

Chapter 7



## PROGRESSIVE HALAKHAH AND HOMOSEXUAL MARRIAGE

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In 1997 the Responsa Committee of the Central Conference of American Rabbis decided by a majority of 80 percent that same-sex unions do not qualify as kiddushin, which is the only form of Jewish marriage. In a long and learned responsum published in full in the *CCAR Journal*, the committee decided that a Reform rabbi should not officiate at a ceremony of marriage or commitment between two persons of the same gender.<sup>1</sup> As a member of the committee, I voted with the majority, agreeing with its conclusions and almost all its *halakhic* reasoning. Nevertheless, I decided to write a concurring decision to bring forth certain factors that were not considered in the committee's deliberations. This is neither a critique nor commentary of the responsum, but rather a form of *tosafot* and *hashlamot*.<sup>2</sup>

### K'vod Habriot-Human Dignity

We are considering very sensitive matters. They relate to persons who have suffered from discrimination and persecution. They

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are human beings created in the image of God and dedicated Jews. We must, therefore, deal with these subjects in a sensitive way. It might be helpful to recall Maimonides' ruling in a different context. "The Great Eagle" exhorts the *dayan* before making judgment: "Let all of his deeds be for the sake of Heaven, but let not the dignity of human beings be light in his eyes."<sup>3</sup>

Respect for human dignity is one of the foremost qualities required of a judge, a rabbi, and every Jew. Yet, respect for human dignity does not negate ruling according to one's principles, conscience, and understanding of Jewish tradition, which may be contrary to another person's opinions and needs.

Most studies of homosexuality in Jewish tradition emphasize its negative aspects and the prohibition of this practice in the Torah and rabbinic literature.<sup>4</sup> The Torah castigates such behavior in males as one of the forbidden sex relationships (Lev. 18:23, 20:23) and condemns it as an abomination or abhorrence. The rabbinic sages took steps to prevent such forbidden intercourse. They also condemn lesbianism as *peritzut* (licentiousness), even though it was not considered a form of sexual intercourse. These prohibitions have been a consistent aspect of the tradition. This study will not accentuate these negative views of homosexuality in the tradition. Rather, it will attempt to study other aspects of the tradition that would determine the possibility of Jewish religious marriage for same-sex couples.

### The Criteria of Progressive Halakhah<sup>5</sup>

There are those who believe that if Progressive and Reform Jews explore the ramifications of halakhah and tradition on current problems, they are succumbing to Orthodoxy. This belief reveals a lack of insight into the chasm between the approaches of these two streams of Judaism to revelation and halakhah. Evolving, modernist halakhah must be founded on reinterpretation of scholarly study of the classic texts of Judaism, which discovers variety, flexibility, and creativity in halakhah and draws on new information derived from archaeological excavations and documents unknown to our ancestors. Rabbi Louis Jacobs explicated: "The ultimate authority for determining which observances are

binding upon the faithful Jew is the historical experience of the people of Israel, since, historically perceived, this is ultimately the sanction of the *halakhah* itself."<sup>6</sup>

Serious modernist Jews accept or reject the content of Jewish tradition not because of convenience or caprice, but as a matter of principle, based on their liberal theological understanding of revelation, history, and halakhah. Modernist Jews have a different basic conception of the divine authority of halakhah. The progressive view initiates and supports inquiry aimed at uncovering the latent principles of halakhah and Jewish tradition and then applies them to reach *halakhic* decisions.

This theological position on the divine authority of halakhah, together with a sensitivity to ethical concerns, inner spirituality, and social justice, is the crucial factor in the opinions issued by modernist halakhists. Some of the foremost thinkers of the twentieth century have set forth criteria for *halakhic* decision making and observance of the commandments by modern, non-fundamentalist Jews. Most Orthodox decisors reject these criteria because the very process of choosing and selecting which traditional precepts should be observed is incompatible with the traditional view of the absolute authority of the divinely authored and sanctioned halakhah.<sup>7</sup>

It is incumbent upon us to determine which of these criteria of Progressive halakhah apply to *pesikah* in the case of same-sex marriage. Does Progressive Judaism sanction homosexual marriage?

To resolve this issue we must determine what are the criteria and principles for *pesikah* (decision making) in progressive halakhah that may be applied to such a question. A number of such progressive criteria may help us ascertain the moral and liberal Jewish religious approach to this problem. My contention is that decisions in such important matters should be decided on the basis of these criteria and principles.

### Major Thrust of the Tradition

The rules and principles mentioned here may serve as a guide for liberal tradition and halakhah. As with any collection of precepts, these principles will be useful only if we make the effort to

delve deeply into our tradition and go beyond a superficial glance and incomplete understanding. Professor Jakob Petuchowski of Hebrew Union College stated:

In the process of examining the traditional material, one must not remain satisfied with first impressions. Rather should one pursue the meaning of a given observance in the Jewish past. Moreover, since, within a span of four thousand years, the meaning was not always uniformly understood and interpreted, it becomes particularly important to discover the main thrust within this tradition.<sup>8</sup>

If we examine closely the flux of Jewish tradition over the ages, we find that there was always a balanced orientation that emphasized enlightened spirituality and generally stayed clear of extremism. We must find this mainstream in the tradition. It is not enough just to decide what is appropriate for our own community and generation. Tradition is what is passed on from generation to generation and spreads throughout the entire Jewish world.

The first of the criteria, "the major thrust of the tradition," according to Professor Petuchowski, should lead one to pursue the meaning of a given observance in the Jewish past and its main thrust within this tradition. What then, has been the main thrust of heterosexuality or homosexuality within the millennial tradition? Instead of analyzing the many prohibitions and castigation of homosexuality, let us look at the obverse side of this question. What is the approach of the tradition to heterosexuality?

### *Zugit*

The rabbis accentuated the significance of heterosexual relationships more than they denounced same-sex relations. This may be expressed in the concept of *zugit*, "coupleness," the quality of being a couple, a sexual or erotic partnership. The term, per se, postdates rabbinic literature, but the concept is prevalent throughout the rabbinic period. We find the view of *normative zugit* throughout the written Torah and the Oral Law. The story of creation illustrates this phenomenon: "God created the human in his image, in the image of God he created him, male and female he created them" (Genesis 1:27). This specification of the two sexes is

not incidental, as we see in the next verse, which presents God's first commandment of procreation to those created in the Divine image: "And God blessed them and said to them: 'Be fruitful and multiply and fill the earth and conquer it'" (Gen. 1:28) This commandment applies only to heterosexual couples.

Almost all descriptions of the family unit in the Bible include a reference to parents of both sexes. Thus we find in the Decalogue, "Honor your father and your mother"<sup>9</sup> and in the Holiness Code: "One must revere one's mother and father."<sup>10</sup>

The normative family in Jewish tradition consists of a heterosexual couple with children, from Adam and Eve through matriarchs and patriarchs, Abraham, Isaac, and Jacob with Sarah, and Rebecca, Rachel, and Leah. This is also the recorded tradition in the talmudic, gaonic, medieval and modern literature. Heterosexuality is the rule in the entire Jewish tradition.

### Procreation

The first commandment of God, the Creator, to his human creatures is to imitate him by engaging in creation or, more specifically in procreation. This form of *imitateo Dei* is obviously meant exclusively as a mitzvah for a heterosexual couple. The fulfillment of this first commandment serves as a precedent for other mitzvot of the Torah. The rabbis claim that those who fulfill these commandments "are crowned by Scripture as partners with God in the work of creation."<sup>11</sup>

Furthermore, the Torah spells out the passage of the couple from the nuclear family to their new family: "Hence a man leaves his father and mother and clings to his wife, so that they become one flesh" (Gen. 2:24). Rashi interprets "one flesh" to refer to "the child created by both of them in whom their flesh becomes one."<sup>12</sup>

Procreation by these human creatures is an essential aspect of creation. A couple becomes united in the conception of their offspring in which both share. Man and wife cling together emotionally and physically and spiritually. This is not merely a sexual act, but the continuity from one generation to another by bringing into life their offspring. The couple leaves the parental home and establishes its own family.

The Tradition emphasizes again and again the utmost significance of sexual reproduction. According to the Midrash, "God said I created the world only for the sake of procreation, as it is written (Isaiah 45:18) 'God who formed the earth and made it, he did not create it as a waste, he formed it to be inhabited.'"<sup>13</sup>

A number of heterosexual couples, of course, are unable to bring children into the world. Their number is relatively small when compared to fertile couples. The Torah and the halakhah go according to the majority. Today, these infertile couples may seek medical assistance through artificial insemination, In-vitro-fertilization (IVF), or adoption.

Gays and lesbians claim that they also fulfill the mitzvah of procreation in a similar fashion by means of medical science or adoption. The vast majority of heterosexual couples are able to reproduce naturally, and this was the intention of the Torah commandment to be fruitful and multiply to bring children into the world. Medical aid to reproduction was developed as an alternative to the natural process. In most of these techniques the ova of the wife and sperm of the husband are used. Even though the process is artificial, in most cases the genetic makeup of the children is that of their father and mother. It is a genetic family. Lesbians might rely on the donation of sperm by a stranger or friend outside the family circle. Same sex families can never be fully genetic.

Scientists indicate that the rate of success in conception and childbirth by artificial means is much less than in natural sexual intercourse. According to this finding, same sex-couples, on the average, will have fewer children than heterosexual parents.

In order to have children, of course, these techniques can be used only by lesbians, whereas homosexual men are limited to adoption. The resulting childbearing may be relatively small. More than two decades ago there was a widespread debate about the world population explosion and the threat of world wide famine. Political leaders concerned about the dangers of wide spread starvation encouraged society to adopt the policy of zero population growth.

When this proposition was discussed in Jewish communities, the conclusion of the majority was that after the Shoah, the Jewish people could not afford to limit its numbers. On the contrary, it was considered a mitzvah to bring into the world a large Jewish family.

### *Kelal Yisrael*—Responsibility to the Covenant Community

Most of the fundamental principles for evaluating the mitzvot and deciding which should be observed, like internalizing the commandments and heeding the voice of individual conscience, relate to the individual's struggle between soul and heritage. There comes a moment, nevertheless, in the observance of the commandments when Jews are called upon to express their sense of responsibility to their people, to the Covenant Community, or *kelal yisrael*. A Jew cannot live a full Jewish life alone. Many precepts can be performed only in public as part of a community, in a prayer quorum or *minyan*, in the synagogue, and at home. For citizens of Israel there is also the community of the Jewish state, which adds the responsibility of observing special precepts, such as defending our homeland and serving our people, as well as other civic obligations, which in Israel assume the character of mitzvot.

Beyond the individual, then, there is *kelal yisrael*, which includes all Jews wherever they live. Each of us bears responsibility for the entire nation; we are all responsible for one another. We must observe certain precepts for the good of the collective even when we have personal reservations about them. This is another criterion for the observance of mitzvot.

Accordingly, we must all ask ourselves not only whether a particular precept is compatible with our individual world view, but also whether observing it would harm or strengthen the Jewish people as a whole.

Rabbi Petuchowski has written that "everything ... which contributes to the survival and to the unity of the Covenant Community of Israel must be regarded as a religious commandment. Everything, on the other hand, which hurts the Covenant must be avoided. Bearing this perspective in mind, the Reform Jew will observe many a *mitzvah* toward which he might feel no personal obligation, because it is not a matter of the individual only [but] also of the community as a whole."<sup>14</sup>

Following this principle, our *halakhic* decisions must take account of more than just ourselves and our synagogue, community, and movement. We must be aware of their ramifications for *kelal yisrael*. When dealing with issues relating to marriage

and personal status, to the physical and spiritual welfare of Jews that do not share our views, and to the relations between Jews of the Diaspora and Israel, we must be mindful that we are one people. In spite of diversity and severe conflict, we are all of us bound by that contractual covenant that our ancestors, and we ourselves, made with the God of Israel.

When the North American Reform movement makes a radical decision to abandon a basic tenet of the Jewish heritage relating to marriage, it does not affect its own constituents alone. The Reform, Liberal, and Progressive congregations and movements in Europe, Israel, South Africa, Latin America, and Australia are affected.

Most of them are in the midst of large Orthodox communities, who take advantage of such activities in North America to denigrate the local Liberal Jews. The example of the Progressive rabbis and congregants in Israel is especially difficult. Not only are they fighting for the recognition of Reform conversions, including those from North America, but they have been appealing for the right to officiate at marriages. The fact that their colleagues will officially marry gays and lesbians will weaken their case not only with the intransigent Chief Rabbinate, but also with a large portion of secular Israelis and very possibly with the courts. If same-sex marriages are performed by American Reform rabbis, it will harm the struggle of their Israeli colleagues to attain the right to officiate at weddings and conversions.

We must, therefore, consider the needs of *kelal yisrael*, not only the Orthodox and Conservatives, who are in religious opposition to this step, but the secular and especially our own Progressive, Liberal, and Reform rabbis and lay people, who suffer because of these unacceptable marriages. MARAM, the Israel Council of Progressive Rabbis, has researched and studied this issue. Its rabbis have decided not to officiate at same-sex marriages or ceremonies.<sup>15</sup>

### The Scope of Same-Sex Marriages

When we deal with questions relating to homosexuality and lesbianism, one puzzle that appears to remain unsolved is the dimensions and extent of this phenomenon. How many gays



and lesbians are there in a particular society? Is this a widespread social issue? Furthermore, what is the proportion of Jewish homosexuals in relation to the entire Jewish population? It would appear that no such census has been taken. How many of these constitute permanent couples?

The Kinsey Report, published in 1948, had been the basis of the statistical assumption that about 8 percent of the adult population is homosexual. Kinsey actually concluded that 8 percent of men were exclusively homosexual. A half century later in 1994 *The New England Journal of Medicine* analyzed a number of scientific studies published independently, that concluded that 2 percent of men were currently exclusively homosexual.<sup>16</sup> There are no statistical data on lesbians. We have no data on the sexual orientation of Jewish males. The most reasonable conjecture is that the percentage of Jewish homosexuals is about the same as that of the general population, namely, 2 percent. The question remains: How many of these homosexuals are involved in a committed, coupled relationship? The answer would undoubtedly be a small proportion of the Jewish population, perhaps 1 percent or less. Coupled gays or lesbians therefore appear to constitute an extremely small portion of the Jewish population. How would Jewish law and tradition react to such a situation?

In several instances the halakhah was not clear to the sages. In one such case we learn: "Rabbah bar Hanin asked Abaye: 'What is the legal ruling?' Abaye said to him: 'Go and see what is the accepted practice of the people.'"<sup>17</sup> What is the accepted practice of the vast majority of the Jewish people today? There is no doubt that the accepted practice is heterosexuality.

### A Matter of Choice?

One of the controversies surrounding the phenomenon of homosexuality is whether it is based on a free choice or a compulsory orientation. Are they the way they are because of nature or of nurture? The report of the CCAR Ad Hoc Committee on Homosexuality and the Rabbinat indicates that members of the committee held two major opposing views on the origin and nature of sexual identity: 1) Sexual orientation is not a matter of conscious choice but is consti-

tutional and therefore not subject to change; and 2) Sexual orientation is a matter of conscious choice.<sup>18</sup> Learned studies have produced contradictory conclusions that are similar to these above.

A member of the Responsa Committee claimed that "we tend to regard homosexuality as an orientation, as the product of a complex of causational factors which render it, like heterosexuality, a part of one's psychological makeup rather than the result of a conscious choice on the part of the individual."<sup>19</sup> Yet the same person that made this statement quotes the conclusions of the ad hoc committee "that the scientific community lacks unanimity on this question and that the very definition of sexual orientation depends largely upon the interpretations and constructions which various disciplines and groups place upon that group." He notes that there is vast scientific literature on the nature and causes of human sexual orientation, but we are not qualified to judge the scientific character of this material.<sup>20</sup>

Other researchers have completely different conclusions. Widespread psychiatric research has shown that homosexuality is reversible as a matter of personal choice. He bases his conclusions such research.<sup>21</sup> These studies may raise questions for those who claim that concessions should be made to homosexuals and lesbians in officiating at religious marriage ceremonies, because they have no choice.

Not a few gays and lesbians claim that homosexuality is their preferred, legitimate lifestyle along with or, perhaps, instead of heterosexuality. This seems to be a matter of free choice. They have chosen a gay or lesbian lifestyle. This seems to fit in with the Rambam's view: "Every human being may become ... wise or foolish, merciful or cruel; penurious or generous; and so with all other qualities. There is no one that coerces him/her or decrees what he/she is to do, or draws him/her to either of the two ways; but everybody turns to the way which one desires, spontaneously and of one's own volition."<sup>22</sup>

### The Struggle Against Discrimination

As we discuss the possibility of a gay rite of marriage, it will be helpful to study the development of gay rights, both in society at

large and within the Jewish community. We note with satisfaction that there has been a considerable improvement in the status of gay men and lesbian women in this last century. Not long ago homosexual relations between consenting adults were considered a criminal offense. In 1895, Oscar Wilde was put on trial in the Old Bailey of London and was convicted of "acts of gross indecency" with other men. Mr. Justice Wills immediately sentenced Wilde to two years imprisonment with hard labor.<sup>23</sup> Today, such a criminal trial and sentence would be unthinkable. In most countries homosexual acts have been decriminalized, but in others they remain on the legislative books, including in certain states of this Union.

Homosexuality was once considered a mental illness. In 1973, the American Psychiatric Association decided by a majority vote to remove the definition of homosexuality as a sexual perversion from the association's *Diagnostic Statistical Manual*.<sup>24</sup> Discrimination against gays and lesbians has been rampant in matters of employment, housing, rights of insurance, inheritance, and survivors' benefits, to mention but a few areas. Court decisions, legislation, and executive orders have, at times, helped homosexuals in their struggle for full and equal civil rights.

In other instances, judges, legislators, and even the President of the United States have ruled against them. For the most part, successes in their struggle were due to the initiative, leadership, and determination of gays and lesbians, many of whom were assisted by heterosexuals that identified with their cause. In spite of the obstacles and homophobia, an impressive list of accomplishments has been achieved by gays and lesbians to improve their lot. No matter what one's views may be, the progress through self-help, political pressure, legal action, and public relations aimed at convincing the "straight" community, has been very impressive.

In spite of the obstacles and homophobia, an impressive list of accomplishments was achieved by gay and lesbians to improve their lot. The UAHC and CCAR have fought for gay rights over the years. Following is a partial list of their accomplishments:

1. In 1977, they called for the decriminalization of homosexuality.

2. In 1987, they supported the inclusion of gay and lesbian rights;
3. In 1990, they supported the ordination of gay and lesbian rabbis.
4. In 1993, they called for legislation that would grant spousal benefits to lesbian and gay partners in a committed relationship.
5. In 1996, the CCAR passed a resolution supporting the right of lesbian and gay couples to share fully and equally in the rights to civil marriage, to oppose governmental efforts to ban gay and lesbian marriage. The CCAR decided that this is a matter of civil law and is separate from the question of rabbinic officiation at such marriages.

Five gay synagogues have been founded from coast to coast in the United States: is this a variation of "separate, but equal?" or a form of "landmannschaft" in our movement? Jews used to separate themselves by the country of their origin or their vocation; my grandfather would *daven* only in the *Litvisische Schul* (Lithuanian synagogue); a relative was married in the Furrier's Synagogue in New York.

Gays and lesbians are welcome to all services and functions of our synagogues, as well as to regional and national activity. They are welcome to join our congregations and to participate in all their activities, both religious and social. If they prefer, they have the opportunity of joining any of the five gay/lesbian synagogues from coast to coast affiliated with the UAHC, which has welcomed them to its midst and membership. The Reform movement has done as much or more than any other Jewish religious body to further the civil and religious rights of gays and lesbians.

### Commitment Ceremonies

Many gays and lesbians have expressed a desire to have their unions sanctified with a commitment ceremony. What is the origin of this custom? It certainly is not a Jewish ceremony. We know that the Christian clergy has introduced these ceremonies for the commitment of gay or lesbian couples in churches.

The Responsa Committee has received many requests to affirm the use of creative, private religious ceremonies. Some of these have no roots in Jewish tradition or theology. A *mohel* was asked to officiate at the *berit milah* of the child of a mixed marriage. The mother is Jewish, the father a believing Catholic. They have requested that the child have a *berit* and then be baptized. The child is to be educated in both religious traditions.

The responsum, given by Walter Jacob, stated that the circumcision and synagogue education would only lead to the confusion of the child. The *mohel* is not to proceed with the *berit*.<sup>25</sup>

In another situation, a rabbi, who serves a New England community, has received a request to participate in the annual ceremony of "blessing the fleet" with the Christian clergy of the area. After a thorough analysis, this interfaith ceremony, was revealed to be a sort of Christian ritual, and finding that there is no precedent for blessing things in Jewish tradition, the Responsa Committee responded in the negative.<sup>26</sup> We can understand from this that not every creative ritual and ceremony may be accepted as properly Jewish.

Nevertheless, if a same-sex couple and the rabbi must choose between a same-sex marriage or a commitment ceremony and cannot avoid either alternative, they should choose the latter. The marriage ceremony can be considered a violation of Jewish Law; the commitment ceremony might be prohibited because it gives the appearance of a wedding ceremony. Neither has any justification in Jewish law and tradition. Of the two, the wedding ceremony is a more serious violation of Jewish law.

### The Rabbi, the State and the Marriage

A Reform rabbi and a professor posted the following on the Hebrew Union College alumni internet forum: "However, the fact remains that in New York State, among others, it is against the law. to perform a gay/lesbian marriage. If I perform one, I am breaking the law. If I perform some other sort of ceremony which appears to be a wedding but in fact is not a wedding, I am giving the appearance of breaking the law. These are not, in my thinking, trifling matters."<sup>27</sup>

Rabbis should check the ramifications of such marriages in the state or country in which they serve. The license to marry is received from the state. Does this fact carry any responsibility to the law of the state that forbids or does not recognize the marriage? As of this writing, no state of the Union has enacted legislation permitting the marriage of a same-sex couple. A number of acts and ordinances have been passed to grant certain rights and measures of equality, but no nuptials. Thirty states have passed or are in the process of enacting legislation to prevent same-sex marriages from being performed either in their jurisdiction or elsewhere.<sup>28</sup>

Perhaps the greatest stumbling block to gay marriage was the passage of a bill in the United States Congress entitled the Defense of Marriage Act, which was signed into law in 1996. Among its provisions of this Federal Bill is Section 7: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife." The House passed the Defense of Marriage Act on July 12, 1996 by an overwhelming 342-67. The Senate followed suit on September 10, by a vote of 85-14. President Clinton signed it into law.<sup>29</sup>

Some European countries have passed legislation to establish the status of same-sex couples. In 1989, Denmark became the first country to legalize same-sex unions. Although the legal ceremony creates a legal bond, it is not the same as marriage between men and women; gay and lesbian couples were not granted access to adoption, artificial insemination, in-vitro fertilization, or church weddings. The other Nordic states more or less followed the Danish precedent. No European country has fully recognized gay marriage, even those countries that arrange for an official domestic union for the couple.

What about the above question of the New York rabbi who asked whether he may marry such a couple in a state where it is prohibited. Solomon B. Freehof dealt with a question about a different matter, which nonetheless reveals a similar principle. An elderly couple who were living together asked a rabbi to officiate at their wedding without registering it with the civil authorities.

If they were formally married, their joint Social Security would be reduced.

Freehof raises the question:

Is the Rabbi violating the state law by officiating for a couple who do not have a marriage licence? I have received various legal opinions on this matter. The majority opinion seems to be that it is a violation of the law so to officiate. ... Since this marriage ceremony is being conducted without a license for the purpose of evading or contravening the just and legal regulations governing Social Security, such an arrangement must be deemed illegal, even from the Jewish point of views. ... The marriage in question may, however, be an illegal action by the Rabbi who officiates, if the law of the state requires recording the information of every marriage conducted.<sup>30</sup>

### What is a Valid Jewish Marriage?

A valid marriage is one of an unmarried couple of a Jewish man and woman for whose union there is no prohibition in Jewish law. Gays and lesbians are not the only ones unable to contract a valid Jewish marriage. A mixed couple of a Jew and Gentile may not have a Jewish wedding. An adulterous Jewish couple, where one member is still married to another person, may not be joined in matrimony. Furthermore, incestuous couples may not be married. In all these cases the explanation is *ein ha-kiddushin tofsin* (There is no marriage—it does not take hold). The wedding ceremony has no significance and the marriage is null and void. When there is a valid marriage, there exists *havaya* between the couple. This refers to a legal and spiritual binding between the pair. This is the legal status of marriage, which is broken only by divorce or death.<sup>31</sup>

Many lesbians and gays prefer not to have *kiddushin* because of the heterosexual character of the ceremony. A few scholars tend to denigrate this ancient rite. Eugene Mihaly sharply criticized a statement of a group of rabbis who equated *kiddushin* with sacred matrimony. In his view, "*kiddushin* is clearly a rabbinic metaphor and refers to a man's acquisition of a woman through an act of appropriation ... We must not translate *kiddushin* as 'sacred Jewish marriage.'"<sup>32</sup> He goes on to elucidate: "Since the *kiddushin*

basically consists of the man giving the woman a *perutah* (the smallest copper coin) in the presence of two qualified witnesses, while he recites the appropriate formula. In this way the woman is acquired."<sup>33</sup>

From this analysis Professor Mihaly draws the following conclusions: traditional halakhah, however, sees marriage primarily as an act of acquisition by the man, as a *kinyan*, a commercial transaction, with the woman as a passive object in the process."<sup>34</sup> This view of *kiddushin* as primarily a business deal has been repeated in recent years with the claim that this betrothal no longer exists in our day. There was indeed an aspect of acquisition in *kiddushin* at an early stage of Jewish law. Bet Hillel determined that a woman may be betrothed with a *perutah*, the smallest coin of the realm, whereas Bet Shammai insisted on a silver *denar* worth 200 times as much.

Nonetheless, it is my claim that Bet Hillel, by allowing *kiddushin* to be effected with the smallest possible coin, in reality eliminated any financial or acquisitional aspect of the ceremony and converted into a symbolic act.<sup>35</sup> There has not been a commercial feature in *kiddushin* for millennia, nor is there in our day. *kiddushin* remains the holy bonding of a Jewish man and woman.

Mark Washofsky, the chair of the Responsa Committee summed up the majority decision, which defines "Jewish marriage" as *kiddushin*: That concept, whether understood according to its traditional terms or its Reform interpretation, is a legal institution whose parameters are defined by the sexual boundaries that Jewish Law calls the *arayot*. Homosexual relationships, however exclusive and committed they may be, do not fit within this legal category; they cannot be called *kiddushin*. We do not understand Jewish marriage apart from the concept of *kiddushin*, and our interpretation of rabbinic authority does not embrace the power to "sanctify" any relationship that cannot be *kiddushin* as its functional equivalent. For this reason, although a minority disagree, our majority believe that Reform rabbis should not officiate at ceremonies of marriage or "commitment" for same-sex couples.<sup>36</sup>

That is the position of this paper, which follows the criteria and principles of Progressive *Halakhah*, as well as the major thrust of our tradition, which does not sanction homosexual marriage.



We have seen that normative *zugiyut* from biblical to modern times has been heterosexual. We indicated that the mitzvah of procreation is almost exclusively fulfilled by heterosexual couples, whereas gays or lesbians may have offsprings only with difficulty. *Kelal yisrael*, the Covenant Community, means being concerned for Jews abroad, especially Progressive rabbis in Israel, whose struggle to officiate at marriages and conversions will undoubtedly be harmed by their colleagues in North America marrying two men or two women. We demonstrated the uncertainty of a compulsive orientation that might justify such action. For these and many other *nimmukim*, I concur with the decision of the CCAR Responsa Committee, that Reform rabbis should not officiate at ceremonies of marriage or "commitment" for same-sex couples.

### Notes

1. "On Homosexual Marriage," *CCAR Journal*, winter, 1998, pp. 5-35, (written by the Chair of the Responsa Committee, Mark Washofsky).
2. Addenda and complementa.
3. *Hilkhot Sanhedrin* 24:10.
4. The Responsa Committee (decision *supra*, note 1) mentions some of these negative aspects (pp. 8-11), while showing more positive sides (pp. 12 f.).
5. For the sources of this section, see Moshe Zemer, *Evolving Halakhah*, Vermont, 1999, p. 37 ff.
6. *Ibid.*, p. 44.
7. *Ibid.* p. 45.
8. See Jakob J. Petuchowski, *Heirs of the Pharisees*, New York, 1961, p. 174.
9. Exodus 20:12 and Deuteronomy 5:16.
10. Leviticus 19:3.
11. See *Shabbat* 119b, *Ibid.* 10a; *Mahzor Vitry* 328; *Responsa Jacob Weil* 191 and *Responsa Divrei Rivot* 361, among the many sources of this saying for different mitzvot.
12. *Ibid.*, Rashi commentary.
13. S. Buber, ed., *Midrash Tanhuma*, Warsaw, 1878, *Parashat B'reishit* 26.
14. *Ibid.*, pp. 177-179.
15. See Zemer, *supra*, note 5, 53-55.
16. R.C. Friedman and J.I. Downey, "Homosexuality," *New England Journal of Medicine*, October 6, 1994, vol., 131, no. 14, pp. 921-931.
17. *Eruvin* 14b; See Rashi to *Berakhot* 45b.

18. CCAR Yearbook, vol. 100, 1990, 109–110. 57 51.3, pp 159 f.
19. Supra note 1, p. 12.
20. Ibid.
21. Nathaniel S. Lehrman, "The Reversibility of Homosexuality," *Midstream*, April, 1998, pp. 30 f.
22. *Hilkhhot Teshuvah* 5:2 .
23. H. Montgomery Hyde, *Famous Trials, Oscar Wilde*, Middlesex, 1962, pp. 222–273.
24. *American Journal of Psychotherapy*, 1978, 32:414.
25. Walter Jacob, *Questions and Reform Jewish Answers*, New York, 1992, #109, p. 173
26. W. Gunther Plaut and Mark Washofsky, *Teshuvot for the Nineties*, New York, 1997,
27. HUCALUM, Digest 239, 29 November, 1999 (copied in another digest).
28. In December, 1999, the Supreme Court of the State of Vermont made a precedent-making decision in favor of three same-sex couples who had appealed in 1977 for the right to a recognized marriage. The judges did not give a verdict recognizing homosexual and lesbian marriages, but they made it clear to the Vermont legislature that it has the following choice: either to give full recognition to such states of matrimony or to establish a comprehensive arrangement of "domestic partnership" that would give them the same rights as married couples.
29. Internet, Thomas Legislation.
30. Solomon B. Freehof, *Contemporary Reform Responsa*, Cincinnati, 1974, pp. 100–103.
31. *Kiddushin* 5a; *Yevamot* 13b.
32. *Teshuvot on Jewish Marriage*, Cincinnati, 1985, p. 40.
33. Ibid. pp. 29–30.
34. Ibid. pp. 40–41.
35. Moshe Zemer, *Journal of Reform Judaism*, Spring 1988, p. 32.
36. *CCAR Journal*, Winter 1998, p. 29.