels of impurity and virulence at different stages in the purification process (often a multi-day affair): someone who has immersed to begin purification during the day but who will not be fully pure until nightfall may participate in some rituals afforded to the pure (eating tithes) but not in others (eating foods that carry a higher level of consecration).<sup>384</sup> A *metzarah* is one of the strongest vectors of impurity, ranking behind only a corpse and a bone fragment,<sup>385</sup> but a *metzarah* who has recovered and is waiting out their days of purification is one of the weakest vectors.<sup>386</sup>

The Mishnah also understands that ranking virulence is complicated and recognizes a difference between *absolute* and *contextual virulence*: while some forms of impurity have more potential routes of transmission, convey more severe secondary impurity, or can transmit impurity more indirectly than others, a less absolutely virulent type of impurity may nevertheless be more likely to be transmitted in a given context than a more absolutely virulent type. Kelim 1:4 states that a corpse is the most absolutely

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<sup>381</sup> M. Kelim 1:4.

<sup>382</sup> M. Kelim 1:3.

<sup>383</sup> M. Kelim 1:3.

<sup>384</sup> M. Kelim 1:5.

<sup>385</sup> M. Kelim 1:4.

<sup>386</sup> M. Kelim 1:1.

virulent vector of impurity, because it can convey impurity by overhang—that is, anything in the same tent as a corpse will be rendered impure because the corpse and anything else in the tent share a shadow—which no other source can do. Recall from the previous chapter, however, that Zavim 4:6 discusses ways in which a *zav* may actually be a stronger source of impurity than a corpse:

If a *zav* were in one pan of a set of scales, and food or drink were in the second pan, they are impure; but if a corpse [were in the first pan], anything [in the second pan], save a person, remains pure.

This is a case where greater stringency applies to a *zav* than to a corpse. But greater stringency is also applied to a corpse than to a *zav*. For a *zav* renders impure anything under him that is fit for lying or sitting on, such that it in turn renders persons and garments impure; he also conveys *madaf*-impurity [another term for indirect contact impurity] to whatever lies above him, such that it in turn conveys impurity to food and drink--impurity which a corpse does not convey.

But greater stringency applies to a corpse, because a corpse conveys impurity by overhang, and it conveys seven days' worth of impurity--impurity which a *zav* does not convey.

The corpse transmits seven-day impurity and conveys impurity by overhang, which the *zav* cannot. However, the *zav* can convey impurity by indirect contact to seats and beds below him such that they render persons and garments impure, and to anything above him such that it renders food and drink impure. The general rule may be that the corpse is a more absolutely virulent type of impurity than the *zav*, but there are circumstances in which the *zav* has greater contextual virulence than the corpse. Different impurities, in short, have different traits, and those particular traits may be more helpful in understanding which source is a greater concern in a given situation than is an abstract ranking of virulence.

Context also matters when analyzing the risks different STIs pose. While the Mishnah focuses largely on contextual versus absolute *virulence*, its logic can be

extended to both virulence and severity in the case of STIs. Abstractly speaking, HIV is among the most *absolutely severe* STIs known, and it also has fairly high absolute virulence. Untreated, it is almost invariably fatal, and it is also easily transmissible through blood and semen. However, contemporary antiretroviral treatment not only turns HIV into a chronic, manageable condition but also significantly reduces its virulence. Someone who has been on antiretroviral drugs long enough to bring their viral loads down to undetectable levels is, for most practical intents and purposes, no longer contagious.<sup>387</sup> Responsible use of barrier methods and prophylactic drugs lower the risk of infection even further. By contrast, gonorrhea does not have high absolute severity: while it can lead to significant complications if left untreated, it is unlikely to be fatal.<sup>388</sup> Because it is a bacterial STI, however, it is one of the commonplace conditions whose treatment is increasingly affected by the growing problem of antibiotic resistance.<sup>389</sup> Although most people manage to clear even drug-resistant gonorrhea on their own, reinfection is common. One of the easiest ways to spread drug-resistant gonorrhea is by way of fellatio, which, ironically enough, is reputed to be a safer-sex practice through which one can reduce one's risk of contracting HIV. So, in certain contexts—communities where HIV rates are well under control and people have access to effective treatment—gonorrhea certainly has greater *contextual virulence* and may well have greater *contextual severity* and thus be a greater overall risk than HIV.

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<sup>387</sup> See, for example, Susan M. Schader and Mark A. Wainberg, "Insights into HIV-1 Pathogenesis through Drug Discovery: 30 Years of Basic Research and Concerns for the Future," *HIV & AIDS Review* 10:4 (December 2011): 91-98.

<sup>388</sup> See Kara A. McElligott, "Mortality From Sexually Transmitted Diseases in Reproductive-Aged Women: United States, 1999-2010," *American Journal of Public Health* 104:8 (August 2014): e101-5, doi: 10.2105/AJPH.2014.302044.

<sup>389</sup> This is not to say that drug resistance does not also affect HIV: it does, especially when patients fail to take their antiretroviral drugs regularly. It is to say, however, that antibiotic resistance seems to be a much more widespread and rapidly developing problem for the treatment of gonorrhea.

Both the general, default character of impurity in the Mishnah and the specific facts of mishnaic impurity—its multiple types, those types’ varying levels of severity and virulence, and the contextual dependence of those levels—bring us back around to Balberg’s observation that mishnaic impurity discourse ultimately focuses less on individual *sources* of impurity than on “circles” or “networks” of impurity. Because the risks of transmission in a given situation depend not only on the sources to which one might be in proximity, but also on the social and material circumstances of that proximity, one’s own purity status, and one’s own mental state, it is most reasonable to understand impurity transmission as a phenomenon to occur within and as an ultimate consequence of an intersecting network or structure of social and material variables. As I noted in chapter three, the world of Zavim is one in which social actors touch each other regularly, in multiple ways. Intimate human interaction in this world is inevitable, and one’s understanding of impurity transmission must account for this.

Let us take as a case study one of the quotidian, labor-related incidents that Zavim posits as a potential route of transmission. Suppose that Tom, who is pure, and Harry, who is a *zav*, are unloading a heavy burden from a donkey together (*Zavim* 3:2), a situation which would result in Tom contracting *zivah* impurity from Harry by way of “shift.” Tom thus contracted *zivah* impurity as a direct result of unloading the donkey with Harry. However, the fact that Tom found himself in that position results from the complex interaction between the basic rules of impurity transmission, social and material circumstances, and mental state. And this complexity is a major part of why, in the mishnaic world, impurity becomes default to begin with. Tom might have made a different set of decisions such that he would not have unloaded the donkey with Harry in

particular while Harry was a *zav*. Practically speaking, however, there are very few sets of decisions Tom could have made that did not eventually result in his contracting *some* kind of impurity. If, for example, he chose to unload the donkey with someone else instead, he could not guarantee that that person did not have a different kind of transmissible impurity. And all this is to say nothing of whether he actually knew that Harry was a *zav* in the first place—something which is fairly unlikely. Again, this is not to deny or discount the direct causal chain; the direct cause of transmission of *zivah* impurity is a specific sort of contact between the vector and the host, and the Rabbis' extended discussion of the specifics of *zivah*'s potential routes of transmission devotes a great deal of entirely appropriate attention to this. However, the way individual direct causes of impurity, and the interactions among those individual direct causes, function within mishnaic society is best described and addressed in terms of networks rather than in terms of individual sources.

### 3. *The Role of Intention*

At this point, it is necessary to give some attention to the role of intention and mindset in mishnaic impurity, because it is here that the analogy between the transmission of impurity and the transmission of infection seems to break down. In mishnaic purity law, persons and objects are only susceptible to impurity if they participate (via membership in the Jewish people, either by birth or conversion) in the system of purity and sanctity. Furthermore, objects are only susceptible to impurity if they are made, intended, and used for particular purposes, and body parts are only susceptible to impurity inasmuch as they are visible and associated with the host's self-

understanding. Moreover in individual cases of doubtful transmission, the agent's intention or mindset during a given action can determine whether impurity is or is not contracted or transmitted. If, for example, one whose status as a *zav* were in doubt experienced sexually stimulating thoughts at the time he saw his genital emission, he is considered a *ba'al keri* (someone who had a seminal emission) rather than a *zav*.<sup>390</sup> Or, in the case of food that has been wetted by dew (liquids have the power to "activate" objects such that they are susceptible to impurity), whether or not the liquid has in fact "activated" the food depends on whether the owner intentionally put it out in the open for the purpose of getting dew on it.<sup>391</sup> As Balberg puts it, "only that which *matters* to human beings can partake in impurity."<sup>392</sup> "Matters" here refers both to whether the object is a member of a species is intended for human use (so food matters in a way that, say, beach sand does not) and whether someone intended for the specific object to undergo a particular change. Something that does not matter to those who participate in the system of purity and impurity cannot itself participate in that system, and so what it comes in contact with is irrelevant.

Our current understanding of the biology of infectious disease sees no role for mental state or intention in the direct causation of STIs. There cannot, thus, be a direct parallel between STIs and impurity on this point. However, I argue that the broader concept of "circles" or "networks" of impurity—or infection—means that mental state and the idea of what "matters" to human beings applies to STI transmission in a different way. Here, our mindset, both individual and collective, and what "matters" to us—a more

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<sup>390</sup> M. Zavim 2:2.

<sup>391</sup> M. Makshirin 3:5, 6:1; discussed in Balberg, 92-3.

<sup>392</sup> Balberg, 75.

expansive category here than in mishnaic purity discourse—affects the particular sets of actions we take and the particular sorts of STI risks to which we are exposed.

Unlike the mishnaic schema, in which only that which matters to people may participate in impurity, the rule for STIs seems to be something more like this: the *more* a particular infection and/or infection site matters to us, the *less* likely that infection is to be transmitted and the *less* likely that site is to be infected. Consider this example: Lillian contracts oral gonorrhea as a direct result of her having unprotected oral sex with Bobby. However, the fact that Lillian and Bobby chose that particular activity may have a great deal to do with their individual and joint judgments about what “matters.” Perhaps Lillian and Bobby are particularly concerned about avoiding HIV transmission and unintended pregnancy, and thus chose oral sex as a lower-risk (where HIV and pregnancy are concerned) alternative to vaginal or anal sex. Condom use for oral sex is not common, and the reasons why one might want to use a condom during oral sex are not reliably covered in sex education.<sup>393</sup> The risk of contracting gonorrhea may not have occurred to Lillian and Bobby as a reason to use condoms during oral sex. After all, STI testing—if it is offered at all—may focus on HIV to the exclusion of other infections,<sup>394</sup> and gonorrhea can be asymptomatic. Bobby may have been entirely unaware that he had gonorrhea, even as he may have assumed that he had practiced due diligence and gotten tested. Alternatively, Bobby and Lillian may have assumed that gonorrhea was not a significant

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<sup>393</sup> See Nicole Stone, Bethan Hatherall, Roger Ingham, and Juliet McEachran, “Oral Sex and Condom Use Among Young People in the United Kingdom,” *Perspectives on Sexual and Reproductive Health* 38:1 (2006): 6-12, doi: 10.1363/psrh.38.006.06. While this study treats sex education in the UK, my own anecdotal experience and those of many of my peers is that there is a similar lacuna in public school sex education in the U.S.

<sup>394</sup> I once asked my family doctor for routine STI testing. After I explained that my entire sexual history was with other cisgender women, she was deeply confused as to why I wanted testing, and offered me only a blood test for HIV.



concern, or they may have decided that condom-free sex was something they valued and concluded that oral sex was the least risky way to indulge.

In none of these possible stories did the risk of contracting oral gonorrhea matter most to Bobby and Lillian. Either it mattered less relative to other concerns (pregnancy, HIV, avoiding condoms), or it simply did not occur to them as a concern. Further, what mattered more and less to Lillian and Bobby likely had a great deal to do with what mattered to their broader medical and social community. The concerns public health discourse chooses to emphasize have a direct effect on which concerns are salient to individual agents. If the community does not treat the prevention of oral gonorrhea as a prominent concern, individuals are also unlikely to treat it as such. Because gonorrhea and infections of the mouth and throat mattered less to Bobby and Lillian, Bobby became vulnerable to transmitting and Lillian to contracting oral gonorrhea.

Questions of mindset and of what matters to us do *not* have a directly determinative effect on the transmission of STIs from one individual to another. In this way, STIs simply belong to a different metaphysical reality than does mishnaic impurity. Mindset, however, *does* affect that transmission in complex and various ways. STIs *do* have a social function similar to that of impurity, and that function moves along similar social and rhetorical channels. Like impurity, STIs are a form of contagion that is an ultimately unavoidable consequence of common forms of social interaction. As with impurity, STIs do not represent a single, monolithic phenomenon; rather, they are a broad category encompassing several different infections with different levels of severity and virulence—levels, furthermore, which are mutable from situation to situation depending on the other variables involved. And, like impurity, while the direct causes of STI

transmission are straightforward, those causes exist within broader and more complex social and material networks that affect the circumstances in which individual transmissions occur, on multiple levels.

Thus, while mishnaic impurity and STIs cannot form an exact parallel, they share enough similarities in their social function to establish an analogy that is useful. As I argue in the next section, these similarities are enough to make the impurity management strategies employed by the Rabbis of the Mishnah valuable models for devising social strategies for contemporary STI management as well.

### III. Remedies for Impurity

In one important sense, the developed world knows how to manage STIs. Modern medical science has developed treatments, vaccines, and physical and chemical methods of prophylaxis that make sex, for those who have access to these wonders, safer than it has ever been at any point in human history. These advances are part of the broader success story of modern scientific medicine. However, if I have demonstrated anything about STIs in the preceding pages, it is that they are far from a strictly technological problem. Technological advances are an essential component of STI management, but they are not sufficient, because STIs are socially transmitted among fundamentally social beings.

Thus, STIs are an important case study for questions of risk management in sexual ethics in part because they demonstrate the extent to which social behavior occurs in and tangibly affects the material world. The social components of STI transmission affect the efficacy of our technological tools for STI management in serious ways.

Inappropriate antibiotic use and nonchalance about the prevention of bacterial STIs has led to a worrying rise in antibiotic resistant gonorrhea.<sup>395</sup> Inconsistent compliance with antiretroviral drug regimens makes drug-resistant HIV strains a serious concern.<sup>396</sup> Suboptimal rates of vaccination against cancer-causing strains of Human Papillomavirus (HPV) allow innumerable preventable cancers to arise, some of them fatal. Disparities in access to medical care, combined with stigma against people who are infected and faulty reasoning about the moral effect of proactive STI prevention and sex education mean that potentially effective methods of treatment and prevention fail to reach those who need them most. The best possible medical technologies are useless if not adopted. It is in encouraging the widespread adoption of effective modes of treatment and prevention that social strategies for managing STIs are critical.

I have discussed several ways in which mishnaic impurity and STIs have similar social functions. These similarities, I argue, extend to management strategies. Mishnaic impurity and STIs are both forms of social contagion that are ultimately unavoidable consequences of particular types of social interaction. The Rabbis' prescriptions for managing the contagion of impurity—and the way they understood the practice of those management strategies to shape one as a moral agent—are valuable resources for contemporary STI management.

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<sup>395</sup> “Antibiotic Resistant Gonorrhea Basic Information,” Centers for Disease Control and Prevention, accessed March 17, 2017, <https://www.cdc.gov/std/gonorrhea/arg/basic.htm>.

<sup>396</sup> See, for example, Rutao Luo, Michael J. Piovoso, Javier Martinez-Picado, and Ryan Zurakowski, “Optimal Antiviral Switching to Minimize Resistance Risk in HIV Therapy” *PLOS One* 6:11 (November 2011): e27047, doi 10.1371/journal.pone.0027047.

### 1. *Talking About Impurity, Talking About Sex*

I begin by reiterating from the previous section a general claim about mishnaic impurity: in the mishnaic world, “the contraction of impurity is construed as a *default*.”<sup>397</sup> The fact that impurity takes multiple forms, each with its own routes of primary and secondary transmission, means that the encounter with impurity in the social world of the Mishnah is understood to be a constant. Thus, the Mishnah “presents [impurity] as the daily and ongoing concern of *everyone*, even of persons who are not currently impure or known to have had contact with a source of impurity.”<sup>398</sup> As I have noted, this has the effect of destigmatizing the contraction of impurity. Now, however, I go one step further: the recognition of impurity’s default status, and its resulting destigmatization, means that impurity is a thing about which it is possible to talk freely.

The importance of making social contagion into a thing to be discussed cannot be overstated. Open discussion of a matter is a critical step toward understanding it. Discussion allows the collection and comparison of relevant data and, consequently, the pooling of knowledge; it allows multiple minds to work on contextualizing and analyzing that data, and multiple bearers of expertise to correct their own and each other’s errors. Even beyond that, however, discussing something gives a name to it, makes it familiar, and tames it. Something unspeakable can be weaponized, and its victims made powerless to confront it directly. If, however, that thing can be discussed out in the open, there is a greater chance to defuse its impact. Those who need help managing that thing have the opportunity to stop hiding.

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<sup>397</sup> Balberg, 35, (emphasis added).

<sup>398</sup> Idem, 28.

As with other forms of impurity, *zivah* in the Mishnah is treated as default. It is particularly notable that this is the case even for a form of impurity that, by definition, arises as a result of an *abnormal* discharge. This makes more sense when we consider it in the context of Balberg's argument that the Tannaim understood the body to be, by nature, fluid or porous.<sup>399</sup> It is in the nature of the human body to regularly exchange substance with its environment, and to be both a vehicle for and a recipient of the transmission of impurity through this exchange. A fundamental part of this leakiness is mutability—that is, the state of the body is in some constant circumstance of flux. And this flux, in turn, means that the body is always in a state of vulnerability—not just to external sources of impurity, but also to internal changes that confer impure status. Put another way, the rabbinic understanding of the body as leaky or porous helps us see a way in which the production of an *abnormal* discharge is considered well within the range of *normality* for a body that exists constantly in circumstances of exchange or flux.

That the body's porousness and mutability can be taken not only in stride, but as opportunities for moral growth (as both Balberg and Jonathan Schofer argue),<sup>400</sup> is a helpful corrective to a modern set of discourses that have taken leakiness, porosity, and vulnerability as signs of moral weakness. Margrit Shildrick, notably, has argued in *Leaky Bodies and Boundaries* that disdain for the "leakiness" of the female body is both an important foundation for and manifestation of misogyny and patriarchal power structures.<sup>401</sup> Certainly the discharges that result from many untreated STIs were taken,

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<sup>399</sup> Idem, 57. Also see Schofer, *Confronting Vulnerability*, 53-76 for another take on the porous rabbinic body.

<sup>400</sup> Balberg, 48-73 and 148-179; Schofer, *Confronting Vulnerability*, 53-76.

<sup>401</sup> Shildrick, *Leaky Bodies and Boundaries*. See, for example, p. 35: "[T]he very sign of fertility, the menses has been regarded as evidence of women's inherent lack of control of the body and, by extension, the self. In other words, women, unlike the self-contained and self-containing men, leaked; or, as [Elizabeth] Grosz claims: 'women's corporeality is inscribed as a mode of seepage.' (1994: 203)."

historically, as external manifestations of moral and cultural “leakiness” or looseness and used to further the “us versus them” dichotomy that characterized the near-universal understanding of STIs as diseases of the “other.” By contrast, the Mishnah understands leakiness to be a universal quality of human physicality and prescribes reflections and practices designed to accommodate one’s social and religious habits to this fact.

While the Mishnah clearly could not have anticipated germ theory and modern epidemiology, its observations here fit very well indeed into that contemporary milieu. As Margaret Battin, et al., note in their important article “The Patient as Victim and Vector”, the realities of infectious disease require us, at least where public health is concerned, to rethink our understanding of selfhood and agency, and to do so in a way that is quite congruent with Balberg’s concept of “networks of impurity.” We all, they write, “live in a web of potential and actual disease, even when we are not currently overtly ill and not aware of the possibility of transmission.”<sup>402</sup> It can be difficult to identify individual vectors, since transmission can occur without awareness or agency, or with the help of intermediate agents (such as is the case, for example, with mosquito-borne infections.) Further, the picture of the body painted by Battin, et al., corresponds not only with the Mishnaic account of the body’s porosity but also with the “modularity” of the mishnaic body, wherein “the individual body can change its qualities and consistency by having other external parts, such as another body, added to it. When the two bodies are connected, they conceptually form [one] shared body, and when they are no longer connected, each of the bodies functions as a separate unit.”<sup>403</sup> In modern epidemiological terms, as Battin, et al., write, “the human ‘individual’ [is] a larger

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<sup>402</sup> Battin, et al., 276.

<sup>403</sup> Balberg, 58.

organism carrying and inhabited by a host of smaller ones that move easily from their habitat in one ‘person’ to another.”<sup>404</sup>

## 2. *Know Your Status: The Value of Self-Examination*

After making impurity a matter for mundane discussion, the most important feature of the Mishnah's account of social contagion is its emphasis on self-examination. Virtuous rabbinic agents build their daily routines around practices meant to foster self-control and self-awareness, practices that Balberg classifies according to two categories: “examination of the day,” which is “an ongoing effort to give oneself an account of all one’s activities and encounters that could have exposed one or one’s possessions to impurity,”<sup>405</sup> and “self-examination of the body,” in which one searches for “signs that will attest to a bodily state that renders one impure”<sup>406</sup>—impure genital discharges, for example, or impure lesions of the skin. Rabbinic subjects must then process and interpret the results of these examinations, usually with either direct or indirect expert aid, to determine whether it is likely they have contracted some form of impurity that requires mitigation.

Notably, this sort of self-examination is considered virtuous for *everyone*, not just those who engage in some sort of high-impurity-risk behavior.<sup>407</sup> Self-inventory is not

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<sup>404</sup> Battin, et al., 276.

<sup>405</sup> Balberg, 157.

<sup>406</sup> Ibid.

<sup>407</sup> The first line of M. Niddah 2:1—“Every hand that examines frequently—in women, it is praiseworthy, but in men, it should be cut off”—appears to complicate this claim. The line, which refers specifically to the examination of genital discharges and which is classically interpreted as discouraging masturbation in men, is certainly a problematic one, as it simultaneously discourages men from one potentially valuable mode of self-knowledge and places a disproportionate burden of examination upon women (although it is possible to put forth a counter-interpretation in which it figures *women* as the paradigmatic self-examiners).

Nevertheless, for my purposes here, I do not believe the passage disproves my claim that self-examination, writ large, is virtuous for *everyone*. M. Niddah 2:1 discourages men from engaging in *one specific form* of self-examination of the genitals—it states that the *hand* that examines frequently in men

some kind of behavioral sin-tax levied against those who are socially or occupationally lax; it is a mental and behavioral ideal to be striven for. In fact, the default character of impurity and the subsequent practical need for regular self-examination are, as Balberg argues, best understood as an opportunity to cultivate self-examination and self-awareness as components of a virtuous character in their own right.<sup>408</sup> In other words, the fact that a particular kind of contagion is practically unavoidable for all social actors means that the management strategies necessitated by that contagion also teach us how to be better social actors more generally.

Much as the Mishnah's account of impurity as a phenomenon is nuanced and encompasses many different types and degrees of impurity, each with its own set of characteristics, so too its model of examination and subsequent diagnosis of impurity is nuanced and attentive to particular details. The process by which it is determined whether a person with a genital discharge is a *zav g'mur*, or "true *zav*" who is liable for the full purification ritual outlined in Leviticus 15 is an example of such attention. The first chapter of Mishnah Zavim introduces a number of variables which contribute to the diagnosis of a *zav g'mur*: type of discharge, quantity of discharge, number of episodes of discharge, and the timing of those episodes are all in play in this diagnostic process. The second chapter of Zavim brings social and circumstantial data into play; these factors are relevant both for determining the type of discharge (is it possible that the suspected *zav* encountered a sexually arousing stimulus around the time of the discharge, such that it

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ought to be cut off. It does not discourage men from examining the body (including the genitals) more generally, nor does it discourage them from examining their memories of the day. Indeed, much of the language in Zavim refers literally to *seeing* episodes of discharge, suggesting that *visual* examination of the genitals is still encouraged, even if *tactile* examination is not.

<sup>408</sup> Idem, 148-179. See, for example, p. 164: "[Mishnaic] practices [of self-examination both assume and generate] a subject distinguished by his self-command and self-consciousness...self-examination is also self-formation." (Emphasis in original.)



may actually have been a spontaneous seminal emission?) and the consequences of the discharge (gentiles are not made impure by *zivah*, and the consequences for those with ambiguous genitals are complicated).

Equally important, it does not seem to be the case that the responsibility for this examination and subsequent diagnosis rests wholly on either the one with suspected *zivah* or the rabbinic interpreters. As Balberg puts it, "the process of regular self-examination is complemented, at least on occasion, with an appeal to the specialized knowledge of the Rabbis."<sup>409</sup> Consider *Zavim* 2:2, which discusses how one examines a suspected *zav* to confirm that the discharge is, indeed, *zivah* and not semen:

There are seven lines along which they examine a *zav*, the nature of whose discharge is yet undetermined: concerning food, drink, what he has carried, whether he has jumped, whether he has been sick, what he has seen, and what he has thought about: did he have sexual thoughts before he saw [an arousing sight], or did he see [the arousing sight] before he had sexual thoughts?

Clearly, the examination depends quite strongly on the suspected *zav*'s memory of the circumstances surrounding the discharge. However, the way in which the passage is phrased suggests the participation of others in this examination. "They examine" (*nizkak*) the *zav*—the verb is in the third person plural, indicating that this examination is being performed by multiple third parties. These people, presumably Rabbis, ask the suspected *zav* to recall the specific circumstances of his discharge, and analyze those circumstances to come to a conclusion as to whether the discharge was *zivah* or semen. There is no language of command; the text does not state that the suspected *zav* *must* present himself before the Rabbis—but it does indicate that such consultation is both customary and expected.

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<sup>409</sup> Idem, 161.

Balberg argues that this combination of self-examination and consultation with experts should not be read merely as a reinscription of rabbinic authority, although such reinscription is clearly a major aim of purity discourse. Rather, "the choice to seek a sage's counsel is portrayed in rabbinic texts as part of a personal and self-motivated quest for purity, rather than as submissive compliance with authority...[the sage] fulfills a supporting role in one's active formation as a subject of the law."<sup>410</sup> The purity texts, according to Balberg, *are* deeply concerned with the formation of the individual moral agent, but they locate that agent within a web of social influences and ritual expertises that make foundational contributions to and substantially direct the formation of that person as a continuously developing moral agent. Indeed, broadly speaking, an agent's practice of self-examination must include a detailed awareness of those social influences, including the systems of expertise and the particular expert voices that help them sort through the data of which they must take careful and regular stock.

The worth of the Mishnah's emphasis on socially embedded self-awareness and regular self-examination should become readily apparent when we consider the fact that a significant contributor to STI transmission is simple ignorance of one's STI status.<sup>411</sup> Perversely, a potential partner who discloses a known and well-managed infection may appear to present a greater risk than a potential partner who assumes or claims to be infection-free but has no concrete information to back up that assertion. Sex advice columnist Dan Savage has had to remind numerous callers who are afraid of continuing a

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<sup>410</sup> Ibid.

<sup>411</sup> See, for example, Sami L. Gottlieb, Nicola Low, Lori M. Newman, Gail Bolan, Mary Kamb, and Nathalie Brought, "Toward Global Prevention of Sexually Transmitted Infections (STIs): The Need for STI Vaccines" *Vaccine* 32:14 (March 2014): 1527-1535, doi [10.1016/j.vaccine.2013.07.087](https://doi.org/10.1016/j.vaccine.2013.07.087); and David Mabey, "Epidemiology of Sexually Transmitted Infections: Worldwide" *Medicine* 42:6 (June 2014): 287-290, doi [10.1016/j.mpmed.2014.03.004](https://doi.org/10.1016/j.mpmed.2014.03.004). Both of these articles specifically note the asymptomatic character of many STIs as a factor in their transmission.

relationship with a partner who has disclosed that they are HIV-positive that one actually may be at greater risk of infection from someone who (wrongly) assumes or (falsely) claims they are HIV-negative than someone with a known and well-managed HIV infection.<sup>412</sup>

Self-examination is also important for another, more specific reason: examining oneself for impurity yields critical information about what *type* of impurity one might have contracted; this, in turn, makes it possible to know the appropriate mitigatory response. Recall that Mishnah Zavim distinguishes between *impurity status*, *type of impurity*, and *degree of impurity*; there are two distinct types of impurity caused by male genital discharge, and even within the fairly narrow realm of impurities caused by *abnormal* genital discharge, there exist different levels of severity which, in turn, call for different variations of purificatory procedure. Impurities are not all the same and do not call for identical treatment. Examination of the day and examination of the body allow one to review which sources of impurity one came into contact with and how the contact

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<sup>412</sup> See, for example, Savage Lovecast Magnum episode 365 (October 22, 2013), responding to a caller who is in the early stages of a relationship with someone who has just disclosed their HIV-positive status: "...a huge percentage of people who are positive don't know they're positive. There are many people out there running around who think they're HIV-negative, may have been negative the last time they got an HIV test, who are now HIV-positive. And paradoxically, you are at more risk being in a sexual relationship with someone who thinks he's negative and isn't, than you are in a relationship with someone who knows he's positive and is under treatment. Most people who are positive and are being treated have zero viral load. They are—doctors will say they are functionally non-infectious. They pose, really, no threat. If you're also then not having anal intercourse, you're not doing anything that puts you at greater risk for HIV transmission, if he *were* crazy infectious or if his viral load is for some reason spiking because his meds are off, you're really at very, very little risk."

<http://www.savagelovecast.com/episodes/365#.WJSil7badE4>  
accessed February 3, 2017. Transcription my own.

Savage's claim about risk seems supported by the results of HIV Prevention Trial Network study 052, "A Randomized Trial to Evaluate the Effectiveness of Antiretroviral Therapy Plus HIV Primary Care versus HIV Primary Care Alone to Prevent the Sexual Transmission of HIV-1 in Serodiscordant Couples," which showed a 93% reduction in HIV transmission among serodiscordant couples in which the HIV-positive partner received early anti-retroviral treatment. Notably, out of 1171 couples in both treatment arms (so both early AND delayed ART) who completed the study, only eight cases of transmission were reported after the HIV-positive partner began treatment.  
<https://hptn.org/research/studies/33> accessed 2/3/17.

occurred, information which helps one figure out—with rabbinic assistance, if necessary—how to proceed.

Along similar lines, thorough and appropriate examination helps one determine how to proceed regarding one's STI status. In the previous section, I drew the parallel between type of impurity and type of STI (chapter four, section 2:2): STIs are not all the same, and different STIs call for different treatment and prevention strategies. Here, the need for expert intervention is, if anything, greater than suggested by the Mishnah for determining types of impurity. A genital sore could indicate herpes, syphilis, warts, or merely a pimple or an ingrown hair, and a layperson is unlikely to be able to distinguish between them without laboratory testing and expert interpretation of the test results. In addition, the growing problem of drug resistance makes it all the more important to administer the correct treatment for a given infection.

Attentiveness to type as well as general status, and to the circumstances surrounding transmission, is important not only for determining treatment, but for social reasons as well. Clearly knowing that one has a relatively mild, treatable or curable condition rather than a more serious one can help curtail unnecessary panic, as can knowing the exact course of action needed to mitigate the infection. Knowing the specifics of a partner's infection is also important; for example, knowing that a potential partner is "HIV-positive" can mean very different things depending on that person's viral loads and whether they are on antiretroviral treatment. Knowing who one's recent and current partners are once an infection is discovered means that partners can be contacted and treated, and that specific trajectories of infection can be curtailed.

Making impurity default and therefore discussable is the Mishnah's insight about how to *understand and conceptualize* social contagion; the emphasis on self-examination and self-awareness is its insight about how to *respond* to social contagion. Put another way, by making social contagion discussable, the Mishnah also makes it *actionable*. Having emphasized self-examination and self-awareness, the Mishnah goes on to offer a concrete prescription for the *sorts of action* it has now made possible.

The connection between making a form of contagion mundane and discussable and basing any method of managing that contagion on a foundation of self-examination and self-awareness goes even further than this, however. I have argued that making contagion mundane and commonplace makes it more difficult to attach shame and stigma to it, and that such defusion of the contagion's social power makes it possible to discuss the contagion which, in turn, defuses the potential shame and social power even further. As shame is defused, self-examination becomes less psychologically and socially foreboding and onerous. Because learning that one has, indeed, contracted a given contagion becomes a less dreadful and terrifying potential result, there is less reason to avoid performing the prescribed examinations for fear that one will learn something one would desperately prefer not to have known.

## Chapter 5

### What, Then, Ought We Do? Practical Conclusions

#### I. Articulating Discrete Sexual Responsibilities

Up to this point, I have discussed ways in which the social functions of Mishnaic impurity can map, both descriptively and prescriptively, onto our current understanding of sexual health and our strategies for preventing and treating STIs. I have yet, however, to offer explicit directions for individuals and communities. What practical, normative instructions, then, do I present? I offer five broad types of responsibility incumbent upon all sexually active persons and upon the communities in which those persons live. These responsibilities entail concrete actions in almost all cases, and even if the details of those actions may vary according to particular circumstances, the general sorts of concrete action indicated remain fairly consistent.

1. *Respect for Persons/Tzelem Elohim*. Because sex is a social activity, any duty that holds in social interactions more generally holds here; because sex is a social activity that usually involves a heightened level of vulnerability those duties apply even more so. Chief among those duties, and the one upon which the subsequent and more specific ones I articulate below rest, is a duty of what can broadly be termed “respect for persons.”

The pivotal account of the concept of “respect for persons” in the Western ethical tradition is Kant’s. In the *Groundwork of the Metaphysics of Morals*, Kant states that “rational beings are called persons because their nature already marks them out as an end

in itself, that is, as something that may not be used merely as a means, and hence so far limits all choice (and is an object of respect).”<sup>413</sup> He then formulates the categorical imperative as follows: “So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.”<sup>414</sup> So for Kant—and for the Western tradition that follows him—the basis of a duty of respect for persons is a person’s rational capacity for agency. This focus on rational autonomy is drawn into particularly sharp relief in modern bioethics. The 1979 Belmont Report on the protection of human research subjects lists “respect for persons,” defined as “the requirement to acknowledge autonomy and the requirement to protect those with diminished autonomy”<sup>415</sup> as its first basic ethical principle. Tom L. Beauchamp and James F. Childress sharpen this even further in their seminal *Principles of Biomedical Ethics*, in which they articulate a principle of “respect for autonomy,” understood as “acknowledging the value and decision-making rights of autonomous persons and enabling them to act autonomously.”<sup>416</sup> Such emphasis on agency and autonomy has also been central to Western liberal feminism. Martha Nussbaum, for example, connects the oppression of women to an insufficient appreciation for women’s equal capacity for rational autonomy and their subsequent treatment, *contra* the categorical imperative, as means rather than ends in themselves: “women have all too often been regarded not as

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<sup>413</sup> Immanuel Kant, *Groundwork of the Metaphysics of Morals*, Mary Gregor and Jens Timmerman, eds. and trans. (Cambridge, UK: Cambridge University Press, 2008), 4:428.

<sup>414</sup> Kant, *Groundwork of the Metaphysics of Morals*, 4:429.

<sup>415</sup> Department of Health, Education, and Welfare, *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research* (Washington, DC: OPRR Reports, 1979), B1, accessed January 25, 2016, <https://www.hhs.gov/ohrp/regulations-and-policy/belmont-report/#xrespect>.

<sup>416</sup> Tom Beauchamp and James F. Childress, *Principles of Biomedical Ethics*, 7th Edition (Oxford, UK: Oxford University Press, 2012), 107.

ends but as means to the ends of others, not as sources of agency and worth in their own right but as reproducers and caregivers.”<sup>417</sup>

The Western tradition, then, broadly has an account of “respect for persons” that is based in a person’s capacity as a rational agent. Jewish tradition, however, holds that the duty to respect and honor a person begins in that person’s having been created *b’Tzelem Elohim*, in the image of God (Genesis 1:26). This does not necessarily mean that a Jewish duty of respect for persons ought not include a respect for their rational agency, but it does mean that such a capacity is not the ultimate grounding for that duty, nor is it ultimately autonomous. The rational actor may make choices, and other persons must respect, among other things, that actor’s ability to make them, but that freedom of choice is bounded by the fact of one’s having been created and by one’s having certain divinely issued duties that stem from that creation.

The realization of the *tzelem Elohim* in the other is fulfilled in relationship with that other. Laurie Zoloth articulates well why the encounter with the other is the formative ethical moment: “The moral encounter involves a decentering of being, an opening up to plurality and, indeed, to the infinity of possibility in the presence of the other.”<sup>418</sup> In relationship with another person, one encounters that to which one must relate and which one may not possess, that which is at once familiar and alien; that is, one encounters the Divine in microcosm. As Levinas puts it: “The idea of infinity is produced in the *opposition* of conversation, in sociality... The relation with the face, with the other absolutely other which I cannot contain, the other in this sense infinite...is maintained

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<sup>417</sup> Nussbaum, *Sex and Social Justice*, 10.

<sup>418</sup> Laurie S. Zoloth, *Healthcare and the Ethics of Encounter: A Jewish Discussion of Social Justice* (Chapel Hill, NC: University of North Carolina Press, 1999), 209.



without violence, at peace with this absolute alterity.”<sup>419</sup> Yet there *is* the potential for violence. For Levinas, the encounter with the Other is one of vulnerability, for it is in that encounter that it becomes possible to want to kill the Other. And it is because of the vulnerability of this encounter that we receive the command, “you shall not murder.”<sup>420</sup> Zoloth puts the matter succinctly: “The vulnerability of the face imposed its own demands...[T]he vulnerability recalled the command not to kill, and alterity recalled respect for difference.”<sup>421</sup>

Jennie Rosenfeld applies the concept of *tzelem Elohim*, paired with the Biblical command to love one’s fellow as oneself (*ve-ahavta le-re’akha kamokha*) and mediated through the Levinasian encounter with the Other, specifically to sexual ethics. Rosenfeld follows the sage ben Azzai’s interpretation of *ve-ahavta le-re’akha kamokha*,<sup>422</sup> which ties that obligation to the *tzelem Elohim*: because both you and your fellow were created in the image of God, you owe a duty of respect and goodness to that image which is found in both of you.<sup>423</sup> This obligation to the *tzelem Elohim* emerges in Levinas’s writings as, in Rosenfeld’s words, “a limitless responsibility and as a responsibility that emerges prior to commitment.”<sup>424</sup> Even though the other is alien and unknowable, we have a prior obligation to them, one of which we are reminded by the encounter with their face, that is grounded in this *tzelem Elohim* we share with them. And in the sexual realm, Rosenfeld writes, “a sexual ethic which balances between closeness and distance begins to emerge; there are times when an ethical stance will mandate that we move

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<sup>419</sup> Levinas, *Totality and Infinity*, 197.

<sup>420</sup> Levinas, *Totality and Infinity*, 198-9.

<sup>421</sup> Zoloth, 145.

<sup>422</sup> From Midrash ha-Gadol on Lev. 19:18; also found in Sifra Kedoshim 4:1, Bereshit Rabbah 24:7, and Y. Nedarim 9:4.

<sup>423</sup> J. Rosenfeld, 270.

<sup>424</sup> J. Rosenfeld, 272.

closer to the other [and] there are times where in recognition of the *tzelem Elohim* that animates the other, we must step back and simply own their un-knowableness, or what Levinas would term mystery.”<sup>425</sup>

In a Jewish key, then, I argue that a duty of “respect for persons” means a duty to act in such a way, in any encounter, that acknowledges the *tzelem Elohim* equally in both oneself and in the other. It affirms, with Kant, the duty to treat other persons as ends in themselves and not merely as means, but it grounds the duty in the *tzelem Elohim* of each person, recognizing that all the characteristics that mark one as a person, including rational agency, flow from that divine image. It also recognizes that while all persons are alike in that they share the dignity of the divine image, nevertheless the inexhaustible variation contained within the One God’s being manifests itself in the variation and diversity we encounter in other persons. So a duty of respect for persons encompasses at once a duty to recognize and draw out what is shared between us, and also a duty to recognize and let flourish one another’s alterity.

How does such a “respect for persons” cash out in sexual situations? If the ethical encounter in any social situation is marked by vulnerability, it is even more so in a sexual situation. Similarly, if it is incumbent upon us in any social situation to respect and not attempt to flatten or annihilate the other’s difference, it is even more incumbent upon us in a sexual situation, where anarchic and idiosyncratic variation is laid even barer than usual. Sexually active persons, therefore, have especially strong duties to respect the shared *tzelem Elohim* in themselves and in their partners by respecting the agency and variation that flow from it. Any sexually active person must operate from a stance of respect for the humanity, agency, and well-being of any current or potential partner, as

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<sup>425</sup> J. Rosenfeld, 283.

well as for their own humanity, agency, and well-being. This includes, but is not limited to, seeking genuine and enthusiastic consent—the particulars of what “genuine and enthusiastic” look like should be discussed in advance, as they may vary from person to person—and not proceeding with an encounter in its absence, attending to one’s own and one’s partners’ physical and psychological well-being, and respecting one’s own and one’s partners’ capacity to act as competent agents.

2. *Acceptance of Risk.* Mishnaic purity discourse assumes impurity to be default and ultimately unavoidable. Therefore, any rabbinic subject who enters any social sphere, no matter how assiduous their personal purity practice, knowingly risks contracting some form of impurity. Similarly, sexual interaction is inherently risky. Persons who participate in sexual encounters place themselves in a position of physical and psychological vulnerability to their sexual partners. While these risks can be mitigated to a considerable degree, they can never be fully eliminated; indeed, part of what makes sexual interaction so appealing—and such an important site for moral and social development—is precisely the continuous presence of risk and vulnerability. In particular, the risk of sexually transmitted infections, while largely manageable or preventable, can never be eliminated. Some STIs are spread through skin-to-skin contact, and even the barrier methods that reliably prevent fluid-borne STIs are still subject to occasional mechanical failure or user error. Thus, to be ready for partnered sex is to accept that one is engaging in a risky activity, and to be prepared to accept and manage any risks that do come to fruition.

Communities have a corresponding responsibility to describe and contextualize sexual risks accurately. It does little good if educators or community leaders play up the risks of one set of activities while downplaying the risks of others. Nor is it helpful if they fail to acknowledge that sexual actors balance multiple types of risks of which STI transmission is only one, frame sex as an outlandishly risky activity outside of specific and narrow standards, or frame sexual choices in terms of stark dichotomies of danger and safety. Rather, community leaders must understand sexual risks as existing within a broader web of social and physical risks, and contextualize their messages accordingly.

3. *Self-Awareness*. The Mishnah's major exhortation to individual moral actors regarding purity is one of constant self-awareness and self-examination. If impurity is ubiquitous, one who strives towards purity must begin by endeavoring to know their status at all times. Along these lines, all sexually active persons have a responsibility, within reason, to know their status. This refers most concretely to STI status; anyone who plans to engage in an activity that could transmit STIs should know what they may risk transmitting to their partners.

I say that one has a responsibility within reason to know their status because such knowledge is often mediated by other factors. These factors may be primarily technical—for example, there is no reliable test for herpes in asymptomatic individuals. They may be social, political, or economic—many people do not have reliable access to testing, or they may fear domestic or economic losses or violence if a positive test result becomes known. The factors may even come down to prioritization—a genuinely monogamous

long-term couple has no real need to test and re-test themselves several years into their relationship.

Communities have a corresponding responsibility to make it convenient and acceptable for people to discover their status. STI testing should be free, easily accessible, confidential, and offered without shame. Sex education should emphasize regular testing, as well as pleasure, consent, and the importance of masturbation both as self-care and as a means of discovering the particularities of one's own sexual response. Medical providers have a professional responsibility in this area, as do sex educators, parents, and community leaders, including clergy, who often bear a moral authority that can be invaluable in lending legitimacy and weight to these duties.

There is also a broader responsibility for self-awareness, however: to be ready for partnered sex is, among other things, to have a certain basic knowledge of and comfort with one's own body, and to have the beginnings of a reasonable idea of what one finds pleasurable, what one finds intolerable and what one is and is not comfortable doing in a given moment. One is thereby better able to advocate for what they want in a sexual encounter. While one will likely discover the bulk of what one likes and dislikes sexually through experience with partnered sex, one can and should learn the basics of one's own sexual response through masturbation prior to engaging in partnered sex. Acquiring this basic knowledge is especially important for anyone who has been socialized as female, as this socialization often includes tacit or explicit cultural messages that women should not assert their sexual needs and that female sexual pleasure is unimportant or does not exist. Knowing that one is capable of experiencing sexual pleasure and knowing how to cause it is thus especially powerful.

4. *Communication.* Awareness of potential social contagion is not terribly useful if it is not shared with those at risk. All sexually active persons therefore have a prima facie responsibility to disclose their STI status to current and potential partners. This is important for two reasons. First and most directly, it allows one's partners to make informed decisions about which risks they are willing to shoulder in a given encounter. Since some STIs, like HIV, are fatal if left untreated and access to effective treatment remains inconsistent for some communities, this can truly be a life-or-death matter. Even in less dire circumstances, making one's partners aware of known risks and allowing them to make informed decisions is a part of full consent and follows from the responsibility of respect for persons.

Second and more broadly, disclosing one's status to potential partners is a valuable tool for dispelling stigma and misinformation about STIs. Recall that perhaps the most powerful feature of Mishnaic purity discourse is the text's constant and matter-of-fact consideration of impurity: something that can be broadly and calmly discussed is something that can be acted upon. The more people make a practice of discussing their status and specifically of disclosing it to potential partners, the less irrational panic will occur, and the less incentive others will have to conceal their status in the first place.

This responsibility is a prima facie responsibility rather than an absolute one. There may well be situations in which disclosing one's status could put one's life, well-being, or livelihood in immediate danger. This being the case, it is all the more incumbent upon those who are able to disclose without such fear to do so. More disclosure should help decrease the extent to which knowledge of another's status can be used as a weapon, and so make it safer for more and more people to disclose.

Along these same lines, communities have the corresponding responsibility to work towards a world in which disclosure is a safe norm. Medical professionals, community leaders, educators, and parents should all speak matter-of-factly about STIs and work to dispel associated shame. Sex educators in particular should offer scripts and other discussion strategies for disclosing STI status to potential partners. Medical professionals should encourage partner notification and be empowered to reveal the risk of infection and offer treatment to partners of STI patients.<sup>426</sup> Medical professionals also have the responsibility to continue honing their communication skills, doing their best to ensure that accurate information about STIs and their consequences, prevention, and treatment are communicated to the public in a manner that is clear and understandable.

5. *Mitigation of Risk.* Recall that the Mishnah, even though it treats impurity as commonplace, nevertheless scorns the *Ammei ha-aretz* for their perceived failure to take available precautions and utilize mitigation strategies. Similarly, while sexual interaction will never be risk-free, and STIs will never be entirely avoidable, there is nevertheless much we can and should do to mitigate those risks. Barrier methods, such as condoms and dental dams, are highly effective means of preventing the transmission of fluid-borne STIs and can reduce the transmission rates of STIs transmissible by skin-to-skin contact. There are also highly effective medical prophylactics for certain STIs, such as Pre-Exposure Prophylaxis (PrEP) for HIV if used consistently (although its effectiveness should not serve as an excuse for foregoing condoms). There also exists a remarkably

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<sup>426</sup> This prescription is not without its own risks: notifying partners of a patient's infection raises serious questions about privacy and, potentially, the safety of the patient: an abusive partner, for example, may use such notification as an excuse to escalate the abusive situation. I am inclined to think that the benefits of empowering medical professionals to notify and treat partners outweigh the risks at this point, but sensitivity and good judgment on the part of the provider are absolutely required.

effective vaccine against the strains of Human Papillomavirus (HPV) that cause most cervical cancers, as well as many oral, anal, and penile cancers. All youth, regardless of sex or gender, who do not have a medical contraindication should receive this vaccine.

All sexually active persons—and, in the case of vaccines, all persons who may ever become sexually active—have a responsibility to utilize the best combination of protective measures for their particular situation. This includes getting immunized against vaccine-preventable STIs such as Hepatitis B and cancer-causing strains of HPV, using barrier methods in any situation in which all parties are not reasonably sure of their STI status, and using PrEP for persons at high risk of contracting HIV. All sexually active persons also have the responsibility to quickly seek testing and treatment, where available, if they suspect they may have contracted an STI. In the absence of a medical contraindication, they also have the responsibility to carry out fully the courses of treatment prescribed by legitimate medical professionals; failing to follow through fully on treatment contributes to the growing problem of antibiotic and antiretroviral resistance, which makes many STIs that much more difficult to treat.

Again, communities have corresponding responsibilities. Barrier methods should be widely available, free or low-cost, and communities should actively work to encourage and destigmatize their use. Medical providers should actively encourage relevant vaccinations and, where appropriate, other forms of medical prophylaxis. Educators must actively work to dispel misinformation about these mitigation techniques.

I anticipate some objections to the responsibilities I have presented, and I respond here to two types of objection. First, these responsibilities may seem, to some, to be



unnecessarily complicated. One might ask why I recommend bothering with an intricate and potentially onerous schema of medical tests, treatments, barrier devices, and communication strategies when I could simply recommend the far simpler expedient of sexual restraint as a means of restricting the spread of STIs. Second, one might ask how I can call my framework feminist or liberatory when the responsibilities I articulate depend on working with, and to a significant extent trusting, institutionalized systems of medical expertise and authority.

In response to the first objection, I previously argued that human sexuality and sexual satisfaction is multifarious, so it is naive to recommend a uniform code of sexual behavior and expect enough people to follow it to significantly reduce STI transmission. Underlying that objection, however, is an important point: I have argued that a uniform and restrictive code of sexual behavior will be too difficult for many people to follow, but by recommending this regimen of regular testing, barriers, treatment, and disclosure, am I not simply substituting one onerous discipline for another?

To answer, I return to the concept of *livability* I introduced earlier (see chapter four, section 1:1). I defined livability as a condition in which one's needs and desires are balanced with the needs and desires of other individuals with whom one is in direct relationship and the needs and desires of one's broader community, such that no one is subject to overwhelming hardship. I noted that a livable situation need not be an easy situation, only that the hardships that one experiences in a livable situation must not overwhelm or consume one.

Indeed, depending on how we define "easy," a harder situation could also be a more livable one. Consider the significant effort the Mishnah expects its moral subjects to

expend in keeping track of, managing, and remedying one's impurity status. A mishnaic subject, as Balberg describes, must engage in rigorous daily practices of self-examination, both mental (the "examination of the day," in which one reviews where one has been and with what and whom one has interacted) and physical (the examination of one's body for impurity-producing abnormalities). Yet part of the expectation of this daily practice is that it will be a process of training the self to become more habitually attentive and careful, and that these habits will become relatively seamless parts of the daily routine. Further, if one wishes to participate regularly in rabbinic social and ritual life—activities, presumably, that are of deep import to the identities of rabbinic Jews—these processes become the best ways to deal with the inescapable reality of impurity in the rabbinic world. In theory, it would be possible to significantly reduce one's risk of impurity and, thus, the time and effort spent examining oneself, through a process of near total isolation. This would be, in one sense, "easier" as one would have to do far fewer of these onerous self-examinations. That "ease," however, would come at the cost of much of one's social and ritual connection. Thus, the "easier" approach turns out to significantly constrain how one conducts one's life; the "harder" route, by contrast, is actually more livable.

There is a clear parallel to sexual activity and risk here. It is certainly more complicated and, in an important sense, "harder" to take regular STI tests and use multiple forms of protection for every sexual encounter than it is to practice sexual abstinence. Such practices involve sorting and analyzing multiple types of information, time commitments, expenses, and medical relationships, and even then the STI risk mitigation is not absolute. However, if one is sexually and socially unfulfilled by

abstinence or strict monogamy, attempting to conduct one's sexual life according to those terms, while perhaps simpler, would be psychologically onerous enough to overtake one's consciousness—that is, much of one's life would be about maintaining a sexual practice that is a poor and unsatisfying fit and managing the disappointment and frustration that ensue. For that person, the “simpler” or “easier” route might turn out to be the far less livable one.

In response to the second objection I have anticipated—how can I call a framework liberatory that depends so much upon acquiescence to institutionalized expertise?—I must devote more detailed attention. To begin with, I note that while the responsibilities I have detailed here may start from the perspective of individual sexually active agents, they also all have significant communal and even institutional components. Indeed, I have framed them in such a way that their optimal practice depends on functional, accessible, well-intentioned, and institutionalized social supports and systems of expertise. I do this because, like impurity, sex and sexual health are fundamentally social and collective issues. Further, as with impurity, the mechanics of sexual health, both medical and social, are complex enough that effectively addressing them requires the sort of specialized expertise that cannot flourish absent the supports of institutionalized resources and systems. Unfortunately, these systems have not and do not always function well, and their abuses of power form the all-too-real basis of this second objection. In what follows, I attempt to address some of the ways these systems, especially as they relate to sexual health, have failed and how they might begin to do better.

## II. Problematics of Power: Navigating Medical and Ritual Expertise in a Broken World

As I have noted, the role of the medical establishment in defining personal and public health risks and controlling access to their treatment is a well-established source of concern and critique for feminist and queer scholars. Public health interventions save lives. However, they can also negatively target marginalized populations, something that becomes a particularly acute issue in the realm of sexual health. Public health discourse can serve the well-being of a community and attend to the concrete, physical interconnections between the health statuses of individuals, but if misused it can also sacrifice marginalized individuals or groups in the name of the common good and even go so far as to construct certain persons as "pathological." Furthermore, by exhorting people, especially marginalized people, to cede a portion of their bodily agency to communal norms and to the medical establishment, this discourse also raises troubling questions about power dynamics.

The rabbinic purity model, as I have said, reflects this danger. Balberg, Halberstam, and especially Fonrobert (see chapter three, section 5) have all shown the ways in which the complicated systems of menstrual classification in rabbinic literature were constructed to require the intervention of a sage in determining a woman's purity status. Indeed, the Tannaim also abstract ritual-legal categories from their physical, phenomenal realities, so central for the Biblical discussion of purity, allowing the Rabbis to take a greater and greater diagnostic role with regard to purity, and thus to have increasing authority over the regulation of citizens' bodily processes.

There remain, however, good reasons for retaining a protected status for expertise, in the medical realm as in the textual one. Expertise, either textual or medical/scientific, cannot be fully democratized; the body of necessary knowledge and skills needed to practice this sort of work well and responsibly almost always requires a specialized career devoted to it. Furthermore, communities routinely evince both need and desire for expertise. If they lose trust in reliable sources of expertise, they are liable to turn instead to charismatic quacks and charlatans—figures to whom groups who are already marginalized and ill-served by mainstream systems of expertise are especially vulnerable.

The task, then, is to try to work out ways in which a respect for systems of expertise can avoid, as much as possible, either denying or accepting the evils of hegemonic power. In this final and admittedly more speculative section, I turn my attention to that task. In what follows, I take steps toward establishing a Jewish ethics of medical expertise that is responsive to power disparities, using sexual health ethics as a case study. I argue that tannaitic purity discourse offers a model for thinking about ethical issues surrounding STI transmission, and can also be helpful for thinking about power, authority, and expertise within that context. The particular social character of purity discourse can provide a model for disseminating public health norms in a community without shaming members of that community; at the same time, the role of Rabbis as experts can help us unpack questions about the nature of expertise and its relationship to authority.

I examine two components of this problem: the subject of expert knowledge and discourse, and the authority and limits of expertise. I argue that while expertise itself

cannot be democratized, discourse on a subject of expertise that affects both experts and nonexperts can be, and that this democratization can function as a check against the abuse of expert authority. I further argue for a strong yet bounded understanding of expertise, one in which expertise comes with significant authority, but in limited areas.

### *1. The Case of Sexual Health: The Contagion of Silence*

Sexuality is a significant enough component of people's lives that it bears studying for its own sake. However, several characteristics of sexuality as a social and biomedical phenomenon make it something that is good for religious and biomedical ethics to think with more broadly. In particular, sexual health is a fruitful case study for the larger question of navigating medical expertise, power, and authority. The diversity of sexual desires and experiences and the diversity of cultural customs regarding sex, as well as its potential public health consequences, mean that questions of sexual health throw potential conflicts between individual and communal interests into sharp relief.

Further, because societies tend to map sexuality onto their internal power structures, expectations about sexual behavior and the ways in which value is assigned to the sexualities and sexual health outcomes of different social groups can be an illuminating way to understand the intricacies of those power dynamics. Marginalized groups are often coded as sexually deviant, and their sexual health outcomes are framed as obvious moral consequences of their deviance, even to the point that negative outcomes are primarily associated with or even personified by those groups: HIV/AIDS as the "gay plague", for example, or the personification of syphilis as a female

prostitute.<sup>427</sup> Such framings inevitably affect the character and distribution of health services, in both active and passive ways. Attitudes about the moral character of marginalized groups' behavior color the types of services members of such groups are given—or even, as the U.S.'s history of forcibly sterilizing women of color demonstrates, coerced into.<sup>428</sup> These disparities foment an entirely understandable distrust of medical institutions, which further worsens health outcomes and, conveniently, serves to reconfirm negative stereotypes about these groups' collective moral character.

Silence and shame abet both the spread of STIs and the perpetuation of these unjust authority structures in self-reinforcing ways. When STIs are not part of common discourse, it is easy to ignore their risk factors, transmission, and treatment, especially given that many types of STI can remain asymptomatic. Silence also allows misconceptions about STIs to spread unchallenged, facilitating both their transmission and their stigma. This stigma suppresses conversation; talking about the possibility of contracting or transmitting STIs, or about prevention or treatment, becomes a tacit admission of being the sort of stigma-worthy person who would have to worry about

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<sup>427</sup> See Mary Spongberg, *The Feminization of Venereal Disease: The Body of the Prostitute in Nineteenth-Century Medical Discourse* (New York: New York University Press, 1998); Levine, *Prostitution, Race, and Politics: Policing Venereal Disease in the British Empire*; and Brandt, among others. Syphilis, as I discuss in chapter 1, was also routinely associated with the ethnic and national identity of the “other”—the “French disease” for the medieval Genoans, the “Neapolitan malady” for the French, and so on. For an exploration of syphilis as a Jewish disease, see Gilman, *The Jew's Body*. Interestingly, in the 19th and early 20th centuries, there existed a dual picture in which syphilis was figured as a Jewish disease while at the same time, Jews were often painted as being immune to syphilis. This supposed immunity was often linked to the practice of circumcision, but not always—there was also speculation about the Jew being constitutionally immune to syphilis as well. See Gilman, as well as Hart, *The Healthy Jew*, and Presner, *Muscular Judaism*.

<sup>428</sup> On the forcible sterilization of women of color see, for example, Alexandra Minna Stern, “Sterilized In the Name of Public Health: Race, Immigration, and Reproductive Control in Modern California” *American Journal of Public Health* 95:7 (July 2005): 1128-1138.

The Tuskegee Syphilis experiment is perhaps the most infamous case in which the mapping of sexual vices onto marginalized bodies led directly to medical abuse. The classic treatment of this debacle is James H. Jones' *Bad Blood: The Tuskegee Syphilis Experiment*. Also see Dorothy Roberts' classic *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (New York: Random House, 1997-1999) and Harriet A. Washington's *Medical Apartheid: The Dark History of Medical Experimentation on Black Americans from Colonial Times to the Present* (New York: Doubleday, 2006).

STIs in the first place. This, in turn, gives the healthcare system default power of moral opprobrium, making it the final source of shame or approval.

## *2. A Prescription for Discourse*

If a lack of discourse on sexual health abets the abuse of expert authority, then repair requires conversation. Not just any discourse, however, will do. I am not the first person, nor will I be the last, to note that our common discourse is simultaneously long on sexualization and short on substantive discussion of sex. Yet a discourse about sexuality that does not critically consider sexuality as a lived experience or think intelligently about what actual sexual experiences may mean is a powerful ally of the negative sexual stereotypes that shut marginalized people out of fair, respectful, and effective sexual healthcare and thereby perpetuate negative outcomes (by which I mean harmful and/or unwanted results of sexual encounters). A reparative discourse of sexual health must address the specific ways in which unjust power structures reproduce themselves: personifying negative outcomes as members of marginalized groups, framing those outcomes as moral consequences of deviant behavior, and making them shameful and alien.

Some features within purity discourse that I have discussed earlier are also helpful for re-imagining the role of expert authority. The focal point of purity discourse in tannaitic literature is the moral and social actor as a legal subject. In maintaining a complex and difficult practice of near-constant attention to purity, the rabbinic subject disciplines and forms himself. Thus, the rabbinic construction of the self, even the virtuous self, as a social being presumes the ever-present risk and eventual contraction of



impurity. Because of its ubiquity, impurity becomes mundane—nothing to panic about, and no reason in and of itself to stigmatize its contractor. On the other hand, because it is consequential for the community’s spiritual and social well-being, and because a significant part of the formation of the virtuous subject is centered on its management, impurity is also nothing about which to become complacent. In short, impurity is a predictably transmissible consequence of certain forms of social interaction and thus an inextricable part of the social existence of the mishnaic subject.

Several things about this construction are noteworthy. First, to reiterate, in the Mishnah, “the contraction of impurity is construed as default.”<sup>429</sup> It is impossible to think about impurity as something that happens only to “those people,” or as something that occurs only in disastrous circumstances or as a result of notably aberrant behavior. Therefore, the contraction of impurity is not a “shameable” event. Rather, it is an “ongoing reality,”<sup>430</sup> a part of daily life that simply must be dealt with. Straightforward activities invite impurity by default: Mishnah Tohorot 7:1, for example, declares that if a potter leaves his wares briefly to get a drink—something he presumably does more than once a day—those pots most accessible to public touch have been rendered impure. As Balberg points out, this ruling assumes “first, that whatever is left unattended will be touched by someone; and second, that someone is likely to be impure.”<sup>431</sup> The potter is not advised not to leave his wares or to work only in hermetically sealed spaces, nor is he shamed for allowing his wares to become impure. The event is simply something that happens as a result of living and working in public. Because the situation an expert adjudicator is asked to diagnose is not shameful, the expert is not as powerful as he might

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<sup>429</sup> Balberg, 35.

<sup>430</sup> Balberg, 19.

<sup>431</sup> Balberg, 38.

otherwise be. The quotidian and inevitable nature of the impurity limits the expert's power, because he is pronouncing neither shame nor deviance.

Second, the Mishnah's discussion of impurity, like its discussion of everything else, is very specific. Here, however, this specificity takes on moral significance. Rather than simply talking about impurity in general terms or allowing the implicit suggestion of impurity to sit behind seemingly unrelated conversations, it extensively discusses minute details of the contraction, diagnosis, transmission, and mitigation of impurity in practical terms. Recall that M. Zavim 1 distinguishes between *impurity status*, *type of impurity*, and *degree of impurity* through discussion of the number, volume, and timing of non-seminal genital emissions necessary to declare one a "true zav" who is required to undergo the full purification ritual described in Leviticus 15:1-15. Talking in general or vague terms about "a discharge from one's member" provides insufficient information on which to act. Indeed, it transpires from the discussion in M. Zavim 1 that one whose discharges are scant is ritually impure, but not to the degree of a "true zav." All impurity is not created equal, nor does it trigger equal social or ritual consequences. The details matter, so they must be extensively discussed. This makes it much more difficult to shame, shun, or ignore one who experiences such impurity. It also requires the bearer of that impurity to become conversant in its details, and it requires the expert adjudicator of those details to pay close attention to the bearer's self-accounting.

Third, the Mishnah focuses as much or more on routes and methods of transmission as it does on particular sources of impurity. While the management of impurity becomes a primary method of self-formation, impurity itself is de-personalized. Zavim, for example, begins with a discussion of the conditions under which one enters

and exits the temporary state of *zivah*, but much of the rest of the tractate is occupied with how inanimate parts of the social and physical environment act as conduits for impurity. Throughout, the discussion seems to take for granted that a *zav* will continue to go about his daily life and social interactions, so the focus shifts to the management of objects that are presumed to have come in contact with sources of impurity, rather than to the management of the *zav* himself. It becomes difficult, even impossible, to personify impurity as any one individual or class of individual, because the *zav* himself is, in important ways, secondary.

Finally, the Mishnah, in contrast to Biblical systems of purity, “turns impurity from a condition restricted to those who function as sources of impurity or those in their immediate vicinity to a concern pertaining to anyone and everyone at any given time.”<sup>432</sup> Because impurity is an ongoing reality, an inextricable feature of social intercourse, it becomes “the daily and ongoing concern of *everyone*, even persons who are not currently impure or known to have had contact with a source of impurity.”<sup>433</sup> To cite Zavim once more, since it is assumed that the *zav* will continue to conduct his day-to-day affairs, it is relevant to persons who might find themselves, say, riding on a boat with a *zav*, to know the conditions under which *zivah* is transmitted, both how they might themselves contract second-degree impurity, and how they might then communicate that impurity to other objects. It is not feasible to shun someone who happens to be a *zav* at a given moment, so the onus is on everyone to learn how to manage *zivah*.

Rabbinic purity discourse thus models an account of STIs that takes them and their public health implications seriously *without* resorting to fearmongering or shaming.

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<sup>432</sup> Balberg, 15.

<sup>433</sup> Balberg, 28.

Impurity's constant presence in tannaitic discourse means that it is normalized but never allowed to fade from the collective consciousness. Along these lines, keeping discourse about sexual health status a constant presence in social interaction can normalize STI risk without trivializing it, in turn creating a communal climate that encourages subjects to cultivate the appropriate attention to their sexual health. Such subjects, in turn, are better equipped to engage in productive dialogue with expert providers.

Indeed, one important lesson of purity discourse is that recognition of expertise is not synonymous with passivity. Rather, the Rabbis of the Mishnah expect that virtuous subjects will consult with experts (the Rabbis themselves) *and* will become educated about the conditions of ritual impurity, pay close and regular attention to their status, and undertake the necessary purification rituals themselves.

### *3. Prescriptions for the Prescribers*

However, even as the Tannaitic Rabbis normalize impurity as a day-to-day issue whose management involves a process of self-discipline, self-knowledge, and self-formation, they do so in a way that maintains a central, indispensable role for rabbinic (male) authority. This exercise of authority becomes inescapably gendered, both because the ideal rabbinic subject is already male and because the realm of impurity, especially impurity linked to women's bodies, provides particularly fertile ground for the exercise of rabbinic authority. These problems of power, expertise, and authority also apply to contemporary questions of sex and public health. The role of the medical establishment in defining personal and public health risks and controlling access to their treatment is a

well-established source of concern and critique for feminist, womanist, and queer thinkers.<sup>434</sup>

While attention to the character of expertise in purity discourse does not yield the same sort of straightforward corrective as does attention to the character of the discourse itself, it *can* yield insights into the ways expert authority works for good and for ill in public health contexts. The potential for abuse of authority is greatest when experts do not recognize the limits of their expertise. These limits are both disciplinary and social: in addition to recognizing boundaries of disciplinary knowledge, experts must also recognize the limits of their understanding of their subjects' social, emotional, and sensory contexts, and cede particular authority in those areas appropriately.

Even as the Rabbis of the Mishnah create a purity discourse that has the potential to limit the abuse of expert authority, they make use of other categories that are conducive to such abuse. Gender, predictably, is an especially problematic category here, and Charlotte Fonrobert has documented well the way in which the Rabbis, in tractate Niddah, create an exclusive pseudo-science of the female body that gives them epistemic and (at least intended) practical control over the details of women's sexual, reproductive, and ritual lives.<sup>435</sup> Even in non gender-specific purity contexts, women are framed as less morally and intellectually capable of the kind of attention and self-control the practice of rabbinic purity demands. Similar assumptions are made about the *Ammei ha-aretz* and

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<sup>434</sup> See, for example, Barbara Ehrenreich and Deirdre English, *Complaints and Disorders: The Sexual Politics of Sickness*, Preface to 2nd. ed. Susan Faludi, 2011 (New York: The Feminist Press at the City University of New York, 1973); as well as the essays in *Feminism and Bioethics: Beyond Reproduction*, Susan M. Wolf, ed. (Oxford, UK: Oxford University Press, 1996). For a specifically womanist perspective, see, for example, Emile M. Townes, *Breaking the Fine Rain of Death: African American Health Issues and a Womanist Ethic of Care* (Eugene, OR: Wipf and Stock, 1998).

<sup>435</sup> Charlotte Fonrobert, *Menstrual Purity: Rabbinic and Christian Reconstructions of Biblical Gender* (Redwood City, CA: Stanford University Press, 2000)

about gentiles, demonstrating that categories of class and ethnicity are also problematic.<sup>436</sup>

One way to read these problematic categories without jettisoning the entire discourse is to think about them in terms of the overextension of authority beyond legitimate expertise. The Rabbis may wish to paint themselves as experts on as many topics as possible, but they are not experts on everything. Not least, they are not experts on the characters, capacities, and inner lives of those who are not themselves Rabbis. Furthermore, rabbinic texts themselves sometimes admit rabbinic limits.<sup>437</sup> There may thus be seeds of a corrective within rabbinic literature itself. Consider the story of Rav and the herders from B. Sanhedrin 5a-b. The text, using the example of inspecting firstborn livestock for their fitness to be dedicated to the Temple, reflects on the character of authority and its limits:

What is authority (*rashut*)?

When Rabah bar Hana went down to Babylonia, Rabbi Hiyya said to Rabbi, “My brother’s son is going down to Babylonia. May he adjudicate matters of ritual law?” “He may.” “May he adjudicate matters of financial law?” “He may.” “May he inspect firstborn animals [for blemishes that would render them unfit for sacrifice and thus permitted for profane slaughter]?” “He may.”

When Rav went down to Babylonia, Rabbi Hiyya said to Rabbi, “My sister’s son is going down to Babylonia. May he adjudicate matters of ritual law?” “He may.” “May he adjudicate matters of financial law?” “He may.” “May he inspect firstborn animals?” “He may not.”

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<sup>436</sup> See Balberg, chs. 5 and 6.

<sup>437</sup> See, for instance, the narrative in Mishnah *Bekhorot* 4:4 in which Rabbi Tarfon errantly declares a wombless cow *terefah* [unfit for consumption] because he is ignorant of the Alexandrian custom of spaying all exported female livestock. He is corrected after the fact by Todos, a physician.

After an excursus on the family relationships between Rabbi Hiyya and the other figures in the story, the Gemara returns to the question of Rav's authority. Why may Rav not inspect firstborn animals, when Rabah bar Hanah may?

“May he inspect firstborn animals—he may not.”

What is the reason for this? Might we say that he was not learned enough? But we have just said he was very learned indeed!

Perhaps he was not an expert (*b'kiah*) in judging blemishes. But Rav himself said, “for eighteen months I trained alongside a herder in order to learn to distinguish between a permanent blemish [which permits profane slaughter] and a temporary blemish [which does not].

The Gemara explores and rejects the obvious explanation as to why Rav was denied authority in this matter—that his expertise was insufficient. On the contrary, it transpires that Rav is supremely expert on precisely this matter.

Rather, it was withheld from him to honor Rabah bar Hana.

Or, if you prefer, I might say that precisely because Rav was *more* expert in judging blemishes, he might permit (permanent) blemishes of which others did not know, who might in turn permit (forbidden) temporary blemishes, saying “Rav permitted suchlike!”

Per the Gemara, there are thus two possible reasons why Rav may not inspect firstborns: first, because Rabah bar Hanah has already received this permission, and so his pre-existing authority commands respect. Second, and for our purposes more intriguing, is the concern that, rather than being insufficiently expert, Rav is in fact *too* expert for his authority to be practically useful.

Tzvi Novick has argued that this second reason for Rav's disqualification casts rabbinic expertise as a “fundamentally social phenomenon.” Per Novick, “Experts in a given area form a collective unit whose members study and learn from each other's behavior...By achieving a level of expertise unintelligible to other Rabbis working in the

area of animal blemishes, Rav excludes himself from the circle of the authorized.”<sup>438</sup> The text’s understanding of expertise as socially constituted thus means that it identifies a distinction between expertise (*b’kiah*) and authority (*rashut*)—that is, it distinguishes between legitimately *knowing* something and being permitted to affect the behavior of others based upon that knowledge. In other words, it explicitly separates the categories of expertise and authority.

In separating these categories, the text also implicitly clarifies that the aspect of the situation in which Rav is expert is not the only aspect that is relevant to the overall situation. We see, in the *stam*’s reasoning about why Rav is not authorized to judge blemishes in a particular social context, a weighing of various priorities. Even though Rav may indeed be the most expert judge of blemishes, his master judges that potential negative consequences of granting authority to his particular expertise in Babylonia outweigh the benefits of introducing his more refined expertise there.<sup>439</sup>

How can one apply this story to contemporary sexual health ethics? Clearly, the story of Rav and the herders does not dilute the overall authority of the rabbinic elite; rather it offers ways of shifting authority around *within* that elite circle. However, I suspect that the method it uses to accomplish this internal shifting—the explicit

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<sup>438</sup> Tzvi Novick, “A Lot of Learning is a Dangerous Thing: On the Structure of Rabbinic Expertise in the *Bavli*” *Hebrew Union College Annual* 78. Hebrew Union College - Jewish Institute of Religion: 91–107. <http://www.jstor.org/stable/23508944>. This coheres, as Novick notes (*ibid*), with Steve Fuller’s claim that the recognition of an individual’s expertise depends on the existence of expert peers to confirm or challenge their credentials; see Steve Fuller, “The Constitutively Social Character of Expertise” in Selinger and Crease, eds., *The Philosophy of Expertise* (New York: Columbia University Press, 2007). It also coheres more generally with Anthony Giddens’ and Steven Shapin’s concepts of “expert systems” or “systems of expertise”, in which our trust in a particular expert is grounded in a broader trust in the system of expertise within and according to which the individual operates. See Anthony Giddens, *The Consequences of Modernity* (Stanford, CA: Stanford University Press, 1990); Steven Shapin, *A Social History of Truth: Civility and Science in Seventeenth-Century England* (Chicago: University of Chicago Press, 1994).

<sup>439</sup> Notably, one of these potential consequences is the dilution of the authority for the broader system of expertise in Babylonia!



separation of expertise and authority—may, if carefully applied, also provide ways to think about the distribution of authority between medical experts and patients.

One further inference a contemporary thinker might make from this separation of expertise and authority is that expertise in one relevant area does not necessarily confer expertise in other relevant areas. In the realm of medical ethics, Benjamin Freedman discusses the *halakhic* categories of *tza'ar*, or pain, and *sakana*, or danger, in the context of evaluating risk and duty in medical ethics. Freedman argues that while “expert estimations of *sakana* are more reliable than [one’s] own estimation,” one’s own “perception of *tza'ar*, of the impact that illness has upon my life (through direct physical pain or more broadly) supersedes the judgment of others, including my physician or other experts.”<sup>440</sup> Freedman’s discussion of *tza'ar* and *sakana* revolves primarily around the question of the individual patient’s duties as a reasonable caretaker to their own body. These categories can also apply to public health questions—both those concerning potential conflicts between an individual and a community and those concerning potential conflicts between two or more communities.

One can understand Freedman’s treatment of these categories in terms of the insights from the Rav story. A physician’s expertise does not automatically grant her the authority to pass final judgment on all matters to which that expertise is relevant. Further, multiple expertises are relevant to a given situation, and a physician’s expertise in matters of *sakana* does not render her expert in matters of *tza'ar* (at least, not for anyone other than herself). I would further modify this schema to recognize multiple forms of *sakana*, in only some of which does the authority of the provider’s expertise trump that of the

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<sup>440</sup> Benjamin Freedman, *Duty and Healing: Foundations of a Jewish Bioethic* (New York and London: Routledge, 1999), 320.

patient. For other forms of *sakana*, the patient's lived experience may give them greater expertise. Furthermore, in many cases, prioritizing these potentially contradictory forms of *sakana* ultimately becomes a matter of *tza'ar*—a matter in which Freedman rightly privileges the patient's perception.

Questions of sexual health tend to raise potential conflicts between *tza'ar*, broadly defined, and *sakana*, but they also elucidate why it is important to recognize multiple forms or sources of *sakana*. What appears to an outsider to be thoughtlessly risky behavior may, at least in part, be the result of a careful weighing of priorities: one may decide that avoiding the psychological or social pain of denying themselves sexual fulfillment is worth the added health risk that their behavior incurs. Further, when the actor is part of a marginalized community, that actor may correctly recognize control—especially medicalized control—of their sexual behavior as a potential mechanism of oppression. That is, the actor, in addition to avoiding the *tza'ar* of sexual restriction in and of itself, may also decide that the *sakana* of sexual restriction as a political lever outweighs the *sakana* of sexually transmitted infection. Or it may be that instead of being thoughtlessly risky, the actor is operating out of ignorance, because pursuing accurate information about sexual health and the resources to engage in safer sex practices opens one up to the *sakana* of that same political control, as well as to the *tza'ar* of shaming and condescension.

I have argued here that expertise and expert authority are important yet problematic categories that are worth repairing. I have argued that sexual health is a useful site for identifying the needed repairs because it is a site on which many of the assumptions that abet the abuse of expert authority are mapped especially boldly. I have

then identified two areas for repair. First, I have argued that mishnaic purity discourse provides a model for thinking and talking about sexual health that can neutralize several potential avenues for the abuse of expert authority. Second, I have argued that the separation of expertise and authority, and the recognition that different actors may be expert in different aspects of a situation, found in the story of Rav and the herders, may yield the basis for some self-limiting principles. I have applied these, along with Benjamin Freedman's understanding of the role of risk in biomedical decision making, to sexual health ethics, where I have argued that the authority of medical experts is strong in their actual areas of expertise—the diagnosis, transmission, and treatment of sexually transmitted infections, the prevention of unwanted pregnancies, and so on— but that they are required to recognize the potential expertise of their patients with regard to other aspects of their sexual and social lives.

While deeply flawed, expert medical authority, especially in the realm of sex and sexuality, is critically important for maintaining both individual and communal health. For this reason, it must do better. In asking it to do so, I am not, *pace* Audre Lorde, engaging in a futile project of attempting to dismantle the master's house with the master's tools.<sup>441</sup> The tools of good science and good medicine never properly belonged to the master to begin with; instead, the master hoarded tools that should have been shared by all and turned them, many times, to nefarious purposes even as he also did great good with them. It is my hope that I have begun to offer some strategies that may prevent such hoarding in the future.

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<sup>441</sup> A reference to Audre Lorde's 1984 essay "The Master's Tools Will Never Dismantle the Master's House," reprinted in *Sister Outsider: Essays and Speeches* (Berkeley, CA: Crossing Press, 2007), 110-114.

### III. Summary and Remaining Questions

In this dissertation, I have argued that sex, rather than being a *sui generis* phenomenon, is a species of social intercourse and that, therefore, it is possible to find useful models for doing sexual ethics in non-sexual social contexts. I have argued that these new models are necessary, particularly for Jewish sexual ethics, as extant accounts of Jewish sexual ethics largely fail to account for the complexity and variety of human sexual experience. I have focused the dissertation on questions at the intersection of sexual ethics and public health, with the idea of risk management as my conceptual pivot, and I have used sexually transmitted infections (STIs) as my case study. In this realm, I have argued that Mishnaic ritual purity discourse provides a model for a better and more nuanced understanding of contagion that is the ultimately unavoidable consequence of certain forms of social intercourse—a category into which STIs also fall—than anything currently available.

In chapter one, I offered a brief social history of STIs, taking particular note of the fact that throughout their modern history, STIs have been treated as diseases of the “other” and that they have usually been treated as a single entity in public discourse, with one particular infection (historically, syphilis, and more recently HIV/AIDS) standing in for all possible STIs. I used epidemiological, sociological, and psychological data to sketch out pictures of STI rates and general sexual behavior as they stand contemporarily. I also used sociological and ethnographic data to sketch out a speculative picture of these

issues within Jewish communities, and began to critique current Jewish responses across the ideological spectrum.

In chapter two, I gave a brief summary of Jewish discourse on sex in classical text and history. I argued that while the treatment of sex in the Hebrew Bible is largely concerned with maintaining social boundaries, rabbinic literature begins to focus on sexual situations as opportunities for moral development. It is also in rabbinic literature that we see a dualistic picture of sex begin to take shape. Sex, including sex for pleasure, is understood as simultaneously life-giving and dangerous.

I then examined modern and contemporary treatments of Jewish sexual ethics. I arranged these according to a typology of “expansive” versus “cautious” voices. Cautious voices prefer marriage as the most appropriate or only appropriate context for sex, regarding marriage as the best way to tame or contain an otherwise dangerous or, at best, self-centered impulse. They talk about sex using two main languages: that of purpose and that of risk. Purpose language insists that sex must exist in a committed union in order to attain meaning and goodness. Risk language focuses on the potential dangers of uncontrolled sexual urges and sexual encounters, and insists that a committed union is the only way to contain these dangers. Expansive voices, meanwhile, focus either on transforming Jewish traditions about gender and sexuality or on reclaiming the sexually affirming stream of rabbinic tradition. They are likely to identify as feminists or feminist allies and believe that sexuality can achieve meaning, holiness, and goodness in a variety of contexts and expressions.

In chapter three, I argued that the rabbinic texts that address explicitly sexual subject matter may not in fact be the most useful sources for thinking about contemporary

questions of sexual ethics. This is because sex for the Rabbis is a thing that functions differently and has different meanings than does sex for us contemporarily. Further, these texts ultimately tend not to be about sex for its own sake so much as they use sexual situations as case studies through which to examine an entirely different matter. I argued that instead of looking to superficial subject matter, scholars who wish to use rabbinic texts for constructive practical ethics might consider the ways in which the topic of a given text functions in the rabbinic world and look for contemporary analogues to those functions.

Using this functionalist approach, I argued that the Mishnah's portrait of ritual impurity bears several important similarities to STIs and offers a productive and humane model for managing them, and I undertook a close reading of Mishnah Zavim—which deals with impurity that is a consequence of abnormal genital discharge—to illustrate this. Like STIs, ritual impurity in the Mishnah is a form of socially transmitted contagion that is the manageable but ultimately unavoidable consequence of certain types of common social interaction. Zavim, broadly speaking, treats *zivah* impurity in two ways: general rules and case studies. The general rules are nearly obsessive about detail, treating the bodily, temporal, physiological, and social factors that contribute to a clear “differential diagnosis” of the type and status of one's impurity, and establish that even within the relatively narrow category of impurity from genital discharge, there are multiple different types of impurity that have different levels of severity and virulence and require different courses of treatment. The case studies reinforce these distinctions as well as the ubiquity of impurity in the rabbinic world. They also demonstrate the ways in

which the Rabbis expect one to respond to the ever-present risk of impurity, a response that is characterized by a complex and ongoing process of self-examination.

In chapter four, I applied my analysis of social contagion as we see it in Mishnah Zavim to the contemporary case of social contagion as we see it with STIs. I reiterated and expanded upon my foundational claim that sex is not a *sui generis* phenomenon but rather a species of social intercourse, and I used this claim to complicate our understanding of risk and benefit in sexual interactions. I enumerated the parallels between Zavim's account of ritual impurity and the empirical realities of STIs: both are commonplace, manageable but ultimately unavoidable, and have many different types with correspondingly different severities, virulences, and appropriate courses of treatment. I argued that the model found in Zavim points us toward a more nuanced and humane account of risk balancing and mitigation in contexts of socially transmitted contagion, and I introduced the concept of *livability*, which I defined as a state in which no one risk or risk management practice became so onerous as to utterly overwhelm one's life, as central to this picture of risk balancing.

In the final chapter of this project, I put forth a list of five responsibilities incumbent on all sexually active persons and on the communities they live in. The first responsibility is a "respect for persons" that draws on both the Kantian tradition and the Jewish concept of each person's having been created *b'Tzelem Elohim*, in the image of God. This requires any sexually active person, in any encounter, to honor the *tzelem Elohim* in themselves and their partner by respecting the dignity, well-being, and agency that flow from it. The second responsibility is a thoughtful and nuanced acceptance of risk. Sexually active persons and their communities must understand that sex is an

inherently risky activity, as is any kind of social interaction. The third responsibility is one of self-awareness. Sexually active persons have a responsibility to be aware of their STI status, as well as being more broadly aware of the particulars of their own body and the basic ins and outs of their own preferences and sexual response. Communities have a corresponding responsibilities to make STI testing and high quality sex education broadly available and accessible, and to not shame or ostracize people based on their STI status. The fourth responsibility is one of communication. Sexually active persons have a *prima facie* responsibility to disclose their STI status to current and potential partners, and to respond without shame or threat to their partners' disclosures to them. Communities have a corresponding responsibility to work towards a world in which disclosure is a safe norm, and in which STI status and mitigation is part of day-to-day conversation. Finally, all sexually active persons and their communities have a responsibility of risk mitigation. Individuals have a responsibility to use barrier methods and medical prophylaxis where appropriate, to be immunized against any vaccine preventable STIs, and to quickly and appropriately treat any infections that do occur. Communities have a corresponding responsibility to make these mitigation methods accessible and readily available.

These responsibilities have the potential disadvantage of relying heavily upon systems of expert authority, systems which, at many points, have worked against the liberatory goals to which I have said I am committed. I have argued, therefore, that these responsibilities must go hand-in-hand with a model of expert authority that is attentive to its potential for its abuse, and that there are features of rabbinic discourse that may provide some of the necessary boundaries.



Where to go forward from here? One obvious next step is a practical one. I have suggested several concrete steps towards mitigating STI rates and towards changing the general culture around sex and risk. To implement these steps is, on my estimation, much more a problem of political and communal will than it is of technical know-how. Another next step is conceptual. I have made the claim that sex is a species of social intercourse; I think it follows from this not only that sex is relatively underexamined as a species of social intercourse, but also that the study of sex can teach us a great deal about social ethics more generally. If Balberg's analysis is correct, purity and impurity functioned as paradigmatic sites for the cultivation of social and ritual virtue in the rabbinic world. I have argued here that in the contemporary world, sex functions similarly as a site for the cultivation of social virtue, as well as religious and ritual virtue. This claim in and of itself does not necessarily contradict even conservative moral thought on sexuality. Where my claim does differ is in the breadth of sexual expression I admit as a potential site of such discipline. Sex within a committed, monogamous relationship may indeed serve as a school for the virtues of patience, loyalty, tolerance, and clear, long-term communication. Sex outside of such a relationship may *also* serve as a school for the virtues of direct, immediate communication, openness to diverse bodies, preferences, and experiences, and kindness in the face of new encounter and unexpected vulnerability.

I have made this general argument—that a broad spectrum of sexual expression can be a school for the development of a range of social virtues—throughout this dissertation. I conclude by noting that the conceptual next step of this line of work would be to develop that argument into greater detail. What are the particular ways in which the study of sex is helpful in understanding other areas of social ethics? Do particular sexual

practices have the ability to teach specific virtues that other practices do not? What are the ways in which these practices cultivate virtue, and are there other specific social contexts in which the virtues cultivated by a particular sexual practice are especially useful? By studying in greater detail the moral relationships between our sexual lives and the other parts of our social lives, we can help create the world of open discourse about sex and risk that is modeled by the Mishnaic conversation on ritual impurity, and we can also come to a better understanding of ourselves as social and moral beings.



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