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## **Jewish Norms for Sexual Behavior: A Responsum Embodying a Proposal**

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*This תשובה was adopted on March 25, 1992, by a vote of eight in favor, eight opposed and seven abstentions. Voting in favor: Rabbis Ben Zion Bergman, Elliot N. Dorff, Richard L. Eisenberg, Dov Peretz Elkins, Howard Handler, Jan Kaufman, Joel Rembaum and Gordon Tucker. Opposing: Rabbis Stanley Bramnick, Sam Frint, Arnold M. Goodman, Reuven Kimelman, Herbert Mandl, Avram I. Reisner, Joel Roth and Morris Shapiro. Abstaining: Rabbis Kassel Abelson, David M. Feldman, Aaron Mackler, Lionel E. Moses, Mayer E. Rabinowitz, Chaim Rogoff and Gerald Skolnik.*

*Note: This paper was adopted as a philosophical and legal rationale to the CJLS decision regarding homosexuality adopted March 25, 1992 (see the “CJLS Consensus Statement of Policy Regarding Homosexual Jews in the Conservative Movement”). Three other תשובות, providing differing rationales, were also adopted. Those תשובות are “Homosexuality” by Rabbi Joel Roth (14-7-3), “Homosexuality and the Policy Decisions of the CJLS” by Rabbi Reuven Kimelman (12-7-4), and “On Homosexuality” by Rabbi Mayer Rabinowitz (8-5-10).*

### **תשובה**

Rabbi Roth and Rabbi Artson have each written well-researched and passionate תשובות on homosexuality. Each of them, though, assumes that we know much more about the relevant facts concerning homosexuality than we actually know. I understand fully the desire to come to definitive decisions about this matter, for it affects many lives and arises inevitably and perhaps often in a rabbi's service. Moreover, human beings often manifest what Dewey called a “quest for certainty” — for psychological, if not for philosophical or social, reasons. We like to have things neat and clean. It gives us a sense of security and order. It also confirms our sense of self. The world in which we live, however, is, as Dewey noted, not static or easily defined, and so that quest is not only misguided, but potentially dangerous.

Law which comes out of the need for certainty when none can legitimately be had is always bad law. The same is true for ethics. As Aristotle said, “Our discussion will be adequate if its degree of clarity fits the subject-matter; for we should not seek the same degree of exactness in all sorts of arguments alike, any more than in the products of different crafts.”<sup>1</sup>

For reasons which I shall delineate below, we do not know enough now to make a definitive decision on homosexuality. In that situation, adopting either Rabbi Roth's or Rabbi Artson's responsum is, at least at this time, a “no-win” situation for us, and adopting both is worse. Still, somewhat more detail than I previously supplied as to the nature of the study I propose and the interim policies I am suggesting can be provided. I am, therefore, writing now to summarize and supplement the arguments I have presented at our last two meetings for my three-pronged proposal — namely, that,

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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.*

### *Committee on Jewish Law and Standards of the Rabbinical Assembly*

(1) We, as the Committee on Jewish Law and Standards, affirm the 1990 Rabbinical Assembly resolution on gay and lesbian Jews and the similar 1991 resolution of the United Synagogue of Conservative Judaism.<sup>2</sup>

(2) We ask the President of the Rabbinical Assembly, the Chancellor of the Jewish Theological Seminary of America, and the President of the United Synagogue of Conservative Judaism — the three leaders whose appointments we bear — to constitute a commission which would spearhead a Movement-wide study of both heterosexual and homosexual norms. The study should examine all relevant halakhic precedents, guided by responsa already submitted to the Law Committee and any other material written for it; solicit germane expert scientific testimony; investigate pertinent sociological realities; and address the theological and moral issues involved in these issues as it seeks to make a judgment as to good social policies for the Conservative Movement on sexuality. The commission should include rabbinic and lay members, men and women, heterosexuals and homosexuals, and a cross-section of ages. The educational arms of the Movement should be engaged in creating appropriate educational materials and programs on these issues for teenagers and adults as part of the process of this Movement-wide study. The commission should be asked to report its findings to the three leaders who constituted it and to the Committee on Jewish Law and Standards as soon as possible, but hopefully no later than three years from the adoption of this proposal.

(3) In the meantime, as according to our usual procedures, the status quo norms will remain in effect. Specifically,

(a) We will not perform commitment ceremonies for gays or lesbians.

(b) We will not knowingly admit avowed homosexuals to our rabbinical or cantorial schools or to the Rabbinical Assembly or the Cantors' Assembly. At the same time, we will not instigate witch hunts against those who are already members or students.

(c) Whether homosexuals may function as teachers or youth leaders in our congregations and schools will be left to the rabbi authorized to make halakhic decisions for a given institution within the Conservative Movement. Presumably, in this as in all other matters, the rabbi will make such decisions taking into account the sensitivities of the people of his or her particular congregation or school. The rabbi's own reading of Jewish law on these issues, informed by the responsa written for the Committee on Jewish Law and Standards to date, will also be a determinative factor in these decisions.

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

(e) In any case, in accordance with the Rabbinical Assembly and United Synagogue resolutions we are hereby affirming, gays and lesbians are welcome in our congregations, youth groups, camps, and schools, and appropriate steps must be taken to insure that this welcome is not empty rhetoric.

I make this proposal for three reasons. First, on the merits of the case, I do not agree with either Rabbi Roth's or Rabbi Artson's reading of the Jewish tradition on this issue for reasons which I shall explain below. Second, even if I did concur with either of them, I do not think that the Conservative Movement is ready for either one of the two *תשובות* before us — again, for reasons which I shall explain below. Finally, third, I do think that this is a golden opportunity for the Conservative Movement to study something together and to say something important about how Judaism should affect a significant area of our lives in contemporary times, and it would be a terrible shame if this opening were lost.

### **The Impact of Historical Consciousness on Legal Method**

First, then, to the merits of the case. Rabbi Roth asks us to see gay sex<sup>3</sup> as a *תועבה*. He reads the texts of our tradition in a highly formalistic way. As evidenced by his book on halakhic process, that kind of reading pervades his philosophy of Jewish law generally. His formalism is not of the most extreme sort, for he does

acknowledge “extra-legal” factors as potential sources for influencing decisions. Nevertheless, his view is formalistic in that the legal process is seen as logical deduction from previous texts of the law. Even in his modified brand of formalism, a very heavy burden of proof must be borne in order to invoke any non-textual factor to alter what the decisor takes to be the meaning of the texts because authority ultimately rests in them.

Rabbi Roth’s responsum heavily depends upon his method. Since Leviticus calls homosexuality an abomination (תועבה), the responsum begins with an analysis of what that means. There is no problem in this; indeed, other methods might begin the same way. Where other methods would differ from his, however, is in what comes next. The text, for Rabbi Roth, is so powerful a determinant of the outcome of the law that even interpretations as to *why* the text calls gay sex an abomination cannot be used to challenge the law. Indeed, he tells us that if any or all of the interpretations are “found wanting” — that is, if they do not convince us to maintain the law as stated in the text — “that proves only that the interpretations are inadequate, not that homosexuality is not תועבה according to the Torah.”<sup>4</sup>

Of course, the Torah does call a man’s “lying with a man as one would lie with a woman” an abomination, and so in the exclusively textual sense he is obviously correct; the text says what he says it does. The issue, though, is not that, but whether we rabbis should now determine the law in line with that text or not, and it is *that* decision which Rabbi Roth wants to determine on strictly textual grounds. If interpretations of the rationales of the text cannot count for Rabbi Roth against the text itself, factors completely outside the text (like historical context, science, morality, theology) have in his method an even more tenuous hold on the law. They do have some bearing on the law, and in this Rabbi Roth’s formalism is of a modified sort. In his terminology, however, such factors are “extra-legal” — outside the law — precisely because he identifies the law with the texts in the first place. Given that assumption, such “extra-legal” factors must understandably have truly overwhelming force to justify any change in the law. It is not surprising, then, that Rabbi Roth concludes thus: “We have found that none of these [scientific] theories, even if assumed to be absolutely correct with no hint of ספק [doubt], negates the applicability of the reasons for which homosexuality is called תועבה [abomination]”<sup>5</sup> — let alone, as Rabbi Roth’s specific rulings on homosexuality make clear, the ultimate judgment that it is an abomination.

I think that formalism, even of this modified type, is an erroneous way to understand any legal system, certainly one which has undergone all of the historical vicissitudes of Jewish law. One simply cannot pretend that the texts of our tradition existed in some pristine metaphysical realm in which the only issue was the logical relationships tying one to another. As Supreme Court Justice and legal philosopher Oliver Wendall Holmes, Jr., noted almost a century ago, proper legal reasoning is not simply a matter of deductive reasoning from previous texts. It is not a form of mathematics, where one must worry exclusively about doing one’s sums correctly; it requires attention to historical context and conscious recognition of the moral judgments each judicial decision involves:

I once heard a very eminent judge say that he never let a decision go until he was absolutely sure that it was right. So judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come.

This mode of thinking is entirely natural. The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind.

But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place.<sup>6</sup>

If the historical method, to which we are committed as the Conservative Movement, means anything, it requires us to consider the historical realities behind the relevant texts on any given issue and to apply them with as clear a vision of their historical context as we can muster. We then must compare that context to our own to see if the same norms should apply.

The historical method also, as Holmes rightly states, requires us to recognize that the way in which we choose to interpret and apply received texts depends on an antecedent moral judgment which we make. Historical awareness affects not only our understanding of the past, but of the present and future as well. One who has such awareness must acknowledge that jurists choose *which* of many possible texts to interpret and which to ignore, and they choose *how* to interpret and apply the texts they have selected to examine. In making that choice, their moral convictions inevitably, and often consciously, play an important role, in some cases even a determinative one.

In a religious legal system like Jewish law, concepts of God, humanity, and nature must also affect the jurist's decisions, for in articulating what Jews believe *is* the case, such beliefs set the ideational framework for determining what *ought to be*. In other words, as I see it, moral, theological, social, and historical factors are all part and parcel of the law along with the texts which try to keep up in articulating the law's ongoing development. Consequently, these extra-textual (but not extra-legal) factors can and should have a strong affect on the law without meeting nearly as heavy a burden as Rabbi Roth's methodology would impose.

In theological terms, then, we must *now* determine what we think God *now* wants of us. In making that decision, traditional texts, definitely do play an important role, for they link us to our ancestors and to our heritage, they articulate our tradition's understanding of God, humanity, and the world, and they specify the practices by which Jews have acted on their conceptions throughout history. Moreover, in contrast to Reform positions, we believe that a burden of proof must be borne to deviate from established law — whether that is expressed in the texts of our tradition, in its underlying values and concepts, or in the practices of the observant Jewish community — and we must make such decisions as a community, not as individuals. In the process of our deliberations, however, citing texts is not sufficient and not necessarily the most cogent kind of proof, for we must evaluate traditional texts in light of all that we believe and know. Not for naught did the Talmud warn the judge in every generation to judge “according to what he sees with his own eyes.”<sup>7</sup>

### **The Critical Factor: The Lack of Choice**

Rabbi Roth's legal formalism is bad enough intellectually, but here the results of that method lead him — and, I fear, too many of us — to unbelievably cruel results. All who know Rabbi Roth, myself certainly included, know that he is anything but a cruel man. His method of interpreting Jewish law, however, has led him, in this instance, to results which are unquestionably cruel. Since the vast majority of psychological litera-

ture on the subject attests, as Rabbi Roth admits himself, that psychological techniques are incapable of changing a homosexual person into a heterosexual one, Rabbi Roth is effectively — indeed, explicitly — asking gays and lesbians to refrain from sexual expression all their lives. That result is downright cruel.

Moreover, it is not halakhically necessary and not ultimately Jewish. On the latter point, I, for one, cannot believe that the God who created us all created ten percent of us to have sexual drives which cannot be legally expressed under any circumstances. That is simply mind-boggling — and, frankly, un-Jewish. Jewish sources see human beings as having conflicting urges which can be controlled and directed by obedience to the wise laws of the Torah; it is Christian to see human beings as endowed with urges which should ideally be forever suppressed. It makes of God a cruel director in this drama we call life, and our tradition knew better. It called God not only merciful, but good. God's law, then, must surely be interpreted to take those root beliefs of our tradition into account.<sup>8</sup>

In the case at hand, the simple fact is that all of the organizations of our time which embody relevant expertise on these issues have officially said that homosexuality is not a sickness and that, in any case, it is not reversible.<sup>9</sup> Of course there are individual psychologists or psychiatrists who hold some other view, but to cite them, as Rabbis Roth and Norman Lamm do, is to choose what are by now isolated opinions in the world of psychology to buttress their weak scientific case. It is just like quoting some of our Conservative rabbinic colleagues who think that we should accept patrilineal descent and then pretending that that is the policy of the Conservative Movement. Like it or not, the clear evidence of the psychological community — clearer now than when they took their respective actions in the mid-1970s — is that homosexuality is not an illness and that it is not reversible.

That, for me, is the critical factor which must lead us to rethink our position on this whole issue halakhically. I am impressed by the massive historical data which Rabbi Artson has brought to our attention about the nature of homosexuality in the past, and it may be, as he contends, that cultic, promiscuous, or abusive homosexual relations are the only ones our ancestors could possibly have meant to condemn since those are the only kinds they knew. We all, though, have read Jewish texts on this issue for so long to prohibit all forms of homosexuality that it is jolting to read them in his way. For me, the jury is not yet in on the issue, especially given two texts: the one in the Sifra<sup>10</sup> which describes the marriages of men to each other or women to each other as one of the practices of the Egyptians and the Canaanites; and the one in the Talmud,<sup>11</sup> which, at least as Rashi understands it, praises non-Jews for at least not writing marriage contracts for people of the same gender who were having sex together, presumably in an ongoing and stable relationship.

What *is* clear, though, is that all the traditional Jewish texts assume that homosexuality is a violation of the law because the homosexual could *choose* to be heterosexual. That, we have found, is definitely *not* the case. Three new studies raise the possibility that homosexuality is genetically and/or neurologically determined — or, at least, that genetic and neurological factors over which the person has no control are major factors in making him or her homosexual.<sup>12</sup>

These, however, are only preliminary results. Moreover, even if we assume that these studies are correct, one can, at least at this point, raise “the chicken and the egg problem” — i.e., do these physical factors, which are different in homosexuals, cause homosexuality, or is it homosexual behavior which engenders these physical features of a person? Further research may someday soon resolve these questions.

What is therefore more cogent for me now is the testimony of gays and lesbians themselves. Constitutional gays and lesbians — that is, those who cannot meet their physical and emotional needs in heterosexual romantic relationships (i.e., those in category six and many of those in category five of Kinsey's delineation) — attest that being gay is not something they chose. In fact, because of the widespread discrimination against gays and lesbians in our society, such people usually denied their homosexual orientation for many years and actively tried to fight off their homosexual tendencies.

Jewish law takes such evidence very seriously. Although homosexuality is not an illness, according to all of the relevant professional organizations, it is a feature of a person which that person is likely to know better than anyone else. In that sense, it is akin (although *not* equivalent) to the circumstances under which Jewish law recognizes a patient's need for food on Yom Kippur: "Wherever the person says, 'I need it,' even if a hundred [physicians] say that he does not need it, we listen to him, as Scripture says, 'The heart knows its own bitterness.'"13 Thus even if the compulsion is culturally generated rather than biologically so, and even if some people would then claim that the culture must be changed to avoid homosexuality in some way, for the individual homosexual that compulsion is already a fact of his or her existence — one for which the homosexual himself or herself provides the most reliable evidence and one which, on the best of authority, cannot be altered.

The combination of these sources of evidence, it seems to me, necessitates a rethinking and recasting of the law, *for if anything is clear about the tradition, it is that it assumed that gay behavior is a matter of choice*. Otherwise, a commandment forbidding it would logically make no sense — any more than would a commandment prohibiting breathing for any but the shortest periods of time.

Now, of course, it is logically possible to say to gays and lesbians, as Rabbi Roth does, that if they cannot change their homosexual orientation, they should remain celibate all their lives. As I said before, that flies in the face of some very deeply rooted theological assertions of Judaism. Moreover, it seems to me that that is not halakhically required. If gays and lesbians are right in asserting that they have no choice in being homosexual — and, given the widespread discrimination in our society against them, I have no reason to doubt them in this claim and, indeed, every reason to believe them — then they are as forced to be gay as straights are forced to be straight. That is, gay men can no more extirpate their sexual or emotional attractions to other men and cultivate sexual and emotional attractions of a romantic sort toward women than straight men can expunge their sexual or emotional attractions to women and create them toward men — and, of course, the same thing, *mutatis mutandis*, is true for lesbians and straight women. We are all equally "forced" (אונס) in our sexual orientations.

In discounting this line of reasoning, Rabbi Roth cited the comment by Rava<sup>14</sup> that אונס does not apply to a male's sexual arousal, that having an erection is always voluntary. There are, of course, some problems with this assumption strictly on a factual level. Rava himself recognizes that nocturnal emissions cannot be called voluntary since they occur during the unconsciousness of sleep. Involuntary erections, though, are not restricted to sleep. Males (especially teenagers) often have erections in embarrassing situations where they definitely do not want their penises to be erect. Even if we interpret Rava to be referring exclusively to the context of sexual intercourse, where his remark is more plausible, *his legal ruling would only say that having an erection is always construed to be voluntary; the object which arouses that desire may well not be* — and, indeed, the existence of erections in embarrassing circumstances would argue that it is not.

Indeed, Jewish law seems to acknowledge this differentiation between the voluntarism which produces an erection in a man and the compulsion of the situation or person that may lead the man to produce it. The Talmud specifically includes incest and adultery (גילוי עריות) among the three prohibitions which one must obey even at the cost of one's life.<sup>15</sup> What happens, though, if a person acquiesced to the forbidden sexual act under these circumstances? The Torah already exempts a woman who does this — indeed, that case becomes one of the paradigms for other cases of compulsion. There is general agreement among later Jewish legists that this biblical exemption remains valid even in cases of incest or adultery despite the fact that later rabbinic law specifically provides in such cases that she is supposed to give up her life, if she can, to prevent the illegitimate sex act.<sup>16</sup>

What about a man, though, who has illegitimate sex to save his life? In line with the talmudic assumption that male erections are voluntary, most rabbis do not exempt such men from the death penalty for such

offenses, *but some do!*<sup>17</sup> Even those who make the man liable for capital punishment do so on the explicit assumption that a man can be *coerced to want* to have an erection;<sup>18</sup> he is thus held liable for wanting to engage in the sex act — even though he was being forced into it at the threat of losing his life and even though women so threatened were exempted. I find this latter understanding of his desires implausible and the ruling unfair, but for our purposes the important thing is not that; it is rather to note that even those who take the latter position recognize that a man can have erections in response to people and situations in which he is forced to “want” to participate. This is hardly the level of voluntarism for which we would normally make a person responsible. Most importantly, rabbis *on both sides of this debate* did not automatically assume that the men to whom the talmudic law applied must be passive recipients of the aggressor’s sexual advances but rather could be the active partner in the forbidden sex act. This indicates clearly that all of these rabbis knew that male erections were not all voluntary, that sexual intercourse, even for a man, could be coerced.

Thus Jewish law recognizes the fact that we know from experience, i.e., males can be coerced into sex, even as the active partner. אונס (compulsion), that is, can apply to males engaged in sex. That is not what we usually expect in cases of incest, adultery, or rape, and Rava’s statement may therefore properly be the judicial standard in assessing culpability in most such cases. The case of engaging in sex to save one’s life, however, makes clear that Rava bespeaks a general policy, not an inviolable rule. If his statement is to be consistent with the rest of Jewish law, it cannot plausibly be construed entirely to rule out coercion as an excuse for illegitimate sex for either females or males, even when the latter produce erections in the process.

### **The Legal Implications of Compulsion**

What are the legal consequences if one is compelled to do that which is against the law? Normally, the judgment in Jewish law for such acts is that the person is exempted from any punishment even though the act itself remains forbidden (פטור אבל אסור).<sup>19</sup> Thus, if at some future time this person or any other adult Jew engages in the act *without* being compelled to do so, he or she would be totally liable at law for the infraction. On the theological level, such a person will have committed a sin — that is, a violation of God’s will and hence a rift in one’s relationship with God. The person who sins willingly must suffer the attendant consequences delineated in Jewish law and must seek to make amends to those he or she has wronged and to God through the process of return (תשובה). The previous occurrence of a situation in which the person was compelled is no excuse for any future time when s/he is not.

The category in Jewish law of פטור אבל אסור, however, normally applies to cases in which the compulsion is *temporary*. The classical case in the Mishnah is that of the person who vows to eat with his friend but is prevented from doing so because the friend or his child became ill or because a rising river prevented the one who vowed from reaching his friend’s residence. As Rabbenu Nissim explains the passage, the Mishnah’s cases are specifically cases in which there is *not* full compulsion *and yet* the person is automatically freed of his vow without the need to go to a sage for release from it, for, as Rabbenu Nissim says, “it never occurred to the one exacting the vow that it would apply if something happened such that one could not fulfill it.”<sup>20</sup> The word used to describe what happens to the vow in the first Mishnah of that chapter, in fact, is “התיר,” “they unfastened (released) it,” the verb form of “מותר” (permitted), a considerably more accepting evaluation of the failure to fulfill the vow than “פטור אבל אסור” (freed of liability but still prohibited). The Talmud, though, does not go that far. “When a person is compelled,” explains Rava, even in these temporary ways, “the All Merciful One frees him [from any punishment] (אונס רחמנא פטריה).”<sup>21</sup> (Notice the theological language embedded in the law on this issue).

What would happen, however, if the person could never fulfill the commandment because he or she is *always compelled*? The closest parallels to such a situation are those in which our human bodies compel us to do something. That is true, for example, of our needs to eat, to eliminate waste, and to have sex. In each case,

Jewish law assumes that we cannot, and indeed should not, refrain from these actions altogether. It regulates, however, the circumstances in which these compulsions may be legitimately met. It says, for example, that we may only eat according to the dietary laws and with proper blessings before and after meals; that we must cover our feces; and that we must restrict sex to marriage. This channeling of our natural energies into a specific path for their satisfaction is one way God makes us holy.

These analogues in Jewish law, then, suggest that if homosexuality proves to be an orientation over which the individual has no choice, then the proper reading of Jewish law should be that homosexual acts, like heterosexual ones, should be regulated such that some of them are sanctified and others delegitimated — or perhaps even vilified as abominations. Putting the matter theologically, as the texts on compulsion do, if human beings can never reasonably require that which a person cannot do, one would surely expect that to be even more true of God, who, presumably, knows the nature of each of us and therefore the commandments appropriate to the various groups of us.

### **The Remaining Questions Regarding Homosexuality**

Why, then, is there any question on this issue? That is, why am I *not now* suggesting that we conceive of homosexual sex as being halakhically on a par with heterosexual sex?

In part, it is because the biological information on which I have based my reasoning above is all very new. In fact, as I have said above, at this point I am more convinced by the testimony of gays and lesbians themselves as to the involuntary nature of their homosexuality than I am by the three recent scientific studies which suggest this view of the matter. Another important piece of evidence is the position taken by all the professional organizations of those having psychological expertise that a homosexual orientation is not a disease and that, in any case, it is not subject to change by the techniques known to them.

Taken together, these data are sufficient for me to affirm confidently that we should no longer see homosexuality as a moral abomination. The tradition, in saying that it was, clearly assumed that sexual attraction to, and sexual intercourse with, people of the same gender were totally voluntary. We certainly know enough by now to assert that that is a factual error.

I hesitate, though, to overturn a long history of Jewish norms on this subject by fully equating the moral status of homosexuality with heterosexuality on the basis of the firm knowledge we now have. As disconcerting and frustrating as this may be, to the extent that law is based on scientific information, it must take account of the tentative nature of new findings in an area and be flexible enough to respond to what we know now, recognizing always that more information may make further changes in any of a variety of directions advisable.

Moreover, even if homosexuality were proven beyond a shadow of a doubt to be involuntary, that would still not force a halakhic conclusion. Here Rabbi Roth's point in philosophy of law is absolutely correct: scientific information should inform the legislator's decision, but it does not determine it. The decisor must take a whole host of factors into consideration — scientific, moral, social, historical, economic, educational, and theological — and integrate them all into his or her decision.

What are the other relevant considerations in this case?

Of the issues discussed by Rabbi Roth, it is not, for me, the description of heterosexuality as “natural” or “normal” — and, conversely, of homosexuality as “unnatural” or “abnormal.” It is rather matters of propagation and parenting.

### **“Natural” and “Normal”**

Rabbi Roth and others denigrate homosexual acts as “unnatural” and/or “abnormal.” These terms, indeed, often accompany some of the most passionate anti-gay rhetoric. They express, at least, the feelings of the speaker that homosexual sex acts are revolting, that they do not fit the speaker's understandings of what is



right and proper.

When one examines the usage of these terms in arguments against homosexuality, however, one finds that the speakers all too easily slip from using their descriptive meaning to articulating a prescriptive judgment (G. E. Moore's "naturalistic fallacy"). Rabbi Roth's discussion of this matter (on pp. 47-48) is an example of this danger. He, among others, also wrongly identifies homosexual sex with anal sex.

It certainly is the case, for example, that the vagina excretes fluids which make penetration by the penis easier and less painful for both the man and woman involved in heterosexual intercourse, while the anus has no such feature. That is a descriptive fact of nature. That fact imposes a norm, however, only if one believes that everything natural, in this descriptive sense, is good. That, though, we Jews surely do not believe. We engage in medical treatments, after all, precisely to alter what is the natural course of a disease.

In general, Moore's point is that we cannot deduce values from facts. Facts certainly influence our value judgments, but one needs to invoke and apply a value system and its attendant perspective on life to proclaim some actions good and some bad. It is precisely that value judgment, however, which is in question with regard to homosexuality. Thus calling anal sex acts "unnatural" in a prescriptive sense does not resolve, but rather begs, the question of what our value stance *should* be with regard to such acts.

Moreover, homosexual sex is not the same as anal sex. Lesbians, after all, cannot engage in anal sex; only some gay men do; and some heterosexuals do too. As a result, anal sex is *not* the equivalent of homosexuality or even of homosexual sex. There is, in other words, a basic confusion of definition here. Homosexuality is an orientation, probably best defined as "the attraction to, and the capacity romantically to love, members of the same sex." This orientation, like a heterosexual orientation, involves sex acts, but it is not restricted to them, for emotional components of romantic love and the many non-sexual expressions of the commitment involved in such love play a critical role in defining the orientation. Both a homosexual orientation and homosexual acts are to be distinguished from anal sex acts, which are practiced by no lesbians, some gay men, and some heterosexuals.<sup>22</sup> As a result, if anal sex is judged as abnormal in either a descriptive or prescriptive sense, it is *that* which we should discuss, not homosexuality or homosexual sex acts *per se*.

Our tradition had an ambivalent attitude toward heterosexual anal sex.<sup>23</sup> Although some sources oppose it on grounds of being "unnatural," that, I am afraid, is deducing norms from facts (Moore's naturalistic fallacy again). Some people — perhaps many — simply do not like it aesthetically. That is good reason for such people not to engage in it, but not a basis for the many disqualifications imposed on homosexuals by contemporary society or by Jewish tradition. The substantive issue regarding anal sex, it seems to me, is the impossibility of procreating that way, and I shall address the important matter of procreation below; but then procreation is the issue, not homosexuality or heterosexuality.

The term "normal" is even more ambiguous and hence even more problematic. Does it mean what the statistical norm of people do? If we understand it in that *descriptive* sense, why should we assume that "normal" behavior, so understood, is necessarily right or good? We surely can think of many cases in which we would say that the majority engage in downright immoral actions — even abominations.

Does "normal" instead mean normative? If it does — and it certainly seems to denote this in some of Rabbi Roth's material — then ascribing normalcy to some acts and abnormalcy to others requires a moral judgment about the acts. But how we should judge homosexuality is precisely the point at issue. It cannot be decided simply by calling it "normal" (in the *prescriptive* meaning of that term) or "abnormal"; that would be begging the question.

### **Propagation and Parenting**

Two other issues, however, seem to me to be more cogently related to our contemporaneous judgment of homosexuality. Propagation by homosexuals may be possible through the new techniques of artificial

insemination and surrogate motherhood, but the former, and especially the latter, involve halakhic problems even in the context of heterosexual marriage and, all the more so, outside it. Adoption is, of course, a possibility and, indeed, an honored one in our tradition; but people seeking to adopt a child these days are experiencing immense difficulty in finding one — at least if they want a healthy infant. Consequently, the interest of the Jewish tradition in propagation cannot be met as easily — physically or morally — in homosexual unions as Rabbi Artson suggests.

Rabbi Kimmelman and I — and, I would imagine, all of the rest of the Conservative rabbinate — share the Jewish tradition's concern for procreative marriages. It is important to recognize, though, that increasingly gays and lesbians have the same desires. Two decades ago, when we were in the midst of the "Me generation" and when propagation was, in any case, all but impossible for homosexuals, even those who wanted to have children had to resign themselves to the impossibility of doing so. Now, in the 1990s, both factors have changed. Marriage and families are "in," and medicine has now provided lesbians and even gay men with the potential for having children. Consequently, it will no longer do, if it ever could, to object to homosexuality on the grounds that homosexuals cannot and, in any case, do not want to, procreate. They can and do — and so the only question is whether the means by which they can and do, namely, artificial insemination and surrogate motherhood, pose any inherent problems in themselves or specifically in the context of unmarried people.

The Jewish emphasis on having and educating children raises an anomaly in Rabbi Roth's position. He is willing to accept gays and lesbians to rabbinical school and to allow them honors in our congregation only on the condition that they remain celibate. That is precisely the stance of the Catholic Church. For Catholics, however, all priests and nuns must be celibate, and so their policy with regard to gays and lesbians is simply a consistent extension of their policy toward heterosexuals training for the clergy. Similarly, the Catholic Church prohibits "artificial" means of propagation (or birth control) precisely because they are artificial, whether used by heterosexuals or homosexuals. Within Judaism, however, neither of those conditions applies: we expect rabbis to marry and procreate — to the point that we even look somewhat askance at those who can but do not; and we not only permit, but encourage, couples who are having difficulty conceiving to use whatever methods medicine can provide to help them have children — with the exception, according to most opinions, of surrogate motherhood. A demand for celibacy of candidates for professional or lay leadership, then, seems to be altogether strange within a Jewish context, even granted our residual problems with some of the new procreative methods.

Beyond these matters of propagation, there is the issue of parenting. One should expect the result that recent studies suggest — namely, that two people raising one or more children do better, on average, than one, if only because two people have twice the time and energy to deal with the children that one person has. These factors of time and energy remain the same whether the two people involved are of opposite genders or of the same gender. This finding obviously does not mean that single parents will necessarily fail or that two parents will necessarily succeed, but the availability and skills of two people can reasonably be expected to be a net advantage over one. Moreover, another recent study has given us preliminary information, at least, that children who grow up with homosexual parents are no more likely to be homosexual themselves than children who grew up in a heterosexual environment.<sup>24</sup> It is, of course, also true, as Rabbi Artson notes, that *some* single parents or homosexual couples may actually do a better job of loving and supporting their children (however obtained) than some heterosexual couples do.

As a matter of general policy, though, it is still better, I believe, for children to have both a male and female parent as influences in their lives rather than one parent or two parents of the same gender. That certainly has been the experience of Jewish Big Brothers, which now provides male models on at least an occasional basis for both boys and girls growing up exclusively with their mothers. A Jewish Big Brother helps to some degree to fill in for the absence of the father, but it surely is not ideal. The more we learn about males

and females, the more we discover that men and women differ from each other in immensely significant ways. Deborah Tannen's recent best seller, *You Just Don't Understand*, demonstrates that males and females even talk in gender-specific, distinctive ways, and that betrays much deeper differences in male and female patterns of thought, feeling, and action, as other recent studies have proven. All individuals are unique, but we apparently do share some far-ranging characteristics with the other members of our gender which go well beyond the ways we eliminate bodily waste and our physical roles in sexual intercourse. That means that, all else being equal (which, of course, it seldom is), we should, as a matter of policy, prefer heterosexual parenting over that of single parents or homosexual couples.

Please note: I am not now claiming that these factors — the moral and physical problems involved in homosexual propagation and the psychological advantages of having both a mother and a father — bear sufficient weight to justify prohibiting homosexual relations or to restrict the positions homosexuals should be permitted to assume within the Jewish community. Whether they do or not is a judgment which we as the Committee on Jewish Law and Standards must make in consultation with the Conservative community. Of the various factors which Rabbi Roth and others mention as grounds for their opposition to condoning homosexuals functioning in public roles, these are the ones which I take to have *some* substance. Whether it is enough to justify exclusionary policies of any type toward homosexuals within our Movement is something which we need to discuss openly as a Movement.

In the meantime, to sustain both the letter and the spirit of the resolutions of the Rabbinical Assembly and the United Synagogue, we need to do everything in our power to make people and families of all configurations — married, divorced, single parents, singles, heterosexuals and homosexuals — welcome within our midst. We dare not make them feel shunned or alienated by our synagogues or educational institutions — as all too many unmarried adults do. After all is said and done, what we really want is to increase the number of homes in which we can say that each is a *בית נאמן בישראל*, a faithful home amongst the people Israel. Since such homes come to be only with the education and spiritual sustenance which synagogues and schools provide, our only hope of achieving that goal depends upon taking positive steps to make sure that the welcome which our Movement's resolutions articulate is expressed in our actions as well as our words. Our tradition has depicted ideals of family life, and we may make some decisions about leadership roles with those in mind; but with well over half of adult American Jews finding themselves outside the context of heterosexual, child-bearing marriages, we as a Jewish community had better adjust our institutions and programs fast if we are going to survive as a people. Moreover, as children of God and members of our People, Jews of all sorts deserve no less.

### **The Readiness of the Conservative Movement for Any Decision on Homosexuality**

Having discussed the case on its merits, let me now turn my attention to the community for whom our deliberations are intended. The Talmud, after all, asserts that rabbis may not decree rulings which the community cannot tolerate.<sup>25</sup> While we usually think of that statement as a limit on the court's authority to enact stringencies, it should be understood to apply to leniencies as well. In both cases, the community's readiness for a judicial action must be a factor given consideration. Law does not exist in a vacuum; it can be effective only if it fits its audience. The law should guide and not just condone, but to provide effective direction it must know the sensitivities and practices of the people who are supposed to live by it. Judges in any legal system must be good educators, and that is all the more true for rabbis whose legal decisions are only one aspect of their educational roles.

Gender identity goes to the very root of who we are as human beings. As a result, even raising the issues surrounding homosexuality threatens many people's understanding of themselves and the way they want others to see them. Fear and apprehension pervade the atmosphere. Part of the fear, no doubt, stems from the

threat homosexuality poses to many heterosexuals' fundamental beliefs as to what is right and proper in sexual behavior. Another part of the fear may come from an insecurity in one's own gender identity. The roots of this are very understandable, for human sexuality does *not* come in two, well-defined, exclusive packages, but rather ranges over a spectrum. For most of us, in fact, there is a blend of homoerotic and heteroerotic urges, based, in part, on the estrogen and testosterone which the pituitary glands of every one of us produce.<sup>26</sup>

Our people, even if not Jewishly sophisticated, are predominantly college-educated, bright, and current in their thinking. The vast majority of them, I suspect — especially the younger element, for whom sexual urges are all the more pressing — not only know the new findings of science and psychology regarding homosexuality, but also know that these results require rethinking the whole issue of gender identity and appropriate morals for sex. This is part of what is behind the fact that about half the states of the United States now permit consensual sex among adults regardless of gender.<sup>27</sup> Except for those who are too afraid of this whole issue to talk about it, then, our people know enough, and have been sensitized to this issue enough, to know that a blanket prohibition of homosexuality simply does not accord with scientific facts as we know them now, for it places an undue burden of suppression on those who cannot choose a heterosexual form of expression for their sexual and emotional needs.

They also know and appreciate that gays and lesbians cannot be shunted off to the Reform or Reconstructionist movements, for many homosexuals want to take an active role in the more traditional form of Judaism we embody, especially those who grew up in our own synagogues or in Orthodox synagogues. Some want to be rabbis, cantors, teachers, or youth leaders in our movement, for they are committed to Conservative Judaism and want to act in a professional role to see it prosper. And so the Conservative laity, I think, is not ready for Rabbi Roth's paper.

On the other hand, most of our laypeople, I think, are not ready for Rabbi Artson's paper either. The new knowledge about the etiology and history of homosexuality has shown us many things, but it is all very new for the vast majority of us. Indeed, it is only my interests in bioethics and the phenomenon of AIDS which introduced me to this whole area earlier than most (the early 1980s), and I personally still am having trouble thinking about, and emotionally adjusting to, the moral and halakhic implications of what we have learned so far.

I am convinced that, with all sorts of exceptions, the reaction of people to homosexuality generally follows generational lines. People currently in their teens, twenties, and thirties by and large react more liberally to homosexuality than do people in their forties, fifties, and sixties. There is a simple explanation for this. As one of my graduate students told me, even if you are a straight who finds the very imagination of homosexual sex acts disgusting, if people you know and love have discovered themselves to be gay, you can no longer think of the phenomenon as something strange and threatening. I have no doubt that the percentage of gays when I went to high school and college in the late 1950s and early 1960s was no smaller than it is today, but I never knew that any of my friends was gay (although I discovered at the 25th reunion of my college graduating class that one of my former roommates was). Older people may now know a number of younger people who are gay, but that is not the same thing as growing up knowing such people. Consequently, even if Rabbi Artson is totally right — and I am not convinced he is — it will take some time, particularly for those of us beyond forty years of age, to see that he is. The same, I think, would be true of my analysis based on biological compulsion.

This need for time for thought and emotional adjustment is true for many of us individually, but it is also true for the Conservative Movement as a whole. In the last two decades, after all, we have instituted major changes with regard to the legal status of women within Judaism. We had been preparing for those changes, though, over a long period of time and in many varied arenas. The men and women of our Movement have been sitting together for prayer and studying together from early in this century, if not before. The first Bat Mitzvah occurred in 1922, but it was not until the 1960s or 1970s that many synagogue had boys and girls do

equivalent things in celebration of reaching the age of Mitzvot. Changes in the Jewish marriage contract (כתובה) to insure that divorced women can remarry began in the 1950s. Women were permitted to be called to recite the blessings over the reading of the Torah in 1954, but, again, most synagogues did not begin doing that until the 1970s. Counting women as part of a מנין only became widespread in the 1980s, and only now are Conservative synagogues beginning to hire female rabbis or cantors. The history of this line of development was certainly not always smooth, and we are still feeling the reverberations of these changes. I, for one, am very much in favor of these modifications in Jewish practice to include women, but I recognize that they have taken a toll on our sense of cohesiveness and identity as a Movement. We are still smarting from the rancor that some of these changes produced.

We have not had anything like that preparation or time to absorb the new knowledge about homosexuality and the new sensitivity toward gays and lesbians. Quite apart from the merits of the case, then, I frankly doubt that the Conservative Movement is ready now to make the kinds of changes that Rabbi Artson wants us to make — and certainly not without a major effort in the Movement to study sexual norms on both the lay and rabbinic levels. The recent, fractious experience of mainline Protestant churches on this issue has been anything but encouraging.<sup>28</sup>

But it is not just a matter of time and education; there are also some hard questions which must be answered before the Jewish community can be expected to adopt anything like Rabbi Artson's position. For example, what would family values be like under such a construction? What is, or should be, the halakhic and moral status of artificial insemination and surrogate motherhood, and does it make any difference if the couple involved is straight or gay?

What, if any, are the implications for children being exposed to the sexual models of all sorts that they are in fact now seeing in their teachers and youth leaders? After all, even those who maintain that there is a biological basis for homosexuality acknowledge that that is only part of the picture and that other factors influence the formation of one's sexual orientation. What does that mean, if anything, regarding openly gay teachers and youth leaders? Or is it a matter of the age of the children or the discretion of the teacher or youth leader, whether straight or gay?

What, if any, are the ramifications of gay parenting? Are the preliminary results correct — namely, that there are no significant differences in the results vis-a-vis the emotional security and interpersonal skills of the child when cared for by either a heterosexual and homosexual couple? Are the current studies also correct in stating that the instance of homosexuality in children is no greater when raised by gays than by straights? Does that matter?

What shall we say about bisexuals? Do we urge them to act only on their heterosexual tendencies? Is a homosexual "putting a stumbling block before the blind"<sup>29</sup> in engaging in a relationship with a bisexual in the first place?

These questions are precisely that — questions, not veiled assertions. They bespeak deeply felt concerns of our community, though, including this member of it. Thus, even if Rabbi Artson is right, I do not think that affirming his position at this time would be understandable to many in our Movement, and it would undoubtedly lead to derision on the part of those who object to it on halakhic or other grounds.

We are, then, precisely in the situation we should expect when new information has come to light: we know enough to know that old standards must be altered, but not enough to know how. It is this intermediate and tentative position, with all of its ambiguities and frustrations, which, I think, is at the heart of the 1990 resolution of the Rabbinical Assembly which Rabbi Roth quotes and the similar 1991 resolution of the United Synagogue for Conservative Judaism, both of which are appended to this responsum.<sup>30</sup> The very fact that the Rabbinical Assembly and the United Synagogue went out of their way in those resolutions to make sure that gay and lesbian Jews understand that they are welcome within the Conservative Movement indicates, I think,

that the Conservative rabbinate and laity do *not* want simply to reaffirm that gay relations are an abomination. Why, after all, would we extend ourselves officially to invite into our midst people who openly practice acts so odious as to merit the description “abominations” (not just “sins”)? That would make no sense. I think, therefore, that my reading of the tradition on this matter, as indicated above, is a much more faithful rendering of these resolutions than is Rabbi Roth’s.

On the other hand, the resolutions’ reassertion of family values, while consistent with Rabbi Artson’s position, was intended, I think, to say that we cherish Jewish family values and do not yet know how they can be preserved in the context of a homosexual union. Consequently, I dare to think that my proposal is also more in line with the resolution than is Rabbi Artson’s.

I recognize fully that “justice delayed is justice denied,” and so homosexuals, in particular, will justifiably feel frustrated by the delay in action on this issue that I am proposing. I also recognize that there is a basic inconsistency in my position: on the one hand, I want us to work to eliminate licentiousness in both heterosexual and homosexual relationships; but, on the other hand, I am not, at least at this time, advocating that we perform commitment ceremonies for gays or lesbians. Needless to say, I am not happy about these results.

The Talmud, though, was wise in requiring rabbis to take community receptivity into account in their legal findings. That does not mean that the law should simply condone whatever the community is doing; on the contrary, religious law can and should be normative, even to the extent of asking the community to stretch in its moral aspirations to become a holy people. There is a point, though, when the elasticity of the community approaches the breaking point, and rabbis have the responsibility to recognize that point and to frame their decisions accordingly. Otherwise the law may be pristine in its purity and logically correct in its sums — whether in maintaining past views or in legislating new ones — but simultaneously be the source of derision, abandonment, or, worse still, the breakup of the community it was meant to guide and govern in the first place.

If I am correct, then, we do not, as a Movement, have at this time a definitive position on homosexuality. That does not mean, however, that we have made no decisions whatsoever. Based, I think, largely on the new information we have about the involuntary nature of homosexuality, we have, through the Rabbinical Assembly and United Synagogue resolutions, rejected the classification of all homosexual relations as an abomination — although some forms of gay sex clearly are an abomination, just as some forms of straight sex are. If we had not done that, the resolution would make no sense. We have not, however, thought through all of the implications of this new knowledge, especially how we should reconcile it with the traditional Jewish family values we cherish. Both resolutions, by juxtaposing our openness to gay and lesbian Jews with our commitment to Jewish family values, ask us, separately and together, to carry out the process of thinking through these two convictions.

### **The Challenge — and Opportunity — Before Us**

The case of homosexuality begs for legal reconsideration precisely for the reason that Rabbi Roth demonstrates — namely, that the word “*תועבה*” (abomination), which the Torah ascribes to homosexual sex, does not describe a fact of nature but rather assigns a moral and legal assessment to a given act. Since we now have new knowledge about it, we rabbis have the clear obligation to see homosexual sex anew “with our own eyes” in light of that knowledge. In these cases, even if in none other, Holmes is certainly right: when new facts present themselves, law certainly cannot be a matter of doing one’s sums using the previous texts — as if it ever can be.

I am arguing for as open and broad a process of reconsideration as possible. Only if we discuss sexual norms openly with our community can our discussion be informed and legally effective. Only if we frankly and honestly discuss heterosexual norms of sexual conduct before we address homosexual norms can straights have any credibility with gays on this issue. For that matter, when we come to homosexuality, gays and lesbians

must be included in the discussion. This whole process may be painful, for if the statistics on heterosexual activity in our society are right, 72% of high school seniors have had sexual intercourse, almost all while unmarried, and by the senior year of college it is undoubtedly closer to 85% or 90%.<sup>31</sup> The percentages only go higher as people age further. Rabbis across the continent have confirmed my experience that couples coming to be married during the last ten years or so overwhelmingly list the same address and are no longer even embarrassed about that. Given these realities, traditional norms restricting legitimate sexual intercourse to marriage almost definitely will need to be adjusted — or remain ignored.

I, for one, believe that restricting sexual intercourse to marriage should remain the ideal; with all the sexual license of our society, I still believe strongly in the institution of marriage, in *חופה* and *קדושין*, and the reservation of sexual intercourse until then. Contemporary rabbis, though, like those of the mishnaic period, must recognize that not everyone will abide by that ideal.<sup>32</sup> *This, however, should not mean that Judaism then has nothing to say about sexual norms to those who are not achieving the ideal in this area; it should not be “all or nothing.”* Judaism, I think, would still have much to say to couples who are not abiding by the ideal. Jewish values relevant to such a situation would include the following, among others: modesty in dress and speech and privacy in sexual expression; honesty and openness in determining the nature of the relationship and its planned duration (“truth in advertising”); compassion and fairness in dissolving the relationship (if that happens) and in dividing the formerly shared property; the Jewish concern for health in communicating honestly about one’s susceptibility to AIDS and to other venereal diseases and in protecting each other from them to the extent that that is possible; responsibility in planning for the possibility of children — and for custody of them if the arrangement is dissolved; etc. The process of determining how Jewish values can still instruct an unmarried couple living together may disturb us rabbis and others devoted to the tradition, but it is absolutely necessary if Judaism is going to have any effect whatsoever on Jews’ sexual lives.

In view of my interest in an open discussion of these matters, one other thing must be said. As much as I object to the cruelty of Rabbi Roth’s ultimate judgments, I object even more to the suggestion he made in the first draft of his paper that his opinion be adopted as the sole opinion which any Conservative rabbi may follow, on pain of expulsion.<sup>33</sup> Our new knowledge about homosexuality is enough *at least* to say that nobody can speak with one definitive voice on the etiology of the phenomenon or on what standards are best for Judaism and for Jews with regard to it. Rabbi Roth’s suggestion of invoking precedents of *ממרה וקץ* smacks of witch hunts and inquisitions — and, frankly, of the utter fear many of our Orthodox colleagues have of voicing their honest opinions on many issues and of acting on them. No matter what our various positions on homosexuality may be, we must clearly and definitively reject such a move in order to preserve one of the real assets of Conservative Judaism, its recognition of the dynamism of Jewish history and the consequent wisdom of openness and pluralism in dealing with issues where old certainties are no longer so certain.

My proposal suffers from a procedural problem: a move to table requires a majority, while acceptance as a validated option within the Conservative Movement requires six. If the Law Committee in its wisdom, then, refuses to table this matter and adopt the plan I am proposing, I will submit my paper as a *responsum* requiring six votes. Rabbi Roth has softened the application of his position somewhat since our February meeting, and, at bottom, that puts his rulings not far from mine, at least for the present. I, however, would leave it to individual rabbis to determine the status of homosexuals within their synagogues, saving only the prohibition against commitment ceremonies for the interim, while he would be more restrictive. More importantly, he and I disagree on the status of homosexual sex acts for the constitutional homosexual. He sees them as an abomination to be avoided by celibacy; I see them as the only way some of God’s creatures can fulfill their sexual and emotional needs and therefore not an abomination *per se*. Clearly, some homosexual sex acts are an abomination, just as some heterosexual sex acts are, and we need to define the spectrum of sex acts, from abominations to sanctified relationships, for both heterosexuals and homosexuals. We need, in other words, to

explore both heterosexuality and homosexuality to devise norms which reflect Jewish beliefs and values and which will be taken seriously in our time.

Opening the issue of homosexuality emphatically does *not* entail overturning all the other prohibitions in Leviticus 18 or 20. That is worst sort of use of the domino theory. As with most applications of that theory, it ignores relevant differences among the various members of the group, differences which fully account for why, contrary to the theory, laws and people do not fall like dominos. In our case, the whole point of this paper is that homosexuality is different from all other sex acts in that list in that current evidence indicates that the homosexual has no choice in being homosexual. It is that piece of new information which underlies a rethinking of the status of homosexual sex acts. This clearly does *not* apply to any of the other acts prohibited in Leviticus. Heterosexuals may surely be tempted to have sex with forbidden human partners or even with animals, but they can, and, by law, must choose to channel their sexual energies within the bounds of marital sex.

One last matter. Rabbi Frait asked whether the number of people we are talking about makes any difference. Yes and no. Yes, if only one or two per Jewish community were involved, I might say we should just shove the issue aside halakhically and deal with the matter solely on the basis of counselling. It takes considerably time, energy, and emotional investment, after all, to rethink patterns of thought and action which we have pursued for centuries, especially when they are embodied in Jewish law. But no, that is not the case. *At the very lowest estimate*, 4% of the human community is homosexual. Figure that out. If the American Jewish community numbers approximately six million, that means that 240,000 Jews are homosexual — almost as many, according to the *American Jewish Yearbook*, as there are in Rabbi Frait's home town of greater Chicago. If the more commonly accepted estimate of 10% is used, we are talking about 600,000 — a number equivalent to all the Jews in Chicago, Philadelphia, and Boston put together. Because of the high social and economic cost entailed in acknowledging homosexuality, even on a supposedly anonymous survey, the estimates are, if anything, low.

As I said during the December meeting, I think it would be a disaster for the Movement if the Committee on Jewish Law and Standards approved opposing papers on a topic as central to people's lives as their sexuality is; it would mean that we are totally incoherent. I think it would be even worse, though, if only Rabbi Roth's position were validated. We would then not only be ignored, especially by most of our younger members, straight as well as gay; we would be seen as austere, alienating, and cruel.

This, however, brings me back to the beginning. I strongly recommend that we table action on Rabbi Roth's and Rabbi Artson's תשובות and engender a movement-wide discussion of appropriate Jewish standards of sexuality for our age. I am convinced that it would not take all that long to devise such standards — maybe two or three years — and that whatever time, money, and energy it would take would be more than worth it. We would be addressing something which, in some form, is part of literally everyone's life, and we would be doing it openly, Jewishly, and, hopefully, intelligently.

I have no special wisdom as to the most effective format for this discussion; that is a matter we should discuss among ourselves and with the educational arms of the Movement. The tasks would be two-fold, probably accomplished in different ways and by different people: (1) to establish Jewish sexual standards for our time, recognizing in that process the values of the tradition, the social realities of modern life, and the new knowledge we have of the formation of sexual orientations; and (2) to educate our constituency as to the product of our deliberations so that they will at least know that Judaism, in this area as in all others, continues to have something important to say to them even if one is not fully complying with its ideal norms. Lay leaders of various ages should be involved on both levels to give us rabbis some input as to both the practices and views of those not as involved with the tradition as we are. Moreover, given that at some point we will want to apply the tradition to homosexual sex, gays should be specifically included in the discussion.



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If the Law Committee were to initiate such a process, we would be acting as rabbis for our community in a very powerful sense of the title “rabbi,” for we would be bringing the values and laws of the Jewish tradition to bear on an important part of the real lives of our people. What we need now is creative vision and cooperative discussion, not a premature lashing out at the “other.” We have a golden opportunity in our hands to generate some real intellectual and moral movement in our Movement; we should not miss it.

### NOTES

I would like to thank Mr. David Bianco and Rabbi Daniel Gordis, both of whom did me the favor of providing detailed and constructive critiques of earlier drafts of this paper. I would also like to thank the members of the Committee of Jewish Law and Standards, many of whose comments at the three meetings at which this subject was discussed also led to rethinking and revision. That is how we all learn!

In the following, M. = Mishnah; T. = Tosefta; B. = Babylonian Talmud; J. = Jerusalem (Palestinian) Talmud; M.T. = Mishneh Torah; and S.A. = Shulhan Arukh.

1. Aristotle, *Nicomachean Ethics*, Ch. 3; cf. Ch. 7.
2. The Rabbinical Assembly resolution (*Proceedings of the Rabbinical Assembly 1990* [New York: Rabbinical Assembly, 1991], p. 275) is as follows:

#### GAY AND LESBIAN JEWS

Whereas Judaism affirms that the Divine image reflected by 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, siblings and other relatives, and

Whereas the AIDS crisis has deeply exacerbated the anxiety and 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 traditions 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 synagogues and the arms of our movement to increase our awareness, understanding and concern for our fellow Jews who are gay and lesbian.

The November, 1991 resolution of the United Synagogue of America was identical, except that it omits the “Whereas” clause on AIDS and the fourth resolution.

3. I am aware that the words describing sexual orientations have taken on political meanings for some people. Let me say at the outset, then, that I intend no such political connotations. As evidence of that, and simply for variety of style, I shall use words like “homosexual,” “gay,” “lesbian” “heterosexual,” and “straights” in roughly equal proportions. That will hopefully

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enable me to discuss the issues involved without any position preconceived or indicated in the language I use.

4. Joel Roth, "Homosexuality," p. 25 of the typescript.

5. *Ibid.*, p. 115.

6. Oliver Wendall Holmes, Jr., "The Path of the Law," 10 *Harvard Law Review* 457 [1897].

7. B. Bava Batra 131a. Holmes' philosophy of law was only one of the first alternatives to legal formalism; it is surely not the only one. The precise nature of the interaction between legal texts and the law as lived in the community has been vigorously debated in the twentieth century, most recently by people like Robert Cover, z"l, Ronald Dworkin, and Michael Moore. This is not the place to discuss their various approaches and to evaluate the applicability of their theories to Conservative Jewish law. Instead, what I have written in this section is only meant to demonstrate the limitations of the kind of formalism Rabbi Roth espouses, and I leave it to another time to develop some of the positive theses of recent philosophy of law.

8. Along these lines, of all the arguments I have heard over the last six months on this issue, Rabbi Morris Shapiro's is clearly the most intriguing. After our February meeting, he told me that after the Holocaust he no longer can believe in a good God. He therefore sees the commandments of God as decrees which bind us with no pretension of their being good in any of the usual senses of that word. For him, then, the Torah's prohibitions of homosexual sex acts fall under the general rubric of God's inscrutable commands. As he emphasized during our March meeting, we can challenge God's morality, but we must do so out of a sense of humility and, in any case, our challenges do not give us grounds to change the law. We simply cannot understand God but must obey His laws nonetheless.

Rabbi Shapiro has the courage of his convictions, and I sincerely and deeply admire that. My own view on the Holocaust and its implications for our faith, expressed some years ago ("God and the Holocaust," *Judaism* 26:1 [Winter, 1977], pp. 27-34), posits, as Rabbi Shapiro does, that God was indeed involved in the Holocaust. I, however, still maintain the traditional faith that, even with that unfathomable fact, God is ultimately good. It is possible that the differences between us are generational; born in 1943, I, after all, did not experience the Holocaust as an adult, as he did. Instead, I was shaped by the frankly comfortable American environment in which I grew up, and my theology undoubtedly reflects that — although I hope it is not insensitive to human suffering, as evidenced most especially in the Holocaust. In any case, I believe, along with the Jewish tradition, that God, however inscrutable at times, is ultimately good, and that fundamental belief must enter into how I and all who share that belief interpret Jewish law.

9. The American Psychiatric Association deleted homosexuality from its list of mental disorders in 1974, and similar decisions were made by the American Psychological Association in 1975 and by the National Association of Social Workers in 1977. Although political factors may have influenced those decisions in part, that stance remains the considered opinion of the mental health professions, now with even more evidence. See the *American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders*, Third Edition, Revised (DSM III-R), 1974, 1986.

10. Sifra, "Aharei Mot," *Parashah* 9:8.

11. B. Hullin 92a-92b.

12. *Newsweek* just recently ran a cover-page article discussing this and other research on the matter. See "Is This Child Gay? Born or Bred: The Origins of Homosexuality," *Newsweek*, February 24, 1992, pp. 46-53. See also "What Causes People to Be Homosexual?" *Newsweek*, September 9, 1991, p. 52; and "Survey of Identical Twins Links Biological Factors With Being Gay," *Los Angeles Times*, December 15, 1991, p. A43.

13. B. Yoma 83a; M.T. Laws of the Sabbath of the Tenth Day (*Hilkhot Shevitat Asor*) 2:8; S.A. Orah Hayyim 618:1.

14. B. Yevamot 53b; cf. M.T. Laws of Forbidden Intercourse 1:9; Laws of Courts (*Sanhedrin*) 20:3. Rabbi Roth cites this point of law on p. 93 of the typescript of his responsum.

15. B. Sanhedrin 74a.

16. Deuteronomy 22:26-27. Cf. M.T. Laws of the Foundations of the Torah 5:4; Laws of Courts (*Sanhedrin*) 20:2.

17. R. Solomon ibn Adret (Rashba) on B. Yevamot 53b; Responsa of Rabbi Yitzhak bar Sheshet Barfat (the Rivash), #4, #11, and #387; Magid Mishnah on M.T. Laws of Forbidden Intercourse 1:9, in the name of "There are those who say." See also Tosafot to B. Yevamot 53b, s.v. *sheansuhu* and s.v. *ain*.

18. Kesef Mishnah to M.T. Laws of Courts (*Sanhedrin*) 20:3. In general on this topic, see *Encyclopedia Talmudit*, "אונס," Vol. 1, pp. 346-360, esp. pp. 348-9 (n.b. notes 20-24) and p. 358 (n.b. note 148) (Hebrew).

19. B. Bava Kamma 28b, et. al. See also Sifra on Lev. 20:3; Sifra, "Tzav," end of chapter 14; M.T. Laws of the Foundations of the Torah 5:4; Tosafot on B. Yevamot 54a.

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20. Rabbenu Nissim's comment is printed on the page of the standard editions of the Babylonian Talmud, B. Nedarim 27a. That the vow is canceled automatically follows from the Mishnah Nedarim 3:1, of which this Mishnah is the explanation.
21. M. Nedarim 3:3 (27a); B. Nedarim 27a; M.T. Laws of Sanhedrin 7:10; Laws of Selling 11:13, 14; Tur and S.A., Hoshen Mishpat, Ch. 21; 54:5; and 207:15.
22. I am indebted to Mr. David Bianco for clarifying this for me.
23. See David M. Feldman, *Birth Control in Jewish Law* (New York: New York University Press, 1968), pp. 155ff for a discussion of the ambivalent attitudes rabbis over the ages had toward anal sex. Rabbi Roth discusses this; see pp. 38ff of his typescript.
24. *New York Times*, January 21, 1987, p. C16; Samuel Guze, "Children in Lesbian Homes," *Psychiatric Capsule & Comments*, 6, 4:1-2.
25. B. Avodah Zarah 36a, et. al.; M.T. Laws of Rebels (*Mamrim*) 2:5.
26. The relationship between these hormones and sexual orientation, however, is anything but simple. Some studies have found that gay men become more same-sex oriented when given testosterone, not less.
27. Richard D. Mohr, "Gay Basics: Some Questions, Facts, and Values," in James P. Sterba, ed., *Morality in Practice*, 3rd edition (Belmont, CA: Wadsworth Publishing Co., 1991), p. 406.
28. See, for example, "Homosexuality Issue Threatens National Council of Churches," *Los Angeles Times*, December 7, 1991, p. B-4.
29. Leviticus 19:14, which is interpreted by the rabbis to prohibit not only a physical stumbling block, but also an intellectual and, especially, a moral one. Examples of this verse being interpreted to prohibit a physical stumbling block: B. Moed Katan 5a. An intellectual one: Sifra, "Kedoshim," on Leviticus 19:14; B. Nedarim 62b. A moral one: B. Pesahim 22b; B. Moed Katan 17a; B. Kedoshim 32a; B. Bava Metzia 75b.
30. Rabbi Roth cites it on p. 141 of the typescript of his responsum. It is drawn from p. 275 of the *Proceedings of the Rabbinical Assembly* for 1990.
31. That 72% of high school seniors have engaged in sexual intercourse: The report of the federal governments Centers for Disease Control, as reported in "54% of High School Youth Have Had Sex, Report Says," *Los Angeles Times*, January 4, 1992, p. A-2. (While I guessed that 85 to 90% of college seniors have engaged in sexual intercourse when I wrote this responsum, subsequently a definitive study confirmed that guess: Robert T. Michael, John H. Gagnon, Edward O. Laumann, and Gina Kolata, *Sex in America: A Definitive Survey* [Boston: Little, Brown, and Company, 1994], p. 91.)
32. M. Ketubbot 1:5, its explanation and expansion in B. Ketubbot 12a, and M. Yevamot 4:10 all testify to the fact that in Judea (in contrast to the Galilee) the custom was that a man lived with the family of the woman he intended to marry during the year between betrothal and marriage. Consequently, he was barred from claiming that she was not a virgin at marriage since we assume that he may well be the one who made that so.
33. Roth, "Homosexuality," pp. 123-124 of the typescript, including note 168.