

# The Halakhah of Same-Sex Relations in a New Context

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Are intimate relations permitted between two men or two women? May members of שאלה the Rabbinical Assembly or the Cantors Assembly officiate at same-sex unions? May openly gay or lesbian Jews who are otherwise qualified be ordained and serve as rabbis or cantors?

תשובה

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## Section One: Introduction

The present reopening of formal discussion on homosexuals and their sexuality in Conservative Judaism does not vitiate the importance of our earlier teshuvot on this subject. In a series of responsa by Conservative writers in 1992 and since, some approved by the Committee on Jewish Law and Standards, others rejected, some submitted in reaction to approved teshuvot and others never having come before the CJLS at all, traditional halakhic sources about those who engage in same-gender sex relations have been fully identified and explored, recorded and debated. These sources are already in plain view and there is little that new teshuvot will uncover in the halakhic canon to impact the outcome of our current effort.

There is not much disagreement about what the halakhah was, only whether it is now possible and necessary to decriminalize gay sexuality and allow homosexuals equal

participation in our religious life from the present time forward. Some of us are restrained by the assumption that the halakhah is immutable. They see Scripture's sexual ethic as unchallenged by the passage of time and sufficient for the contemporary Jewish community. Others, in response to a shift in their own and society's perception of homosexuality, would reinterpret the halakhah. Given the transformation in our understanding of the subject in recent decades, that is, widespread agreement that "sexual orientation is most likely the result of a complex interaction of environmental, cognitive and biological factors.....shaped at an early age,"<sup>1</sup> and its "enduring" character, they no longer view homosexuality as a choice or gay sexual behavior as deviant or unnatural and would remove some or all restraints to which homosexuals have been subjected heretofore.

As we deliberate on this matter we must in our view balance our obligation to the halakhic record and its method against the uncertain but insistent claim of contemporary sexual ethics. The posek should consider the impact of social, ethical and scientific change in the interpretation and development of halakhah. A teshuva should be more than a look at sources and precedents, it must reread them in light of current circumstances, perceptions, and realities. The historical and evolutionary character of halakhah is not unique to Judaism, it is a significant element in any vital legal system. It presupposes a creative role for the posek as well as an archeological one. This has been true since the earliest days of halakhic debate and decision making.

The tension between past and present has created an open flexibility in the Jewish legal system that has sometimes encouraged the emergence of diametrically opposed views of halakhah. This will no doubt be a feature of our present undertaking and will demonstrate once again that Jewish law does not express the unambiguous thundering voice of God, only the limited attempts of limited human beings to discover God's will and to express it in their own formulations.

## **Section Two: Essential Halakhic Sources**

The Torah prohibits a male from engaging in sexual relations with another male, as he might with a female, and criminalizes it. "ואח זכר לא תשכב משכבי אשה תועבה היא" "Do not lie with a male as one lies with a woman; it is an abhorrence" (Lev. 18:22). This act along with some twenty other sexual relationships plus infanticide are prohibited as ברתוע.

The chapter in which this passage is found opens with a general admonition against mimicking behavior common in the lands of Egypt and Canaan, that is, in the past

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<sup>1</sup> Judith Glassgold, "Summary of Research on Select Issues in Lesbian, Gay and Bisexual Psychology," appendix to Elliott Dorff, Daniel S. Nevins and Avram Israel Reisner, "Homosexuality, Human Dignity and Halakhah," currently being considered by the CJLS.

and future lands of residence and historical experience of the Israelites then attending to God's voice. כמעשה ארץ מצרים אשר ישבתם בה לא תעשו וכמעשה ארץ כנען אשר אני מביא אתכם. “Do not follow the practices of the land of Egypt in which you have dwelt, do not follow the practices of the land of Canaan to which I bring you, and do not observe their laws” (Lev. 18:3).

The term תועבות is repeated four times in the chapter's summary statement which again urges Israelites to imitate the deeds of neither Egyptians nor Canaanites among whom the specified abhorrent behaviors were considered to be common practice. A punishment of כרת is imposed for violations (Lev. 18:24-30).

The prohibition and criminalization of משכב זכר is repeated in a second list of proscribed acts, mainly sexual, where emphasis is placed on creating distinctions between טהר and טמא in order to achieve a life of sanctity. ואיש אשר ישכב את זכר משכבי אשה תועבה. “If a man lies with a male as one lies with a woman, the two of them have done an abhorrent thing; they shall be put to death -- their blood guilt is upon them” (Lev. 20:13).

Here the term תועבה appears only a single time, to describe משכב זכר, and while the Egyptians are overlooked, the identification of the entire list of prohibited acts with the practices of the unnamed nation inhabiting Eretz Yisrael before the arrival of the Israelites is repeated (Lev. 20:22-24). Moreover, both lists include the threat of expulsion of the Israelite nation from its anticipated territorial patrimony, should it engage in the prohibited practices (Lev. 18:28, 20:22).

Although Scripture refers only to משכב זכר, the Sifra expands the biblical prohibition to forbid female homosexual relations also. The point of departure is the prohibition against mimicking Egyptian practices: ומה היו עושים האיש נושא לאיש והאישה, “What did they do? A man would marry a man and a woman a woman” (Sifra, Aharei Mot 9:5).

The Mishnah rules: הבא על הזכור ועל הבהמה והאישה המביאה את הבהמה בסקילה. “He who commits sodomy with a male or a beast and the woman who commits bestiality are stoned” (M. Sanhedrin 7:4). The Gemara identifies Leviticus 18:22 and 20:13 as the source of the prohibition and its punishment while elaborating on the mishnah:

ת"ר: "איש" ויקרא כ:יג) פרט לקטן. "אשר ישכב את זכר" (שם) בין גדול בין קטן. "משכבי אשה" מגיד לך הכתוב ששני משכבות באשה. א"ר ישמעאל הרי זה בא ללמד. ונמצא למד. מות יומתו בסקילה.

Our sages teach: “[If a] man [lies with a male, Lev. 20:13], to exclude a minor. [That is, since the word “man” is used rather than “male” we learn that a minor is exempt from culpability if he is the active partner. The Torah continues:] “Lies with a male” [teaching that, since here the word “male” is used rather than “man,” there is no difference] whether [the passive partner is] an adult or a minor. [That is, even if the passive

partner is a minor, the active partner is still culpable assuming that he is an adult. The Torah continues:] “As one lies with a woman.” Scripture teaches that there are two types of sexual intercourse with a woman [i.e., vaginal and anal]. Rabbi Yishmael says: Behold this comes to teach [regarding male-male relations] and goes to teach [a general rule that is applied in other cases, that anal intercourse is equivalent to vaginal intercourse in all cases of sexual infractions. The Torah continues:] “They shall sure be put to death” by stoning (B. Sanhedrin 54a).

Elsewhere the Gemara, like the Sifra, adds sexual relations between women to the list of prohibitions in the following discussion: דא"ר הונא נשים המסוללת זו בזו פסולת לכהונה. “Rav Huna said: Women who engage in sexual practices with one another are forbidden in marriage to a kohen.” That is to say, the stigma of זונה, a prostitute, is invoked upon these women and a kohen is forbidden to marry them. Rashi explains the term מסוללת to mean a very specific form of lesbian sexual relations דרך תשיש זכר ונקבה משפשפות נקבתן זו לזו. “In the way that a male and a female engage in intercourse they rub their genitalia against each other” (B. Yevamot 76a). The opposing opinion of Rabbi Elazar is also cited. He distinguishes between the unmarried male and female who engage in promiscuous sexual relations without an intention of marriage, where the male is not culpable or stigmatized but the woman becomes a very much stigmatized זונה, and two women who engage in sexual relations which is considered אפריצותא בעלמא, merely licentiousness, because there has been no actual intercourse, hence no prostitute status and the women are not prohibited from marrying a kohen. The Rabbis disagree only about invoking the זונה designation when women are sexually active together but not about the forbidden nature of what they are engaged in. And that has been defined very precisely by Rashi.

Maimonides codified the criminalization of משכב זכר in these words:

הבא על הזכר או הביא זכר עליו כיון שהערה אם היו שניהם גדולים נסקלים שנאמר ואת זכר לא תשכב בין בועל או נבעל. “A male who penetrates another male or who causes a male to penetrate him, from the moment of penetration, if they are both adults they are both subject to stoning. As the Torah says, ‘Do not lie with a male...’ neither as the penetrator nor as the .)penetrated” (Hilkhoh Issurei Biah 1:14

Maimonides also codified the prohibition against female sexual relations:

נשים המסוללת זו בזו אסור וממעשה מצרים הוא שהזוהרנו עליו שנאמר כמעשה ארץ מצרים לא תעשו אמרו חכמים מה היו עושים איש נושא איש ואישה נושאת אשה ואישה נושאת לשני אנשים אע"פ שמעשה זה אסור אין מלקין עליו שאין לו לאו מיוחד והרי אין שם ביאה כלל לפיכך אין נאסרת לכהונה משום זנות ולא תיאסר אשה על בעלה בזה שאין כאן זנות וראוי להכותן מכת מרדות הואיל ועשו איסור. Women are forbidden to engage in sexual relations with one another and it is among the Egyptian practices about which we were warned, as the Torah says, “Do not imitate the practices of the land of Egypt.” The Rabbis said: “What did they do? A man would marry a man, a woman would marry a woman, or a woman would marry two men.” Although this act is forbidden, lashes are not imposed because there is no specific prohibition and there is no actual intercourse. For that reason women

who do this are not prohibited in marriage to a kohen as harlots and are not forbidden to their husbands because there is no prostitution. Nevertheless, it is appropriate to impose lashes for rebellion because they violated a prohibition” (Hilkhoh Issurei Biah 21:8).

Rationales for the prohibitions of same gender sexual relations are varied. The Talmud offers the opinion of Bar Kappara that the biblical term תועבה is a contraction of תועה אתה בה, “You are lost because of her/this” (B. Nedarim 51a). Some believed that the word בה “her” referred to the entire list of sexual violations with various women enumerated in the Bible text rather than משכב זכר alone.<sup>2</sup> However, Tosafot, Rosh and Ran viewed the antecedent of בה translated as “this” to be משכב זכר, using almost identical phrases to explain the scriptural prohibition. In the words of Tosafot, שמניחין נשותיהן, והולכין אצל משכב זכר, “They abandon their wives to pursue sex with men.” This somewhat ambiguous concern may possibly have been about the preservation of family and the tragedy of an abandoned wife. Or the Torah’s prohibition of משכב זכר could have been over a rejection of the mitzvah of procreation and that is what Tosafot and other Rishonim pointed to.

This much is clear, Bar Kappara was understood by the Rishonim to read the Torah verse to apply to married males and it was about the neglect of two specific mitzvot that devolve upon them, rather than any abhorrence with homosexual activity as a despicable, repugnant or unnatural act. If the concern was indeed about procreation, one may well wonder if the prohibition of משכב זכר should include married men whose wives are pregnant or who have already fulfilled the mitzvah of procreation. The prohibition would hardly seem applicable to those unmarried males who, because of their homosexuality, are unlikely and possibly unable ever to take wives in marriage to procreate. And Bar Kappara was silent about sexual relationships between women, who are not bound by the mitzvah of פרו ורבו.<sup>3</sup>

### Section Three: The CJLS on Homosexuality

In 1992, the CJLS adopted the following Consensus Statement on Homosexuality:

The Committee on Jewish Law and Standards of the Rabbinical Assembly affirms the following policies:

- (A) We will not perform commitment ceremonies for gays and lesbians.
- (B) We will not knowingly admit avowed homosexuals to our rabbinical or cantorial schools or the Rabbinical Assembly or the Cantor’s Assembly. At the same time, we will not instigate witch hunts against those who are already members or students.
- (C) Whether homosexuals may function as teachers or youth leaders in our congregations and schools is left to the rabbi authorized to make

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<sup>2</sup> A lengthy analysis of the Bar Kappara passage can be found in Joel Roth, “Homosexuality,” in Kassel Abelson and David J. Fine, eds., *Responsa 1991-2000* (New York: Rabbinical Assembly, 2002), pp. 623ff.

<sup>3</sup> See Hilkhoh Ishut 5:2.

halakhic decisions for a given institution within the Conservative Movement. Presumably, in this as in all other matters, the rabbi will make such decisions taking into account the sensitivities of the people of his or her particular congregation or school. The rabbi's own reading of Jewish law on these issues, informed by the responsa written by the Committee on Jewish Law and Standards to date, will also be a determinative factor in these decisions.

(D) Similarly, the rabbi of each Conservative institution, in consultation with its lay leaders, will be entrusted to formulate policies regarding the eligibility of homosexuals for honors within worship and for lay leadership positions.

(E) In any case, in accordance with the Rabbinical Assembly and United Synagogue resolutions, we hereby affirm gays and lesbians are welcome in our congregations, youth groups, camps and schools.”<sup>4</sup>

It is possible that the anomalous last paragraph of the CJLS statement was an accommodation to two resolutions, one adopted in 1991 by the United Synagogue, the other a year earlier by the Rabbinical Assembly. The latter read:

“THEREFORE BE IT RESOLVED that we, the Rabbinical Assembly, while affirming our tradition's prescription for heterosexuality,  
(A) Support full civil equality for gays and lesbians in our national life, and  
(B) Deplore the violence against gays and lesbians in our society, and  
(C) Reiterate that, as are all Jews, gay men and lesbians are welcome as members in our congregations, and  
(D) Call upon our synagogue and the arms of our movement to increase our awareness, understanding and concern for our fellow Jews who are gay and lesbian.”<sup>5</sup>

The CJLS Consensus Statement opposed gay participation in community life far more strongly than the two resolutions would have warranted, only its last paragraph reflecting their welcoming tone, the rest at odds with them. The consensus that was achieved was contradictory. It was not possible to welcome gays and lesbians to Conservative synagogues at the same time that gay and lesbian rabbis and cantors were excluded from employment and synagogue honors were withheld from lay people. The Consensus Statement exposed a fault line of disagreement within the CJLS between those who would restrict gays and those who preferred their full inclusion. Consensus was reached to prevent what Rabbi Elliot Dorff saw as “a disaster for the Movement if the Committee on Jewish Law and Standards approved opposing papers on a topic as central to people's lives as their sexuality; it would mean that we are totally incoherent.”<sup>6</sup> Instead, the incoherence was formalized in a contradictory Consensus Statement.

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<sup>4</sup> “Consensus Statement on Homosexuality,” *Responsa 1991-2000*, p. 612.

<sup>5</sup> *Proceedings of the Rabbinical Assembly* 52 (1990): 275.

<sup>6</sup> Elliott Dorff, “Jewish Norms for Sexual Behavior: A Responsum Embodying a Proposal,” in *Responsa 1991-2000*, p. 710.

It seems to us that homosexuality as a general condition, or “orientation,” need not be a halakhic problem. While certain sexual types such as the castrated male or the androgynos are identified as unique categories in halakhic parlance, the homosexual or the lesbian is not. There exists, in fact, no Hebrew word for “homosexual” other than the transliteration, evidence that such a category never existed in Jewish law. It is conceivable that a kohen gadol who met all other requirements and was willing to participate in a heterosexual marriage but was by our contemporary understanding homosexual, could nevertheless enter the Holy of Holies on Yom Kippur to seek absolution for his own sins and those of his people.

It seems wrong to us, therefore, that the Consensus Statement on Homosexuality adopted by the CJLS in 1992 which remains our Movement’s policy to this day, should far exceed what the halakhah required. The statement not only bars commitment ceremonies for homosexuals, it also opposes the admission of “avowed” homosexuals to Conservative rabbinical and cantorial schools and to the Rabbinical Assembly. It urges congregational rabbis to use policies set down by the CJLS in considering employment of gays as teachers or youth leaders and even in the formulation of policy regarding synagogue honors. In these latter concerns, no distinction is made between “avowed” and other homosexuals. Therefore, the Consensus Statement reads as restricting the participation of gays and lesbians in general within Conservative Judaism, and that restriction went beyond the requirement of halakhah. The Statement should have clarified that these restrictions do not apply to all gay and lesbian Jews, but rather only to those who are known to engage in same-sex intimate relations.<sup>7</sup> Furthermore, it is generally the case that beyond greater expectations of clergy, the Conservative movement hardly limits the participation of lay public sinners of any type. It is inconceivable that restrictions on the study or teaching of Torah or receiving synagogue honors would be imposed by those who would enforce the halakhic ban on gay sexual activity upon gays who should enjoy a presumption of innocence that they do not violate the law at all and if they are in violation of halakhah are doing so only in private.

The CJLS also considered the use of placement services by a homosexual rabbi already a member of the RA and ruled, “In accord with the apparent intent of the consensus statement, the Joint Placement Commission should not recommend “avowed homosexuals” for placement in congregations.”<sup>8</sup> An opposite conclusion was also

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<sup>7</sup> Rabbi Joel Roth’s 1992 responsum on homosexuality made this distinction quite clear: “We have asserted that halakhah does not prohibit homosexual attractions or arousals. Its exclusive concern is with homosexual behavior, primarily homosexual intercourse. As a result, it follows that one who is of homosexual orientation, but affirms that the lifestyle that usually accompanies that orientation is halakhically unacceptable and therefore chooses to live a celibate life, suffers no halakhic restriction of any kind whatsoever. Such a person could serve in any position of religious leadership, professional or lay, including the rabbinate and the cantorate” (Joel Roth, “Homosexuality,” in *Responsa 1991-2000*, p. 667).

<sup>8</sup> Kassel Abelson, “Placing Homosexual Rabbis in Congregations,” *Responsa 1991-2000*, p. 723.

accepted thanks to an argument based not on halakhic but organizational grounds.<sup>9</sup> It seems to us that the decisions reached by both sides in this discussion were extra-halakhic, disregarding the actual limits placed by tradition on homosexual behavior. These have nothing at all to say about gays as rabbis and cantors or their placement in congregations. We recognize that the adjective “avowed” may have indicated that the reference is only to gays and lesbians who avowedly engage in activities that violate halakhah as per the CJLS’s determination.<sup>10</sup> We further recognize that there might be a general assumption that someone who is avowedly gay or lesbian would be engaged in intimate same-sex relations. And yet, we are perplexed why the CJLS would assume that all gays and lesbians are engaging in intimate relations. Would we automatically assume that all heterosexual rabbis are sexually active, even if they are not married? Does “avowal of homosexuality” apply only to gays and lesbians in committed relationships? What about a rabbi who is openly gay but single? The precedents appear to be discriminatory against gays and lesbians because of their sexual orientation and with no regard to the context of their personal relationships. This perception of broad discrimination is unfortunate.

Regardless of whether the *issur* is defined broadly or narrowly, the prohibition of זכר משכב ought not to become the basis for the exclusion of homosexuals from Jewish life and leadership. The enforcement of the biblical prohibition in our day, if it is to be enforced, should not justify the elevation by the Conservative movement of זכר משכב above every other *issur* and its violators should not be singled out for restrictions and exclusions never imposed on those who do not live in accord with other demands of halakhah.

In addition to the Consensus Statement, four teshuvot were also adopted in 1992 that provided differing philosophical and legal rationales for it.

1) Rabbi Elliot Dorff proposed a delaying posture because he did not believe that the Conservative movement was prepared to embrace total parity between gay and straight sexual activity and unions despite the RA and United Synagogue resolutions supporting full civil equality for gays. Rabbi Dorff distinguished between homosexual sex and anal sex, the former he believed was not under prohibition at all, the latter banned by a decree of the Torah that might eventually be eased. He hoped that the Bible text would not be the sole authority in determining the halakhah but that contemporary views

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<sup>9</sup> Arnold M. Goodman, “Placing Homosexual Rabbis in Congregations,” *Responsa 1991-2000*, pp. 724-725.

<sup>10</sup> This is a charitable reading. The 1993 responsa on placement of avowed homosexual rabbis (*Responsa 1991-2000*, pp. 722-729) consistently refer to avowal of “homosexuality,” not of any form of behavior. Additionally, one of the papers specifically identifies the case that brought about the שאלה: “A colleague, having been ‘outed,’ has avowed his homosexuality” (Arnold M. Goodman, “Placing Homosexual Rabbis in Congregations” *ibid.*, p. 725). While the facts of the case may have been otherwise, the presentation in the responsa refer to avowal of sexual orientation, not to forbidden behavior.

on homosexuality, that it is neither a disease nor reversible, could counterweigh the halakhic record in future CJLS deliberations. Rabbi Dorff, feeling that there was not sufficient evidence then available for the Conservative movement to come to a definitive conclusion about homosexuality, sought the creation of a commission to study all aspects of the issue.

2) Rabbi Reuven Kimelman was satisfied that halakhic issues were being dealt with in other teshuvot so he addressed only the public policy aspects of homosexuality. He was fearful that “the approval of a priori non-procreative marriages as a class could tend to devalue the type of sexuality that leads to procreation” and “to equalize the status of the two especially in the eyes of children.”<sup>11</sup> He was also concerned that “same sex activity has the potential of undermining the whole idea of sexual prohibitions.” He therefore favored retaining traditional restraints on homosexuality, rejected homosexuals as suitable Jewish role models and supported the imposition of additional limits on their acceptance in public life.

Rabbi Kimelman was anxious about the very problem perceived by the Rishonim who applied Bar Kappara’s exegesis of the term תועבה to a married man engaging in gay anal sex to avoid procreativity with his wife. But Rabbi Kimelman also perceived a threat to the procreative ideal in marriage when unmarried gays engage in non-procreative sex. In fact, procreative potential is not an entry requirement for Jewish marriage and its absence is no hindrance to heterosexual unions. Non-procreative marriages and non-procreative sexual relations within marriage are not prohibited in Jewish law and are not deemed a threat to equalize procreative and non-procreative marriages in children’s eyes. Nevertheless, Rabbi Kimelman feared negative effects upon heterosexual procreativity if homosexual non-procreative unions were not stigmatized. He asserted, without proof, that gay sex undermines the idea of sexual limits in human behavior.

While the Jewish community is certainly dependent for its continuity on heterosexual marriage and procreative sexual unions, Rabbi Kimelman offered no proof-text at all that the Jewish tradition prohibits non-procreative sex except in the specific circumstance described by Tosafot and he provided no sociological evidence for his assertion that a Gresham’s Law of human sexuality exists, the bad, which he defined as homosexual, driving out the good, which he defined as heterosexual.

Rabbi Kimelman’s public policy concern for encouraging procreative sex and the danger to it that he senses if gay non-procreative sex were permitted seems to us to be overstated. We cannot imagine any heterosexual couple refusing to have children because their next door neighbors are childless homosexuals. That is too preposterous a scenario to be the basis for determining the status of gays in our community. Rather, we believe

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<sup>11</sup> Reuven Kimelman, “Homosexuality and the Policy Decisions of the CJLS” in *Responsa 1991-2000*, pp. 676-685.

that the public policy issue is a different one entirely. Firstly, contemporary reproductive technologies, as well as adoption, provide same-sex couples with options to raise children that they never had before. But more importantly, we do not condemn the infertile heterosexual couple, nor do we insist that they take advantage of contemporary reproductive technologies.<sup>12</sup> Moreover, the prophet Isaiah was mindful of the pain experienced by the childless eunuch who might be feeling like an עץ יבש, a dried out stick, and was sympathetic. He reassured those without offspring, ונתתי להם בביתי ובחומתי, that the keeping of the Sabbath, choosing what God wishes and affirming the covenant may bring rewards better and more lasting than sons and daughters. What Isaiah seems to us to be saying is that because God has a house for all, it is good public policy to include the minority who are physically unable to engage in procreative sex in the ברית. It is reasonable to speculate about the position Isaiah might take on gays who for reasons beyond their control may be childless.

3) Rabbi Mayer Rabinowitz determined that עקירת דבר מן התורה, abrogating biblical law, would be the only way to change the halakhah on homosexuality, that abrogation “had to be done for the betterment of the Jewish people as a whole, not simply for the benefit of a minority of the people,” and that therefore, it was inapplicable in this instance. He ruled that homosexuals who advocate homosexuality as an acceptable alternative Jewish lifestyle are prohibited from holding leadership positions in our synagogues, institutions and schools.<sup>13</sup>

Rabbi Rabinowitz did not allow that any alternative way to address the biblical prohibition of משכב זכר may be available and he imposed an additional prohibition to exclude gays from leadership in the Jewish community. Since the CJLS has ruled that we do not accept testimony about illegitimacy,<sup>14</sup> Rabbi Rabinowitz’s teshuva and others lead to the ironic circumstance that a mamzer, biblically excluded from the Jewish community, may become a rabbi while a gay person may not.

Rabbi Rabinowitz, aware of the proportional distribution of the largely heterosexual majority and the small homosexual minority, did not allow redress of the biblical criminalization of gay sex. He believed that only a minority would benefit from doing so. He did not consider that there was another way to define the majority, that is the majority of Conservative Jews who, as demonstrated by approved resolutions of the Rabbinical Assembly and United Synagogue, had rejected limits on the participation of homosexuals in our religious and communal life. Those resolutions seemed to indicate

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<sup>12</sup> See Elliott Dorff, “Artificial Insemination, Egg Donation and Adoption,” *Responsa 1991-2000*, p. 509: “Infertile couples are not required to engage in these procedures to have children.”

<sup>13</sup> Mayer Rabinowitz, “On Homosexuality,” *Responsa 1991-2000*, p. 689.

<sup>14</sup> See Elie Kaplan Spitz, “Mamzerut,” *Responsa 1991-2000*, p. 558.

that changes in the halakhah regarding homosexuals would in fact address the ethical and sociological needs of the majority of the Conservative community and reflect their wishes.

Nor did Rabbi Rabinowitz explain why only homosexuals advocating homosexuality as an acceptable alternative Jewish lifestyle should be subject to censure. According to his reasoning, heterosexuals who do so should also be excluded from our seminaries, from the rabbinate and from teaching in our schools because they too project undesirable behavior as licit, if not by example then by advocacy. Moreover, they cannot make the mitigating claim that they are אנוסים, acting under compulsion, as gays might. Should members of the CJLS who support them be censured? We do not believe that Rabbi Rabinowitz would support such action against heterosexuals and we cannot agree with the conclusions reached in his teshuvah.

4) Rabbi Joel Roth read Leviticus 18:22 and 20:13 to “posit some type of prohibition against homosexuality.”<sup>15</sup> That was a surprisingly loose reading of the texts because they actually refer only to משכב זכר but not to homosexuality.<sup>16</sup> He asserted that “the Torah defines homosexuality as תועבה,” a too broad and, we believe, inaccurate reading of Scripture. Rabbi Roth claimed that lesbianism is forbidden based on the Sifra’s understanding of Leviticus 18:3. While his assertion was accurate that the prohibition against מסוללות גשמים is דאורייתא, he translated the phrase to mean “lesbianism” when Rashi had a decidedly narrower and very precise understanding of it. Rabbi Roth may have used the terms homosexuality and lesbianism to refer to gay sexual relations, but that was inaccurate, unfortunate and misleading. His use of these terms was confusing and unnecessary particularly since he acknowledged “that the Torah does not prohibit homosexual attraction-orientation.”

Rabbi Roth’s conclusions were based on the Bible text and many halakhic sources that ban משכב זכר as תועבה and he included other physical expressions of gay sex in the prohibition. Although this expansive understanding of the halakhah was not the only way in which it might be understood or applied, it would be very hard, we think, to refute the fact that the entire weight of halakhic evidence to this point takes this view. But when he evaluated various rationales for the Torah’s attribution of תועבה to homosexuality (actually, only to משכב זכר and possibly to other gay sexual acts as well), Rabbi Roth acknowledged that there may not be a single adequate explanation for it but using that as an argument to determine that the prohibition was irreversible. Had there been a clear rationale it might be refuted to permit or compel a change in the law, as we will suggest below. But when there is only the unexplained and unambiguous Bible text, Rabbi Roth concluded and has continued to argue that nothing could overturn that text or the halakhic

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<sup>15</sup> Joel Roth, “Homosexuality,” *Responsa 1991-2000*, p. 624.

<sup>16</sup> Some claim that the Torah’s prohibition is specific to anal sex between men. See the paper approved by the CJLS by our colleagues Rabbis Dorff, Nevins and Reisner for an elaboration of this.

pattern that followed in its wake. It seems strange to us that Rabbi Roth empowered the text with unalterable control over our practice when text interpretation is the very basis of Jewish law and the halakhic system. Our own view of halakhah as a historically based religious/legal system that reflects the values, ethics and circumstances of the Jewish people at any particular period and whose evolving judgments, including those recorded in Scripture, are expressions of Jewish ideals in a given place and time, compels us to disagree.

We recognize that positions taken in these teshuvot do not result from any animus toward or fear of gays or lesbians, what is generally called “homophobia,” but rather out of theological or halakhic concerns. Nevertheless, we reject their conclusions that oppose the normalization of Jewish gays and lesbians in the community, for reasons articulated below.

#### **Section Four: Reading Parashat Arayot**

The prohibition of homosexual behavior originates in the Rabbinic understanding of the term משכבי אשה Leviticus 18:22 and 20:13. As is evident from the gemara in Sanhedrin (54a-b),<sup>17</sup> the phrase משכבי אשה teaches us that anal sex is legally considered to be real sex, and that it is so when it is performed either with a man or a woman. What the phrase means is that anal intercourse with a man has the legal status of intercourse with a woman. One might have thought that the gender of the passive partner makes a difference. The Torah tells us that it does not, as far as constituting sexual relations.<sup>18</sup>

It might be argued that the prohibition of homosexual behavior derives from Deuteronomy 23:18 (the prohibition of the שִׁקְדָּה, usually understood as cult prostitute) or from Genesis 19 (the story of the men of Sodom, and its parallel in Judges 19). But the Genesis and Judges sources are clearly concerned more with rape than homosexuality per

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<sup>17</sup> See above, p. 3.

<sup>18</sup> Jacob Milgrom goes even further in arguing that “it may be plausibly suggested” that the term משכבי אשה is only used in relation to *forbidden* sexual relations, specifically those enumerated in Lev. 18, and that “sexual relations occurring with males outside these relations would not be forbidden” (Jacob Milgrom, *Leviticus 17-22: A New Translation with Introduction and Commentary* [New York: The Anchor Bible, Doubleday, 2000], p. 1569, s.v. “as one lies with a woman”). While Milgrom offers this interpretation as a mere “plausible suggestion” and does not follow through with it in his general interpretation of the verse (as we discuss below in this section), his argument here on the meaning of the phrase is important. He claims that the context of the verse is not homosexuality per se, but rather that male-male sexual relations are just as much forbidden as male-female sexual relations when the relationship is incestuous or adulterous as enumerated in Lev. 18 and 20.

se.<sup>19</sup> The Deuteronomy source is concerned more with what is permitted in the Temple rather than with purity of sexual life in general. Some scholars argue that the concern with the cult prostitute was an issue throughout the First Temple period (see 1 Kings 14:24; 1 Kings 15:12; 1 Kings 22:47; 2 Kings 23:7), perhaps only eradicated with the Deuteronomic reforms under King Josiah. Only later did Leviticus address itself beyond cultic concerns.<sup>20</sup> Whether or not this can be accepted as a historical sketch, the halakhah sees the Leviticus verses as the heart of the prohibition. Since the halakhah is rooted in those verses, it is upon those verses we focus.

Recent efforts have attempted to understand Leviticus 18:22 and 20:13 in ways that limit or exclude their applicability in our time. For example, it has been suggested that the issur applies only to cultic, coercive or exploitative sex.<sup>21</sup> We find these efforts unconvincing because they do not fit the context of פְּרִישַׁת עֲרִיוֹת. We believe that context is the sanctity and purity of sexual relations.

According to פְּרִישַׁת עֲרִיוֹת, real sex requires sanctification, codified later by halakhah as קִידוּשִׁין. There is strong opposition in halakhic literature to sexual relations outside of

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<sup>19</sup> Interestingly, there is no known prohibition against homosexual behavior from the ancient Mesopotamian cultures. However, there are Assyrian laws against homosexual rape. See David F. Greenberg, *The Construction of Homosexuality* (Chicago: University of Chicago Press, 1988), p. 126; James B. Pritchard, ed., *Ancient Near Eastern Texts Relating to the Old Testament* (Princeton: Princeton University Press, 1969), p. 181; G.R. Driver and John C. Miles, eds., *The Assyrian Laws* (New York: Oxford University Press, 1935), pp. 71, 391. Some interpret Genesis 9:21-24 as narrating a homosexual encounter between Ham and Noah when Noah was drunk. But the text frowns upon Ham because he was inappropriate towards his father, not because of homosexual behavior per se. If it was just that he uncovered his father's nakedness, then the crime is that he uncovered *his father's* nakedness. If it really means incest, then the essence of the crime is that it was incest, not the sexual act itself. Interestingly, the only Hittite prohibitions of homosexual behavior are incestuous ones. See Pritchard, *ANET*, p. 196; Greenberg, *Construction of Homosexuality*, pp. 124-125.

<sup>20</sup> Louis Epstein writes: "Sodomy in the Temple was not eradicated until the vigorous reforms of the righteous King Josiah. It was then followed up by the deuteronomic legislator, who set down the specific prohibition, 'There shall be no *kedeshah* among the daughters of Israel nor shall there be any *kadesh* among the sons of Israel.' This prohibition, it should be noted, differed from the later levitical law in two ways. First, it stressed the crime of sodomy not as a sexual crime but as a form of idolatry, saying nothing concerning secular sodomy. Second, it prohibited it on the same level as prostitution but did not consider it a capital crime. The levitical law went the whole way" (Louis Epstein, *Sex Laws and Customs in Judaism* [New York: Bloch, 1948], p. 136. See also, on the homosexual cult in the ancient world in general, Greenberg, *Construction of Homosexuality*, pp. 94ff.).

<sup>21</sup> See Bradley S. Artson, "Gay and Lesbian Jews: An Innovative Jewish Legal Position," *Jewish Spectator* (winter 1990).

marriage. According to most views it is forbidden.<sup>22</sup> The Torah, in פרשת עריות, lists a series of forbidden relations that include incest, adultery, homosexual acts and bestiality. They are forbidden because there is not any chance of them becoming “sanctified” through קידושין. Even though it was the Rabbis and not the Torah who fully developed the concept of betrothal, the Torah surely had a sense of marriage, and recognized marriage as sacred.<sup>23</sup> Adultery is a capital offense since it offends the sanctity of marriage and the union cannot be sanctified as a marriage because society would not permit it (hence the halakhah: אסור לבעל אסור לבעול). Incestuous relationships could not be sanctified through marriage since society would not permit close relatives to marry. Of course, one could not marry an animal. And a man could not marry another man. It would seem that the sexual transgressions of פרשת עריות are primary transgressions because they lack even the possibility of marriage. However, non-marital sex, while prohibited, is not an ערוה since it can lead to marriage. The punishment, therefore, would be much less severe. What is noteworthy is that all the עריות lack the possibility of fulfillment because of societal standards. Sometimes societal standards change, as we are seeing today with same-sex domestic partnership and marriage. But from the perspective of the Torah and the Rabbis, there was clearly no possibility for same-sex marriage. From that perspective, same-sex relations meant only sex. And the Torah teaches, then, that gay sex is real sex and is forbidden as are the other עריות.

Jacob Milgrom as well, in his recent comprehensive commentary on Leviticus, argues that Leviticus 18:22 and 20:13 must be understood within the context of the list of forbidden relations, the עריות. However, he understands the concern of the chapter(s) to be procreation rather than marriage. “The common denominator of all the prohibitions, I submit,” he writes, “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, lack of progeny (or its destruction in the case of Molek worship, v. 21). In a word, the theme (with

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<sup>22</sup> The prohibition against nonmarital relations is not entirely clear from the halakhic literature, although Maimonides does state clearly in his introduction to Hilkhot Ishut in the Mishneh Torah that it is forbidden for a man to engage in relations with a woman without ketubah and kiddushin. While there is no specific verse in the Torah forbidding nonmarital relations in general, one could argue that such a verse was unnecessary since the prohibition was surely known. In any case the category of a פילגש was developed in the Middle Ages to permit a man to engage in relations with a woman without kiddushin. The halakhic controversy, and the fact that the category is no longer invoked, shows that the tradition surely frowned on nonmarital relations in general. On the halakhic controversy, see Eliakim Ellinson, *נשואין שלא כדת משה* (Tel Aviv, 1982), pp. 25-79. See also Robert Gordis, *Love and Sex: A Modern Jewish Perspective* (New York: Women’s League for Conservative Judaism, 1978), pp. 167-168; and Robert Gordis, *Sex and the Family in Jewish Tradition* (New York: Burning Bush Press, 1967), pp. 54-55, n. 56. He concludes: “Judaism maintains the principle that sexual relations are proper only within the marriage bond” (ibid., p. 41). The Rabbinical Assembly has clearly taken the position that “Judaism would have us refrain from sexual intercourse outside of marriage.” See Elliot Dorff, *This Is My Beloved, This Is My Friend: A Rabbinic Letter on Intimate Relations* (New York: Rabbinical Assembly, 1996), p. 31. See also the responsum by Pesach Schindler in *Responso of the Vaad Halakhah of the Rabbinical Assembly of Israel*, vol. 4, 5750-5752 (Jerusalem: Rabbinical Assembly of Israel and the Masorti Movement, 1992), pp. 81-90.

<sup>23</sup> See now Michael L. Satlow, *Jewish Marriage in Antiquity* (Princeton: Princeton University Press, 2001), for the Rabbinic construction of “Jewish marriage.”

Ramban) is procreation.”<sup>24</sup> Milgrom goes on to explain that nocturnal emissions require purificatory rites (Lev. 15:16-18) because of the wasting of seed, but that the Torah nowhere explicitly forbids masturbation and, Milgrom infers, would permit birth control “as long as the couple reproduced itself.”<sup>25</sup> Female-female sexual relations are ignored by the Torah, Milgrom argues, since there is no exchange of seminal fluids and hence no destruction of seed. What is extraordinary about the lists of forbidden relations in chapters 18 and 20 is that they can only hope to produce illicit children (through incest or adultery), no children (through male-male relations and bestiality), or dead children (through Molek worship). While Milgrom’s approach is slightly different from our suggestion in focusing on procreation and the emission of semen rather than on marriage, he agrees that it is the licit or illicit nature of the relationship that permits or forbids the exchange of fluids. A non-marital heterosexual union would not be an ערווה because unlike incest or adultery, the potential progeny would not be illegitimate, and unlike male-male relations and bestiality, the potential for procreation does exist.

We are now in a position to consider the underlying rationale of פרשת ערווה. The Torah’s concern is the sanctity of marriage, as we formulate it; Jacob Milgrom understands the concern as the importance of procreation. These two views are, in fact, the two understandings among the Rishonim of Bar Kappara’s statement in Nedarim 51a (discussed above on pp. 4-5) on the meaning of “abomination.” Bar Kappara said: מאי בה תועבה: תועבה אתה בה, what is *to’evah*? You go astray through it (a Hebrew play on words). The Rishonim understand this as meaning either destructive to the family or non-procreative.<sup>26</sup> The *meaning* of the Torah was to prohibit male-male anal intercourse. Its *rationale*, however, was to protect against non-procreative relations or non-marriageable unions.

The intent of the Torah, we have argued, was to teach that gay sex is real sex. This is not a lesson with which many today would disagree. But whereas the context of the Torah was to forbid such an activity to Israelite men lest they think that sex with a man was not real sex and hence permitted, today we are faced with a very different context. Our שאלה relates to committed Jews who wish to form marital bonds, the very bonds that the Torah and the Rabbis were so concerned to preserve and keep pure through the sexual purity rules of Leviticus. In the past, same-sex unions were not a societal

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

<sup>25</sup> *Ibid.*, p. 1568.

<sup>26</sup> See the discussion of these sources in Joel Roth, “Homosexuality,” *Responsa 1991-2000*, pp. 627, 635.

option.<sup>27</sup> They are today. If the concern is procreation, then our times also offer new options.

Today, both male and female same-sex couples have various means of raising children, including adoption.<sup>28</sup> We need only point to recent CJLS decisions on adoption, artificial insemination, in vitro fertilization and surrogate motherhood to indicate the many options available to couples who wish to raise children.<sup>29</sup> What should be clear is that both primary concerns of the Torah, marriage and procreation, can be fulfilled today by same-sex couples in ways that did not exist in earlier times. This is a clear case of שינוי העיתים, of changing times and contexts.

### Section Five: The Term תועבה

Any discussion of שינוי העיתים in this context must address the meaning of the term תועבה. We are convinced that the term תועבה as used in the Torah was not absolute but relative to society, to culture, to individuals and to time. It was attributed to same gender sexual relations in the distant and recent past but generally no longer reflects the attitude of most members of the Jewish community. The halakhah is now at odds with the legal status of gays and their sexual habits in Jewish society both in Israel and in the United States because gay sex is no longer considered תועבה or criminal by most Jews and by others.

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<sup>27</sup> This is clearly true despite the statement of the Sifra (Aharei Mot 9:5) cited above (p. 3) that in ancient Egypt men married men and women married women. The Sifra is polemical. The Rabbis are projecting onto ancient Egypt practices they wish to prohibit. There is no evidence for same-sex marriage in ancient Egypt. If there were, it would certainly be trumpeted by the many studies of homosexuality in the ancient world that have been written in recent decades. Any real example from the ancient world of same-sex *marriage* (as opposed to general homosexual behavior), such as the emperor Nero's marriage to his young male lover, is clearly aberrational and does not represent societal acceptance. (Caligula made his horse a senator. Does that mean that Roman society accepted animals as senators?) The effort to interpret the wall paintings discovered in the necropolis of Saqqara outside Cairo in 1964 as a gay couple has certainly not achieved scholarly consensus. "Over the years, the tomb's wall art has been subjected to learned analysis, inspiring considerable speculation. One interpretation is that the two men are brothers, probably identical twins, and this may be the earliest known depiction of twins. Another is that the men had a homosexual relationship, a more recent view that has gained support among gay advocates... Most Egyptologists accept the normal-twins interpretation advanced most prominently by John Baines, an archaeologist at the University of Oxford in England" (John Noble Wilford, "A Mystery Locked in Timeless Embrace" *The New York Times*, December 20, 2005. Cf. John Baines, "Egyptian Twins" *Orientalia* 54(4) [1985]:pp. 461-482).

<sup>28</sup> As Milgrom writes following his elucidation of the meaning of Leviticus 18:22: "Finally, it is imperative to draw the logical conclusion of this discussion for our time. If my basic thesis is correct that the common denominator of the entire list of sexual prohibitions, including homosexuality, is procreation within a stable family, then a consolatory and compensatory remedy is at hand for Jewish gays...If gay partners adopt children, they do not violate the *intent* of the prohibition. The question can be asked: Why didn't the biblical legist propose this remedy? The answer simply is that this option was not available, since ancient Israel did not practice adoption" (Milgrom, *Leviticus 17-22*, pp. 1568-1569).

<sup>29</sup> See papers by Elliot Dorff, Aaron Mackler and Elie Kaplan Spitz, *Responsa 1991-2000*, pp. 461-557.

We begin by examining the meaning of the term תועבה in the Torah, where it appears a number of times and is generally translated as “abhorrent.” The translation implies an aesthetic or moral judgment although that is not how תועבה was viewed by some Rabbis in the prohibition of anal sex among males. It was understood to be a rationale for prohibiting a husband from violating his sexual responsibility to his wife or his obligation to have children.

The word תועבה is also used in the Torah to describe objects that Israelites are urged to abhor, such as idols<sup>30</sup> and non-kosher food<sup>31</sup> or actions such as idolatry<sup>32</sup> or the use of false weights and measures in business transactions.<sup>33</sup> The Torah generally deems only the object or action a תועבה but not the sinner. While an idol or non-kosher meat are identified as abhorrent, the idolater, the consumer of treif meat and one who engages in זכר משכב are not. Not so the unscrupulous merchant who is personally abhorrent to God.

Rabbi Joel Roth correctly claims that תועבה as used in the Torah is an attributed quality rather than an inherent one. One people’s תועבה may be another’s means of gaining a livelihood or celebrating its deliverance. Sheep herding<sup>34</sup> and lamb<sup>35</sup> are תועבות מצרים but they are favorably considered by Hebrews, the former as a desirable occupation, the latter for an offering to God. Egyptians may not sit at a dining table with Hebrews, they call it a תועבה,<sup>36</sup> while the Torah forbids זכר משכב, from the perspective of the Torah an acceptable and widespread practice among Egyptians, as תועבה. The term is not used to describe the inherent or universal quality of an item or human action, it expresses its culturally or religiously determined value in a given society and identifies specific material objects or behaviors that are denied to its members.

Scripture views some תועבות, however, as abhorrent not only to a given society but to God. The falsifying of weights and measures is an inequity that places the violator in this category although other forms of commercial cheating do not. Most often the phrase is used to describe idols and idolatry as abhorrent to God<sup>37</sup> but so is cross-

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<sup>30</sup> Deut. 7:26: ולא תביא תועבה אל ביתך והיית חרם כמהו שקץ תשקצמו ותעב תתעבנו כי חרם הוא.

<sup>31</sup> Deut. 14:3: לא תאכל כל תועבה.

<sup>32</sup> Deut. 13:15, communal, and Deut. 17:4, individual idolatry.

<sup>33</sup> Deut. 25:16: כי תועבת יי א-להיך כל עשה אלה כל עשה עול.

<sup>34</sup> Gen. 46:34.

<sup>35</sup> Exod. 8:22.

<sup>36</sup> Gen. 43:32.

<sup>37</sup> Idols in Deut. 7:25 and 27:15; infanticide in Deut. 12:31 and 18:9-12 where augering, hidden sorcery, divining, enchanting, magical knot tying, seeking ghosts and spirits and inquiries of the dead are added; the wages of female and male prostitutes, probably in connection with a cult in Deut. 23:19.

dressing,<sup>38</sup> while homosexual intercourse is not identified in this way. And even when an object or action is designated in the Torah as a תועבת, there is the recognition that non-Israelite societies may not react with the abhorrence felt by Israelites or their God.

Abhorrence is not only relative to society and its values. The Torah believes that individuals may experience תעוב based on their historical experience. Israelites are warned against abhorring Edomites or Egyptians despite any cultural or personal inclination that may impel them in that direction.<sup>39</sup> Abhorrence it seems is something that the Torah believes can be controlled and there are occasions when it ought to be.

Behavior that is not deemed תועבה in one generation may be so in another. The Torah includes among the sexual practices enumerated as תועבות in Leviticus 18 marriage to one's half sister<sup>40</sup> or to two sisters<sup>41</sup> yet a few generations earlier, the Patriarchs Abraham<sup>42</sup> and Jacob<sup>43</sup> had consummated such marriages. Of course the Torah was not yet promulgated and the Patriarchs were not obligated to observe its sexual prohibitions. But does this mean that in the biblical view they engaged in sexual relations that God deemed abhorrent at the time but God, remaining silent, without a word of admonition to the Patriarchs, established the covenant with them and with the descendants born out of these abhorrent relations nevertheless? Or does the Bible mean that God did not consider their marriages abhorrent at all before the Torah was given at Sinai? These Leviticus prohibitions are not identified as תועבת and perhaps they are not to be perceived in that way at all.

These are instances in which permitted actions were subsequently banned as תועבות. An example of something prohibited as תועבה being permitted at a later time is to be found in the Talmudic discussion about the permissibility of meat from stabbed animals brought to Eretz Yisrael during the period of the Israelite conquest. Rabbi Jeremiah b. Abba cites Rav that based on the biblical promise that the conquerors would discover בתים מלאים כל טוב, “houses full of all good things,” even כתלי דחזרי that Rashi helpfully explains are הזירים יבישים שקורין בקינ"ש, “dried pigs that are called bacons,” were permitted at that time and surely בשר נחירה, “stabbed meat.”<sup>44</sup> The assertion that pig meat, a forbidden תועבה, was permitted for a time goes unchallenged because in the view

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<sup>38</sup> Deut. 22:5.

<sup>39</sup> Deut. 23:8.

<sup>40</sup> Lev. 18:9 and repeated in 20:17.

<sup>41</sup> Lev. 18:19.

<sup>42</sup> Gen. 20:12.

<sup>43</sup> Gen. 29:18-28.

<sup>44</sup> B. Hullin 17a. Stabbed meat refers to the flesh of kosher animals not dispatched according to the requirements of kosher slaughter.

of the Rabbis, the תועבה designation was subject to suspension. Even more remarkable, perhaps, is that something considered תועבה by Scripture should be located by Rav under the rubric of “all good things.” Most remarkable is that he was prepared to accept the consumption of meat that is תועבה by our ancestors through text interpretation alone, without concluding that it was one of the *takkanot* ascribed by tradition to Joshua.

What is clear to us is that the use of the תועבה term in the Bible may apply only to a specific society and within that society to a specific and limited period of time in its history, and the rabbinic tradition was at peace with that. Moreover, the transition from licit to abhorrent could take place in the Torah’s telling, over a very short span of time.

Since תועבה is an attributed characteristic rather than an inherent one, it is proper to ask if the attribution, once made, is unalterable. Is the biblical prohibition of משכב זכר along with the halakhic record in its wake fixed for all time or is change possible? The Torah does not suggest that homosexual relations are תועבה so they would not seem to fall into the permanent category that would include idolatry. We believe that the Torah’s תועבה attribution to same gender sexual relations is entirely accurate to the biological facts and sexual morality as understood and practiced in ancient and even in more modern times but not as they are today. The general state of scientific knowledge about homosexuality does not sustain that perception nor does the Jewish community in the Diaspora or in Israel still consider same-gender sex relations תועבה or subject to capital punishment.

It may be an incidental but not insignificant point that contemporary sexual morality is egalitarian in ways never contemplated in the Torah. Engaging in promiscuous premarital heterosexual intercourse has no subsequent social implications for a male but according to halakhah transforms a Jewish women into a זונה, a prostitute. Because our sexual ethic has evolved from patriarchal to more nearly egalitarian, this is a morally unacceptable distinction for us and we dare say to very many Jews today. One cannot fault the Torah or the halakhic tradition for not being aware of contemporary sensibilities. But we are not and need not be limited by ancient sensibilities.

## **Section Six: Our Changed Societal Context**

At the present time, it is almost universally accepted in the scientific community that homosexuality occurs naturally in a given percentage of the population, is neither a sickness nor a personal choice and is irreversible. In 1974, the American Psychiatric Association removed homosexuality from its list of mental disorders, followed closely by the American Psychological Association and the National Association of Social Workers. At the 2004 CJLS retreat in Baltimore, where the issue was addressed by several psychiatrists and psychologists, it became clear that modern scientific thinking does not

consider a homosexual orientation as one of choice. It certainly is not a “lifestyle” chosen from a shopping list of alternatives.

Particularly telling was the statement by Dr. Abba Borowich, a psychiatrist who has worked for more than two decades to reverse homosexuality in the Orthodox community where he is affiliated. He reported that although intensive therapies may be able to exert some movement on the Kinsey scale to make it possible for some gays to marry and have children, he has abandoned all efforts toward that end. Despite his religious commitment and professional history of some success, Dr. Borowich’s experience with reversion and the creation of unhappy individuals and families has moved him to terminate his efforts to make it possible for homosexuals to live as heterosexuals. This is consonant with what we believe is the broader scientific consensus that not only do homosexuals not choose their sexual orientation but that it is essentially irreversible.<sup>45</sup>

In Israel the treatment of homosexuals has been transformed by legislation that decriminalizes homosexual intercourse, prevents discrimination based on sexual orientation in employment or the military and provides eligibility to same sex partners for various social and monetary benefits. The Knesset also passed the Prevention of Sexual Harassment Law that includes provision for civil and criminal relief to victims.<sup>46</sup> This transformation in the conservative social environment of Jewish society in Israel, despite its setting in the Middle East, its population’s roots and the influence of Orthodox rabbinic authority, has resulted in a gap between the halakhah and public law that invites attention. How much more so should Conservative Jews in the United States and other parts of the West attempt to bring halakhah, their sexual morality and the law into agreement!

The changes that have occurred and continue to occur in public law in Western societies as more and more jurisdictions are acknowledging same-sex couples are the result of a process undertaken by legal authority. In Israel the amelioration of the legal standing of gays is reflected in the law as written by Jews and under which they live of their own choice. That is a powerful message to us that the halakhah, if it is not merely to be a frozen historical record but offer direction for contemporary Jews wherever they reside, must be impacted by this transformation in public law. This has been true in the past and efforts to block considered (due process) change in halakhah at this time only

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<sup>45</sup> These arguments are presented forcefully and compellingly, with all the supporting scientific evidence, by Rabbis Dorff, Nevins and Reisner in their paper, “Homosexuality, Human Dignity and Halakhah” currently being considered by the CJLS.

<sup>46</sup> Alon Harel, “The Rise and Fall of the Israeli Gay Legal Revolution,” *Columbia Human Rights Law Review* (spring 2000). The author’s conclusion that the liberalization of the law has provoked a reaction in an essentially conservative society that will make further changes more difficult seems obvious. It does not alter the fact that discrimination in Israeli society against gay sexuality is no longer tolerated according to the law.

diminish its authority and render it irrelevant. To maintain in this day that gays who engage in same gender sex are criminals who deserve to be executed by stoning will in our view bring no glory to God, Torah or כלל ישראל.

It seems to us that a remarkable change has taken place in the attitude of the Jewish community towards gays in recent times and this must cause an evolution in the halakhah. We are left, therefore, with the burden of finding a resolution within the Conservative movement that is theologically and morally consistent with a reasonable and acceptable concept of Jewish law.

More than a decade has passed since the Conservative movement through the United Synagogue and the Rabbinical Assembly has expressed its opposition to restrictions on homosexuals and welcomed them to the community. Despite that, the consensus reached by the CJLS in 1992 imposed limits on the roles gays may play in our community. That should be corrected at this time.

Why? What has changed since the 1992 CJLS deliberations? While “commitment ceremonies” were a part of the discussion, they were not the central focus. Since then, the movement for recognition of same-sex unions has been waged across the globe and political efforts to achieve rights for gay and lesbian partners, be it through actual marriage, health care, inheritance, etc., have flourished. Recently, courts in Canada, as well as California, Connecticut, Massachusetts, Hawaii, Maine, New Jersey, Vermont, and the District of Columbia, and a growing number of governments including Andorra, Argentina, Belgium, Brazil, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Iceland, Israel, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland and the United Kingdom have ruled that either same-sex unions or marriages must be civilly recognized. Some American municipalities have begun to offer same-sex marriages, although this is an ongoing legal debate. The category of “domestic partnership” has become widely accepted. A proposed constitutional amendment in the United States banning same-sex marriage acknowledges this changed reality. Opposition to same-sex marriage has been surprisingly combined with acceptance of domestic partnerships. And in a landmark case, the United States Supreme Court’s 2003 decision in *Lawrence vs. Texas*,<sup>47</sup> overturning *Bowers vs. Hardwick*, struck down the “sodomy laws.” This is a profound transformation of society, and much of it has taken place after 1992. Again, this is what halakhists call שינוי העיתים.

The idea of a same-sex couple living comfortably in society and having the option of raising children was not as pervasive in 1992 as it is today. Through the popular media of television and film the general culture has become accustomed to same-sex couples and their families in ways that were not imagined only a decade ago. Many newspapers

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<sup>47</sup> 539 U.S. 558 (2003).

now regularly includes same-sex couples with the marriage announcements in the society pages. Additionally, we know much more about the viability of same-sex family life and child-rearing. Gays and lesbians have, in the last decade, been more active in suing for custody of children and the courts have examined (and commissioned) social-scientific studies concerning family relationships of gays and lesbians. These studies have shown that lesbians and gays are at least as successful as heterosexuals in forming stable relationships, that they are as interested in forming strong unions and raising children as heterosexuals, and that the children born to or raised by gay or lesbian parents are no less “normal” than those born to or raised by heterosexual parents.<sup>48</sup>

In summary, the CJLS could not envision in 1992 that the *ideal* of the Jewish family could be fulfilled in a gay or lesbian context. Rather, it struggled with exempting those who could not fulfill that ideal from the responsibilities of our general expectations. The CJLS decided that concerns for marriage and children outweighed the needs of gay and lesbian Jews. The Consensus Statement itself was only intended to be temporary until further study could take place, as argued strongly by Rabbi Dorff at the time. It no longer reflects the needs of our community, nor our reading of halakhah and God’s will.

In our view, the Torah prohibitions of same-gender male or female sexual relations as תועבה, abhorrent acts, are not consistent with current knowledge almost universally accepted in the scientific community about the origins of homosexuality, its natural occurrence in a given proportion of the population, its essential irreversibility and that it is neither a sickness nor a choice. The תועבה designation and subsequent halakhic prohibitions no longer reflect the legal treatment of gays in Israel or in most other Western countries and do not represent the perception of them in most of the Jewish community. This disparity between what the law allows and what halakhah has heretofore denied, between the halakhah and general perceptions about same gender sexuality, should be a cause for concern to everyone who would live according to a code of Jewish religious law.

## Section Seven: The Systemic Question

We have suggested a way of reading פרושה עריות where the reasons for the prohibition would no longer apply today. We have argued that the context of same-sex relations in our time is not the same as that known by the Torah and the Rabbis, and that the criminalization that the Rabbis codified can no longer be maintained. This conviction is driven by the overwhelming consensus of scientific and sociological findings on

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<sup>48</sup> Some argue that gay and lesbian families are statistically *safer* environments for children since there is a lower reported incidence of domestic abuse in same-sex families. See, for example, Charlotte J. Patterson, “Family Relationships of Lesbians and Gay Men,” *Journal of Marriage and the Family* 62 (November 2000): 1052-1069, for a thorough overview of recent studies through 2000, including an extensive bibliography. See also, though now dated, Laura Benkov, *Families We Choose: Lesbians, Gays, Kinship* (New York: Columbia University Press, 1991).

homosexuality. And yet we recognize that the precedented view of the Rabbis has been that the Torah meant to prohibit all acts of *משכב זכר*, and that it is a bold step to suggest a limitation or the non-applicability of what the Rabbis understood to be *דאורייתא*.

We agree that the text of the Torah is unchangeable, but the meaning that the text holds, that is, its halakhic meaning, is explained by the rabbis. An analogy from American constitutional law is that while the judiciary cannot amend the Constitution, it can reinterpret its meaning. The duty of the judiciary to determine the legal meaning of the Constitution is as basic to American constitutional law as is the duty of the rabbis to determine the meaning of the Torah. We fully understand that a change in understanding of the Torah's halakhic meaning is a major change in precedented rabbinic law. Only a significant difference in historical circumstances, such as the case before us, could merit such a change. We believe, however, that in this case the change in historical circumstance is adequate to justify a change in the halakhah.

The systemic question arises whether we, as modern-day rabbis, have the authority to offer our own readings or limitations of the Torah if they are at variance with the precedented interpretations of the Sages. One must usually follow precedent in order to retain the integrity of the legal system. But there are circumstances when precedent can be overturned. Rabbi Joel Roth defines those circumstances as “compelling reason,” that is, when, in the judgment of the decisor, there is sufficient justification for overturning precedent.<sup>49</sup> We feel there is ample compelling reason in this case.

Throughout the history of Jewish law, rabbis have found it necessary over and over again to limit or exclude the applicability of ancient legislation when faced with changed circumstance or “compelling reason.” A classic example is the limitation of the law of the rebellious son (Deut. 21:18-21) by means of interpretive exclusion. The *mi'utim* offered by the Rabbis in this discussion go so far as to depart from the obvious *pshat* of the text. Specifically, the Rabbis argue that the phrase *איננו שמע בקלנו* (he does not listen to our voice), since *קל* is singular rather than plural, excludes any child whose mother and father do not have voices identical in tone and timber. The Rabbis themselves recognize that this virtually eliminates the law when they say immediately after: *בן סורר ומורה לא היה ולא עתיד להיות*, the stubborn and rebellious son never was and never will be.<sup>50</sup>

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<sup>49</sup> See Joel Roth, *The Halakhic Process: A Systemic Analysis* (New York: Jewish Theological Seminary, 1986), ch. 4.

<sup>50</sup> Sanhedrin 71a. The statement of Rabbi Jonathan in the gemara that disagrees with this conclusion stating that he saw a *בן סורר ומורה* and sat on his grave does not mitigate the gemara's conclusion. R. Jonathan's statement is appended as a minority voice against the gemara's bold conclusion. Alternatively, it is a way of saying that although we do not adjudicate this law, there are indeed people who deserve the punishment of *בן סורר ומורה*. And even assuming that R. Jonathan is referring to an actual adjudicated case, subsequent Jewish law has completely disregarded this legislation.

The Rabbinic treatment of the law of the apostate city (Deut. 13:13-19) similarly renders it inoperative through the process of *mi'ut*.<sup>51</sup> Yet another example is the mishnaic treatment of the man who had suffered a seminal emission, a *zav* (Lev. 15:1-18). Rabbi Akiva rules that if a man has eaten or drunk anything prior to seeing the signs of *zivah*, the flow can be attributed to that and exempt him from the necessary purification rites. He maintains his view even when challenged that this eliminates the possibility of anyone ever being considered a *zav*.<sup>52</sup>

An example of rabbinic limitation of an explicit Toraitic law due to cultural change is the treatment of the proscription of the Canaanites (Deut. 20:15-18). The Torah says: “Thus [referring to the previous legislation about offering terms of surrender] you shall deal with all the towns that do not belong to nations hereabout. In the towns of the latter peoples, however, which the Lord your God is giving you as a heritage, you shall not let a soul remain alive. No, you must proscribe them—the Hittites and the Amorites, the Canaanites and the Perizzites, the Hivites and the Jebusites—as the Lord your God has commanded you, lest they lead you into doing all the abhorrent things (תועבותם) that they have done for their gods and you stand guilty before the Lord your God.” The Rabbis limited the application of this law because they could not believe that God would have commanded genocide of the native populations. And so the Sifrei teaches: אם עושים תשובה אין נהרגים, if they repent, we do not kill them.<sup>53</sup> That is, only unrepentant Canaanite idolaters are to be killed. The Torah’s legislation is quite clear. But the Rabbis looked at the context of the law, and saw that the concern of Deuteronomy was with the danger of idolatry in the midst of ancient Israel. They reasoned that if that concern were mitigated by repentance on the part of the Canaanites, then the Torah’s command of proscription would not apply. That is, if circumstances changed so that the practices of the Canaanites were no longer considered תועבה, and therefore their continued existence no longer posed a threat to the spiritual security of ancient Israel, then the legislation would no longer apply.<sup>54</sup>

This is precisely the type of *mi'ut*, based on a changed cultural context, that we are proposing here. Casual or promiscuous sex, whether heterosexual or homosexual, does indeed threaten the values of the Torah. However, consecrated societally recognized same-sex unions, which did not exist in the ancient world but do in ours, are not a threat to the Torah’s values; on the contrary, such unions support them.

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<sup>51</sup> Sanhedrin 71a.

<sup>52</sup> Mishnah Zavim 2:2.

<sup>53</sup> Sifrei Deuteronomy to ch. 20, siman 102. For a discussion of the modern critical approach as well as that of rabbinic literature, see Excursus 18 in Jeffrey Tigay, *The JPS Torah Commentary: Deuteronomy* (Philadelphia: Jewish Publication Society, 1996), pp. 470-472.

<sup>54</sup> Cf. also the discussion on Hullin 17a of stabbed meat that had been considered תועבה, discussed above p. 17.

These *mi'utim* cited above were not considered to be *takkanot* in the framework of the halakhic system.<sup>55</sup> They derived their authenticity from the interpretive powers of the Rabbis to reread and rework an earlier understanding of the text in their effort to hear God's voice in their time.<sup>56</sup> The *mi'ut* that we offer in this paper is far less bold.

Two further examples of rabbinic limitation (*mi'ut*) of an explicit Toraitic law due to cultural/societal change (*shinui ha'itim*) are presented in Mishnah Sotah 9:9:

משרבו הרצחנים בטלה עגלה ערופה-משבא אלעזר בן דינאי ותחינה בן פרישה היה נקרא, חזרו לקרותו בן הרצחן. משרבו המנאפים פסקו המים המרים.  
When murderers increased they cancelled the breaking of the heifer's neck. This was when Elazar ben Dinai came, who was at first called Tehinah ben Perishah but was then called ben Harazhan (son of the murderer). When adulterers increased they stopped the [ritual of the] bitter waters.

Deuteronomy 21:1-9 commands the breaking of a heifer's neck in a ceremony to relieve a town of blood-guilt when the identity of a murderer is unknown. The Mishnah limits the applicability of the command so that it does not apply in a society, such as the Rabbis' knew, where the number of murderers has increased. The Torah envisioned a circumstance where there was no one in the world who knew who the murderer was. The Rabbis recognized that their world was a different world from that of the Torah. They even date the sociological change to the time of Elazar ben Dinai, who they note became known as Son of the Murderer. Elazar ben Dinai is remembered by Josephus as an active first century Zealot.<sup>57</sup> The Rabbis reflected on the experience of the Great Revolt as a period of great bloodshed that changed the nature of society. In their world, the mitzvah of the Torah could not apply. It was limited to a different historical circumstance.

The second example from the mishnah in Sotah addresses the ritual of the sotah itself, the bitter waters that an accused adulterous had to drink, as commanded by Numbers 5:11-31. The Mishnah teaches that the ritual of the bitter waters applies in a societal circumstance where adulterers were rare. As explained in the Gemara (Sotah 47b), the efficacy of the ritual could only apply where men were free from guilt, based on a non-contextual interpretation of Numbers 5:31: "The man shall be clear of guilt." The

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<sup>55</sup> See ישראל שציפנסקי, התקנות בישראל (Jerusalem, Mosad Harav Kook, תשנ"א) for a fuller discussion of the subject. For example, the abandonment of the המאררים מים by Rabbi Yohanan b. Zakkai is not considered a takkanah because his decision was based on a verse from Scripture (p. שסז). The examples cited here are not included in Schepansky's comprehensive list of takkanot. See also Menachem Elon, "Takkanot," (*Encyclopaedia Judaica* 15:714) and "Interpretation," (*Encyclopaedia Judaica* 8:1414) where he distinguishes between legislation derived from exegesis or midrash and takkanot.

<sup>56</sup> As Rabbi Roth has explained: "The scope of rabbinic authority is, in theory, unbounded. The meaning of the Torah in every generation, and with it the determination of the will of God for that generation, is entrusted to the hands of that generation. Rabbinic interpretation of the law is, as it were, the never-ending revelation of the will of God" (Roth, *Halakhic Process*, p. 133).

<sup>57</sup> Ant. 20:2-4,121,161; Wars 2:235, 253.

Rabbis argued that in their day men committed adultery in greater numbers, and in such a changed societal context the Torah's law of the Ordeal could not apply. This example is particularly interesting because the assumption that in their day adultery was more common than in the Torah's day is a difficult claim to prove, since adultery, by nature, is usually concealed. An increase in violence, as in the first case in the Mishnah, should be more readily apparent. Nevertheless, the Rabbis still assumed the discretion to make a sociological judgment, both about their own times, as well as the Torah's time. That judgment is an extra-legal factor, which they chose to consider in order to limit the application of Torah commands in their time.

Two rabbinic "legal fictions" that limit the applicability of biblical laws because of changed societal circumstances are the *prosbul* and the *heter iska*. Deuteronomy 15:2 orders the remission of loans in the sabbatical year. The basic principle behind the law is relief of the poor. However, by the time of the Rabbis, society was no longer barter-based but currency-based. In a currency-based economy, automatic remission of debts every seven years had an adverse effect on the poor, since no one would grant them credit in the sixth year of the cycle. The *prosbul*, instituted by Hillel, is a device whereby the court is a party to the loan, and the court's action is not cancelled by the sabbatical year. The intent of the Torah's command to remit debt was to protect the poor. In order to preserve the Torah's intent, the *prosbul* limits, indeed defeats, the Torah's law.

Similarly, the Torah forbids lending (at least to other Israelites) at interest (Exodus 22:24, Leviticus 25:35-37, Deuteronomy 23:20-21). Again, the basic principle is protection of the poor, that lenders not bleed them for interest in their time of need. However, in a barter-based economy like the Torah's, where lending was only practiced when there was a need, but not as a business of its own, the charging of interest could be considered an oppression of the poor. However, in a currency-based economy such as that known by the Rabbis, money itself was a commodity, bought and sold. Various halakhic solutions were developed over time to limit the applicability of the prohibition of lending at interest, since in such a world, lending at interest was not considered "usury." The most famous of these solutions is the *heter iska*, which establishes a partnership between lender and borrower so that the interest is considered as common profits. The application of the *heter iska* was extended by the CJLS in 1988, by a vote of eleven to one, so that a constructive *heter iska* was considered as operative in all transactions between Jews, and a specific document to that effect is no longer required.<sup>58</sup> Here we have a case of *lo ta'aseh*, a biblical prohibition, limited so completely as to have no practical application.

Two broad examples which might be deemed more philosophical are sacrifices (*korbanot*) and slavery. The Torah commands an elaborate system of sacrificial worship.

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<sup>58</sup> Ben Zion Bergman, "A Question of Great Interest: May a Synagogue Issue Interest-Bearing Bonds?" *Responsa 1980-1990*, pp. 319-323.

Maimonides famously states in the Guide that sacrifices served a more primitive stage in relation to the Divine, but would not be appropriate in an age of philosophical thinking. While we do not know if that would be Maimonides' halakhic position were a Third Temple established, and while it is true that he treated the sacrificial code in full detail in the Mishneh Torah, nevertheless, we cannot but respect Maimonides' appreciation that the Torah addressed a particular time and society, even while it transmits eternal truths.

A major change in societal values was experienced in the nineteenth century when slavery was abolished in most of the civilized world. Although the Torah allows for slavery, Rabbi Sabato Morais, the founding president of the Jewish Theological Seminary, was a leading abolitionist voice in Philadelphia before and during the American Civil War. His absolute rejection of slavery was not inconsistent with his loyalty to the sanctity of the Torah. Rabbi Morais understood that the Torah's regulations regarding slavery were driven by the principle of the recognition of all human beings as images of the Divine. The Torah sought to regulate slavery, which was a societal given. No one living in the time of the Torah could envision a society without slavery. However, in Morais' time, the surrounding society was rejecting slavery. Therefore, the regulations permitting slavery ought not apply.

Just as the ancient Israelites could not envision a world without slavery, so could they not imagine a society where two men or two women could live together in a recognizable consecrated relationship and raise children. Just as the Rabbis understood that monetary interest could no longer be considered usury in a currency-based economy, so do we understand that same-sex relationships can no longer be considered תועבה. And just as the Rabbis limited the application of biblical laws (such as the proscription of the Canaanites, the *eglah arufah* and the sotah ordeal) because of changed societal circumstances, so are the rabbis of today able to limit the prohibition of משכב זכר and related laws in a society such as ours where same-sex couples are able to fulfill the intentions of the Torah, that is, to strive to achieve holiness in their relationships and to build families.

## **Section Eight: Responding to an Alternative Approach**

We have discussed the halakhah of משכב זכר and the grounds for excluding its applicability. An alternative approach to the question, argued by our colleagues Rabbis Dorff, Nevins and Reisner, makes a distinction between משכב זכר, understood strictly as anal intercourse between men, and other means of homosexual intimacy. They argue that

only anal intercourse is forbidden by the Torah, while other forms of homosexual intimacy, while forbidden דרבנן, by the Rabbis, should be permitted today.<sup>59</sup>

The Talmud itself, in a fascinating gemara, discusses different forms of homosexual behavior. The Rabbis lived in the Greco-Roman world, and in that world anal intercourse was not the generally preferred means of male-to-male sexual contact. The more preferred, or more “honorable” means was what K.J. Dover describes as “intercrural intercourse,” that is, through the thighs.<sup>60</sup> The Rabbis clearly recognized intercrural intercourse, as seen in the following passage from Niddah 13b:

ת"ר: הגרים והמשחקין בתינוקות מעכבין את המשיח... "משחקין בתינוקות" מאי היא? אילימא משכב זכר- בני סקילה נינהו. אלא דרך אברים-- בני מבול נינהו. אלא דנסיבי קטנות דלאו אולודי נינהו.

Our Rabbi taught: Converts and those who make sport with children delay the coming of the Messiah.... “Those who make sport with children”—who does that refer to? If you wish to say that it refers to *mishkav zakhur* (male-male anal intercourse), [then you would be incorrect since] they are included among those who are executed by stoning [and therefore they cannot fall in the category of those who merely delay the coming of the Messiah]. If rather [you wish to say that it refers to those men who engage in sexual acts] between the limbs, [then you would also be incorrect since] they are included among those [who merit destruction] in the Flood [since, as R. Eliezer said above (Niddah 13a), whoever takes hold of his penis and makes water is as if he brings a Flood upon the world]. Rather, [the phrase] includes those who marry minors who cannot bear children [because they are too young].

This gemara presents here a hierarchy of actions which are frowned upon, but by decreasing levels of legislative control. Anal intercourse is a capital offense. Sexual acts that do not constitute sexual intercourse but involve spilling of seed (which is the ultimate effect of “between the limbs”) are forbidden because they involve spilling of seed, an offense but not a capital offense. Reference is made to a statement of Rabbi Eliezer from the previous page in the Talmud: כל האוהז באמתו ומשתין כאילו מביא מבול לעולם, that one who takes hold of his penis and emits fluid/urinates is as though he had brought a flood upon the world. Rabbi Eliezer may have been simply referring to one who touches his penis during urination, but he is probably referring to masturbation, or is concerned that touching the penis during urination might lead to masturbation, and he is, thus, ultimately concerned with the spilling of seed. Finally, marrying young girls who will not be

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<sup>59</sup> See Dorff, Nevins and Reisner, “Homosexuality, Human Dignity and Halakhah.” This view was earlier presented by our colleague Rabbi Simchah Roth in “Dear David: Homosexual Relationships—A Halakhic Investigation.” Though not formally submitted to the CJLS, this responsum was distributed to its members for informational purposes. Dated 2003, it can be accessed on the internet at: <http://www.bmv.org.il/ab/dd.asp>.

<sup>60</sup> Dover writes: “When courtship has been successful, the erastes [active partner] and the eromenos [passive partner] stand facing each one another; the erastes grasps the eromenos round the torso, bows his head onto or even below the shoulder of the eromenos, bends his knees and thrusts his penis between the eromenos’s thighs just below the scrotum” (K.J. Dover, *Greek Homosexuality* [Cambridge: Harvard University Press, 2004], p. 98).

capable of having children for some time is not illegal, but discouraged as something that will delay the advent of the Messiah. That is not an actual spilling of seed, but it is still a waste of potential seed. The phrase זרע אברים is particularly interesting. It refers to what Dover describes as intercrural intercourse, a type of male-male sexual interaction that was not anal intercourse and includes the spilling of seed. This was not prohibited by the Torah, according to this gemara, but is prohibited by the Rabbis because of שכבת זרע.<sup>61</sup> One cannot imagine that the Rabbis would have made any real distinction between the prohibited nature of anal intercourse and intercrural intercourse. From the plain sense of the gemara, one knows that sexual activity, of any type, between men is forbidden. What is unclear is the source of the prohibition.

Female-female relations are not forbidden under the definition of משכב זכר as anal sex. The Talmud prohibits it as מסוללות, “lewdness,” although, as we have seen, the Sifra suggests that this may also be a דאורייתא prohibition.<sup>62</sup> However, what constitutes מסוללות, lewd and licentious behavior, is a cultural judgment that is subject to change as culture and society evolve. Forms of male homosexual behavior other than anal sex should be understood in the same way. The Torah forbids משכב זכר because it saw it as a תועבה. Since we no longer see homosexual behavior as a תועבה, and since today same-sex couples may form legally recognized unions, the application of the Torah’s prohibition should be limited. Since the basic prohibition does not apply, other forms of homosexual intimacy are no longer prohibited. The debate among our learned colleagues about whether or not female homosexual behavior and other forms of male homosexual behavior besides anal sex is אסור מדרבנן or אסור מדאורייתא becomes academic because the *mi’ut* of the chief prohibition applies to the other forms of intimate behavior as well.<sup>63</sup> Unlike our colleagues Rabbis Dorff, Nevins and Reisner, we are not compelled to waive certain prohibitions because of the concern for human dignity, כבוד הבריות. The prohibition itself does not apply.

We agree with the arguments put forward by our colleagues that homosexuality should not exclude Jews from full participation and acceptance in the Jewish community and the synagogue. However, we do not concur with their judgment that the prohibition of משכב זכר, narrowly defined as anal sex, ought to be preserved. We are troubled by the

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<sup>61</sup> The gemara in Niddah is concerned, in part, with the obligation to procreate. We understand the prohibition of שכבת זרע as driven by that concern. There are traditions in the halakhic literature that relax the concern for שכבת זרע when the man is not avoiding thereby a marital union where there is at least the possibility of procreation. See Tosafot to Yevamot 34b, s.v. ולא, for the opinion of the Ri, that when there is no intention to desist from the mitzvah of פרו ורבו, then any kind of seminal emission within marital relations is permitted. The decisions that same-sex couples make with respect to having children are not so dissimilar from the decisions that heterosexual couples make, especially infertile ones who also need to avail themselves of various modern technologies. We do not see שכבת זרע as a barrier to same-sex intimacy, especially within consecrated unions.

<sup>62</sup> Yevamot 76a. See Mishneh Torah, Hilkhot Issurei Biah 21:8, and S.A. Even HaEzer 20:2.

<sup>63</sup> Rabbis Dorff, Nevins and Reisner argue that these forms of intimacy are all rabbinic prohibitions; Rabbi Roth argues that they may be Toraitic. See their respective responsa approved by the CJLS.

proposed limitation on the forms of intimacy in a couple's private life. Since Rabbis Dorff, Nevins and Reisner are prepared to accept the legitimacy of same-sex couples, we do not see how they can limit their forms of intimate expression. This approach seems to go against the precedented halakhic view that all is permitted between husband and wife. The Talmud, on Nedarim 20b, specifically rejects the view that anal sex is prohibited, concluding that, *כל מה שאדם רוצה לעשות באשתו עושה. משל לבשר הבא מבית הטבח רצה לאכלו, כל מה שאדם רוצה לעשות באשתו עושה. במלח אוכלו צלי אוכלו מבושל אוכלו שלוק אוכלו וכן דג הבא מבית הצייד* "A man may do whatever he pleases with his wife [at intercourse]. A parable: Meat, which comes from the abattoir may be eaten salted, roasted, cooked or seethed, so with fish from the fishmonger."<sup>64</sup>

Maimonides applies logic where the gemara applied pithy parable: *אשתו של אדם* אשתו היא לו. לפיכך כל מה שאדם רוצה לעשות באשתו עושה. "A wife is permitted to her husband. Therefore, whatever a man wishes to do with his wife he may do" (Hilkhoh Issurei Bi'ah 21:9). Maimonides is doing more than simply quoting the gemara. He offers a logical argument for the law, as indicated by the word *לפיכך*, "therefore." Unrestricted intimacy is a logical consequence of the permittedness of the relationship of husband and wife. If their intimacy is restricted, then they are not fully permitted to each other. Maimonides did not neglect to offer his own views, many from the gemara as well, about recommended and non-recommended forms of intimacy. But from the perspective of halakhah alone, there were no restrictions on intimate behavior.<sup>65</sup> Logic did not permit any other view.

The argument suggested by Rabbis Dorff, Nevins and Reisner, that heterosexual intimacy is restricted by the observance of *niddah*, is not convincing. The whole basis of *taharat hamishpahah* is the temporary restriction of what is usually permitted. That cannot be compared to the permanent restriction of one form of intimacy as suggested by our colleagues. We fear, as well, that a judgment involving a restriction of intimacy will not only be derided by the public as hypocritical, but will ultimately fail to answer the needs of our people that the Torah be explained in a way that is consistent with our understanding of God's will.

The practical difference between our approach and that of our colleagues Rabbis Dorff, Nevins and Reisner, is not restricted to the question of the permissibility of anal sex between men. We also differ on the question of the permission of intimate relations between Jews of the same-sex without a Jewish ceremony. Our colleagues specifically avoid ruling on the halakhic status of gay and lesbian relationships. We find, however,

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<sup>64</sup> B. Nedarim 20b, translation from Michael Gold, *Does God Belong in the Bedroom?* (Philadelphia: Jewish Publication Society, 1992), p. 81.

<sup>65</sup> Maimonides does restrict this permission to circumstances where there is no wasteful ejaculation. See above, n. 61, for our discussion of *שכבת זרע*. In our view, where there is no willful avoidance of procreation, there is no wasting of seed. However, whether or not ejaculation is permitted, it is clear that Maimonides and most of the major halakhic authorities permit all intimate contact between husband and wife.

that one cannot consider the permissibility of a sexual act without reference to its context. Therefore, on the specific question of anal sex between men, Rabbis Dorff, Nevins and Reisner forbid in all circumstances whereas we permit in some circumstances. But on the more general question of intimate relations between Jews of the same sex, Rabbis Dorff, Nevins and Reisner permit without a ceremony whereas we require a sanctifying act. We elaborate on this requirement in the following section.

### **Section Nine: The Requirement of Consecration**

What determines the permissibility of a sexual act, in our view, is not the nature of the act but its context. For a heterosexual couple who are married בקידושין, in a Jewish marriage ceremony, all sexual acts are permissible in traditional Jewish sexual ethics. Absent consecration, sexual intimacy is forbidden by most halakhic authorities. According to the Rabbinical Assembly's 1996 *This Is My Beloved, This is My Friend: A Rabbinic Letter on Intimate Relations* edited by Rabbi Dorff, "Judaism posits marriage as the appropriate context for sexual intercourse....Only marriages can attain the holiness and communal sanction of *kiddushin* because it is the marital context which holds out the most promise that people can live by those views and values [previously articulated in the document] in their intimate relationships. Judaism would therefore have us refrain from sexual intercourse outside marriage."<sup>66</sup>

At the same time, the Rabbinic Letter acknowledges "that many Jews are engaging in sexual relations outside of marriage." Section C of the Letter addresses nonmarital intimate relations that are loving and committed. While nonmarital intimate relations are not given halakhic sanction, the individuals in such relationships are still bound by the sexual ethics and values, among them modesty, honesty, fidelity, concern for health and safety, that were already stated in the Letter in relation to married couples. In our view, this was the most important and controversial part of the document, that halakhic guidance was being offered for relations that were not halakhically validated. "Jewish norms in sexual matters, like Jewish norms in other areas," the Letter argues, "are not an 'all or nothing' thing. Certainly, failing to abide by Judaism's command that we restrict sexual relations to marriage does not excuse one from trying to live by the concepts and values that Judaism would have us use in all of our relationships, including our intimate ones."<sup>67</sup>

These same values are incumbent on same-sex couples according to the Rabbinic Letter on Intimate Relations. "Gays and lesbians," it says in conclusion to its discussion of homosexuality, "like heterosexuals, have the duty to strive to live by the values articulated in Section A [of the Letter] in all of their relationships, including their sexual

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<sup>66</sup> Dorff, *This Is My Beloved*, p. 31.

<sup>67</sup> *Ibid.*, p. 31.

ones.”<sup>68</sup> Jewish sexual ethics require that both same-sex and heterosexual couples be subject to the same behavioral standard. Like adulterous, incestuous and coercive relations among heterosexuals, gay promiscuity and casual sexual encounters are to be condemned “since they involve little or no love or commitment.”<sup>69</sup> Committed and long-term intimate relationships among gays and lesbians should be subject to the same values and principles that are incumbent upon heterosexual couples.

We further recognize, as guided by the Rabbinic Letter, that marriage is the halakhically valid context for intimate relations. The Letter acknowledges that unmarried couples “may care deeply for each other, especially in a long-term relationship, but their unwillingness to get married usually signifies that they are not ready to make a life-long commitment to each other.”<sup>70</sup> In this view, *it is precisely the consecration of a long-term commitment that establishes the context for permitted intimate relations.* We call, therefore, for appropriate rituals of sanctification when same-sex individuals wish to live in an intimate relationship in accordance with halakhah.

At this point in time, the possibility of same-sex marriage is available in some jurisdictions, but not in others. Civil unions, however, are increasingly available as a way to recognize the legal, spiritual and intimate relationships of same-sex couples. Because of **דינא דמלכותא דינא**, the respect given to the law of the land, we cannot authorize rabbis and cantors to solemnize same-sex marriages where the civil jurisdiction forbids. But we do authorize ritual celebration as far as civil law permits. Some form of Jewish ceremony will always be available.<sup>71</sup> The concept of שותפות (partnership) in Jewish law, on which there is an extensive literature, is available to structure same-sex unions and the responsibilities of contracting partners. The substance of the rites associated with same-sex commitment ceremonies and their dissolution is evolving. However, a Jewish ceremony is required to establish the consecration of the union. Without any consecration, the context to permit intimate relations has not been created.<sup>72</sup>

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<sup>68</sup> Ibid., p. 42.

<sup>69</sup> Ibid., p. 30.

<sup>70</sup> Ibid., p. 31.

<sup>71</sup> Whether the resultant union is called a “marriage” or something else is a matter that we defer to the civil jurisdictions.

<sup>72</sup> The Mishnaic law of the androgynos, one with both male and female genitalia, states that the androgynos marries a woman but does not marry a man (Bikkurim 4:2 and Yevamot 8:6). This is because the androgynos is **ספק איש ספק אישה**, possibly a man and possibly a woman. The possibility of a woman marrying another woman was preferable to the possibility of a man marrying another man, since in the latter case there would be a violation of **משכב זכר** while the prohibitions of female-female relations are, at worst, less severe. We learn from this that not only did the Mishnah not consider the possibility of celibacy for the androgynos, but also that this constituted a circumstance where two people of the same gender, specifically women, could marry one another (**נשא**). The concept of “marriage” then, was not absolutely restricted to the unions of men with women by the Mishnah.

Same-sex couples should be encouraged to enter recognizable consecrated relationships and should be treated as married couples in Jewish law. Intimate relations are permitted in such contexts. Same-sex couples not in recognizable consecrated relationships are duty-bound to observe the many other requirements of Jewish sexual ethics as enumerated in the Rabbinic Letter on Intimate Relations of 1996.

## **Section Ten:**

### **CONCLUSION -- פסק דין**

Jewish law has prohibited intimate relations between two men or two women because intimate relations are traditionally permitted only within the context of marriage, and a societally recognized same-sex union was never an option before our time. It is now, because homosexual relations are no longer considered an abomination. The term *תועבה* as used in the Torah to describe many proscribed actions, including gay sex, was not absolute but relative to society and time. The halakhic system recognizes that certain realities change through time. The new contemporary reality of a same-sex couple in a recognizable consecrated relationship should be excluded from the Torah's and subsequent halakhic prohibitions. This "exclusion" is called a *mi'ut* in halakhic parlance. There are a number of examples where the Rabbis limit, through *mi'ut*, the application of legislation from the Torah, which we cite in our responsum. However, like heterosexual relations, same-sex relations are permitted in the context of a recognizable consecrated union. Not only does this reflect a changed reality; it also accords with traditional Jewish sexual ethics, especially as articulated by the Rabbinical Assembly in its 1996 Letter on Intimate Relations. Consecrated unions establish the context where sexual intimacy can achieve holiness and be permitted by halakhah. The Torah's prohibition, then, does not apply in our new context.

In traditional midrashic parlance we might express our argument as follows: את זכר לא תשכב...תועבה היא. מתי לא תשכב? בזמן שתועבה היא "Do not lie with a man...it is an abomination." When does the prohibition apply? When it is considered an abomination. However, when societal perceptions have changed and homosexual relations are no longer considered abominations, the prohibition disappears.

Therefore:

1. Intimate relations between two men or two women are permitted within the context of a recognizable consecrated relationship.
2. Members of the Rabbinical Assembly and the Cantors Assembly may officiate at same-sex unions to the extent permitted by civil law.

3. Gay or lesbian Jews who are otherwise qualified may be ordained and serve as rabbis or cantors.

*Note: This paper was declared a takkanah by a vote of twelve in favor, nine opposed, and four abstaining (12-9-4) which is a majority of those present and voting. It failed by a vote of six in favor, seventeen opposed and two abstaining (6-17-2).*