

# A CRITIQUE OF JACOB MILGROM'S VIEWS ON LEVITICUS 18:22 AND 20:13

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Jacob Milgrom's three-volume commentary on Leviticus will undoubtedly set the standard for decades to come.<sup>1</sup> As such his comments on the Levitical prohibitions of homosexual intercourse in his second volume will carry significant weight. Those who want to discount the hermeneutical relevance of the Levitical proscriptions will be discomfited at several points by Milgrom's work. For example:

- Milgrom supports a pre-exilic date for the Holiness Code (H), associating it with the reforms of Hezekiah.<sup>2</sup> Such a dating would make it more difficult to argue that the proscriptions are a late product of an increasingly xenophobic community that has been sent into turmoil by the Babylonian exile.
- Milgrom argues that whereas the root word for concepts of defilement and uncleanness, טָמָא, refers in P to *ritual* impurity capable of being expiated by purificatory rituals,<sup>3</sup> the same root denotes in H *moral* impurity that can only be expunged by exile (for community-wide infractions) or capital punishment (executed either by God or the community, for individual offenses).<sup>4</sup> Hence, in H self-defilement is specifically attributed to those who commit adultery and

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<sup>1</sup> Jacob Milgrom, *Leviticus 1-16* (1991), *Leviticus 17-22* (2000), and *Leviticus 23-27* (2001), all published by Doubleday for the Anchor Bible series. The second volume of Milgrom's commentary was not available at the time I received galley proofs for my book, *The Bible and Homosexual Practice: Texts and Hermeneutics* (Nashville: Abingdon, 2001). To be sure, Milgrom had already written short editorials on Lev 18:22 and 20:13 in *Bible Review*: "Does the Bible Prohibit Homosexuality?" *BRev* 9:6 (Dec. 1993): 11; "How Not to Read the Bible," *BRev* 10:2 (Apr. 1994): 14, 48. (These editorials are reprinted, with occasional minor alterations and one major paragraph addition, in *Leviticus 17-22*, 1786-90; the paragraph addition, which is on the distinction between incestuous and non-incestuous homosexual intercourse, appears on p. 1786.) In my book I commented briefly on his positions. However, his argument regarding non-procreation was not fully developed in his *Bible Review* editorials and his theory regarding non-incestuous homosexual relations (see below) received no mention at all.

<sup>2</sup> *Leviticus 1-16*, 1-35. See also: Israel Knohl, *The Sanctuary of Silence: The Priestly Torah and the Holiness School* (Minneapolis: Fortress, 1995); and J. Joosten, *People and the Land in the Holiness Code: An Exegetical Study of the Ideational Framework of the Law in Leviticus 17-26* (VTSup 67; Leiden: Brill, 1996), esp. 9-16, 203-7; Richard Elliott Friedman, *Who Wrote the Bible?* (New York: Harper & Row, 1987), 207-16.

<sup>3</sup> Specifically, the following three sources of impurity: corpse, scale disease, and genital discharges.

<sup>4</sup> *Leviticus 17-22*, 1550-51, 1572-73. "These radically differing concepts of *ṭum'â*, 'impurity' is one of the terminological hallmarks that distinguish H from P" (*ibid.*, 1574). Also: *Leviticus 1-16*, 37.

bestiality (18:20, 23) and those who consult mediums or wizards (i.e., idolatry; 19:31). What this suggests is that a misunderstanding has arisen on the part of those who regard the purity and defilement language associated with the sexual laws in Lev 18 as clear proof that we are dealing with nonrational and preethical judgments. On the contrary, H is employing the language of defilement to buttress moral claims.<sup>5</sup>

- Some have argued that the Levitical sex laws in ch. 20 cannot be taken seriously as ethical formulations because they do not take into account issues of consent. Victim and victimizer are alike condemned. Milgrom contends, however, that the laws presume consent; unwilling victims are not penalized. He points out that even when the formula “their bloodguilt be upon them” (וְדַם חַיְיָהֶם יִשָּׂא, 20:11-13, 16) does not appear among the capital cases in 20:10-16, a rationale following the phrase וְדַם חַיְיָהֶם does, serving essentially the same function.<sup>6</sup> Hence, it is not likely that the proscription of male homoerotic intercourse would consign a raped participant to death.

Despite these arguments, Milgrom ends up limiting the Levitical proscriptions to such an extent that for all practical purposes they are made irrelevant for contemporary discussions of same-sex intercourse. He accomplishes this end in three ways.

### I. Proscribed Merely Because of Wasted Seed and Lack of Progeny?

First, Milgrom argues that male homosexual intercourse in Lev 18:22 and 20:13 is proscribed because it results in a “lack of progeny” or “the wasting of seed.”<sup>7</sup> Thus:

I hold that the basic rationale [for the laws in Lev 18] is procreation within the ordered, patriarchal structure. Thus vv. 6-18, 20 presuppose the production of seed destructive of the family (the social rationale), whereas vv. 19, 21-23 presuppose the reverse: relationships that would produce no seed.<sup>8</sup>

<sup>5</sup> This is true even in the case of the laws prohibiting sexual intercourse during a woman’s menstrual cycle (18:19; 20:18). With respect to 18:19, Milgrom comments simply: “H subsumes [the act of sex with a woman during menstrual impurity] under its rubric of moral impurity” (*Leviticus 17-22*, 1550). As regards the penalty of כָּרֵת in 20:18, Milgrom speculates that “by imposing such a drastic penalty H is creating a deterrent that will protect the woman from unwanted advances by her husband during her period of weakness” (*ibid.*, 1755).

<sup>6</sup> Cf. 20:9 which provides *both* the blood formula and the rationale, setting the pattern for the prohibitions that follow insofar as it is the initial case (*ibid.*, 1747). The law against “taking” a wife and her mother in 20:14 is usually cited as an instance where consent is not considered, given the reference to “taking” (= seizing by force), the intergenerational dimension, and the fact that the formula “x shall surely be put to death” is replaced with “by fire they shall burn.” However, Milgrom states that “the Akkadian semantic cognate *ahāzu* ‘take’ also means ‘marry,’” so a connotation of rape is not implied. Moreover, “the fact that both women are put to death implies that they gave their consent (i.e., in marriage). But if he exercised his authority to ‘seize’ them, the possibility exists that they were forced and, hence, not culpable (cf. Deut 22:26)” (*ibid.*, 1750).

<sup>7</sup> *Leviticus 17-22*, 1566-70, 1785-90.

<sup>8</sup> *Ibid.*, 1530-31.

. . . The common denominator of all the prohibitions, I submit, is that they involve the emission of semen for the purpose of copulation, resulting in either incest and illicit progeny or, as in this case [of homosexual intercourse], lack of progeny (or its destruction in the case of Molek worship, v. 21). In a word the theme . . . is procreation.<sup>9</sup>

. . . [T]he common denominator of the entire list of sexual prohibitions, including homosexuality, is procreation within a stable family.<sup>10</sup>

It might be argued, based on these quotations, that Milgrom does not regard the wasting of seed in non-procreative intercourse as the primary reason for disallowing male homosexual intercourse but only as “the common denominator” of the prohibitions in 18:19, 21-23. However, that Milgrom treats the non-procreative ejaculation of semen during coitus as the fundamental reason for banning male homoerotic intercourse is clear from three other observations by Milgrom. (i) He explains the absence of any prohibition against lesbian sex on this basis: “The legal reason for interdicting [male] anal intercourse . . . is the waste, the nonproductive spilling, of seed--the equivalence of Onanism (Gen 38:9-10)—which, in this case, does not occur.”<sup>11</sup> (ii) He theorizes that “if gay partners adopt children, they do not violate the *intent* of the prohibition,” namely that couples engaged in sexual intercourse be able to reproduce themselves.<sup>12</sup> (iii) He comments that “the case of homosexual relations . . . specifically addresses the fear of a stagnant birth rate. . . . However, particularly now, when the paramount issue is not birth increase but birth control . . . , does this biblical criterion (for ancient Israel!) carry universal validity?”<sup>13</sup>

Milgrom’s fixation on the issue of procreation overlooks the larger issue of which procreation is but a subset for the sex laws in Lev 18 and 20. For example, the concern regarding bestiality is that of “mixing” two species that should never be mixed, as is evident both from the use of the term *תִּבְלֵל* (probably related to *בלל* “mix”) to characterize bestiality in 18:23 and from the prohibition of mixing different kinds in 19:19. The use of the term *תִּבְלֵל* in 20:12 for incest between a man and his daughter-in-law suggests, too, that this concept of “mixing” is not limited to the cases of bestiality and only one type of incest, but rather applies derivatively and to a lesser extent to the whole range of proscribed sexual acts in chs. 18 and 20. Thus, sex between a man and a menstruating woman produces a discordant mix of physiological functions: on the one hand, a woman whose body is shutting down a previous cycle of fertility and allowing the “field” to lie fallow in order to renew itself; and on the other hand a man whose body is still trying to work the “field” by planting “seed.” Adultery is a bad mix insofar as it disrupts the self-contained “one-flesh” union constituted by the marriage covenant. Child sacrifice, the only act listed among the sexual offenses in ch. 18 that is technically not a proscribed act of sexual intercourse, does not fit quite so well as an issue involving discordant merger—and indeed in ch. 20 it is separated from the list of sexual offenses in 20:10-21 as if to

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<sup>9</sup> Ibid., 1567.

<sup>10</sup> Ibid., 1568.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

confirm its awkward placement in ch. 18.<sup>14</sup> Nevertheless, it bears a tangential relation to the other proscribed behaviors since it disrupts the productivity that the marriage merger is designed to promote (“be fruitful and multiply”).<sup>15</sup>

With regards to incest, the inappropriate mixing is not between two overly dissimilar entities, as with bestiality, but rather between two overly similar entities (cf. 18:6,<sup>16</sup> 12; 20:19, which refer to sex with one’s own “flesh”). The same can be said for same-sex intercourse.<sup>17</sup> Same-sex intercourse involves a merger of two discomplementary sexual sames rather than two complementary sexual others. Hence the wording of the prohibition: a man “shall not lie with a male as though lying with a woman.” Why? Quite simply because such intercourse involves a category error, a merger of two beings that are incongruous in terms of anatomy, procreative potential, and an array of personality features. The wording “as lying with a woman” is the closest thing we have to an explicit motive clause in the prohibition and, as such, is clearly the best evidence we have for discerning what the legislators were reacting against. Procreation is undoubtedly involved as a subpoint; but the larger heading is wrongly putting a person gendered by God as a male in the category of female so far as sexual interaction is concerned.<sup>18</sup>

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<sup>14</sup> Child sacrifice is discussed in 20:2-5, turning to mediums and wizards in 20:6, and cursing one’s parents in 20:9.

<sup>15</sup> Milgrom, citing a forthcoming word by Schwartz (no further reference), suggests that Molech worship was included in a list or prohibited forms of sexual intercourse because it too was regarded as an “abomination” that could bring about expulsion from the land (see Deut 18:10-12). Moreover, “elsewhere the H legist uses the verb *zānâ* ‘whore’ in describing Molek worship (20:5 [bis]), thereby associating it with a sexual offense (M. Hildenbrand).” Its placement after 18:20 (adultery) was dictated by the repetition of *הַתֵּן* and *נָתַע* (*Leviticus 17-22*, 1559).

<sup>16</sup> NRSV “near of kin” is literally “flesh of his flesh” (*שְׂאֵר בְּשָׂרוֹ*).

<sup>17</sup> This is one reason why incest, especially incest between consenting adults, provides a nice test case for evaluating pro-homosexuality arguments in the contemporary debate.

<sup>18</sup> Some proponents of homosexual intercourse agree that gender-identity issues, not procreation, is the main issue for the Levitical prohibitions of male homosexual intercourse. However, they view gender stratification or the preservation of dominant male hierarchical roles rather than gender differentiation per se as the main concern of the legislation. Key advocates for this view are: Martti Nissinen, *Homoeroticism in the Biblical World: A Historical Perspective* (Minneapolis: Fortress, 1998); Phyllis A. Bird, “The Bible in Christian Ethical Deliberation concerning Homosexuality: Old Testament Contributions,” *Homosexuality, Science, and the “Plain Sense” of Scripture* (ed. D. L. Balch; Grand Rapids: Eerdmans, 2000), 142-76; and, as regards NT texts, Bernadette J. Brooten, *Love Between Women: Early Christian Responses to Female Homoeroticism* (Chicago: University of Chicago Press, 1996). Milgrom does not speak to this hypothesis so I will not devote much attention to it here. Yet because of its increasing popularity in some circles it is important to make two points.

First, the other proscribed forms of sexual behavior in Lev 18 and 20 do not appear to have the preservation of male dominance foremost in view. The incest laws in 18:6-18, for example, seem to be more interested in putting limits on predatory male sexuality and protecting females than in asserting the unlimited authority of the paterfamilias. The same can be said for the law that prohibits sex with a menstruating woman in 18:19: God has given that time for the “field” of the woman’s body to rest from its weakness, free from male intrusion. The prohibition of bestiality in 18:23 is not just about human dominance, let alone male dominance, over the animal kingdom. For since (as Bird, Nissinen, and Brooten argue) penetration is a symbol of dominance, a male human conceivably could penetrate a female animal and still demonstrate that dominance. The law against child sacrifice in 18:21 clearly is not about male dominance. Only the law against having sexual intercourse with “your neighbor’s wife” (*אִשְׁתּוֹ עִמֵּי הָרֵדָה*) is arguably about protecting a husband’s dominant interests, where the wife’s belonging to her husband is paramount and no restriction is placed on a married man having intercourse with an unmarried woman.

In Milgrom's view, H was P's redactor. If Milgrom is correct (a debatable proposition, to be sure), H knew the creation story in Gen 1. Since H gives no hint of disagreement on the matter of the complementary sexuality of males and females,<sup>19</sup> and since too the Levitical proscriptions are grounded, at least in part, in natural differences between males and females, there is every reason to believe that H accepted P's understanding of human sexuality in Gen 1:27-28 and grounded the proscriptions in Lev 18:22 and 20:13 on such an understanding.

Milgrom is certainly cognizant of the importance for P and H of the concept of not mixing different classes<sup>20</sup> but somehow misses the connection on this issue. For him the "mixing" is wrong solely because of progeny concerns. Milgrom's assertion is the equivalent of saying that H's sole concern about bestiality was that it wasted seed—a conclusion that is patently untenable (if not for the progeny issue, sex with one's horse would be acceptable?). Indeed, progeny is not the only issue as regards incest (it would be okay to have sex with one's parent, sibling, or daughter so long as precautions against conception are taken?). Milgrom himself admits that the incest laws have an additional

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(Too much emphasis should not be placed on the latter point, however, since female virginity prior to marriage was highly prized in ancient Israel.) Yet even in the case of this law there is undoubtedly concern for the sanctity of the covenant bond of marriage. Moreover, I do not know of any scholar who, when advocating that contemporary culture scrap entirely the prohibition of same-sex intercourse, would simultaneously advocate that we scrap entirely the prohibition of adultery. Rather, they expand the notion of belonging to include a husband's belonging to his wife. This speaks to the fact that the prohibition of adultery is about more than just male dominance over females.

Second, if maintaining proper hierarchical roles had been the main concern of ancient Israelite society in proscribing male homosexual behavior, then one has to ask why Israelite society was more unequivocally opposed to male homosexual practice than other ancient Near Eastern cultures. Why did Lev 20:13 impose the penalty of death on both partners? Indeed why did it criminalize consensual homosexual intercourse at all, given that Middle Assyrian Laws 19 and 20 (tablet A) criminalize only the actions of the perpetrator of forcible same-sex male intercourse or of one who falsely slanders another man with the charge of being laid repeatedly by other men? Was Israelite society more misogynistic than its ancient Near Eastern counterparts? Surely this is implausible. In Mesopotamian society, male homosexual behavior was regarded as an acceptable way of enforcing status differentiation among males, at least for the active partner; and males possessed by the goddess Inanna/Ishtar could be excused for regularly playing the passive receptive role in same-sex intercourse. This is precisely what one would expect of a society where status differentiation was the key concern. But this is also precisely what we do not find in the biblical record, where no exceptions are made. Here it is evident that gender differentiation, not status differentiation, took precedence. We see this manifested in Gen 2-3 where the Yahwist treats as a pre-fall development the establishment of the institution of marriage as a one-flesh union (better, reunion) of complementary gendered beings, while relegating to God's curse at the fall the husband's rule over his wife (Gen 3:16).

Therefore, the thinking of the authors of Scripture was apparently not in the first instance "Men should not take on the role of women in sexual intercourse because women are inferior beings" but rather "Men should not take on the role of women in sexual intercourse because God created distinct sexes and designed them for complementary sexual pairing." One might still feel a need to reformulate some aspects of Israelite thought to stress more the compromise of the *active* partner's gendered existence in a homosexual relationship and to give equal attention to the problem of lesbian intercourse. An adjustment of this sort is to be preferred to "throwing the baby out with the bath water" by dispensing with a heterosexual norm altogether.

<sup>19</sup> If anything H intensifies this theme, which in any case is a basic assumption running throughout the Hebrew Bible.

<sup>20</sup> E.g., *ibid.*, 1571 where he cites the work of Mary Douglas.

purpose besides preventing illicit progeny: “the purpose of these laws is the prevention of family quarrels.”<sup>21</sup> And, of course, having sex “with one’s own flesh” is a problem. As we stated with respect to sex with a menstruating woman, more is involved than the failure to produce progeny. Adultery is not just about the birthing of illicit offspring. It is also about disrespecting another’s covenant relationship with his wife.<sup>22</sup>

Consequently, Milgrom’s thesis is problematic not because the issue of progeny is irrelevant but because for any given sexual sin discussed in 18:6-23 it is only *a* factor and often not the most important one. In fact, Milgrom cannot integrate the block of non-incest laws in 18:19-23 under the single problem of not producing offspring because adultery, mentioned in 18:20, has the potential to produce offspring. Milgrom’s thesis is thus reductionistic. Not even Philo, who vigorously subscribed to the view that sex should only be for the purpose of lawful procreation, thought the main problem with homosexual intercourse and bestiality was the absence of procreative potential (*Spec. Laws* 3.33-50). Furthermore, Milgrom ignores the ancient Near Eastern data, particularly from Mesopotamia, which identifies the compromise of masculine identity and not the absence of progeny as the key issue.<sup>23</sup>

To Milgrom’s credit, he attempts to explain why cases of non-procreative *heterosexual* acts are not proscribed along with male homosexual intercourse. Of course, he must explain away such exemptions from legal restriction if he is to prove that the sole or primary concern of H as regards homosexual intercourse was that such intercourse spilled semen without the intent to procreate.

(i) With respect to masturbation, Milgrom gives two reasons why this act, which obviously involves the non-procreative ejaculation of sperm, was not severely proscribed.<sup>24</sup> “First, it must be recognized that masturbation was not condemned by the ancients.” This is not really an answer to the problem that Milgrom addresses for it only reinforces the suspicion that the non-procreative spilling of seed was not a key concern in ancient Israel.<sup>25</sup> So Milgrom moves on to his second point.

In Israel, moreover, the spilling of seed, by itself, is not the issue. As illustrated in the story of Onan, sin occurs if seed is *deliberately spilled during coitus* (Gen 38:9-10). Indeed, all the cases cited in our chapter [18] refer to illicit intercourse. But [in P] the ejaculation of semen results in only a one-day impurity that requires laundering and ablutions (15:16-18), *regardless of whether the act takes place during (legitimate) intercourse or by the self, deliberately (masturbation) or accidentally (nocturnal emission).*<sup>26</sup>

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<sup>21</sup> Ibid., 1530.

<sup>22</sup> Cf. the emphasis on covenant fidelity to “the wife of your youth” in the discussion of divorce in Mal 2:14-16.

<sup>23</sup> See my *The Bible and Homosexual Practice*, 44-56; also, Nissinen, *Homoeroticism in the Biblical World*, 19-36, 144-52.

<sup>24</sup> *Leviticus* 17-22, 1567-68.

<sup>25</sup> Milgrom acknowledges that the rabbis condemned masturbation (b. Nid. 13a, b). Nevertheless, “it is their enactment, not that of Scripture” (ibid., 1568).

<sup>26</sup> Emphasis added.

So it is not enough to spill one's "seed" in non-procreative fashion. One must intentionally spill it in the context of sexual intercourse with another. Yet, if this is the central concern, how does Milgrom explain the fact that P does not take a hard line on the deliberate ejaculation of semen during (legitimate) intercourse? Is this another case of P taking a different approach than H? Milgrom does not say. Perhaps Milgrom implicitly intends to bring H into harmony with P on this point through his subsequent contention that H is proscribing only *illicit* (= incestuous) forms of male homoerotic intercourse.

Yet this cannot suffice as a complete explanation, for the story of Onan does not involve the deliberate and non-productive spilling of semen during *illicit coitus*. Indeed, what is at issue in the story of Onan is the deliberate spilling of semen in an attempt to deprive a deceased brother's wife of the offspring she legitimately deserves (i.e., failure to fulfill kinship obligations in levirate marriage).<sup>27</sup> So it would appear that the real concern regarding spilled semen is that the act not be continually performed so as to deprive one's partner entirely of the children she desires. That this is the real concern is indicated by the next example cited by Milgrom (*coitus interruptus*). But it raises the problem: why is homosexual intercourse between two men not permitted in certain cases where no attempt is made to deprive a spouse of progeny, such as a man who has divorced his previous wife after giving her children (thereby fulfilling the biblical mandate to be fruitful and multiply) in order to enter a homosexual union? One can press the point further to encompass a broader range of homosexual relationships. Clearly, ejaculation of semen in a homosexual relationship does not deprive one's partner of the children that the partner desires, because neither participant in the relationship expects to beget children from the intercourse. Since remaining unmarried is not a criminal offense in early Israel—this would seem to relativize the importance of P's mandate to "be fruitful and multiply"—why penalize homosexual relationships at all?

(ii) Why does the law not explicitly condemn *coitus interruptus* in the case of married couple?<sup>28</sup> Milgrom's answer. "Analogously to the case of masturbation, the silence of our text would permit the inference that birth control was not prohibited as long as the couple reproduced itself. This, indeed, is the opinion of the tannaitic rabbis (*m. Yeb.* 6:6; *t. Yeb.* 8:4), two males according to R. Shammai . . . , and one male and one female, according to R. Hillel." But, again, such an understanding only underscores the fact that an absolute proscription of homosexual relations cannot be attributed solely or even primarily to an abhorrence of non-procreative acts of sexual intercourse in which semen is spilled.

(iii) The same issues attend the question of why heterosexual sex during a woman's pregnancy is not severely proscribed in Lev 18 and 20. Milgrom's response is: "If the rationale of procreation proves correct, I would have to presume that Israel's priests might have frowned on sexual congress during certified pregnancy, but they would not have forbidden it; their prohibitions focused on illicit intercourse." Again, one wonders

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<sup>27</sup> Several sentences later Milgrom himself notes that the example of Onan "is irrelevant" to the question of whether birth control practice by a married couple is permitted by the law (*ibid.*).

<sup>28</sup> To this question one can add another: why does the law not proscribe heterosexual anal intercourse? Milgrom does not raise this case. He does raise the case of sex by married couples after the onset of menopause. Israel's priests "would have held up the example of Abraham and Sarah."

why Milgrom introduces the issue of “illicit intercourse” at all. He had just concluded that the practice of *coitus interruptus* by married couples was not outlawed “as long as the couple reproduced itself.” Since there is no law classifying (non-incestuous) heterosexual married sex as illicit,<sup>29</sup> what non-procreative illicit acts of heterosexual intercourse is he thinking of? With the possible exception of deliberately depriving a wife entirely of children, contrary to her wishes—and even this is not proscribed in Levitical law, whether by P or H<sup>30</sup>—it is clear that the issue of the wasting of seed in non-procreative relationships was not a criminal concern of Israel’s priests.

Thus, contrary to Milgrom’s assertions which I cited at the beginning of this section, neither the wasting of seed nor the lack of progeny constitutes the overarching rubric for the laws in Lev 18:19-23, let alone those in Lev 18:6-23. The spilling of seed in a non-procreative sexual act is at best an ancillary or secondary concern for *some* of the laws in 18:19-23. If so, then the main reason for proscribing male homosexual intercourse had to be for reasons other than the wasting of sperm in non-procreative sex acts. This is precisely what we would expect from the specific application of the term “abomination, abhorrence” (הוֹיֵעֲבֹדָה) to male homosexual intercourse in 18:22; 20:13.

This conclusion in turn raises problems for Milgrom’s explanation for why lesbian relationships were not forbidden in Lev 18 and 20. For if the proscription of male homoerotic relationships is not solely or primarily about “the waste, the nonproductive spilling, of seed,” then the absence of a proscription of female homoerotic relationships probably does not have to do solely or primarily with the fact that semen is not ejaculated in lesbian intercourse. It is impossible to know why same-sex female intercourse was not explicitly proscribed in H; arguments from silence are always tricky.<sup>31</sup> Some of the reasons may include one or more of the following: the primacy of penetration for defining when sexual intercourse definitively takes place, obviously absent from lesbian eroticism;<sup>32</sup> the absence of concrete cases of lesbianism in Israelite and/or Canaanite

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<sup>29</sup> Apart from intercourse during menstruation, which proscription does not arise solely from its non-procreative character.

<sup>30</sup> The levirate law of Deut 25:5-10 (cf. Ruth 4) *advised* that a man provide offspring for his deceased brother’s childless wife. Yet even here a non-compliant brother-in-law is not to be executed. He merely undergoes public disgrace through a ritual ceremony in which his widowed sister-in-law pulls a sandal off his foot and spits in his face. H appears to rule out levirate marriage altogether (18:16; 20:21). There are no laws anywhere in the OT penalizing either a man who refuses to marry or a husband who habitually abstains from procreative sexual acts.

<sup>31</sup> For example, if Rom 1:26 had not been preserved in the church, scholars might have concluded based on 1 Cor 6:9 and 1 Tim 1:10 (which proscribe only male homosexual intercourse) that Paul did not regard female homoerotic relations as morally repugnant.

<sup>32</sup> This might reduce the penalty for lesbian behavior but it would hardly lead to its approval. One can imagine a lot of sexual activity short of penetration and/or the ejaculation of semen that H does not proscribe as a capital offense but undoubtedly would have regarded as sin. What would have been H’s response to a man who stripped a neighbor’s wife of all her clothes and fondled her but did not penetrate her or ejaculate semen? Such an act would have stopped short of a strict violation of “giving/using your lying (as an occasion) for (emitting) seed” (the literal meaning of the prohibition in Lev 18:20, which Milgrom understands as “You shall not use your penis for sex”). Perhaps it would have merited a punishment less than the death penalty. In any case, it is hard to believe that it would have been tolerated, let alone endorsed. The same undoubtedly would have applied to erotic contact with animals or with near kin short of penetration/ejaculation.



society (it goes unmentioned in other legal materials from the ancient Near East);<sup>33</sup> the fact that lesbian eroticism posed little threat to Israelite family structures or determination of paternity; and a male-biased premium placed on the loss of manly honor by men but not so much on the acquisition of manly honor by women.<sup>34</sup> In the end what we do know is that Paul in Rom 1:26, *The Sentences of Pseudo-Phocylides* 192, and some rabbis<sup>35</sup> expanded the prohibitions in Leviticus to forbid lesbian intercourse explicitly. We also know that Jesus expanded the definition of forbidden sexual intercourse to include the interior lust of one's heart toward another, thereby making concerns about actual penetration or paternity issues non-essential to the proscription.

It is also apparent that neither the adoption of children by homosexual parents nor the current population explosion addresses the fundamental problem that accounts for the ban of male homosexual intercourse. If the lack of progeny is not the main concern of the proscriptions, then adoption by homosexual parents obviously does not answer the objections of Scripture to same-sex male intercourse—to say nothing of the fact that adoption could have been offered as a solution millennia ago and was not.<sup>36</sup> And if male homoerotic intercourse was not indicted for wasting seed on non-procreative sex, of what relevance then can dramatic increases in the globe's population be for the ascertainment of the legitimacy of same-sex intercourse? No more relevance, surely, than for any revisionist interpretation of bestiality.

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<sup>33</sup> The idea of lesbian intercourse presupposes female initiative in sexual intercourse, which is not presupposed in the other laws in 18:6-23. All of the proscriptions are directed at men (the “you” of “you shall not . . .”). The only exception, and that merely in part, is the semi-passive reference to a woman “not standing/appearing before (לֹא־תֵעָמַד לְפָנָי) an animal to lie with it” in 18:23b. The corresponding reference in 20:16 uses a slightly more active verb of “approaching” (לִּפְתֹּקֶיךָ אֵל).

<sup>34</sup> This last reason is emphasized by, among others, Nissinen, Bird, and Fewell and Gunn. The problem with it is that it does not explain why in the Greek and Roman world female homosexuality was often considered more appalling than male homosexuality—precisely because of the challenge it posed to male supremacy.

<sup>35</sup> Some rabbis did regard female homoeroticism as a significantly lesser offense than male homosexual intercourse, perhaps in part due to the absence of the subject in Mosaic law (*b. Nid.* 13b; *b. Yebam.* 76a and *Sabb.* 65a, b). See my *The Bible and Homosexual Practice*, 143-44; and Daniel Boyarin, “Are There Any Jews in ‘The History of Sexuality’?” *Journal of the History of Sexuality* 5 (1994): 336-40, 345-47; Michael L. Satlow, “‘They Abused Him Like a Woman’: Homoeroticism, Gender Blurring, and the Rabbis in Late Antiquity,” *Journal of the History of Sexuality* 5 (1994): 1-25; Brooten, *Love Between Women*, 66-70.

<sup>36</sup> Milgrom deals with this last problem by asserting that “ancient Israel did not practice adoption (. . . the alleged cases of Est 2:7; Ezra 10:44 . . . reflect foreign practice)” (*Leviticus 17-22*, 1568-69). Is the allegation that some biblical cases of adoption “reflect foreign practice” really relevant? They nevertheless remain “biblical.” Moreover, the fact remains that when adoption became a larger part of Jewish life, the proscriptions against homosexual intercourse continued to be maintained absolutely. Milgrom's conclusion is also at odds with the same Frederick Knobloch to whom Milgrom appeals in support. “Although adoption was practiced in ancient Israel, it is impossible to say to what extent this was true. . . . The silence of biblical law collections may simply reflect their selective and incomplete nature; compare the haphazard notice adoption receives in the Mesopotamian collections. Since adoption was, it seems, of little theological interest (except as a metaphor), there was no particular reason to mention it” (“Adoption,” *ABD* 1:79; emphasis added). Later, in an appendix, Milgrom admits to there being at least “isolated cases of a kind of pseudo-adoption in the Bible” (e.g., Gen 15:2; 30:3) but does not draw out the implications of that concession (*Leviticus 17-22*, 1787).

## II. Prohibiting Only *Incestuous* Homosexual Unions?

Given the problems I have enumerated above with the view that H proscribed male homosexual intercourse because it wasted semen in non-procreative sexual acts, it is not surprising that Milgrom seeks to limit the proscription to only certain types of male homosexual relations. He does so by claiming that “the homosexual prohibition does not cover all male-male liaisons, but only those within the limited circle of family. But homosexual relations with unrelated males are neither prohibited nor penalized.”<sup>37</sup> He cites the following as the reason for making this claim: the idiom *מִשְׁכְּבֵי אִשָּׁה*, “lyings down of a woman,” which appears in Lev 18:22 and 20:13 is used elsewhere “for only *illicit* heterosexual unions.” There are two things surprising about this second part of Milgrom’s strategy to limit severely the relevance of the Levitical proscriptions for contemporary discussion. First, Milgrom makes no attempt to integrate this point with his other conclusion that “lack of progeny” or “the wasting of seed” is the key reason for the proscription. I will say more about this below. Second, it is surprising that Milgrom, whose observations on the text of Leviticus are normally restrained and sensible, would posit such an odd and, on the face of it, far-fetched theory. One can only wonder whether Milgrom felt driven to it because he was “caught between a rock and a hard place”; that is, between a personal reverence for Scripture and a desire for limited acceptance of committed homosexual unions.<sup>38</sup>

I can think of at least nine problems with this argument.

First, his appeal to *מִשְׁכְּבֵי אִשָּׁה* sounds less convincing when one considers two things. (1) Milgrom’s observation applies just to the use of the plural *מִשְׁכְּבֵי* (“lyings down, beds”). As Milgrom acknowledges, the singular *מִשְׁכֵּב* in Num 31:18 refers to *licit* sexual relations. The same applies to the corresponding phrase, *מִשְׁכֵּב וְזָכָר*, “the lying down of a man,” in Num 31:17-18, 35; Judg 21:11-12. (2) Outside of Lev 18:22 and 20:13 the plural occurs elsewhere only in one other text, Gen 49:4: “the lying downs / beds of your father” (*מִשְׁכְּבֵי אָבִיךָ*), referring to Reuben sleeping with Jacob’s concubine Bilhah. Note here that the phrase stands parallel to the singular synonym *צִינְעִי*, “my bed/couch,” suggesting that the plural/singular interchange involves no more than stylistic alternatives. This one rather unconvincing example of a meaningful difference between singular and plural uses is hardly a broad enough sample to give credibility to Milgrom’s contention, especially given the contradictory evidence of the singular use of *מִשְׁכֵּב*. A better explanation is that the phrase, singular and plural, is neutral. It simply refers to the manner in which women, as distinct from men, engage in sexual intercourse. In fact, Milgrom never clarifies why a simple change from the singular (“lying down”) to the plural (“lyings down”) should make such a momentous difference in the reading of the phrase, from a positive expression to a negative one.

<sup>37</sup> Ibid., 1786. See also p. 1569.

<sup>38</sup> Cf. Milgrom’s “personal note”: “I am not for homosexuality, but I am for homosexuals. I grieve for their plight—their pariah status and their discrimination in the workplace and the military. But when the Bible is distorted to make God their enemy, I must speak out to set the record straight” (ibid., 1789-90). In his zeal to “set the record straight,” Milgrom may have allowed his normally acute exegetical sensibilities to be clouded.

Second, Milgrom's reading ignores the plain sense of the proscription's absolute formulation: a man "shall not lie with a male."<sup>39</sup>

Third, Milgrom's reading ignores the fact that the proscription of homosexual intercourse is separated from the listing of incest cases in 18:6-18 by three other sexual offenses. Milgrom himself, in an apparent contradiction to his own argument, states: "The final four sexual prohibitions (menstruation, adultery, *sodomy*, bestiality, vv. 19-20, 22-23) refer to nonrelatives of either party."<sup>40</sup> In other words, none of the other prohibitions listed after the incest laws in 18:6-18 are limited to incestuous relationships—including the one against same-sex male intercourse.

Fourth, how any readers could be expected to pick up the limitation to homosexual incest is hard to explain. And apparently no one did pick it up. We have no evidence in the entire corpus of the Old Testament that *any* types of homosexual relationships, non-incestuous or otherwise, would be acceptable: no laws regulating non-incestuous homosexual relationships, no positive prophetic images, no positive images in poetic material or narrative stories. Nothing. The distinction between incestuous and non-incestuous unions left no trace in the history of Jewish literature, before or after. The rabbis nearly a millennia later speculated that the use of the plural was intended to denote two different kinds of sex acts with a woman, not to distinguish illicit forms of intercourse from licit forms (*b. Sanh.* 54a, 55a; *b. Yeb.* 54b).<sup>41</sup> Apparently, on Milgrom's reading, for two-and-a-half millennia or more every subsequent interpreter, not only of homosexual relations in general but also of the Levitical prohibitions in particular, among Jews and Christians alike, somehow missed the point.<sup>42</sup> How likely is that?

Fifth, Deut 22:5 expresses great consternation at cross-dressing as an "abomination"—is this too only about incestuous cross dressing? Or is there a deeper concern about preserving distinctions in male-female sexuality? Obviously the latter.

Sixth, Deuteronomic law detests both male (homosexual) and female (heterosexual) cult prostitutes but it reserves the derogatory label "dogs" for male homosexual cult prostitutes (Deut 23:17-18). Why the exceptional revulsion? Parallels in Assyrian literature applied the same term to the *assinnus* and other cult functionaries not because

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<sup>39</sup> It is ironic that Milgrom in a recent article faults a critic of his, Hyam Maccoby, for invoking the principle of ellipsis. "Maccoby avers that whenever the text speaks of the pollution of the sanctuary it takes for granted that the perpetrator entered it. Thus the sanctuary is never polluted miasmatically, from afar. Ellipsis, however, is a dangerous principle. It can prove anything" ("Impurity Is Miasma: A Response to Hyam Maccoby," *JBL* 119 [2000]: 729). To be sure, Milgrom acknowledges that "ellipses can be found in P" (*ibid.*). Yet appeal to ellipsis requires great caution, with the ellipsis being "either derivable from the text or . . . fleshed out elsewhere" (*ibid.*, 730). The notion that Lev 18:22 and 20:13 distinguish between incestuous and non-incestuous homosexual intercourse is neither derivable from these texts nor fleshed out elsewhere, notwithstanding Milgrom's dubious appeal to the plural מְשַׁכְּבֵי.

<sup>40</sup> *Ibid.*, 1549 (emphasis added).

<sup>41</sup> These texts are referred to in: Saul M. Olyan, "'And with a Male You Shall Not Lie the Lying Down of a Woman': On the Meaning and Significance of Leviticus 18:22 and 20:13," *Journal of the History of Sexuality* 5 (1994): 183-84 n. 9.

<sup>42</sup> And a certain David Stewart's dissertation proposal that Milgrom obliquely mentions.

the latter sought male intercourse within the family but rather because their “masculinity was changed into femininity.”<sup>43</sup>

Seventh, are we to believe that the creation stories in Gen 1-2, which justify sexual intercourse only between males and females, somehow have room for non-incestuous homosexual relationships?<sup>44</sup>

Eighth, Milgrom has to argue that Ezekiel was unaware of the Levitical prohibition of homosexual intercourse and that the stories of Ham, Sodom, and the Levite at Gibeah, as well as the references to homosexual male cult prostitutes, had nothing to do with the narrator’s disgust for the inherent typological feminization of penetrated males<sup>45</sup>—all of which are implausible views.<sup>46</sup>

Ninth, Milgrom’s theory stands in tension with his own proposal that what is at issue in the Levitical proscriptions of homosexual intercourse is the “lack of progeny.” It is a strange argument. According to Milgrom, the problem with incest is that it results in

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<sup>43</sup> See *The Bible and Homosexual Practice*, 48-49; Nissinen, *Homoeroticism in the Biblical World*, 28-34.

<sup>44</sup> See my discussion of the relevance of the creation texts in: *The Bible and Homosexual Practice*, 56-62; but especially in “Does the Bible Regard Same-Sex Intercourse as Intrinsically Sinful?” in *Christian Sexuality* (ed. R. Saltzman; Minneapolis: Kirk House, 2003), 111-26, and “The Old Testament and Homosexuality: A Critical Review of the Case Made by Phyllis Bird,” *ZAW* (forthcoming).

<sup>45</sup> *Leviticus 17-22*, 1788-90.

<sup>46</sup> As regards Ezekiel’s awareness of the Levitical proscription: Ezekiel 16:49-50 states that one of the sins of Sodom was that she “committed an abomination before me and I removed them when I saw it.” Most interpreters have argued that the reference to “abomination” (הוֹרְעָבָה) is a collective singular for the previously described offenses of “pride” and failure to “take hold of the hand of the poor and needy.” This is not likely. Ezekiel 18:10-13 concludes a list of offenses with the words “he committed all these abominations.” One of the eight elements in the list, occurring in the seventh position, is “he commits an abomination.” This offense is distinguished from “oppresses the poor and needy” (the third element on the list), making it unlikely that “abomination” in Ezek 16:49-50 is to be identified with the preceding mention of the failure to help the poor and needy. The interchange of the singular and plural uses of הוֹרְעָבָה is precisely what we find in Lev 18:20 and 18:26-30, where the singular occurrence refers to homosexual intercourse. Most likely, then, “abomination” in Ezek 16:49-50 is employed as a metonym for an act regarded as so heinous that it was described by oblique reference (we see a similar obliqueness in the story of Ham and in the Levite’s recounting of the mob’s actions in Judg 20:5). That this is the correct interpretation is confirmed by several other considerations. (1) The lists of evil actions in Ezek 18:5-18 bears strong linguistic and thematic echoes with the Holiness Code (most scholars see some sort of relationship between Ezekiel and the laws found in the Holiness Code). (2) The phrase in Lev 20:13 is nearly an exact match with Ezek 18:12: “they committed an abomination.” (3) The two other singular uses of הוֹרְעָבָה in Ezekiel (22:11; 33:26), like all the occurrences of הוֹרְעָבָה in Leviticus (singular and plural), refer to sexual sins as well. What this means is that the earliest extensive commentary that we have on the Sodom episode (apart from, perhaps, the Deuteronomistic story of the Levite at Gibeah) appears to have interpreted one of the major offenses of Sodom in the light of a broad legal prohibition against homosexual intercourse, drawn either from the Holiness Code itself or a precursor tradition. This broad prohibition is not restricted to instances of homosexual rape. And, of course, the Sodom story has nothing to do with incestuous homosexual intercourse. See further *The Bible and Homosexual Practice*, 79-85. As regards the stories of Ham, Sodom, and the Levite at Gibeah, as well as the references to homosexual male cult prostitutes, see *ibid.*, 63-78, 91-110; and now also: Robert A. J. Gagnon and Dan O. Via, *Homosexuality and the Bible: Two Views* (Minneapolis: Fortress, 2003), 56-62.

“illicit progeny.”<sup>47</sup> Homosexual intercourse *per se* is not wrong but only incestuous homosexual intercourse, on analogy with heterosexual relationships. But if *heterosexual* incest is wrong because it produces “illicit progeny” why should incestuous *homosexual* intercourse be wrong? After all, it does not produce “illicit progeny.” Put differently, if homosexual intercourse is wrong only when it is incestuous, and incest is only wrong because it produces illicit progeny, *but* incestuous homosexual practice does not produce *any* progeny, then why is homosexual practice wrong only when conducted in the context of an incestuous union but otherwise acceptable? The whole argument is convoluted.

In short, Milgrom’s novel suggestion that Lev 18:22 and 20:13 were outlawing only incestuous acts of male homoerotic intercourse must be viewed as completely untenable. The ban on male homosexual intercourse was absolute and total. The reason for the ban was that same-sex relationships mixed two non-complementary sexual sames in violation of creation structures.

### III. Morally Irrelevant for Gentiles Not Living in Israel and Women?

There is one final argument that Milgrom develops to limit the relevance of the Levitical proscriptions of homosexual intercourse for the contemporary debate about homosexual behavior:

This biblical prohibition [Lev 18:22] is addressed only to Israel. Compliance with this law is a condition for residing in the Holy Land, but not elsewhere (see the closing exhortation, vv. 24-30). Thus it is incorrect to apply this prohibition on a universal scale.

. . . Thus from the Bible we can infer the following: Presumably, half of the world’s population, lesbians, are not mentioned. Over ninety-nine percent of the gays, namely non-Jews, are not addressed. This leaves the small number of Jewish gays subject to this prohibition.

. . . In this theology [of the holy land], all those who live in God’s extended Temple, the holy land, are accountable to a higher moral and ritual standard.

. . . In . . . Lev 18, Israel is enjoined “You shall not imitate the practices of the land of Egypt where you dwelt, or of the land of Canaan to which I am taking you” (v. 3). If it were incumbent on all nations to observe these sexual prohibitions, . . . one would have to conclude that the Egyptians would be just as culpable for the violation of these laws as the Canaanites. . . . But not once do [the prophets] condemn [Egypt] for their sexual deviations. Ezekiel, for example, is familiar with . . . the last chapters of Leviticus, including chap. 18. . . . but in the four lengthy chapters describing their crimes and forthcoming punishment (chaps. 29-32), not once does he mention any of the several violations of Lev 18, let alone homosexuality. The conclusion is obvious: since the Egyptians do not live in the holy land, their sexual aberrations are not sins against God and, hence, not subject to divine sanctions.

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<sup>47</sup> Ibid., 1567.

. . . The ban on homosexuality is limited to male Jews and inhabitants of the holy land.<sup>48</sup>

In Milgrom's thinking, the Levitical proscriptions of male homosexual intercourse do not apply to lesbians or to Gentile males living outside the Holy Land. I see at least five problems with Milgrom's argument.

First, once it is recognized that the Levitical prohibitions of male homosexual intercourse are based in the first instance on the complementary sexuality of males and females grounded in creation structures, two further conclusions fall into place. (1) The reasoning behind why the framers of Lev 18:22 and 20:13 treated male-male intercourse as abhorrent to God had little to do with venue. That is to say, such intercourse was not regarded by the authors of the Holiness Code as an "abomination," "an abhorrent thing," or "something detestable, loathsome, utterly repugnant, disgusting" because it was committed in the land of Israel but foremost because it ran counter to God's own design in creation. As such, an attempt to draw a hard-and-fast distinction between Gentiles outside and Gentiles within the land of Israel becomes problematic. The Levitical proscriptions suggest that God abhors male homoerotic behavior regardless of where it is done. The relative insignificance of the venue is also clear from the fact that Jews in exile felt themselves to be equally bound by these sexual standards (e.g., Ezek 18; 33:10-20), even if civil penalties were not or could not be implemented (as Milgrom himself seems to acknowledge). (2) One cannot assume that the omission of any mention of lesbian intercourse was due to the fact that Israelites accepted such semen-less relations. Rather, it becomes more likely that a proscription of lesbian intercourse is to be inferred, or at least that one does greater theological justice to the spirit behind the letter of the Levitical proscriptions by inferring such a proscription (though perhaps one of lesser severity).

Second, an examination of the closest analogues raises problems for Milgrom's views. For example, what sense would it make to state: "The ban on adultery is limited to male Jews and inhabitants of the holy land." Or: "The biblical prohibitions against incest are addressed only to Israel. It is incorrect to apply these prohibitions on a universal scale." Or: "Over ninety-nine percent of those who engage in bestiality, namely non-Jews, are not addressed. This leaves the small number of Jewish participants in bestiality subject to this prohibition."

Third, it is unclear what Milgrom means by using such expressions as "the ban is limited to," "is addressed only to," "leaves only Jews subject to." If he means only that the death penalty should not be enforced on non-Jews in our own day he will get little counter-argument—though it is questionable whether H's distinctive theology of the Holy Land had anything to do with an alleged intensification of the civil penalty to a capital crime.<sup>49</sup> It goes without saying that the penalty of being "vomited out" of the

<sup>48</sup> The quotes are from *ibid.*, 1786, 1787, 1788, 1788, 1790.

<sup>49</sup> The imposition of the death penalty against some of the sexual offenses listed in Lev 20 coincides with the same penalty found in other Israelite law codes that do not necessarily share H's decision to extend spatial holiness to the land of Israel. This is true of adultery (Deut 22:20-24; Ezek 23:45-47; cf. Exod 20:14; Deut 5:18) and bestiality (Exod 22:19; cf. Deut 27:21). Child sacrifice in the "Molech" cult is cited

Holy Land (Lev 18:28; 20:22) could only be applied to those dwelling in the Holy Land. But what of capital punishment? The institution of capital punishment obviously requires the existence of Israel as a theocratic state. Yet Milgrom does not seem to mean by “addressed to,” “limited to,” “subject to” the enforcement of capital punishment since he himself does not recommend capital punishment for Jewish males or Israel-residing Gentile males who engage in homosexual intercourse. Nor does anyone else recommend this to my knowledge.

When Jews and Christians appeal to the Levitical proscriptions as a basis for forming moral judgments about same-sex intercourse, they have in mind not so much the imposition of civil criminal sanctions as the praxis of their religious communities and the question of whether the macrosociety they inhabit as voting citizens should provide cultural incentives or disincentives for such behavior. Jews and Christians routinely take stances in religious and public sectors against forms of behavior they find incompatible with their religious and moral beliefs; for example, in the sexual sphere, against adultery, incest (even adult consensual incest), bestiality, polygamy, adult-child sex, and prostitution. Why should the issue of homosexual intercourse be any different? In non-sexual spheres they allow their religious convictions to inform their opposition to the economic exploitation of the poor and the environmental rape of the planet. Is Milgrom advocating that the Levitical proscriptions against various forms of sexual and non-sexual misbehavior should have no bearing on the formation of moral judgments for non-Jewish communities? Granted, there should be a critical appropriation of these rules as moral guides. That is different, though, from what Milgrom is suggesting; namely, that the laws in Lev 18 and 20 (and how about those in Lev 19?) are irrelevant to the way in which the behavior of non-Jews is assessed by Jews.

Milgrom advocates supporting adoption rights for homosexual couples. Here Milgrom is advocating an action that not only withdraws criminal sanctions from homosexual behavior but also provides cultural endorsement and supports. Would Milgrom also want to support adoption for infertile or birth-control-practicing adult incestuous unions, just to be consistent? It is hard to see how a recommendation of homosexual adoption rights reflects the spirit of the Levitical prohibitions—all the more so since it is evident that a lack of progeny is not the main problem with homosexual behavior. It is equally hard to see how recommending that society withhold the recognition of same-sex unions as the

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as grounds for expulsion of the Canaanites from the land (and, by implication, Israel’s expulsion if Israel should repeat the practice) and is described as an utterly “abominable” practice (Deut 12:31; 18:10, 12; 2 Kgs 3:27; 16:3; 17:17; 21:6; 23:10, 24; Jer 7:31; 19:5; 32:35; Ezek 23:32-35). Participants in various kinds of incest are cursed in Deut 27:20-23 (cf. 22:30). The only sexual act that appears not to have been regarded as a serious offense in other legal codes is the prohibition against sex with a menstruating woman. Lev 15:24 speaks only of the man being unclean seven days (cf. the conflicting discussion by Milgrom in *Leviticus 1-16*, 940 and *Leviticus 17-22*, 1550). The extreme repugnance for male homosexual intercourse exhibited by both the Yahwist and the Deuteronomistic Historian, the absence of any favorable or even neutral mention of same-sex intercourse throughout the Hebrew Bible, and the extreme repugnance for it as manifested in early Judaism and Christianity make amply clear that the severity of the Levitical proscriptions of male homosexual intercourse was not radically discontinuous with other developments in Israel, if indeed discontinuous at all.

functional equivalent of marriage fails to utilize these proscriptions in an appropriate fashion.

Fourth, Milgrom's contention that "the sexual aberrations [of Gentiles not residing in the Holy Land] are not sins against God" is overstated. Most of the oracles against the nations, including the one against Egypt in Ezek 29-32, make no pretense of listing all the sins for which the nations will be held accountable.<sup>50</sup> Indeed, usually the basis for judgment is simply that such-and-such nation had a hand in Israel's destruction. Occasionally one finds reference to the shedding of blood among a nation's own inhabitants (e.g., cf. Isa 24:5 with Num 35:33; also, Gen 9:5-6). However, many other egregious misbehaviors—most of which Milgrom would probably want to discourage in the countries outside of Israel, including theft, false witness, and economic exploitation—generally go unmentioned. This does not prove that theft, false witness, and economic exploitation of a country's own citizens is not a "sin against God." When Lev 18:2 enjoins the Israelites not to "do as they do in the land of Egypt," namely, not to commit various "abominable practices," is the inference not clear that these practices are abominable to God, regardless of whether they are committed by Egyptians in Egypt, Canaanites in Canaan, Israelites in the wilderness, or Israelites in Canaan? Amos 9:7-8 suggests that God destroys the "sinful kingdoms" of the earth for essentially the same reason that God destroys Israel—"except that I will not utterly destroy the house of Jacob" (cf. Pss 8; 11:4-7; 14; 33:13-17; 76:8-9; 94; 96). And what should we make of Israel's role as a "light to the nations" (Isa 42:6; 49:6; 51:4; 60:3)? Did exilic and post-exilic Israel not come increasingly to the view, at least in some sectors, that it had a moral responsibility to enlighten the religious and moral sensibilities of Gentile nations? Texts that speak of the *torah*/teaching of Israel going out to the nations or the nations streaming to Jerusalem to receive it (e.g., Isa 2:1-4; 45:22-23; 51:4-8; 60:1-3; Joel 3:9-10; Mic 4:1-4) underscore the role of Israel in educating others to take the path that leads to life and to avoid roads that lead to death. God's identity as Creator, the making of humans in God's image, and the hope of the coming of God's kingdom over the whole world likewise mandate such a mission. The promise to Abraham that "in you all the families of the earth shall be blessed" can be interpreted in part along similar lines (Gen 12:3; 18:18; 22:18; 26:4; 28:14). The Book of Jonah is a monument to God's concern for the repentance of the nations. The sexual laws in Lev 18 and 20, like those in Lev 19 and elsewhere, were designed to promote the well being of the Jews in Israel. They are not irrelevant for the promotion of the well being of Gentiles. No diaspora Jew in the ancient world who was intent on living righteously would have promoted to his Gentile neighbors the behaviors proscribed in Lev 18-20.

Fifth, in the Second Temple period and beyond, Jews and Christians certainly regarded Lev 18:22; 20:13 as binding outside the boundaries of Palestine. Philo, Josephus, and other Jews criticized the sexual mores of Gentiles, especially the pursuit of

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<sup>50</sup> In Ezek 29-32 God punishes Egypt for the arrogance of its Pharaoh (who attributes his good fortune and power solely to his own doing), for Egypt's failure to aid Israel militarily, for the country's reliance on idols, and for the terror Egypt spread "in the land of the living." That's it. Should we conclude from this that no other behaviors committed by any Egyptians were offensive sins in God's sight?



passions for members of the same sex.<sup>51</sup> By the early third century C.E. rabbis generally identified at least seven “Noahide” commandments,<sup>52</sup> one of which had to do with “the uncovering of nakedness,” a reference to forms of sexual intercourse forbidden by Torah in Lev 18 (*t. ‘Abod. Zar.* 8:4; *b. Sanh.* 56a-b). According to *b. Sanh.* 58a, sexual intercourse between males was included in the prohibition against sexual immorality. The “Apostolic Decree” cited in Acts 15:20, 29; 21:25 required that Gentiles abstain from πορνεία. That πορνεία would have included same-sex intercourse is evident from the fact that all of the other prohibitions of the Apostolic Decree derive from the laws of Lev 17-18, among the few laws in the Hebrew Bible expressly enjoined even on resident aliens (Lev 17:8-10, 12-13, 15; 18:26).<sup>53</sup> The Book of Revelation, whose author John of Patmos was certainly steeped in Jewish tradition and values, presents the great eschatological judgment of the nations as a referendum on Gentile morality, including “abominable” sexual practices (21:8, 27; 22:15). Paul in Rom 1:18-32 could speak of God’s wrath, both present and coming, upon Gentiles for their deliberate sinning against their knowledge of the truth, particularly their commission of idolatry and same-sex intercourse. Milgrom argues that such developments as the Noahide laws were “a later interpretation, not the plain meaning of the biblical text.”<sup>54</sup> In light of the discussion in point four above, these developments would appear to reflect accurately the spirit of the biblical text, or at least one trajectory of it.

#### IV. Conclusion

In conclusion, Milgrom’s three strategies for effectively eliminating the relevance of the Levitical proscriptions of homosexual intercourse must be judged as fatally flawed. First, it is not true that “the legal reason for interdicting [male] anal intercourse . . . is the waste, the nonproductive spilling, of seed.”<sup>55</sup> Rather, male homosexual intercourse is proscribed because, in opposition to divinely ordained creation structures, it attempts the merger of two discomplementary sexual sexes. In so doing, it compromises the gender identity of the participants, particularly of the male who is lain with as though a woman. Second, Lev 18:22 and 20:13 are not prohibiting only incestuous male homosexual unions—a thesis which, in any case, stands at odds with Milgrom’s first thesis about lack of progeny. Rather, the prohibitions were intended as the broadest possible indictment of

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<sup>51</sup> Jews “emphasized those aspects of Jewish law which were likely to get a sympathetic hearing from enlightened Gentiles—chiefly monotheism and the prohibition of idolatry, and various sexual laws such as the prohibition of homosexuality. . . . No sin is denounced more frequently in Jewish writings than homosexuality” (John J. Collins, *Between Athens and Jerusalem: Jewish Identity in the Hellenistic Diaspora* [New York: Crossroad, 1986], 142-43).

<sup>52</sup> Antecedents for this development appear much earlier. For example: In *Jub.* 7:20-21 (c. 150 B.C.E.) Noah is said to have commanded his descendants to “do justice and cover the shame of their flesh (= avoid incest) and bless the one who created them and honor father and mother, and each love his neighbor and preserve themselves from πορνεία and pollution and from all injustice.” *Sibylline Oracle* 4:24-34 (c. 80 C.E.) pronounces “happy” “those of humankind on earth” who worship the true God and reject idolatry, “commit no wicked murder, nor deal in dishonest gain. Neither have they disgraceful desire for another’s spouse (= adultery) or for hateful and repulsive abuse of a male (= homosexual intercourse).”

<sup>53</sup> See *The Bible and Homosexual Practice*, 159-83, 436-38, 468.

<sup>54</sup> “Does the Bible Prohibit Homosexuality?,” 11.

<sup>55</sup> *Leviticus* 17-22, 1568.

male homosexual intercourse and, by inference, female homosexual intercourse. In terms of their comprehensive scope and severity, there are no comparable analogues anywhere else in the ancient Near East. Third, it is misleading to claim that these prohibitions should not be applied “on a universal scale” beyond male Jews, or that the commission of homosexual intercourse by Gentiles outside the Holy Land does not count as a sin against God. While the civil penalty of capital punishment is obviously and rightly bound to the existence of Israel as a theocratic state, the clear implication of these proscriptions is that God detests male homosexual intercourse and holds culpable at some level those who commit it, irrespective of *where* it is committed, whether the Holy Land or elsewhere, and *who* commits it, whether Jews or Gentiles.

Milgrom’s multi-volume commentary on Leviticus ranks as one of the finest commentaries on that text ever produced, probably the finest. But it should receive that rating in spite of Milgrom’s interpretation of Lev 18:22 and 20:13.