

# HOMOSEXUALITY

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*The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.*

## **Part I**

Few topics evoke the type of visceral response that homosexuality does. Responses are often quick and definitive on both ends of the spectrum. I have been cornered by some who wonder how the question could even be on the agenda of the Law Committee. “What is there to say about the subject from a halakhic point of view”, they ask? “Putting it on the agenda validates a question which, in fact, has no validity,” they claim.

At the other end of the spectrum, I have been contacted by some homosexuals whose claim is equally definitive. “Halakhah has no option but to validate homosexuality as a lifestyle co-equal with heterosexuality. If it does not do so, it has lost any and all influence on the lives of Jewish homosexuals, it has excised the Jewish homosexual from the community, and it has reinforced the homophobia of the American society at large.”

To the first group we must assert that there is no question which cannot be on the agenda of the Law Committee. Each age may have its lists of questions which seem unlikely ever to require serious discussion, yet subsequent ages may find it necessary to discuss those very questions. Answers which may have seemed a foregone conclusion years ago, may no longer be self-evidently true. However, willingness to discuss a question in no way predetermines what the answer will be. It is as possible to discuss a question and reaffirm a longstanding precedent as it is to discuss it and abrogate that precedent.<sup>1</sup>

When a longstanding precedent is questioned by a significant number of people who cannot be dismissed as “fringe lunatics,” it may no longer be sufficient merely to assert that the precedent stands because it is the precedent. Surely precedent will stand unless

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<sup>1</sup> When the CJLS took up the question of patrilineal descent there were some who asserted that placing it on the agenda would validate the question and predetermine the answer. In fact, though, the CJLS reaffirmed the longstanding precedent, and that decision was then promulgated as a Standard of Rabbinic Practice.

there is compelling reason for it not to stand. But it must be remembered that those who are questioning the precedent are offering what they believe to be compelling reason for overturning it. One who wishes to reaffirm the precedent must now respond to the claim that there is compelling reason to overturn it. If there is evidence that the “compelling reason” is not as compelling as those who assert it claim, the precedent should stand. If one can offer equally compelling reason why the precedent should stand, then surely the precedent should stand. And if, in the course of discussion and analysis, one comes to the conclusion that there is, indeed, compelling reason to overturn the precedent, one should support overturning the precedent. It is dangerous for halakhah to refuse to discuss a question for fear that legitimate discussion will result in the “wrong” answer.

At the other end of the spectrum there are also things that ought to be said. Halakhists are duty-bound to listen carefully and attentively to the claims and contentions of those who address questions to them. They are also duty-bound, however, to listen with equal attentiveness and care to the claims and contentions of those who may not have addressed questions to them, but who do have something to say on the issue under discussion.

Halakhists are the guardian of a legal system they hold very dear. They ought not to be expected to violate their commitment to that legal system because members of their constituency are unhappy with their decisions. Halakhists can be sensitive, understanding, and caring – and still disagree with the claim of the constituent. It is easy to contend that the halakhist did not really understand because if he had, he could never have decided as he did. The ease of the contention does not necessarily make it true.

It is possible to reject the claim of a constituent without expelling the constituent from the halakhist’s constituency. There are many issues concerning which certain constituents have very strong feelings. They, too, often turn to halakhists for recognition and validation of their views as “the Jewish view.” They, too, expect the halakhists to listen carefully and attentively, and to decide the issue as they believe halakhah demands. When the decision is consonant with the claim of the questioner, the questioner is clearly pleased. But when the decision is not as the questioner might have wished, the questioner ought not to feel himself chastised by the answer. The questioner ought not to feel that he has been expelled from the community or excised from the constituency.

We must assert from the outset that the question of homosexuality cannot be excluded from halakhic discourse on the grounds that halakhah stops at the bedroom door. While it may be possible to claim that a secular legal system should say nothing about the legality or morality of private acts between consenting adults, that could hardly be a tenable claim for a religious legal system. Not only are there myriad areas where halakhah does already have something to say about what goes on between consenting adults and behind closed doors, it seems unthinkable to claim that private behavior could or should be of no concern to God.

It seems most reasonable to begin halakhic analysis with statements of the Torah itself. There are two verses that clearly posit some type of prohibition against homosexuality. Lev. 18:22 reads: **ואת זכר לא תשכב משכבי אשה תועבה היא** – “Do not lie with a man as one lies with a woman: it is an abhorrence.” The context of the verse is a list of forbidden sexual unions – **ערייות**.<sup>2</sup> The term **תועבה** is applied specifically only in verse 22, though verses 26, 29, and 30 apply the term **תועבה** to all of the forbidden relationships.

Lev. 20:13 reads: **ואיש אשר ישכב את זכר משכבי אשה תועבה עשו שניהם מות יומתו** – “If a man lies with a male as one lies with a woman, the two of them have

<sup>2</sup> Though the term **ערוה** does not appear in verse 22, Maimonides lists homosexuality as an **ערוה** in הלכות מלכים ט:ה.

done an abhorrent thing; they shall be put to death – their bloodguilt is upon them.” The context of this verse is similar to the context of the first verse. It appears in a list which basically repeats the prohibitions of Leviticus 18, adding the appropriate punishment for each offense. Lev. 20:13 clearly calls homosexuality a תועבה and stipulates death as the punishment for both of the parties involved.

Referring to an act as תועבה surely is a term of opprobrium. It impels us to look at the term itself to see whether it can shed light. Therefore, a few comments on the term תועבה seem appropriate. These comments will be confined to the term as it appears in the Torah alone.

The term, as it appears in Leviticus 18 and 20, seems to connote some universally recognized inherent quality called תועבה. That is, it could be read to imply that anyone who looks at the acts described in those chapters would recognize them as acts of תועבה, even if they had not been called תועבה by the Torah. In other words, the Torah calls them תועבה because they are inherently תועבה.

Upon closer analysis, however, it seems to me that the opposite is the case. The term תועבה in the Torah does not refer to an inherent quality of an act. Acts are תועבה because the Torah calls them תועבה. “Abhorrence” is not an inherent quality of the act, it is an attributed quality.

The most telling evidence that תועבה is an attributed, rather than an inherent, quality can be found in Genesis and Exodus. The term appears twice in the Joseph cycle. In Gen. 43:32 the Torah says לא יוכלון המצרים לאכול את העברים לחם כי תועבה היא למצרים “The Egyptians could not dine with the Hebrews, since that would be abhorrent to the Egyptians.” Mixed eating is not inherently abhorrent. It is not objectively abhorrent. It is abhorrent to Egyptians for whatever reason they consider it abhorrent. It is תועבה למצרים – not inherently. The same analysis could be given for Gen. 46:34: כי תועבה מצרים כל רעה צאן. Similarly, the verse in Exod. 8:22 – כי תועבת מצרים נזבח לה' אלקינו הן נזבח את תועבת מצרים – recognizes that תועבה is an attributed quality, not an inherent one.

The Torah recognizes תועבה as an attributed quality for matters that are abhorrent to Jews, too. It is not contending that foreigners might mistakenly think certain things to be abhorrent, while Jews consider abhorrent only those things that are inherently abhorrent. There are four cases that make this abundantly clear, in my opinion. Regarding the sacrifice of a blemished animal the Torah<sup>3</sup> says: כי תועבת ה' אלקיך הוא. Regarding cross-dressing it says:<sup>4</sup> כי תועבת ה' אלקיך כל עשה אלה. Regarding the prohibition to be מחזיר גרושתו the Torah says<sup>5</sup> כי תועבה היא לפני ה' and regarding the use of unjust weights and measures the Torah says:<sup>6</sup> כי תועבת ה' אלקיך כל עשה אלה כל עשה עול.<sup>7</sup> We consider these acts abhorrent because the Torah informs us that God considers them abhorrent, not because they are inherently or objectively abhorrent.<sup>7</sup>

The greatest number of occurrences of the term תועבה in the Torah appears in contexts of the discussion of idolatry. In seven of eleven occurrences the term is linked to תועבת ה'.<sup>8</sup>

<sup>3</sup> Deut. 17:1.

<sup>4</sup> Deut. 22:5.

<sup>5</sup> Deut. 24:4.

<sup>6</sup> Deut. 25:16.

<sup>7</sup> The case of Deut. 25:16 will seem the most problematic. Some will claim that dishonesty is inherently abhorrent. I think we must be careful, however. The Torah is full of prohibitions against matters that we recognize as inherently dishonest or immoral – moving boundaries, murders, robbery – yet none of these is called תועבה. In Deut. 25:16, the clause כל עשה עול seems to explain why God considers unjust weights abhorrent, but is not claiming that every act of dishonesty is תועבה.

<sup>8</sup> The seven are Deut. 7:25-26, 12:31, 18:9, 18:12, 23:19, and 27:15.

Two of the remaining four<sup>9</sup> deal with the עיר הנדחת and the יחיד העובד עבודה זרה. In these the behavior of Jews in enticing other Jews to idolatry or themselves engaging in idolatry is defined as תועבה without any further modifier. These verses seem to me to be claiming that these acts are abhorrent because the Torah has already defined idolatry as abhorrent. Their abhorrence is contingent upon idolatry's having been so defined. Similarly, the third of these four<sup>10</sup> – למען אשר לא ילמדו אתכם לעשות ככל תועבתם אשר עשו לאלהיהם – stipulates as abhorrent only those acts which have been previously defined as abhorrent. And the final verse of the four<sup>11</sup> appears in a poetic context and is inappropriate as a source for the meaning of words in legal contexts.

In theory, though, one might wish to claim that the verses in Leviticus about homosexuality are different. They do not say תועבת ה' and are not linked to acts which have been previously defined as abhorrence. Perhaps homosexuality is abhorrent not by attribution, but inherently. I think not.

The final appearance of the term תועבה in the Torah, I think, proves my point. Deut. 14:3 reads: לא תאכל כל תועבה and appears in the Deuteronomic recap of the laws of kashrut. Nowhere in Leviticus 11 are nonkosher animals defined as תועבה. Thus, Deut. 14:3 cannot be alluding to a תועבה which has been previously defined as such. Since one would be very hard pressed to posit that nonkosher animals are inherently abhorrent rather than abhorrent by attribution, it follows that the תועבה of Deut. 14:3 should be understood as we have understood all the other occurrences of the word in the remainder of the Torah. And if that is the case, there seems to be no defensible grounds for asserting that תועבה in the context of homosexuality refers to inherent abhorrence rather than to attributed abhorrence.

Legally speaking, the Torah defines homosexuality as תועבה. It does not define why it is to be considered תועבה. It is quite conceivable that later commentators might attempt to define why it ought to be considered תועבה. But, it should be borne in mind that demonstrating deficiencies in the attempts of the commentators to explain why it ought to be considered תועבה does not remove it legally from the category of תועבה.

There are no other explicit references to homosexuality in the Bible. Gen. 19:5 in the Lot/Sodom incident – הרציאם אלינו ונדעה אתם – is, however, widely interpreted to refer to homosexuality.<sup>12</sup> Similarly, in Judges 19, the פלגש בגבעה also has an apparent reference to homosexuality.<sup>13</sup> Finally, either Rav or Samuel claims that Ham's violation of Noah<sup>14</sup> was an act of homosexuality,<sup>15</sup> and Rav understands Gen. 39:1 – ויקנהו פוטיפר סריס פרעה – to imply a homosexual intent on the part of Potiphar.<sup>16</sup>

The two explicit biblical verses refer to male homosexuality, not to female homosexuality. They cannot be understood legally to refer to female homosexuality even by extension

<sup>9</sup> Deut. 13:15, 17:4.

<sup>10</sup> Deut. 20:18.

<sup>11</sup> Deut. 32:16, though see *Sifrei Deuteronomy*, 318 (Finkelstein ed., p. 364), which interprets the תועבה of this verse as homosexuality, based on a גזירה שוה with Lev. 18:22.

<sup>12</sup> Genesis Rabbah 50:5 (Theodor-Albeck ed., p. 522) comments succinctly לתשמיש אותם – ונדעה אותם. Medieval commentators like Rashi, Rashbam, and Ibn Ezra also interpret it thus. Indeed, even the new JPS takes it the same way. It is interesting, however, that Ezek. 16:49, 50 does not include homosexuality in its litany of Sodomite offenses.

<sup>13</sup> Verse 22 reads: ויאמרו אל האיש... לאמר הוצא את האיש אשר בא אל ביתך ונדענו.

<sup>14</sup> Gen. 9:29-35.

<sup>15</sup> Sanhedrin 70a.

<sup>16</sup> Sotah 13b.

(i.e., **איש והוא הדין אשה**) because of the term **משכבי אשה**. That term seems to imply some type of penetration by the genital. Since that is impossible in an act of lesbianism, it cannot legally be included under the Torah's prohibition.<sup>17</sup>

The Sages, however, have forbidden female homosexuality. At bottom line, then, the primary difference between male and female homosexuality in halakhah is that one is **אסור דאורייתא** and the other is **אסור דרבנן**. Female homosexuality is no less forbidden by the law than male homosexuality. It is the classification of the prohibitions that distinguishes them from one another.

I think it is important, furthermore, to make clear why lesbianism is forbidden **רבנן** rather than **דאורייתא** from a legal point of view. Let us, therefore, look first to a baraita in the Sifra:<sup>18</sup>

“כמעשה ארץ מצרים... וכמעשה ארץ כנען לא תעשו” (ויק' יחג:) – יכול לא יבנו בניות ולא יטעו נטיעות כמותם? ת"ל “ובחוקותיהם לא תלכו” (שם), לא אמרתי אלא בחוקים החקוקים להם ולאבותיהם ולאבות אבותיהם. ומה היו עושים? האיש נושא לאיש והאשה לאשה. האיש נושא אשה ובתה והאשה ניסת לשנים – לכך נאמר “ובחוקותיהם לא תלכו.”

“You should not follow the acts of the land of Egypt. . . or the acts of the land of Canaan (Lev. 18:3)” – Is it conceivable that [the Israelites] should not built buildings or plant plantings as they [i.e., the Egyptians and Canaanites] do? The Torah states: “You should not follow their practices (id.)” – [implying:] “I [God] have declared prohibited only the practices which they and their ancestors established.” And what did they do? A man would marry a man and a woman [marry] a woman, a man would marry a woman and her daughter, and a woman would be married to two men. Regarding these it is said: “You shall not follow their practices.”

Among the practices mentioned in the Sifra as intended by Lev. 18:3 is lesbianism. The prohibition is grounded in **לא תעשו**. According to this baraita lesbianism is forbidden by implication of the Torah itself. If so, why is the claim always made that female homosexuality is forbidden only **דאורייתא**? Maimonides' wording of the law provides an accurate answer:<sup>19</sup>

נשים המסוללות זו בזו אסור ומעשה מצרים הוא שהוזהרנו עליו... אע"פ שמעשה זה אסור, אין מלקין עליו שאין לו לאו מיוחד. והרי – אין שם ביאה כלל וראוי להכותן מכת מרדות הואיל ועשו אסור.

Lesbianism is forbidden, being “a practice of Egypt” about which the Torah has warned. . . . And even though the act is forbidden, lashes [i.e., the normal legal punishment for a negative commandment] are not given because [the offense] has no unique prohibiting verse<sup>20</sup> and there is no actual intercourse involved.<sup>21</sup> . . . But it

<sup>17</sup> Its exclusion also results in a leniency in terms of the punishment prescribed by the law. Only male homosexuality could ever legally entail the death penalty. But see below.

<sup>18</sup> אחרי מות. פרשה ט. ה (הוצאת ווייס דף פה, ד).

<sup>19</sup> איסורי ביאה כאח.

<sup>20</sup> I.e., there is no specific verse listing the offense explicitly. Rather, the prohibition is general, deduced from the prohibition against “practices of Egypt.”

<sup>21</sup> And, therefore, **איש והוא הדין אשה** cannot be generalized by an extension like **אשה**.

is appropriate that [lesbians] be whipped under the category of **מכת מרדות** since they have acted in a forbidden manner.

According to Maimonides, therefore, the baraita in the Sifra posits lesbianism as forbidden **דאורייתא** though not punishable as **דאורייתא** norms. Since there is no actual intercourse involved, and since there is no *specific* mention of lesbianism in the Torah's prohibition **מכות דאורייתא** cannot be invoked. Nonetheless, lesbianism is itself **דאורייתא** and we refer to it as **דרבנן** only in terms of the applicable punishment – **מכת מרדות**.

Given what we have just said, it should be clear that the passage in Yevamot 76a which refers to lesbianism as **פריצותא בעלמא** – “simple lewdness” – has been popularly misunderstood. Understanding that passage to imply that lesbianism is merely some petty offense ignores its context. The question being addressed is whether having engaged in an act of lesbianism renders a woman unfit to marry a priest, because of **זנות**. If that question were answered in the affirmative, it would imply that an act of lesbianism is intercourse. That was the opinion of Rav Huna. Rava, however, claims that such a woman could not be in the legal category of a **זונה** because intercourse is not involved. From the perspective of the woman's eligibility to marry a priest, the act was **פריצותא בעלמא**, i.e., not intercourse. This passage in Yevamot does not contradict the clear statement of the baraita. Both male and female homosexuality are forbidden. Male homosexuality is forbidden by a specific prohibition of the Torah, female homosexuality by implication of the Torah. Both are equally forbidden, though not equally punishable.

Commenting on the Mishnah<sup>22</sup> – **הבא על הזכור** – the Gemara<sup>23</sup> asserts:

ת"ר: "איש" (ויק' כ: יג), פרט לקטן. "אשר ישכב את זכר" (שם) בין גדול בין קטן... נאמר כאן "דמיהם במ" (שם) ונאמר באוב וידעוני "דמיהם במ" (ויק' כ: כז) מה להלן בסקילה אף כאן בסקילה. עונש שמענו, אזהרה מניין? ת"ל "ואת זכר לא תשכב משכבי אשה תועבה היא" (ויק' י: כב). למדינו אזהרה לשוכב, אזהרה לנשכב מנין, ת"ל "לא יהיה קדש בישראל" (דב' כג: יח) ואמר "וגם קדש היה בארץ עשו ככל התועבות הגויים אשר הוריש וגו'" (מלכ' א' יד: כד) דברי ר' ישמעאל. רבי עקיבא אומר אינו צריך. הרי הוא אומר "ואת זכר לא תשכב משכבי אשה", קרי בה "לא תישכב."

Our sages taught: [The word] “Man” (Lev. 20:13) excludes a minor.<sup>24</sup> [The phrase] “Who lies with a male” [implies] either one who has attained majority or one who is a minor.<sup>25</sup> [How do we know that the punishment is stoning?] It says here (20:13) “Their blood is upon them” and it says regarding the ghost and familiar spirit (Lev. 20:27) “Their blood is upon them.” [From this it fol-

<sup>22</sup> Sanhedrin 7:4.

<sup>23</sup> Sanhedrin 54a.

<sup>24</sup> I.e., a minor is not culpable if he is the active partner.

<sup>25</sup> I.e., if the active partner is an adult, he is culpable whether the passive partner is as adult or a minor. Sanhedrin 54b, end, indicates a disagreement between Rav and Samuel regarding the lower age terminus for a minor. A baraita is quoted in support of Rav, exempting from punishment if the minor is under nine. That is based on the common premise (Niddah 45a) that an act of intercourse by a male under the age of nine is not legally intercourse. Apparently, Rav agrees with the view of R. Akiva (see below) regarding the derivation of culpability for the passive partner. Since both are derived from **לא תשכב**, any minor who could not legally be the active partner because his intercourse is not intercourse, cannot cause an adult to incur liability even when the minor is the passive partner. See Rashi to Sanhedrin 54b, end, and Maimonides' codification in **איסורי ביאה איד**.

lows that] just as the latter is punished by stoning,<sup>26</sup> so too is the former punished by stoning. This teaches us the punishment, but what is the source of the prohibition (warning)? The Torah says:<sup>27</sup> “Do not lie with a male as one lies with a woman, it is abhorrent.” This verse indicates the source for the prohibition to be the active partner. Where is the source for the prohibition to be the passive partner? The Torah says:<sup>28</sup> “No Israelite man shall be a cult prostitute,” and [furthermore Scripture] says:<sup>29</sup> “There were also male prostitutes in the land. [Judah] imitated all the abhorrent practices of nations that the Lord had dispossessed before the Israelites,” according to Rabbi Yishmael.<sup>30</sup> Rabbi Akiva says that his proof is unnecessary. [Rather,] read the verb תשכב of the verse זכר לא תשכב משכבי אשה also as תישכב.<sup>31</sup>

What follows clearly from this passage is: (1) that the Talmud understands the Torah to forbid any sexual intercourse between adult males, either as the active partner or as the passive partner;<sup>32</sup> (2) that an adult male is liable as the active partner even if the passive partner is a minor; and, (3) that the legal liability about which the Torah speaks is incurred by the act of intercourse, not by any thought or fantasy of homosexual intercourse.

Moshe Halevi Spero attempted to argue<sup>33</sup> that homoerotic fantasies and homosexual preference are themselves forbidden in halakhah. His basic textual proof comes from the prohibitions of the codes against things which lead to עריות. He provides a list of sources<sup>34</sup> which he claims support his position. It is not necessary of refute his understanding of each of his sources. I shall suffice with demonstrating that he misinterprets the two sources that come closest to supporting his thesis.

Spero refers to Maimonides, הלכות איסורי ביאה 21:1 as one of his proofs. Maimonides

<sup>26</sup> The verse says באבן ירגמו אותם ומיהם כם.

<sup>27</sup> Lev. 18:22.

<sup>28</sup> Deut. 23:18.

<sup>29</sup> 1 Kings 14:24.

<sup>30</sup> The derivation of Rabbi Yishmael is somewhat cryptic. Apparently he takes Deut. 23:18 to refer to any passive male partner, not just a male cult prostitute. How does he know that the verse refers to the passive partner? He derives that from the verse in Kings which refers to the act as תועבה and deduces that just as Kings calls קדש a תועבה, so Deuteronomy implies that קדש is a תועבה. And, since Lev. 20:13 applies the term תועבה to both active partner and passive partner, and Lev. 18:22 already implies warning for the active partner, Deut. 23:18 must refer to the passive partner. In addition, the Yad Ramah adds that Deut. 23:18 must be understood to refer to the passive partner because the beginning of the verse (לא תהיה קדשה מבנות ישראל) refers to the passive partner – the woman.

The derivation of Rabbi Yishmael rejects understanding קדש as referring only to cult prostitutes. That is not the פשט of the verse, and Rabbi Yishmael's exegesis may be unclear, but his intent is clear. The fact that his exegesis is not פשט is halakhically irrelevant.

<sup>31</sup> I.e., in the נפעל (passive) voice – “Do not be lain with by a male. . . .” Rabbi Akiva's exegesis is also not פשט, and, as with Rabbi Yishmael, that fact is halakhically irrelevant.

<sup>32</sup> The parallel passage in Yerushalmi Sanhedrin 7:7, 24d-25a says it succinctly: תועבה עשו שניהם שניהם בסקילה, שניהם באוהרה, שניהם בהכרת כרת. The Yerushalmi also provides proofs for the punishment of כרת for both active and passive partners when the full liability for the death penalty is impossible, as, for example, where there was no warning given to the men before the act was committed.

<sup>33</sup> *Tradition*, vol. 17, no. 4 (spring 1979): 57.

<sup>34</sup> In n. 17, *ibid.*

כל הבא על ערוה מן העריות דרך איברים או שחבק ונשק דרך תאוה ונהנה בקרוב בשר הרי זה לוקה מן התורה שנאמר (ויק' יח:ל) לבלתי עשות מחקות התועבות... ונאמר (שם, ו) לא – תקרבו לזנות. כלומר לא תקרבו לדברים המביאים לידי גלוי עריות – “One who has non-genital intercourse with any of the forbidden relationships, or hugs and kisses them lustfully, or engages in close bodily contact is liable for lashes by law of the Torah, as it says (Lev. 18:30), ‘That you not engage in the abhorrent practices’ . . .and it says (Lev. 18:6), ‘You shall not come near to uncover nakedness’ . . .that is to say, do not approach even those things that might result in forbidden relationships.”

Only by the wildest stretch of the imagination can this statement of Maimonides be assumed to render either homosexual fantasies or attraction forbidden. Rather, the passage must be understood to mean that homosexuals must refrain not only from actual homosexual intercourse, but also from other sexual behavior which is not intercourse. The source from Maimonides is surely not forbidding either fantasies or attractions, which are far less controllable than behaviors are.

Spero also refers to Maimonides, הלכות איסורי ביאה 21:9, which reads: אשתו של אדם מותרת היא לו, לפיכך כל מה שאדם רוצה לעשות באשתו עושה... ואף על פי כן מדת חסידות שלא יקל אדם את ראשו לכך ושיקדש עצמו בשעת תשמיש... ולא יסור מדרך העולם ומנהגו, שאין – “A man’s wife is permitted to him. Therefore, he may behave with her [sexually] as he wishes. Nonetheless it is righteous for a man not be overly frivolous in this regard. Rather, he should sanctify himself at the time of intercourse. . .and not deviate from common behavior in this regard, since the sole purpose of the act of intercourse is procreation.”

This passage is obviously a plea by Maimonides for what he considers to be a sexually proper attitude when engaged in sexual behavior. It is a plea not to allow even permissible behavior to blind one to the greater purpose of intercourse. The passage does not forbid fantasizing the acts which it forbids. Maimonides and the Talmud were far too wise to forbid thoughts. It is impossible to forbid them, and any attempt to do so only increases the feelings of guilt of those who have thoughts and cannot control them. Controlling behavior is hard enough. Legislating that thoughts or attractions are forbidden is not only unreasonable, it is foolish.

These are the two of Spero’s sources that come closest to reflecting what he contends, and they are very far from convincing. The fact that fantasies and attractions cannot be forbidden legally does not mean that the tradition has nothing to say about them. They are in the category of הרהורי עבירה and should be avoided, if possible.<sup>35</sup> Their power and potency is clearly recognized. The Gemara<sup>36</sup> affirms קשו מעבירה הרהורי עבירה, but that must not be confused with a legal statement. It does not mean that the thoughts are more illegal than the acts. It means they are more burdensome, more difficult to control, more difficult to will out of existence. The sages surely recognized that הרהורים can have undesired consequences. As Rabbi Pinhas ben Ya’ir put it,<sup>37</sup> אל יהרהר אדם ביום ויבא לידי טומאה בלילה.

The issue of הרהור is deserving of its own treatment, but that is not the purpose of this paper. What is important to note is that the avoidance of הרהור is a desideratum, not

<sup>35</sup> See Berakhot 12b and *Encyclopedia Talmudit* entry הרהור. The principle of הרהור is the source of many rabbinic statements advocating behavior intended to prevent certain thoughts – e.g., not watching animals mate, not watching women doing laundry at the shore.

<sup>36</sup> Yoma 29a., quoted by Spero, id., p. 62

<sup>37</sup> Ketubbot 46a, and cf. Avodah Zarah 20b.



a legal requirement. One must attempt to avoid הרהור, but is not legally liable for failure. Indeed, the sages clearly recognized the pervasiveness of הרהור. They said:<sup>38</sup> שלש הרהור עבירה ועבירות אין אדם ניצול מהן בכל יום: הרהור עבירה ועיון תפלה ולשון הרע is one of the three things which humans cannot avoid even for one day. All of the rabbinic dicta about הרהור עבירה must be understood in the light of this statement. As undesirable as הרהור עבירה may be, it is the lot and fate of humans to be subject to it. They can try to avoid it and to control it,<sup>39</sup> but they cannot be free of it. Homosexuals can no more be free of their הרהורים by a simple act of will than heterosexuals can be free of theirs. Indeed, the vast majority of the rabbinic statements about הרהור עבירה are heterosexually oriented.

Let us now note that the verses in Leviticus which prohibit homosexuality are blanket statements of prohibition. They do not stipulate that homosexuals of type X who engage in intercourse are not liable. Anyone who wishes to make such a claim is obligated to provide convincing proof that the distinction he wishes to read into the law is really there.

Our colleague, Rabbi Bradley Artson, has written a paper on the subject of homosexuality which he has presented to the CJLS. It is not my intention to respond to everything he has written, point by point. I must, however, demonstrate in detail why the central core of his argument does not provide the convincing proof that would be required to allow his conclusions to be supported.

Rabbi Artson argues that the Torah's prohibition against homosexuality does not apply to constitutional homosexuals. The Torah does not know of such people, and cannot be forbidding what it does not know about.

It is true that the Sodom episode and the פלגש בגבעה episode reflect homosexual violence, not homosexual love. Nonetheless, it would be erroneous to conclude that only such homosexuality is forbidden. I have demonstrated above that the Torah does not prohibit homosexual attraction – orientation, if you will. The silence of the Torah concerning any distinction between homosexual acts and homosexual orientation is because the Torah does not forbid the latter, only the former. But, the former is forbidden even for one whose orientation is homosexual.

And even if Rabbi Artson is correct about the Torah itself, he himself tacitly recognizes that what is really critical is whether the Sages were able to conceive of such a loving homosexual relationship. If they were, and if they considered it forbidden under the law, that would be determinative.

Rabbi Artson quotes three passages which he interprets to support his claim. I think he misinterprets all three, and will treat them *seriatim*.

The Gemara in Hullin<sup>40</sup> reads: עולא אמר (על הפסוק בזכריה יא:יב – וישקלו את שכרי – שלשים כסף) : אלו שלשים מצות שקבלו עליהם בני נח ואין מקיימין אלא שלשה: אחת שאין כותבין כתובה לזכר – Ulla said (concerning the verse in Zachariah 11:12 – “They weighed out my wages, thirty shekels of silver”), “[The thirty shekels] refer to the thirty commandments which the Noahides accepted upon themselves, though they comply with only three: One, that they do not write a ketubbah for a male. . . .” Rashi comments on this passage: אע”פ דחשודין למשכב זכור ומייחדין להם זכר לתשמישן, אין נוהגים קלות ראש במצוה כתובה – Even though they are suspect to engage in homosexual

<sup>38</sup> Bava Batra 164b.

<sup>39</sup> See Kiddushin, 30b – ממשכהו לבית המדרש and Maimonides, לבו, אם יבוא לו הרהור יסיע לבו, איסורי ביאה כאיט – מדברי הבאי לדברי תורה.

<sup>40</sup> 92a-b.

behavior and designate<sup>41</sup> a male as their partner, they do not make so light of this mitzvah that they write a ketubbah for their partner.

Polygamy is permitted by biblical and talmudic law, and is not considered either immoral or incapable of being loving, committed, permanent, and sacred. No interpretation of this passage, therefore, can work from the premise that such relationships are necessarily loveless or involve only lustful intercourse, or are like a series of affairs.

Rashi interprets Ulla to be praising the non-Jews for their recognition that no matter how committed, permanent or sacred they might wish their relationship with their homosexual partner-to-be, it cannot be legalized by a marriage contract. The ketubbah provides both a potent symbol and legal protection for the partner. It is the indicator of an acceptable, valid and legal relationship. It is the unacceptability of such a relationship that the passage intimates. Not only, claims Ulla, do Jews recognize that such a relationship – even if loving and permanent – is religiously unacceptable, even non-Jews do not attempt to legitimate what cannot be legitimated. Even if it is a permanent relationship, a loving relationship, a relationship of commitment, it cannot be legitimated. Such a relationship can be conceived of, it cannot be legitimated.

The second passage comes from Genesis Rabbah<sup>42</sup> and reads: ר' הונא בשם ר' יוסף: דור המבול לא נמחור מן העולם עד שכתבו גמומסיות לזכור ולהמהמה – Rabbi Huna in the name of Rabbi Joseph [said]: “The generation of the flood was not obliterated from the world until they wrote marriage contracts from males and beasts.”

I have translated the term גמומסיות as “marriage contracts” on the basis of both Theodor-Albeck and Mordecai Margulies. It clearly comes from the Greek *gamikon*, which means marriage. It is possible that it is a shortened form of *gamikoi humnoi*, in which case it would refer to “wedding songs.”<sup>43</sup> In either case, the term is a positive one. What the passage says, therefore, is that the generation of the flood was not destroyed until they legitimated homosexual behavior, sanctifying it with marriage contracts or marriage hymns, lending to such unions an aura of legitimacy and permanence. The passage clearly recognizes the possibility of such a union and such a relationship, and denies its acceptability. It is so unacceptable that the attempt to validate it brings on the destruction of the flood.<sup>44</sup> It is not that such a relationship cannot be conceived of. It can be conceived of. It cannot, however, be legitimated.

<sup>41</sup> Rabbi Artson translates this word as “sequester,” which, of course, supports the way he wishes to read the passage. His translations supposes that the word in the original is מתייחדין, not מייחדין. The former implies an illicit being together, while the latter intimates the designation of a single individual as a mate or partner.

<sup>42</sup> 26:5, on Gen. 6:2, Theodor-Albeck ed., p. 248. See also the parallel in Leviticus Rabbah 23:9, on Lev. 18:3, Margulies ed., p. 539; and *Midrash ha-Gadol*, Genesis, 6:11, Margulies ed., p. 153.

<sup>43</sup> Rabbi Artson’s translation, “coupling songs,” comes from Jastrow, it seems to me. That translation carries a very negative connotation essential to Rabbi Artson’s understanding, but not really present in the original. Jastrow may be asserting that the presence of the word מום in the term גמומסיות is the sages derisive perversion of the Greek term. Theodor-Albeck, Margulies, *Sefer he-Arukh* (s.v. גמס), modern translations of Midrash Rabbah and the variants in both Genesis and Leviticus Rabbah argue against his understanding.

<sup>44</sup> Rabbi Artson makes much of the positioning of the passage in Genesis Rabbah, after טבת הנח – “כי טובת הנח” – כתיב משהיו מתיבין אותה לבעלה היה גדול נכנס ובויעלה תחילה... “ויקחו להם נשים” – אלו נשואות. “מכל אשר בהרו” – זה זכור ובהמה.

He argues that as these do not refer to ongoing love relationships, so, too, the statement of Rabbi Huna does not. Two things argue against Rabbi Artson’s claim: (1) the appearance of Rabbi Huna’s statement in parallel passages without this context; and (2) the fact that the passage as it stands is a literary crescendo. To wit: the בני האלהים were perverse. They exercised the *jus primus noctus*, they forcibly raped virgins, and they seized the wives of other men. But even these acts of violence did not compel God to wipe out His creation. That happened only when they attempted to legitimate homosexual unions as if they were marriages.

Finally, Rabbi Artson finds the linkage of זכור ובהמה telling and important. Regrettably, he demonstrates a

The final passage has already been referred to earlier.<sup>45</sup> We quote again the part of the passage relevant to this point in the discussion: לא אמרתי (שאסורים משום "ובחוקותיהם לא תלכו") אלא החוקים החקוקים להם ולאבותיהם ולאבות אבותיהם. ומה היו עושים? – האישי נושא – לאיש נושא אשה ובתה והאשה ניסת לשנים – לאיש והאשה לאשה, האישי נושא אשה ובתה והאשה ניסת לשנים – “I have forbidden only those practices which they and their ancestors have established. And what did they do? A man would marry a man and a woman marry a woman, a man would marry a woman and her daughter, and a woman would be married to two men.”

There is no way to read this passage as implying only lustful, non-supportive, loveless relationships. There is not even a hint of such a thing in this passage. The Torah forbids the marriage of a woman and her daughter.<sup>46</sup> But there is no greater reason to believe that such a marriage would be loveless and non-supportive than would be any other polygamous marriage. Surely the Torah does not assert that polygamous marriages are lustful and loveless by definition. The Torah forbids polyandry, but societies which permit it would find such marriages no less supportive and loving potentially than polygamous marriages in the societies which permit them. It forces the meaning of the words of the Sifra beyond credulity to assert that this passage passes judgment on the nature of the marriages which it lists. No such judgment is passed. These types of marriages are forbidden, not because they are by definition non-permanent, lustful, loveless, or whatever. They are forbidden because the Torah forbids them. Among them are listed homosexual unions of both males and females.

Part one of this paper is at a close. In dealing with the texts of the Bible and the Talmud we have demonstrated that homosexuality is called *תועבה* by the Torah, but that the term denotes an attributed characteristic, not an inherent one. We have demonstrated that both male and female homosexuality are forbidden in Jewish law, and that it is erroneous to claim that female homosexuality is prohibited by the sages only because of lewdness. We have demonstrated that both the active and the passive partners are liable at law under usual circumstances. We have demonstrated that the prohibitions of the Torah are against sexual relations between homosexuals, not against fantasies, attractions, or orientations. And we have demonstrated that the prohibition of the Torah (*דאורייתא*) makes no distinction between supportive, loving, permanent relationships and lustful, transient, and non-supportive relationships. Same gender sexual relations of both types are forbidden by the Torah.

## Part II

We must now turn our attention to interpretations of the term *תועבה*. As we do so, we must also remember that if they are found wanting, that proves only that the interpretations are inadequate, not that homosexuality is not *תועבה* according to the Torah.<sup>47</sup>

Since the Torah itself does not define *why* homosexuality is *תועבה*, just *that* it is, it seems most logical to begin this quest for an explanation in the Talmud. And, indeed, there is a passage in the Talmud that provides a start for this discussion. In Nedarim 51a, Bar Kappara offers an explanation of the meaning of the term *תועבה*.

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bias in his understanding which is not reflected in the text. The text implies that the generation of the flood attempted to legalize and legitimate ongoing and permanent relationships with animals. The linkage implies that as relationships with animals are unacceptable – no matter how permanent or legalized – so, too, are relationships between males – no matter how permanent or legalized.

<sup>45</sup> Sifra, Aharei Mot 9:8, Weiss ed. 85d; see above, p. 617.

<sup>46</sup> Lev. 18:17.

<sup>47</sup> See above, p. 616.

We will subject Bar Kappara's explanation to analysis, but preface the analysis by pointing out the context. The interchange between Bar Kappara and Rebbe, during which Bar Kappara defined the meaning of תועבה, took place at the wedding of Rebbe's son, Rabbi Shimon. Previously, Bar Kappara had promised Rebbe's daughter that he would drink wine while her father danced and her mother sang. At the wedding, Bar Kappara asked Rebbe: מאי תועבה? Whatever explanation Rebbe offered, Bar Kappara refuted. Finally, Rebbe said: פרשיה את – "You explain it!" Bar Kappara told Rebbe to have his wife pour him a drink, and insisted that Rebbe himself get up and dance before him as preconditions to his explaining. Rebbe did both things. Then Bar Kappara said: תועה אתה בה – "תועבה" – הכי אמר רחמנא: "תועבה" – "Thus did the Merciful One say: 'To-evah' – You go astray on account of it (or, her)."

This is immediately followed in the gemara by two further episodes that took place at the wedding. Bar Kappara repeated his demands on Rebbe as preconditions to his explaining the terms תבל<sup>48</sup> and זמה.<sup>49</sup> The former he defines as תבלין יש בה? and the latter as זו מה היא.

We refer to the continuation of the passage which contains the definition of תועבה in order to indicate that Bar Kappara himself might not have intended his definitions quite as seriously as we will be taking them. Furthermore, it is quite clear that all three definitions are plays on the words. Having said this, we return to a careful analysis of תועה אתה בה, understanding it as very seriously intended by Bar Kappara.<sup>50</sup>

First we note that תועה אתה בה is clearly a *notarikon*, i.e., תוע (ה אתה) כה. Secondly, we note how difficult it is to translate it into English because of the unclear referent of the pronoun בה. Bar Kappara asked מאי תועבה. He did not specify a particular verse as the locus of the term. On the one hand, therefore, we would like his answer to refer to verses in which the term *as stated*, namely, תועבה, actually appears. If that is his intent, he refers either to Lev. 18:22 or 20:13, for only in those two verses does the term תועבה actually appear. In such a case, the בה must refer to homosexuality, i.e., "you go astray because of it." Bar Kappara's phrase obviously requires בה or the *notarikon* does not work. However, it is very difficult. To what does the בה refer? If its antecedent is a term like משכב זכר, the pronoun should be בו, not בה. The only real possibility is that the בה refers to the noun תועבה, i.e., you go astray because of the abomination. That is not smooth either, because it requires using the term being defined as part of the definition itself.

There is another grammatical possibility. If Bar Kappara's question used תועבה as a general term, rather than with reference to a specific occurrence of the word, his answer need not even be about homosexuality. Bear in mind that all of the sexual offenses are referred to as תועבות in Lev. 18:26, 27, and 29. If Bar Kappara was asking what the meaning of תועבה was in general, as opposed to in regard to homosexuality in particular, the pronoun בה is far less problematic. Since most of the עריות – all of which are תועבות – are women, תועה אתה בה means: "You go astray on account of her." If this explanation is correct, Bar Kappara is referring primarily to the other עריות, not to homosexuality, and we can probably learn nothing from what he says that will shed light on why homosexuality is a תועבה. The advantage to this explanation is that we clearly

<sup>48</sup> Lev. 18:23 concerning bestiality.

<sup>49</sup> Lev. 18:17 concerning ערות אשה ובתה. In Yevamot 37b, the same explanation of זמה is given by Rava with reference to Lev. 19:29, ומלאה הארץ זמה.

<sup>50</sup> Let it be clear that if his explanation is dismissed as a joke told at a wedding, when he may even have been less than completely sober, we would have to say that the Talmud gives no guidance as to the meaning of תועבה. We could not conclude that homosexuality is not תועבה on the grounds that Bar Kappara did not mean his explanation seriously. It is for this reason that we will analyze his explanation as if we knew for certain that he meant it with utmost seriousness.

understand the antecedent of the pronoun **בה**. The weakness of this explanation is that it leaves unexplained the very verses in which the term **תועבה** actually appears with reference to a specific sexual offense.

There are at least two classical commentators who understand Bar Kappara in this latter way. The **מיוחס לרש"י**<sup>51</sup> explains Bar Kappara: **שמןיה את אשתו של היתר ותפס זו** – “You go astray because of her.” That is to say, he abandons his wife who is permissible to him in favor of one with whom relationships are in the category of **זנות**.

In a similar vein, the **בעלי התוספות על התורה**<sup>52</sup> explain: **תועה אתה בה שלא פנית אל מה** – “You go astray on account of her” because you paid no heed to what is recorded in Proverbs (5:15). “Drink water from your own cistern and flowing water from your own well.” That is, by ignoring the wisdom of Proverbs which indicates that you should stay with a wife who is not **ערייות**, you go astray.

The **מיוחס לרש"י** and the **בעלי התוספות**, therefore, opt for clarity of the antecedent of **בה**, even though, for them, Bar Kappara sheds no light on the specific behavior which is called **תועבה** by the Torah.

All others, to the best of my knowledge, understand Bar Kappara to be referring to homosexuality, and offering an explanation of why God considers it to be **תועבה**. Tosafot, the Rosh and the Ran all offer a similar explanation.<sup>53</sup> Indeed, the language of Tosafot and the Rosh is identical: **שמניחין נשותיהם והולכין אחר משכב זכר**, and that of the Ran very close: **שמניח משכבי אשה והלך אצל זכר**. The “going astray” according to these three lies in the fact that a man abandons his wife to pursue a homosexual relation.

Let us first assume that the Tosafot et al. correctly understand Bar Kappara. If so, the model of homosexuality to which Bar Kappara refers is the Greek model.<sup>54</sup> In the Greek model it makes perfectly good sense to speak about homosexuality drawing one away from one’s wife. The classical Greek model of homosexuality is an older man (about twenty-five), usually married, and a young man (about fifteen). Indeed, when the young man gets married he is expected to have regular heterosexual relations with his wife, and probably take a young male lover.

The pederastic relationship is viewed by the Greeks as a type of role model relationship in which the older man feels a strong attraction to his young lover, while the young man is expected to admire his lover, but not be attracted to him sexually. The pederastic model was supposed to transmit virtues from the old to the younger man.<sup>55</sup> In this model it is quite possible to speak at least of the older man as being **זכר משכב אחר** and **הולך אשתו**.

While this model is probably very infrequent in our day, there is no question that many men who have been married and have decided in the present climate to “come out of the closet” have also abandoned their wives for homosexual relations, and may have been doing so all along, although not openly.

This proves *only* that the reason of the Tosafot et al. is still applicable. It does not prove that it ought to be applied, or that it is what Bar Kappara meant. Even if it is not

<sup>51</sup> Nedarim 51a, s.v. **תועה**.

<sup>52</sup> End of parashat **מרת** אחרי in vol. 6 (New York: Shulsinger Bros., 1950), p. 49b.

<sup>53</sup> All at Nedarim 51a, s.v. **תועה**.

<sup>54</sup> That Bar Kappara may well have known and understood the Greek model is possible. He was, we know, a lover of things Greek, especially Greek ideas of beauty and Greek language. See Bereshit Rabbah 36:8. Theodor-Albeck ed., p. 342, and J. Megillah 1:9 71b.

<sup>55</sup> See Michael Ruse, *Homosexuality* (New York: Basil Blackwell, Inc., 1988) pp. 176-182; and Arno Karlen, “Homosexuality in History,” in Judd Marmor, ed., *Homosexual Behavior: A Modern Reappraisal* (New York: Basic Books, 1980), pp. 78-80.

what Bar Kappara meant, it seems most plausible that it is what the Tosafot, the Rosh and the Ran meant.

It is most likely that moderns would wish to expand the concern embodied in the statement of Tosafot et al., and analyze its relevance to the issue at hand. Perhaps מנייהין נשתייהן וכר' is the way that the Rishonim intimate that homosexuality is disruptive to family life. They would not be the first to make such a claim. Rabbi Akiva, commenting on the verse in Gen. 2:24 והיו לבשר אחד says: – דרבק – “‘He shall cleave’ – [implies a union with a woman] and not with a man.” It is through union with his lost rib that the man becomes whole again, and a union with a man does not result in such wholeness.

Clearly one might argue that if society would recognize the equal validity of homosexuality with heterosexuality, thereby eliminating the impetus for homosexuals to even consider or attempt heterosexual family arrangements, the disruption would disappear. The disruption occurs when a homosexual finds himself in so unhappy a relationship with a spouse of the opposite sex that he has extramarital affairs with men, or divorces his wife. Either way is disruptive.

That argument, however, is much too restrictive and restricted. The issue need not be only about the disruption of pre-existing heterosexual family structures. The issue could well be couched in terms of the desirability, willingness, and ability of society as a whole to accept multiple familial structures. The claim might be that homosexuality as a recognized, validated, co-equal option is itself disruptive to the family structure. The question is not whether a specific homosexual relationship disrupts a specific family, but whether homosexuality in general is disruptive to families in general.

The issue cannot be entirely separated from the question of procreation, to which we shall come in due course. For the time being, however, the emphasis is on the structure of the family *per se*, without concern for ancillary issues.

Surely one could make a very strong case that there is only one family model in both the Biblical and rabbinic literature. And one could surely claim that the model is intended not merely as a description of the real, but of the ideal.

When God says in Gen. 2:18 וְהָיָה לְךָ עֹזֶר כַּגֹּדֶל לְךָ, אֵשֶׁת לְךָ, אֵשֶׁת לְךָ, אֵשֶׁת לְךָ and that עֹזֶר is a woman, does this not posit a heterosexual family as the ideal?<sup>56</sup> From the perspective of the biblical author, God chooses a woman as Adam's helpmate and companion. And notice, too, that the primary purpose of the creation of this first family is for companionship and עֹזֶר, not procreation. Even the later contention,<sup>57</sup> והיו לבשר אחד, refers not to procreation *per se*, but to marital intimacy. Surely one could cogently argue that the Bible reflects an ideal, and that it could have posited a homosexual family structure at least in addition to a heterosexual one if it deemed it co-equal or even acceptable. As everyone must admit, a homosexual family can be a source of mutual help, companionship and intimacy. Why is there no mention of such a structure, no hint of it anywhere? Surely one could argue that the reason is because the Bible refuses to see a homosexual family unit as an acceptable structure.

The Rabbis, too, are as clear as one can be on this subject. We need not belabor the issue too much. A couple of examples will suffice. לא איש בלא אשה ולא אשה בלא איש

<sup>56</sup> It again becomes important to remind ourselves of the material above, pp. 621ff, in which we demonstrated that the Rabbis *could* conceive of a loving, non-violent homosexual union. That is important again now in order to forestall the contention that Genesis and the Rabbis posited heterosexual families only because they could not conceive of homosexual ones.

<sup>57</sup> Gen. 2:24.

כל אדם שאין לו אשה שרוי בלא שמחה בלא, and, ולא שניהם בלא שכניה said the Rabbis.<sup>58</sup> And, ברכה בלא טובה, they claimed.<sup>59</sup> Surely a loving homosexual family unit would not be described by its members as בלא טובה, or ברכה בלא טובה. If, as we have claimed above,<sup>60</sup> the Rabbis were able to conceive of a loving homosexual relationship, these statements made by them must be understood to reflect the unacceptability of such unions. The heterosexual family unit is the only one in which the rabbinic tradition can see the presence of God, and the presence of joy, blessing and good. It is not that a homosexual family is inconceivable, but that it is unacceptable.

If these are defensible arguments, or stronger, the explanation of תועה אתה בה as disruptive to family structure stands as a defensible argument in favor of the precedent. That precedent disallows homosexual behavior as co-equal with heterosexual behavior, and, therefore, does not recognize a homosexual family structure as co-equal with a heterosexual family structure.

Thus far, then, we have demonstrated that there is an inherent ambiguity in the words of Bar Kappara. They might not even be about homosexuality. Further, we have dealt with one of the explanations of his words according to those who do take them to be about homosexuality. That is the explanation of the Tosafot, the Rosh, and the Ran, who understand Bar Kappara to refer to the disruption of the family as the “going astray.” Even if that is not the original intent of Bar Kappara, it remains, we have demonstrated a clearly defensible interpretation of what תועה אתה בה can legitimately be understood to mean. If for no other reason, then, the weight of precedent does not yet seem to be overridden.

We turn our attention now to the second explanation of the words of Bar Kappara among classical commentators. The פסיקתא זוטרתא on Lev. 18:22 reads: “תועבה היא” תועה בה, שהרי אין לו ממנו זרע אנשים. The quotation of Bar Kappara’s words, תועה בה, clearly indicates that the Pesikta is explaining תועבה in terms of Bar Kappara’s explanation of it. His comment is interpreted to mean that the “going astray” of homosexuality lies in the fact of its being non-procreative.

The Pesikta is not alone in that claim among classical commentators. Nahmanides, in his comments to the same verse says: והבהמה מפורסם כי הוא דבר נתעב ואיננו בקיום – “The reason behind the prohibition of homosexuality and bestiality is well-known, being an abhorrent thing because it does not allow for procreation, since a male [with another male, and a male with an] animal cannot procreate.” Similarly, משרשי המצוה לפי שהשׁיׁת חפץ בישׁוב עולמו אשר ברא ולכן יצוום לבל ישחיתו זרעם במשכבי – הזכרים כי הוא באמת השחיתה שאין דבר תועלת פרי ולא מצות עונה. “Among the underpinnings of the commandment is that God wishes the world that He created to be populated and He therefore commanded against wasting one’s seed in homosexual relations for that is truly wasteful since it is not procreative and not the fulfillment of the mitzvah of conjugal relations.” We shall return to the last part of the statement in due course. For the moment, however, the main point is to see that the *Sefer ha-Hinukh* also considers the non-procreative element of homosexuality as a reason for its being תועבה.

Finally, let us note the comment of the תורה תמימה who writes:<sup>62</sup> נראה הכוונה שתועה בה ובפסיקתא זוטרתא מפרש תועה אתה בה שהרי אין לך ממנו

<sup>58</sup> Genesis Rabbah 8:9, Theodor-Albeck p. 63.

<sup>59</sup> Yevamot 62b. See there, in general, for paens of praise to the heterosexual family unit.

<sup>60</sup> Pp. 621ff.

<sup>61</sup> Mitzvah 209.

<sup>62</sup> Lev. 18:22 letter אין לך.

זרע אנשים והכוונה אחת היא – “The implication [of Bar Kappara’s statement] seems to be that one deviates from nature by having relations with a male. And in the פסיקתה זוטרתא [the author] explains that ‘You go astray because of it’ since you cannot procreate with a male. And the essence of both explanations is the same.”

We have left this comment of the תורה תמימה for the last both because of chronological reasons and because he explicitly links the category of unnaturalness with non-procreativity. Since many of the issues raised today also link the two, or equate the two, or consider non-procreativity as a subcategory of unnaturalness, we shall discuss these elements as one unit.

On a most literal and technical level, one might claim that this explanation for the תועבה nature of homosexuality would be untenable if there is homosexuality among lower species. That is, one might claim that if there are instances of homosexuality in nature, then it cannot be called unnatural. Obviously, this point is generally raised because those who raise it can point to evidence of homosexual behavior in nature.<sup>63</sup> The point that there is some behavior among animals that is homosexual need not be contested. Herders and husbandmen have known about it for years.

The question that can be asked against this thesis is whether animal behavior should be used as a criterion for the determination of what is natural for humans. Surely, on one level the answer is “yes,” but that may be inadequate. Do not humans commonly claim that it is unnatural for them to go around without clothes, even though animals do? Do humans really think of their acts of intercourse as the same as those of animals? Do humans posit such things as love and attraction as elements of animal copulation? Are not the differences we perceive between ourselves and animals in regard to sexual behavior and intimacy sufficient to warrant the claim that what may be natural for animals is not natural for humans?<sup>64</sup> Surely it is at least defensible, and perhaps far stronger than merely defensible, to claim that “natural” means “natural for human beings,” and is not contingent at all on evidence from other animals. An act which may appear in nature among animals may be unnatural for human beings. There are species of animals which eat their young. Would that fact make it natural for human beings to do so? A literalist definition of the term natural is too restrictive, and not very useful toward an evaluation of whether or not homosexuality may be considered natural for human beings.

There is another element to the natural argument which is heard with sufficient frequency that it should be dealt with. Some argue that homosexuality is unnatural because of biological fit. That is, a penis fits comfortably in a vagina from a physiological perspective, whereas it does not fit so elsewhere: and the male organ in the female organ has a biological function (here again the linkage between “natural” and “procreative”), whereas it does not have such a function elsewhere.

The response to these claims contends that physiological fit is hardly a criterion for naturalness for several reasons: (1) Homosexuals have no trouble making their organs fit in orifices that are not vaginas, and (2) there is a long history of the acceptability among heterosexuals of sexual intimacies in which the penis is not inserted into the vagina, but

<sup>63</sup> See the chapter by R.H. Denniston in Marmor, *op. cit.*, pp. 25-40. Note, however, that the chapter is entitled “Ambisexuality in Animals,” not “Homosexuality in Animals.” Denniston reports no instances of exclusively homosexual behavior among lower species. See also, “Is Homosexuality Biologically Natural?” by J.D. Weinrich, in W. Paul, J.D. Weinrich, J.C. Consiorek and M.E. Hatvedt, eds., *Homosexuality: Social, Psychological, and Biological Issues* (Beverly Hills: Sage, 1982), pp. 197-208.

<sup>64</sup> In Part III of this paper we will deal with the possibility that human homosexuality is natural because it is caused by hormonal imbalances.



elsewhere. If these are not unnatural when carried out by heterosexuals, why should they be considered unnatural when done by homosexuals?

On one level, these claims are absolutely accurate and incontestable. There is a long rabbinic history of recognition of non-vaginal intercourse. Indeed, the very concept of non-vaginal heterosexual intercourse is derived by the Rabbis from the biblical verses which deal with homosexuality. Both Lev. 18:22 and 20:13 refer to *משכבי אשה*. In its comment to Lev. 20:13, the Sifra reads:<sup>65</sup> *“משכבי אשה” – מגיד הכתוב ששתי משכבות באשה*. There is mention throughout rabbinic literature of *ביאה שלא כדרכה*, which is the second type of *ביאה* implied by the words *משכבי אשה*. And *ביאה שלא כדרכה* is most widely understood to mean, or at least include, *שלא במקום זרע*, i.e., non-vaginal intercourse. On this level, then, there is clear rabbinic recognition of non-vaginal intercourse. Furthermore, the Sages clearly recognize non-vaginal intercourse as intercourse,<sup>66</sup> with all the legal implications thereof.<sup>67</sup>

Nonetheless, the claims in the paragraph above could be cogently argued to be insufficient to warrant the conclusions which some wish to draw from them. First of all, regarding the physiological fit claim, the issue is not whether the fit is possible. No one denies that it is possible. The issue is whether the physiological structures seem designed for that purpose.<sup>68</sup> Is there a biologically natural lubricant which eases penetration and movement both in *ביאה כדרכה* and *שלא כדרכה*? Is the threat of abnormal stretching or damaging of tissues the same in both types of intercourse? Is the occurrence of pain as frequent and likely in both types of intercourse? Clearly the answers to these questions might lead one to posit that vaginal intercourse is more natural, the physiological structures themselves being more appropriately designed for vaginal intercourse than for anal intercourse.<sup>69</sup>

Understood as above, the claim that homosexual relations are considered *תועבה* by the Torah because they are unnatural is not an untenable claim. The term *יסודות הבריאה*, as used by the *Torah Temimah*, need not (indeed, probably should not) be understood to imply physiological impossibility, but to imply (at least partially) physiological fit. Indeed, one might argue that it is precisely because such relations *can* occur in nature, however poor the physiological fit, that the Torah sees fit to attribute to them the attribute of *תועבה* as a sign of its rejection of such use of the physiological structures.

This brings us, then, to a discussion of the second element of the “natural argument,” namely, that homosexual relations are unnatural because they are not procreative. To this claim, too, there are responses now regularly proffered, generally, two. First, because of technological advances, homosexuals need not be prevented from procreating. They can procreate even without engaging in heterosexual behavior. The male’s sperm can be used to impregnate a woman artificially. That woman can then carry and bear the child, which

<sup>65</sup> Perek 9, 14 Weiss ed., p. 92b. Cf. Sanh 54a.

<sup>66</sup> E.g., Rashi to Yevamot 34b, s.v. *שלא*. But see David Feldman, *Birth Control in Jewish Law* (New York: New York University Press, 1968), pp. 155ff, for indications of rabbinic hesitancy in condoning anal intercourse between male and female without reservations.

<sup>67</sup> See Horayot 4a regarding *העראה שלא כדרכה* as legally *העראה*; San. 95a for *ביאה שלא כדרכה* being sufficient for liability for bestiality; Yev. 54a for *ביאה כדרכה* being *קונה כיבמה* (and cf. M. Yev. 6:1, 53b. with Rashi and Tosafot ad loc.); and, Kid. 9b for *ביאה שלא כדרכה* being *קונה באשה*.

<sup>68</sup> The phrase “designed for that purpose” does *not* mean “designed *exclusively* for that purpose.” The fact that something may have a second purpose does not negate that it also has a first purpose.

<sup>69</sup> None of these contentions is meant to deny that aberrations might occur in individual males or females – either physiological or psychological or both – that make some acts of vaginal intercourse seem less “natural” than in general. But, no argument from nature was ever meant to imply that there could be no exceptional cases. Nobody is claiming that nature is always perfect. The fact that there are imperfections in nature, however, hardly justifies calling something natural which is generally unnatural.

can then be raised by the male whose sperm fathered the child. Conversely, a lesbian woman can be artificially impregnated with a man's sperm and bear a child whom she will then raise. Thus, homosexuals, both male and female, can be involved in the procreative process, can have families of their own, and the fact that their sexual relations are with members of the same sex becomes irrelevant.<sup>70</sup> Indeed, one might imagine the sperm of one male homosexual partner being used to impregnate two female lesbian partners, with one of the children becoming the child of the male couple, and the other the child of the female couple. Such children could even have "siblings" who are known to them, and with whom they might relate as "family."

Second, if procreativity is a *sine qua non* for illicit sexual behavior, there are many heterosexual unions which are equally forbidden. All heterosexual acts of non-vaginal intercourse would be forbidden, because they are non-procreative. Sexual intercourse with a post-menopausal woman, an infertile woman, a woman who has had a tubal ligation, becomes forbidden for a man; intercourse with an infertile man becomes forbidden for a woman. Since halakhah clearly does not forbid sexual relations in these circumstances, it must imply that procreativity is *not* a *sine qua non* for licit sexual behavior. Therefore, the non-procreative nature of intercourse is not a grounds on which it should be considered forbidden.

As with most arguments we have thus far discussed, these also have a level of truth to them, the second even more persuasive than the first. But, they are not without their shortcomings.

Among animals, the purpose of sex is entirely for procreation. Copulation is almost always during the females' period of fertility. Even among those species which appear to be "monogamous," sexuality is not a function of love, attraction, or caring. Among humans alone is this not the case. Jewish tradition has long recognized that there are purposes to human sexual intercourse beyond the merely procreative, and it is unnecessary for us to prove its acceptability.<sup>71</sup> But, as permissible as non-procreative sex is, the linkage between intercourse and procreation is not severed entirely. Once intercourse becomes permissible for purposes other than procreation, there is no reason to forbid even non-vaginal intercourse. But it is the inescapable linkage between intercourse and procreation that gives rise to the hesitancy that the Sages expressed about some types of *כרובה*.<sup>72</sup>

How and where should the line be drawn between legitimate non-procreative sex and sex as a means of reproduction? It seems more than merely reasonable to posit the mitzvah of *עונה* as the characteristic which makes non-procreative sex permissible.<sup>73</sup> Since it is in the nature of human beings to engage in sexual intercourse for purposes other than procreation, such intercourse shall be considered sanctioned (i.e., natural) when it fulfills the other primary purpose of intercourse recognized by the law, namely, the mitzvah of *עונה*.<sup>74</sup> Since *עונה* is a mitzvah which applies only between a husband and wife, any act of intercourse between

<sup>70</sup> Our discussion of this claim will ignore entirely all of the halakhic questions involved in artificial insemination and the type of surrogacy arrangement implied by this claim. These issues are of only secondary importance in this matter, for the present at any rate.

<sup>71</sup> See Feldman, *op cit.*, pp. 65ff.

<sup>72</sup> See above, n. 66.

<sup>73</sup> The Ravad, in *Ba-alei ha-Nefesh, Sha-ar ha Kedushah*, also lists the benefits accruing to a pregnant woman and her fetus as justification for intercourse. See Feldman, p. 69 and p. 132. This issue need not concern us for the purposes of this paper.

<sup>74</sup> See ch. 4 of Feldman's book for a thorough discussion of the mitzvah itself and the related issues of the quality of *עונה* and Chapter Five for his discussion of pleasure and wellbeing as motives for intercourse.

a man and someone not his wife cannot be called *עונה*. One may engage in *כדרכה שלא כדרכה* with one's wife because the mitzvah of *עונה* can be fulfilled that way. But any *ביאה* whatsoever with one to whom the category of *עונה* is inapplicable is not justifiable. The fact that *ביאה שלא כדרכה* is permissible, natural, as a form of *עונה* with one's wife does not render it permissible, natural, in a different context, such as homosexual union.

We referred above<sup>75</sup> to the passage from *Sefer ha-Hinukh*. The author stated that homosexual relations were forbidden because they were non-procreative, and added: *ולא מצות עונה*. Not only do homosexual relationships fail to meet the justification of legitimacy that would be possible if they were procreative, they also fail to meet the other criterion of legitimacy – the mitzvah of *עונה*. All homosexual sex must be *ביאה כדרכה*. Such *ביאה* is permissible only as an act of *עונה*. The naturalness of *ביאה כדרכה* is determined not by the substance of the act, but by the legitimacy of the actors so engaged.

Apparently the earliest utilization of the argument from nature came from Plato, and he gives very conflicting messages as to what he meant by it. On the one hand, there are passages which intimate the most literal understanding of the argument. Thus for example Plato writes:<sup>76</sup>

Our citizens ought not to fall below the nature of birds and beasts in general, who are born in great multitudes, and yet remain until the age for procreation virgin and unmarried, but when they have reached the proper time of life are coupled, male and female. . . surely, we will say to them (i.e., our citizens), you should be better than the animals.

Or, in a similar vein:<sup>77</sup> “If anyone. . .denounces these lusts as contrary to nature, adducing the animals as a proof that such unions were monstrous, he might prove his point.”

On the other hand, though, Plato also writes:<sup>78</sup>

I think that the pleasure is to be deemed natural which arises out of the intercourse between men and women: but that the intercourse between men with men, or of women with women, is contrary to nature.

In this passage it is the phrase *para phusin* which is translated as “contrary to nature.” John Boswell has pointed out<sup>79</sup> that Plato probably meant by it “unrelated to birth,” “non-procreative” rather than “unnatural” in the sense of being a violation of some moral or physical law. Though this might not have been understood by Plato's intended audience – indeed, Plato seemed to enjoy puns and double meanings – this nuance would surely have been present, and perhaps even primary. If so, Plato, too, may have made the link between “natural” and “procreative.” Indeed, he may well have used the word “natural” to mean “procreative.”

<sup>75</sup> P. 627.

<sup>76</sup> *The Laws*, 840d-e translation B. Jowett in *The Dialogues of Plato* (New York: Random House, 1937), vol. 2, p. 589.

<sup>77</sup> *Ibid.*, 836c, p. 586.

<sup>78</sup> *Ibid.*, 636b-c, p. 418.

<sup>79</sup> *Christianity, Social Tolerance and Homosexuality* (Chicago and London: The University of Chicago Press, 1980), pp. 13-14, n. 22. See also David Greenberg, *The Construction of Homosexuality* (Chicago and London: The University of Chicago Press, 1988), pp. 207ff.

Kant also used the concept of “natural” to mean “non-procreative,” and reject homosexuality on those grounds. He wrote:<sup>80</sup>

A second *crimen carnis contra naturam* is intercourse between *seux homogenii*, in which the object of sexual impulse is a human being but there is homogeneity instead of heterogeneity of sex, as when a woman satisfies her desire on a woman or a man on a man. This practice too is contrary to the ends of humanity: for the end of humanity in respect of sexuality is to preserve the species without debasing the person: but in this instance the species is not being preserved.

Clearly, then, there is a long history, both within Judaism and outside of it, of explaining the prohibition against homosexuality in terms of its non-procreativity, and meaning that by the term unnatural. Could the non-procreative nature of homosexuality and the impossibility of fulfilling the mitzvah of עונה with a sex partner of the same gender be reasonable grounds for the Torah's evaluation of it as תועבה? Surely even those who would prefer a different answer must admit that the answer could be “yes.” The preference for a different answer might impel one to interpret the argument from nature very literally, but such a literal interpretation is neither the only one possible, nor, perhaps, even the most probable.

There are two other arguments often offered against the claim that homosexuality is unnatural. These arguments are statistical and cross-cultural. Let us look at each of these, in turn.

In 1948, Kinsey and his associates W.B. Pomeroy and C.E. Martin, published a study<sup>81</sup> based on 6,000 American males from which they concluded that thirty-seven percent of the male population had some homosexual contact after adolescence, that thirteen percent had been more homosexual than heterosexual for at least three years between adolescence and age fifty-five, and that four percent were exclusively homosexual after adolescence. For the purposes of these figures, homosexuality was defined as having achieved orgasm through a homosexual experience. If one included homosexual yearnings that might not have led to an orgasm, the figure for males reached fifty percent. The findings of Kinsey have been subsequently confirmed in published studies.<sup>82</sup>

In 1953 Kinsey and his associates published their findings regarding women.<sup>83</sup> The following paragraph summarizes the findings for women, as compared to the findings for men:<sup>84</sup>

<sup>80</sup> *Lectures on Ethics*, translated by L. Infield (New York: Harper & Row, 1963), p. 170, quoted by Ruse, op. cit., p. 186.

<sup>81</sup> *Sexual Behavior in the Human Male* (Philadelphia: W.B. Saunders, 1948).

<sup>82</sup> See, for example, R.W. Ramsay et al., “A case study: homosexuality in the Netherlands,” in J.A. Loraine, ed., *Understanding Homosexuality: Its Biological and Psychological Bases* (New York: American Elsevier, 1974), pp. 14-40; and F. Whitam, *Archives of Sexual Behavior*, 12 (1983): 207-226.

    Rabbi Samuel Dresner has written an extensive monograph on the subject of homosexuality, as yet unpublished. On p. 37f Dresner writes: “Kinsey’s statement. . .has been under heavy attack. . .He withheld the fact that a high percentage of subjects were ‘prisoners, ex-prisoners, or sex offenders,’ and that eighty percent were ‘lapsed Protestants’. . .An associate of the Kinsey Institute, who had broken with its founder, said that ‘Kinsey’s real activity has generally been misunderstood, owing to a cloud of statistical hokum. . .[His] not-very-secret-intention was to respectabilize homosexuality and certain sexual perversions. . . .’

    I am in no position to judge the conflicting claims concerning Kinsey’s statistics. But, for the purposes of this paper, I am prepared to accept them as accurate. Obviously, if they are grossly overstated, their usefulness as an objection to the “unnatural” claim is greatly reduced.

<sup>83</sup> *Sexual Behavior in the Human Female* (Philadelphia: W.B. Saunders, 1953).

<sup>84</sup> *Ibid.*, p. 475.

Among the females, the accumulative incidence of homosexual responses had ultimately reached twenty-eight percent; they had reached over fifty percent in the males. The accumulative incidences of overt contacts to the point of orgasm among the females had reached thirteen percent. . . . Among males they had reached thirty-seven percent. This means that homosexual responses had occurred in about half as many females as males, and contacts which had proceeded to orgasm had occurred in about a third as many females as males. Moreover, compared with the males, there were only about a half to a third as many of the females who were, in any age period, primarily or exclusively homosexual.

The substance of the argument offered from these statistics is that the frequency of homosexuality they reflect makes it untenable to refer to homosexuality as unnatural. Surely, the high incidence of homosexual behavior makes that behavior normal, and behavior which is normal is natural. Thus, the term natural is to be equated with normal.

Again, it must be clear that there is a level of truth to the claim. But again, it must be stated that the argument could well be an oversimplification. The terms “normal” and “abnormal” do not carry with them any denotation of morality or choice. Thus, to call obesity abnormal makes neither a moral judgement nor a claim that the person who is obese is somehow at fault for being obese. The obese person *may* be at fault, or may not be. But the term “abnormal” does not imply either one or the other.

Nor are the terms contingent on numbers, except perhaps in the extreme. Would we not call obesity abnormal even if the percentage of people who struggled with it for a period of at least three years was as high as thirteen percent? If four percent of all adults were perpetually obese throughout adulthood, would we not still call obesity abnormal?<sup>85</sup>

It is even conceivable that very high percentages of incidence might not change our view of what should be called normal or abnormal. Might we not reasonably claim that keeping kosher or observing Shabbat are normal for Conservative Jews, even if the percentage of those who do not is very high? In that context, “normal” means “posited as normative behavior.” In a similar vein, if one said that homosexuality is abnormal, one would mean by it that homosexuality is posited as being non-normative behavior. Indeed, it need not make a claim about the desirability or the consequences of the abnormality. Such claims may be made, but they are not inherent to the claim of naturalness or normalcy.

Thus it is surely possible from a halakhic perspective to call homosexuality unnatural and mean by it “posited as non-normative behavior.” That sense of the word is not unusual, and is not contingent upon the numbers of people who engage in the non-normative behavior. Furthermore, if a group feels strongly enough about the non-normativeness of a certain behavior, it might even call such a behavior תרעבה. If one were to say, “Nudity is unnatural and abhorrent,” one could be contending, “Our group feels that nudity is a non-normative behavior pattern, and we feel so strongly about it that we call it abhorrent.” This sentence would *not* explain *why* we feel so strongly about nudity that we call it abhorrent. In other words, it is defensible to say that the Torah calls homosexuality תרעבה because it feels so strongly that it is a non-normative (i.e., unnatural) behavior pattern that it attributes to it the characteristic of being abhorrent. Why the Torah feels that strongly must be accounted for by some other reason.

<sup>85</sup> Obviously if ninety-five percent of all adults were obese throughout adulthood, we might change our definition of normalcy. That is what I meant by the phrase “except perhaps in the extreme” in the first sentence of this paragraph.

Related to the arguments from numbers is the argument from cross-cultural evidence. Since we find homosexuality in virtually every society from antiquity to modernity, both in societies that were permissive of it and in societies that were repressive of it, we are surely mistaken to call it unnatural.

The contention that homosexuality is found in every culture is not really subject to doubt.<sup>86</sup> Even that claim, however, may not really lead to the conclusion many wish to draw from it. That conclusion, after all, seeks ultimately to validate homosexuality as a co-equal lifestyle with heterosexuality, even when (indeed, for some, solely when) homosexuality is the exclusive lifestyle, and points to cross-cultural evidence for support of its naturalness. Yet, note the following contention by J.M. Carrier:<sup>87</sup>

Heterosexual intercourse, marriage and the creation of a family are culturally established as primary objectives for adults living in all of the societies discussed above. Ford and Beach (in their book, *Patterns of Sexual Behavior* [New York: Harper & Row, 1951] – J.R.) concluded from their cross-cultural survey that “all known cultures are strongly biased in favor of copulation between males and females as contrasted with alternative avenues of sexual expression.” . . . Exclusive homosexuality, however, because of the cultural dictums concerning marriage and the family, appears to be generally excluded as a sexual option even in those societies where homosexual behavior is generally approved.

If the argument from cross-cultural and transhistorical evidence were intended to demonstrate that homosexuality is not inherently abhorrent – or else it would be difficult to fathom how it could have such a long history – it might prove its point. But the claim of תועבה is not a claim of inherent abhorrence, but of attributed abhorrence.<sup>88</sup> Cross-cultural and transhistorical evidence can provide no counterclaim to an attribution of abhorrence by a given culture. Indeed, it might even be possible to assert that a given culture attributed abhorrence to homosexuality as a purposeful response to societies that did not do so.<sup>89</sup>

We are all aware, at least intuitively, that terms like “natural” and “unnatural” are, on one level, sociological and cultural terms, rather than biological or objective terms. We would call the consumption of human flesh unnatural, though that is merely our cultural bias. Westerners think that having one day off a week is natural, though that is only a cultural perception. We would probably consider binding the feet of infants unnatural, though there have been societies in which it was very natural.

For a religious tradition to call a type of behavior unnatural may well reflect its biases and values. But, then, is that not part of what religious traditions are supposed to do? To say that homosexuality is unnatural from a Jewish religious perspective is defensible even if all

<sup>86</sup> David Greenberg’s book, *The Construction of Homosexuality* (see above, n. 79), is a superb and thorough and cross-cultural transhistorical study of homosexuality. At this point in time it is probably the best available resource on the subject. A very readable, and more concise summary of findings can be found in Arno Karlen’s chapter, “Homosexuality in History,” and J.M. Carrier’s chapter, “Homosexual Behavior in Cross-cultural Perspective,” in Marmor, op. cit., pp. 75-122.

<sup>87</sup> In Marmor, op. cit., p.118.

<sup>88</sup> See above, pp. 615-616.

<sup>89</sup> That, precisely, is a significant part of the claim of Dennis Prager in the Special Edition of *Ultimate Issues* which he devoted to the issue of homosexuality.

it means is that Jewish religious values and biases favor heterosexuality as the sole legitimate avenues for sexual expression.

Nobody summarizes what we have been claiming about either the argument from numbers or from cross-cultural studies more aptly than David Zvi Hoffman. In his commentary to Lev. 20:13 Hoffman writes:<sup>90</sup> “תועבה” מציין מעשה שה' מגנה אותו אף אם היה – “[The term תועבה] denotes an act which God denounces, even if it was widespread among enlightened peoples.”

A summary of the road we have been treading since our last summary<sup>91</sup> is now in order. We have been analyzing the second explanation of the classical commentators of the words of Bar Kappara, namely, that homosexuality is called תועבה because it is non-procreative and unnatural. After noting the commentators who make this claim, we analyzed counter-claims to the argument of unnaturalness. We asserted that the argument from the evidence of homosexual behavior in lower animals is unconvincing because it is doubtful that animal behavior should be considered the sole criterion for what is natural in humans. We claimed, further, that the argument from physiological fit is defensible or better because the argument is really from design, not physiological impossibility of exclusiveness. Our discussion of non-procreativity as the basis of the claim of unnaturalness led us to the conclusion that only the mitzvah of עונה legitimates non-procreative intercourse. Intercourse which is neither potentially procreative nor עונה can be called unnatural. We found, in fact, that there were early links between “unnatural” and “non-procreative,” dating even from Plato, and later from Kant. Then, we rejected the argument from numbers because “natural” is used to mean “normal,” and “normal-abnormal” is not primarily a function of numbers, except perhaps at the extremes. And, finally, we rejected the evidence from cross-cultural and trans-historical studies because the term “natural” is, in some measure, a sociological term, not a scientific or objective one.

In sum, then, we have seen that both explanations of the classical commentators are surely defensible and, in significant parts, much stronger than merely defensible. The arguments against them have points of validity, but they are far from convincing enough to seek to overturn precedent because of them. Even if they were so strong as to force us to reject them, or to reject Bar Kappara's explanation itself, we would have succeeded only in proving that earlier explanations of why homosexuality might be תועבה are insufficient. Even the rejection of Bar Kappara would not lead to the conclusion that the *Torah* is incorrect or insensible in calling homosexuality תועבה.

### Part III

#### Section A

The author of this responsum does not merely concede or acknowledge that knowledge unavailable to earlier ages has potential halakhic relevance today, he affirms it enthusiastically.<sup>92</sup> That being the case, the previous two sections of this paper are insufficient. We must proceed with some analysis of modern theories of homosexuality, and determine whether these theories should have actual halakhic significance.

<sup>90</sup> דוד צבי הופמן, ספר ויקרא (ירושלים: מוסד הרב קוק, תשי"ג), כרך ב' עמ. נד.

<sup>91</sup> Above, p. 627.

<sup>92</sup> See, in particular, chs. 9-11 of my book, *The Halakhic Process* (New York: The Jewish Theological Seminary, 1986).

In order to do so usefully, the broad outlines of the theories will be summarized. The summaries will not be in great depth, nor will they be in very technical language. Michael Ruse, in his book *Homosexuality: A Philosophical Inquiry*, has done this superbly, and much of the summary material is culled from the relevant chapters of his book<sup>93</sup> and will not be extensively footnoted in this responsum.

The first theory is the psychological, primarily psychoanalytic, theory first proposed by Freud in *Three Essays on the Theory of Sexuality* (1905). For Freud, every human being is bisexual, and at various stages of our development we go through phases that are appropriate to different sexes. Indeed, even in adulthood we have bisexual elements. Also, as is well known, Freud posited the idea of the libido. That is so well known that it is unnecessary to say more about it.

The first stage that an infant males goes through is called the oral stage. During this stage, the infant is totally dependent on his mother. The child's libidinal energies, are therefore, directed entirely toward his mother (i.e. heterosexual). At about a year and a half, the libidinal energies become directed toward the child's own body as he discovers his ability to produce feces. This is the onset of the anal stage, during which the homosexual nature predominates because his libidinal energies are directed toward himself and his body.

When the child reaches the age of three or four, his attention moves from his anus to his genitals. This is the beginning of the phallic stage. In addition to becoming aware of his own penis, the boy also becomes aware that girls do not have a penis. His sexual energy is turned back in this stage to the most significant female in his life, his mother, and his heterosexual side again predominates. It is during this stage that the child begins to work out the Oedipus complex.

The child enters the period of latency next, as other (non-sexual) elements of his growth continue to take place. The latency period continues until puberty, when the final stage of his psychosexual development takes place. During this stage, the child realizes that his love for his mother is not acceptable, since fulfilling it through consummation would violate a universal taboo against incest. His "successful" resolution of the Oedipus complex results when he transfers his heterosexual attraction from his mother to other females.

The process described above is the conventional (i.e. average, i.e. normal) path leading to heterosexual maturity. For Freud, there are two kinds of abnormalities: neuroses and perversions. A neurosis results from overly great repression of some stage of one's normal growth. Thus, for example, if a child is overly repressed during the anal stage by rigorous toilet training that represses the normal libidinal energies which are concentrated on the feces during this stage, the child must find alternative methods of releasing those libidinal energies. He may do so by developing other avenues of control – keeping things in – as a displacement for the normal libidinal energies which he is not being allowed to express. This example might result in the anal retentive personality. In sum, then, a neurosis is the result of overly great repression of libidinal energies.

Perversions, on the other hand, are not the result of repression, but a lack of proper control. Remember that part of normal growth involves learning to control urges, and that control, when appropriate, leads to the next stage of development, until maturity is reached. Perversion, therefore, is an instance of arrested development. Homosexuals' development is arrested at some point, and they cannot develop to the point that their libidinal energies are directed toward females. For Freud, then, homosexuality is a perversion, not a neurosis.

<sup>93</sup> Mainly chs. 2, 3, 5 and 6. See above, n. 55, for publication information.



What might trigger such arrested development? It could happen during the anal stage, which is a homosexual stage for Freud. At a crucial juncture, the development arrests at the perception of male genitals being the norm, and they remain the norm for the rest of the child's life.

A second possibility would be for the arrested development to take place sometime during the phallic stage. The following possible scenario will sound familiar to most moderns. The young boy discovers that females do not have penises, and is frightened by that discovery. He thinks of women as castrated men, and he fears being castrated. If the boy cannot resolve this castration complex successfully enough to allow him to proceed to the next stage of normal heterosexual development, he remains homosexual — i.e., with his development arrested at this point. Female genitals trigger such fear and anxiety in him because of the castration they embody that he cannot develop to the next stage of releasing his sexual energies heterosexually.

A final possibility will also sound very familiar. Indeed, it will sound the most familiar of all. During his teens, the boy is supposed to resolve the Oedipus complex successfully. He must develop from his heterosexual attraction to his own mother to heterosexual attractions to other females (with whom he could consummate his energies). But if he is just too close to his mother because she constantly smothers him with attention, and even more, if at the same time his father is often absent or hostile, the boy's development may be arrested. He cannot transfer his desires from his mother to other women, so he must turn for release of his sexual energies to objects that do not place him in rivalry with his father, and which can be consummated — namely, other men. This scenario reflects homosexuality as a result of the unsuccessful resolution of the Oedipus complex.

The essence of Freudian therapeutic technique is probing into the subconscious. The probing takes place in a host of ways, but emphasis on things like verbal slips and dreams play a central role. The purpose of the therapy is to bring to consciousness repressions of which we were unaware on a conscious level. The very act of bringing them to consciousness helps the patient see that they are there, and allows the patient to rectify the repressions by allowing the libidinal energy now to be released in normal manners, rather than in the abnormal manners that were imposed because of repressions.

Freudian therapy, therefore, is directed toward the successful resolution of neuroses. It does not, however work very much on perversions, since they are not caused by repressions, but by an absence of control. The oft-quoted letter of Freud to an American mother<sup>94</sup> will now make sense:

By asking me if I can help, you mean, I suppose, if I can abolish homosexuality and make normal heterosexuality take its place. The answer is, in a general way, we cannot promise to achieve it. In a certain number of cases we succeed in developing the blighted germs of heterosexual tendencies which are present in every homosexual, in the majority of cases it is no more possible.

Since homosexuality is not a neurosis, but a perversion, the essence of Freudian therapy is not particularly effective. The most that can be hoped for is the reawakening of the heterosexual tendencies that are part of every person's makeup (since every person is bisexual), but that is not too likely in most cases. What the therapist *can* proba-

<sup>94</sup> Ernest Jones, *The Life and Work of Sigmund Freud* (New York: Basic Books, 1955), pp. 208-09. The letter is dated 9 Apr. 1935, and is quoted by Ruse, p. 27.

bly accomplish is helping the homosexual live with and accept his homosexuality.<sup>95</sup>

There are many psychoanalysts, heavily indebted to Freud who have nonetheless broken with him on several issues which have direct bearing on our subject. These people are called “adapationalists,” for reasons that will soon become clear. Without going into great detail, let us refer to the two major differences between the adapationalists and Freud.

The adapationalists deny that all human beings are bisexual, in the sense that Freud meant that term. That is, they deny that adult humans have components within them of the male and the female. Just because humans may go through physical stages in their very early development that might lead them to develop either way, that does not prove either that such bisexuality is present in the adult, nor that the physiological reality has a psychological counterpart.<sup>96</sup> In order to call a person bisexual, we must be able to say about the person that he can reproduce both as a male and as a female. Bisexuality must be judged by the character of the person as a whole.

They also criticize Freud’s theory of the libido, claiming it to be tautological, perhaps meaningless, and surely not supported by neural activity. We quote from A. Kardiner:<sup>97</sup>

For example, suppose we observe an infant’s relation to its mother. We can say from this clinical observation: The infant is intensely interested in the mother, who is the source of all his gratifications. This is an inference based on observation with which we can all agree, and it tells us something about the mother-child relationship. Suppose now we make use of the energetic hypothesis and say: The infant intensely cathects the mother with libidinal energy. This statement does not add anything to our knowledge about the relationship between the mother and the child. We have merely restated the original observation in hypothetical energetic terms. Hence, the tautology.

Using the libidinal hypothesis leads one to believe that the various evolutionary stages of development reflect fixed patterns that are not all dependent upon environment or education. What is needed more is a theory which focuses not on hypothetical concepts, but on how children respond to the external environment.

Normally, a child will develop into a heterosexual adult. However, if something happens in the course of his maturation, he must respond – adapt – in order to survive. What might happen to trigger homosexuality as an adaptation? Something in the child’s environment might lead to a fear of women, or of their genitals. As a response and adaptation to this fear, the child might switch from the normal path of development to homosexuality. And what might lead to such a fear on the part of the child? The child’s failure to successfully resolve the Oedipus complex could be the most common cause.

Now of course, we are once again on familiar ground, and see the influence of Freud on the adapationalists, even though they deny two of his major premises: human bisexu-

<sup>95</sup> Richard Isay, author of *Being Homosexual: Gay Men and Their Development* (New York: Farrar, Straus and Giroux 1989), argues this position very forcefully, though not necessarily from a Freudian perspective. See also S. Fisher and R. Greenberg, *The Scientific Credibility of Freud’s Theories and Therapy* (New York: Basic Books, 1977).

<sup>96</sup> See Sandor Rado, “A Critical Examination of the Concept of Bisexuality,” *Psychosomatic Medicine* 2 (1940): 459-467; and Lionel Ovesey, “The Homosexual Conflict: An Adapational Analysis,” *Psychiatry* 17 (1954): 243-50, for example.

<sup>97</sup> “A Methodological Study of Freudian Theory: II, The Libido Theory,” *Journal of Nervous and Mental Disease* 129 (1959): 137, quoted by Ruse, p. 47.

ality and the libidinal theory. For them, however, human beings never go through a natural homosexual phase. If a human becomes homosexual it must be because something deflects him from the natural development into heterosexual maturity. Something must force the child to repress his natural evolution into heterosexual maturity.

This, then, leads us to the primary reason for our summary of the view of the adaptationists. For Freud, homosexuality is a case of arrested development, a perversion as opposed to a neurosis, and not subject to effective treatment by analysis which seeks to alleviate the results of repressions. For the adaptationists, on the other hand, homosexuality is precisely a neurosis, caused by a repression along the normal path of heterosexual development. As a result, the adaptationists affirm that homosexuals can be brought over to heterosexuality through analysis, by bringing to consciousness the fears and anxieties that brought about the neurosis.

This ought not be oversimplified to imply that adaptationists believe that every homosexual can be transformed into a heterosexual. There are factors that make success more likely and the absence of which make failure more likely. For example: being fairly young, having some heterosexual urges, having strong desire to become heterosexual.<sup>98</sup>

Freud is not nearly as clear about female homosexuality as he is about male homosexuality. In brief, though, the following would summarize his views on lesbianism. Through the oral and the anal stage, the development of a girl is the same as the development of a boy, with the primary erotic figure in their lives being their mothers. When the girl reaches her period which is parallel to the phallic stage, she, too, discovers her clitoris, as a boy discovers his penis. Later during this period, the girl discovers that she is castrated, because she has no penis. Her mother, too, she discovers, is similarly castrated.

The discovery that she lacks a penis begins to evoke in the girl a desire for one, and she envies anyone who does have one, and denigrates those who do not. The girl begins to turn against her mother – for it is she, after all, who has brought her into this world so woefully inadequately equipped – and turns toward her father as the other side of the female Oedipus complex. There follows the girl's latent period until puberty. At that point, the normal girl will transfer her sexual feelings for her father to other men, and the focus of her sexual pleasure will move from the clitoris to the vagina.

Freud is not very clear or explicit about the causes of lesbianism, but seems to hold that just as parents playing "abnormal" roles might cause homosexuality in men, so might it cause lesbianism in women. It might also be caused by female fear of male genitals.<sup>99</sup>

Our summary of the psychoanalytic theory of the etiology of homosexuality is at an end. Now we must remind ourselves why we are dealing with the subject in the first place. Our interest is as halakhists, not as psychoanalysts. That is, it is not our obligation to determine whether Freud is right or wrong, but to analyze whether conclusive evidence in either direction would constitute sufficient grounds for us *as halakhists* to seek to overturn the halakhic precedent against homosexuality. Only if we discover that such evidence would impel us to seek to overturn the precedent would it become necessary for us to make some judgment about whether the evidence is valid or invalid. And if we are forced to make such a judgment, we must remember that our conclusion might well be that a definitive judgment is impossible. Then, of course, we would have to determine the effect of a תיקון on

<sup>98</sup> See, especially, the work of Irving Bieber et al., *Homosexuality* (New York: Basic Books, 1962).

<sup>99</sup> This parallels the adaptationist view of one of the causes of homosexuality in males, i.e., male fear of female genitals. This reason of Freud's for the cause of female homosexuality is generally adopted by adaptationists. See Lionel Ovesey, "Masculine Aspirations in Women: An Adaptational Analysis," *Psychiatry* 10 (1956): 341-351.

the precedent. Bearing these facts in mind will help to clarify why we will discuss some matters at length, and virtually ignore others (even though discussion of them might be both fascinating and interesting, and even though many [whose purpose is not the same as ours] might well discuss them at great length).

For the purpose of our analysis we shall consider the Freudian position and the adaptationist position together, except when the differences between them become relevant to the analysis. When that happens, the distinction will clearly be made.

Let us suppose, first, that the psychoanalytic position were conclusively demonstrable as false. That is, suppose we had incontrovertible evidence that no homosexuals came from family constellations (except insofar as such a constellation might be attributable to pure chance) that psychoanalytic theory would lead us to believe should be frequent. What would the halakhic consequence be of such a finding? The finding would have no halakhic significance whatsoever. Since, at most, the halakhic sources may indicate reasons why homosexuality is to be considered *תועבה*, and those reasons are not linked in any way to the etiology of homosexuality, proving that the psychoanalytic theory is absolutely incorrect would leave us exactly where we began. Homosexuality would still be considered *תועבה*, and the tradition would still offer defensible (or stronger) reasons to explain why it should be considered so. And finally, those reasons would be independent of the etiology of homosexuality.

Now let us suppose the opposite. That is, let us suppose that the psychoanalytic theory could be conclusively demonstrated to be correct. For the sake of simplicity, let us even assume that the evidence proved that there was only one etiology of homosexuality, namely, an overprotective mother and a hostile or absent father. And, let us assume even further that the evidence proved that that constellation was not only sufficient, but necessary. Anyone with an overprotective mother and a hostile or absent father became homosexual, and no heterosexual had an overprotective mother and a hostile or absent father.

Would these facts, unknown to the Torah or the Sages, impel us to seek a change in the precedent? I think not, but let us proceed a step at a time. If the facts as laid out in the preceding paragraph were true, and we accepted any or all of the traditional explanations of why the characteristic of *תועבה* is attributed to homosexuality by the Torah, those explanations would not cease to be acceptable because we can now understand the etiology of homosexuality.

And if the facts were true, and we rejected even all of the traditional explanations of why homosexuality is called *תועבה*, where would that leave us? It would leave us with the given that the Torah attributes the characteristic of *תועבה* to homosexuality, with no adequate explanation of the reason for its doing so, and a set of facts that is irrelevant to either concern. It is the last clause of the sentence that needs clarification. It seems unlikely that we would succeed in claiming that homosexuality is called *תועבה* *because* it is caused by overprotective mothers and hostile fathers. That is, there does not seem to be a defensible argument to lead one to that conclusion. Yet, it seems equally implausible to argue that our knowledge of the etiology of homosexuality proves that there is *no* reason for attributing to it the quality of *תועבה*.<sup>100</sup>

<sup>100</sup> An analogy might help. Assume that the Torah calls stealing *תועבה*, and that one traditional explanation of why it is so called is that stealing is an antisocial behavior. Assume furthermore that some theory now proves conclusively that the etiology of stealing is always a lack of parental attention. Surely we would not claim that stealing is *תועבה* because it is caused by inattentive parents. Nor, however, would we claim that knowledge of its etiology removes it from the category of antisocial behavior. It remains *תועבה* – in this instance, an antisocial behavior – even though we now know its etiology.

Thus, if we knew that the psychoanalytic theory was absolutely correct, there would still be no reason to seek overturning the precedent, whether or not we accept the classical explanations of why the Torah calls homosexuality תועבה. How much more is this the case when we consider the reality that the psychoanalytic theory is not proved conclusively either right or wrong, and when we consider the reality that the theory itself allows for more than one etiology of homosexuality. If we would not find reason to overturn precedent if the theory were a ודאי (either positive or negative), how much more so if it is a ספק!

There is, however, one argument that might be made to impel us to seek to overturn the precedent. One might argue that the Torah not only did not know the etiology of homosexuality when it declared it to be תועבה, the Torah assumed its etiology to be something entirely other than what our new knowledge now recognizes it to be. The Torah assumed homosexuality to be a free choice on the part of the individual, a choice totally under the individual's control and one which the individual makes without any other factors predisposing him (or literally causing him) to make that choice. Given our new knowledge, the argument would go, we must seek to overturn the precedent because the moral God would not demand the avoidance of a behavior of one whose attraction to that behavior was not a matter of pure volition. This argument, notice, does not deny that the traditional explanations for why the Torah called homosexuality תועבה might, in fact, be defensible or stronger. It argues that even if they are, there are other grounds to supersede the precedent.

The argument is a complex one, and it must either be answered or accepted. It cannot be ignored. He who raises such an argument must be reminded that it is based on premises and assertions that are presumed to be true, though not proved to be true. Therefore, the rabbinic principle of המוציא מחבירו עליו הראיה must be applied. The Torah makes a blanket statement of prohibition, as we have demonstrated in Part I of this paper. One who wishes to argue that such a blanket statement is predicated on a certain assumption must prove himself correct. Mere assertion is not legally sufficient. In the absence of compelling evidence to the contrary, one ought to assume that a blanket prohibition is just that, and independent of etiology.

But even if one were to concede for the sake of argument that the Torah assumed homosexuality to be entirely voluntary, overturning the precedent would be considered only if there were no way to retain the precedent (particularly because the reasons for it are not denied by the argument), even in the face of the new knowledge. Put differently, if knowledge of the etiology holds out the possibility that one who is homosexual can be changed from homosexuality to heterosexuality, the precedent can and ought to be retained, and therapy urged.

Many who are demanding recognition of homosexuality as a co-equal lifestyle tacitly recognize this, because the success rate of therapy for homosexuality is often raised by them. The claim is that since homosexuality cannot be reversed, and is not chosen freely by those who are homosexual, therapy is not the answer to the rectification of the perceived immoral demand made upon them.

As poskim, we must realize that the claim is anything but objective. The adaptionists, even if not the classical Freudians, assert that change from homosexuality to heterosexuality is possible. Some, such as Irving Bieber,<sup>101</sup> claim reasonable rates of success in therapy. Even such a liberal on homosexual issues as Judd Marmor wrote:<sup>102</sup>

<sup>101</sup> See above, n. 98.

<sup>102</sup> Op. cit. (above, n. 55), pp. 276-77.

Some homosexuals, however, are unhappy with their sexual orientation. . . . [I]f their motivation to change is sincere and strong, I believe they deserve an opportunity to try to accomplish their goal. . . . Not that this is always possible. Even the most optimistic psychotherapists rarely report more than a 50 percent success in changing a homosexual orientation to a heterosexual one. On the other hand, the general view in the gay community that treatment is *never* successful is without foundation. The fact that most homosexual preferences are probably learned and not inborn means that, in the presence of strong motivation to change, they are open to modification, and clinical experience confirms this. The kernel of truth in the gay point of view, however, is that once a major pathway to sexual gratification has been established and reinforced by repeated experiences, the tracks of that pathway can never be totally obliterated. Thus although it is possible for successfully treated homosexuals to change their overt behavior from homosexual to heterosexual, the tendency toward erotic arousal by the same sex is probably never totally lost.

For a Jew concerned with obedience to the will of God as expressed in halakhah, that very concern constitutes a strong and sincere motivation to change. When that motivation is coupled with the knowledge that halakhah forbids only overt behavior, as we have demonstrated above,<sup>103</sup> not erotic arousal by the same sex or even homosexual fantasies, the chances for halakhically acceptable change seem to be enhanced.

Change from homosexuality to heterosexuality, *measured by the only criterion the halakhah forbids, namely, overt behavior*, can take place in some relatively significant percentage according to many therapists.<sup>104</sup> If so, as poskim we must favor the precedent over the desire to overturn it. The counterclaim that all therapy is ineffective has hardly been proved sufficiently to warrant using it as grounds for arguing in favor of the overturning of established precedent.<sup>105</sup>

Rabbis would be well advised to remember how hard change for homosexuals is to accomplish. But this knowledge should move them to greater awareness of what has a chance of increasing the effectiveness of therapy,<sup>106</sup> and not move them to assert that the difficulty of therapy constitutes grounds for overturning the precedent.

But what, the question at the next stage of our investigation will be asked, about the homosexual who has tried therapy without success, or who is in one of the categories (such as obligatory homosexuals who trace their homosexual feelings and arousals to very early ages) that are poor therapeutic prospects? Would not our new knowledge of the etiology of homosexuality, as against the Torah's assumption that homosexuality is an act of pure and simple volition, lead us to advocate overturning the prohibition at least for them?

<sup>103</sup> Pp. 619-621.

<sup>104</sup> We have restricted our analysis to the psychoanalytic approach. As poskim we ought not ignore as a datum of our decision-making the views of other approaches. See ch. 21 of Marmor's book by Lee Birk. Birk is a behaviorist, and he reports remarkable rates of success in therapy.

<sup>105</sup> This is especially true when the legal prohibition is דאורייתא as in the case of homosexuality. To the extent that דאורייתא norms can be overturned at all – see ch. 7 of my book – doing so on the basis of such inconclusive evidence is surely not defensible.

<sup>106</sup> Marmor, *ibid.*, p. 277 lists several factors: (1) Youth. Therapy is more effective when initiated before the age of thirty-five. (2) Previous heterosexual experience. (3) Recency of onset of homosexual activity. And, (4) “masculine” looking and acting men tend to succeed in therapy more than “effeminate” ones. Cf. above, p. 639.

At this point, our answer begins to be expressed with great anguish, but must be given nonetheless. Firstly, there is the matter of the principle of *לא פלוג*. Even if we were to come to the conclusion that the precedent should be overturned for such people, making legal distinctions between homosexuals of category A and homosexuals of category B is legally very difficult, probably impossible. The very positing of the distinction as having legal consequences would push many homosexuals to define themselves as members of the second category. The very impetus for the strong motivation to change would be removed even for those for whom it would be an effective start to change. We quote again the words of Marmor:<sup>107</sup> “The fact that most homosexual preferences are probably learned and not inborn meant that, in the presence of strong motivation to change, they are open to modification.” When we posit a class of homosexuals to whom the prohibition no longer applies because therapy does not work for them, we remove the strong motivation for therapy to work from many for whom it probably could work. Therapy is difficult even for those for whom it can work. When we permit the claim that therapy does not work to exempt one from the prohibition, most will take the path of least resistance. The very motivation to succeed in therapy will be undercut by the knowledge that dispensation will be granted if therapy fails. Of course, therefore, therapy – hard, long and expensive – will fail. That which we might posit as a possible last resort will become, in fact, a quick and first resort.

But there is even more to say, and it, too, is said with heavy heart for those who must bear the burden of its message. We have asserted above<sup>108</sup> that even if the Torah misperceived the etiology of homosexuality, that “argument does not deny that the traditional explanations for why the Torah called homosexuality *תואבה* might, in fact, be defensible or stronger. It argues that even if they are, there are other grounds to supersede the precedent.” Now we must deal with the implied question: Are the “other grounds” sufficient to supersede the precedent when the traditional explanations are at least defensible, and perhaps stronger?

Put forthrightly, the question can be restated thus: Would a moral God ever demand that people who are as they are through no choice of their own nonetheless behave in a way that suppresses an essential element of what they are in order to reflect and embody values and principles that for most others do not entail suppression of essential elements of what they are? Refraining from homosexual behavior embodies values and principles which we have enunciated in both classical and modern terms in Part II of this paper. For the heterosexual population, compliance with the prohibition does not entail suppressing their essential sexuality. For the homosexual population that might be successfully changed from homosexuality to heterosexuality, the moral God might well demand that they comply with the prohibition – even if they choose not to try to change. Since change might be possible, one cannot say that homosexuality constitutes an essential part of what they are. Therefore, suppression of homosexual behavior does not constitute a suppression of an essential element of what they are. But for obligatory homosexuals and for those for whom therapy has truly failed, homosexuality can probably be called an essential part of what they are. For such as these, then, demanding compliance with the prohibition against homosexual relations entails suppressing an essential element of what they are. Would God demand such a thing? That is the question.

One must admit from the outset that few things compare with sexuality, and that perfect analogies are hard find. I do, however, think we can offer one close analogy, at least for the open-minded. I would imagine that for a kohen, particularly in days when the priestly establishment functioned more or less as ordained by Jewish law, being a priest

<sup>107</sup> *Ibid.*, p. 276.

<sup>108</sup> P. 641f.

was part of the essential psychological make-up of kohanim. The priesthood was an essential part of what they were. It was an essential part of how they saw themselves and how others saw them.

Jewish law mandated certain behaviors for priests, and given their psychological make-ups, it does not seem at all unreasonable that these behaviors were an essential part of who and what they were. Let us posit serving at the altar and blessing the people as two examples.

Jewish law also mandated both that certain genealogical imperfections and certain physical imperfections disqualified the kohanim so affected from serving in these functions. Surely, too, the imperfections were not their own choice, and they could not be changed. If we assume, as we both must and will for the purposes of this analysis, that there are defensible reasons for the laws which forbid imperfect priests from engaging in these behaviors, the analogy is complete.

The position of the law must be understood as follows: The desirable values and principles embodied in the mandate which prohibits imperfect kohanim from serving at the altar and from blessing the people are so important to God that He asks His devoted kohanim to suppress that essential element of what they are for the greater good of embodying the principles which the mandate reflects. He asks of them an act of great sacrifice as part of their service to Him. It is a hard act He demands of them, and its difficulty is made even greater by the fact that their need to suppress an element of their essential character arose through no act of will on their own part. But, in the final analysis, one would have to admit that Jewish law recognizes that an act of personal suppression of an element of one's character is not an inherently immoral demand. The fact that the demand is difficult and may even fill one with both anguish and anger does not make the demand immoral.

The idea that one might be called upon to suppress a behavior because the behavior violates a principle or a value which we mandate is not so unusual, in general. We expect people to suppress the behavior called stealing, even if they are poverty stricken and are stealing food to satisfy their hunger, because we feel that the value embodied by the prohibition against stealing is not superseded even by the hunger which results from poverty. It is true that we try to provide an alternative to allow the hunger to be alleviated, like soup kitchens, charity, welfare, etc., but the principle is still the same.

We may be able to understand when one cannot fulfill the mandate that the law imposes, but that does not lead us to the conclusion that the mandate was itself immoral. So, too, we must conclude that it is not inherently immoral to esteem the values and principles embodied in the prohibition against homosexuality so greatly that we recognize the morality of the mandate even in the hardest of cases – the obligatory homosexual or the homosexual for whom therapy has failed. We may understand when one cannot fulfill the mandate that the law imposes, but that does not lead us to the conclusion that the mandate was itself immoral.

We asked whether a moral God could prohibit homosexual behavior even in the hardest of cases. We have answered that He could, and did. As a result, we are led to the virtually inescapable conclusion that the knowledge gained from psychoanalytic theory does not provide compelling reason to advocate overturning the established precedent against homosexuality, even in the hardest cases, קל וחמר in the less hard cases.

One more issue is raised so often that I feel it necessary to add a postscript to this part of the paper, even though the answers to the issues have been implied already. Many point to the decision of the American Psychiatric Association (APA) removing homosexuality from its list of mental disorders. They see in that decision corroboration of their contention



that homosexuality should be recognized as a co-equal lifestyle with heterosexuality. If the mental health professionals recognize homosexuality as nonpathological, so should the rest of the community. And if it is nonpathological, there is no reason it should not be equally acceptable with heterosexuality.

First the facts, quoted from Marmor:<sup>109</sup>

Early in 1972 the members of the Massachusetts District Branch, a component society of the American Psychiatric Association, acting entirely on their own, passed a resolution expressing their conviction that homosexual behavior in and of itself was not a mental illness and requesting the APA to remove it from the DSM-II [second edition of the APA *Diagnostic and Statistical Manual for Mental Disorders* – J.R.]. This resolution was sent through normal channels to the Reference Committee. . . .The Reference Committee, following normal procedure, referred the resolution to the Council on Research and Development, which in turn sent the matter to one of its component committees, the Committee on Nomenclature. . . .recommended to the Council on Research and Development that it be removed from DSM-II. This decision was approved by the Reference Committee and brought to the Board of Trustees of the APA in December for a final decision. The Board ratified the recommendation. . . .Under normal circumstances a decision of the Board of Trustees does not have to be ratified by the membership. Opponents of the decision, however, quickly marshaled the necessary two hundred signatures to compel a referendum of the entire membership of the APA. . . .The decision of the Board of Trustees was upheld by a substantial majority, with 5,854 (fifty-eight percent) in favor and 3,810 (37.8 percent) opposed; 367 (3.6 percent) abstained.

One of the things that these final figures do not tell us is what the number of eligible voters was. Those who voted numbered slightly over 10,000, but the total number of eligible voters numbered 18,000.<sup>110</sup> Those who voted in favor equal only 32.5 percent of the total eligible. I do not know at all how those 8,000 who did not vote felt. On an issue which was probably a very “hot” one in the APA, it is unlikely that many failed to vote because they were uninterested in the issue and had no feelings on the subject. At a minimum, the statistics are sufficiently ambiguous that they do not warrant the conclusion drawn from them except on the most technical level.<sup>111</sup> There is certainly a different flavor to the claim that fifty-eight percent voted to remove homosexuality from the list of mental illness than there is to claim that thirty-three percent so voted.

Far more crucially, however, reference to the vote of the APA as part of halakhic discourse is erroneous on two counts. First, when the figures of the APA vote are used to justify a claim that homosexuality should be recognized as halakhically co-equal with heterosexuality, outside experts are being allowed to determine halakhah. Outside ex-

<sup>109</sup> *Ibid.*, pp. 392-93.

<sup>110</sup> See the letter from Dr. Mortimer Ostow in *Conservative Judaism* 40 (fall 1987): 105.

<sup>111</sup> I am reminded of the Seminary faculty’s vote on the ordination of women. Though I have forgotten (or suppressed) the exact figures, I recall enough to know that anyone who gauged the sentiment of the faculty as a whole solely on the basis of the percentages of the votes, and totally ignored the members of the faculty who simply did not vote as a protest, would have gotten a very skewed picture.

perts can provide data for the consideration of halakhists, but they cannot decide halakhah.<sup>112</sup> And most importantly, arguing on the basis of the decision of the APA works only if one believes that the Torah called homosexuality *תועבה* because it was pathological, or that *תועבה* means pathological. Then it might make sense to argue that since moderns no longer consider it pathological we should no longer consider it *תועבה*.<sup>113</sup> But, we have demonstrated right from the beginning of Part I that the term *תועבה* refers to an attributed characteristic, and bears no hint of meaning pathological. Homosexuality may or may not be pathological. I shall let mental health professionals argue about that. But that homosexuality is *תועבה* has nothing to do with whether or not it is pathological.

In the final analysis, recourse to the decision of the APA is misleading at best and, at worst, a vitiation of legitimate halakhic process.

## Section B

We turn our attention now to the second theory of the etiology of homosexuality, the biochemical, or hormonal theory.<sup>114</sup> As was the case in our discussion of the psychoanalytic theory, here, too, an introduction is required.

Any organ that separates certain elements from the blood and secretes those elements for the body to use (as, for example, adrenaline) or to discard (as for example, urine) is called a gland. There are two types of glands. One type has special passages called ducts, which carry the secreted element directly to the place where it is needed by the body. A good example of such a gland is the salivary gland, which has ducts which carry the saliva directly to the mouth. The second type of gland has no special ducts which carry the secreted element to the needed location. Instead, these ductless glands secrete their products directly into the blood stream, by which the products are carried throughout the whole body. Ductless glands are called endocrine glands, and their products are called hormones.<sup>115</sup> A partial list of the endocrine glands would include the pituitary, thyroid, adrenal, kidney, pancreas, and ovary (in females) and testes (in males).

Some endocrine glands work very directly. That is, where the concentration in the blood of the product of that gland is low, the gland works actively to separate and secrete more of the product. When the concentration is high, the gland is not as active. Other glands, however, do not work so directly. They produce a hormone which then acts on another gland, which is then stimulated into action or inaction. Hormones which act primarily on other glands are called tropic hormones.

Another example will clarify the interrelated functioning of the hormonal system. In a woman's cycle, the pituitary begins by producing a hormone called FSH (follicle stimulating hormone). The FSH is a tropic hormone, which acts on the ovary. There are two effects of the action of FSH on the ovary. First, a layer of cells (follicle cells) gathers around the immature ovum, and second, the ovary releases a female sex hormone (estrogen) into the blood stream. The released estrogen hormones cause the wall of the uterus to build up so that the uterus can hold the egg if it becomes fertilized.

<sup>112</sup> See pp. 231-33 of my book, *The Halakhic Process*.

<sup>113</sup> Note, of course, that such a claim would be immediately subject to the first objection, just raised.

<sup>114</sup> The author has even less expertise in this theory than he does in psychoanalytic theory. A reiteration of indebtedness to Ruse for a comprehensible explanation in lay terms is therefore greatly in order.

<sup>115</sup> Ruse suggests *Hormone: A Delicate Balance* (New York: Pegasus, 1972) by R. Le Baron as an excellent, non-technical presentation of the subject.

When the estrogen level reaches a certain point, it triggers in the pituitary a change from the production of FSH to the production of LH (lutening hormone). The LH releases the ovum from the follicle, and causes the release of another ovarian sex hormone, progesterone. The progesterone, in turn, causes a continued build up of the uterine wall, which collapses in a flush of blood if fertilization does not take place.

In males, the pituitary releases FSH which acts on the testes to cause the production of sperm, and LH acts on them to cause production of the male sex hormones, called androgens. The principle androgen is called testosterone.

Hormones are crucial in the development of human sexuality. In order to understand their importance we must back up for a moment. Of the twenty-three pairs of chromosomes, one pair is the sex chromosomes, crucial in determining whether the child is a boy or a girl. Each parent contributes one sex chromosome to the zygote. The mother always contributes an X chromosome, and the father may contribute either another X chromosome or a Y chromosome. Under normal circumstances, the XX combination result in a female child and the XY combination will result in a male child.

During the first trimester of pregnancy there is no sex differentiation in the fetus. That is, whatever the chromosome combination, all fetuses have rudimentary male organs – Wolffian ducts – and rudimentary female organs – Mullerian ducts. Sex differentiation takes place subsequently, and the key factor in the differentiation is the male sex hormone.

It is not the presence of the Y chromosome that *itself* produces a boy. Rather, the Y chromosome somehow triggers the production in the fetal testes of two hormones – androgen and Mullerian-inhibiting substance. This latter hormone acts on the Mullerian ducts, causing them to regress and shrink rather than develop into a uterus and Fallopian tubes. At the same time, the androgen acts on the Wolffian ducts causing them to develop into male internal organs and external genitalia.

While the fetal testes produce hormones, fetal ovaries do not. What is needed in order to get a male child is the hormones of the fetal testes that inhibit the development of the Mullerian ducts and enhance the development of the Wolffian ducts. If the androgen is not produced and secreted, or if the androgen cannot be effective for some reason, the fetus will not become a boy. Without androgen, the fetus will develop morphologically into a female.<sup>116</sup>

Sex hormones do not play much of a part in a child's life, either male or female, between birth and puberty. At about that time, however, the hypothalamus triggers the pituitary to produce the tropic hormones which then produce an effect on the sex glands. The estrogens in the female lead to the development of such characteristics as breasts and broad hips. The androgens in males lead to such development as the growth spurt, the growth of pubic hair, enlargement of the penis and deepening of the voice.

The effects of sex hormones is well known, and, in part, was well known before modern scientific understanding. Castration of males before puberty prevents the development of the characteristics of mature adult males because it prevents the production of androgens by the testes. Females whose gonads are either missing or non-functioning will not develop as sexually mature women because the ovaries do not produce estrogens. When either males or females with missing or non functioning sex hormones are treated

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<sup>116</sup>There are people who suffer from a disorder known as androgen-insensitivity syndrome. These people have the XY chromosome combination, but are morphologically female. When they reach puberty they develop as mature women. However, the effects of the Mullerian-inhibiting hormone secreted by the fetal testes early on in pregnancy have made the female organs ineffective. Therefore, these people – chromosomal males and morphological females – cannot bear children.

with the missing hormones, they mature in a normal way.<sup>117</sup>

Conversely, when mature adults are either missing the appropriate sex hormone or have the inappropriate sex hormone, in males<sup>118</sup>

The visible effects are enlargement of breasts: a tendency of feminine deposition of subcutaneous fat: reduced oiliness of the skin: reduced facial acne, if present: and an arrest of masculine balding, if it has begun. Beard and body hair do not disappear, but the hairs tend to be less wiry, and more slow growing.

In addition, the penis and testicles shrink somewhat, the male becomes unable to achieve and maintain an erection and the production of sperm and seminal fluid ceases. In females, doses of androgens produce more body hair and more oily skin, deepen the voice, suppress the menstruation and may enlarge the clitoris. There is no possibility, however, of hormones during adulthood undoing the effects of hormones in early life, making a man into a woman or vice versa.

Most will immediately recognize that there is a link between physiology and sexual attitudes and behavior. Hormones clearly play an important role in that linkage. The ancients knew this too, even if they did not have the scientific terminology. Eunuchs are boys castrated before puberty. Since the production of male sex hormones begins at that time, castration before puberty prevents the production of androgens. Eunuchs were purposely used to attend to the harem because the castration of the young boy also inhibited or eliminated entirely sexual desire. But it is also true that male castrates who are given long term treatment of androgen replacement therapy beginning at about the normal time of puberty mature physiologically in a normal fashion, and demonstrate sexual drives and desires.

If one begins with the assumption that homosexual inclinations are by definition inclinations appropriate to the opposite sex – homosexual males showing “female” inclinations and homosexual females showing “male” inclinations – certain conclusions seem to follow. Since we know that both sexes produce both androgens and estrogens, male homosexuals would probably be men with high levels of estrogens and female homosexuals would be women with high levels of androgens. We quote now directly from Ruse:<sup>119</sup>

I think it is true to say that all hormonal explanations of human homosexuality have some variant on this conclusion at their core – after all, it is difficult to see how they could avoid it. However, intensive studies on humans and animals have shown that whatever else may be the case, *the relationship between hormones and homosexuality is not a simple one of cause and effect*. It is just not true that in any straightforward crude sense male homosexuals have an excess of female hormones and lesbians have an excess of male hormones. If this were so, then correcting the imbalance ought to be a relatively simple matter and ought to be followed by clear-cut, not to say dramatic, results. In particular, dosing homosexuals with the appropriate hormones ought to pro-

<sup>117</sup> See J. Money and A. Ehrhardt, *Man and Woman, Boy and Girl: The Differentiation and Dimorphism of Gender Identity from Conception to Maturity* (Baltimore: Johns Hopkins University Press, 1972), p. 214.

<sup>118</sup> *Ibid.*, p. 208, quoted by Ruse, p. 95.

<sup>119</sup> P. 97. Emphasis added.

duce heterosexuals, and, (as a kind of control) dosing heterosexuals with appropriate hormones ought to produce homosexuals. But none of these results obtain. If male homosexuals are given androgens, their sexual drive if anything goes up; but it is just as fixedly or even more directly homosexual. Conversely, if heterosexuals are given oestrogens (as is sometimes done in the treatment of certain forms of cancer, particularly that of the prostate), they do not become homosexual. It is true that the drive and the ability of such heterosexuals is reduced, but this is a fact that they regret bitterly, for their heterosexual orientation is just as fixed as ever.

Still, it appears so eminently logical that there should be some relationship or linkage between sex hormones and sexuality, that research has proceeded along other lines of inquiry. The first line seeks to discover whether there are any differences between homosexuals and heterosexuals to be deduced from long term hormonal imbalance, as opposed to massive doses of hormones after sexual orientation has already been established. Again we quote from Ruse.<sup>120</sup>

Early attempts to find significant differences between the pertinent hormonal levels of adult heterosexuals and homosexuals met with little or no success. However, in recent years more sophisticated and accurate methods of hormone concentration measurement have been developed, and there have been renewed interests in comparing adult heterosexual and homosexuals hormonally. Unfortunately, the flood of studies has come up with entirely contradictory results. Some few studies have produced results suggesting that male homosexuals have depressed testosterone levels. Other studies found absolutely no significant differences between testosterone levels of homosexuals and heterosexual controls, nor did they find any connection between testosterone level and intensity of homosexual orientation (as measured by the Kinsey scale). And there are yet other studies suggesting that male homosexuals may have testosterone levels above those of heterosexuals! . . . The findings for women also fail to establish any direct connection between lesbianism and high adult androgen levels. . . . The conclusion to be drawn from all of this is surely not that there are absolutely no hormonal differences between homosexuals and heterosexuals. What is clear, however, is that today one would be naive, not to say presumptuous, to claim definitively that there are such differences.

The second line of inquiry focuses on people who have experienced hormonal deficiencies or excesses, primarily before birth, that is, fetal hormonal deficiencies or excesses. The primary researcher in this area is John Money of Johns Hopkins, and it is to his work that we now turn.

People who have no sex hormones at all during fetal development because they have non-functioning or missing gonads, are born looking female and are raised as girls. The evidence is that they identify unequivocally as females and have a strong desire to fulfill female roles – heterosexual romance, marriage, babies, etc.

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<sup>120</sup> P. 98f.

People with no functioning androgen (including people who produce androgen but are insensitive to it), but some estrogen, are born looking female even if they are genetically male (XY). They do not, however, have female internal organs.<sup>121</sup> Obviously they will be raised as females, and because they do produce some estrogen, they will mature as females. Such people tend to be heterosexual in their attractions, i.e., attracted to males.

The third category is genetic males who are partially insensitive to androgen.<sup>122</sup> Because there is some androgen sensitivity, there is usually some development of male external genitalia. At birth, the child will appear hermaphroditic and might be assigned designation either as a boy or a girl. Money studied a group of ten such people.<sup>123</sup> Of the ten, eight were raised as males and two as females.

Money found that the children raised as boys showed some marked differences from fully androgenized boys. Specifically, they tended to be less aggressive, less competitive in sports, less socially assertive. These are the types of behavior often referred to as “sissy boy syndrome.” All of the children<sup>124</sup> felt themselves to be unequivocally part of the sex to which they had been assigned, and all were heterosexually oriented in their attitudes (daydreams, etc.), and behavior.

The next category consists of girls who are over androgenized.<sup>125</sup> Money found these girls to be consistently more tomboyish than most girls, even when they had been raised unequivocally as females, had any physical problems surgically corrected and had treatment to suppress excess androgen.

Regarding adult sexual orientation, early reports favored the view that even if the tomboyism persisted into adulthood, androgenized women were as likely to turn out heterosexual as non-androgenized women were. More recent reports, however, are beginning to indicate that a greater percentage of such girls than would be the case randomly are either homosexual or bisexual.

Boys with greater amounts of prenatal androgen tend to become aggressive and competitive, but show no distinctive sexual orientation.<sup>126</sup> Boys who received larger than normal amounts of estrogen before birth were less athletic and less assertive, but there was no report on their sexual orientation.<sup>127</sup>

We quote again from Ruse:<sup>128</sup>

Summing up the results of his (and like) studies, Money therefore sees a picture where prenatal hormones can play an important role in future gender identity (including presumably sexual orientation), but where the environment in the form of the child's upbringing can play

<sup>121</sup>Their bodies have produced the Mullerian-inhibiting substance which acts on the Mullerian ducts to prevent formation of female internal organs.

<sup>122</sup>This is Reifenstein's Syndrome.

<sup>123</sup>J. Money and C. Ogunro, “Behavioral Sexology: Ten cases of genetic male intersexuality with impaired prenatal and pubertal androgenization,” *Archives of Sexual Behavior* (1974): 181-205.

<sup>124</sup>Except for one of the “girls” who was raised in an atmosphere of ambiguity about her sex.

<sup>125</sup>There are two usual causes. First, it may be a side effect of treatment of the mother to prevent miscarriage; second, it may be the result of AGS (androgenital syndrome), a genetic defect causing the production of too much androgen.

<sup>126</sup>A. Ehrhardt, “Prenatal androgenization and human psychosexual behavior,” in J. Money and H. Musaph, eds., *Handbook of Sexology* (New York: Elsevier, 1977), p. 251.

<sup>127</sup>*Ibid.*, p. 252.

<sup>128</sup>P. 102.

just as important a role – indeed, probably more important. . . . Adult sexual orientation can therefore be influenced by prenatal hormones, although there is certainly no absolute link of cause and effect.

In a sense, these words say it all. Nobody questions that hormones influence development in many ways. It is logical to assume that sex hormones influence sexual maturation and even sexual orientation. But there is not any evidence that allows a jump from high androgenization or low estrogenization to lesbianism or from low androgenization or high estrogenization to male homosexuality. It is not clear that such factors are even sufficient, let alone necessary conditions for homosexuality.

None of this is to deny why the hormonal theory has a great deal of appeal to many homosexuals and to the families of homosexuals. If homosexuality is directly attributable to hormonal imbalance, there can be no more valid a value judgement about homosexuality than there can be a value judgement about dwarfism or gigantism. When parents of homosexuals speak of the atypical behaviors of their children as youngsters, either sissy-boys or tomboys, they may be overexaggerating the relationship between those syndromes and hormonal imbalance. That is surely understandable because it alleviates guilt feelings on the part of the families. If it is possible to posit a cause and effect relationship between prenatal hormonal imbalance (over which the parents surely have no control) and subsequent atypical syndromes (which might be taken to prove that the prenatal imbalance must have been present), and between those syndromes and homosexuality, all feelings of guilt or inadequacy disappear. Neither the family nor the homosexual bears any responsibility for the homosexual's homosexuality. Environment becomes totally irrelevant. The homosexuality of the individual was hormonally predetermined.

Our description of the second common theory of the etiology of homosexuality is at an end. We must now turn our attention to the relevance of the hormonal theory halakhically, just as we did after our description of the psychoanalytic theory.

Let us suppose, first, that the hormonal theory is conclusively proved to be false.<sup>129</sup> That is, science is finally able to prove beyond question that the sex hormones effect sexual differentiation prenatally, and affect sexual maturation and sexual desire at puberty and thereafter, but have nothing to do with the object of one's sexual desires. To the extent that statistics seem to indicate a greater than random incidence of homosexuality in a certain group, the incidence is to be definitively accounted for by some other reason.<sup>130</sup> The halakhic consequence of such a finding would be identical to what we concluded above<sup>131</sup> regarding a similar hypothesis concerning the psychoanalytic theory. Namely, the conclusive disproof of the hormonal theory would have no halakhic significance whatsoever. Homosexuality would still be considered *תועבה*, the tradition would still offer defensible or stronger reasons why it is to be so considered, and those reasons would still be independent of the etiology of homosexuality.

<sup>129</sup> Remember, the hormonal theory is predicated on an assumption that male homosexuals are showing female emotions and female homosexuals are showing male emotions. That is a faith claim, not a scientific one.

<sup>130</sup> We reported above on boys who received more than normal doses of estrogen prenatally. The study (which did not say anything about the sexual orientation of the subjects) was based on the sons of severely diabetic mothers. (That, indeed, is why the children were exposed to the extra estrogen in the first place, because their mothers received hormone shots.) If there had been found a greater than random incidence of subsequent homosexuality among the boys, it could be attributable to the tendency of sick mothers to be overly protective of their children. I am, of course, not claiming this as fact. However, it is as reasonable an hypothesis to account for the increased incidence as the hormonal hypothesis.

<sup>131</sup> P. 640.

Now let us suppose the opposite, that the hormonal theory could be conclusively demonstrated to be correct. Let us even suppose that the theory could be made sufficiently precise to allow the attribution of actual straightforward cause and effect between some hormonal cause (or causes) X and homosexuality. We would ask again as we asked above: Would these facts, unknown to the Torah or the Sages, impel us to seek a change in the precedent?

If we still affirmed the defensibility and strength of the classical explanations of the reasons why homosexuality is called *תועבה* by the Torah, those reasons would continue to be acceptable even though we might now know the etiology of homosexuality. And, if we rejected the classical explanations for why the Torah calls homosexuality *תועבה*, we would still find ourselves in the position of affirming that homosexuality is *תועבה* because the Torah attributes that quality to it, and we would still not know why the Torah does so. But, whatever the reason for such attribution by the Torah, knowledge of the etiology of homosexuality would not render it false or unacceptable.

More importantly, if we could get to the point where hormonal theory is proved to be correct, the hope for hormonal therapy to bring about heterosexual development is enhanced. The possibility of prenatal testing at the appropriate time for the secretion of the appropriate hormones in the appropriate amounts is not out of the question. Though it may not yet be possible, some medical achievements of our age would have been considered impossible dreams even half a generation ago. If the reasons the halakhah forbids homosexuality continue to obtain, why would one seek to overturn the precedent when the discovery of the actual etiology holds out great hope for the eventual ability to control against it?

We have thus far presented the strongest case scenarios, by positing the hormonal theory as proven either conclusively incorrect or conclusively correct. If in either of these cases there does not seem to be grounds for overturning the established precedent, how much more is that the case when the evidence for the theory is itself so “iffy,” inconclusive and tentative.

As above<sup>132</sup> however, we must raise again the issue of whether or not we would seek to overturn precedent if it were clear to us that the Torah not only did not know the etiology of homosexuality, but assumed it to be something entirely different from what our current knowledge teaches us. Having raised the question again of whether a moral God could demand the avoidance of behavior of one whose attraction to that behavior is entirely non-volitional, we refer again to what we have already written in response to that question on pages 643-644. Here too, then, we conclude that the knowledge gained from biochemical theories does not provide compelling reason to advocate overturning the established precedent against homosexuality.

As there was a postscript to Section A of Part III, so too, there is one to Section B. It deals with the category of *אנס*.

Rabbi Hershel J. Matt was, to the best of my knowledge, the first one who seriously proposed using the category of *אנס* regarding homosexuals.<sup>133</sup> The essence of his claim is that moderns recognize homosexuality to be more than an overt act of choice. Rather, it is an entire orientation which the person did not choose in any conventional sense and which is not usually subject to change. For Matt, however, homosexuality does not become a co-equal lifestyle. Modern knowledge requires, for him, that we not be quick

<sup>132</sup> P. 641.

<sup>133</sup> Hershel J. Matt, “Sin, Crime, Sickness or Alternative Lifestyle?: A Jewish Approach to Homosexuality,” *Judaism* 27:1 (winter 1978): 13-24, esp. pp. 16-17.



to judge homosexuals, that we have deep compassion for their plight in our society, that we demonstrate those feelings of compassion and do all within our power to move our communities to greater understanding of homosexuals so that they will also demonstrate the compassion which the Torah mandates, and that we oppose legal penalties for homosexuality. Yet, “such a stance would maintain the traditional view of heterosexuality as the God-intended norm and yet would incorporate the contemporary recognition of homosexuality as, clinically speaking, a sexual deviance, malfunctioning, or abnormality – usually unavoidable and often irremediable.”<sup>134</sup> Thus, even this most liberal view falls far short of validating homosexuality as a co-equal lifestyle.<sup>135</sup>

Rabbi Norman Lamm had raised the subject earlier.<sup>136</sup> He rejected the possibility that **אנס** could be used halakhically as a grounds for permitting homosexuality. What he did claim, however, was that with restrictions and some reservations, the category can be used to define homosexuality as an illness rather than a crime. If it is an illness, the category of **אנס** which applies to constitutional homosexuals “lays upon us the obligation of pastoral compassion, psychological understanding and social sympathy. . . . [T]he objective crime remains a *ma’aseh averah*, whereas the person who transgresses is considered innocent on the grounds of *ones*. . . . Under no circumstances can Judaism suffer homosexuality to become respectable.”<sup>137</sup> Lamm uses the category of **אנס** only to exonerate from legal culpability, not to give any imprimatur of acceptability to homosexual behavior. Whether or not specific reference to the category of **אנס** is made, those who use the non-choice nature and the generally irremediable status of homosexuality as Jewish arguments for leniency are, in fact, arguing from the **אנס** category. Therefore, we must look at the category briefly.

We intend to offer specific halakhic recommendations about homosexuals in Part IV of this paper. Until that point it will suffice to affirm Lamm’s contention that the claim of **אנס** does not *permit* any behavior, it merely *exonerates* from legal liability. The operative phrase is **אנס רחמנה פטריה**<sup>138</sup> – “The Merciful exempts with regard to one who acts under duress (compulsion).” The critical word is **פטריה**, which almost always means **אסור** – “Exempt from liability, though the act remains forbidden.”

We have asserted above<sup>139</sup> that the Torah does not prohibit attractions or orientations. It prohibits only behaviors. The category of **אנס** does not ever apply to thoughts or fantasies

<sup>134</sup> *Ibid.*, p. 20.

<sup>135</sup> In the annotated bibliography in Christie Balka and Andy Rose, eds., *Twice Blessed: On Being Lesbian, Gay and Jewish* (Boston: Beacon Press, 1989), p. 296, Matt’s *Judaism* (1978) piece is described as follows: “For many years this essay was considered the authoritative liberal Jewish statement on homosexuality.” The annotators assert, furthermore, that “[h]e calls for a marriage ceremony or similar affirmation for gay and lesbian Jews.” That is hardly true. On p. 22 of his article, Rabbi Matt wrote, “Even if the flexibility and resourcefulness of the halakhah were renewed and increased. . . it is hardly conceivable that a homosexual departure from the Torah’s heterosexual norm would ever be accepted by halakhically faithful Jews or ever be recognized as *k’dat moshe v’yisrael*.” On pp. 22-24, Matt formulates a response to this which he puts into the mouths of homosexuals. The article ends with the end of their response. It does not contain Matt’s resolution. Perhaps the annotators are correct, but the article seems to me to end with a **תקו**. Even Rabbi Matt’s article, “Homosexual Rabbis?”, *Conservative Judaism* 39:3 (spring 1987): 29-33, does not validate homosexuality as a co-equal lifestyle.

<sup>136</sup> Norman Lamm, “Judaism and the Modern Attitude to Homosexuality,” in *Encyclopaedia Judaica Yearbook*, 1974 (Jerusalem: Keter Publishing House, 1974), pp. 194-205, reprinted in Menachem Marc Kellner, ed., *Contemporary Jewish Ethics* (New York: Sanhedrin Press, 1978), pp. 375-399.

<sup>137</sup> *Ibid.*, pp. 202-203; Kellner, pp. 394-395.

<sup>138</sup> Bava Kama 28b, Nedarim 27a, and Avodah Zarah 54a.

<sup>139</sup> Pp. 619-621. See, too, the succinct comment of Rabbi Walter Wurzbarger in *Judaism* 32:4 (fall 1983): 425.

or attractions as an exculpatory factor. There can be no exculpation for a matter for which there could never have been liability in the first place.

Furthermore, the category can apply in sexual matters only to the passive party, in a rape case, for example. In the first place, the source of the principle *אנס רחמנה פטריה* is the case of the *נערה המאורסה*, about whom the Torah says:<sup>140</sup> *ולנערה לא תעשה דבר*, and the *נערה* was the passive and forced party. And secondly, Rava claims (and his view is the normative halakhic position)<sup>141</sup> that *אין אנס לעריות לפי שאין קישוי אלא לרעת אלא בישן* – “The category of *אנס* is inapplicable to [the active parties in] forbidden sexual relationships because there are no unwilling erections except during sleep.”

Whether or not there can really be an involuntary erection other than during sleep is not particularly relevant. What Rava means is that one who is *unwilling* to engage in an act of intercourse can not be forced against his will to achieve an erection that would allow him to do so.

The issue is not whether one might or might not find oneself sexually aroused by someone without having chosen to be aroused by that person. The question is whether one can be forced against his will to engage in the act of intercourse with any person.<sup>142</sup> The arousal which is the result of sexual attraction does not compel anyone to engage in an act of intercourse against his will.

While it is not difficult to understand why one might wish to apply the category of *אנס* to homosexuals, particularly constitutional homosexuals, it is halakhically indefensible, as we have shown.

### Section c

The third (and newest) attempt to explain the etiology of homosexuality is the genetic, or sociobiological theory. This theory, too, requires an introduction.

Sociobiology is defined as “the systematic study of the biological basis of all social behavior.”<sup>143</sup> Sociobiological explanations of homosexuality will understand it as a social phenomenon – i.e., involving interaction between people – governed by the Darwinian evolutionary model which understands life as a process of natural selection (survival of the fittest). The essence of the natural selection process is response to struggles for existence and reproduction, which are necessary for survival.

Before we begin our presentation of the theory itself we owe it to ourselves to be conscious of several points. We humans pride ourselves on our having transcended nature in many ways. The development of human culture, with language, science, and religion often both seems to and does, in fact, elevate us above pure biological determinism. On the other hand, human culture is comparatively young from an evolutionary perspective. For the vast part of the history of life (not restricted to human life) on earth, evolution has been the primary factor. It is the epitome of human hubris to assume that we have so far transcended our own biology that evolution is now an irrelevant factor. The extent to which human social realities are themselves the result of the evolutionary process is a

<sup>140</sup> Deut. 22:26.

<sup>141</sup> Yevamot 53b, and see Maimonides, M.T. Issurei Bi-ah 1:9 and Sanhedrin 20:3.

<sup>142</sup> The exotic cases dealt with by the Rishonim, like the status of one who has already achieved erection for permissible intercourse and is then compelled to engage in intercourse with an *נערה*, are not relevant to this discussion.

<sup>143</sup> E.O. Wilson, *Sociobiology: The New Synthesis* (Cambridge, Mass.: Harvard University Press, 1975), p. 2, quoted by Ruse, p. 130.

matter of considerable debate, as one might imagine. For the purposes of our inquiry, however, we will not reject the possibility that even our human social behaviors are more controlled by evolution than we might like or be willing to admit.<sup>144</sup>

Also, we affirm that the discipline of sociobiology is justifiably concerned with the phenomenon of homosexuality. It is not correct to assert that psychoanalysis and endocrinology are within their disciplines to be concerned with homosexuality, but sociobiology is not. From the perspective of Darwinian evolutionary theory, human nature is directed towards reproduction. From that perspective, physical characteristics, mental properties and social activities are all directed toward that ultimate goal. Surely, therefore, it must be a legitimate concern of the sociobiologists to attempt to understand how and why a social phenomenon which is not geared to reproduction exists within their theoretical framework. And, so long as we are not prepared to reject evolution entirely, we must see whether any light that sociobiologists may shed on the subject impinges on our halakhic stance.

Acknowledging yet again my indebtedness to Michael Ruse for his clear and thorough presentation,<sup>145</sup> we begin the presentation of the three suggestions for the etiology of homosexuality proposed by sociobiologists.

The first theory is called the balanced superior heterozygote fitness theory. Genes, the unit through which heredity is passed on from generation to generation, are located on the chromosomes. Chromosomes come in pairs. Therefore, each gene has a mate on the complementary chromosome. When both alleles (gene forms) are identical, the lifeform of which they are a part is a homozygote with regard to the characteristic which those genes govern. If the alleles are not identical, the lifeform is a heterozygote.

If a certain homozygote (let us call it  $A_1 A_1$ ) is more beneficial to the survival and reproduction of an organism than homozygote  $A_2 A_2$  or than heterozygote  $A_1 A_2$ , then homozygote  $A_1 A_1$  will become the genetic norm (since it is the "fittest"), and  $A_2 A_2$  and  $A_1 A_2$  will disappear.

If, on the other hand, the "fittest" allele is  $A_1 A_2$ , neither of the homozygotes can disappear. Why? Since survival and reproduction are best with the heterozygote, and since there is no way for the organism to have such a combination without getting one of each type of gene from the parents, both homozygotes must continue to exist in some 'balanced' situation. Furthermore, the homozygotes must continue to exist even if they are totally unfit (i.e., entirely non-reproductive).<sup>146</sup>

The first sociobiological explanation of homosexuality would, therefore, be as follows: Homosexuality is the direct result of a homozygote  $H_1 H_1$ . The second homozygote,  $H_2 H_2$ , reproduces averagely. But the superior reproducer is the heterozygote  $H_1 H_2$ , because it has a natural immunity to some disease. In order for the heterozygote to exist,

<sup>144</sup>Ruse, on p. 132, points out that there may be biologically determined factors that underlie areas of human social behavior, even where there is wide variation in the behavior between one society and another. With all of the diversity in marriage norms, for example, polyandry is still exceptionally rare. Given the different biological natures of men and women, it is almost never in the reproductive interest of a society for husbands to share one wife since that would limit rather than expand reproduction. Therefore, a polyandrous adaptation would be counterproductive to the procreative push of evolution. Only in a group where men must band together tightly to eke out a subsistence living might polyandry be reproductively adaptational, since long-term survival depends on reducing reproduction.

<sup>145</sup>See ch. 6 of his book.

<sup>146</sup>From Ruse, p. 134: "The best attested case of this phenomenon in humans is that centering on sickle cell anemia. Possession of one sickling allele (heterozygously) gives a natural immunity to malaria, a highly adaptive feature in various parts of the world. Possession of two sickling alleles (homozygously) produces severe anemia and death in childhood. The disease persists, because the threat of malaria is so strong."

there must be in each generation some balanced number of existing homozygotes. Consequently, homosexuality must exist in every generation in order to guarantee the survival of the fittest allele group,  $H_1 H_2$ , which is the most adaptive.

The balanced superior heterozygote fitness theory is the most straightforward of the sociobiological theories we will discuss. Of course, the specific homosexual-orientation-producing homozygote allele has not been identified, nor has anybody yet defined what makes the heterozygote allele most adaptive. Furthermore, it has two greater weaknesses. First, there is evidence that male homosexuality runs in families,<sup>147</sup> and that would be very unlikely according to this theory. Second, if the mere procession of the homozygote allele results in homosexuality as a biological inevitability, there should be no sets of identical twins (whose genetic structure is absolutely identical of necessity) in which one is homosexual and the other is heterosexual. Regarding this fact Ruse writes:<sup>148</sup>

Although there are some reports that identical twins do tend to share orientation, and some of these reports are better than others (Heston and Shields), there are some very strong and very careful findings of identical twins, one of whom is heterosexual, and one of whom is homosexual (Rainer et al.; Green).

The claim of the balanced superior heterozygote fitness theory is so inconclusively proved at this point in time that a posek who relied upon it as the grounds for overturning an established precedent (one of which is דאוריינתא, at that) would be on extremely thin ice, at best. Even if it were conclusively proved to be correct, it would provide the posek with potentially significant extra-legal data. Even then, though, it would still be the posek who would have to decide whether it was actually significant halakhically. We will return to that consideration when we consider the sociobiological theories in general.

The second genetic or sociobiological theory is the kin selection theory. From the Darwinian perspective, what counts most biologically is reproducing one's own genes, i.e., making copies of one's own genes through reproduction. But, since what is critical is the copies of one's genes, it might not make any significant difference where the copy came from, so long as it is a good copy. Insofar as one's relatives produce relatively similar copies of one's own genes, one's reproductive drive can be biologically fulfilled through the reproduction of one's close relatives.

Usually, one would choose to reproduce oneself, since, after all, nobody else is as closely related to one as oneself. But there could be exceptions. Among the hymenoptera (wasps, bees and ants), kin selection has resulted in some females caring for their siblings rather than reproducing themselves, because that results in the production of more copies of their genes than if they reproduced themselves. The non-reproducing hymenoptera are sterile. The process of natural selection has brought this about. The non-reproducing females do not need to reproduce in order to fulfill the biological function of propagating, so the natural selection process has done away with that ability in them.

<sup>147</sup> See J.D. Rainer, "Genetics and Homosexuality," in A. Kaplan, ed., *Human Behaviour Genetics* (Springfield: Thomas, 1976), pp. 301-316; and R.C. Pillard and J.R. Weinrich, "Evidence of Familial Nature of Male Homosexuality," *Archives of General Psychiatry* 43 (1986): 808-812.

<sup>148</sup> P. 145. The studies listed in the parentheses refer to L.I. Heston and J. Shields, "Homosexuality in Twins: A Family Study and a Registry Study," *Archives of General Psychiatry* 13:2 (1968): 149-160; J.D. Rainer et al., "Homosexuality and Heterosexuality in Identical Twins," *Psychosomatic Medicine* 22 (1960): 251-258; and R. Green, *Sexual Identity Conflict in Children and Adults* (New York: Basic Books, 1974).

If one equates the lack of human reproduction with sterility, the analogy to homosexuality in humans becomes apparent. The process of kin selection results in some becoming homosexual because they fulfill the biological drive toward reproducing copies of one's genes through helping their relatives reproduce, usually by their ability to bring the benefits of society to their reproducing relatives. The natural selection process helps them along by giving them a sexual orientation that releases them from trying to have their own children, which, for them, would be maladaptive. It is homosexuality that is adaptive under these circumstances.

Why would one move in that direction rather than making copies of his or her genes him or herself? Either because the person would be an inefficient reproducer personally (i.e., a poor quality heterosexual), or because the person would be exceptionally good at helping relatives fulfill the biological drive – or both.<sup>149</sup>

We will describe the third genetic theory before we discuss the last two theories together. The third theory is the parental manipulation theory. At its core lies the realization that since the biological task of every individual is to reproduce his or her own genes, there is room for competition even within a family, with one member trying to force another to further his or her own biological mandate. Since parents tend to be stronger than their children, parental manipulation may be a factor from a sociobiological point of view.

How does the parental manipulation theory work to produce homosexuals? The parents who may already have passed on their genes to their own children are nonetheless driven to increase the number of genes even for succeeding generations. For the parents it does not matter whether the genes are reproduced by each child reproducing or by some children reproducing significantly more. If the parents see that they can enhance the total number of reproductions by suppressing the reproduction of one child so that that child becomes an enabler and helper to that child's siblings, the parents might do just that. From the parents' perspective, the biological drive to increase the number of gene copies as much as possible is best fulfilled by manipulating one child into a homosexual path.

There is much in common between the kin selection theory and the parental manipulation theory. In both we would be looking for some kind of evidence that the homosexual is aiding relatives in some way. But the major difference between them is that in the kin selection theory, the homosexual's orientation serves his or her own needs; and in the parental manipulation theory, the orientation of the homosexual serves the needs of others, primarily the parents of the homosexual.

There are difficulties with both the kin selection and the parental manipulation theories that we must point out explicitly. First of all, note that these last two theories are not genetic in the same way that the balanced superior heterozygote fitness theory is. According to the latter, there is a specific configuration of genes that results in homosexuality. According to the kin selection and parental manipulation theories, there is nothing in the genes *per se* that results in homosexuality. With the right environmental push, the genetic impulse to reproduce might push one along a homosexual path. The type of genetic

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<sup>149</sup>The kin selection theory can probably account for the greater number of male homosexuals than female homosexuals. Men, by their physiological nature, can reproduce an almost infinite number of times. The normal process of natural selection provides all males with the sex drive to go out and reproduce. With their enormous reproductive potential, men are in competition with all other men to find avenues to fulfill their drive. If anything goes wrong with a male he will be unable to meet the competition, i.e., he will be an inefficient heterosexual. Therefore, men are subject to greater pressure to switch to homosexuality.

Women on the other hand, are far less likely to be inefficient heterosexuals because they can only have a very small number of offspring (in comparison to men). The chances of their being losers in the biological stakes are much lower, and there is, therefore, much less reason for them to seek the homosexual alternative.

inevitability that the balanced superior heterozygote fitness theory implies is totally missing in the other two.

In the kin selection model, we seek evidence of its defensibility by looking for indications that something in the childhood of homosexuals might have made them ineffective reproducers and we seek indications that homosexuals are able to aid in the reproductive struggle by bringing the good of society to their families. Surely there is no well-known evidence of childhood traumas that might move those children onto the homosexual path because they perceive that they would be ineffective heterosexuals. And, particularly in our society, it is extremely doubtful that homosexuals are any more effective at bringing the blessings of the good of society to their families than heterosexuals.<sup>150</sup> Indeed, the opposite seems to be the case in many instances. Is homosexuality, therefore, a maladaptive turn in our society which is still just holding on as a legacy of the past, and which will be obliterated by the natural selection process itself because it is maladaptive?

These same objections apply also to the parental manipulation theory. There, too, the parents turn their child toward homosexuality because it can increase their reproduction through the good that the children can bring to their siblings. What's more, the turning that the parents do must be reflected by some evidence of trauma or something else during childhood which can be used to deflect the child from reproducing by him or herself.

Unlike our treatment of the psychoanalytic and the hormonal theories, the author finds it important at this point of Section c to deal briefly with a couple of the objections that might be raised against the entire sociobiological enterprise, particularly as it affects homosexuality.

First and foremost, some might be inclined to reject it out of hand because of the nature of its language. The way sociobiologists talk and write contains frequent reference to people "choosing" a specific reproductive strategy, or to the genes "choosing" to do something or other. The orientation of the homosexual is directed toward some certain end, like aiding siblings in reproduction by bringing the benefits of society to them, or people are in "conflict" with each other, especially within families in which there can easily be "conflicts of interest." None of these terms are themselves offensive. However, some might object to their use regarding genes, or actions which cannot be called "chosen" or even conscious. Problems of verification might impel some to reject the enterprise out of hand. Let us quote Ruse's response:<sup>151</sup>

Again, the critic has a good point; but again, it is not definitive. There is no doubt that sociobiologists do use their language loosely. . . .metaphorical language is what they surely use when they speak of the mechanisms for producing homosexuals. There is no literal manipulation, nor is it supposed that actual relationships are calculated and acted upon. . . .[[I]n using the language of intention or purpose or design, sociobiologists are doing no more than is done by any Darwinian evolutionist. They are dealing with adaptations (or maladaptations), trying to see what ends they serve in the struggle to reproduce. The language of conscious purpose comes naturally here. . . .If one thinks of nature consciously trying to further its biological ends, and that natural selection "designs" features to aid in this task, one can follow

<sup>150</sup> Perhaps there are such indications in those societies where homosexuals function as shamans or priests because they are thought to have magical or religious powers.

<sup>151</sup> P. 139.

through pertinent causal chains. . . .The aim is primarily that of finding out what people are up to, without so much worrying about what people think they are up to.

The second objection that some might raise that would lead them to reject the entire enterprise is the sociobiologist's definition of homosexuality as something akin to eye color, that is, "above culture, and preserved in splendid, eternal isolation."<sup>152</sup> The sociobiologists tend to give homosexuality a real existence, and then link it to the genes. If by that linkage they mean that all homosexuality is identical, as all blue eyes are identical – that the features and activities that are common to homosexuals in our culture have been common to all homosexuals in all cultures and times – then they are probably wrong. But, in truth, that is probably not what they are claiming. "[T]here are threads linking homosexuals. Culture may be crucial for homosexual identity. It is a lot less obvious that it is crucial for homosexual orientation. There is good reason to think that this is a transcultural phenomenon and as such (at least) plausibly a candidate for a biological explanation."<sup>153</sup>

By affirming that the sociobiological enterprise should not be rejected out of hand, we have now gotten to the point where we must discuss whether the knowledge gleaned from it about the etiology of homosexuality ought to have actual significance halakhically.

On the one hand, the answer can be given with great brevity. No. The knowledge gained from the sociobiological theories is more in the category of ספק than the knowledge gained from psychoanalysis and endocrinology, though they were ספק enough. As we stated above regarding the balanced superior heterozygote fitness theory, a posek who relies on such theories to overturn established precedent, especially דאָררײַתאָ precedent, could be doing so only at the cost of responsible halakhic decision-making.

On the other hand, though, the issue deserves a more theoretical answer, similar to the answers we offered regarding the same question as applied to psychoanalytic and hormonal theories. It deserves such treatment for two reasons:

(1) Who can say what future research will find? What if scientists are able to find significant corroborative evidence of those matters we indicated above still require such evidence? Would that evidence then imply that the data have become halakhically significant?

(2) Scientific evidence favoring the sociobiological theories would probably be more difficult for a posek to grapple with than evidence favoring the other theories. Neither psychological nor biochemical theories can be called "natural" in the way that sociobiological theories can be. For Freud, homosexuality is a perversion, and for the adaptationists it is a neurosis – but for neither is it "normal." For the biochemists, homosexuality may be the result of hormonal imbalances, excesses or deficiencies. To the extent that hormones are "natural," so, then, would homosexuality be "natural." Normally, there are neither excesses nor deficiencies. For the psychologists and the biochemists, then, homosexuality is abnormal (a term which is descriptive and carries no necessary implications as to whether the abnormality is illness or pathology, or neither).

For the sociobiologists, however, the situation is different. Homosexuality is genetically inevitable according to the balanced superior heterozygote fitness theory, and it is not a genetic aberration or mistake. The homozygote that results in homosexuality must exist for the sake of the general good that is derived from the heterozygote of which one of the genes of the homosexual homozygote is a necessary part. Homosexuality is not an aberration, an excess, a deficiency, but a necessary ingredient for the natural selection process.

<sup>152</sup> Ibid., p. 138.

<sup>153</sup> Ibid.

For the kin selection and parental manipulation theories the push to homosexuality (whether it comes from the homosexual or from family manipulation) serves an important natural and desirable function, aiding in reproduction. Homosexuality is not abnormal or aberrational, it is part of the natural selection process of evolution. It is not some type of error in God's creation (as hormonal imbalance might be), it is an integral part of the evolutionary process. And, for a believing Jew, evolution is not free and independent from God's providence.

For these reasons, the question must be addressed with the same seriousness we addressed it at the ends of Section A and Section B of this part. To rely on the newness of the theories, or the paucity of evidence to support them as the total reason for rejecting their halakhic significance would be inadequate. So, we turn to the same hypothesis we turned to at the end of the previous sections of this part.

If the sociobiological theories were conclusively proven to be false, we would be at a position already familiar to us from our analysis of the psychoanalytic and the biochemical theories. The Torah would still have called homosexuality *תועבה* and the reasons for that attribution would still be defensible or better. The characteristic of being *תועבה* would be true irrespective of the etiology of homosexuality. The conclusive disproof of the sociobiological theories would leave the precedent intact.

For the purposes of our analysis of the opposite hypothesis, that sociobiological explanations are proved to be correct, we can deal with the kin selection theory and the parental manipulation theory at the same time. Since both are essentially the same except for the "detail" of who does the pushing along the homosexual path, we can deal with the essence of both of them.

In what many might find an unusual twist at first blush, the proof of either of these theories would serve to reinforce at least one of the classical explanations of the reason for the prohibition against homosexuality. The person who becomes homosexual is pushed along that path in order to enhance and further propagation of the family, primarily by bringing to bear upon it the benefits of society which allow for greater propagation. The family and procreation stand at the core of these sociobiological theories, just as these two factors (and in the relationship between them) were central explanations of the reason homosexuality is called *תועבה* by the Torah.<sup>154</sup>

Validating homosexuality as a co-equal lifestyle would have the effect of undermining the reason for its very existence according to these sociobiological theories. Co-equal validation is usually understood to imply the setting up of homosexual families structured along the same basic lines as heterosexual families, except that the two mainstays of the family are of the same sex. Doing that absolutely undermines the genetic intent of the selection process. When homosexuals set up nuclear family structures that are other than the families into which they were born, i.e., their parents and siblings, their attention will become directed to the new family structure. That very fact undermines the purpose for which the homosexuals were pushed along the homosexual path in the first place. Once the lifestyle receives co-equal validation, the efforts of the homosexuals will not be directed toward the greater propagation of the families into which they were born. Furthermore, whatever benefits of society the homosexuals are uniquely competent to bring their families, they will bring to their "new" families, not to their birth families. And, again, the intent of the selection process will be subverted by the very people whose orientation was intended to have the opposite effect.

<sup>154</sup> See above, pp. 626ff.



The orientation was intended to free them from the very things that validation of co-equality would impose. The validation would change the entire “purpose” of homosexuality according to these sociobiological theories, and change it in such a way as to be counterproductive. So, if anything, the kin selection and parental manipulation theories, if either were proved to be absolutely correct, would argue against the validation of homosexuality as a co-equal lifestyle.

Furthermore, if these theories are correct, they can even be helpful in explaining the notorious promiscuity of homosexual males. Heterosexual intercourse is, in essence, a compromise between the male and the female. The male could further the reproduction of the copy of his genes innumerable times, by copulating constantly with many, many partners. The female, however, who has to go through considerable difficulty to reproduce copies of her genes (pregnancy, labor, delivery), and who can really only reproduce a limited number of times (particularly in comparison to males), finds it in her best interests to be very selective in choosing partners with whom to copulate. Heterosexual intercourse, therefore, becomes a compromise between a male and female. Once the need for compromise is removed from the male because the process of natural selection has turned him to the homosexual path, restraint disappears as well. Hence, homosexual men tend to have a large number of sexual partners.<sup>155</sup>

The validation of homosexuality as a co-equal lifestyle creates the impetus to impose a pattern of behavior on homosexuals (particularly males) that the very reason for their homosexuality subverts. It seeks to impose patterns of behavior on them that their very genetic make-up makes it unlikely that they can live up to. And, if they do live up to them, it subverts the natural selection process entirely by diverting the homosexuals from their role as enablers.

The kin selection and parental manipulation theories, if proved correct, argue against the validation of homosexuality as a co-equal lifestyle.<sup>156</sup> The orientation has a natural purpose. The validation of that orientation as similar to heterosexuality except for the object of one’s desires is counterproductive from a sociobiological perspective.

The responsible halakhist, therefore, would be ill advised to utilize such theories as grounds for seeking abrogation of the precedent. The theory itself argues against the conclusion of co-equal validation, and using it to advocate a conclusion which is contraindicated by it would be halakhically irresponsible and indefensible.

We come now to our discussion of the halakhic significance of the balanced superior heterozygote theory. Remember that we posited that the homozygote  $H_1 H_1$  results in homosexuality, the homozygote  $H_2 H_2$  reproduces in an average way, and that the most fit reproducer is heterozygote  $H_1 H_2$ .

<sup>155</sup> See Donald Symons, *The Evolution of Human Sexuality* (New York: Oxford University Press, 1979), esp. p. 286. Cf. Ruse, p. 137.

<sup>156</sup> Do these theories argue for validation of homosexual intercourse, even without validation of the co-equality of the homosexual lifestyle with the heterosexual lifestyle? From a halakhic perspective the answer is surely “no.” Validation of co-equality of lifestyle would imply that the intercourse between members of the same sex could be fulfillment of *עונה*, even if not procreative. However, non-procreative *עונה* is linked to the physiological possibility for the act, under general and normal circumstances to be procreative. Therefore, since there could never be procreative intercourse between members of the same sex, nonprocreative *עונה* is impossible. Since the only sexual relations allowed by halakhah must be either procreative or the fulfillment of *עונה*, halakhists could not reasonably conclude that kin selection and parental manipulation lead to an halakhic category that allows intercourse outside of the context of procreation or *עונה*. The only thing that might be argued is that homosexuals who do act on their orientation by engaging in homosexual intercourse are in the category of *אנס*. On that subject, see above, pp. 652-654.

From the perspective of the natural selection process, the people who possess *either* of the homozygote alleles have been called upon to make some “sacrifice” for the greater good of the majority. Both of the homozygotes have been dealt less than the most fit genes, and neither can account for why he is “chosen” to maintain the balance in order to insure that the majority will be heterozygotes.

The quest for co-equal validation constitutes an attempt to claim that both sets of genes are equally fit, that the  $H_1 H_1$  allele is not less fit than the  $H_1 H_2$  allele. From the standpoint of the sociobiologist it is an unacceptable (probably absurd) claim. To utilize a claim based on false scientific premise as the scientific grounds to overturn established precedent is halakhically irresponsible. It is not irresponsible to point out that according to this theory homosexuality is genetically inevitable in homosexuals. It is an untenable jump however, to claim that genetic inevitability makes the result adaptive or equal to the superior heterozygote. The scientific data themselves do not lead to a conclusion of co-equality, and could not be used halakhically to support such a conclusion.<sup>157</sup>

What would be correct for halakhists to emphasize, if the balanced superior heterozygote fitness theory were ultimately proved to be absolutely correct, is that heterosexuals should recognize the sacrifice the natural selection process has imposed upon homosexuals for the heterosexual’s benefit. Not only does Providence deal them a less fit set of genes, God calls upon them to refrain from the behavior which the genetically inevitable orientation seems to foist upon them. But homosexuals, by the same token, should also recognize that the sacrifice is a sacrifice. They may have become what they are in orientation through no choice of their own, but that reality does not negate the reasons why acting on that orientation remains halakhically unacceptable.

In sum, then, we have looked at each of the three sociobiological theories and concluded that even if they were ultimately proved correct, they would not result in defensible halakhic arguments for overturning the established precedent forbidding homosexual behavior.

With this we conclude our analysis of the three regnant hypotheses concerning the etiology of homosexuality – the psychological, the hormonal and the genetic. We find none of them sufficient to warrant our utilizing it to overturn precedent at this time; and none of them sufficient to warrant utilizing it to seek to overturn the precedent even when we posit that all elements of ספק are removed from it and it is proved either absolutely incorrect or absolutely correct.

Let us summarize our findings to this point. In Part I of this responsum we have found:

(1) That the Torah attributes to homosexuality the characteristic of תועבה, which is not an inherent quality, but an attributed one.

(2) That both male and female homosexuality are forbidden.

(3) That both the active and the passive partner are liable at law, under normal circumstances.

(4) That the prohibition is against sexual relations between members of the same sex, not against fantasies, attractions, or orientation.

(5) That the prohibition applies not only to lustful, transient and non-supportive homosexual relations, but also to supportive loving and permanent homosexual relations.

In Part II of this responsum we analyzed the statement of Bar Kappara that תועבה signifies תועה אתה בה and we have found:

<sup>157</sup> See preceding note regarding whether these data would lead poskim to conclude that homosexual intercourse is permissible, even if homosexuality is not deemed co-equal.

(1) That Bar Kappara might not have been referring to homosexuality at all, but to עריות in general.

(2) That the first classical interpretation of his words as implying the disruption of the heterosexual family ideal and model is clearly defensible and applicable.

(3) That the second classical explanation of his words as implying the non-procreative and unnatural aspects of homosexuality is clearly defensible and applicable.

In Part III of this responsum we have analyzed the three most prevalent modern theories of the etiology of homosexuality, the psychoanalytic, the biological (hormonal), and the sociobiological (genetic). We have found that none of these theories, even if assumed to be absolutely correct with no hint of ספק, negates the applicability of the reasons for which homosexuality is called תועבה. Furthermore, we have found that even if we assume that the Torah misunderstood the etiology of homosexuality to be something other than we know, there would still not be any cogent and compelling reason to seek to overturn the precedent against homosexuality on the basis of our current knowledge.

In sum, then, it is the clear obligation of responsible halakhists to reaffirm precedent with all vigor, there being at a minimum no compelling reason to overturn it and, at best, many cogent reasons to continue to affirm it.

#### **Part IV**

In the final analysis, a responsum such as this cannot end with הלכה עיונית alone. We must turn, then, to הלכה למעשה, actual answers to practical questions that arise. After all, the CJLS is discussing this issue because it has been asked real questions by individuals and organizations that normally turn to it for guidance.

It is not without some significant trepidation that one begins addressing the specific questions that need to be answered. Since not all questions can be directly answered, and since differences in situations often necessitate different responses, we can hope to give sufficient guidance only if we also offer principles which will enable decision-makers to render decisions consonant with the intent and spirit of this responsum.

Furthermore, halakhic conclusions often sound dispassionate. They often do not openly reflect the anguish of the decisor in having to reach them, or the decisor's recognition of the difficulty and *angst* they might cause those who are bound by them. I shall do my best to address these concerns both in this section of the paper and in Part V.

In the opinion of this author, the clarity of the halakhic position on homosexual behavior is not open to any real doubt. The biblical and rabbinic sources do not really lend themselves to permissive interpretations. Furthermore, that being the case, we have also summarized and analyzed the current knowledge on the etiology of homosexuality in Part III. That section began with the premise that modern knowledge might well have an impact upon halakhic decision-making by providing data which might impel poskim to reinterpret or overturn accepted precedents and norms, even ones which are דאורייתא.<sup>158</sup> Our conclusion, however, was that modern knowledge – even if we assumed it to be definitively proved – does not, *in this case*, offer any compelling reasons to overturn the normative halakhic precedents. Part III did not presuppose its own conclusion: it was an attempt to lay out the arguments and reasoning which led to its conclusion.

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<sup>158</sup>Those who are familiar with my paper on the ordination of women are aware of my willingness to advocate just such steps.

As a first principle to guide decision-making, therefore, we should assert that the halakhically committed Jewish community, *qua* community and acting through its communal institution, ought not take any act which can reasonably be understood to imply the halakhic co-equality, validation, or acceptability of a homosexual lifestyle.

The halakhic community recognizes the legitimacy of the ongoing union of a couple through the institution of marriage. Where there can be no halakhic legitimacy to the union, no matter how loving and caring, there can be no marriage. The halakhic community, therefore, should not legitimate such unions by performing or recognizing affirmation ceremonies. In this we are acting in consonance with the same principle regarding intermarriage. There, too, we claim that there is no halakhic validation possible for an intermarriage. As a result, we do not perform or recognize intermarriage as legitimate. We understand that they can be loving and caring, we reach out to the intermarried, we do our best to make the intermarried feel comfortable in our midst – but all of us draw the line at performing the marriages or recognizing them as halakhically valid. Here, too, that must be our approach. We do understand that homosexual couples can be loving and caring, we must reach out to them, and we must do our best to make them feel comfortable in our midst – but the line must be drawn at performing the marriages or recognizing them as halakhically valid.

As we have seen in the case of intermarriage, where outreach ends and validation begins is not always clear. Such ambiguity will inevitably exist regarding homosexual couples too. The clarity of our commitment to the basic principle will not obviate differences of opinion on certain specific questions. As we have been able to live with those ambiguities regarding intermarriage, so we will be able to live with them regarding homosexual couples. But, the basic principle should remain clear.

It is one thing to speak about communal validation of homosexuality as halakhically co-equal, but quite another thing to speak of individual homosexuals. As a prelude to doing just that, then, permit me to posit what seems to me to be a fundamental difference between the various views expressed before the Law Committee in the course of its deliberation.

In its resolution of 1990,<sup>159</sup> the Rabbinical Assembly affirmed “our tradition’s prescription for heterosexuality.” The term “prescription” is not the same as the term “preference.” “Prescription” is a term which is clearly stronger and more authoritative than “preference.” At a minimum, though, “prescription” includes “preference.”

I must say that I do not know that many persons come to Conservative rabbis for advice on sexual preference and behavior. What faces us in this committee is a situation in which the behavior is a given, and we are asked to consider its consequences. If, however, a person were to consult a rabbi on this matter, one might conjure up a scene in which a young man might say, “Rabbi, I am deeply confused, I am having trouble sorting out my sexual identity and my sexual behavior. I need help. It is clear to me that most of my arousals are homosexual, though some are heterosexual. That would probably put me, for example, if we try to look at it with some objectivity, around a 4 or a 5 on the Kinsey scale. I can’t even tell if my heterosexual arousals are more than incidental, Kinsey’s 4, or really just incidental, Kinsey’s 5. Can you possibly tell me what Jewish law would have me do? I know that you will be concerned that you may tell me something that will offend me, or that I will not be willing or able to do what you tell me Jewish law would require, or that I may need counseling to reconcile myself to your answer, but let’s try to set all of that aside for the moment and just give me an answer as to what you think that Jewish law would have me do.” There seems to me little ambiguity what the resolution of the RA would have

<sup>159</sup> PRA 52 (1990): 275, quoted below, p. 673-674.

the rabbi answer. Since, at the minimum, the resolution implies a clear preference for heterosexuality, it bids us to answer the questioner by telling him that Jewish law would have him act on his heterosexual urges, and not on his homosexual urges. For anyone between a 3 and a 5 on the Kinsey scale, the preference for heterosexuality bids us urge that he refrain from acting on whatever homosexual urges he feels. It seems to me that we would probably all agree that the RA resolution means at least this.<sup>160</sup>

Imagine the same question addressed to a rabbi, but in place of defining oneself as a 4 or 5, the questioner defined himself as a 6 – exclusively homosexual. At bottom line, then, the question is, “What would Jewish law have me do if my arousals and attractions are exclusively homosexual?” I am convinced both that the halakhic analysis of this question and the wording of the RA resolution require that the rabbi answer, “Jewish law would have you be celibate.” Prescribing heterosexuality means proscribing all other types of sexual expression. Inability to abide by the heterosexual prescription does not validate violating the homosexual proscription.

Nobody should misunderstand the dispassionate sound of the answer as an absence of feeling on the part of the posek who gives it. It is given with anguish, tears, and a heavy heart. It is given only after being convinced that the values implied by the prohibition are of such importance that they warrant asking an individual to suppress acting on his or her sexuality. It is given with the hope that the Jew committed to halakhah will find that that very commitment will provide the “strong motivation to change”<sup>161</sup> that will make the questioner “open to modification. . . to change [his] overt behavior from homosexual to heterosexual, [even though] the tendency toward erotic arousal by the same sex is probably never lost.”<sup>162</sup> It is given with the prayer of the rabbi that someone will be able to counsel the questioner in a way that will allow him or her to accept the celibacy if modification continues to prove impossible. It is given coupled with a clear understanding of just how difficult the requirement is, and the implications of that difficulty for the life of the person. But, in the final analysis, it is, I think, the answer both of the halakhah and of the Rabbinical Assembly resolution.

The Rabbis may not have had a term for “role model,” but the concept was hardly foreign to them. Statements like *כל תלמיד חכם שאין תוכו כברו אינו תלמיד חכם*,<sup>163</sup> and *כל תלמיד בזמן שהרועה תועה הצאן*,<sup>165</sup> and *בתר רישא גופא אזיל*,<sup>164</sup> and *חכם שנמצא רבב על כגדו חייב מיתה*<sup>166</sup> attest to their understanding of the concept. Leaders are role models whether they like it or not. Religious leaders are, therefore, religious role models. A religious leader in a Movement committed to halakhah serves as a role model of what that commitment means.

It is important to note that the role modeling I refer to, as it pertains to homosexuality, has nothing to do with whether people learn homosexuality from role models.<sup>167</sup> Rather, I refer to role modeling of what is halakhically acceptable.

<sup>160</sup> I do recognize the possibility that some might place 5s in a category with 6s (no heterosexual urges) as opposed to placing them in a category with 3s and 4s. If so, 5s should be dealt with as a part of what follows immediately.

<sup>161</sup> Above, p. 642, quoted from Judd Marmor.

<sup>162</sup> *Ibid.*

<sup>163</sup> Yoma 72b, in the name of Rava.

<sup>164</sup> Shabbat 114a, in the name of Rabbi Yohanan. And, note the words of Rashi: *ד"ה שממאסין – משניאי עצמן בעיני הבריות אומרים ארי להם ללומדי תורה שהם מאוסים ומגונים. נמצה זה משניא את התורה.*

<sup>165</sup> Eruvin 41a.

<sup>166</sup> *Pirkei de-Rabbi Eliezer*, ch. 40.

<sup>167</sup> Poskim would be well-advised to stand clear of that dispute among “experts,” and not be too quick to decide that one group of experts is correct and the other is wrong.

As we look at various leadership roles within the Jewish community, we must act carefully. The more it is clear that a given leadership role in the Jewish community provides a role model for halakhic acceptability, the less ambiguity there will be in our stand. The less it is clear that a given leadership role in the Jewish community provides a role model for halakhic acceptability, the more ambiguity there will be in our stand.

This much, though, seems very clear. Clergy in the Conservative movement are perceived almost universally as role models for halakhic acceptability. Therefore, persons who live an openly homosexual lifestyle could not reasonably be accepted as rabbis or cantors precisely because their lifestyle suggests that homosexuality is halakhically acceptable. I shall not attempt to define with absolute precision how “living an openly homosexual lifestyle” should be defined. I will say, however, that it does not invite or condone invasive investigations into the private lives of candidates for the rabbinate or the cantorate.

Other categories of religious leadership are not as clear, because there is not nearly the unanimity of agreement whether they function as role models, or to what degree. Besides that, there is a widespread tolerance within our Movement for leaders in these categories to behave openly in other ways that suggest halakhic acceptability for behaviors which we do not really consider halakhically acceptable, as for example, *שמירת שבת* and *kashrut*. This reality puts us on the horns of a dilemma. Though we have never posited this reality as our goal or model, it is just that in the eyes of many. It is, in a sense, precisely this reality that creates the chasm that generally exists between the clergy of the Movement and the vast majority of its laity in terms of halakhic observance and halakhic expectation.

Since our primary concern here is with the role modeling influence of avowed and open homosexuals on the communal perception of halakhic acceptability, that influence should be judged in the same way as the role modeling influence of open *מהללי שבת* or *אוכלי טריפות* is judged. How that judgement is made about them varies from community to community, from institution to institution, from school to school. The guiding principle should be that openly homosexual behavior should be a factor for non-clergy religious leadership positions, professional and lay, in the same measure that other unacceptable halakhic behaviors are a factor. Only the authorized governing individuals or boards of the community organizations, institutions and schools are competent to make this judgment because they are the ones most familiar with the actual facts and situations. But those boards must remember that our concern here is not with openly homosexual behavior *per se*, but with it as a reflection of halakhically unacceptable role modeling. On this premise, open *הלול שבת* or *אכילת טריפות* and open homosexual behavior are equal – to be considered or ignored equally.

I reiterate that the stress on *openly* homosexual behavior as the sole criterion of potential consideration precludes any right of any institution, organization or school to engage in invasive investigations of the *private* lives of individuals. Private behavior that is not halakhically acceptable but which does not flout communal standards publicly is simply not a factor, because it bears no role modeling influence.

The issue of intimating halakhic acceptability to what we consider halakhically unacceptable is also involved in such matters as synagogue honors. Here, too, the waters are very muddy. Intermarriage is again a good example. Because we wish to make clear that we, as a community, stand against the validation of intermarriage as a co-equal halakhic option, we take certain steps almost universally and other possible steps are taken in some communities and not taken in others. Regarding other halakhically unacceptable behaviors, such as *הלול שבת* and *kashrut*, however almost no community within our Movement takes any steps to restrict honors from those who engage in those unacceptable behaviors.

I see no reasonable option but to leave to the local **מרא דאתרא** to determine for (and possibly with) his or her community which category open homosexual behaviors fall into, the intermarriage category or the **הלול שבת** category. In either case, though, the essential point is that we are treating openly homosexual behavior as a halakhically unacceptable behavior, just as we treat intermarriage and **הלול שבת** as halakhically unacceptable behaviors. Our exclusive focus is on the behavior, not on the individuals who engage in the behavior. We disapprove of the behaviors, not of the people.

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. Such people are, in fact, serving as role models of what is halakhically acceptable.

In this claim I agree in large measure with Dr. Mortimer Ostow who wrote:<sup>168</sup> “I recommend to Chancellor Cohen that only those homosexual applicants be accepted for rabbinic training who abstain completely from homosexual indulgence, who agree that homosexual behavior is halakhically unacceptable.”

If Ostow had stopped there, I would be in total agreement with him. However, he added two other conditions which I reject. He wrote: “. . . who acknowledge the perverse nature of their homosexual inclination and who undertake intensive psychotherapy in the hope of overcoming it.” Since I have asserted throughout that homosexuality is called **תורעבה** for reasons that are independent of whether it is a perversion, I see no reason to insist that a homosexual concede that it is a perversion. Finally, while I might well urge such individuals to seek some type of therapy, I cannot go as far as Ostow. I cannot agree to any restrictions on a celibate homosexual who believes that his or her inclinations are not subject to psychotherapy at all (and therefore refuses psychotherapy) because they are genetically or biochemically caused. Nor would I consider psychotherapy with some goal other than “overcoming it” insufficient. The goal of the psychotherapy *might* be to come to grips with the anger or frustration the homosexual feels at the restriction on behavior his or her commitment to celibacy for solely halakhic reasons imposes upon him or her.

In attempting to anticipate the reaction that some might have to what I have written **למעשה** in this section of the paper, I suspect that certain circles will understand my words as an invitation (or perhaps demand) to homosexuals that they remain “in the closet.” While I can understand what might lead one to make such a claim, I wish to make it absolutely clear that that is not my intention.

I understand the phrase “remain in the closet” to mean “remain silent and discrete about the practice of one’s homosexuality.” That, of course, has not been my recommendation at all. I have said that people of homosexual orientation who remain celibate incur no halakhic disability. I have urged halakhically concerned homosexuals to refrain entirely from homosexual practice by remaining celibate if necessary. That is not the same as practicing homosexuality with silence and discretion. I have invited persons committed to halakhah to refrain from prohibited behavior, not to circumvent the prohibition by violating it in silence and with discretion.

Finally, I wish to make as clear as I possibly can that nothing I have written in this section of this responsum can or should be construed to intimate any restriction what-

<sup>168</sup> *Conservative Judaism* 40 (fall 1987): 104.

soever on the academic freedom of anyone. Nothing I have written forbids or discourages anyone from arguing that in his or her opinion homosexuality ought to be halakhically permissible. Nothing I have have written forbids or discourages anyone from offering interpretations of the legal texts of the halakhic system to support the conclusion opposite from mine. Nothing I have written forbids or discourages anyone from invoking extralegal factors and arguing that they permit or even compel what I do not think they permit.

If more than one paper is adopted by the CJLS on this subject, the papers adopted become valid options for all members of the Rabbinical Assembly. If only one paper is adopted, however, it is reasonable to anticipate that virtually all rabbis would govern their own *behavior* by the guidelines set forth in the paper which is approved, though even that would not be enforceable unless that paper were recommended by the CJLS as a Standard of Rabbinic Practice and approved as such by the Convention of the RA.

## *Part V*

### **To the heterosexual community**

Throughout this paper I have assiduously avoided using words, phrases and terminology which are much in vogue these days. I have refused to use words like “gay,” “straight,” and “homophobia” because their very use is intended to carry implications that I have been unwilling to imply. Instead, I have chosen to use terminology which is more dispassionate and which has been used in scientific discourse until very recent times. The purpose of this choice on my part has been to avoid as much as possible the value overtones usually understood to be implied by the use of the terminology currently in vogue.<sup>169</sup>

Rejection of the terminology, however, should not be confused with rejection of all of the claims of the group that uses that terminology. There are, indeed, many elements of truth to the complaints of the homosexual community against the heterosexual community and it is the obligation of the heterosexual community to give them careful consideration – even though we have concluded that halakhah cannot condone homosexual behavior.

Much of the heterosexual community reacts to homosexuality as if it were inherently ugly, inherently immoral and inherently repulsive. None of these claims is true. Homosexuality, from a halakahic perspective, is *תועבה*, but it is the Jewish legal tradition that attributes that characteristic to it. We have spent much time in this paper attempting to understand why the law attributes the quality of abhorrence to homosexuality. We have concluded that the reasons for it remain more than merely defensible. They are cogent and compelling, and they buttress our reaffirmation of the normative proscriptive precedent. But the abhorrence remains attributed, not inherent.

What difference does it make whether the halakhic abhorrence of homosexuality is inherent or attributed? It seems to me that the difference lies primarily in the reaction of the heterosexual community to it.

If homosexuality is inherently immoral, ugly and repulsive, the heterosexual community feels a type of justification in vilifying people who are homosexual. How can they engage in such repulsive behavior? Only pure and unadulterated *רשעות* could prompt one

<sup>169</sup>I am aware, of course, that once the usage of terms like “gay” becomes widespread, the usage of the term “homosexual” is also perceived to bear implications. Regrettably, that is unavoidable even when unintended.



to engage willingly in behavior which even he must know and feel is inherently ugly. What greater immorality can there be for one who is not mentally deranged than to behave in a manner that is inherently abhorrent?

If, however, homosexuality is neither inherently immoral, ugly, or repulsive, the perceived justification for the vilification of the class of homosexuals no longer exists. There are good reasons for homosexual behavior to be illegal, but those reasons do not include any judgments about the inherent ugliness, repulsiveness, or immorality of the behavior. Homosexual behavior is to homosexuals as heterosexual behavior is to heterosexuals. Just as the latter engage in intercourse because they find it beautiful, fulfilling, rewarding and meaningful, so, too, do the former. Homosexual love for homosexuals is as potentially beautiful, fulfilling, rewarding and meaningful for homosexuals as heterosexual love is for heterosexuals. Halakhah prohibits homosexual behavior for reasons it deems sufficient, but not because the behavior is inherently רשעוּת.

At the core of the unwarranted reaction of too much of the heterosexual community lies its conviction that homosexuality is somehow chosen by homosexuals. The heterosexual community must understand that homosexual orientation is almost never chosen by homosexuals in any conventional sense.<sup>170</sup> The passions, attractions and fantasies felt and experienced by homosexuals are no more often of their own making than the passions, attractions and fantasies of heterosexuals. A heterosexual rarely blames him or herself for feeling an attraction to the spouse of someone else, even though acting on that attraction is illegal. The heterosexual does not castigate him or herself as inherently ugly or repulsive because of the attraction or the fantasy. In the same way, heterosexuals may not blame homosexuals for their attractions and fantasies, as if they arose from an act of pure will. Homosexuals are no more evil and subject to vilification because they fantasize an illegal relation than are heterosexuals who do the same thing.

That, of course, brings us to the next issue, namely, what type of reaction by the Jewish community is warranted and responsible toward homosexuals who behave in the manner which halakhah forbids? I find it unacceptable for the community to be more severe and intolerant in its reactions to the illegal act of homosexual behavior (which is not chosen in any conventional sense) than it is to the illegal acts of הלול שבת or intermarriage (which are freely chosen). Yet, by and large, that is exactly what usually happens.

The Conservative Jewish community bends over backwards to be understanding and tolerant of those who flout its commitments regarding Shabbat observance and intermarriage and a host of other illegal acts that each of us could list. “שמירת שבת is so hard for those unaccustomed to it.” “The economic and social costs to the שומר שבת are sometimes greater than many of our constituents can undertake.” “We must reach out to the intermarried lest we lose them entirely.” “All of our efforts must be geared toward effectuating the conversion of the non-Jewish spouse and we cannot accomplish that by ostracizing the intermarried.”

Homosexuals are no less members of the Jewish community though they may flout its commitments than are מהללי שבת or the intermarried who also flout its commitments. If קירוב is the order of the day for our constituents who behave in halakhically unacceptable ways, it is also the order of the day for our constituents who behave in the halakhically unacceptable way called homosexual behavior. As we never give up on

<sup>170</sup> Even if there are “choice points” in a person’s life, the person rarely is aware that he or she is standing before a choice point. It is not like a person who consciously knows that he or she is about to choose between two different model cars and can just as easily opt for one model as for the other.

the possibility of leading the intermarried to a commitment to our laws and resulting in the conversion of the non-Jew, so, too, must we never give up on the possibility of leading the homosexual to a commitment to our laws and resulting in his or her adoption of celibacy.

Part IV of this paper was devoted in large part to the halakhic task of drawing the line between actions that would undermine our values and commitments by actually validating what is illegal and actions that would not. We cannot validate illegal acts, but neither can we treat those who engage in those illegal acts any more severely or intolerantly than we treat those who engage in other equally halakhically unacceptable acts.

We cannot forbid the formation of separate synagogues predicated on the premise of the co-equality of homosexuality with heterosexuality and yet make homosexuals so uncomfortable and unwanted in our synagogues that we actually push them to form their own synagogues. We can adamantly forbid public acts that impart an imprimatur of halakhic acceptability to homosexual behavior, but cannot also ostracize and push away those homosexuals who refrain from those public acts.

It is conceivable that the establishment institutions of the halakhic Jewish community might someday be forced into decisions that are undesired because the homosexual community of Jews will accept continued membership in the larger Jewish community only if homosexuality is validated as an acceptable halakhic option. But, unless and until such a time arrives, the institutions of the normative halakhic community may not turn away from and reject homosexuals any more than they turn away from and reject other groups who engage in halakhically illegal acts.

More than anything else, the heterosexual community must remember that the halakhic demand being made upon homosexuals – celibacy – is far more severe and difficult a demand than any that is made by halakhah on heterosexuals. Homosexuals must observe all of the same mitzvot as heterosexuals, and are denied the pleasure and fulfillment of sexual relations. If the heterosexual community is able to be embracing to those who backslide regarding halakhic demands less onerous than celibacy, surely it can be at least no less embracing to those who backslide regarding this most onerous halakhic demand. To embrace does not mean to condone. It means never to be *מתיאש מן התשובה*.

## To the homosexual community

There is a fundamental difference between the primary premise of the halakhic system and the primary premise of the American legal system. “Obligation” is the operative term which characterizes halakhah, while “rights” is that term for American law. In Jewish law, the category of individual rights does not hold the virtually sacrosanct status that it does in the United States. In the American system, there is always tremendous opposition to any legislation that impinges on the presumed broad rights of individuals to act as they wish, especially when their actions do not impinge on others or when they result from consensual agreement.<sup>171</sup>

Jewish law is a religious legal system. In the final analysis, it seeks to determine what God wishes. God’s wishes clearly impinge with great frequency on the behavior of individuals, even when that behavior does not impinge on others, or when that behavior might be engaged in with the consent of another. Jewish law dictates what one may eat,

<sup>171</sup> Consider, for example, the opposition voiced against seatbelt laws and helmet laws for cyclists. Purely paternalistic legislation is almost impossible to pass in the United States.

drink, and wear; it posits restrictions and obligations on the relationship between a person and the person's spouse, and most of those restrictions and obligations cannot be superseded by the consent of the two spouses. The law obligates Jews and they are expected to submit themselves to its authority, even when it mandates or forbids actions that are wholly personal or consensual.

The homosexual Jewish community must recognize that if it seeks halakhic validation of the homosexual lifestyle as co-equal with heterosexuality, that validation cannot be predicated on the claim that homosexual relationships are consensual. The degree to which a homosexual relationship is loving, caring and supportive is non-determinative in deciding whether it is legal.

Members of the homosexual community must recognize that saying no to a request for halakhic validation of homosexuality does not imply rejection of homosexuals or their exclusion from the greater community. Rather, the halakhic community is more than merely entitled to stand by its commitment to the authority of halakhah, it is obligated to do so. And when the best possible halakhic thinking leads to the conclusion that the halakhic precedent ought to stand, it is unfair of anyone to assert that the conclusion is possible only for decisors who do not understand, who do not empathize, who are insensitive, who do not care for all of the elements of their community, who harbor an irrational and unwarranted fear of a segment of the community.

It is possible for a decisor to be understanding, empathic, sensitive, caring and without irrational fears and yet conclude that the halakhic precedents are defensible, warranted and compelling. The decisor and the halakhic community are then entitled to turn to the segment of the community whose question has been answered negatively for its understanding. The halakhically concerned community of Jewish homosexuals must demonstrate its understanding of "obligation" rather than "rights" as the core value of halakhah. That community must recognize that the demand of halakhah upon it reflects the common halakhic demand to put one's commitment to the values which the precedents embody above one's personal feelings, to submit one's personal feelings and behavior to the authority of the law, even though one wishes that the law might be different.

The demand of halakhah vis-à-vis the homosexual reflects a difference of degree rather than a difference of kind, and the homosexual community must understand that the decisors of the halakhic community can and do understand this. When a decisor is forced to declare an animal nonkosher, at a great cost, inconvenience and pain to the family which presented it for inspection, the decisor *does* feel the family's pain and is himself pained. But the cogent and compelling reasons for obedience to the norms of kashrut supersede both his pain and that of the affected family. When a decisor must declare that two people who wish to be married may not be married because their union is a halakhically consanguineous marriage, the decisor *does* feel the couple's pain and is himself pained. But the cogent and compelling reasons for obedience to the norms of forbidden marital unions supersede both his pain and that of the affected couple. That is precisely what is meant by submission to the halakhic system.

Castigating the halakhic community and its decisors as insensitive and unfeeling because they have given a negative answer is unwarranted. When a decisor has investigated all possible avenues to permit an agunah to be remarried and has concluded that it cannot be done without sacrificing the ideals and values which the norms embody, he reaches his conclusion with heavy heart and tearful eyes. That heavy heartedness and tearfulness are caused precisely *because* the decisor knows and feels the pain and anguish his decision will inevitably cause. There is no glee in the mind of the decisor when he

reaches a decision that imposes any hardship of any kind on any individual. Nonetheless, the values and ideals of the law – the community's best understanding of God's will – sometimes make the imposition of such a hardship unavoidable.<sup>172</sup> המבין יבין.

## Part VI

### Postscript

It has been the purpose of this paper to deal with homosexuality as an halakhic issue. That purpose has been completed. Nonetheless, I consider it critical to make a few additional comments that are not technically part of an halakhic analysis, but are, in my opinion, crucially important.

I asserted briefly from the outset<sup>173</sup> that the issue of homosexuality could not be excluded from halakhic discourse by the claim that halakhah must stop at the bedroom door. For a religious legal system, that claim is simply untenable. The United States legal system, however, is not a religious legal system. It behooves us, therefore, to reflect briefly on the practical consequences of the difference between a religious and a secular legal system vis-à-vis the issue of homosexuality. Since these remarks constitute a postscript to the essence of this paper, they are not intended to be an in-depth analysis, but rather more in the category of ראשי פרקים.

We have claimed that the classical explanations of why the Torah has chosen to attribute to homosexuality the attribute of תועבה remain defensible, at a minimum and arguably, convincing and compelling to this day. Those reasons – disruptive to family structure and life, unnatural, nonprocreative – justify the prohibition against homosexual behavior which the halakhah mandates. The reasons are of legitimate concern to a religious legal system.

It is far harder to argue that those same reasons are of legitimate concern to a secular legal system. Indeed, one would be very hard pressed to defend that claim at all. If “rights” is the primary category of significance in the United States legal system, rather than “obligation,” the rights should be virtually unrestricted. They are legitimately restricted by the state only if the unrestricted exercise of individual rights by members of the society presents some kind of danger or threat to the legitimate interests of the state itself or to its citizens.

I am unable to offer any cogent argument to demonstrate why the private sexual acts of consenting adults should present any danger or threat to the legitimate interests of the state itself or to its citizens, under common circumstances. Therefore, I can see no justification for civil legislation proscribing such acts. The fact that those acts may be unnatural

<sup>172</sup> I leave a final point for a footnote. The ideological commitment of the Conservative movement to halakhah and its authority is, in large measure, independent of whether or not the constituency recognizes that ideological commitment or acts on it. Therefore, it would be untenable to argue that since a large percentage of the Movement does not take halakhah seriously, the Movement need not take halakhah seriously. The Movement could not possibly justify anything as halakhically acceptable on the grounds that halakhah does not matter to the constituents, nor could it reasonably declare that for a certain issue it suspends its commitment to halakhah. It follows, therefore, that if the homosexual community seeks validation within Conservative Judaism, it must seek halakhic validation. Only that could validate it authentically. Furthermore, if halakhic validation is found to be unwarranted or impossible, the homosexual community cannot demand validation within Conservative Judaism extra-halakhically. Such validation could come only at the cost of a gross violation of one of the very characteristics of the Movement that impel the homosexual community to seek its validation in the first place.

<sup>173</sup> Above, p. 614.

and non-procreative in the sense we have defined<sup>174</sup> presents no danger to the state or to its citizens,<sup>175</sup> and therefore, should not be the subject of civil legislation.<sup>176</sup>

There is no inconsistency whatsoever in making the halakhic claims made in this paper, on the one hand, and asserting absolute opposition to any infringement of the civil rights of homosexuals on the other. The halakhic tradition has every right to make judgements about the acceptability of the private acts of consenting adults, the secular American legal system does not; the halakhic tradition has every right to restrict from leadership positions persons whose behavior implies an imprimatur of halakhic acceptability, the secular American legal system does not.

Neither the halakhic tradition nor the American legal system can justify civil discrimination, violence or the threat of violence, official or unofficial prejudice against homosexuals.

Jews who are halakhically committed must tread a fine line between their very defensible halakhic/religious conclusions and their legal and moral responsibilities within the secular state. Treading that line is not always easy and usually requires considerably explanatory effort. That careful treading is beautifully reflected in a resolution of the Rabbinical Assembly, passed at the 1990 Convention:<sup>177</sup>

WHEREAS Judaism affirms that the Divine image reflected in every human being must always be cherished and affirmed, and

WHEREAS Jews have always been sensitive to the impact of official and unofficial prejudice and discrimination, wherever directed, and

WHEREAS gay and lesbian Jews have experienced not only the constant threats of physical violence and homophobic rejection, but also the pains of anti-Semitism known to all Jews and additionally, a sense of painful alienation from our own religious institutions, and

WHEREAS the extended families of gay and lesbian Jews are often members of our congregations who live with concern for the safety, health and well-being of their children, and

WHEREAS the AIDS crisis has deeply exacerbated the anxiety and

<sup>174</sup> Above, pp. 627-630.

<sup>175</sup> Of course, if all of the citizens of the state chose to engage exclusively in nonprocreative sex, that could be understood to be a threat to the survival of the state itself. As a practical matter, though, the issue need not concern us.

<sup>176</sup> While I am not convinced, I admit that one might make a defensible argument that a homosexual family structure presents a danger to the very fabric of the state and that it is therefore within the legitimate interests of the state to forbid the family structure which presents the danger. If the state adopted such a position, it might refuse to recognize homosexual marriages as marriages and, therefore, refuse to such unions the legal standing that accompanies being defined as a family. It could, however serve no compelling purpose to the state to forbid consenting adults to engage in nonprocreative or unnatural intercourse – provided the adults do not seek recognition of their union as having family status.

Similarly I recognize that one might make a defensible argument that the presence of homosexuals in some clearly definable subgroups within society (e.g., the army, the police, the firefighters) might have consequences that could pose a danger or threat to the state or to its citizens. But even in these cases, it is not the unnaturalness or the nonprocreativity of the homosexual behavior that provides the state with its compelling interest. Rightly or wrongly, those who make these claims assert that it is the social consequences of these relationships on such matters as discipline and trust that validate the state's interest in the behavior of the homosexuals involved. The state has no legitimate interest in the behavior *per se*. Its interest is solely in the threatening or dangerous consequences of the behavior to the state or its citizens. לא אכזבתי.

<sup>177</sup> *PRA* 52 (1990): 275.

suffering of this community of Jews who need in their lives the compassionate concern and support mandated by Jewish tradition, THEREFORE BE IT RESOLVED that we, The Rabbinical Assembly, while affirming our tradition's prescription for heterosexuality,

- 1) Support full civil equality for gays and lesbians in our national life, and
- 2) Deplore the violence against gays and lesbians in our society, and
- 3) Reiterate that, as are all Jews, gay men and lesbians are welcome as members in our congregations, and
- 4) 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.

## Epilogue

It has no doubt been noted that until the term AIDS appeared in the quotation of the resolution of the Rabbinical Assembly directly above, the term had not appeared in this entire responsum. To many, that fact must seem strange. This Epilogue is devoted to a brief explanation of this strange fact.

There are, indeed, many halakhic issues that must be addressed as a result of the AIDS crisis. Those issues include some very difficult and complicated matters. Among others, issues include טהרה of the bodies of victims of AIDS, the dilemma of privacy vs. disclosure, what constitute appropriate actions for the protection of the unaffected vs. unwarranted actions that reflect unjustified ostracism of those affected by AIDS. A paper on the halakhic questions that have arisen as a result of the AIDS crisis is currently being written for the consideration of the Law Committee.

The subject of this paper, however, was the questions of the halakhic status of homosexual behavior and that question is not related to AIDS in any way, in my opinion. My opinion is predicated on two premises, which, when spelled out, will clarify why AIDS has not been mentioned.

I reject categorically that AIDS can be viewed as God's punishment of homosexuals. Were it possible to view it that way, AIDS would have to have been mentioned as a support for the prohibition against homosexuality, for surely God does not punish people for behavior which is approved as halakhic.

This is not the place for a lengthy discourse on why I reject the premise that AIDS is Divine punishment for homosexuality. A brief statement will suffice.

I see no evidence of God's direct intervention as a punishment for such violations of Jewish law. There is no indication either in the Torah or in Rabbinic literature that the violation of the prohibition against homosexuality is any more heinous than the violation of any of the other prohibitions which are legally punishable in the same way as homosexuality is. The list of such offenses<sup>178</sup> includes, *inter alia*, blasphemers, Sabbath desecrators and those who curse their parents. Since there is no halakhic justification for singling out homosexuals from the entire list of offenders who are technically liable for stoning and since Sabbath desecrators (to pick one category) do not seem to be suffering from AIDS in

<sup>178</sup> M. Sanhedrin 7:4.

any significant percentage to warrant the conclusion that God is using AIDS as a punishment for those who are liable for stoning.<sup>179</sup> I reject categorically any such claim. Once rejected, any reference to AIDS as support for the proscriptive precedent is not only unwarranted, it is outrageous.

That, of course, leaves the other side of the possible equation, namely, that the AIDS crisis constitutes some type of grounds for validating homosexuality halakhically. I reject that possibility with equal adamance. Those who suffer from AIDS have legitimate halakhic claims toward the rest of the Jewish community. Those claims stem from halakhic requirements for treatment of the sick and suffering and care for the families of the sick and suffering. Victims of AIDS have legitimate halakhic claims that stem from halakhic requirements concerning *הלוית המת*. But none of the legitimate halakhic claims of sufferers and victims of AIDS has anything to do with the question this responsum addressed. The anguish, torment and cruelty that AIDS inflicts upon those who suffer from it, upon their families, upon their communities, upon the entire Jewish community have no bearing whatsoever on the halakhic question of the halakhic status of the homosexual behavior itself. All suffering is a tragedy. Great suffering is a great tragedy. But neither suffering nor tragedy, in and by themselves, constitute grounds for the grant of a *היתר* to what is *אסור*.

יהי רצון מלפניך ה' אלקי שלא יארע דבר תקלה על ידי ולא אכשל בדבר  
הלכה וישמחו בי חברי ולא אמר על טמא טהור ועל טהור טמא ולא  
יכשלו חברי בדבר הלכה ואשמח בהם.<sup>180</sup>

<sup>179</sup> What's more, even if one were willing to accept the claim that God does punish those who would be liable at law for offenses for which they cannot now be punished by judicial procedures because we are no longer entitled to try *דיני נפשות*, AIDS is not the appropriate punishment. After all, the Gemara (Sanhedrin 37b) which asserts that theological premise demands that the God-inflicted punishment be recognizable as approximating the actual punishment for which the person would be liable. For *חייבי סקילה*, the Gemara posits *או נופל מן הגג או חיה דורסתו*, paralleling the punishment of being thrown off a cliff onto rocks. AIDS hardly qualifies to be viewed as a replacement for *סקילה*.

<sup>180</sup> Berakhot 28b.