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THE DISPUTE BETWEEN RAMBAM AND RAMBAN ABOUT HARCHAKOT NIDDAH

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Negative Commandment #353 in Maimonides' Book of Commandments prohibits hugging, kissing, and similar activities between men and women who are Biblically forbidden to have sex with each other, including couples where the woman is *niddah*. This prohibition is derived by Sifra (midrash Halakhah to Vayikra) as follows:

- Vayikra 20:18 declares that *niddah*-sex leads to the punishment of *karet* for both men and women.
- Vayikra 18:19 formulates the prohibition as *lo tikrav legalot ervatab*. "*Lo tikrav*" literally means "do not draw near." This mandates *harchakot* (distancings) beyond avoiding intercourse, although the punishment of *karet* applies only to intercourse.
- Vayikra 18:6 formulates a general prohibition against incest as *lo tikrevu legalot ervatab*. The prohibitions of *harchakot* therefore apply to all such relationships as well.

However, Sifra does not obviously support Maimonides' conceptualization of all Biblical *harchakot* as a single mitzvah applying to both incest and *niddah*, and perhaps adultery. Rather, *harchakot* for incest and *niddah* are derived independently.

Nachmanides disagrees with Maimonides and holds that *harchakot* are not an independent *mitzvah*. He also rejects Sifra's derivation of the prohibitions, arguing that the verb *kry* is often a euphemism for intercourse. He offers two alternatives. The first is that *harchakot* are Rabbinically rather than Biblically prohibited. The second is that they are Biblically prohibited, but do not constitute an independent mitzvah. Rather, *harchakot* are subsumed into the individual prohibitions against intercourse.

Nachmanides explains the second option via analogy. Many prohibitions are punishable only if the violation exceeds a threshold *shiur*/measurement. However, Rabbi Yochanan held that violations falling below that threshold are still Biblically prohibited "because they can be combined." For example, the *shiur* for eating forbidden foods is generally an olive-size, but eating less than an

olive-size of pork (*chatzi shiur*) remains Biblically prohibited according to Rabbi Yochanan. Nachmanides suggests that hugging, kissing, etc. are parallel to *chatzi shiur* violations:

דכל דמתהני מאיסורא - איסורא הוא

כענין בחצי שיעור

Because everything that derives benefit from prohibition – is itself prohibited

in the manner of violations below the threshold shiur

How seriously should we take this analogy? Conceptual halakhists generally distinguish between *chatzi shiur*, where the prohibited action is done to an undersize object, and *chatzi ma'aseh*, where the action itself is incomplete. For example, Rabbi Yochanan conceded that carrying an object less than 4 cubits in a public domain on Shabbat is not Biblically prohibited. Surely hugging, kissing, and even mixed dancing are more like a *chatzi ma'aseh* of intercourse than a *chatzi shiur*! So what does Nachmanides gain by introducing the analogy? (Note also that there is also much discussion of whether *chatzi shiur* is an independent generic prohibition or rather an internal aspect of all other prohibitions.)

I suggest the following. Yoma 74a says that Rabbi Yochanan's rationale for prohibition is

כיון דחצי לאיצטרופי

since it can be combined

The classic conceptual question is whether this means that *chatzi shiur* is prohibited **lest** one continue on to a full-*shiur* violation, or rather that the existence of the full-*shiur* prohibition demonstrates that G-d objects to the performance of this action with this object (and if, e.g., one ate 1.5 olive-sizes of pork, the prohibition would relate equally to each molecule). By staking his rationale on "deriving benefit," Nachmanides makes clear that his analogy is to the second understanding of the prohibition against *chatzi shiur*. In other words, he views *harchakot* not as preventive measures, but rather as activities that are wrong in and of themselves.

This position has potentially radical implications. If *barchakot* are preventive, then plausibly in circumstances where there is no risk of a slippery slope, they can be permitted. But such circumstances are irrelevant if *barchakot* are intrinsically prohibited.

However, Nachmanides offers this analogy in support of the possibility that *barchakot* are Biblically forbidden but not a separate mitzvah. The bulk of his discussion assumes that they are Rabbinically forbidden.

Moreover, Nachmanides argues that Rabbinic prohibitions allow more room for subjective considerations. He cites a number of Talmudic stories which endorse great rabbis' physical interactions with female relatives on the grounds of purely innocent intent. "If this were an absolute Biblical prohibition, it would not be permitted to pious sages to act this way even when doing so for the sake of Heaven. Rather, everything is a fence and a barrier, and permitted with relatives to men who have an established reputation of being above suspicion in these matters and who avoid such behavior with other women."

How can Nachmanides reject Sifra out of hand? He contends that all Talmudic positions reject it. On Shabbat 13a and Avodah Zarah 17a, the Amora Rabbi Pdat is cited as saying

לא אסרה תורה אלא קורבה של גלוי עריות בלבד

The Torah forbade nothing but the kurvah of actual intercourse

This directly contradicts Sifra's notion that the verb *ker* extends the prohibitions beyond intercourse. However, in each case Rabbi Pdat's statement is introduced with the term **ופליגא**, meaning that it disagrees with what came before. Perhaps what came before agreed with Sifra! Nachmanides responds that no, what came before argued for a Rabbinic prohibition of a specific behavior, and Rabbi Pdat argued that such behavior was entirely permitted.

This seems difficult to fit with Rabbi Pdat's language. Even if we agree that **לא אסרה תורה** does not **necessarily imply** a Rabbinic prohibition, how can it be read as rejecting such a prohibition? Nachmanides argues that in context it can be, as follows:

The sugya on Shabbat 13a opens with a query: Is it permitted for a husband and wife to share a bed while she is *niddah* if both remain clothed? Nachmanides explains that the question assumes that despite the clothing, they will touch each other and feel each other's body heat. In other words, the experience will be erotic.

Rav Yosef argues that such behavior must surely be forbidden as a preventive, just as we prohibit having chicken and cheese on one's table together. But the Talmud rejects this proof, arguing that the husband and wife can serve as checks on each other, and the requirement to be clothed will serve as a reminder that intercourse is prohibited.

The Talmud eventually finds a dispositive proof. An anonymous beraita derives from Yechezkel 18:6 an analogy between the prohibitions of adultery and *niddah*, and concludes: Just as sharing a bed together with both clothed is forbidden to a man with another's wife, so too it is forbidden to a man with his own wife in *niddah*. It is this *beraita* that Rabbi Pdat's statement disagrees with.

Nachmanides argues that the analogy between *niddah* and adultery leads to banning all eroticism, **even if it will not lead to intercourse**. He understands the prohibitions against men deriving erotic pleasure from looking at or listening to another man's wife as intended that way. Rabbi Pdat responds that the **intent of the Torah in the context of *niddah*** is to prevent intercourse only. He therefore rejects the *beraita's* analogy to adultery, and holds that Rabbinic preventions in the context of *niddah* are legitimate only if they tend to prevent intercourse. Furthermore, he holds that when there are "two minds" able to check each other, and there is a *beker*, a change in behavior that serves as a reminder of the prohibition against intercourse, one need not be concerned that intimacy will lead to intercourse.

Nachmanides does not tell us whether he rules like Rav Pdat. Furthermore, he understands Rabbi Pdat as fully agreeing with *barchakot* that might lead to intercourse. His willingness to allow subjective leniencies probably also carries with it stringent implications, for example if an interaction has specific erotic implications for a couple, or a society. For example: Rabbi Pdat would agree that in a society where pajamas are standard, being clothed in bed could not function as a *beker*. Practical halakhah certainly adopts great stringencies in this regard.

Nonetheless, it seems to me that Nachmanides' comprehensive effort to refute Maimonides signifies an endorsement of Rabbi Pdat's underlying principle that *barchakot* in the context of *niddah* are very different than those in the context of adultery. However, practical halakhah appears to have rejected this approach, as many of the *barchakot* we practice seem very distant from concerns that they will lead to intercourse.