

## Medical and Moral Reasons to Change the Law

By Rabbi Elliot Dorff

I am glad to be part of this conversation, but I do want to put it in context. I am very much in the middle of the Movement, and in some ways that is attested to by the fact that I've written about 15 t'shuvot for the Law Committee, and most of them have gotten overwhelming votes in favor. In a lot of the issues that we confront in the Conservative Movement, Rabbi Roth and I are very much on the same side. Truthfully, we share much more than we don't. So the fact that we disagree about this particular issue should not be taken out of context.

The second piece of context is my own understanding of this entire issue, for after all is said and done, law does not exist in an isolated realm. It emerges out of the context of the particular lawmaker or the particular judge: that person's background, that person's experiences in life, that person's values and hopes. And what happens in any legal system is that the people who are charged with interpreting it and applying it inevitably do so, not just on the basis of their intellectual deductions or inferences, but also on the basis of their "kishkas," their social associations, and their biographies. So, consequently, there is one piece of my own biography that I think is important to understand here.

When I was growing up, I had no idea what the word "homosexual" meant. The first I ever heard about this whole issue was in 1961, when I was a freshman at Columbia and took the mandatory great books course. One of the books was Plato's Symposium, in which Plato understands the homosexual relationship between a master and a student as being the culmination of their relationship. We tittered about that for two days, and then it was on to the next book. The next time that I even heard about this subject was in 1973. I was already in Los Angeles, and a friend of mine called me. He was then a rabbi in Cleveland. He told me that a young man in his congregation — who had become part of the Joint Program between the Seminary and Columbia — had come out as a gay man and had been shunned by the Seminary community, so he had transferred to UCLA. The rabbi wanted me to meet with him, simply to tell him that the Jewish community still cared.

I met with him for about three hours one day. Truthfully, all I knew about the subject was Leviticus. He really gave me an education as to what it was like to be a committed Jew and absolutely condemned, at least apparently, by the Torah itself and by the later Jewish tradition as well. I have to say that this was the first, and truthfully the only time, that I have been genuinely embarrassed by my tradition because it didn't seem to me right that a good God, a moral God, would in some way or another create people who wanted to be traditional and, nevertheless, found themselves to be homosexual.



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The next time I was involved in this issue was after the AIDS virus was identified in 1981. I do a lot of work in bioethics, and so I was on a task force at UCLA Medical Center in regard to AIDS. This ultimately got me involved in Nechama, the Los Angeles Jewish AIDS response. So my own interest in this issue really came over time and was a result of these modes of exposure to the issue. From the very beginning, I understood this as being a generational issue because I've noticed that my children had a very different experience about this. When they were in high school in the eighties and early nineties, they knew a number of people who were openly gay or lesbian, and being gay or lesbian was just not an issue. I can't say that's true for everybody in their generation, nor can I say that my view is contested by everybody in my generation, but I do think that part of this is generational.

Let me now move to law. We start with the verse in Leviticus: "A man shall not have sex with another man as a man has sex with a woman; it is an abomination." The verse is not clear. "It is an abomination" sounds absolutely horrendous in English, as if it is by far the worst possible violation of the Torah that one can imagine. I need to tell you, though, that the Torah uses the exact same word for people who eat non-kosher meat. It uses the same word, also, for people who do not use honest weights and measures in business. So this particular prohibition is not singled out as being the only thing that merits that term. Also, the very thing it is prohibiting is itself not clear: "A man shall not have sex with a man as a man has sex with a woman." How does a man have sex with a woman? My guess is that the vast majority of sex between men and women is vaginal. Men do not have vaginas. What does it mean then for a man not to have sex with another man as a man has sex with a woman? That is physically impossible. So the very thing the Torah meant to prohibit is itself not clear.

We, however, are Conservative Jews. We certainly believe that the Torah has a history and that Jewish law has a history, and we take that history very seriously. The fact of the matter is that the tradition understood all forms of male homosexuality to be prohibited. Even though the Torah itself mentions nothing about women, the tradition also includes a rabbinic prohibition in regard to lesbian sex. That has been the tradition on this until our own time.

In most other areas of the Torah, the Rabbis expanded what the Torah said, contracted what the Torah said, changed the form — and we are the recipients of a whole tradition of Rabbis trying to deal with what the Torah said. In this case, we do not have that. Part of the reason why this issue is so problematic for us as Conservative Jews — who take Jewish law seriously — is that we do not, in this case, have a long history of development regarding this law. Consequently, those of us who are interested in understanding the law differently are in the first generation of Jews who are testing this law, testing what its scope is and ought to be. Because of the very short legal history on this law, this is very close to what lawyers call "a matter of first impression."



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My own understanding is that we have both moral and medical reasons for changing the law. The medical reason is that AIDS is still lethal. The cocktail of drugs that was discovered for it in 1996 only works for about half of AIDS patients, and we are finding out that many of those patients who have returned virtually to full health as a result of these drugs are now developing strains of the disease that are resistant to the drugs. In addition to that, there are many other sexually transmitted diseases. We are given medical mandates by our tradition to take care of our bodies and to help other people take care of theirs. With all of modern medicine, for all of the sexually transmitted diseases, the most effective way to avoid them is either to have no sex at all or restrict oneself to monogamous sex. Consequently, we have a very clear interest in trying to get gays and lesbians within our community to be monogamous.

How do you do that? To tell them “Have no sex whatsoever” is just going to be seen as impossible. It is one of the problems we have with what we say to heterosexuals about their sexual activity as well. What do you say to unmarried heterosexuals? If you say “Don’t do anything,” I can guarantee you that Jewish tradition will become completely irrelevant to people from puberty until they get married. So what we need to say is that Jewish tradition has the ideal of not having sex until you’re married, but if you’re not going to be able to attain that ideal, then understand that Judaism is not an all-or-nothing kind of thing, in sex or in anything else for that matter. What that means is that the Jewish values and laws that govern sex should, to the extent that they can, be observed by unmarried people having sex.

The same thing is true for gays and lesbians; namely, that the hormones “do their thing” at more or less the same ages as they do in heterosexuals, and in one way or another, they will, for most people, be expressed in some sort of sexual activity. So we have a medical reason to get them to be monogamous.

We also have a moral reason — the same reason we have to convince heterosexuals to be monogamous. Why is the tradition interested in that? In monogamy, we get people to take responsibility for one another. After all is said and done, marriage is not just a license to have sex together with a given person. It is also an announcement before family and friends that you are going to take responsibility for each other. That is the moral piece of it. In part, that is expressed in the ketubah. I think everybody understands that when they get married in front of family and friends, this is not going to be just a series of sex acts together. It is also living life together, sharing its joys and the pains as well as the ongoing, regular moments of life, and growing old together. And how do we get people to do that? Partly through the ceremony of marriage. That does not guarantee that there will not be adultery. But it does lead to the probability that they will be faithful, because they have announced this commitment to each other in front of family and friends.

If we do not do the same sort of thing for gays and lesbians, then we heterosexuals are being duplicitous, because what we are saying is, “We will not give you the authorization to have a



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commitment ceremony, or whatever you call it; we will not give you that kind of public affirmation; and then we will look down our noses at you if you are promiscuous.” My position also involves a number of humrot, a number of stringencies, in that I would then expect gays and lesbians not to be promiscuous. I would, in fact, expect them to be monogamous, and I would expect them to conduct their sexual lives under the same Jewish norms that we expect heterosexual Jews to, including procreation. I would hope that lesbians either get artificially inseminated or adopt children and raise them. I would hope that gay men either adopt children or use surrogate mothers to have children and that, frankly, they help us with our demographic crisis as Jews.

Until now, the science has been very soft on all of this. That is, we have not really known what leads to sexual orientation to begin with, for either heterosexuals or for homosexuals. What is clear is that in 1973 already, based upon clinical evidence, the American Psychiatric Association, the American Psychological Association, and the American Association of Social Workers all maintained that it was not necessary, or for that matter even desirable, to try to change a gay person into a straight person. That kind of intervention was not successful and, aside from that, led to even more problems — in many cases, unfortunately, suicide. Already in 1973, the American Psychiatric Association took homosexuality out of the DSM, the manual of mental diseases. Some maintain that this decision was politically rather than scientifically motivated. Whether that is true or not is open to question. Eighteen years later, however, when the American Psychiatric Association reaffirmed its position in 1991 based on yet more clinical evidence, clearly the science was motivating its stance. That position, though, was based solely on clinical evidence of what, in fact, works and what does not work in the treatment of people who come to them for some kind of intervention.

Just last week (October 21), a report came out of UCLA that may be the beginning of some hard scientific evidence about how we develop sexual identity. It stated: “Refuting 30 years of scientific theory that solely credits hormones for brain development, UCLA scientists have identified 54 genes that may explain the different organization of male and female brains... Published in the October edition of the journal *Molecular Brain Research*, the UCLA discovery suggests that sexual identity is hard-wired into the brain before birth and may offer physicians a tool for gender assignment of babies born with ambiguous genitalia....Sexual identity is rooted in every person’s biology before birth and springs from a variation in our individual genome.” This is all very new. You need to know that the science is just developing, but it appears that what scientists expected all along — namely that there was some genetic base to who we are, as we are — is true.

A prohibition only makes sense if the person to whom it is addressed can do it. What we are finding out is that choice does not really exist. You can say to gays and lesbians, do not have sex ever, which is logically, at least, a choice — but I think that is very cruel. It means that from the



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point of view of Jewish tradition, gays and lesbians could never in their lives have legitimate sex. I think that is both cruel and, in many ways, un-Jewish, because Jewish tradition did not tell us to completely suppress our sexual urges. Jewish tradition said that what we are supposed to do is channel our sexual desires into legitimate modes of expression.

It seems to me that what we now know about the etiology of sexuality is enough to say that what we need to do is to understand the verses about homosexuality in Leviticus and the rest of their sparse legal history in a very lawyerly way. That is, what did the Rabbis do? The Rabbis expanded the scope of various requirements and prohibitions in the Torah. They narrowed some to the point of extinction, like capital punishment. They themselves say that if a court issues a capital verdict once in seven years, then that is a bloody court. On the other hand, they expanded things like Shabbat to the extent that they say it is like a mountain hanging on a hair because there is a lot of rabbinic legislation and very little biblical legislation.

I would simply affirm Leviticus but understand it as referring to cultic sex — which, judging by its context in the Holiness Code, may be what it was talking about to begin with — as well as to promiscuous sex and oppressive sex. I think those three forms of sex are indeed abominations, whether they are referring to homosexuals or heterosexuals. But consensual, monogamous sex by adults I would want to sanctify in some sort of commitment ceremony.

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