

Chapter 8



REFORM JUDAISM AND SAME-SEX MARRIAGE

A Halakhic Inquiry

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This paper seeks to explore the question of whether same sex marriage would be permitted under a liberal understanding of *halakhah*.¹ Since the CCAR Responsa Committee has published a long and complex responsum on the topic and has concluded that rabbis should not perform ceremonies of commitment either under the rubric *kiddushin* or even under an alternative designation, this paper is in part a response to this conclusion. The analysis here, however, depends on the lengthy analysis of Reform Judaism and marriage.² To clarify the issues I wish to begin with some methodological considerations.

The current debate about same-gender marriages or commitment ceremonies is part of a broader discussion of the methodology of Reform Jewish decision making and its relation to or its lack of relation to *halakhic* process. Is there a difference between how we respond individually and how we respond collectively? Is there a place for sustained intellectual debate about crucial issues, that will have an influence on our personal deci-

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sions? The Responsa Committee of the CCAR—under Rabbis Walter Jacob, W.Gunther Plaut and now Mark Washofsky and the Freehof Institute of Progressive *Halakhah* has been one of the most significant venues for these discussions. In my view, the seriousness of this enterprise requires that those who differ with their conclusions offer a sustained rebuttal. Judaism is essentially about reading sacred texts, seeking God's will in these texts, and applying these insights to Jewish living.

In an important paper entitled "Culture Wars," Prof. Mark Washofsky, chair of CCAR Responsa Committee, analyzes the current debate in Reform Judaism about proper methods of decision making. He identifies himself as "a text-and-tradition type." He assumes that "text-and-tradition types" will inevitably conclude that same-sex marriages or same-sex commitment ceremonies are not permitted in Reform Judaism. He writes:³

1. *The acknowledgment of particularity.* We text-and-tradition types discuss questions of Jewish practice from the assumption that there is something identifiable that can be called Jewish practice. This something is a particular phenomenon, one which has emanated from the historical experience of a particular religious community which we call Israel. While it is imaginable that the Jews might have developed different religious institutions, different concrete means by which to respond to the call of the divine, they in fact came up with *these*, the particular observances which make up what we know as the tradition. Thus, in the case before us, we must begin our thinking with the fact that while marriage is a universal social institution, the particular form of marriage which has historically prevailed among the Jews is called *kiddushin* and that there is no such thing as Jewish marriage other than *kiddushin*.⁴ While it is theoretically possible that an alternative form of Jewish marriage might be created today, such theoretical possibilities do not provide the point of departure for our discussions for we begin our religious conversation from within the parameters of that which is and has always been *Jewish* practice, the religious way of life of a particular people.⁵
2. *The valuation of our particular tradition.* This particular people, moreover, is our people, and its particular religious tradition is an integral element of our own Reform Jewish religious life. Unlike some of those folks who speak the other languages I have described today, text-and-tradition speakers do not assume a stance of objective neutrality (let alone skeptical distance or scornful hostility) toward the particular traditions that have

come down to us. While we are liberals and while we stand ready to criticize those aspects of the tradition which can no longer function in our religious universe, we do not start our thinking by identifying the "good" with the "contemporary," as though the latter were a litmus test of Jewish legitimacy. We do not understand ourselves as essentially modern (or post-modern) people who are ready to accept a traditional practice only to the extent that it fits into a system of religious value that is already hewn from the stone of contemporary thought. *Lehefekh*: we see ourselves as essentially *Jewish* people who are willing to introduce changes into traditional practice when this becomes necessary.⁶ This difference in stance is a significant one: while some others begin their discussions with no great sense of commitment toward preserving tradition, we seek to validate and to incorporate traditional practice into our lives whenever we can. We assert the primacy of the particular over some abstract, universalizable notion of religious value. To use someone else's theological language, we might call this a preferential option for the traditional⁷. What makes a practice Jewish, in this view, is the very fact that we have inherited it from the Jewish past, that it has been Jewish for longer than a few days, and that this practice has a venerable record of service within the concrete life of a people that has regarded that life as an exercise in holiness. True, the tradition arose in times and within cultural contexts much different than our own, but this does not make it our enemy, something other and alien to us. When the traditional practice seems to endorse immorality or oppression, we believe that it is better to make adjustments or to find new interpretations (which more often than not already exist in the sources) than to junk the whole system. For example, if the classical conception of *kiddushin* involves the legal and economic subjugation of women, we would prefer to look upon our own marriage institution as an egalitarian *perush* on the traditional one, in which the woman sanctifies the man in the same way as the man traditionally sanctifies the woman, rather than to declare that the time has come to invent a new institution of Jewish marriage.⁸ For such a new institution, whatever its advantages over the old, is unavoidably and entirely a creation of our own, and not something we have inherited from the Jewish past.⁹

3. *A language of text and sources.* Once we acknowledge that Jewish practice is a *particular* phenomenon, and once we value the tradition as a positive thing and the appropriate starting point for our thinking, it follows that the language we use to express our religious consciousness ought to be the language that has traditionally been used to express it. These are the texts and sources of our sacred literature, including the halakhic literature, which has always occupied a central position in Jewish

religious talk. I repeat that I do not want to engage here the theological debate over the question of *halakhah's* authority, or any authority, for that matter, over the individual Reform Jew. I want simply to emphasize that the very way we vocalize our approach to marriage and to all other religious issues is not through the use of grand but essentially empty slogans as *bet-zelem elohim* or *ve'ahavta lere'ekha kamokha*,¹⁰ and not through a stance of critique whose terminology is borrowed wholesale from Kant, Hegel, Nietzsche, Marx, Freud, or Foucault.¹¹ Rather, our language is a traditional one; its grammar, syntax, and vocabulary are the texts of those books that have served as our sources of value and argument for many centuries. We read these texts, to be sure, as Reform Jews, a community that has fully experienced and endorsed modernity. The perspectives we can bring to *halakhah*, we immodestly assert, constitute a vital contribution to the history of its interpretation. With all that, however, the language we use to verbalize our understanding of religious practice is the language of text and tradition. And the primary difference between us and others is that we want to speak this language and have trouble defining our work as Jewish unless we manage to speak.

When you take this approach and speak this language, you tend to construct your world differently than do others. Let us take as an example the issue of *kiddushin*. Some Reform Jews argue for the abandonment of *kiddushin* as the proper designation for marriage in our communities, on the grounds that we in fact abandoned that Rabbinic institution long ago. As proof for this assertion, they will cite the fact that we Reform Jews, at least in the United States, will accept a civil divorce as sufficient for remarriage. If we no longer demand a religious divorce, the argument goes, then we have already rejected the Rabbinic understanding of marriage, *kiddushin* as a legal-halakhic institution, replete with its civil and financial connotations.¹² We have transformed marriage into a spiritual and emotional union. Yet this argument by no means describes the theoretical basis on which our forbears actually decided to dispense with the requirement for *gittin*. As they reasoned it, divorce in Jewish tradition has always been a matter of civil rather than religious law; as such, since Jewish law can accept the validity of the civil actions of a non-Jewish court, a decree of divorce under the secular law is valid for us according to Jewish law as well. In other words, although our predecessors initiated a far-reaching change

in Jewish religious practice by recognizing the validity of civil divorce, they justified this change by using halakhic language. They explained their action, however revolutionary it seemed, not as a revolution at all but as a move fully consistent with the theory and rhetorical style of the Rabbinic legal tradition.

In the passage above, Professor Washofsky has described clearly what is at stake. It is the nature and method of Reform decision making. Decisors using the same method may, however, come to different conclusions. It is the responsibility of those who wish to introduce new understandings or new practices to do so from within rather than outside the vocabulary and style of halakhic decision making.¹³ The CCAR Responsa Committee has produced a masterful document "On Homosexual Marriage 5756.8," which says: "A Reform Rabbi should not officiate at a ceremony of marriage between two persons of the same gender, whether or not this ceremony is called by the name *kiddushin*." A minority of the committee disagreed and said "A Reform rabbi may officiate at a wedding or commitment ceremony for two homosexuals, although for important historical and theological reasons that ceremony should perhaps not be called *kiddushin*."¹⁴ The responsum makes clear that same sex marriage is a complex and difficult issue. It tells the reader at the outset: "We discovered we were no longer talking *to* or even arguing *with* each other, rather we were conducting a series of parallel monologues in place of the dialogue that has served us so well in the past one."¹⁵

Before proceeding to the substance of my argument, it seems important to delineate the principle within halakhah itself that grants the *posek* authority to make changes and the warrants for those changes.

Menachem Elon, in his comprehensive work on Jewish law, writes about the authority of contemporary decisors to determine the law in a different manner from the past.

Thus was established and accepted the fundamental principle of decision making in Jewish law: The law is in accordance with the view of the later authorities. It should not be thought that this principle diminished in any way the respect later generations accorded to earlier generations. It was precisely this respect that induced the later authority responsible for declaring

the law to ponder his own decision earnestly, fearfully, and humbly, because he was aware that he was dealing with a question already considered by the earlier authorities. Nevertheless, when he finally reached his conclusion his view, and not the view of the earlier authorities, became law.¹⁶

The contemporary decisor, or in our case, the Responsa Committee, must carefully weigh the decisions of prior generations and "ponder earnestly, fearfully and humbly," but ultimately the decision lies in the hands of the contemporary sage either to uphold the past or to rule differently.

The task of determining and fashioning the halakhah was entrusted to the halakhic authorities of every generation, to perform according to the tradition they possessed and according to their human reason and intelligence. The halakhic authorities that constituted an integral part of the general community and whose own lives were affected by the problems of their generation, were authorized to examine the previously existing halakhah in the light of their own later circumstance; and their decisions established the law. In this way, the halakhah continued and developed. Linked to and interwoven with current life and problems, it guided at the same time was shaped by contemporary life.¹⁷

Our contemporary intellectual, social, ethical, scientific, and economic environment is part of the equation. Our decisions are in response to the problems engendered by the context in which we live. In the case of our attitudes toward homosexuality, there has been a dramatic change over the last two decades. Homosexuality has been uprooted from the categories of sin and illness and been replanted as sexuality identity.¹⁸

Dorff and Rossett offer the following observation: significant changes in Jewish law sometimes come through outright revision, but more often they were produced by shifting the weight according to varying constructions of precedents.¹⁹ Reform Judaism has for more than a century been revising its marital halakhah. For the last two decades we have been reevaluating our position on homosexuals and homosexuality. The discussion about same-sex marriage or commitment ceremonies should be understood as the latest step in a long and complex process. The issues have been considered not only by the rabbinate, but by the Union of American Hebrew Congregations.

Joel Roth, in his book *The Halakhic Process A Systemic Analysis*, describes in detail the authority of the *posek* and various factors that inform a decision. In the Orthodox community the *posek* is an individual, and in the Reform and Conservative movements a committee of experts plays the same role. The book clarifies systemic principles of legitimate change within the halakhic system.

The authority of the decisor is extensive: In the most extreme instance this principle applies, *peiamim she bittulah shel Torah zehu yesodah* (sometimes the abrogation of Torah which is its foundation). As Roth writes, "when the ultimate goals of the Torah would be better served by its abrogation, even in its entirety, it is within the purview of the sages to take that step." The circumstances that might warrant such action are never defined. In the final analysis, the determination of the need for such action lies with the sages themselves. As Moses rendered the decision on his own, so too must the sages make the decision on their own.²⁰

Another important systemic principle for making a change is *et laasot la-donai heferu toratekha*. Roth notes sages amended or abrogated norms in order to strengthen the Jew's commitment to the will of God.²¹ He cites Rashi on *Berakhot* 54a s.v. *ve-omer*. There are times when we abrogate (*she-mevattelin*) the words of the Torah in order to act for the Lord. ... It is permissible to violate the Torah and to do what seems to be forbidden."²²

The sages used medical and scientific sources to change the law. What counts is the specialist's expertise. It is a matter of record that the number of matters of law in the first sense stipulated in the talmudic sources and contradicted either by the expert scientific opinion of later ages or by the personal observation of later sages has produced many problems. How could it be that the talmudic sages had been mistaken? Surely it was not reasonable to suppose that the talmudic sages had misperceived their own reality. It was more reasonable to surmise that the reality had changed, and once it became acceptable to make such a claim, medical and scientific sources that might result in the abrogation of previously held legal norms could be introduced without impugning the reliability or integrity of the talmudic sages. A new systemic principle referred to as *shinnui ha-ittim* ("a changed reality") became the vehicle that enabled later sages to

make use of new medical and scientific knowledge without vitiating the smooth functioning of the halakhic system.²³

Roth further writes: If new medical/scientific evidence indicates that a norm no longer applies to a majority of cases, and the norm itself was ground in earlier medical and scientific evidence that it did apply to a majority of cases, the extralegal sources allow the reopening of the question of the factual basis upon which the norm was predicated. In such a case, the extralegal sources allow the norm to be overturned by the claim of *shinnui ha-ittim* if the evidence is strong enough.²⁴

New information can also alter the meaning of a text. Archaeological, historical, and philological research is used to analyze a text. Such an analysis can potentially reveal that the text has been misunderstood. The goal of the critical study of rabbinic texts is to discover the *peshat* of each statement, comment, and question in a passage, and then to establish the *peshat* of the entire passage. If the end product of such an analysis results in an interpretation different from the interpretation of the passage offered by the classical commentators or from that codified by the codifiers, its legal status is the same as that of another interpretation or a variant reading, and carries with all the options that we have seen new interpretations and variant readings to provide a *posek*. And, obviously, the greater the degree of certainty the new interpretation is in fact the *peshat*, the less will be the hesitancy of the *posek* to employ his systemic rights.²⁵

In claiming that he understands the *peshat* of a statement better than any of his predecessors, a modern scholar would be doing no more than those sages who have claimed that, had some earlier sage had access to knowledge to which the later sage has access, the earlier sage would have retracted his view.²⁶

The prohibition of same sex intercourse is mentioned twice. "Do not lie with a male as one lies with a woman; it is an abhorrence."²⁷ If a man lies with a male as one lies with a woman, the two of them have done an abhorrent thing; they shall be put to death;²⁸ their blood guilt is upon them.²⁹

The CCAAR responsum analyzes these passages as follows: In both cases the prohibition appears as part of a list of forbidden sexual acts, (incest, adultery, relations with a menstruating woman, and sex with animals) associated with the customs of

the Canaanite peoples whose land is assigned by God to Israel.³⁰ Indeed, the Canaanites have defiled the land by committing these abhorrent acts (*to-eivot*; 18:26, 30) and the land, as it were, cooperates with God's plan by "spewing" out its offending inhabitants to make way for the Israelites (18:24ff, 20:22ff). The Torah admonishes Israel to keep far from these practices and instead to observe God's statutes, which are a source of life (18:5) and holiness (20:7-8, 26).³¹

Rabbinic literature adds relatively little to this legal material. The Talmud contains few mentions of overt homosexual acts and no reports of executions carried out as punishment. We cannot determine how prevalent homosexual behavior may have been in the society of the time. At any rate the rabbinic sources, which we use as the building blocks of our own textual conversation, imply that the phenomenon was either not widespread, or successfully hidden or suppressed. Thus, although Rabbi Yehudah forbids a lone unmarried male from pasturing a beast and two unmarried males from sleeping together under a common blanket, the *hakhamim* permit these practices, because "Jews are not suspected of homosexual relations and of buggery." On the other hand, one who avoids even *yihud* (being alone together) with another man or a beast is deserving of praise.³²

It is clear that sages had no concept of sexual identity. The Torah and the rabbis prohibited a particular sex act. This act performed between a male and female was emblematic of marriage and therefore prohibited to those who are not proper marriage partners. In addition, the identification of homosexuality with Canaanite and Egyptian practices suggests that the rabbis connected homosexuality with idolatrous practices.

Sexual orientation is a new category.³³ Rabbinic literature does not have a concept of sexual orientation. It deals with permitted and prohibited sexual behavior. The Torah prohibits male-male intercourse and makes no mention of female-female sexual contact. Joan Friedman, points to a passage in *Yevamot* 76a. Since R. Huna said: Women who practice lewdness with one another are disqualified from marrying a priest. And even according to R. Eleazar, who stated that an unmarried man who cohabited with an unmarried woman with no matrimonial intention renders her thereby a harlot, this disqualification ensues

only in the case of a man; but when it is that of a woman the action is regarded as mere obscenity.

And the following passage from Maimonides *Yad Issurei Bi'ah* 21:8 says: It is forbidden for women to commit lewdness with one another. This is one of the "practices of Egypt" concerning which we were warned, as it is said. "You shall not copy the practices of the Egyptians. Said our sages, What did they do? A man would marry a man and a woman, or a woman would marry two men." (*Sifra* to Lev. 18:3) Even though this practice is forbidden, they do not impose flogging as a penalty since it does not have an explicit prohibition of its own and no intercourse is involved. Therefore they are not disqualified from a marriage to a *kohen* on the grounds of being considered a whore, nor is a woman prohibited to her husband if she has done this, for this is not a matter of *zenut*. But it is appropriate to flog them for rebelliousness for violating this prohibition. And a man should take care that his wife does not do this and should prevent women that are known to engage in such practice from coming to visit her or her, going to visit them.

Friedman writes: "Throughout the rabbinic discussion there is no evidence of any awareness of such a phenomenon as *sexual orientation* among either men or women. A married woman engaging in lesbian relations is seen simply as a woman engaged in illicit sexual acts—not as someone whose entire sexual and emotional being draws her to seek intimacy with women rather than men.

In fact it would be no exaggeration to say that the conceptual framework within which we understand sexuality and sexual relations is irrevocably different from that of our tradition. The chasm between them is as wide as the Enlightenment. . . . We cannot simply start quoting *halakhic* sources without stopping to ask ourselves about the context of these sources and its implications for their relevance.

The responsum continues: "To the extent that the sources offer a rationale for the Toraitic and rabbinic condemnation of homosexual behavior, we find that the concern over the breakdown of marriage, the bearing of children, and "normal sexuality," the proper and accepted relations between the genders, figures prominently. The Talmud explains that the prescription

that the male shall "cleave unto his wife" (Gen. 2:24) comes explicitly to prohibit homosexual intercourse; that is to say, homosexual behavior threatens marriage and childbirth."³⁴ Bar Kaparah offers an agadic etymology for *to- evah*, the biblical term for "abhorrence": *toeh atta bah*, "you go astray after it."³⁵ The fourteenth-century Spanish commentator R. Nissim b. Reuven Gerondi explains: "One abandons heterosexual intercourse (*mishkevei isha*) and seeks sex with males."³⁶ That is to say, since sexual union is traditionally expressed within the context of marriage, the indulgence in homosexual intercourse is destructive of this most basic unit of society and community.³⁷ This theme continues in the medieval *Sefer Hachinukh, mitzvah 209*:

God desires that human beings populate the world He created.³⁸ Therefore, He has commanded that they not destroy their seed through acts of unnatural intercourse which do not bear fruit (that is, children). These acts violate not only the commandment of marital intercourse (*mitzvat onah*) but also every standard of sexual propriety, since by its nature homosexual intercourse is despised by every person of reason. Thus, the human being, who was created to serve his God, should not bring shame upon himself through such disgusting behavior. And for these reasons the rabbis prohibited a man from marrying a barren woman or one who is past childbearing years.³⁹

From the sources cited by the Responsa Committee, the major concern of the rabbis seems to be that homosexual activity will be nonprocreative, and will prevent men from marrying and women from marrying and producing children. Some of the most tragic family circumstances created by forcing gays or lesbians to live straight lives and marry has been the pain caused to spouses and children when gays and lesbians can no longer pretend to be heterosexual. In a society that accepts gays and lesbians, they will not feel compelled to be what they are not. The *mitzvah* of *peru urevu* (procreation) is limited to males.⁴⁰ In Reform Judaism the *mitzvah* would equally apply to males and females. We have also come to recognize that some people genuinely ought not be parents, and therefore we have limited the *mitzvah* to those who are physically and psychologically capable of performing parental duties. The issue of procreation is complex. New reproductive techniques, however, are being used

with increasing success to overcome the problems of infertility. Artificial insemination has become a relatively common technique. Males are faced with a more difficult ethical dilemma, but surrogate motherhood⁴¹ and adoption are possibilities. There are issues of gestational, genetic, patrilineal, and matrilineal parenthood. They are complex but not insurmountable issues.

Rabbinic teaching considers celibacy unnatural. It is not he who marries who sins; the sinner is the unmarried man who "spends all his days in sinful thoughts." (*Kid.* 29b).

Notes

1. "The term halakhah, is also used to signify the process which legal conclusions are reached. To this end the term refers to all the factors that use or that might be considered by a *posek* before rendering his *pesak* (decision). When these factors are expounded together with the resultant norm, it rarely appears clear or definitive. It is rather complex, ambiguous, and replete with ground for disagreement." Joel Roth *The Halakhic Process a Systemic Analysis*, New York, 1987, p.1.
2. Peter Knobel, "Love and Marriage Reform Judaism and *Kiddushin*," W. Jacob and M. Zemer, *Marriage and Its Obstacles in Jewish Law*, Pittsburgh, 1999, pp. 57 ff.
3. I have chosen to quote an extended section of Prof. Washofsky's statement because of the profound esteem in which I hold him. His knowledge of texts and clarity of thought make him one of the most important voices for those of us who believe that Reform halakhah is not an oxymoron. The text is taken from an unpublished paper and I am grateful to the author for permission to quote it.
4. Prof. Washofsky assumes that Reform Jews use the term *kiddushin* in the same way that traditional Jews use the term. I have argued in "Love and Marriage Reform Judaism and *Kiddushin*" that although we still use the term *kiddushin* for marriage we have altered its meaning. We have changed the halakhic paradigm; we reject its origins in property law, and we reject its patriarchal nature. Although on a superficial level Reform marriage and traditional marriage appear to be the same, they are really different. I find myself convinced by the halakhic case made by Rachel Adler in her groundbreaking book *Engendering Judaism*. Marriage as we understand it is *Brit Ahuvim* an egalitarian covenant of lovers.
5. We cannot begin this discussion *de novo* as if Reform Judaism had not previously modified Jewish marriage law. Reform Jews have in very decisive

ways changed the meaning of *kiddushin*, and the real question is, given the changes, does it still constitute *kiddushin* in any meaningful sense of the term as used by tradition? Or to put it another way do Reform Jews and the "tradition" use the terms differently and therefore, following a Reform definition of *kiddushin*, same sex marriage would be legitimately included.

6. This is a very important point. The question is whether such a time has arrived. *Halakhic* change often takes place gradually. In the body of the paper, I will argue that the halakhic process provides for significant change when there is a social, moral economic or scientific breakthrough that makes it appropriate. Reform decisors are more self-conscious than Orthodox decisors in their use of extra-halakhic considerations to change the halakhah. We have often ignore the halakhah when we make changes than offer a halakhic justification for the change. Prof. Warshofsky's paper "Reinforcing our Jewish Identity: Issues of Personal Status," *Central Conference Of American Rabbis Yearbook*, 1994, describes the competing narratives that dominate Reform decision making.
7. Simeon Maslin, in the introduction to *Gates of Mitzvah* argues that the burden of proof is not on the one who wishes to preserve prior practice, but upon the one who wishes to make the change.
8. From a halakhic perspective mutual *kinyan* is no *kinyan*. "Processes in which both parties are active participants are explicitly rejected. The man must take and the woman must be taken." Rachel Adler p. 176: Egalitarian marriage is a new institution or at least a very significant modification of an older institution. Judith Hauptman in her book *Rereading the Rabbis: A Woman's Voice* makes it clear that there are trends within rabbinic Judaism to mitigate the patriarchal character of marriage but at best they make of women second class citizens. She points to precedents, that, if they had been adopted, would have made even more profound changes in favor of equal rights for women. "The changes they (the rabbis of the Talmud) made and, in particular the direction in which they were headed makes them fitting precursors for us. As we face our own problems with the practice of Judaism today, we can turn to the rabbis of the Talmud for solutions. They laid the groundwork and pointed the way. ... In the Talmud, women seemed content with gaining a measure of control within a patriarchal system. Today armed with the knowledge that Jewish law is open to change, women are likely to seek to become full-fledged members of the Jewish community." pp. 247-249.
9. If we move from property law to partnership law we may be creating something new but we are doing it within the framework of "tradition."
10. Here I disagree. These phrases need not be empty slogans. They have halakhic implications, and they have a history of usage with Reform Judaism that also constitutes a portion of the "tradition." Modern philosophers are part of the cultural backdrop that affects the reading of texts. We cannot pretend they do not exist. Their authority for us may be limited and we may choose consciously to reject their language but Reform Judaism is itself a product of modernity and inhabits a postmodern reality. These intellectual trends are part of the apperceptive mass of our constituency. We seek what might be described as a "Maimonidean synthesis."

11. These thinkers and others provide a cultural backdrop which has halakhic significance. The works of Rachel Adler, Judith Plaskow, Daniel Boyarin, and Howard Eilberg-Schwartz probe the rabbinic mind and culture that reveal to us rabbinic conceptions and biases.
12. We have modified but not rejected *kiddushin*. The question of *gitin* is complex, but the essential point is that the rejection was based on halakhic language. The challenge of those who reject *kiddushin* as a proper paradigm for Reform Jewish marriage or who would include gay and lesbian marriage within the *kiddushin* paradigm is to use "halakhic language" and to make it consistent "with the theory and rhetorical style of the Rabbinic legal tradition."
13. Such arguments are important only to those understand Reform Judaism within the general rubric "rabbinic Judaism."
14. CCAR Responsa Committee "On Homosexual Marriage" 5756.8, p. 1 I have indicated in my paper cited in footnote 1. Whether Reform marriage halakhically should be considered *kiddushin*, is questionable. And if, in fact, it is not would we not be better to use a new name and a new ceremony. There are immense difficulties with this suggestion. One of the most important is the acceptance of such a change by ordinary Jews and whether it will be a *python pe* for the Orthodox.
15. *Ibid.*, p. 1
16. Menachem Elon, *Principles of Jewish Law*, Philadelphia, 1994 p. 272.
17. *Ibid.*, p. 273.
18. The majority of psychiatrists and psychologists have accepted the APA decision to remove homosexuality from its official list of pathologies. See citations provided by Bradley Artson in his "Enfranchising the Monogamous Homosexual: A Legal Possibility A More Imperative," *S'vara* Vol .3 #1, 1993 p. 19. Some health professionals still do not agree with the decision. Reform and Reconstructionist Judaism and liberal Protestants have been explicit in the acceptance of gays and lesbians. More conservative Christians and Orthodox Jews still maintain that homosexual behavior is a sin.
19. Elliot N. Dorff and Arthur Rosett, *A Living Tree the Roots and Growth of Jewish Law*, New York, 1988. p .224.
20. Roth p. 180.
21. *Ibid.* p. 171.
22. *Ibid.* p. 172
23. *Ibid.* p. 237.
24. *Ibid.* p .244.
25. *Ibid.* p. 373.
26. *Ibid.* p.3 74 The historian Shaye J.D. Cohen writes, "The sort of homosexual relationships which we are encountering more and more frequently in our society and about which you are speaking, that is stable monogamous loving relationships between adults of equal status—relationships of this kind were unknown in antiquity ... Consequently we may assume that the rabbis of antiquity did not know and therefore were not addressing, this type of homosexual relationship." Artson, " Enfranchising," p. 22.
27. Lev. 18: 22

28. See M, *Sanhedrin* 7:4, BT *Sanhedrin* 54a-b, and *Yad, Isurei Bi'ah* 14, the penalty is *sekilah*, or "stoning" according to its particular halakhic form (M. *Sanhedrin* 6:4).
29. Lev. 20:13.
30. Footnotes 30, 31, 32 are quoted from the CCAR Responsum. Male homosexual intercourse features as one of the wicked deeds of the Sodomites (hence, "sodomy"; Gen. 19:5) and of the Benjaminites in Gibeah (Jud. 19:22). In addition, the *kadesh* or male prostitute (I Kings 14:24, 15:12; 11 Kings 23:7) proscribed in Deut. 23:18 may have provided male homosexual intercourse; this, at any rate, is how the Talmud (*Sanhedrin* 54b) interprets the verse, although Targum *Onkelos* reads it differently.
31. Rabbinic tradition, however, affirms that male homosexual intercourse (*mishkav zakhur*), like the other *arayot*, is forbidden to Gentiles as well; *Sanhedrin* 58a-b; *Yad, Melakhim* 9:5.
32. The concept of holiness is here identified with that of *distinctness*, of separateness from other peoples and their way of life (20:24, 26), a theme to which we shall return below.
33. "It is only in our generation that homosexual behavior has been found to involve not merely a single overt act or series of such acts, but often to reflect a profound inner condition and basic psychic orientation, involving the deepest levels of personality." Hershel Matt as cited by Bradley Artson, "Gay and Lesbian Jews: An Innovative Jewish Legal Position," *Jewish Spectator*, Winter 1990-91 Vol. 55, #3, p. 6.
34. Footnotes 34-39 are cited from CCAR Responsum; *Sanhedrin* 58a. Note Rashi's comment to the next part of the Genesis verse, "And they shall become one flesh." "a child is created by both male and female and it is in the child that her flesh. becomes one."
35. *Nedarim* 51a.
36. *Ran*, 5a, s.v. *to'eh attah bah*.
37. See also *Gen. Rabah* 26:5 and *Lev. Rabah* 23:9: the generation of the Flood was destroyed because they wrote wedding contracts for males and animals.
38. See *Gitin* 41b and *Arakhin* 2b: the world was created only for the sake of the commandment "be fruitful and multiply", as it is said (Is 45:18), "He did not create it for waste, but formed it for habitation."
39. *Yevamot* 61b-62b; *Yad, Ishut* 15:7. A dispute exists in the literature as to whether a man ought to continue to try to beget children even after he has fulfilled the Toraitic *mitzvah* of procreation. Rambam holds, at least as a matter of Torah law, that one who has fulfilled this commandment may then marry a woman who is not capable of bearing children.
40. *Yevamot* 65b *Kiddushin* 34b-35a.
41. I have certain reservations about how women are recruited as surrogate mothers which may lead to the exploitation of poor women.

