

ON HOMOSEXUALITY AND BIBLICAL IMPERATIVES: A CONCURRENCE

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This paper was submitted as a concurrence to the CJLS "Consensus Statement on Homosexuality" and the papers by Rabbis Roth, Kimelman, Rabinowitz, and Dorff. Concurring and dissenting opinions are not official positions of the Committee on Jewish Law and Standards.

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.

I was heartened to see that the Committee affirmed the traditional prohibition of homosexuality. I did not feel another resolution was tenable. I wanted to enter into the record the reasons why and offer a text which I found persuasive which is not represented in the other papers appended here.

Our Torah and tradition bear a very difficult message for modern interpreters; a counterintuitive one that I feel strongly is essential. Against rigid orthodoxy, we correctly claim the grant of *אין לדיון אלא מה שענינו רואות* (the judge must rely on his own insight). But God's commands are not infinitely malleable and the *דיון* must as well train his eyes to the Torah and tradition. For the Torah's premise, that of the concept of revelation, is that God gave specific instructions to Israel and that thus, in some sense, it is His word that we are instructed to follow and are always struggling to find. In our tradition, antiquity, that is proximity to Sinai and the events of revelation, is a *prima facie* argument in favor of a practice, rather than its indictment as superannuated, antediluvian, *passé*.

When, then, can we rely on our own insights, and when do we follow what we have received? I have always held there to be three gradations in the mutability of halakhic prescriptions, roughly as set forth by Maimonides in his introduction to the Mishneh Torah. That which is of recent or popular vintage is most susceptible to our inclinations and by that I mean, effectively, all that is post-Talmudic. Those rulings have their provenance during our own halakhic epoch. Within this category, it is true, we might be differentially more respectful of a Rishonic precedent than one of Aharonic vintage but it is a matter of degree, not of kind.

Worthy of a higher degree of respect are classic rabbinic rulings from the period of Mishnah and Talmud. Ours is a rabbinic Judaism. Many of the institutions which create and inform Judaism as we know it were expounded or created by the men (such they

were) of that age. But we too are rabbis equally, both men and women. As Rabbi Solomon Luria writes in his elegant argument for academic freedom in the Introduction to his *ים של שלמה* (Hullin):

אני אמרתי אלהים אתם ובני עליון כלכם אכן כאדם תדרושון.

I have said: You are as gods, all heavenly progeny, but you teach only as humans.

Our allegiance to rabbinic structures and rulings is profound, they are subject to our faith, but also, ultimately, subject to our best judgement.

The third category, however, is beyond us. It is the category of Torah. Now as to the Sinaitic provenance of any single command many will argue. But we insist that that form of command and response, *נעשה ונשמע*, a faithful and total commitment, was true of Sinai, and that we are no less committed to a covenant of observance today than we were then. In effect, the text of the Torah, though we understand that it, too, is the product of generations, represents that original covenant. It serves as our constitution and cause, the heart of our exegesis, the font of our nation's self-understanding. In this area, it is not sufficient to claim authority, though as Drs. Roth and Rabinowitz indicate, authority exists to change even the prescriptions of Torah. In this area the standard is much stricter. To abrogate Torah one needs to argue compelling national need, the requirements of Israel's survival. Then, indeed, Torah may succumb – provisionally, at least. Let God or Elijah eventually set the record straight.

In this matter of homosexuality we find ourselves squarely questioning the propriety of a clear Biblical prohibition. While Rabbi Artson tried artfully to dodge that bullet, it was the overwhelming consensus of the Committee that that could not be done. What we debated, in fact, was what I presume to have been the source of Rabbi Artson's involvement – to wit, whether the dislocation and pain felt by homosexuals today was sufficient ground to overturn the Torah's prohibition. Here, I feel, we were led astray by the term *תועבה*, “an abomination.” That term and our profound feeling that it was inappropriate caused much consternation even among those inclined to be most cautious about the Torah's text. It bears stating clearly and repeating that we did not need to and did not, in fact, debate whether homosexuality must now and ever be considered an abomination. We needed only to consider the prohibition. Without further argument, I think the burden of overturning Torah's text, that we act for the survival of Israel, was not met by the private anguish that we heard. I was dismayed, however, by the cavalier dismissal of the voice of *Vayikra* that was heard in some of our discussions. Others can brand *Vayikra* as a product of “excessive priestly zeal.” We consider it Torah. We choose, as our tradition would have it, to read this very prohibition on Yom Kippur. To disregard this level of commandment is to set every other commandment at risk. We do so at our peril.

Withal, we might consider waiving the Torah's prohibition if we were certain of our grounds. But scientific evidence with regard to the origin and unambiguous nature of homosexuality is unclear. The Biblical and rabbinic creation traditions, on the other hand, are not ambiguous at all. Gen. 2:18ff. reflects the creation of humankind and commands:

על כן יעזב איש את אביו ואת אמו ודבק באשתו והיו לבשר אחד.

Therefore a man shall leave his father and his mother and cling to his wife, and they shall be one (Gen. 2:24).

All creatures were considered, all possibilities were open. A clone of Adam (*עצם מעצמי*, bone of my bones) would be male. But the result, the fit mate, is woman. We do not need Bavli Sanhedrin (58a, Bereishit Rabbah 18:5) to interpret for us:

ודבק באשתו – ולא באשת חברו, ולא בזכור, ולא בבהמה.

“And cling to his wife” – and not to his neighbor’s wife, and not to a male, and not to an animal.

The Midrash, in its response to the anthropomorphic and polytheistic threat implied in the words בצלמנו כדמותנו resolves them thus:

לא איש בלא אשה ולא אשה בלא איש ולא שניהם בלא שכינה.

No man without a woman, no woman without a man, and neither without God’s presence (Sanhedrin 38a, Bereishit Rabbah 8.9).

The very fact of procreation, the very first official commandment, argues persuasively the Torah’s premise and expectation of heterosexuality.

Now, I understand that this is myth. But it is constitutive myth. It is fundamental to our perception of the world. It makes the Jewish people who they are. If we were to abandon this we could as well abandon the tale of the Exodus or challenge the notions of creation or revelation. Extreme claims, they are not about homosexuality, which in and of itself is not as threatening. They are about Torah and the notion of covenant and allegiance to our received traditions.

Indeed, even in the Torah one can discern clear emphasis on certain bodies of laws, among them chapter 18 in Vayikra wherein the prohibition of homosexuality is found. The exhortation to “do and observe” the “ordinances and statutes” of the Lord (and not those of the nations) is repeated three times to begin the chapter and again three times to end the chapter. Similarly the Rabbis note that the sexual offenses listed must be unusually significant because this chapter begins and ends with the words ‘אני ה’ – אלהיכם – “I am the Lord your God.” The classic Tannaitic exegesis to this chapter speaks volumes, and it is that text that finally convinces me that there is no room to overturn this particular regulation.

We read selections from Sifra, Aharei Mot, *ad locum* (Perek 13):

דבר אל בני ישראל ואמרת עליהם: אני ה’ אלהיכם. רשב”י אומר: אני ה’ שקבלתם מלכותי עליכם במצרים? אמרו לו: הין והין. קבלתם מלכותי. קבלו גזירותי! אני הוא שקבלתם מלכותי בסיני? אמרו לו: הין והין. קבלתם מלכותי. קבלו גזירותי!

“Speak to the children of Israel and say to them: I am the Lord your God.” R Shimon bar Yohai says: “Am I the Lord Whose sovereignty you accepted in Egypt?” And they said: “Yes. Oh, yes.” “You accepted My sovereignty. Accept My decrees!” “Am I He Whose sovereignty you accepted at Sinai?” And they said: “Yes. Oh, yes.” “You accepted My sovereignty. Accept My decrees!”

ר’ אומר: גלוי היה לפני מי שאמר והיה העולם שסופן לינתק בעריות לכך בא עליהן בגזירה, אני ה’ אלקיכם, דעו מי הגוזר עליכם.

R. says: It was self-evident to He Who spoke and the world came to be, that [Israel’s] fate was to be torn apart over sexual mores.¹ Therefore He came to them with a decree, “I am the Lord your God. Know Who it is Who issues you (these) decrees.”

¹ The Hebrew is not perfectly clear. This might refer to Israel’s detachment from its land on account of its transgression, but this interpretation is suggested by the reference to this Midrash on Yoma 75a.

את משפטי תעשו ואת חקתי תשמרו ולכת בהם אני ה' אלקיכם. עדיין יש תקוה ליצר הרע להרהר ולומר שלהם נאים משלנו. תלמוד לומר ושמרתם ועשיתם כי היא חכמתכם ובינתכם.

“My ordinances you shall do and My statutes you shall keep; I am the Lord your God.” The evil inclination may yet hope to cause hesitation, saying: “Their ways are better than ours.” Therefore the Torah teaches (Deut. 4:6): “Observe and do, for this is your wisdom and insight (in the eyes of the nations who shall hear all these statutes and say: ‘Surely this great nation is a sage and insightful people’).”

את משפטי תעשו – אלה הדברים הכתובים בתורה שאילו לא נכתב בדין היה לכתבן. ואת חקתי תשמרו – אלו שיצר הרע משיב עליהן ועכו"ם משיבין עליהן... תלמוד לומר אני ה' חקקתים. אין אתה רשאי להשיב עליהן.

“My ordinances you shall do” – these are those matters written in the Torah which, were they left unwritten, would need to be written. “And My statutes you shall keep” – these are those matters that the evil inclination argues against or that non-Jews argue against. .therefore the Torah teaches “I am the Lord” – I, the Lord, enacted them; you are not free to retort to them.

ללכת בהם – אינך רשאי ליפטר מתוכן.

“To walk by them” – You may not exempt yourself from them.

ושמרתם את משמתי – להזהיר בית דין על כך.

“And you shall keep My charge” – a warning to the bet din (to be mindful) of these matters.

Rarely do the words of our Sages speak to us so directly. It is in that light that a judge can do only that which he or she sees. I am satisfied that we did so.