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SEPARATING THE ADULT FROM ADULTERY

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## SEPARATING THE ADULT FROM ADULTERY

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**L**o Tinaf—You shall not commit adultery.”<sup>1</sup> These two simple Hebrew words comprise the only sexual transgression to be mentioned in the Ten Commandments themselves.<sup>2</sup> Of all the many sexual prohibitions recorded in the written Torah, adultery alone came to occupy this place of enormous prominence. It is hardly surprising that this is so, for in the Jewish mind set adultery, unlike other sexual violations, represents the shattering of a precious covenant of commitment and devotion. Not by accident does the seventh commandment appear directly opposite the second commandment on the tablets of the Decalogue: just as idolatry signifies a destructive spurning of the covenant with God, so adultery signifies the rupturing of the most fundamental covenant in human life. In fact, as the *Mechilta* saw it, there is an integral connection between the two: “someone who betrays his spouse will eventually betray God himself.”<sup>3</sup> Given this kind of observation, there can be little wonder that Judaism came to hold adultery as a desecration of great magnitude.

Viewed through the perspective of history, the conspicuous location of the interdiction against adultery within the Ten Commandments ensured that adultery would occupy a most significant place in the moral teachings of both Jewish and Western civilization. Indeed, the adultery prohibition, the guard at the gates of marital fidelity, came to be seen as critical to the very functioning of society itself. For it was, after all, obedience to this most basic of laws that provided the family—the fundamental unit seen to be mandated by God—with ensured boundaries within which it was possible for a secure environment to flourish.

Moral thinking, however, is never static, and although the passing centuries saw the prohibition against adultery continue to be

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etched in stone, the fate that awaited the adulterer underwent a profound transition. In the biblical period, an individual acknowledged as guilty of adultery faced either threat of death or some of the severest punishments available in life.<sup>4</sup> Three millennia later, it has become possible for a modern Jew, while remaining within the Jewish community, to commit adultery and still pursue a successful career, further intimate relationships, and maintain positions of leadership. Attitudes to adultery have plainly changed to such an extent for most Jews that it is inconceivable that any responsible formulation of Jewish public policy could advocate a return to speaking of adultery as a capital crime. The issue, then, with which contemporary Judaism must grapple, is the manner in which Jewish public policy on adultery ought to be formulated in a society that regrets but does little to discourage adultery and in which Jewish law can no longer mandate the imposition of its will. If the historical understanding of the resounding implications of adultery, engraved at the heart of the Ten Commandments, continues to hold true within our current ethos, how might a progressive *halakhah* respond appropriately to adultery using the available tools of the Jewish legal system?

### THE CONTEMPORARY PARAMETERS OF ADULTERY

A coherent reply to these questions requires some analysis of the extent and nature of present-day adultery. Today, an adulterous relationship is generally—though not always Jewishly<sup>5</sup>—defined as a voluntary sexual relationship between two parties, at least one of whom is married to someone else.<sup>6</sup> A sexual encounter of this kind constitutes adultery if it happens just once in a lifetime or if it takes the form of a continuing interaction.

Reliable statistics on adultery indicate that although the popular mythology of the rampant nature of such behavior is vastly exaggerated, adultery is by no means a rare occurrence. It is, in fact, cogent to assume from the available data that around one marriage in five will be subject to adultery at some point in its duration.<sup>7</sup> This is certainly a statistic large enough to foster societal implications that cannot be ignored. There is, moreover, no reason to suspect that the figures are any different for the vast majority of the Jewish community that is thoroughly integrated into modern society.<sup>8</sup>

Although the numbers might be relatively straightforward, the picture of adultery is made complex by the reality that not all forms of adultery are alike: we can discern at least five qualitatively different types of adultery. First is what might be called "technical" adultery. In an act of technical adultery, the parties involved may not even think of their behavior as being adulterous. An example that occurs frequently is that of the couple that has been separated for some time in anticipation of a divorce where one spouse decides to have a sexual relationship with someone other than his or her married partner. Whereas the parties concerned might well consider the marriage to be effectively "over," insofar as the marriage has not been ended by a legal divorce, any sexual relationship must technically be defined as an act of adultery. From a Jewish perspective, of course, technical adultery represents a critical halakhic issue, because if no *get* has been exchanged, any new marriage that might be contracted inevitably results in what is halakhically regarded as an adulterous union. The Reform movement's late nineteenth-century decision to rely on civil divorce to effect Jewish divorce without need of a *get* has created innumerable cases of such technical adultery from the point of view

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of traditional *halakhah*.<sup>9</sup> Another instance of technical adultery that used to be encountered regularly within Jewish law would arise when a *get* received by a woman from her first husband and assumed to be valid, turned out—through some imperfection—to be invalid. Although the parties' adultery was produced by an unfortunate technicality, not infrequently a mistake on the part of the *beit din*—the halakhic consequences were just as serious as if the adultery had been fully intentional.

Second is what might be described as "circumstantial" adultery. Circumstantial adultery takes place under extraordinary conditions, most often in cases of the serious physical or mental impairment of a spouse. In such situations the married partner committing the adultery will usually be very conscious of it, but the other partner will often be incapable of such awareness. A spouse in a long-term coma, for instance, is no longer sexually available, may live for many years, and, for a variety of reasons, divorce may be undesirable. If the spouse of the comatose patient finds a committed partner with whom a sexual relationship is shared, adultery will be the result, though it is an adultery that arguably might warrant a moral response different from that given to other categories.

Third is what might be referred to as "unknowing" adultery. Unknowing adultery can result from a deliberate intent to mislead, such as when a single individual has sex with a person that claims to be single but is, in fact, married. Whereas the married individual's adultery is clear, the single person has been deceitfully induced into an act of unwitting adultery. The law, however, also considers cases of unknowing adultery that are entirely accidental. This situation might arise when an individual (X) has sexual

relations—presumably in the dark—with somebody (*Y*) that *X* believes to be his/her spouse. In actuality, *Y* turns out to be somebody other than the spouse.<sup>10</sup> Although it is possible that *Y* might have planned the deception deliberately, it is also feasible—albeit remotely—that *Y* simply ended up in the wrong place, also believing him/herself to be together with his/her spouse.

Fourth is “consenting” adultery. When consenting adultery is committed—in contrast to unknowing adultery—the married partners involved are fully aware of the adultery, since they actually agree to it. Partner-swapping, or the practice of so-called “open marriage,” illustrates this form of adultery, in which the spouse of the adulterer has fully acquiesced.

Fifth is what might be termed “classic” adultery. This is the form of adultery most widely embarked upon and also the one most usually thought of when the term “adultery” is mentioned. Classic adultery may or may not be kept secret from the adulterer’s marital partner, but it is the kind of adultery that—if the partner were to be aware of it—would be seen on some level as a betrayal of the marital bond.<sup>11</sup> Classic adultery can, of course, also include sex for money, so that prostitution, where one of the parties is married, is classic adultery.

The deep concern of Jewish tradition with all manner of adultery meant that the traditional halakhic approach never differentiated between varying kinds of adultery and did not, therefore, address the possibility that diverse consequences might be appropriate to the divergent forms of adultery: adultery was adultery. Whereas classic adultery consequently represented the primary preoccupation of the proscriptions against adultery, other varieties of

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adultery received much the same treatment. The provisions of the Torah itself make it clear that it was classic adultery that Judaism most particularly abhorred.<sup>12</sup> While, then, the other types of adultery await contemporary Jewish evaluation to determine whether they ought to be addressed differently, this exploration will focus on potential modern Jewish legal proposals to deal with the foremost problem of classic adultery.

### CLASSIC ADULTERY FROM A TRADITIONAL PERSPECTIVE

It is impossible, of course, to formulate an appropriate contemporary halakhic response to classic adultery without first appreciating and evaluating the thrust of the halakhic tradition on the subject. The Jewish legal tradition on the matter, rooted as it is in the practices, attitudes, and commandments of biblical Israel, provides an early, sharp differentiation between the Israelite approach to adultery and that of surrounding Near Eastern societies such as the Babylonian, Assyrian, and Hittite. In these other ancient communities adultery was perceived primarily as a wrong done to the husband by a wife, who was his property. The husband, consequently, had full rights to determine the fate of his adulterous wife and to wreak vengeance upon the adulterer. Thus, though judicial process was involved, the injured husband whose "property rights" had been trampled could determine—and personally implement—the fate of the guilty; his options ranged from extending forgiveness to demanding death, with a number of horrible punishments in between.<sup>13</sup>

Some of the thinking that set the stage for these adultery laws of the neighboring peoples was also evident in Israelite society. Thus, in ancient Israel—as in the surrounding cultures—the wife at

times was treated as property, although—as we shall see— unlike elsewhere, the husband’s property rights were demonstrably less than absolute.<sup>14</sup> One clear outcome of this “property mind set,” however, was the acceptance of male polygamy, a practice that remained “on the books” until the *herem* of Rabbeinu Gershom in the eleventh century.<sup>15</sup> Beyond the “property” designation, a wife in ancient Israel also came to be seen as an “extension” of her husband<sup>16</sup> insofar as it was her responsibility to “build up” and continue his name by bearing his children.<sup>17</sup> As a result, clarity on the matter of paternity was of considerable societal importance, since it assured husbands that their names and status<sup>18</sup> would be transmitted to offspring that were indeed theirs.

These two factors—polygamy, combined with the desire to obviate any possible doubts over paternity—led in Israelite society, as it did elsewhere, to a set of adultery restrictions considerably different for men than for women. According to the tradition, a married woman was forbidden to have sexual relations with anybody except her husband.<sup>19</sup> A married man, on the other hand, was forbidden to have sexual relations with any married or engaged woman, but since the Torah permitted both multiple wives and concubines, sex with a single woman—though frowned upon—was not considered adultery.<sup>20</sup> Hence, a single woman could never be an adulteress, a single or married man was an adulterer only if he had sexual relations with a married woman, and a married woman was an adulteress if she had sex with either a single or a married man. “In other words, the wife owed faithfulness to her own marriage; the husband owed faithfulness to another man’s marriage.”<sup>21</sup>

The pivotal issue that decisively differentiated Israelite adultery laws from the surrounding societies, however, arose from



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the fact that in Israel the crime of adultery was seen to be committed not just against one's spouse, but—most significantly—against God. The Torah directly alludes to this in the case of Joseph, who—while fending off the attempted adulterous advances of Potiphar's wife—declares, "He [Potiphar] has withheld nothing from me except yourself, since you are his wife. How then could I do this most wicked thing and sin before God?"<sup>22</sup> Evidence of the same theme is found in Avimelech's avoidance of an adulterous relationship with Sarah. God says to Avimelech in a dream: "I kept you from sinning against me."<sup>23</sup> Inasmuch, then, as God was seen to be party to a marriage,<sup>24</sup> a betrayal of the marital bond represented not only a painful breach of promise to one's spouse, but to God as well. No longer a crime against a fellow human being alone, adultery became a repudiation of God as well.

The implication of this reality for the Israelite legal code was dramatic. Like the laws of other societies of the time, the Torah advocated that the adulterer and the adulteress be put to death.<sup>25</sup> Unlike those laws, however—which placed the ultimate decision as to the nature of the punishment in the hands of the injured husband, who could opt for forgiveness—Israelite law mandated communal rather than private action. This was because a husband was seen to have no prerogative to forgive or to judge as to the appropriate punitive measures for a crime that—besides victimizing him—was also viewed as a moral transgression against God. Whether the husband called for action or not, the adultery nevertheless demanded redress, and the courts had to act in accordance with their procedures.<sup>26</sup> The Book of Proverbs expresses this demand for a societally imposed penalty with poetic clarity: "Can a man rake embers into his bosom without burning his clothes? Can a man walk on live coals without scorching his feet? It is the same with one who

sleeps with his fellow's wife; none who touches her will go unpunished."<sup>27</sup> Thus, in biblical Israel, mandatory punishment for adultery served to weaken the "property rights" claim the husband had over his wife by denying him an autonomous decision over what would be her fate or that of her lover. Rather, it affirmed the place of adultery as a violation of God's will, a transgression of a divine ethic that human beings had no right to forgive.

The fact that the transgression against God demanded accountability did not, however, imply that the stated punishment remained immutable. Whereas the legal language of the tradition expressed an unrelenting demand for the death of both the adulterer and the adulteress that broached no exceptions, in practice this ultimate penalty was almost always ameliorated. In all likelihood it was rare in biblical times for the death penalty actually to be carried out for the crime of adultery,<sup>28</sup> and the Bible itself records no specific cases. Some biblical references clearly suggest that although capital punishment was demanded for the adulterer, the punishment for the adulteress—already in those days—was divorce.<sup>29</sup>

In the rabbinic period the status of adultery as a transgression against God cemented an unyielding attitude to the crime as a sin of fundamental seriousness. Not only did the two versions of the Ten Commandments explicitly prohibit it for Jews, but the rabbis declared its proscription to be one of the seven fundamental Noahide laws, applicable to all humanity.<sup>30</sup> The rabbis affirmed the universality of the principle with their statement that any man "clings to his wife, but not to his neighbor's wife."<sup>31</sup> They regarded adultery as so heinous that they included it in one of the three kinds of odious acts for which—if given the choice between committing them or being killed—one should prefer death rather than engaging

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in them.<sup>32</sup> Indeed, the Talmud alludes to adultery as "*Ha-Aveirah*," conveying the sense of it being "The Sin" par excellence,<sup>33</sup> and the rabbis warned that "all who descend into *Gehenna* subsequently reascend, excepting three who do not reascend: He who commits adultery with a married woman, publicly shames his neighbor, or fastens an evil epithet upon his neighbor."<sup>34</sup> Plainly, the aggadic responses of the rabbis reveal that they viewed adultery as a matter of the utmost gravity.

Their halakhic enactments, moreover, were in keeping with this outlook, even though they took steps to circumvent the harshest potential sanction of capital punishment. The rabbis created regulatory fences around the death penalty concerning *eidut*, *hatra'ah*, and other matters that—in the case of adultery—made it virtually unthinkable that capital punishment could ever have been implemented.<sup>35</sup> As one scholar wrote, it is evident from their actions that "capital punishment for adultery was meant by the rabbis to be and remain a theoretical teaching, but was not favored as a practical penal guide for the courts."<sup>36</sup>

Despite this, the rabbis were not about to let adultery go unpunished. Their approach was to enhance the biblical "defilement" provisions,<sup>37</sup> according to which a married woman that had sexual relations with a man other than her husband was considered defiled and, hence, prohibited to her husband. The rabbis supplemented this prohibition with their interpretation that the Torah's dual use of the word "defiled" was meant to demand a permanent separation not only from the paramour, but from the husband as well:

Mishnah: Just as she is prohibited to the husband [*asurah le-ba'alah*], so is she prohibited to the paramour [*asurah le-vo'alah*]; as it is said: "Defiled...and is defiled" [Num. 5:14, 29]. This is the statement of Rabbi Akiva. Rabbi Josiah said: "Thus did Zechariah ben Ha-Katzav use to expound: Rabbi said: 'The word "defiled" occurs twice in the scriptural portion, one referring [to her being prohibited] to her husband and the other to the paramour."<sup>38</sup>

As a consequence, in a case of proven adultery, the adulteress was to be divorced from her husband, forbidden to her paramour, and probably would have faced a bleak future, with little prospect of finding a new partner. Moreover, whereas capital punishment had been possible only on the testimony of two unimpeachable witnesses, defilement separation of the parties could be called for on the basis of a single witness, even if that witness was the self-incriminating adulteress or the aggrieved husband. Two witnesses, however, remained the standard if the *beit din* were to demand a divorce.<sup>39</sup>

The "forced separation" penalty enshrined within the traditional *halakhah* implied a blatant inequality between men and women that remains a systemic feature to this day. Since the adulterer was not subject to the same defilement as the adulteress, he was not required to divorce his wife, although his adultery was certainly grounds upon which his wife could expect successfully to petition the *beit din* to impel her husband toward giving her a *get*. In a way this inequality could be seen as having been protective of the aggrieved wife in centuries past: if divorce had been enforced, she would not only have suffered the adultery of her husband, but would also then have been required to relinquish her marriage, with significant attendant economic and social implications, as well.

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Under a law based on equality, she would thereby have suffered doubly, whereas—under the actual law—though a man whose wife committed adultery had to endure her loss, in all probability he still possessed sufficient status and resources to rebuild his life. Hence, the aggrieved wife—unlike an aggrieved husband—could opt to continue her marriage, or she could petition the court to rule that her husband provide her with a *get*. Nevertheless, the corollary of this unequal application was that a husband guilty of adultery, as a result of the way the law developed, might suffer no more than stern societal disapproval. There is good reason to believe that the law was more concerned with deterrence than with punishment,<sup>40</sup> and, consequently, in the case of adultery, only one party needed to be deterred for the act to be prevented. Still, the lack of a punishment for the guilty husband inevitably must be seen as diluting the standing of the crime as a moral sin against family and God.

The other serious consequence of adultery that remains a feature of traditional *halakhah* and has significant impact on both adulterer and adulteress is that any offspring of an adulterous union was considered a *mamzer*.<sup>41</sup> The rabbis discerned that the child of a relationship forbidden by the Torah and punishable by *karet* or death is restricted from marrying anybody except another *mamzer* and that this blemish was passed on till the tenth generation, which was understood to imply “for all time.”<sup>42</sup> Maimonides provides a lucid account of his understanding of the reason behind this law:

In order to deter people from illicit unions, a bastard is forbidden to marry a daughter of Israel; so that the adulterous man and adulterous woman should know that by committing their act they attach to their descendants a stigma that can never be effaced. The children born of adultery being, moreover, always despised

to every way of life and in every nation, the seed of Israel is regarded as too noble to mix with bastards.<sup>43</sup>

According to Maimonides, then, deterrence from illicit unions, particularly adultery, is the primary aim of the indelible status of *mamzerut*. This communal stigmatization of the child of adultery—along with its progeny—must surely have acted as a powerful impediment to adultery in much the same way as the death penalty previously had.

The thirteenth-century *Sefer HaChinukh* further develops Maimonides' secondary concern about the "seed of Israel" being mixed with that of bastards:

At the root of the precept lies the reason that the engendering of a bastard is very evil, occurring in uncleanness, abominable thought, and sinful counsel. And there is no doubt that the nature of the father is hidden (latent) in the son....<sup>44</sup>

In other words, the taint of the sin—in this case, adultery—committed by the parents is somehow transferred to the child and, as a result, the child must be kept away from general Jewish society to protect the community from the spread of evil. Although the stated intent here is the need to quarantine immorality, the core purpose of the idea remains the same: to place the illicit union so far beyond the pale of decency that it becomes impossible even to contemplate.

*Mamzerut*, combined with the enforced separation of the adulteress from her husband and paramour, has remained, for two millennia, the very serious consequence of adultery within traditional *halakhah*. In the State of Israel, where the traditional *halakhah* has legal authority for Jews over matters of status, the

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*mamzerut* sanction remains potent. In all communities governed by the traditional *halakhah*, these sanctions retain the potential to be applied and continue, therefore, to serve as a deterrent. Indeed, through the centuries, the clear traditional halakhic condemnation of adultery has never wavered. *Sefer HaChinukh* provides a vivid articulation of the attitude toward adultery that persevered through the generations. From concerns over paternity, the author moves to an explanation of why adultery is tantamount to the breaking of many of the Ten Commandments:

And so did He wish that about a human child it should always be known whose it is, and they should not become intermingled with one another.

Quite a few other harmful results will also be found to follow from adultery: for it will be the cause of transgression of several obligations which God imposed on us. Thus, He commanded us about honoring parents, and they will not be recognized by the children where there was adultery. There will be a further disaster about what we were equally commanded, not to be conjugally intimate with a sister and with many other women [relatives]: All will be uprooted, overturned, on account of adultery, for people will not recognize their female relatives. And this apart from the fact that there is in adultery with a married woman an aspect of theft, which is something that, clearly, the intelligence should spurn. Moreover, it is a cause of the loss of human life: for it is a known fact about human nature that people grow jealous over the adulterous relations of their wives with others, and they settle accounts with the adulterer even to the death. And there are so many other misfortunes in addition to these.<sup>45</sup>

The conclusion could hardly be clearer: the tradition saw adultery as a tragedy of epic proportions that deserved stern condemnation and serious sanctions in an attempt both to minimize its occurrence

and to punish its participants for their sins against fellow human beings and against God.

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With this unequivocal traditional position as an inheritance, it would seem reasonable to expect that, of all the modern branches of Judaism, Reform Judaism would have had a particular interest in expressing itself on the subject of adultery. Post-Enlightenment Orthodox Judaism, of course, saw no need to deviate from the traditional halakhic approach to the issue.<sup>46</sup> But Reform Judaism—particularly in America—declaratively shed any sense of full adherence to the halakhic past and, instead, elevated the ethical as the critical concern of a revitalized Judaism: The Pittsburgh Platform clearly stated that “today we accept as binding only the moral laws”; and the Columbus Platform emphasized that “in Judaism religion and morality blend into an indissoluble unity....” The road to Godliness and holiness in Reform Judaism was paved with ethics.

In addition to ethics, American Reform Jews have given great prominence to the Ten Commandments as the chief cornerstone of Jewish adherence. It was no less a figure than Isaac Mayer Wise, who—echoing an idea promoted in the pioneering days of American Reform—attested that the Ten Commandments were literally revealed and transmitted by God to Moses on Sinai; all the rest of the Torah represented human expansion.<sup>47</sup> It is small wonder that, ever since Wise, many Reform Jews have followed in his footsteps, venerating the Ten Commandments as the divinely ordained foundation of the Jewish contribution to the world.<sup>48</sup>



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It is curious, then, that through more than a century of concentration on the ethical in Judaism and of upholding the Decalogue as the singularly most inspired contribution of Jewish history, so little Reform attention has focused on the significance and the application of the Seventh Commandment. It is all the more mystifying when we recall that at one of the earliest conferences of Reform rabbis, in Philadelphia in 1869, an unwavering rejection of adultery was explicitly stated within the context of decisions that otherwise brought about profound revisions to the laws of marriage. Indeed, the rabbis suggested that, in the wedding ceremony itself, a direct reference ought to be made to the importance of marital fidelity:

For the traditional benedictions, *Birkat Erusin*, there shall be substituted such a benediction as sets forth the full moral grandeur of marriage, emphasizes the Biblical idea of the union of husband and wife into one personality... and designates purity in wedlock as a divine command.<sup>49</sup>

Given the strength of this initial Reform outlook and the continued ethical orientation of the movement, the almost complete silence on the subject of adultery through the following decades is truly striking.

Part of the explanation for this near-total muteness may lie in another nineteenth-century action of the developing Reform movement: the "abolition" of *mamzerut*. The early Reformers saw *Mamzerut*'s affixing of an undeserved, restricting, tainted status on the children of forbidden relationships as deeply at odds with the fundamental ethical outlook of Judaism. They felt strongly that "whilst the intention behind the concept of *mamzerut* was to combat immorality, its effect was to create another immoral situation."<sup>50</sup>

Reform Judaism consequently determined to do away with this "immorality" by ceasing to recognize that any individual could be designated as a *mamzer*. The obvious outcome of this dispensation was that the "immorality" of *mamzerut* was effectively defeated, but a potent combatant against the "immorality" of adultery was also removed from the operational field. Hence, while the uninterrupted Orthodox monitoring of *mamzerut* continued to contribute to the active discussion of adultery in the world of traditional halakhic adjudication, such issues were effectively removed from the Reform Jewish realm.

Still, insofar as the progressive Jewish world never deemed adultery to be anything less than a very serious matter, one could well have expected that even if Reform rabbis were not being buffeted by specific problematic cases, they might well have raised a call for gender equality in this area. After all, the rabbis assembled in Philadelphia in 1869 acted swiftly to equalize various parts of the marriage service, and later Reform rabbis took further path-breaking steps toward gender even-handedness. Given the clear inequities involved in the traditional approach to adultery,<sup>51</sup> one might reasonably have anticipated explicit reform of these traditional imbalances. In fact, one could contend for two reasons that the adultery laws were particularly conspicuous candidates for such treatment: first, a balanced approach to the punishment of adultery for both men and women would serve to strengthen the claim of Judaism that serious sanctions had to be applied to all adulterers in the light of their sin against God. Second, the Talmud itself had established a precedent for acting to bring about a uniform approach to adultery for men and women. The rabbinic explanation for why the biblical test of the "bitter waters" for the suspected adulteress<sup>52</sup> was brought to a halt was seen to be motivated by this very aim:

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*Mishnah:* When adulterers multiplied, the ceremony of the bitter water was discontinued and it was R. Yochanan ben Zakkai who discontinued it....

*Gemara:* When adulterers multiplied: Our rabbis taught: "And the husband shall be free from iniquity" (Num. 5:31). At a time when the husband is free from iniquity, the water proves his wife; but when the man is not free from iniquity, the water does not prove his wife.... Come and hear: "I will not punish your daughters when they commit whoredom, nor your brides when they commit adultery" (Hos. 4:14). And should you say that his sin with a married woman [prevents the water from proving his wife] but not if it is with an unmarried woman, come and hear: "For they themselves go aside with whores and with harlots" (Hos. 4:14)...R. Eleazar said: "The prophet said to Israel: If you are scrupulous with yourselves, the water will prove your wives; otherwise the water will not prove your wives."<sup>53</sup>

The rabbis plainly admonish men that they cannot expect their wives to be subject to legal scrutiny when they themselves are guilty of adulterous behavior. The sages even insert a clear protest against those men that use the cloak of polygamy to whore with unmarried women while these very same husbands demand that their wives be rigorously checked for any hint of adultery. The pretext for doing away with the test of "bitter waters" is the idea that it is improper to make women undergo a difficult scrutiny for adultery under conditions where men are similarly guilty of adultery and licentiousness. This talmudic ruling could well have formed a solid foundation for a modern extension of the same principle: that it is unfitting to apply onerous penalties to women for adultery in circumstances in which men are similarly guilty but are either not halakhically acknowledged as adulterers or are not punished in the same way. A declaration that sexual relationships between married men and single women are to be Jewishly regarded as adultery and that married men should be subject to the same penalties for

adultery as married women could well have been grounded in this sure textual foundation.

Beyond these two reasons one could even have fashioned a credible halakhic case that a sexual relationship between a married man and a single woman ought to be considered adultery. After all, an individual who so much as engages in an "appurtenance" of one of the three transgressions that demanded that a Jew forfeit his life rather than commit them, was considered to have transgressed.<sup>54</sup> One could surely have built a respectable case that—at least from the time the ban on polygamy came into effect—a sexual relationship between a married man and a single woman represented a condemnable appurtenance of adultery. But no such case was forthcoming. With one Israeli exception,<sup>55</sup> even the compelling demand of equality failed to terminate the silence surrounding adultery. As a result, virtually all progressive Jews remain without explicit guarantees of the equal application of precepts of adultery for men and for women.

Even if the challenge of equality were overlooked and *mamzerut* were absent as a spur, the vast twentieth-century changes in the ethics of marriage and sexuality should have supplied ample material to evoke multiple questions on adultery within Reform Judaism. The fact that, through more than one hundred years, the sum total of progressive *pesikah* on adultery amounts to only two *teshuvot*, is remarkable. The first of these *sh'eilot*, not posed until 1986, is itself instructive as regards the development of the thinking of Reform Jews about adultery since 1869:

One of the partners in a marriage has engaged in an adulterous relationship, and the marriage has terminated in acrimonious

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divorce. Subsequently, the adulterous party has asked the rabbi to officiate at the marriage to "the other person." Should the rabbi comply with the request?<sup>56</sup>

The inquiry implies that the "acrimonious divorce" was a result of the adulterous relationship and this is thus a clear case of classic adultery. But it implies even more. It also conveys the sense that a legitimate conundrum exists, and that, indeed, there might be compelling reasons why the rabbi ought to comply with the request. No branch of Judaism had, up until this point, gone on record as relinquishing the traditional halakhic prohibition of marriage to the paramour. As a result, the question itself demonstrates that the attitude of later twentieth-century progressive Jews toward adultery had so relaxed that the "adulterous party" saw no need to "test the waters" by first asking if such a relationship—entered into civilly—would *b'diavad* be acceptable. The questioner evinces no hesitation in directly requesting a rabbinic blessing of this relationship begun in adultery. In any prior period of Jewish history, the notion of parading one's adultery before a rabbi and asking such a question not only would have been the cause of profound embarrassment, but also would have been unthinkable. In 1986, contemporary attitudes combined with the reality that the couple could easily step outside the community and marry under non-Jewish auspices required the rabbis to furnish an answer.

There can be little doubt that, in the context of this particular *teshuvah*, the "adulterous party" would have been well satisfied with the answer provided. For, after a review of the traditional prohibitions against formalizing a relationship with the paramour, Rabbi Walter Jacob ruled as follows:

Despite these strictures the reality of the situation, which usually led the adulterous parties to live together and possibly to marry, brought rabbinic recognition of this status. Tradition gives its grudging consent by stating that if, nevertheless, the adulterous parties marry, they are not compelled to divorce (*Shulhan Arukh Even Haezer* 11.2ff. and commentaries, 159.3; *Otzar Haposqim Even Haezer* 11.1, 44).

A rabbi may, in this instance, find herself in a difficult position as she is duty bound to strengthen family life and defend the sanctity of marriage. If she, however, refuses to marry this couple, they may simply opt to live together, as is frequent in our time; that will not help their situation or the general attitude towards family life. Therefore, the rabbi should officiate at such a marriage, while at the same time discussing her own hesitation in keeping the tradition. She may insist on some special counseling before the ceremony. She should insist that it be a simple ceremony and one which places special emphasis on the seriousness and sanctity of marriage.<sup>57</sup>

Although it is true, as Rabbi Jacob observes, that traditionally the parties were "not compelled to divorce," this was only in cases where two unimpeachable witnesses were unavailable. If, however, witnesses could be produced to attest to a reasonable certainty of adultery, the *beit din* would move to compel the divorce.<sup>58</sup> Nor, of course, should the rabbis' reticence to demand a divorce, when the probability of adultery was high but such witnesses were unavailable, be construed as anything more than what Rabbi Jacob appropriately terms "rabbinic recognition" that nothing could be done from a legal standpoint. It most assuredly did not indicate rabbinic approval of this relationship remaining intact, much less any notion that such a relationship could possibly be the beneficiary of Jewish sanction or blessing.

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Nevertheless, though such approval was never previously forthcoming in Jewish history, Rabbi Jacob grants it. To be sure, his assent is given without any suggestion that this relationship should be regarded as a *simchah*; Jacob's equivocal reaction to this union is clearly seen in his advice that the ceremony be "simple," with a "special emphasis on seriousness." Nevertheless, we should not overlook the revolutionary nature of this *teshuvah*: it represents the first time that any rabbinic authority states a Jewish legal position that explicitly acts to remove the paramour prohibition from the traditional adultery provisions. Not only does it circumvent this penalty, but, in its place, it provides a consent for rabbinic officiation at the marriage of the adulterer and the paramour. This consent, of course, could well be construed as rewarding the adulterous parties with the communally sanctioned togetherness and stamp of Judaism's official imprimatur that they so fervently desire.

Before turning to Rabbi Jacob's second *teshuvah*, it is worth noting that, outside the responsa genre, very few Jews with a liberal orientation have even written *en passant* on the subject of adultery. Among the several who have done so, one or two have addressed the other traditional relationship prohibition, not at issue in either Jacob *teshuvah*: the *Mishnah*'s ruling that the adulteress not only was forbidden from being together with the paramour (*asurah le-vo'alah*), but also was primarily forbidden from being together with her husband (*asurah le-ba'alah*) and ought to be divorced from him. Although in modernity the partners to a marriage in which adultery has occurred are frequently eager to divorce, the question arises as to whether—in the name of penalizing the adulterous party for a sin against God and family—progressive Judaism ought to continue the tradition of insisting on such a divorce if the couple is unwilling to part. Rabbi Eugene Borowitz, a leading progressive

Jewish thinker, is of the view that such a demand would be intolerable:

And shall we agree to the law that after adultery a husband may never take his wife back, ignoring every human consideration as to what brought the act about? Here the law speaks with implacable, impersonal rigor. In the name of community standards of sanctity it calls for depriving the people in the relationship of the right to a positive decision as to what might now best become of it. I do not see that it is a fatal mitigation of the seriousness of adultery to suggest that our modern understanding of persons requires us to introduce more compassion in dealing with a transgressor in this area than the Halacha did.<sup>59</sup>

Borowitz is not alone in holding such a view. Progressive halakhic decision makers within the Conservative rabbinate have advocated that not only should the couple be permitted to stay together, but the community should do everything in its power to encourage a process of *teshuvah* on the part of the guilty party, a reconciliation of the couple, and a continuation of the marriage, thereby following the example of the prophet Hosea rather than the rulings of the rabbis.<sup>60</sup> Indeed, there is every reason to believe that this position would be the one taken by the majority of progressive thinkers.

When these three highly significant revisions—the cancellation of *mamzerut*, Rabbi Jacob's decision to allow the Jewish marriage of the adulterer and the paramour, and the widespread desire to salvage marriages that have suffered adultery—are considered in conjunction, they lead to an extraordinary result: the effective elimination of all the major traditional sanctions against adultery, at least for Reform Jews. There can be no doubt that, without setting out purposefully to reach this outcome, the determination to respond



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with compassion and acceptance to the *mamzer* and to both the instigators and victims of adultery has ended up bringing about the annulment of all substantive penalties for adultery within Reform Judaism.

Seen in this light, it becomes rather important to evaluate whether Rabbi Jacob's response to the question asked of him represents the most cogent position available from the perspective of public policy. After all, when contemplating what might be considered feasible contemporary sanctions for adultery, progressive rabbis would be very hard pressed to rekindle any respect for the *mamzer* status within the progressive community. Indeed, there is general agreement among liberal halakhic thinkers that the situation of the *mamzer* is so ethically untenable that the traditional *halakhah* as well should have deactivated the status. Furthermore, in contemporary society the consequences of divorce are far less serious for couples—and particularly for the economic status of women—than they were in the past. As a result, mandatory separation would nowadays probably be regarded as less of a penalty to a marriage that has been subject to adultery than being asked to stay together in an attempt to save the damaged partnership. Thus, the restraint on adultery that the prospect of forced divorce once represented has lost any real effectiveness, not least because couples that want to try to make their marriages work are apt to be viewed as heroic rather than sinful. As regards the traditional sanctions for adultery, then, the question of granting permission for the Jewish marriage of the adulterer to the paramour remains the only historic penalty that potentially could still be employed gainfully within the contemporary progressive community.

Rabbi Jacob, in making a choice between what he regards as two undesirable options, favors allowing for rabbinic officiation at the marriage of the adulterous couple in preference to the specter of the couple living together. Indeed, Rabbi Jacob views the mere possibility that "they may simply opt to live together" as enough of a threat to the "general attitude towards family life" to make rabbinic officiation worthwhile. Rabbi Jacob does not explain, however, how rabbinic officiation at the marriage of a couple that has committed adultery might serve the interests of this "general attitude towards family life," beyond displaying a clear commitment to the institution of marriage. One could, of course, argue that in a climate in which marriage is still widely seen as a desideratum, requiring such a couple to live together, rather than consenting to their marriage, might be an eloquent articulation of society's disapproval of their prior desecration of family life. Is it not conceivable that—in support of family life—Jewish society could express its thorough disapproval of couples living together and could make this disapproval crystal clear by depicting living together as the only available choice of those who have engaged in undesirable behavior?

Moreover, even if Rabbi Jacob is correct, and it is in fact more desirable for such a couple to regularize their relationship through marriage, this does not at all necessitate a rabbi or Judaism being involved. Civil marriage is certainly a possibility that, having been extensively discussed in the traditional responsa over the last several centuries, is an accepted category within Jewish law.<sup>61</sup> Indeed, given the circumstances of a couple that has committed classic adultery, civil marriage might be said to possess the double attraction of providing a societally recognized formalization of their status while yet according the relationship no Jewish standing. If the

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community sees it to be undesirable to give an adulterous relationship the sense of having attained Jewish blessing—a sense that is most likely conveyed each time a rabbi acts as *m'sader(et) kiddushin* at a wedding—civil marriage may provide a solution to the problem.

Indeed, in the broader world of liberal *halakhah*, Israeli Progressive Judaism, American Conservative Judaism, and British Reform Judaism are all on record as continuing to oppose dignifying such relationships with *kiddushin*. Whether the couple lives together or enters into a civil marriage is, of course, beyond the control of these rabbinic authorities, but the possibility that the couple might make either choice has not propelled these groups to offer Jewish marriage as an alternative. The traditional paramour prohibition, apparently, is still seen to be worthwhile, though none of these groups provides explicit indication of why it is considered deserving of preservation. Since, however, they are unlikely to see the adulterous parties as being personally “tainted,” we might well assume that the paramour interdiction is maintained as a punitive disincentive to adultery, with much the same reasoning as that offered by Maimonides for the institution of *mamzerut*. The position of the British Reform Movement is particularly noteworthy because, although all three groups advocate that individual cases be handled on their merits by properly constituted *batei din*, the British rabbis explicitly draw a distinction between instances of technical adultery, after which they are prepared to conduct the marriage of the adulterer and paramour, and classic adultery, after which they are not.<sup>62</sup> Plainly, then, in cases of classic adultery, the ban on marrying the paramour does not represent some relic of the halakhic past, but remains a decisive element of the present.

Although the position of these three groups demonstrates that penalties for adultery are not unheard of within progressive halakhic structures, the question nevertheless remains whether they go far enough. For though the paramour prohibition might well be a significant factor when the adulterer and the paramour really want to be together, it is not unusual for the adulterous party to have no interest in marrying the paramour—particularly if the paramour is a prostitute—and for the prohibition, therefore, to be inoperative as a discouragement to adultery. In such circumstances none of the traditional sanctions against adultery could be said to have sufficient impact on a progressive Jew to act as a meaningful barrier to adultery.

But if the traditional sanctions carry little contemporary weight, are there modern penalties that might prove to be more potent tools? Post-Enlightenment progressive Jewish communities are characterized by voluntary affiliation and therefore are unaccustomed to applying sanctions that are of real moment. Nonetheless, at least three measures have been employed in different circumstances to send a strong message of disapproval of certain actions. Barring an individual from congregational membership is probably the strongest available penalty. On the basis of the notion that it is counterproductive to distance the sinner from *teshuvah* resources, however, this punishment would probably be seen as an inappropriate penalty for the adulterer, who is arguably more in need of the synagogue's guidance toward *teshuvah* than many others.

Two other possible sanctions exist, though, either of which could more suitably be applied in the case of the adulterer. The first proposes making the adulterous individual ineligible for synagogue

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honors. The second advocates excluding or removing the person from leadership positions in the congregation. Both these penalties have previously been recommended within Reform congregations for serious transgressions. In a 1962 responsum, for example, Rabbi Solomon Freehof, discussed, *inter alia*, the eighteenth-century case of a man that had “embezzled the money of the *Chazan* and [run] away with the *Chazan*’s wife.” Although the man had publicly confessed his guilt, he had made no attempt at restitution. Freehof concluded that such a “notoriously evil man” should not, within the modern Reform setting, “be allowed to shame the congregation by being called up to the Torah.”<sup>63</sup> An instance of the “leadership” penalty appears in a 1995 responsum that ruled that a Board Trustee that had been found, beyond doubt, to have cheated another member of the congregation and “owes him a significant sum of money,” should leave office, unless he is prepared “to do *teshuvah*, to admit his wrong and to make restitution to his accuser.”<sup>64</sup>

Could such penalties be used for cases of proven adultery? Rabbi Freehof’s responsum does not clarify whether his ban on *aliyot* relates more to the theft of the money or to the “theft” of the wife or both. But, turning to Rabbi Jacob’s second *teshuvah* related to the issue of adultery, it is plain that Rabbi Jacob views these kinds of penalties as absolutely appropriate. In 1989, a question arose about a woman in her forties who was participating in an adult *Bar/Bat Mitzvah* program. With the course of study nearing its end and the ceremony fast approaching, it emerged that the woman was involved in an adulterous relationship. “Is it possible,” the *sho’el* asked, “to have her participate in the *Bat Mitzvah* ceremony under these circumstances?”<sup>65</sup> Rabbi Jacob replied as follows:

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It is good that this woman has taken this course of study and hopefully it will bring her closer to Judaism not only in the formal ritual sense, but to a deeper understanding of the commandments. The ceremony itself bespeaks a willingness on the part of the children to accept and live by the commandments of Judaism. This, rather than the brief *haftorah* portion and the family festivities are the primary aim of *Bar/Bat Mitzvah*. It is to be taken very seriously.

For an adult that acceptance has occurred long ago and an adult *Bar/Bat Mitzvah* marks a completion of a course of study and a rededication to the mitzvot rather than a change to the pattern of life. This woman can hardly rededicate herself to *mitzvot* and also commit adultery. She should *not* participate in this ceremony.

We must also ask whether we should give an *aliyah* to a known public adulterer. There are some who would argue that being called to the *Torah* is a *mitzvah*, not an honor, and as a *mitzvah* one can not withhold it from anyone. Solomon B. Freehof has demonstrated that the tradition disagreed on this issue with some authorities arguing in each direction. He felt that we should not deprive an individual of the *mitzvah* of reading from the *Torah* unless the person was "notoriously evil" or the honor of the congregation was at stake. He made this decision as he considered this act as a *mitzvah*. In our modern congregations, especially the larger ones, the *aliyah* is an honor as it is impossible to involve the entire congregation in the *Torah* service even over a period of several years. Individuals are honored for communal leadership, or family and life cycle events through an *aliyah*. This honor should be restricted to those individuals who exemplify Jewish ideals and Jewish morality or at the minimum do not publicly reject a major commandment. I am sure that the woman in question will understand such a decision and finish the course in the spirit which led her to enroll in it. At some later time when the pattern of her life has changed, she should be called to the *Torah*. This will recognize her study and also her efforts to resolve her marital problems.<sup>66</sup>

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Rabbi Jacob is clearly of the view that, when the facts of adultery are not in dispute, it is proper that here, in fact, be some public consequences for adulterous acts. He regards the incongruity inherent in the instance of an adulterer who unrepentantly transgresses the *Torah* being called to recite blessings over the *Torah* as being beyond problematic. Transgressions of such dimensions, Rabbi Jacob conveys, call forth proportionate sanctions in return.

Indeed, though Rabbi Jacob does not address the issue, it is worth considering the implications of not employing such sanctions. For, insofar as Reform Judaism allows substantial public penalties like exclusion from *aliyot* or removal from office to be applied to pecuniary impropriety but not to adultery, the unavoidable message sent to the community must be that progressive halakhic thinking regards financial theft as far more serious than covenantal betrayal.<sup>67</sup> If, then, progressive Judaism continues to regard adultery with the gravity that—since 1869—it has never disavowed, the question becomes rather: How could such penalties *not* be used for cases of proven adultery? If these penalties are used in other circumstances—but not for adultery—the potential adulterer could easily conclude that, having dismantled all previous penalties without enacting any replacements, progressive Judaism is now less than resolute in its opposition to adultery. Conversely, by using some of the sanctions at its disposal to deal with classic adultery, progressive Judaism would convey the significant idea that adultery remains one of the weightiest transgressions a Jew can commit and that, consequently, it may not be dismissed lightly.

The prospect of sanctions, of course, immediately raises numerous questions related to due process and justice: Would witnesses be required to attest to the reality of the adultery? If so, how

many witnesses would be required? Who would determine whether a case of adultery was proved? Would this not create a "witch-hunt" atmosphere akin to that that sometimes existed in bygone generations? How could an equal application of such rulings be ensured?

Such questions could well be answered in the same spirit as that shown by the rabbis in their approach to capital punishment. Just as the extensive talmudic discussion of capital punishment for adultery was "meant by the rabbis to be and remain a theoretical teaching, but was not favored as a practical penal guide,"<sup>68</sup> so contemporary rabbinic authorities might be well served by proclaiming modern penalties, even without intending to use them as practical penal measures. Although they may, very occasionally, be forced, in the name of *kavod ha-tzibbur*, to take action in those cases of classic adultery that are flagrant and where the facts are undisputed by any of the parties involved, such cases are never the subject of controversy over questions of witnesses, witch-hunts, or judicial wisdom. Under normal circumstances, however, appropriate adultery sanctions could be openly and firmly stated, without any need to pursue adulterers or zealously to ensure that justice is seen to be done.

But if the sanctions are not enforced and adulterers are not carefully tracked, then why have penalties at all? The reason, quite simply, is that any good legal system not only has the function of regulating behavior through the efficient employment of punitive disincentives, but also has a vitally important educational function. This is especially true of *halakhah*. Time and again the *Torah*, in both its written and oral forms, threatens dire punishments that it never intends to be carried out.<sup>69</sup> The aim, rather, is to convey an



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unambiguous message about the values of Jewish society and the critical interest of the body politic in embracing certain behaviors and rejecting others. Overblown punishments are threatened to communicate just how menacing a particular infraction is seen to be to the welfare of Jewish civilization. Once the punishment has been stated, enforcement methods become a lesser issue; breaking the law and inviting the predetermined wrath of society—even if empirically that wrath almost never comes—is sufficiently distasteful to most people to make the educational arm of the law powerful, indeed. Although it is true, then, that the particular penalties mentioned may not, in and of themselves, be convincing deterrents to adulterous behavior, if the societal message of disapproval of adultery that inheres in them makes some reconsider their actions, such sanctions would fulfill a most useful purpose. In practice, of course, liberal Jewish communities should opt to require a sincere process of *teshuvah* as their primary vehicle toward rehabilitation from adultery. But this will not address those cases in which the guilty party refuses to do *teshuvah*, nor does it obviate the vital significance of accountability that clearly stated penalties could convey to society as a whole.<sup>70</sup>

If such sanctions are to be valuable educational tools, however, then those charged with teaching them have to be credible role models. It is for precisely this reason that rabbinic adultery is such a serious matter, for whereas rabbis are not considered “holier” than other Jews, their role as educational specialists in Jewish law gives their actions increased weight in response to the law. When a rabbi commits classic adultery, consequently, the primary outcome, as always, is a heinous disloyalty to God and spouse. But additionally, and just as importantly, by demonstrating that a teacher of the law believes that potential penalties and community stan-

dards can be ignored with impunity, the rabbi also personally acts to undermine the educational impact of the law itself. Beyond the issues of abuse of power that are frequently involved,<sup>71</sup> rabbinic adultery is damaging because it sends the message that the person who ought to be in the best position to know that adultery is a fundamental transgression is plainly insufficiently awed by the law to avoid such behavior. For thus torpedoing the educational force of the law, it is appropriate for rabbis who are guilty of classic adultery to face more demanding penalties than others. This is true only, however, if penalties of some nature are proposed for all; for if penalties that have strong educational impact are seen to be undesirable for the crime of adultery generally, it would be an unfair inconsistency—and a truly unequal application of progressive *halakhah*—to punish rabbis severely for a transgression that, when committed by others, lacks even theoretical consequences.

It is a fundamental tenet of civilization, of course, that if society is to be elevated to its fullest potential, clear signals concerning “the right and the good” path, leading to agreed upon boundaries of behavior, are essential for all. It is, furthermore, a truism that Jewish civilization has always viewed strong families founded in secure marriages as the *sine qua non* for the transmission of society’s visions, as well as for the healthy raising of the next generation. Moreover, today’s realities suggest that in a considerable number of liberal Jewish households, although adultery may not always be a direct cause of marital breakdown, it is too often the act that precedes irrevocable marital fracture. If these truths are all indeed evident, it follows that any responsible halakhic approach has a duty to rule with the utmost clarity on which types of behavior it regards as conducive—and which non-conducive—to the well-being of marriage and of society. Following this, it must

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formulate a public policy that has the goal of strongly encouraging conformity and compliance with these expressed ideals. A very real probability exists that among the tools used to attain this goal there will need to be some clearly articulated disincentives for those who might otherwise be only too willing to engage in undesirable behaviors. The fact that these deterrents might find their greatest effect through repeated enunciation rather than actual activation will not diminish their vital role in plainly transmitting the critical core interests of society.

Thousands of years ago the Ten Commandments were chiseled into the foundation stones of Judaism. No Jew since has taken issue with their significance. The Decalogue started out prohibiting adultery because adultery tore at the very fabric of Judaism's divine vision of society, founded on committed relationships of *kiddushin*. Centuries later, the same Jewish vision lives on among its contemporary inheritors. Both liberal and traditional forms of *halakhah*, therefore, carry a mandate to do everything possible to safeguard the sanctity of marital relationships within the context of every new generation. This mandate, unchanged by the passing millennia, conveys a message that is as relevant today as ever and that is once again worthy of revitalized attention.

### Notes

1. Exod. 20:14 and Deut. 5:18.
2. Indeed, adultery is referred to not only directly in the Seventh Commandment, but obliquely as well in the Tenth Commandment's reference to coveting one's neighbor's wife.
3. A. C. Feuer, *Aseres HaDibros* (New York, 1981), p. 56.
4. See *infra* at p. 10ff.

4. See *infra* at p. 8.
6. *The American Heritage Dictionary of the English Language* (Third Edition) defines adultery as "voluntary sexual intercourse between a married person and a partner other than the lawful spouse."
7. There is good reason why adultery is often regarded as much more widespread than it really is. Andrew Greeley, "Marital Infidelity," *Society* (May/June 1994), pp. 9–13, observes that most well-known data reported before 1990 vastly overstated the extent of adultery. Thus, Kinsey asserted that about 50 percent of the men and 25 percent of the women in his samples had committed adultery. Shere Hite in *The Hite Report* averred that 72 percent of married men were adulterous. The June 1977 issue of *Marriage and Divorce* stated that "70 percent of all Americans engage in an affair sometime during their marital life." More recently, the *Janus Report on Sexual Behavior in America* put the infidelity figures at around 33 percent of married men and 25 percent of married women. But, as Greeley observes, "All these statistics have one characteristic in common: they are not based on national probability samples...."
- Hence, the statistically more acceptable numbers are less dramatic. According to Greeley, the authoritative 1991 *General Social Survey*, based on a national probability sample, reveals that 21 percent of men and 11 percent of women have had sex with someone other than their spouse during marriage. If prostitution is excluded from the statistics, however, and only those who are in the work force are counted, the gender gap disappears: "Fifteen per cent of working women and men who have never paid for sex report that they have had sex with someone other than their spouse." Theorists hypothesize that the opportunities for women to find partners for adultery increase when they enter the work force. It is clear, though, that if 21 percent of men have committed adultery of some type (including prostitution), then—unless the 11 percent of women who have committed adultery are all married to the male adulterers—the figure of one in five marriages being touched by adultery may well be conservative. It is, of course, also possible that although the researchers use all available tools to compensate for those who are apt to answer untruthfully, a degree of under-reporting may nevertheless be a factor.
- Greeley also suggests the possibility that infidelity rates may be slightly on the rise. He bases this estimation on the fact that adultery rates among younger people seem to be a little higher than for older age groups.
8. Indeed, the 1994 University of Chicago survey, *The Social Organization of Sexuality*, reports that Jews—on average—had the most partners (lifetime) of any religious grouping. It would stretch credibility to maintain that fewer of these partners represent adulterous liaisons than for the rest of the population. See *Time Magazine*, October 17, 1994.
9. This decision of the Reform movement was first articulated at the 1869 Philadelphia conference. The original text can be found in David Philipson, *The Reform Movement in Judaism*, (New York, 1931), p. 484, n. 38.
10. Such confusion is clearly referred to in *M. Yevamot* 3:10.

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11. There are those who maintain that classic adultery is not so much a betrayal as a symptom of a marriage that, even though the parties may not be fully aware of the fact, is already in trouble. Although this may be true, it hardly lessens the transgression involved in classic adultery. After all, stealing might be viewed as a symptom of unabated poverty, but it is a crime nevertheless.
12. The context of Lev. 20:10, for example, substantiates this point.
13. Louis M. Epstein, *Sex Laws and Customs in Judaism* (New York, 1967), pp. 194-96.
14. See *infra*. at p. 10.
15. Shlomo Eidelberg (Ed.), *The Responsa of HARAGMAH* (New York, 1955), p. 19.
16. The foundation of this idea is in Gen. 2:24. Indeed, the *Tur* comments on this verse, "Let him cling to his wife and to none other, because man and wife are in reality one flesh, as they were at the beginning of Creation."
17. This notion is made most explicit within the institution of levirate marriage. Deut. 25:5ff. requires that the wife bear children by her deceased husband's brother "so that his name not be blotted out from Israel."
18. *As Kohen, Levi, or Israel.*
19. *Yevamot* 95a.
20. *Ibid.*
21. Epstein, *Sex Laws and Customs*, p. 194.
22. Gen. 39:9.
23. Gen. 20:6.
24. See, for example, *Pirkei de Rabbi Eliezer*, 12.
25. Lev. 20:10 and Deut. 22:22.
26. *Ibid.*
27. Prov. 6:27-29.
28. Epstein, *Sex Laws and Customs*, p. 199.

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29. Hos. 2:4ff. and Jer. 3:8. It is possible that the deuteronomic legislation evidenced in Deut. 22:22 and 24:1ff. was enacted as an attempt to include the wife in the more serious penalty. See Anthony Philips, *Ancient Israel's Criminal Law* (New York, 1970), pp. 110-112.
30. *Sanhedrin* 56a-b, based in Gen. 2:16; Maimonides, *Hilchot Melakhim*, 9:5.
31. *Sanhedrin* 58a, based in Gen. 2:24.
32. *Sanhedrin* 74a; *Yoma* 82a.
33. *Avodah Zarah* 3a.
34. *Bava Metzia* 58b.
35. *Sanhedrin* 40b-41a. *Yad*, *Sanhedrin* 12:1-2. *Eidut* raises the issues of the witnesses' suitability and credibility; *hatra'ah* relates to a specific set of warnings that had to be provided to the guilty party before the commission of the crime if capital punishment were to be considered.
36. Epstein, *Laws and Customs*, p. 209.
37. See Num. 5:29, Jere. 3:1.
38. *Sotah* 27b. See also *Yevamot* 24b.
39. Maimonides, *Hilchot Ishut*, 24:17, 18. See also Benzion Schereschewsky, *Dinei HaMishpacha* (Jerusalem, 1984), pp. 409-410.
40. See *infra* at p. 15 for the reasons given by Maimonides for *mamzerut*. Arguably the very same reasons provide the fundamental motivation behind the strong rabbinic prohibition of the wife's continuing relationship with either the husband or the paramour.
41. Based on Deut. 23:3 but made explicit by the rabbis in *Kiddushin* 3:12 and *Yevamot* 4:13. See also Maimonides, *Hilchot Issurei Bi'ah* 15:1.
42. *Ibid.* See also *M. Yevamot* 8:3, *Yevamot* 45b, and Maimonides, *Hilchot Issurei Bi'ah* 15:33.
43. *Moreh Nevukhim*, III.49. This translation from Shlomo Pines, *The Guide of the Perplexed* (Chicago, 1963), Vol. 2, p. 611.
44. *Sefer HaChinukh*, *Mitzvah* 560.
45. *Ibid.*, 34.

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46. See, for example, Maurice Lamm, *The Jewish Way in Love and Marriage* (San Francisco, 1980), pp. 42–48.
47. Michael A. Meyer, *Response to Modernity* (Oxford, 1988), pp. 229, 240–41.
48. The *Encyclopaedia Judaica* gives testimony to the continuation of this belief when it observes that it is a practice peculiar to Reform Judaism that in “many Reform congregations, the solemn recital of the Ten Commandments is part of the confirmation ceremony which is generally celebrated on Shavuot....” *Encyclopaedia Judaica* (Jerusalem, 1972), Vol. 5, p. 1447. Since Shavuot is the festival of revelation, the symbolism, of course, is powerful.
49. Philipson, *The Reform Movement*, pp. 483–84, n. 38. See also Michael A. Meyer, *Modernity*, p. 257, where Meyer maintains that the Philadelphia rabbis’ concerns about “extramarital relations” were owed to the fact that adultery was as “seemingly prevalent among some Jewish men as among non-Jews.”
50. Jonathan A. Romain, *Faith and Practice* (London, 1991), pp. 189–91.
51. One example is the lack of recognition—even after Rabbeinu Gershom’s *takkanah* outlawing polygamy—of a married man’s intercourse with a single woman as constituting an adulterous act. Traditionalists have attempted to justify this inequality on rational grounds, such as that expressed by Mendell Lewittes, *Jewish Marriage—Rabbinic Law, Legend, and Custom* (Northvale, 1994), pp. 15–16:

It seems to me that there is a more profound rationale for this distinction between the man and the woman, reflecting the different intensity of emotional involvements in the sexual act. No matter what feminists might say, hormones and emotions interact. For the woman, since a single act of sexual intercourse may lead to pregnancy, it expresses a profound emotional attachment to the male partner. For her, accepting a partner other than her husband indicates a weakening of her attachment to him and portends a breakdown of the family bond. As for the man, the sexual act does not necessarily indicate a serious emotional attachment to his paramour; it may be for him a casual relationship, a fleeting submission to a carnal urge....

It is unlikely that most liberal Jews would see this reasoning as persuasive grounds to maintain the legal inequality.

Another illustration of inequity is the above-stated requirement that an adulterous wife be divorced, which was never applied to adulterous husbands.

52. The test of the “bitter waters” to which the *sotah*, the suspected “errant woman” was subjected is described in great detail in Num. 5:12–31, and is the focus of extensive rabbinic deliberation, largely in tractate *Sotah*. The purpose of the test—in which the woman had bitter waters administered by a priest, who monitored her for specific signs—was to provide a “divine proof” of the guilt or innocence of a woman who was thought to have committed adultery. While first im-

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pressions might convey the sense that this test was nothing more than a demeaning social tool in which the *halakhah* became involved in the public degradation of women by their jealous husbands, further insight suggests other possibilities. Rachel Biale, *Women and Jewish Law—An Exploration of Women's Issues in Halakhic Sources* (New York, 1984), pp. 186–87, proposes that the ease with which the test would have been passed may well have been designed—in the vast majority of cases—to prove women's innocence. This was particularly important since "suspicion of adultery in a close-knit community would be almost impossible to dispel, and could easily lead to ostracism and perhaps violent revenge." According to Biale, seen in this light, "the ordeal is changed from a measure threatening women to a mechanism for their protection." Whether Biale's explanation as to the motivation for the test itself is plausible, the concern for fair treatment that brought about the cessation of the test is beyond doubt.

53. *Sotah* 47a–b.

54. Hyam Maccoby in his "Halakhah and Sex Ethics," in W. Jacob and M. Zemer, *Dynamic Jewish Law* (Pittsburgh, 1991), p. 138, clearly expressed this notion when he wrote: "But the doctrine of *abrizaihu*, on this interpretation, also requires martyrdom for lesser offenses that are in some way connected with adultery: for example, the offense of embracing and fondling another man's wife, which is regarded as Biblically forbidden (on pain of *malkut*) by Lev. 18:6."

55. The only Jewish statement on gender equality in matters of adultery was made by *Maram*, the Israel Council of Progressive Rabbis, in 1983. In a document setting forth its decisions on marriage, *Hehachlatot Maram B'Nosei Nissuin—Rishum V'Arichat T'kasim*, at section 14A, *Maram* declared: "The approach of *Maram* in the matter of adultery is founded in equality...." This ruling, however, applies only to those who come under the aegis of the Israel Movement for Progressive Judaism, which—at most—numbers several thousand people.

56. Walter Jacob, *Contemporary American Reform Responsa* (New York, 1987), p. 286.

57. *Ibid.*, pp. 286–87.

58. *Shulhan Arukh Even Haezer* 11.2.

59. Eugene B. Borowitz, *Exploring Jewish Ethics—Papers on Covenant Responsibility* (Detroit, 1990), p. 266.

60. Elliot N. Dorff, "This Is My Beloved, This Is My Friend—A Jewish Pastoral Letter on Human Sexuality" for and with the Commission on Human Sexuality of the Rabbinical Assembly, April 11, 1994, p. 11; Michael Gold, *Does God Belong in the Bedroom?* (Philadelphia, 1992), pp. 51–53.

61. For a good summary see Benzion Schereschewsky, "Civil Marriage," in Menachem Elon, *The Principles of Jewish Law* (Jerusalem, 1974), pp. 371–74.



## SEPARATING THE ADULT FROM ADULTERY

62. Romain, *Faith and Practice*, p. 48.
63. Solomon B. Freehof, "Unworthy Man Called to Torah," in Walter Jacob (ed.), *American Reform Responsa* (New York, 1983), pp. 101-106.
64. Unpublished *teshuvah* of the Central Conference of American Rabbis Responsa Committee, 5754.17.
65. Walter Jacob, "Adult Bar/Bat Mitzvah and Adultery," in *Central Conference of American Rabbis Yearbook*, Vol. 99 (New York, 1990), p. 239.
66. Ibid.
67. The argument that is sometimes advanced, that the different treatment of pecuniary and sexual transgressions represents an appropriate differentiation between the public and the private realms, makes no sense from a Jewish perspective. Although Judaism obviously acknowledges significant and critical differences between the two spheres, appropriate sanctions for transgression have always been administered by the rabbis with the tools at their disposal, no matter in which sphere the transgression took place. Moreover, the creation of neat divisions between the private and public domains is no easy matter, and adultery, particularly, extends into both areas, since it is seen as a transgression against the spouse *and* against God or society. Judaism could hardly tolerate an effective disregard of adultery simply on the basis that it is carried on behind closed doors.
68. Epstein, *Sex Laws and Customs*, p. 209.
69. According to Deuteronomy 21:18-21, for example, the *ben sorer u'moreh*, the "stubborn and rebellious son," was to be stoned to death. But in a frank *baraita* recorded in *Sanhedrin* 71a, the rabbis declared: "There never has been a 'stubborn and rebellious son,' and never will be. Why then was the law written? That you may study it and receive reward...." In other words, the law was intended to be a spur to education, and the proposed death penalty was designed to focus profound attention on the transgression and its gravity.
70. If sanctions were ever actually applied they need not, of course, be in place forever. They could be applied for a limited period or until *teshuvah* had been satisfactorily effected. In this context one ought to remember that *teshuvah* is a process without specific length that can be considered complete only when "recognition of the sinful act, sincere remorse, confession, restitution, and resolve" have been addressed. It goes well beyond simply saying, "I am sorry." See Arthur Gross Schaeffer, "Teshuva and Rabbinic Sexual Misconduct," *CCAR Journal: A Reform Jewish Quarterly* (Summer/Fall 1995), pp. 75-80.
71. See Rachel Adler, "A Stumbling Block before the Blind: Sexual Exploitation in Pastoral Counseling," *CCAR Journal* (Spring 1993), pp. 13-43.