

Judaism and Homosexuality: A New Response for A New Reality¹

Bradley Shavit Artson

Traditional Jewish standards for sexuality are in almost-complete disarray. Widely ignored, if not regarded with explicit skepticism, are rabbinic prohibitions against masturbation, the use of condoms (even within marriage), and premarital sex. In no other area of human society is the gap between traditional Jewish law and modernity so stark. There looms a chasm between rabbinic sexual ethics and contemporary ideas of right and wrong, even among those who profess loyalty to the rabbinic tradition.

Even more striking than the gap between sex ethics and modernity is the background question of gender roles and distinctions. The essence of what it means to be male and female, the role of men and women in society and in religion, and issues raised by gay men and lesbian women (not to mention the claim of the bisexual) threaten to reduce Jewish law to irrelevancy².

Without a willingness to work within the framework of rabbinic tradition and of Torah law, without integrating the latest insights of the social sciences back into the structure of Judaism, the gap between what appears self-evident to moderns and what is commanded in the Torah moves beyond even the possibility of unification. In this context, an unwillingness to interpret the Torah in the light of contemporary social science and historical knowledge constitutes an act of unwitting hostility to the Torah as a living tradition and the embodiment of God's imperatives for the Jewish people. It takes one more step toward sealing the Torah between the covers of a book and placing it, closed and unread, on a shelf.

¹ As always, this paper is much improved due to the editorial diligence of my wife, Elana Shavit Artson, and to the comments of my friend and colleague, Rabbi Elie Spitz.

² In fact, the CCAR (Reform) *Report on Homosexuality and the Rabbinate* does so explicitly when it affirms that there is a "unanimous condemnation of homosexual behavior by Jewish tradition" while simultaneously urging that "all rabbis, regardless of sexual orientation, be accorded the opportunity to fulfill the sacred vocation which they have chosen." Without making the least effort to integrate this moral stance back into a traditional context, Jews are forced to choose between a posited rigid and static tradition or a subjective and modern moral imperative. One or the other must be jettisoned in such an approach.

This paper, then, will attempt an act of loyalty to the Torah, focusing on the issue of homosexuality and Jewish law³. Building upon my previous efforts⁴, I will self-consciously also comment upon the method of legal reasoning used to arrive at my position, demonstrating the ubiquity of this jurisprudential approach within rabbinic tradition and illustrating how it seeks to maintain the seamless quality of Torah and halakhah while affirming their authority in the service of God and the Jewish people.

The Issue

In examining the Torah and rabbinic tradition's assessment of homosexuality, I will seek to support two central assertions: that committed, permanent, exclusive homosexual relationships between equals were unknown until the modern era, and therefore could not have been explicitly prohibited by earlier Jewish law, and that our current construal of homosexuality has so radically shifted from what was practiced in the past that the traditional prohibition of male-male sex does not (and should not) expand to include this novel form of homosexuality. If it is true that neither the Torah nor Jewish law explicitly prohibits committed exclusive gay or lesbian relationships, and contemporary science indicates that sexual orientation is fixed irrevocably, then it follows that a contemporary posek may legitimately choose to sanction such relationships as are otherwise consistent with Jewish law.⁵ I will then argue that simple justice, compassion, and a commitment to strengthening Jewish life make it imperative to do so.

These claims will require, consequently, establishing the nature of homosexual acts in antiquity and the current understanding of homosexuality as an orientation. These facts will then engage the traditional categories of Jewish law to arrive at a finding at once compassionate, sophisticated, moral, and halakhic.

³ The alert reader will notice that the sources cited from antiquity (Jewish and non-Jewish) pertain directly to male homosexuals. There is very little testimony to the nature of female homosexual expression before the modern period. Certainly in the Mesopotamian, Greek, Roman, and Jewish cultures, the perspectives of the male writers focused on their own gender. While the moral stance toward contemporary lesbianism is the same as is my stance toward gay men, the silence about the practices of women with women precludes historical comment here. That should not be construed as indifference. However, that silence is immaterial to the legal argument of this paper.

⁴ "Judaism and Homosexuality", *Tikkun*, (3,2), 52-54, 92-93; "Gays and Lesbian Jews: An Innovative Jewish Legal Position", *Jewish Spectator*, Winter 1990-1991, 6-14; and "Homosexuality and Judaism: Synthesis or Impasse?", *New Menorah*, Spring, 1991.

⁵ Thereby precluding gay incest, pederasty, or intermarriage, even if loving and monogamous.

Through it all, I will insist on the authority of the Torah (and subsequent rabbinic traditions) as the preeminent vehicle for establishing the Jewish understanding of divine will.

Even though claiming that the Torah and rabbinic tradition are authoritative, I still preclude a more radical option: that of declaring the equality of homosexuality with heterosexuality as a moral issue of such force that it overrides the authority of the Book of Leviticus.⁶ While talmudic rabbis affirm the right of the posek to abrogate specific verses in the Torah⁷, or to legislate de novo⁸, they act on that right only rarely. To abandon their caution would involve sundering the connectedness of more recent rabbinic rulings from the founding document of the legal system (in this case, the Torah itself)⁹. As a last possible choice, this legislative procedure may, indeed, be a necessary safeguard¹⁰. But each exercise of its power leaves the system weaker and less organic¹¹ than it was before. As a

⁶ Of course, were it impossible to utilize interpretation to reach a moral conclusion, a *posek* could still argue, within traditional methods of Jewish legal method, that the issue of enfranchising monogamous gays and lesbians is a moral mandate of such urgency that contemporary law should override the Torah on this one point. Such an argument, correct in theory and laudable in moral sensitivity, is unnecessary in this case. Since interpretation is possible as a remedy, it is to be preferred. The most elegant legal solution to a moral problem is that which alters the structure of the law as little as possible.

⁷ Through a procedure known as *la'akor davar min ha-Torah* the rabbis insisted on the power to remove a verse from the Torah if its legal retention threatened the survival of the broader Torah tradition or of the Jewish community. See Rashi, *Berakhot* 54a, s.v. *ve-omer*, *Yoma* 69a, *Temurah* 14b, *Yevamot* 79a, *Menahot* 99a, and T. *Nazir* 43b, s.v. *ve-hai*. See Eliezer Berkovits, *Not In Heaven: The Nature and Function of Halakha*, New York: Ktav, 1983, 57-64.

⁸ See, for example, *Berakhot* 26b, *Bava Kama* 80b-81b, *Sanhedrin* 46a, *Sifra*, *Aharei Mot* 10:22, *Yevamot* 21a.

⁹ Thus, Menachem Elon writes that "although other means of solving such new problems were available (e.g. through the enactment of takkanot), the scholars nevertheless first and above all sought to find the solutions in Scripture itself, by endeavoring to penetrate to its inner or 'concealed' content.... The link between the new halakhah and the Written Law was seen as a natural one of father and offspring, and the halakhah evolved from Scripture was, as it were, embedded in the latter from the beginning." In *The Principles of Jewish Law*, Jerusalem: Keter Publishing House, 1974, 59.

¹⁰ According to Elliot N. Dorff and Arthur Rosett, "Takkanot are used either to fill a lacuna in the law that cannot be treated through interpretation or precedents, or to amend an existing law." In *A Living Tree: The Roots and Growth of Jewish Law*, Albany: SUNY Press, 1988, 403.

¹¹ In the sense that Max Kadushin, רמ"ק, used the term: a living, interconnected and **Enfranchising the Monogamous Homosexual, Artson**

first choice, takkanot are legally ill-advised and religiously disastrous. A commitment to the authority of the Torah and rabbinic tradition (and an understanding of Judaism as a dynamic, evolutionary tradition) implies a preference for interpretation over legislation.¹²

That religious framework means, in our case, that we must face the passages in the Torah first, and rabbinic writings second, which deal explicitly with homosexuality, trying to understand them against the context of their own age and practice. Only after taking that preliminary step can we then examine contemporary homosexuality and inquire whether or not we are even dealing with the same phenomenon at all. We will have cause to analyze some of this data in a more detailed fashion, but for now must dwell on two theoretical questions: does shifting non-legal data have significance for legal decision-making, and to what extent is sexual practice and meaning a product of social construal. Halakhah has generally utilized a method of reading the Torah and rabbinic sources as a way of developing applications of old rulings to new circumstances, or to generate new rulings when no established precedent exists¹³. We have already spoken of the preference for interpretation over more radical and disruptive approaches to instituting law¹⁴. A more widely debated question is whether or not non-textual data--new knowledge, new technology, or new standards--can affect the continuing validity and authority of an established law. Here it must be stated clearly that there is a long tradition within halakhah in which non-textual data has legal consequence.¹⁵ Particularly in areas of medical

dynamic organism. See Simon Greenberg, "Coherence and Change in the Rabbinic Universe of Discourse: Kadushin's Theory of the Value Concept", in Peter Ochs, ed., *Understanding the Rabbinic Mind: Essays on the Hermeneutic of Max Kadushin*, Atlanta: Scholars Press, 1990, 19-43.

¹² For a more extensive argument in favor of the priority of interpretation, see my article, "Integrating Tradition and Change: A Framework for Rabbis", *Conservative Judaism*, Winter, 1992.

¹³ See, especially, the 13 *Middot* of Rabbi Ishmael, found at the beginning of the *Sifra*. Also noteworthy are the 7 *Middot* of Hillel (T. *Sanhedrin* 7:11 and ARNA 37), the 32 *Middot* of Rabbi Eliezer ben Yose ha-G'lili (תותירכה רפס and currently printed in standard versions of the Babylonian Talmud following תוכרב תכסמ).

¹⁴ It was a hermeneutical principle to interpret the Torah from the Torah. According to the rabbis, this principle was already known by Noah (P. *Megillah* 1.13, 72b).

¹⁵ Exhaustive documentation is provided in Joel Roth, *The Halakhic Process: A Systemic Analysis*, New York: The Jewish Theological Seminary, 1986, Chapter 9. Much

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science and technology, new knowledge can lead, without any other change, to new legal rulings¹⁶. Citing the legal principle referred to as *shinnui ha-ittim* ("the times they are a-changing"), the Tosafot argue that new knowledge leads to a new ruling because "the times have now changed."¹⁷ Several medieval and modern authorities affirm that reality is now different than it was in talmudic times, stating explicitly that this should lead to different legal conclusions¹⁸. Less objective, but no less forceful are perceptions of sociological shifts. Yet here, too, changes in social practice do lead to altering legal rulings as well. The shift from *yibbum* to *halitzah* is a classical example of a new social norm impelling a new halakhic ruling.¹⁹ Even ethical and psychological data have the power to effect the law, as new insights and heightened sensitivities lead to abrogations of previous legal standards and understanding.²⁰ The history of halakhah on *תירומת*, on capital punishment, on inheritance by women, and on funeral practices for suicides all attest to the power of an ethical imperative (most often never articulated) to shift legal rulings in the direction of greater equity and compassion for individual suffering. In the words of Rabbi Elliot N. Dorff: "the law can be changed on moral grounds.... The rabbis of the Talmud did precisely the same thing."²¹

Having established a claim that halakhah traditionally accepts changing social structures or ethical standards as catalysts for legal change, it still remains

of the subsequent discussion is based on his compilation of sources, although he does not accept my conclusions.

16 See, for example, *Bekhorot* 4:4 and *Sanhedrin* 33a.

17 T. *Avodah Zarah* 24b, s.v. *parah*. See also T. *Hullin* 47a, s.v. *kol*.

18 Rama, *Shulhan Arukh*, *Even ha-Ezer*, 156:4, *Magen Avraham* at EH, 156:4, paragraph 1, *Tiferet Israel* to M. *Shabbat* 19:2.

19 *Yevamot* 39b and T. *Yevamot* 6:9. See also *Avodah Zarah* 31a, *Sanhedrin* 25b, *Kiddushin* 41a, Tosafot *Kiddushin* 12b, Tosafot *Betzah* 30a, s.v. *tenan*, and *Hullin* 93b for other examples of new social practice leading to changing the law.

20 Often based on "בוטחה רשיה." Deuteronomy 6:18. On the power of ethics to drive the halakhah, see Artson, "Halakhah and Ethics: The Holy and the Good", *Conservative Judaism*, Spring, 1994, 70-88, Eliezer Berkovits, *Not*, pp. 19-47, the trail-blazing work of Robert Gordis, most recently in *The Dynamics of Jewish Law*, Bloomington: Indiana University Press, 1990.

21 Elliot N. Dorff and Arthur Rosett, *Living Tree*, 254. Saul Berman writes that "the morality of one generation frequently became the law of the next." In Elon, *Principles.*, 157.

to demonstrate that at least a significant aspect of contemporary homosexuality diverges from the homosexual activity of archaic and classical antiquity.

One prior clarification remains necessary: scholarship on homosexuality in the past and around the world is both abundant and complex. Of necessity I use a kind of short-hand when claiming that exclusive, committed homosexual relations between equals is a novelty. There is ample attestation to passionate love between males in ages gone by. There is irrefutable evidence of jealousy, passion, and long-term relationships. However, there is also a clear distinction between homosexual relationships of the past and the admittedly limited number of committed gay couples under discussion presently.

When speaking of the relationship that meets the religious ideal, we speak of a couple that are exclusive in their legal, sexual, and emotional commitment to the other partner. Such a relationship involves a husband and wife who are chaste outside of their marriage, whose primary emotional nurturance is from and toward each other, and who intend (and create) legal obligations toward the other party--commitments such as providing housing, clothing, joint ownership of assets, and inheritance.

In our age, many homosexuals seek such stable commitment too. There are no examples of such relationships in the past. Intergenerational relationships (men and boys), relationships of unequal status that could be abruptly terminated by one party only (master and slave,) and homosexual love that coexisted with an already established heterosexual marriage form the exclusive record of the past. When speaking of committed, exclusive homosexual relationships, I intend to refer to relationships that parallel the contemporary heterosexual marital ideal, except that the gender of the two adults is the same.

Homosexuality in Antiquity and Today

Surprisingly, given how forcefully many contemporary Jews respond against homosexuality, there are remarkably few verses in the Torah that even deal with it at all. One solitary verse in Deuteronomy²² was, until recently, understood to refer to cult prostitution, both male and female.²³ However, more recent scholarship has challenged that presumption,²⁴ understanding the קדש to be a cult

²² Deuteronomy 23:18.

²³ See, for example, the translation used as recently as 1985 in *TANAKH: The Holy Scriptures*, Philadelphia: Jewish Publication Society, 1985, 310, where "kadesh" is translated as cult prostitute.

²⁴ Jacob Milgrom, in *The JPS Torah Commentary: Numbers*, writes (479) that the term connotes "officiants or devotees of an idolatrous cult... There is no evidence of...being a prostitute." He bases his claim on the now-canonical articles of M.I. Gruber, "The Kadesh in the Book of Kings and in Other Sources," *Tarbiz* 52 (1982/1983); 167-176 and

officiant in an idolatrous rite. That reading renders Deuteronomy's passage irrelevant to our current concerns, leaving only the two prohibitions found in the Book of Leviticus.²⁵ Those two passages explicitly prohibit רכז בכשמ (NJPS: to "lie with a man") as a הבעות (NJPS: "abhorrence")²⁶.

Both of these prohibitions are part of a long list of sexual offenses that constitute the 18th chapter of Leviticus. As a normal jurisprudential (and literary) procedure, clarifying the Torah's intention would require searching the Torah, the Tanakh, and contemporary non-Israelite practice for use of the same term or examples of the same practice that might reflect back on the terse language of the Torah itself. Here that logical step gains added force by the insistence of the Torah itself that these offenses are prohibited specifically because "it is by such that the nations that I am casting out before you defiled themselves."²⁷ In its summation of those prohibitions, the Torah repeats that "you must not do any of those abhorrent things, neither the citizen nor the stranger who resides among you; for all those abhorrent things were done by the people who were in the land before you, and the land became defiled."²⁸ Thus the Torah explicitly identifies these prohibited practices, these abominations, with the accepted practices of the non-Israelites of the period. What would have been a requirement of cogent logic is explicitly mandated by the words of the Torah: the רכז בכשמ question is what was practiced at the time, not what is distinctive to 20th Century homosexuality. Only when we familiarize ourselves with sex as it was practiced in antiquity can we know what the Torah and subsequent Jewish tradition were addressing and

"Hebrew qedusah and her Canaanite and Akkadian Cognates, *Ugarit-Forschungen*, 18, (1986), 133-148.

²⁵ Leviticus 18:22 and 20:13.

²⁶ The argument about whether to'evah is an attributed or an intrinsic status becomes irrelevant when it is recognized that all values in the Torah are understood to be attributed by God. The Torah doesn't distinguish between what we would call morality and ritual. Rather the biblical standard is one of obedience, of making God's will one's own. God may designate something as a toevah for Jews but not so for non-Jews, or may label a practice abhorrent for all humankind. In either case, attribution of a status is a reflection of a (perceived) divine evaluation, not an independent human assessment.

²⁷ Leviticus 18:24.

²⁸ Leviticus 18:26-27. A similar summation occurs at the end of the 20th Chapter of Leviticus (20:22-26) as well, again making explicit that the Torah is prohibiting specifically the kind of רכז בכשמ practiced by the surrounding peoples.

recoiling from²⁹.

Before reviewing homosexual practices in the ancient world, a word of distinction about the other sexual practices in the list of Leviticus 18 and 20 is in order. After all, if the argument will be made that one form of expression of homosexuality today is significantly different from the *בכשם רכז* of the biblical and talmudic periods, couldn't the same argument be made about any of the other sexual practices found in that same list? Wouldn't this argument end up permitting loving adultery, bestiality, or incest?

Fortunately for our research, the ancients were in no way reticent to share the details of their sexuality³⁰. Scholars of antiquity have found ample attestation to the practice of all other the prohibited sexual practices listed in Leviticus, many in the Tanakh itself. None of these practices have changed much over the years, nor does the findings of psychology, anthropology, sociology suggest that their context or construal is much different now than it was in the past. Adultery, sex with children or parents or animals was familiar to the ancients as it is--alas--today. Those practices are still considered pathological and socially destructive now as they were in the past. None of them have been established as a sexual orientation in their own right, hormonally or genetically predetermined, or beyond the reach of psychotherapy. Each of them is a warning sign of psychological illness, abuse, or involves the exploitation of some third party. Their status, therefore needs no review and their identity remains the same. Not so, however, homosexuality. Alone of all the sexual prohibitions listed in Leviticus, homosexuality has been radically reinterpreted by the social sciences, supported by a wealth of empirical data. In modern times, homosexuality (and heterosexuality) have come to describe sexual orientations-- a blend of erotic, fantasy, and emotional satisfaction, which in most cases is irrevocably set by the end of childhood. The term "homosexual" and "heterosexual" now are understood

²⁹ This hermeneutical guide, provided by the Torah itself, will be the basis for the *דק* (distinction) that will allow the halakhic ruling of this paper. For a discussion of this traditional legal procedure, consult Ephraim E. Urbach, *The Halakhah: Its Sources and Development*, Yad La-Talmud, Ltd., 1986, 109-110.

³⁰ Here I rely primarily on the magisterial and exacting *The Construction of Homosexuality*, David F. Greenberg, Chicago: The University of Chicago Press, 1988. Other primary sources are cited in John Boswell, *Christianity, Social Tolerance, and Homosexuality*, Chicago: The University of Chicago Press, 1980. Boswell's work-- however valuable-- must, however, be read with great care and skepticism due to his rather idiosyncratic interpretations of primary texts and his assertion of claims without supporting evidence. For other sources, see my "Gay and Lesbian Jews: A Teshuvah" (unpublished).

to apply to persons, not actions. While there is still disagreement about the specific etiology of sexual identity--whether genetic, hormonal, social, or psychological--there is no significant debate within the mental health sciences about whether or not a homosexual orientation can be replaced by a heterosexual one³¹:

There is no published evidence to support the efficacy of 'reparative therapy' as a specific treatment for homosexuality.... Reparative therapy is not described in the scientific literature, and is not mentioned in the APA's comprehensive new task force report, "Treatments of Psychiatric Disorders." There are few reports in the literature of efforts to use psychotherapeutic and counseling techniques to treat persons troubled by homosexuality who want to become heterosexual; however, results have not been conclusive, nor have they been replicated.³²

We don't know the cause of homosexuality, although genetic factors are clearly involved. What we do know is that homosexuality per se is not a mental illness.... We found that a significant portion of gay and lesbian people are clearly satisfied with their sexual orientation and show no signs of psychopathology. They are able to function effectively in society, and those who see psychiatrists for treatment most often do so for reasons other than their homosexuality. For a mental condition to be considered a psychiatric disorder, it should either regularly cause emotional distress or regularly be associated with generalized impairment of social functioning. Homosexuality does not meet these criteria.³³

The research on homosexuality is very clear. Homosexuality is neither mental illness nor moral depravity. It is simply the way a minority of our population expresses human love and sexuality. Study after study documents the mental health of gay men and lesbians. Nor is

³¹ In his unpublished paper "Homosexuality," Rabbi Joel Roth asserts that there is, indeed, such debate among mental health professionals. Yet he cites as support of this claim studies conducted by a few individuals in the 1970s, as opposed to the consensus of the three major mental health associations in the 1990s. It needs to be stated that those studies in the 1970s were methodologically flawed, have not been replicated, and no longer reflect a real option among mental health practitioners, as the quotations below attest.

³² Press release of the American Psychiatric Association, January 26, 1990.

³³ Melvin Sabshin, M.D., American Psychiatric Association Medical Director, January 26, 1990.

homosexuality a matter of individual choice. Research suggests that the homosexual orientation is in place very early on in the life cycle, possibly even before birth. Indeed, these research findings suggest that efforts to "repair" homosexuals are nothing more than social prejudice garbed in psychological accouterments.³⁴

In addition to this new knowledge that homosexuality is no sickness, no choice, and is irrevocable, modern socio-economic structures have created the possibility--for the first time in recorded history, of exclusive homosexual love within the context of a committed relationship. This is precisely the new kind of data that the halakhic categories of *שדח רבד* of *מיתעה יונש* describe.³⁵ Our new understanding of what homosexuality is in its essence, the unprecedented possibility of (and desire for) monogamous and responsible love--of sexual expression firmly within the context of exclusive commitment--go a long way toward fulfilling the halakhic requirements for considering monogamous and committed homosexual relationships as something not covered by the prohibition in Leviticus. That conclusion becomes inescapable if we recall that the Torah specifically limits what it intends by *רכז בכשמ* to what was actually practiced in the period of the Torah and subsequent rabbinic Judaism. It is to that contemporary practice that we must, therefore, turn.

In antiquity, there was no categorical distinction of humanity into heterosexual and homosexual as orientations³⁶. Instead, all people were divided into one of two groups: pleasure-takers and pleasure-givers³⁷. Free, adult males were considered takers of sexual pleasure. Women, slaves (male and female), prisoners, and children were all considered legitimate sources of sexual pleasure. The more the objects of pleasure, the greater the virility of the man taking the pleasure.

³⁴ Byrant L. Welch, J.D., Ph.D., Executive Director for Professional Practice, American Psychological Association, 1990.

³⁵ See notes 11-15 above.

³⁶ Thus, Greenberg writes that "Greeks of the classical age had no word for a homosexual (or heterosexual) person. With few exceptions, the Greeks assumed that ordinarily sexual choices were not mutually exclusive, but rather that people were generally capable of responding erotically to beauty in both sexes. Often they could and did." (*Construction*) 143-144. Similarly, Boswell (*Christianity*) points out that "there was no word in Latin for 'homosexual.'" (79, n. 89).

³⁷ For this argument and supporting evidence, see Paul Veyne, "Homosexuality in Ancient Rome", in *Western Sexuality: Practice and Precept in Past and Present Times*, Philippe Aries and Andre Bejin, eds., Oxford: Basil Blackwell, 1985, 26-35.

A review of every civilization of the past is both impossible and unnecessary. In seeking to understand what the Torah and later rabbinic traditions knew about, we need understand homosexual practices in the rich and varied cultures of ancient Mesopotamia, Pharaonic Egypt, Archaic and Hellenic Greece, the Hellenistic Mediterranean, Republican and Imperial Rome, Chaldea and pre-Islamic Persia. These were the cultures that formed the context for the Tanakh and the Talmud, and they are therefore the ones commanding our attention.

The relevant civilizations of the period of the Tanakh are those in Mesopotamia and Egypt. None of the ancient Near Eastern codes of Law contain reference to homosexual practice.³⁸ However, the Hittite laws of the second millennium B.C.E. do make father-son incest (along with father-daughter and mother-son incest) a capital crime.³⁹ The issue here seems to be incest, not the homosexuality per se.

The Middle Assyrian Laws of the second millennium B.C.E. stipulate that a person who accuses a man of taking the passive role in a homosexual act will be whipped (fifty lashes).⁴⁰ Similarly, one who accuses someone's wife of taking many lovers receives forty lashes. Apparently it was the receptive sexual role that was punishable by law, whether for men or for women. These same laws also mandate that a man who rapes a male will be subjected in turn to anal penetration and then castrated. While rape was illegal, the active sexual role was not criminal if the intercourse was consensual.⁴¹

Two Mesopotamian kings had male sexual partners: Zimri-lin of Mari and Hammurabi of Babylon. Zimri-lin's wife, the Queen, refers to those lovers in her correspondence.⁴² In these instances, as in the legal codes, "what matters are the roles and statuses of the parties.... To prefer the receptive role, perhaps exclusively, appears to have been negatively regarded except in a cultic context."⁴³ In each case, male sex was "properly" the demonstration of virility--the gender of the object of lust was considered immaterial.

Lacking any legal texts from Egypt, there is even less evidence of attitudes

³⁸ Included in this claim are the Laws of Urukagina (2375 B.C.E.), of Eshnunna (1750 B.C.E.), and the Laws of Hammurabi (1726 B.C.E.).

³⁹ See Pritchard, *Ancient Near Eastern Texts Relating to the Old Testament*, Princeton: Princeton University Press, 1969, 196.

⁴⁰ Pritchard, *ANET*, 181.

⁴¹ Paragraph 20.

⁴² See W.L. Moran, "New Evidence from Mari on the History of Prophecy," *Biblica*, 50:15-56.

⁴³ Greenberg, *Construction*, 127.

toward homosexuality in Egyptian society than there was for Mesopotamia. However, a few do bear out that "the Egyptians stigmatized the receptive role in anal intercourse between men just as the Mesopotamians did."⁴⁴ Summarizing the scanty evidence, Greenberg notes that "homosexuality per se was not a category in Egyptian thought. There was no word for a homosexual person, only composite terms suggesting that gender was the critical category. Involvement with homosexuality was not assumed to be exclusive.... The negative confessions and temple inscriptions refer to acts, not inclinations or states of being."⁴⁵

The varied civilizations of Greece and Rome express in greater abundance the same understanding and practice of homosexual intercourse as did the documents of Mesopotamia and Egypt. Thus, Martial brags of his sexual desire for women and boys when he writes:

And when your lust is hot, surely
if a maid or a pageboy's handy, to attack
instanter, you won't choose to grin and bear it?
I won't! I like a cheap and easy love.⁴⁶

Other writers in antiquity provide more than ample evidence that the relevant concern was not the gender of the object of lust, boys and women were equally acceptable recipients of adult male desire⁴⁷: it was written of Alcibiades "that in his adolescence he drew away the husbands from their wives, and as a young man the wives from their husbands."⁴⁸ Xenophon remarks that prisoners of war were released as ordered "except where some smuggler, prompted by desire for a good looking boy or woman, managed to make off with his prize."⁴⁹ Plato records his praise of the athlete Ikkos of Taras, who "never had any connection with a woman

⁴⁴ Greenberg, *Construction*, 130.

⁴⁵ *Construction*, 135.

⁴⁶ Martial, *Satires* 1.2.116.

⁴⁷ A count of Greenberg's (*Construction*) cited references includes over 70 pre-Christian authors on the subject of homosexuality. This in addition to his extensive anthropological citations and his references in medieval and modern times!

⁴⁸ Diogenes Laertius, *Lives and Opinions of Eminent Philosophers*, Tr. C.E. Yonge, London: George Bell and Sons, 1891, 172. This sounds strikingly similar to the reason given by Bar Kappara (*Nedarim* 51a) for why רכז בכשמ is a הבעות. Later Jewish sources understand him to infer that lust for males will draw husbands away from their wives. See א"ש"רל סחוי"מ and תומ ירחא תשרפ לע הרותה לע תופסותה ילעב at the end of תומ ירחא תשרפ.

⁴⁹ *Anabasis*, 4.1.14.

or a youth during the whole time of his training."⁵⁰ Even the great Socrates, whose liaisons with Athenian youths is a matter of public record⁵¹, also sought out the services of female prostitutes⁵², and all that activity while married! Meleander (around 100 B.C.E.) writes that

Aphrodite, female, ignites the fire that makes on mad for a woman, but Eros himself holds the reins of male desire. Which way am I to incline? To the boy or to his mother? I declare that even Aphrodite herself will say, "The bold lad is the winner!"⁵³

No social stigma attached to a man because of his sexual pursuits, so long as he was the one getting, rather than giving, satisfaction. A boy, because of his inferior social standing, could be the object of male lust. But upon reaching adulthood, such a role was considered a disgrace. Thus, Plutarch writes that "we class those who enjoy the passive part as belonging to the lowest depth of vice and allow them not the least degree of confidence or respect or friendship."⁵⁴

As a result of this way of categorizing sexual acts (rather than orientations), antiquity knew of no exclusive, committed homosexual relationships between equals. David F. Greenberg summarizes the abundant evidence by noting that "preoccupation with status pervaded sexual culture to the point where the Greeks could not easily conceive of a relationship based on equality. Sex always involved superiority."⁵⁵ He goes on to observe that "the idealized homosexual relationship thus involved an adult lover, usually between the ages of twenty and thirty (the erastes) and an eromenos or paidika, a prepubescent adolescent whose beard had not begun to grow. The relationship was ordinarily temporary."⁵⁶ Instead, masters took their slaves (often designating slaves--known as a concubinus--as sexual objects), and men took boys (who had to serve the "passive" sexual role until freed by the onset of puberty). The use of children was not infrequent, without distinction made to the gender of the child. Most often, the men who were involved in this homosexual sex were, simultaneously married, and often had

50 *Laws* 840A.

51 See Plato's *Charmides*, 154c, 155c-e, *Phaedrus* 241d.

52 Xenophon, *Memorabilia* 3.11.

53 Cited in Dover, *Greek Homosexuality*, Cambridge: Harvard University Press, 1978, 63.

54 Plutarch, *Moralia*, 768E.

55 *Construction*, 147.

56 *Construction*, 147.

mistresses at the same time.⁵⁷

The conclusion is therefore inescapable that the loving, committed, and exclusive homosexuality of contemporary society is an innovation of modernity. It never existed in the past. Indeed, the noted scholar, Shaye J.D. Cohen confirms as much when he writes that

The sort of homosexual relationships which we are encountering more and more frequently in our society and about which you are speaking, that is, stable, monogamous, loving relationships between adults of equal status--relationships of this kind were unknown in antiquity.... Consequently, we may assume that the rabbis of antiquity did not know, and therefore were not addressing, this type of homosexual relationship.⁵⁸

That same caveat appears to be equally true for the Torah and the Hebrew Scripture as well. There are only two narratives in the entire Tanakh which offer instances of רכז בכשם. Both of these narratives tell of a hostile group of villagers who demand that a host release male guests to be raped by the householders of the town. These locals were not "homosexual" in the sense of deriving their primary erotic, emotional, and fantasy nurturance from other men. Rather, they were married men, respected leaders, who were attempting to humiliate visitors to their towns through a well-attested ancient form of humiliation. In fact, we have a remarkably similar story from Roman antiquity as well: Ammianus Marcellinus⁵⁹ records that the consul Tertullus offered his own children to an angry crowd in an attempt to spare himself.

The fact that females (children at that) are offered indicates that exclusive homosexuality is not the source of moral repugnance here. And to the extent that it is a homosexual act that is at issue, we are, after all, discussing a rape, not consensual sex. Later biblical passages which speak of the sin of Sodom do not even object to the threatened homosexual rape, but focus instead on the violation of hospitality to strangers⁶⁰, a finding confirmed by Robert Gordis and Louis

⁵⁷ As, for example, Harmodius and Aristogiton of Sixth Century Athens (see, Dover, *Greek*, 1, or Hadrian and the youth Antinous (Spartianus, 1.7.23 reports on Hadrian's wife and his male sexual partners)

⁵⁸ Private correspondence, November 15, 1991.

⁵⁹ 19:10.

⁶⁰ Deuteronomy 29:23; 49:18; 50:40; Lamentations 4:6; Ezekiel 16:46-56; Amos 4:11; and Zephaniah 2:9.

Epstein as well.⁶¹

All we know then, from the sparse testimony of the Tanakh itself, is that homosexual rape by typical townsmen--married and generally practicing heterosexual intercourse--is prohibited. And the cases elucidated in the Tanakh correspond precisely to the practices of non-Israelite antiquity (not surprising since the Torah itself tells us we are discussing abhorrent contemporary practice!).⁶²

In fact, in only a handful of rabbinic passages is the possibility of a contractual relationship between men even raised. These apparent challenges to the evidence adduced above dissolve when examined in the light of their own testimony. In Genesis Rabbah 26:5, Sanhedrin 58a, Hullin 92a-b, and Sifra, Aharei Mot 9:6-8, the rabbis expound on the biblical insistence *u-ve-hukkotehem telekhu*, "you shall not follow their laws (Leviticus 18: 3)". It has already been observed that this verse and the concluding paragraph of that chapter form an *inclusio*, clarifying what the specific prohibitions listed between introduction and summation pertain to. Understanding what "their laws" were, in fact, becomes essential according to the Torah's own understanding. And that hermeneutic governed that of the rabbis as well.

These verses speak of non-Israelite men issuing (or refraining from issuing) marriage contracts to other men. In the case of Hullin, the Talmud praises the B'nai Noah for their restraint--they don't issue these ketubbot. In Sifra, the gentiles are condemned for lacking that restraint. In each case, however, knowing the realia that forms the backdrop of the rabbinic comment becomes essential to prevent the unintentional intrusion of twentieth century reality, with the consequent effect of distorting the meaning of the rabbis and the insertion, instead, to accord with our own.

There are two cases of men issuing the equivalent of a ketubbah in antiquity. The first is the Roman Emperor Nero, who issued marriage contracts to two men: Seutonius records that Nero "tried to turn the boy Sporus into a girl by castration, he went through a wedding ceremony with him--dowry, bridal veil and all."⁶³ At the same time as he issued this "ketubbah", Seutonius also reports that Nero took on a mistress who was the spitting image of his mother, so great was his

⁶¹ Robert Gordis, "Homosexuality and Traditional Religion", *Judaism* 32, 4, 390, and Louis Epstein, *Sex Laws and Customs in Judaism*, New York: Ktav, 136.

⁶² As do the relevant passages in rabbinic literature as well. For references, see my article in *Jewish Spectator*, Winter 1991. With the exception of three rabbinic passages we will deal with below, none even appear to deal with a committed, exclusive relationship between equals. That is quite reasonable, the rabbinic passages reflect the practices of their own age.

⁶³ Seutonius, *The Twelve Caesars*, 6, para. 28.

lust for her, committed repeated incest with his mother while in public, and had himself "released from a cage dressed in the skins of wild animals, and attacked the private parts of men and women who stood bound to stakes. After working up sufficient excitement by this means, he was despatched--shall we say--by his freedman Doryphorus. Doryphorus now married him--just as he himself had married Sporus."⁶⁴ All the while that he was married to the Empress Octavia!⁶⁵

A similar "marriage" is recorded about the Emperor Elagabalus to Zoticus.⁶⁶ Yet Elagabalus's reputation for depravity exceeded even that of Nero. He was known to have dispatched emissaries throughout the Empire to seek out men "hung like mules."⁶⁷ He also forced open private bath-houses to inspect the men who frequented them, and also frequented the docks of Rome at night. In both cases, his goal was men with large genitalia.⁶⁸ For all that, the evidence of his issuing a wedding contract is rather thin: the "ketubbah" given by Elagabalus is reported only by Lampridius. According to Boswell, "the authority for the marriage of Elagabalus might be impugned"⁶⁹ and Greenberg fails even to mention it.

Even if taken as factual, these "ketubbot" hardly correspond to the ketubbot of rabbinic society, where they were intended to signify a legal commitment to the welfare, care, and support of the receiving party. Monogamy, while not legally mandated, was the norm in rabbinic society, and appears to have been so even in biblical Israel⁷⁰. That the two known instances of issuing "ketubbot" for males are at the hands of the most depraved of Rome's emperors, for whom these documents were simply evidence of their frenzied lust and their callous mockery of accepted piety and custom is a serious abomination indeed. What they are charged with by the rabbis is cloaking their depravity under the cover of sanctity. Hypocrisy is here the proper subject of condemnation.

The temptation of any age is to impose our own social constructs on the

⁶⁴ Ibid., para. 29. Nero's publicized "ketubbah" is confirmed by the testimony of Tacitus (15.37), Dio Cassius (61.28, 62.12), and others.

⁶⁵ Ibid., para. 7.

⁶⁶ Lampridius 10-11.

⁶⁷ Juvenal on Naevolus, cited in Boswell, *Christianity*, 80.

⁶⁸ Lampridius 5, 8.

⁶⁹ Boswell, *Christianity*, 82, note 102.

⁷⁰ Moshe David Herr, "Monogamy", *Encyclopedia Judaica*, Jerusalem: Keter Publishing Company, 1971, Volume 12, 258-260. See also Isaiah Gafni, "The Institution of Marriage in Rabbinic Times", 22, in *The Jewish Family: Metaphor and Memory*, David Kraemer, ed., Oxford: Oxford University Press, 1989.

past. What appears to be "common sense" in actuality mirrors the practices and construal of our age. But these rabbinic passages, as challenging as they may have first appeared, do not address our context. They address their own. And the examples of men issuing ketubbot to men that are recorded in the sources are indeed abominations. They are between sovereign and slaves, without legal intent or enforcement. They did not convey a promise to maintain or to provide for the recipient of the ketubbah, nor did they imply (or provide) a promise that sexual expression was restricted to within the "marital" relationship.

Finally, a word about context. It has been argued that Jewish law does not legislate intention. Either something is permissible or it is prohibited, regardless of the intention of the actor. While the role of kavvanah has been debated throughout Jewish history⁷¹, it is clear that Judaism does define an act in part by its context. Plunging a dagger into someone's back can be murder (prohibited and punishable), manslaughter (prohibited but not punishable), self defense (permitted) or may even be a mitzvah (the act of a Jewish soldier during a commanded war, for example). Closer to home, a man and a woman engaging in sex are either performing a meritorious act (and a mitzvah too!) or can be violating the Ten Commandments. Context does have legal consequence. Whether or not homosexual acts take place in the context practiced in antiquity--outside of a larger commitment and responsibility--or in a modern context of exclusivity and legal obligation to the sexual partner--similarly ought to have legal consequence. It ought to make a difference.

Why, then, don't the rabbis or the Torah make explicit their moral repugnance with the homosexuality of their age? Why term it a *toevah*, a strong term of opprobrium, yes, but one with ritual rather than ethical overtones? Why didn't the Rabbis explicitly condemn homosexuality for its lust, oppression, or violence?

The rabbinic standard of right and wrong was divinely based--if the Torah condemned it, it was wrong. Separate terms for moral iniquity or for ritual violation didn't emerge with precision until a more philosophic and self-conscious Jewish vocabulary emerged in the medieval period. For the Torah and the rabbis, strong condemnation was conveyed by a wide range of terms, often interchangeably. And the examples they gave of homosexuality--as destructive of family stability when a homosexual is coerced--through social pressure--into a heterosexual family structure⁷², as outside a context of commitment or responsibility⁷³, as rape⁷⁴, and, generally as between adults and children do

⁷¹ Urbach, *Halakhah*, Chapter 12.

⁷² *Nedarim* 51a, and Rashi, *Tosafot*, and Ran ad loc.

⁷³ *Sanhedrin* 58a and above. See also M. *Kiddushin* 4:14, *Mishneh Torah*, *Issurei Biah*, 1:14, *Bereshit Rabbah* 93:6.

indeed correspond to what we would label as moral concerns.

In every way, the examples of antiquity--as correctly condemned by these rabbinic sources--fail to address the new kind of homosexual relationships made possible in modernity. It is to that new possibility that we must now turn.

Gay and Lesbian Commitment: A Moral Imperative, A Legal Possibility

The great revolution of the Torah in the realm of sexuality is to insist that sexual expression is legitimate only within the confines of a commitment to the sexual partner as a complete person. Sexuality outside of such bounds necessarily devolves into a form of objectification, in which a human being--a reflection of the image of God--is reduced to a useful (even if voluntary) object for sexual release. The Torah and subsequent rabbinic tradition, in defiance of the devaluation of the human being so prevalent in the world, insist that sexuality ought to further human dignity by embracing the entire person, not take advantage of their willingness or their utility. From the perspective of Jewish tradition, sexual intercourse is an expression and an outcome of commitment and responsibility toward another human being.

That standard has still not persuaded the rest of the world. The vast majority of human beings act in violation of this lofty ideal, exulting in their passions and explaining their disregard for the full human being as the consequence of simple human nature or the exigency of circumstance. Thus, for Judaism, the vast majority of heterosexual expression is prohibited. Only a narrow range of heterosexual intercourse is permitted, that which occurs within a permanent, exclusive, and public commitment.

It is precisely because Judaism elevates responsible sex to the status of the holy that it is in a position to speak against other, more degrading forms of heterosexual expression. The institution of a formal marriage ceremony becomes the way that Judaism articulates its expectation of monogamy and fidelity. Whether or not the individual man and women live up to that requirement, the standards of Judaism are quite clear because such a public ceremony elevates the couple into a distinct and exclusive category.

The time has come to provide that same guidance and stability for homosexuals as well.⁷⁵ We have seen that the prohibition in Leviticus and rabbinic tradition knows nothing about the possibility of homosexuality as an orientation, does not address the question of an exclusive, public commitment between two Jewish men or two Jewish women. There is no legal impediment to recognizing--and indeed

⁷⁴ *Sanhedrin* 9b.

⁷⁵ Particularly in the age of the AIDS epidemic, when not encouraging monogamous stability is tantamount to contributing to a tortured and early death.

encouraging--such stability and fidelity now that such relationships do exist.

To refuse to do so, to condemn monogamous homosexual commitment with the same legal opprobrium properly addressed to promiscuous sexuality, anonymous sex, coercive sex, or sex with children is to discourage the former and to encourage the latter. It is consistent with the sexual revolution initiated in the Torah to seek to strengthen the possibility of stable relationships and loving commitment among homosexuals no less than among their heterosexual brothers and sisters.

By developing a public ceremony to mark the beginning and the termination of an exclusive, committed homosexual relationship, the traditional Jewish standards would be clear and enforceable. In fact, by extending those standards to include responsible gay and lesbian love, we would simultaneously strengthen our resolve to place sexual expression within the confines of commitment and fidelity for heterosexuals as well--applying one clear and moral standard to all.

By insisting on a public ceremony, a **תירב הבהא**, we assert that our commitment to stable homes in which responsible adults live their lives in accordance with the mitzvot and values of traditional Judaism is absolute and uncompromising. To posit a norm without providing a means for all people to attain that norm is an act of shortsighted cruelty: it engenders unnecessary suffering and subverts the norm itself by forcing people to live outside of its parameter. The institution of a ceremony prevents the "slippery slope." Note that as with heterosexual practice, the vast preponderance of homosexual intercourse is prohibited. All the approach articulated here authorizes is monogamous, committed homosexuality. All else remains, as the Torah labels it, a toevah.

If we are willing to develop a commitment ceremony for homosexuals, then why not for intermarriage as well? If compassion is to be our highest value, then shouldn't we also recognize the cruelty of refusing to officiate at a marriage between a Jew and a non-Jew? Doesn't the analysis contained in this paper lead to an acceptance of intermarriage too?

At the outset, it must be stated that there are two legitimate, indeed pressing mega-legal concerns that can and generally should override compassion: the survival of the Jewish people as a whole, and the continuation of Judaism as a religion. Both of these values may justify denying the more compassionate position. And precedent, itself, has a claim to preference, unless overriding moral concerns or other legitimate needs impel a modification, or even a rejection, of existing precedent.

In this case, however, the empirical data surrounding intermarriage are so different from the data pertaining to homosexuality that the analogy simply fails from the start⁷⁶. Studies of intermarriage show that the level of Jewish observance

⁷⁶ Data is taken from the 1990 National Jewish Population Survey of the Council of Jewish Federations, and the studies of Egon Mayer, published by the American Jewish

precipitously drops in intermarried families, that the children of such marriages are often raised as non-Jews, that even in those families where they are raised as Jews, the children themselves consider themselves not to be Jewish upon reaching adulthood. The divorce rate for intermarried couples is approximately double the divorce rate for endogamous couples. Subsequent studies reveal that the intermarrieds' rate of affiliation with the Jewish community is identical, whether or not a rabbi agrees to officiate at an intermarriage--vitiating the most frequently asserted argument in support of performing such a ceremony.

While intermarriage may be a blessing to the individuals in question, all empirical evidence affirms that intermarriage poses a grave threat to the survival of the Jewish people and to the continuation of Judaism. Unless both adults share a commitment to Judaism--however attenuated--the statistics prove that it will not be transmitted to the next generation. No rabbi can condone this destruction of Judaism, and Jewish law ought not to be expected to legitimate its own demise. None of these concerns are true for gay or lesbian couples in which both partners are Jewish. Psychological studies have found that there is no statistical difference between the children raised by homosexuals and those raised by heterosexuals, including the children's emerging sexual orientation⁷⁷. There is no reason to presume that two Jewish homosexuals, having sought rabbinic recognition of their commitment to each other and to establishing a Jewish home, should be any less a source of strength and vitality to the Jewish community and to Judaism as a religion than any other similar heterosexual couple. Again, a willingness to perform a commitment ceremony for monogamous homosexuals strengthens Judaism. Far from leading us to accept intermarriage, it is fully consistent with our opposition to that disastrous and regrettable trend.

Conclusion

Living in commitment and love, monogamous gay and lesbian Jews are, regrettably the butt of endless hostility, beatings, and discrimination in employment, housing, insurance, and tax benefits. Much as some would like to deny it, a significant catalyst of this continuing injustice is the reading of the biblical tradition that construes their sexual orientation as itself an abomination. There is simply no way to maintain that homosexuality is abominable and not reinforce the pervasive oppression and suffering of gay and lesbian people.⁷⁸

Committee.

⁷⁷ Samuel Guze, *Children in Lesbian Homes, Psychiatric Capsule & Comments*, 1984, 6, 4:1-2.

⁷⁸ See Roth, "Homosexuality", Section Five, for a sincere attempt to straddle this impossible contradiction. If all homosexuality is abominable and threatens the social

The choice before us is to enfranchise monogamous gay and lesbian Jews, or to sever their connection to Judaism entirely. We can extend the traditional condemnation of abusive homosexuality as an abomination to include monogamous homosexuals. By doing so, however, we should admit that we intentionally close off Judaism to a large segment of the Jewish population seeking spiritual growth, belonging, and wisdom. Not only homosexual Jews, but their parents, siblings, relatives and friends are all distanced from their tradition and their God by this harsh and cruel way of construing our tradition.⁷⁹ Indeed, all Jews who cherish the attribute of *hesed*, of mercy will feel alienated by this rigid and harsh jurisprudence.

Or, alternatively, we can construe Jewish tradition in the light of the argument presented in this paper--one that accords with our knowledge of history, psychology, sociology while also reflecting the highest standards of morality and compassion.

Simple justice cries out for a decriminalization of homosexuality in Jewish law. Homosexuality is no illness, nor is it necessarily unethical. As with heterosexuality, it can be expressed in ways that are degrading to human dignity or in ways that are nurturing and ethical.

Encouraging sexual responsibility and stability among homosexuals can only strengthen family values and traditional communities for all. Lacking any compelling reason for stigmatizing monogamous gays and lesbians, the clear moral imperative is to take a bold stand with these innocent and seeking Jews rather than with those who would oppress them. We must find a way to draw these people into the fabric of Jewish community, with the goal of bringing them to a life of Torah and mitzvot.

Now, as always, we must remember the fundamental goal of Jewish law: "Clearly justice is the ultimate value to which God's will must conform; any dichotomy between them is unthinkable. The demand of ethics and the command of God are one."⁸⁰

order, then there should, indeed, be civil disabilities. The revulsion of decent people would then be the appropriate response (as it is for murderers and child-molesters). The fact that reasonable people recoil from this level of bigotry and abuse for gays and lesbians is evidence that most people don't really hold that monogamous homosexuality is an abomination.

⁷⁹ Not that the individuals who rule in this way are themselves harsh or unfeeling, but that their conclusions and the effects of those conclusions are harsh, unnecessary, and counter-productive.

⁸⁰ Gordis, *Dynamics*, 68.

In our day, the command of God is to enfranchise the monogamous homosexual.

*Rabbi Bradley Shavit Artson is the Dean of the Ziegler School of Rabbinic Studies at the University of Judaism, Los Angeles, and the author of **The Bedside Torah: Wisdom, Visions, and Dreams** (McGraw Hill).*