“When we had sex, we couldn’t use condoms, because having them around would have been admitting an intent to sin or an expectation of fallibility. For the same reasons, I couldn’t take birth-control pills or use any other form of contraception. To prepare to sin would be worse than to break in a moment of irresistible desire. To acknowledge a pattern of repeatedly breaking, of in fact never failing to break, would have meant acknowledging our powerlessness, admitting we could never act righteously. Our faith trapped us: We needed to believe we could be good more than we needed to protect ourselves. As long as I didn’t take the birth-control pill, I could believe I wouldn’t sin again. His father always pulled out, which works until it doesn’t.”[[1]](#footnote-1)

# ****Introduction****

According to halakhic norms, touch between the sexes outside the context of marriage is prohibited under nearly all circumstances. A person who abides by this norm is referred to as “*shomer negiah*,” literally “one who observes [the prohibition of] touching.” I am often asked where the mandate to be *shomer negiah* is found in the Torah. It isn’t, although the answer is more complicated than that, as will be explained below. This pseudo-halakhic term was coined in the 20th century in the wake of vast changes in society, that included increasingly casual interaction between males and females, and the growing exposure of Orthodox young people to the expectations in secular culture that they be sexually active. Thus, *shomer negiah* became a useful (if somewhat vague) platform meant to encapsulate all that Orthodox Judaism wishes to impart regarding physical interaction between men and women before marriage. It describes a Torah lifestyle that demands abstinence before marriage as an essential tenet of religious morality and commitment to halakhah. While it sends a very clear and concise message, it also tends to shut down any deeper conversation on the topic of sexuality and limit people’s opportunities to receive halakhic information or direction. Rarely is an actual textual source cited when the subject is addressed.

*Shomer negiah*-based education is primarily based on a “carrot” and “stick” model. The carrot represents the untold rewards for “saving” all touch until marriage, guaranteed to automatically infuse sexual experience with a magical quality. The stick signifies halakhic violation and transgression, automatically infusing any infractions with shame and guilt. While this tactic might be educationally effective for young people in middle or high school, it fails to address the complexities that religious adults encounter in the sometimes long years before marriage. A “one size fits all” model cannot address the acute differences in dating environments across different age groups and the sexual choices facing teenagers and young adults compared to older singles and formerly married men and women. Having grown up in the Orthodox world and spent the better part of the last 20 years talking to young adults about religion and sexuality, it is increasingly clear to me that the educational religious responses must be more nuanced to counsel and respond to the diverse situations that emerge at different stages in people’s lives.

My experience in pastoral counseling and sexual education has taught me that many teenagers and adults are struggling to balance sexual attraction, sexual identity, and sexual boundaries with their Orthodox way of life and their commitment to *halakhah*. They want to understand more precisely where the halakhic restrictions come from and what they include. For those who make non-halakhic decisions, the dissonance sometimes leads to religious fallout, with no direction or guidance as to how to conduct themselves once halakhic boundaries are crossed.

While the *shomer negiah* rhetoric conflates all touch into a single prohibition, there are significant halakhic differences between sexual, emotional, and casual types of touch that should be made clear to those in a relationship with the potential for physical contact. In this chapter, the main halakhic points around touch will be presented and interpreted as the basis for a broader discussion regarding modern dating challenges in the religious community.

Much of the chapter is directed at a Modern Orthodox community for whom years of casual dating and/or a long courtship often precede the decision to marry. However, I am increasingly made aware of expectations of pre-marital touch among people dating in the *yeshiva* world, especially previously married men and women. Many complain that it is hard to find sensitive rabbinic authorities willing to acknowledge the realities of what some of them – both men and women – are confronting when they embark on dating particularly for those who remain single for many long years.

There is some awakening in the Modern Orthodox sphere, where male and female rabbinic/halakhic authorities, are offering sympathetic, realistic religious guidance to couples who incorporate emotional and sexual touch in their developing relationships despite the prohibition. The existence of pastoral counselors who are willing and can give guidance in such situations is a welcome and important change. I believe that allowing people the opportunity to openly talk to educators, rabbis, or parents about their sexual behavior will reinforce their commitment to other values in interpersonal relationships, and help avoid dissociative and irresponsible behavior. Most of these couples are not able or willing to completely refrain from physical or sexual interaction.

# Forbidden Touch[[2]](#footnote-2)

## Do Not Come Near

The prohibition of physical touch between unmarried men and women rests on the *niddah* status of women from the onset of their first menstruation. All rabbinic authorities agree that sexual touch is prohibited when the woman is a *niddah*, meaning she has not completed seven clean days after menstruation and immersed in the *mikvah*.[[3]](#footnote-3) However, there is disagreement, in the early rabbinic sources as to whether sexual touch is prohibited on a *d’orayta* (biblical) or a rabbinic level based on the interpretation of the relevant verses in the Torah. The main source for the prohibition is the following verse in Leviticus.

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| Leviticus 18:19  Do not come near a woman during her period of uncleanness to uncover her nakedness. | ויקרא פרק יח  **יט** וְאֶל אִשָּׁה בְּנִדַּת טֻמְאָתָהּ לֹא תִקְרַב לְגַלּוֹת עֶרְוָתָהּ. |

Based on early rabbinic interpretation of this verse, Maimonides prohibited sexual touch as violating *d’orayta* (biblical) law in both *Sefer Hamitzvot* and *Mishneh Torah*. Subsequently, this became the dominant halakhic position and the one that is almost exclusively cited. However, Maimonides writes that to violate the biblical prohibition, two conditions must be met: There must be both intent and/or sexual pleasure derived from the act.

Other early post-Talmudic authorities took issue with Maimonides’ on this subject, the most well-known being Nahmanides who understood that sexually touching a prohibited woman violated a rabbinic prohibition and only the “uncovering of nakedness” (the biblical euphemism for intercourse) violates a biblical commandment. He concluded that sexual touching was rabbinically prohibited, serving as a “fence,” a safeguard against transgressing the biblical law, in order to prevent a situation that might ultimately lead to sexual relations.

The *Shulhan Arukh* codified the prohibition of sexual touch as a *d’orayta* (biblical) prohibition like Maimonides. Rabbi Shabtai Cohen Rapoport, known as the *Shakh* (an acronym of the title of his commentary on the *Shulhan Arukh*, *Siftei Kohen*), in his 17th-century commentary on the *Shulhan Arukh*, indicated that only foreplay that is meant to lead to sexual relations is prohibited by Torah law, i.e. touch without intent for sexual relations is rabbinically prohibited. This does not imply that Nahmanides or the *Shakh* would be casually permissive about sexual touch, but this distinction nevertheless has significant halakhic implications. Emotional touch does not fall into the same “transgressive” category as sexual touch. For couples who are trying to create working boundaries that involve physical connection, this differentiation should be an important one. Toward the end of the chapter, I will present a review of the different categories of touch and their halakhic implications.

## Emotional Touch

Much of the focus in *negiah*-based conversation is around sexual touch and the slippery slope that might lead to sexual relations if any physical interaction is permitted. This is certainly a greater concern today than in the past as secular society today no longer attaches any stigma to non-marital and casual sexual relations. On the contrary, sexual relations before marriage is the norm, and sexual experimentation is regarded as healthy.

Gila Manolson’s popular book, *The Magic Touch,*[[4]](#footnote-4) published in the 1980’s, promoted the notion that refraining from all touch before marriage promises something magical afterward. She reiterated over and over the potency of touch and the ease with which it can be abused, cheapened, or trivialized. The book, primarily directed at an audience of young people in high school and college, aimed to discourage them from using one another for purely physical release, encouraging readers to date and marry young and to avoid sexual experimentation, saving the sanctity of touch for marriage.

Manolson is on point in recognizing that the promiscuity of secular culture puts pressure on young men and women to get swept up in meaningless sexual encounters that can ultimately stunt their ability to develop or form intimacy. The alternative she promotes has been adopted by many men and women who exert enormous efforts to remain steadfastly committed to *halakhah* while dating. They accept that physical intimacy will begin only after marriage. In many cases, this commitment to avoiding sexual impropriety and the inevitable sexual tension that results spurs them more quickly toward marriage.

The halakhic discussion of touch is almost entirely preoccupied with the concern that touch can, and perhaps almost inevitably will, become sexual. The halakhah as it stands does not acknowledge how central emotional touch can be in fostering the growth of a relationship. It plays a role in conveying love, affection, and support and is an important means of communication. It is important to be aware that while abstinence from any form of physical interaction while dating ensures that the men and women doing so do not transgress, this comes at a cost. Moreover, relationships that extend for weeks, months, and sometimes years can be extremely challenging and for some, practically impossible.

The reality of modern relationships, unfortunately, does not always correspond to the ideal presented in *The Magic Touch*. Sometimes the lack of touch represses intimacy, acting as an impediment rather than an impetus to move quickly toward marriage. Manolson also does not address the reality that despite her exhortations, touch is frequently either expected or inevitable as the relationship unfolds. For couples embarking on dating following divorce or the death of a spouse the absolute ban on touch before marriage may raise other difficulties. If their previous sexual relationship was problematic, lack of physical intimacy may act as a significant deterrent to their willingness to commit a second.

# The Halakhic Prohibitions Relating to Non-Marital Sexual Relations

## The Niddah Prohibition and Single Women Using the Mikvah

It did not escape the notice of Jewish men already 700 years ago that if (Jewish) women, even prostitutes, immersed in the *mikvah* after seven clean days, they would no longer be considered *niddah*. Rabbi Isaac ben Sheshet Perfet, known as Rivash, a Spanish Talmudic authority in the 14th century, was asked by the men of his community whether Jewish prostitutes in town should immerse in order to prevent men who used their services from transgressing the laws of *niddah*. Furthermore, they stated, perhaps it would be better for all single women to immerse themselves since it is known that sometimes people transgress. Having single women immerse themselves in a *mikvah* after menstruating would prevent those who had relations with them (and the women from themselves) from receiving *karet*.

In a thunderous response, Rivash unequivocally rejected any such policy. First, he clarified that prostitution is prohibited whether the women are *niddah* or not. Second, he affirmed the practice of unmarried women not going to the *mikvah* as means of protecting the daughters of Israel; if unmarried women are always in a state of *niddah*, the threat of *karet*, he argued, is an important deterrent to sin.

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| שו"ת הריב"ש סימן תכה  שאלת: לבאר לך, מה שכתוב בתורה: ואל אשה בנדת טומאתה, לא תקרב לגלות ערותה. אם נאמר על כל אשה נדה: בין באשתו, בין בפנויה? ואם הוא כן, איך לא הזכירו דבר זה, הרשב"א ז"ל בספר תורת הבית; ולא הראב"ד ז"ל בספר בעלי נפש? כי לפי לשונם, לעולם לא דברו: אלא באשתו של אדם; ואיך מורגל בפי כל אדם: פלונית פנויה מותרת? וחכמים ז"ל, איך הניחו שום קדשה בעולם? כי מסתמא, אינן מטהרות עצמן. ואיך לא תקנו: שום תקון, או שום גדר של טהרה, בפנוי'; כדי שלא יכשלו בה רבים, אחר שהבא עליה ענוש כרת, והנוגע בה באצבע קטנה, חייב מלקות? ואם באשתו בלבד הכתוב מדבר, הוקשה לך לשון הרמב"ם ז"ל, בהרבה מקומות. שנראה מדבריו: שאסור הנדה: בין באשתו בין בפנויה.  תשובה: דבר ברור הוא: שאסור ביאת הנדה; לא באשתו בלבד, אלא: בין באשתו, בין באשת חברו, בין בפנויה... וזה דבר פשוט. ולא נסתפק בו אדם מעולם. והדבור בו מותר. גם הכתוב אמר סתם: ואל אשה בנדת טומאתה. ולא חלק: בין אשתו, לפנויה. שהרי לא אמר: ואל אשתך….  ומה שהוקשה לך: איך חז"ל הניחו שום קדשה בעולם, שהרי אינן מטהרות עצמן. חלילה שחז"ל יניחו קדשה, ויתירוה! ואף אם תהיינה טובלות לנדותן. והכתוב צווח:  לא תהיה קדשה מבנות ישראל... באו ונצווח על דורנו, שאין דומה יפה. וגדולי הדור, העלם יעלימו את עיניהם, פן יכשלו בני פריצי עמנו, בנכריות, ותצא אש, ומצאה קוצים, ונאכל גדיש. והקדשות שהיו בימי חז"ל, שלא ברצון חכמים היו....  ומה שנפלאת: איך לא תקנו טבילה לפנויה, כדי שלא יכשלו בה רבים? ואין כאן מקום תמה! שהרי כיון שהפנויה אסורה, כמש"כ. אדרבה! אם היתה טובלת, היה בה מכשול: שהיו מקילין באסורה; כיון שאין אסורה, אלא מדרבנן. | Responsa Rivash 425 (translation: Dr. Jennie Rosenfeld)  Question: You asked me to explain to you that which is written in the Torah: “And to a menstruating woman do not come near to uncover her nakedness,” is it said about every menstruating woman, be it his wife or be it an unmarried woman? And if so, how was this not mentioned in all the laws of *niddah* discussed in the Rashba in the book *Torat HaBayit* and not by the Raavad in the book *Baalei HaNefesh*? For according to their words, they only talked about married women; and how is that everyone says that an unmarried woman is permitted? And our sages, how did allow any prostitutes to remain in the world as they presumably do not purify themselves? And how did they not make a decree, some corrective or restriction for the purity of single women so that the many not falter as anyone who has relations with her [the umarried woman who has not gone to the *mikvah*] is punished with *karet*, and one who touches the little finger of a *niddah* incurs lashes? And if the Torah was talking only about one’s wife when she is a *niddah*, there is difficulty with the language of the Rambam in many places since it is apparent from his words that the prohibition of a *niddah* applies both to one’s wife and to an unmarried woman.  Responsum: It is clear that the prohibition of relations with a *niddah* is not only with one’s wife; rather, whether she one’s wife, or another’s wife, or an unmarried woman… and this is a simple matter. And no-one ever doubted it. And even speaking about it is unnecessary. The verse also said simply “To a menstruating woman do not come near.” And it made no distinction between one’s wife and an unmarried woman for it did not say “to your wife”…..  And that which you asked: how did our sages allow any prostitutes to remain the world as they do not purify themselves [through immersion]. Heaven forbid that our sages would allow prostitution, and make her permitted! And even if they immersed [to purify themselves] from *niddah*! For the verse proclaims: “There should not be a prostitute from the daughters of Israel.” ….Come let us reprimand our generation which is not behaving properly. And the leaders of our generation hide their eyes [and pretend not to notice the Jewish prostitutes], lest the promiscuous Jewish men falter with non-Jewish women, fire will be ignited, and find brambles and the grain pile will be consumed [i.e., it will lead to even worse consequences]. And the prostitutes that existed in the time of the sages were against their wishes….  And that which you wondered: How did they not establish immersion for the unmarried woman, so that people not falter with her? There is no room for wonder. Since the unmarried woman is prohibited as we explained, it is the opposite! For if she would immerse then she would truly be a stumbling block for then people would be lenient about the prohibition [of pre-marital sex], since the prohibition is only rabbinic [and not an liable for *karet*]… |

It is clear from the responsum that Rivash recognized that if single women were allowed to go to the *mikvah,* it would be easy for people to justify outright promiscuity to themselves. The societal, religious, and halakhic norms of traditional Jewish society in place both before and after the Rivash’s responsum precluded single women from using the *mikvah* andhis position on the matter essentially became the only one that is cited thereafter in *Tur* and *Shulhan Arukh.* By aggressively enforcing a ban on *mikvah* use before marriage, the severity of the threat of *karet* acted (and continues to act) as a deterrent.

Interestingly, the issue of single women using *mikvah* has re-emerged in the last twenty-five years but with a major difference: Instead of men looking to immerse all women as a spiritual insurance policy against *karet*, women are seeking to immerse as a way of rendering their sexual activity more in tune with halakhah. They usually come to the decision to go to the *mikvah* on their own and rarely in consultation with rabbinic authorities.

I have heard a variety of rabbinic opinions on whether single women should immerse in a *mikvah* when they are sexually active. Some feel that at least *karet* is avoided and perhaps their engagement in the ritual raises the chances of their maintaining a level of commitment to observance and to monogamy. Others, like Rivash, think that it is impossible to sanction non-marital relations. Allowing women to immerse would give these relations a veneer of permissibility. These rabbis argue that couples *should* feel guilt over their transgressive behavior.

The practice of single women using the *mikvah* is unique to a halakhically observant, educated demographic. They know they are violating the religious (and halakhic) mandate to remain celibate until marriage but are also aware that the severe biblical prohibition of relations with/while a *niddah* (i.e. liability to receive *karet*) is neutralized by the woman’s immersion in a *mikvah*. This behavior is emblematic of a more relaxed sexual culture combined with these women’s sense of their own agency. As financially independent adults, they regard themselves to be entitled to make their own decisions about their personal life and halakhic behavior. In the opinion of some of the couples, while it is not rabbinically sanctioned, engaging in sexual relations after the woman has immersed in a *mikvah* is still within the bounds of their observant lifestyle.[[5]](#footnote-5) This practice is one of the ways these couples navigate the conflict inherent in the reality of their lived experience as both Orthodox Jews and sexually active singles.

I have encountered observant couples who began using *mikvah* before marriage and continued to do so once married and others who were sexually active but deliberately decided to wait before beginning to use the *mikvah* in order to distinguish non-marital from marital sexual relations, using *mikvah* as a frame for their commitment to a Jewish marriage.

Not surprisingly, this practice is most prevalent in cities where there are large clusters of religious singles; this allows more anonymity around *mikvah* use than in smaller communities (and in the past) when the community could monitor closely who was using the *mikvah*.

## Kadesh/Kadeshah

The question of single women using the *mikvah* comes up mostly for couples in committed relationships. In this section, the halakhic differences between promiscuous and committed non-marital sexual relations will be considered.

Interestingly, there is no outright prohibition in the Torah against engaging in consensual sexual relations when a woman is unmarried. There is however a specific Torah prohibition against sexual promiscuity which can be found in Deuteronomy 23:18.

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| דברים פרק כג פסוק יח  לֹא־תִהְיֶ֥ה קְדֵשָׁ֖ה מִבְּנ֣וֹת יִשְׂרָאֵ֑ל וְלֹֽא־יִהְיֶ֥ה קָדֵ֖שׁ מִבְּנֵ֥י יִשְׂרָאֵֽל: | Deuteronomy 23:18  No Israelite woman shall be a cult prostitute [*kadeshah*], nor shall any Israelite man be a cult prostitute [*kadesh*]. |

Who are the *kadeshah* and the *kadesh* according to the halakhah? It is interesting to note that the words *kadesh* and *kadeshah* come from the Hebrew root *k.d.sh* meaning holy, reflecting the ancient practice of sexual rituals as a form of worship in other religions.[[6]](#footnote-6) Rashi and Rashbam ignore the cultic aspect but disagree regarding who is included in these categories:

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| רש"י דברים פרשת כי תצא פרק כג פסוק יח  לא תהיה קדשה – מופקרת, מקודשת ומזומנת לזנות. | Rashi Deuteronomy 23:18  There shall be no *kadesha* — a woman who is promiscuous, dedicated for harlotry. |
| רשב"ם דברים פרשת כי תצא פרק כג פסוק יח  קדשה - זונה, פנויה מנאפת:  קדש - בא על פנויות בלא כתובה וקידושין ולא מיוחדת לו כפלגשים: | Rashbam Deuteronomy 23:18  *Kadesha* – an unmarried woman who has sexual relations.  *Kadesh* – one who has sex with unmarried women without marriage and *ketubah* or without making them his concubines. |

While Rashi seems to regard the *kadesh/kadesha* to be limited to people who engage in a promiscuous lifestyle, perhaps only those who are professional prostitutes, Rashbam extends the category to anyone who engages in sexual relations outside of marriage. These two positions are explicit in the halakhic dispute between the Rambam and the Raavad:



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| Maimonides, *Hilkhot Ishut* Chapter 1:4  Before the Torah was given, a man would meet a woman in the marketplace and if both he and she desired, he could give her payment, engage in relations with her wherever and then depart. Such a woman is referred to as a harlot.  When the Torah was given, relations with a *kadesha* became forbidden as it is stated, “There shall not be *kadesha* among the daughters of Israel.” Therefore, a person who has sexual relations with a woman for fornication, without matrimony, receives lashes as prescribed by the Torah, because he had relations with a *kadesha*. | רמב"ם הלכות אישות פרק א הלכה ד  קודם מתן תורה היה אדם פוגע אשה בשוק אם רצה הוא והיא נותן לה שכרה ובועל אותה על אם הדרך והולך לו, וזו היא הנקראת קדשה, משנתנה התורה נאסרה הקדשה שנאמר +דברים כ"ג+ לא תהיה קדשה מבנות ישראל, לפיכך כל הבועל אשה לשם זנות בלא קידושין לוקה מן התורה מפני שבעל קדשה. |
| Comment of  she is dedicated [to promiscuity, i.e.]. However,,is there |  |

While Maimonides takes a hard line against all sexual relations outside of marriage, anchoring his position in the prohibition of *kadesha*, the medieval commentator on Maimonides’ Mishneh Torah, Rabbi Abraham son of David known as Raavad, disagrees with this approach since it conflicts with the straightforward meaning of the Biblical passage. He argues that only a promiscuous woman who is available to any man is a *kadesha*. If the woman is monogamous, designating herself to one man, there is no prohibition, even if they are not formally married. He identifies this type of relationship as that of a man with a concubine which he believes is permitted.



This disagreement continues to reverberate in the centuries following Maimonides’ codification of law. One school of interpretation defines all sex outside of marriage as promiscuous. The other school defines only women who engage in multiple non-committed sexual encounters as violating the prohibition of *kadesha*, to the exclusion of a non-marital but monogamous relationship.

Rivash, in the responsum quoted above, cites Maimonides that sex outside of marriage is a biblical prohibition; furthermore, even those who disagree with Maimonides (i.e., Raavad), agree that non-marital relations violate rabbinic law.[[7]](#footnote-10) Nonetheless, the fact that such relations were not liable for *karet* and perhaps not a biblical prohibition at all contributed to the policy of preventing single women from immersing in the *mikvah.* Since unmarried women did not immerse in a *mikvah*, relations with them would be transgressive relations with a *niddah*. The severity of the threat of *karet* acted (and continues to act) as a deterrent for religious couples considering sexual relations.

It is remarkable to note that in the 18th century, Rabbi Jacob Emden sought to reintroduce the institution of the concubine, in response to the sexual immorality of his own day. In a very long responsum, he analyzes many of the sources brought earlier in this chapter and concluded that there is room to permit a man to take a woman as a concubine in order to avoid greater promiscuity. Among other things, he insisted that a couple committing to this non-marital framework observe the laws of *mikvah*, practice monogamy for the duration of the relationship, and act in consultation with a rabbi.

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| She’elat Yaavetz Pt. 2 No. 15 (Translation Rabbi Michael Gold and Nechama Goldman Barash)  I further attest that one who wishes to rely on my instructions should nonetheless not do so unless he consults with a rabbi and a halakhic decisor of his community who will arrange the permitted relationship [ensuring that the woman] is exclusively dedicated to him [in a manner] safeguarded from mishap. That is, to designate a room in his house and warn her from seclusion from all other men. And if he finds that she has transgressed and not been careful [about interactions with other men], he will send her immediately from his house. He should also ensure that she immerses at the proper time and inform her that there is no shame in this at all. And explain to her as well that children who will be born to her from him are fully accepted (*kosher*) as with all those who have proper lineage when she holds up the agreement and remains faithful to this man. However, if she betrays him, then the children are children of promiscuity and she would be violating the prohibition of *kadesha* for every sexual intercourse she engages in, whether with him or any other man. And in this way, if they listen and follow all that was said, then there is no concern for faltering in sin….  And also *talmedei chachamim* (Torah sages) require this even more so, for anyone who is greater than another, his desire is greater [*Sukkah* 52a] and it is appropriate that he has bread in his basket [meaning sexual satiety, *Yoma* 18b] and have children if he has not merited to do so from his wife…as long as a person directs his heart to Heaven…and I have already gone on too long on this topic for those who understand and intuit the matter. It is because “*there is time to act on behalf of the Lord”* [a principle that is invoked to allow for halakhic lenience or even the waiving of a halakhic requirement under emergency circumstances]. | שאלת יעבץ חלק ב מספר 15  עוד אני מעיד במי שרוצ' לסמוך על הוראתי זאת עכ"פ לא יעשה כזאת עד שימלך ברב ומור' צדק לעדתו. שיסדר לו ההתר ע"פ יחוד גמור בטוח ממכשול דהיינו לייחד לה חדר בביתו ולהזהיר' מיחוד כל שאר אדם. ושבאם תמצא שעבר' ולא נזהר'. ישלחנ' מיד מביתו. וכן יצוונ' שתטבול בזמנ' ויודיענ' שאין בזה בושה. כלל. ולבאר לה ג"כ שהבנים שתלד ממנו. כשרים כשאר מיוחסים שבישראל כשתשמור בריתה ותהא נאמנת לאיש הזה. משא"כ אם תזנה עליו. אזי בניה בני זנונים וחייבים עליה משום קדשה על כל ביאה וביאה בין איש זה בין אחרים. ובאופן זה אם ישמעו ויעשו ככל האמור אזי אין אחריות מכשול עון…  וגם ת"ח צריכים לכך ביותר שכל הגדול מחברו יצרו גדול וראוי להיות לו פת בסלו ולקיים זרע אם אינו זוכה לו מאשתו שנפלו בגורלו והכל הולך אחר כוונת הלב. בלבד שיכוין אדם דעתו לשמים. …וכבר הארכתי יותר מדי למבין ומשכיל על דבר. שהוא משום עת לעשות וגו'. |

While Emden’s suggestion was rejected by both rabbis and communities alike, his approach is reflective of an attempt to integrate halakhah into actual lived lives. He felt it better for people to engage in sexual activity that had some degree of religious sanction than in totally forbidden activity they were engaging in anyway. Although such a sexual relationship could not be equated with marital sexuality, at least it infused the sexuality with some form of commitment and meaningful intention. The spirit of his proposal has been adopted by a small percentage of religious couples in committed relationships who use *mikvah* before marriage (mentioned in greater detail in the previous section) and practice monogamy but in contrast to Emden’s required rabbinic direction, it is mostly being carried out outside of the framework of any sort of rabbinic consultation.

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| Following is a summary of different types of touch and their halakhic ramifications as analyzed above:  **Sexual relations**, defined as penetrative sex, (anal or vaginal), carry the greatest degree of halakhic consequence if the woman is *niddah* since the punishment for such relations is *karet*.  If one has relations with an unmarried woman who is not *niddah*, it still violates a biblical transgression of *kadesha* according to Maimonides (as explained above). It would be difficult to find public rabbinic sanction for a committed, monogamous relationship between unmarried people, but there are those throughout halakhic history who have ruled like the Raavad and argued that such a relationship does not violate any explicit prohibitions.  **Sexual touch with sexual intent** with a woman who is *niddah*. This includes all types of sexual touch short of penetration. According to Maimonides, such touch violates a negative prohibition if there is intent to be sexual. According to the school of Nahmanides, all sexual touch violates a rabbinic rather than biblical prohibition.  **Emotional touch**, for instance, a hug, holding hands, sitting or walking arm in arm, falls into a grey area. If it remains non-sexual, according to the more stringent approach of Maimonides, it violates a rabbinic safeguard established to prevent touch from becoming sexual. Thus, even if the emotional touch should unintentionally elicit a sexual sensation, it does not meet the criteria stated by Maimonides or by *Shakh* for intent, and would certainly not violate a biblical prohibition. The extreme caution for this kind of touch is due to rabbinic awareness that the emotional can quickly veer into the sexual at times of heightened emotion or simply because two people are attracted to one another.  **Casual and service-based touch** are not prohibited based on the halakhic criteria analyzed above. Tapping someone on the shoulder or professionally shaking someone’s hand does not violate any halakhic prohibition. Medical professionals are always permitted to treat members of the opposite sex. However, men and women within the Orthodox community often decide to avoid any sort of physical contact, including handshaking, outside of service or medical touch as a religious safeguard and a way of clarifying for themselves and others a strict no-touch policy. |

# Other Aspects of Non-Marital Sexuality

## Expectations of Virginity

There are several other aspects to consider when thinking about non-marital sexuality that are quasi-halakhic and nonetheless prevalent in the discourse in the Modern Orthodox community. Virginity, particularly for women, is a religious expectation that is expressed in the Jewish marriage contract (*ketubah*). Specifically, the halakhah mandates that the minimal *ketubah* of a virgin is twice as much as that of a non-virgin. The language of the *ketubah* of a previously unmarried woman thus refers to the bride as a virgin. One of the educational tactics used in religious education is to tell young women that the public reading of the *ketubah* at her wedding is a declaration of her chastity and if she is not a virgin, the *ketubah* will be adjusted to reflect that. This is more a scare tactic than a true threat since the *ketubah* is a contract between husband and wife and if the husband does not object, the information in it about the woman’s virginity does not have to be factual and her prior sexual experience need not be a matter of public record.[[8]](#footnote-11) Since many young women are ignorant of this *halakhic* reality, the threat of being exposed in the *ketubah* is a real one.

This misconception has also led to situations where religious couples choose to engage in oral and anal sexual relations to preserve the woman’s virginity out of fear that her *ketubah* not be compromised, or because they believe that by refraining from vaginal intercourse they escape the punishment of *karet*, unknowing that also anal intercourse incurs that punishment. They may do so considering the broader questions of mutual pleasure and whether this behavior is preferable. In the last part of this chapter, the question of intentional, consensual decision making around sexual behavior in light of religious education will be addressed.

## Fear of Mamzerut

Young women are sometimes led to believe that if they become pregnant out of wedlock, the child will be stigmatized as *mamzer*, inaccurately translated as ‘bastard,’ which in English does mean a child born out of wedlock. The threat of one’s child being *mamzer* is significant since a child categorized as suchis halakhically permitted to marry only other *mamzers* (or converts) and the children of that marriage will also be *mamzers* with the same strictures, ensuring that the status is forever passed on. However, in *halakhah*, this tragic status is limited to the child of an adulterous or incestuous sexual relationship. The product of a non-marital relationship or of a woman who has sexual relations when *niddah* is not a *mamzer*, and the afore-mentioned fear is unfounded. Nonetheless, the possibility of giving birth to a *mamzer,* since it is vaguely associated with all illicit sexual relations, adds to the stigma around pre-marital sex.

## Masturbation

A man is prohibited from masturbating, especially when that results in ejaculation outside the context of sexual relations with his wife. A man who deliberately stimulates himself for sexual pleasure culminating in ejaculation is described as wasting seed. The primary source material for this prohibition is vague.[[9]](#footnote-12) In some later religious texts, the avoidance of masturbation is called *shmirat habrit,* or guarding the covenant. This is meant to reflect a man’s commitment to his covenant with God as expressed through the central rite of circumcision, symbolizing sexual self-control. It is beyond the scope of this book to present an analysis of those sources.[[10]](#footnote-13) The Zohar’s extreme position, equating masturbation with a transgression worse than all others, has had a tremendous impact on attitudes toward male sexuality and masturbation.

Female masturbation is sparsely mentioned in rabbinic sources. There is a difference of opinion in the Rishonim regarding whether it is permitted but it is not mentioned at all in *Shulhan Arukh*. The majority opinion is that since a woman experiencing sexual pleasure does not involve wasted seed, female masturbation is not prohibited. Nonetheless, there is an air of uncomfortable disapproving silence on the topic, reinforcing the attitude that sexual self-gratification is to be avoided even if not overtly forbidden.

## Unsanctioned Sexual Urges

Stories about unsanctioned and illicit sexual urges appear throughout rabbinic literature. Rarely is a solution offered and often, the protagonist shows heroic discipline in refraining from sin. However, in the text below, an outlet is sanctioned for a man who is overcome by his desire.

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| Tractate Kiddushin 40a  [Rabbi Ilai](file:///C:\\topics\\rabbi-ilai-(ii)) the Elder says: If a person sees that his evil inclination is overcoming him, he should go to a place where he is not known and wear black clothes, and he should cover himself in simple black garments, and he should do as his heart desires, but he should not desecrate the name of Heaven in public. | תלמוד בבלי מסכת קידושין דף מ עמוד א  אמר רבי אלעאי הזקן: אם רואה אדם שיצרו מתגבר עליו, ילך למקום שאין מכירין אותו, וילבש שחורים ויתכסה שחורים ויעשה כמו שלבו חפץ, ואל יחלל שם שמים בפרהסיא. |

In this source, Rabbi Ilai, who seems to be addressing fellow members of the Talmudic academy or possibly even himself, acknowledges the reality of sexual urgency and at times its overwhelming presence in a person’s life. He does not condone it, nor does he demand absolute restraint.[[11]](#footnote-14) Rabbi Ilai presents the lesser of the evils in allowing a person to discretely find a way to surrender to his illicit sexual urges without blatantly and publicly flaunting the religious values and practices of the religious community.

In the next source, despite the risk to a man’s life, the rabbis forbid any outlet for his illicit sexual desire.

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| סנהדרין עה.  תלמוד בבלי מסכת סנהדרין דף עה עמוד א  אמר רב יהודה אמר רב: מעשה באדם אחד שנתן עיניו באשה אחת, והעלה לבו טינא. ובאו ושאלו לרופאים, ואמרו: אין לו תקנה עד שתבעל. אמרו חכמים: ימות, ואל תבעל לו. - תעמוד לפניו ערומה? - ימות ואל תעמוד לפניו ערומה. - תספר עמו מאחורי הגדר? - ימות ולא תספר עמו מאחורי הגדר.  פליגי בה רבי יעקב בר אידי ורבי שמואל בר נחמני. חד אמר: אשת איש היתה, וחד אמר: פנויה היתה. בשלמא למאן דאמר אשת איש היתה - שפיר. אלא למאן דאמר פנויה היתה מאי כולי האי? - רב פפא אמר: משום פגם משפחה. רב אחא בריה דרב איקא אמר: כדי שלא יהו בנות ישראל פרוצות בעריות. | Tractate Sanhedrin 75a  Rav Yehuda says that Rav says: There was an incident involving a certain man who set his eyes upon a certain woman and passion rose in his heart, to the point that he became deathly ill. And they came and asked doctors. And the doctors said: He will have no cure until she engages in sexual intercourse with him.  The Sages said: Let him die; she may not engage in sexual intercourse with him.  May she stand naked before him?  Let him die; she may not stand naked before him.  May she converse with him behind a fence?  Let him die and not converse with him behind a fence.  Rabbi Ya’akov bar Idi and Rabbi Shmuel bar Naḥmani disagreed about this issue. One of them says: The woman in question was a married woman, and the other one says: She was unmarried.  This makes sense according to the one who says that she was a married woman. But according to the one who says that she was unmarried, what is the reason for all this?  Rav Pappa says: Because of a flaw on the family, [i.e., harm to the family’s reputation].  Rav Aḥa, son of Rav Ika, says: So that the daughters of Israel should not be promiscuous with regard to forbidden sexual relations. |

In the scenario described in this text, a man has developed an unnatural desire for a specific woman. The rabbis forbid him to have sexual relations with her, see her naked or, even converse with her behind a fence to assuage this desire, although it may lead to the loss of his life.

In the Talmudic discussion, Rav Pappa and Rav Aḥa try to understand why such stringency would be necessary for an unmarried woman given that no severe sexual prohibition exists when it comes to an unmarried woman (as compared to adultery or incest). Since most prohibitions are overridden for the sake of saving a life, why is that not the case here? Rav Pappa suggests the concern is for her family’s honor. Rav Aḥa takes the discussion in a different direction: The concern is for the moral character of the daughters of Israel. If we would begin asking women to perform sexual acts for men outside of marriage, it would result in women losing their moral compass regarding sexuality.

I would add to this that the premise of the story, allowing a man to objectify a woman for his own sexual needs without any consideration for her as a partner, (not to mention without consideration for her consent!) is antithetical to the moral, social and religious fabric of a Torah-based society. Regardless of how one reads the story, we see evidence that sexual morality within the rabbinic discourse goes beyond the letter of the law.

Taken together, the stories seem to be polar opposites but in fact, I believe they can be read in synergy with one another. In the Rav Ilai text, a man’s inability to overcome his evil inclination is acknowledged and he is advised to find a sexual outlet in the most discreet way possible. Women are shadowy presences, unknown and unnamed, concealed perhaps by the man’s dark clothing. Rabbi Ilai’s advice is for him to act outside his regular society in order not to threaten societal norms or desecrate God’s name. In contrast, the text in Sanhedrin describes a case in which there is no tolerance for illicit desire. In this story, the woman is known to both the man and the rabbis. She is a daughter and a sister. Any action on his part will take place publicly and within society. Protecting sexual morality in this situation is paramount, at least for the family’s sake and for the protection of all of the sisters and daughters of Israel in our communities. Together, it seems that the stories can be read as reflecting the complexity of evaluating individual situations that have a potential impact on the fabric of religious society. Concerning the broader “*shomer negiah*/non-marital sexuality” conversation, providing private guidance to many religious men and women who are engaging in sexual activity of one sort or another is a necessity. However, religious society can and should publicly reinforce its sexual values that are expressed by *halakhah*.

In a similar vein, perhaps it is time to rethink the complete ban on male masturbation or at least weigh it against the other options for sexual release. Acknowledging the often overpowering nature of sexual urges and the need to redirect men and women from sexually experimenting with one another opens the possibility of candidly acknowledging that masturbation may be a preferable alternative. This is not without precedent. Sefer Hassidim in the 13th century writes:

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| Sefer Hassidim 176  A person once asked about one who is overcome by desire and lest he sins and have sex with a married woman or with his niddah wife or any of the other sexual prohibitions which are forbidden to him. Can he masturbate so that he does not sin? He answered him at that time he should masturbate since if [the alternative is sex with] a married woman, it is preferable to masturbate and not sin with a woman. However, he needs atonement and should sit in ice during the winter or he should fast for forty days during the summer. | ספר חסידים קעו  מעשה באחד ששאל מי שיצרו מתגבר עליו וירא פן יחטא לישכב עם אשת איש או עם אשתו נדה או שאר עריות האסורות לו אם יכול להוציא זרעו כדי שלא יחטא והשיב לו באותה שעה יש לו להוציא שאם אשת איש מוטב שיוציא שכבת זרע ואל יחטא באשה. אבל צריך כפרה ישב בקרח בימי החורף או יתענה ארבעים יום בימי החמה. |

Sefer Hassidim does not want his readers to become casual about masturbation, and the demand that he perform a penance reinforces the *b’dieved*, nature of the suggestion. Nonetheless, the question and answer presented are fascinating and reflect a thoughtful awareness of the need for a sexual outlet for men facing enforced abstinence, even in the case of a *niddah* wife where the prohibited period will eventually end!

Perhaps the possibility of a designated monogamous sexual relationship with *mikvah* immersion could be privately presented to individuals for whom marriage is not a realistic option. Discretion would be needed to ensure that it does not become broadly accepted within society. This proposal correlates with similarly minded suggestions; Rabbi Jacob Emden’s suggestion of reintroducing the category of concubines to Jewish communities, and the modern practice of some single women using *mikvah*. Both suggestions echo the Talmudic discourse of Rav Ilai, showing a willingness to confront and respond to individuals’ imperfect reality.

# Sex Education

## Crossing the Shomer Negiah Threshold

The space in which sexual behavior and religious observance intersect is a fractious one. People who perceive themselves as careful with halakhic observance but nonetheless begin to sexually experiment will often deny that such behavior is taking place. The sinfulness of the encounter overpowers conscious awareness, preventing any sort of clear assessment of what they are doing or what is being done to them. This can then potentially contribute to a harmful sense of disassociation from the sexual experience along with the inability to take responsibility or acknowledge what is happening, which can lead to true objectification or dehumanization of the other during or after the interaction. In certain circles, intense sexual feelings are too often coupled with drinking, social expectations, and an inability to discuss or set boundaries. This is not unique to religious couples sexually exploring. However, once the *shomer negiah* threshold is crossed, there is no direction or framework for thinking about other Jewish standards when sexually touching, or possibly sexually using, another person. To quote Rabbi Michael Gold, “sex as a purely physical act outside of the context of a relationship detracts from holiness…. It is the opposite of holiness or designation – it is sex as purely physical release with no pretense of relationship.”[[12]](#footnote-15)

Nonetheless, especially in such spaces (of meaningless causal sexual interaction), there is a need to encourage people to think about crafting a Jewish sexual ethic that they can call upon during such encounters. In one of the few resources calling for a Jewish sexual ethic, Rabbi Arthur Green writes that sexually active men and women must evolve a sliding scale of sexual values. “At the top of this scale would stand the fully knowing and loving relationship….while rape – fully non-consenting.... sexuality – would stand at the bottom. Somewhere near the middle of the scale, neither glorified nor condemned, would be the relationship of two consenting persons, treating one another with decency, fulfilling the biological aspects of one another’s love needs, while making no pretense at deeper intimacy. Given such a scale, a Jew might begin to judge his/her own sexual behavior in terms of a series of challenges which s/he might want to address.”[[13]](#footnote-16)

Casual non-relational sex does promote holiness. This does not mean, however, that there are no ethical or even religiously motivated considerations for those engaging in such sexual relations. At the very least, people should be proactive in invoking other Jewish values and commandments: To respect a fellow human being, to avoid causing harm to oneself or one’s partner, and to protect oneself and one’s partner. Being honest and intentional about sexual decision making, especially where it runs counter to religious practice, can help people implement other ethical practices and other Jewish values.

Even within the context of a relationship, I have seen how cognitive dissonance between the perception of religious observance levels and prohibited sexual behavior can inhibit emotional closeness that might be formed through physical intimacy which is happening anyway. Shame over sexual exploration becomes detrimental, hindering the possibility of touch serving as a conduit for emotional growth and an impetus to move toward marriage.

Many years ago, a young woman called me to describe a situation in which she and her boyfriend, both aligning themselves with a more “right wing” religious practice and committed to *shomer negiah* behavior, were careful not to be alone with one another indoors. However, they repeatedly found themselves in compromising situations in outdoor spaces hoping not to get caught. Marriage was not a possibility for at least a year given their ages (eventually they did marry). The rabbi’s wife she went to for counsel was kind and told her that while falling in this manner was natural, they should keep picking themselves up and recommitting to *halakhah*. However, the sense of constant failure was crippling her ability to gain control over the situation. Here, the cognitive dissonance created around *shomer negiah* was leading to more extreme sexual behavior rather than toward no touch. I suggested they create safer and more realistic boundaries by acknowledging their behavior and infusing it with mutual respect for one another and a sense of what role physical touch was playing in the relationship in terms of bringing them toward greater emotional intimacy. In other words, they needed to create a Jewish sexual ethic to contain their behavior.

What is concerning from a sexual education standpoint is that all that exists is a legalistic *halakhic* discourse in which the degree of transgression is the only factor considered. We need to also be able to engage in a value-based conversation about consent, intimacy, and the give-and-take inherent in sexual activity. Rarely is there any honest discussion about healthy sexual outlets, whether it is the encouragement to save touch for marriage, or how to set boundaries beyond the strictest *halakhic* prohibitions. Since everything is prohibited the possibility of being mindful about setting practical limits is not open. This last piece is not unique to Orthodox Judaism. Secular society, with all of its openness, has the same problem in reverse. There is no permission to set limits because everything is permitted. There too, there is a need to be mindful about limits; thinking, and expressing feelings about consent, pleasure, desire, and need.

## An Imperfect World: How Should we be Educating?

To reinforce religious values, some form of religious sex education is imperative. While seeking to stay true to our commitment to *halakhah* is paramount in religious communities, it is also the responsibility of parents and educators to ensure that conversations are held about agency and consent, which must be articulated in even the most religious of spaces, if only to warn against predators or the dangers of drinking in co-ed environments. Especially in the younger years, it is vital that religious education be accompanied by clear information about sexual development and the normality of sexual desire and attraction, for both heterosexual and LGBTQ students. Only then can people take ownership and make room for clear decision making with religious values and/or halakhic commitment as guiding factors.

As a religion, we are committed to protecting life. Evading discussions about safe sex can lead to dangerous encounters that can result in pregnancy and abortion, or possibly life-threatening sexually transmitted diseases. Similarly, failure to provide clear definitions of consent concerning touch and sexual behavior runs the distinct risk of non-consensual interactions when such engagement occurs. If we do not infuse these nuanced conversations about non-halakhic sexual behavior with other Jewish values, like loving one’s partner, along with values of righteousness, justice, and human dignity, all of which are part of a Jewish sexual ethic within marriage, there is a grave danger that no sexual ethic will be implemented.

It is important to me to emphasize that I not calling to halakhically permit the prohibited. The sources reveal that there is nuance in *halakhah* and distinctions between different kinds of touch and types of sexual behavior. It is certainly within the purview of religious parents, educators, and rabbis to provide resources and offer advice beyond the boundaries of Jewish law. The sages of the Talmud repeatedly recognized that sometimes in matters of sexuality, guidance *b’dieved*, is mandated.[[14]](#footnote-17)

In my years of teaching and lecturing, I find that many religious single men and women, in heterosexual and LGBTQ[[15]](#footnote-18) communities, are desperately looking to build a Jewish sexual ethic and infuse their sexuality with meaning despite making non-halakhic decisions. It is here, at this most critical area of their lives, they find themselves without any sort of religious guidance from educators, rabbis, and mentors. In order to create an authentic religious response to the sexual behavior taking place outside of marriage, we need to intentionally and fully think about the values and vocabulary we can use in a Jewish context outside of a justification framework. This too is Torah and we need to learn it.

1. Excerpted from The New York Times, “The Abortion I Didn’t Have,” Merritt Tierce. [↑](#footnote-ref-1)
2. The next few paragraphs are excerpted from chapter 8. For a longer analysis of the source material, see there. [↑](#footnote-ref-2)
3. The focus will be on a woman who is *niddah* but the same methodology applies to all sexually forbidden relationships. For a detailed analysis of this prohibition and the halakhic requirements see the previous chapter. [↑](#footnote-ref-3)
4. [↑](#footnote-ref-4)
5. In the early 21st century, this practice came to be a part of public discourse in Israel when questions were raised about state control of who was eligible to immerse in publicly funded *mikvaot*. It was common practice for *mikvah* attendants to inquire as to the marital status of women. If a woman hesitated or answered honestly that she was single, she was denied entry and forcibly removed. Lesbians were similarly prevented from immersing if their sexual identity was known. Many argued, and continue to argue, that a publicly funded space should be accessible to all women. After many years of prolonged litigation that eventually made its way to Israel’s High Court, a “don’t ask, don’t tell” policy was agreed upon – explicitly single (and gay) women would not be allowed to immerse, however *mikvah* attendants were no longer permitted to ask the marital status of the immersing women. [↑](#footnote-ref-5)
6. BDB p. 873. [↑](#footnote-ref-6)
7. This statement is not completely accurate since according to Raavad and his school of thought, when a man designates a woman as his concubine, sexual relations are permitted. [↑](#footnote-ref-10)
8. *Iggerot Moshe Orah Haim* 4: 118. Regarding the writing of the *ketubah*, you need not tell the rabbi who is officiating.  By signing the *ketubah*, the groom is agreeing to the use of the term "virgin" - and there is no further concern. He is thereby legally bound to the terms of a virgin’s *ketubah*, even if in truth the bride is not, so long as she did not mislead him. [↑](#footnote-ref-11)
9. There is a range of opinions among halakhic authorities on the question of male masturbation. Some view it as a Torah prohibition and others argue that it is a rabbinic prohibition. There are lenient opinions that argue that a married couple may engage in non-penetrative sexual intercourse for the sake of sexual pleasure, even though the man ejaculates outside of the woman’s vagina. [↑](#footnote-ref-12)
10. [↑](#footnote-ref-13)
11. Missing from the story is the exact way this should be done: Jewish or non-Jewish woman? Niddah or not niddah etc. That is not the purpose of the story. Later commentaries try to fill in those gaps. [↑](#footnote-ref-14)
12. Gold, Michael, Does God Belong in the Bedroom?, Jewish Publication Society, 1992, p. 26. [↑](#footnote-ref-15)
13. Green, Arthur, “A Contemporary Approach to Jewish Sexuality,” in The Second Jewish Catalog, edited by Sharon Strassfeld and Michael Strassfeld, JPS, 1976, p. 99. [↑](#footnote-ref-16)
14. See Yoma 18b where there were Talmudic sages who took a bride for a night or Moed Katan 17a cited above. These sources do not sanction non-marital sexuality but they make room for semi-justified outlets. [↑](#footnote-ref-17)
15. The topic of religious men and women who are LGBTQ and struggling to define their sexual identity within the framework of religious observance is complex. However, it is impossible to completely ignore a reality that almost every religious community and attendant institutions is confronting. For religious men and women who are LGBTQ there is even less conversation around sexuality. Beyond the *halakhically* mandated abstinence only position, I believe we need to help LGBTQ members of our community reconcile their sexual identity without completely abandoning the hope of meaningful and committed relationships. Furthermore, *halakhic* authorities, religious educators and parents must provide guidelines and direction based on values from within *halakha* as well as defining more clearly gradations of *halakhic* observance for these members. [↑](#footnote-ref-18)