

GAY AND LESBIAN COUPLES AND FAMILIES AT CONGREGATION OHAV SHALOM.

By Rabbi Dan Ornstein

SHELOT (Halakhic Questions): May Jewish same-sex marriage ceremonies be held at Congregation Ohav Shalom and be officiated by its clergy? May full family memberships be offered to Jewish same-sex couples?

TESHUVAH (Rabbinic Response):

Since December 2006, the Committee on Jewish Law and Standards of our Conservative movement's Rabbinical Assembly has permitted Conservative rabbis and cantors to celebrate publicly the unions of Jewish same-sex couples. It has also permitted gay and lesbian Jews who qualify, to seek and receive admission to the rabbinical and cantorial schools of the Conservative movement. Because Conservative Judaism is firmly committed to a pluralistic approach to *Halakhah* (Jewish law), the Rabbinical Assembly and the United Synagogue of Conservative Judaism recognize as legitimate halakhic options the decision by clergy *not* to perform same-sex commitment or marriage ceremonies and the decision by any of the movement's schools *not* to admit openly gay and lesbian students. The Committee on Jewish Law and Standards deliberated and approved two diametrically opposed *teshuvot* (rabbinic responsa) on this subject.

Since 1998 I have made clear that our synagogue and our movement should enfranchise gay and lesbian Jews religiously. I personally took a great step forward in this process in June 2006, when –with the guidance of my teacher and *posek* (halakhic guide), Rabbi Elliot Dorff- I performed a marriage ceremony outside of the synagogue, for two Jewish men in our congregation who had been civilly married. Since 2006, I have been approached by members of the congregation asking me to rule formally on

both of the above questions with respect to official synagogue practice. The questions are related, since each addresses a different aspect of the core issue for our religious community: are gay and lesbian marriages and family units equal in status to (though not necessarily the same as) heterosexual marriages and family units? In this paper, I am not merely responding to questions about what is permitted, I am proactively advocating that our congregation allow same sex unions to be performed for two Jews, and that Jewish gay and lesbian families be offered full family memberships. I could argue that this subject is already "old hat" for the Conservative movement, and that including gays and lesbians religiously should be self evident and done without debate. However, that is intellectually sloppy and unworthy of consideration by our congregation as a religious community. Better that we should learn and debate together one of the most important religious, moral and social topics of our day as people seeking to understand the will of God embodied in Torah interpretation and *Halakhah*. Further, as I alluded to above, I recognize that my opinions and the movement's rulings notwithstanding, our congregation could decide not to make changes in this realm of religious practice. While I would strongly disagree with that decision, it nonetheless would be a legitimate option. Therefore, my goal in this paper is to argue cogently for these changes and to explain why I believe our movement considers them to be desirable and worthwhile.

Because both *teshuvot* are based upon very complex halakhic arguments, I will first summarize them to the best of my ability. I will then explain why I support the more inclusive position. Though I will do my best to express faithfully the views of each position, I apologize in advance for any oversimplifications in my review. Any brief

summary of them will, of necessity, be incomplete. Prior to this review, I quote the two main verses of the Torah that prohibit male homosexual behavior. (Lesbianism is not mentioned explicitly in the Torah, but is prohibited by the rabbis on the basis of interpretive inference from Leviticus 18:3: "You shall not copy the practices of the land of Egypt where you dwelt, or of the land of Canaan to which I am taking you; nor shall you follow their laws." Rabbinic interpretation of this verse explains that this refers to any acts of sexual licentiousness and depravity similar to those that were practiced in Egypt and Canaan.) The first verse quoted above comes in the context of Leviticus 18, also known as *Parshat Ha-Arayot*, the passage concerning forbidden sexual relations.

Do not lie with a male as one lies with a woman (*mishkevei islah*); it is an abhorrence. (Leviticus 18:22).

If a man lies with a male as one lies with a woman (*mishkevei islah*), the two of them have done an abhorrent thing; they shall be put to death—their bloodguilt is upon them. (Leviticus 20:13)

The Position of Rabbi Joel Roth.

Rabbi Joel Roth's most recent *teshuvah* is a restatement of his earlier, more detailed argument (1992) against full religious enfranchisement of gay and lesbian Jews.¹ He begins the paper by repudiating specific pro-enfranchisement arguments. He argues that, contrary to what some claim, the Talmudic sages well could imagine – and likely knew of- loving, consensual same sex relationships that took place between Roman men of equal status. (Remember that our early sages lived in Greco-Roman Palestine of the 1st and 2nd centuries.) They nonetheless maintained their stringent

¹ Joel Roth, "Homosexuality Revisited" (New York, Rabbinical Assembly Committee On Jewish Law And Standards, December 6, 2006, pp. 1-34.)

prohibitions against male (and by interpretive expansion, female) same-sex relations. They were influenced, among other things, by their readings of Leviticus 18:22 and 20:13 in biblical context, as well as their overall concern for preventing men (and women) from destabilizing the heterosexual family through sexual licentiousness. Though modern interpreters choose to read both verses as being exclusively about abusive, denigrating sexual relations, Roth once again argues that those readings are questionable at best. They are not sufficiently strong to overturn three millennia of precedented rabbinic *interpretations* of the Torah that forbid homosexual behavior, regardless of the type of relationship within which it takes place. Rabbi Roth also opposes attempts to interpret the above verses narrowly, as being only about one limited category of prohibited homosexual activity but not about others. Further, he *disagrees* with the argument that, because being gay or lesbian is an orientation and not a freely chosen decision to rebel against Torah law, Halakhah should no longer forbid every, and all types, of intimate homosexual expression. Rabbi Roth contends that our sages' interpretive tools by which they arrived at the overall prohibition against homosexual behavior carry overwhelming weight of precedent and religious authority. Though contemporary tools of scholarship –history, language studies, etc.- can play an *intellectual* role in understanding the development of Jewish law, they cannot necessarily affect changes in the law. Rabbi Roth is not opposed to the use of contemporary or "extra-halakhic" (outside the halakhic system) approaches and disciplines such as history, medicine and psychology to understand and even develop Jewish law. However, he insists that they operate within the strict parameters of the halakhic system, a system that must take precedence over them, even if it can be

clarified by them. For him, contemporary ethical, spiritual, and halakhic arguments in favor of gay and lesbian religious enfranchisement such as those argued by Rabbi Elliot Dorff (see below) are not sufficiently compelling to overturn years of legal precedent and the values that privilege heterosexual family life and procreation exclusively.

I have been asked by the Religious Life Committee to more fully explain Rabbi Roth's position in order to give his opinions fair review. In his defense, it must be said that Rabbi Roth's criticisms of more liberal readings of Halakhah are exacting and meticulous. He systematically dissects many of the claims concerning how one could read the verses in Leviticus differently than they have been read, particularly through his very close reading of rabbinic sources on those verses. (Again, it is very difficult to expand upon these details in a paper of this kind.) As a long time student of Rabbi Roth's, I can attest to his thoroughgoing honesty with respect to his scholarship in matters of *Halakhah* and its history. Further, I think it is grossly unfair to label Rabbi Roth (as some have) as a homophobe who is seeking to use Halakhic precedents to maintain a discriminatory status quo. As he himself writes in his paper, "Every decisor of Jewish law seeks to find a way to render a decision which does not cause pain, hurt, or anguish to those for whom it is rendered. That is what I meant when I wished that I could become a hero to the gay community. I know very well that the view I have expressed in my previous paper, and which I affirm in this one, causes pain, hurt, and anguish to very many people."² A simplistic argument that his positions are founded upon homophobia holds no more validity than arguing that proponents of Halakhic development in this realm are just secular liberals trying to promote gay and lesbian

² Roth, p. 27.

political correctness. Finally, Rabbi Roth is at least partly right that the earlier sages interpreted all homosexual behavior (not just anal intercourse, as will be explained below) as forbidden by the Torah. The only distinction between the explicit prohibition of the Torah and the later interpreted prohibitions is the type of punishment each incurs for its violation.

I acknowledge the elegance and erudition of Rabbi Roth's arguments, I completely understand and support his concern for the moral integrity of the Jewish family, and I do not disagree with his assessment that halakhic prohibitions against overall homosexual behavior have the tremendous weight of precedent behind them. However, I am troubled by his arguments for three reasons. First, I do not fully accept his "legal positivist" argument that Jewish law as it is posited and passed down through millennia of precedent is largely an enclosed system, howbeit one that at times makes room for new insights. For instance, towards the end of his paper, Rabbi Roth restates his earlier exhaustive argument that whether or not (according to science) a gay person can change him or herself into a heterosexual is irrelevant to Torah law. The Torah states clearly that (male, and by extension female,) homosexual behavior is forbidden. If this is what God demands, then scientific findings have little or nothing to teach us in opposition to it. Yet is this really the case? Isn't the Torah predicated upon the basic idea that we are commanded to follow the *mitzvot* freely because we are completely free to violate them? What if we can establish beyond reasonable doubt that sexual orientation does not easily fit this concept of free choice? Do the decisive findings of psychologists and biologists about homosexuality as an orientation have nothing to tell us now about being gay, that the Torah may not have recognized? As

Conservative Jews, we have learned a lot about the historical, social, and cultural contexts within which the Bible and later Jewish law grew over millennia. Though we preserve tradition with passion, we recognize that change is also part of tradition, and that legal precedents are based upon many different values and findings, not only textual interpretations. (Please see the summary of scientific findings about homosexuality by Dr. Judith Glassgold that is attached to this paper. She compiled the summary as an appendix to Rabbi Dorff's paper.)

Second, many of Rabbi Roth's assertions and critiques of more liberal interpretations are not unassailable, nor do they have universal support among Conservative –and even a few Orthodox- scholars of Halakhah. An excellent case in point is his critique of Rabbi Elliot Dorff's use of the Talmudic concept of *kevod habriot* (overturning rabbinic prohibitions for the sake of preserving human dignity) as a decisive factor in developing the Halakah concerning gays and lesbians. As Rabbi Dorff and his co-authors argue in their paper (see below), Rabbi Roth's highly restrictive reading of the concept in its Talmudic context is simply incorrect, or only partly correct at best. (Again, space and simplicity do not allow me to lay out these arguments and counter-arguments in detail.) Further, Rabbi Roth (and Rabbi Dorff) rightly asserts that *kevod habriot* allows us to overturn rabbinic law to preserve the dignity of the individual and those around him precisely because human dignity is preserved or destroyed in a social context. Rabbi Roth then argues that because an act of sex happens between two people in private, this concept cannot be used to enhance gay and lesbian Jews' dignity halakhically. He seems to miss the point that supporting gay and lesbian Jews in marrying, forming families, and living publicly Jewish lives is very much a matter of

public, social context. Two people who marry and start a family are involved in far more than the sex that they engage in privately, whether they are gay or straight.

However, what I find most troubling about Rabbi Roth's arguments are his theological views that stand behind them. As I mentioned above, Rabbi Roth does not entirely oppose the idea that being gay or lesbian is an inherent and indelible part of a person's identity, one that is not freely chosen. He simply thinks that it is irrelevant in determining permitted personal behavior. For him, the just and merciful God who created gay and lesbian Jews as they are can also demand that they refrain from intimate sexual expression, even to the point of lifelong celibacy. Rabbi Roth advocates life-long celibacy for gay and lesbian Jews, a ruling whose end results are cruel, counterproductive and un-Jewish, even if Rabbi Roth's intent is not. As my teacher Rabbi Arthur Green teaches, Judaism is a religion of householders who express their love for God through marital intimacy, family, and raising children. Certainly, Judaism rightly calls upon each of us to refrain from acting on different sexual impulses. Married people are forbidden from committing adultery; rape, incest, and sexual abuse are absolutely forbidden; and (ideally) a Jewish couple refrains from sexual relations during a woman's monthly cycle. Judaism possesses laws and practices that teach us to achieve holiness through elevating our sexual drives: loving relationship with God is reflected in one's loving relationship with one's partner, and vice versa. Lifelong celibacy is not at all what an authentic Jewish sexual ethic would demand of someone. This, especially when his or her sexual orientation is irreversible and can be expressed in ways that do not violate family boundaries, traumatize, abuse, denigrate, or sexualize a child or another adult. A gay or lesbian Jew is able to act freely upon his or her

orientation with another unrelated, unattached adult to create a permanent relationship and family. Further, Rabbi Roth's theological claim that a just and loving God could create the circumstances for someone to be gay or lesbian, then forbid that person from channeling his or her drives into intimate relationships is totally out of sync with classical Jewish views of our God, Who commands us to pursue justice and behave compassionately.³

Certainly, one could argue that the theological or moral rationales behind *Halakhah* are enlightening but irrelevant to the process of halakhic decision making. What matters is not what Rabbi Roth or others think theologically about this issue, but how they argue the issue legally. However, that would be an inaccurate assessment of how *Halakhah* works.⁴ Though brevity prevents me from demonstrating this here,

³ As one of our committee members asked, how do we respond to the fact that God created a great many unfair and inequitable situations for people, and that some of those circumstances may preclude full participation in the religious life of the community? Preclusion of full participation is of two types: a person cannot participate or fulfill a religious obligation because of a temporary or permanent disability, or a person is excluded by others because of disability, gender, or some other inherent characteristic. In the first case, Halakhah only obligates one to fulfill what one can fulfill. Thus for example, a couple who cannot conceive biologically are permitted and encouraged to adopt but they are not obligated to fulfill the commandment to have children. In the second case, Conservative Judaism has worked hard to overturn traditional exclusions based upon inherent characteristics, to the extent that that is possible and feasible. For instance, the Talmudic rabbinic presumption that a deaf person is similar to a minor or someone who is mentally impaired was likely based upon how deaf people were perceived or interacted with others in the ancient world. Given what we understand about deafness today, to deny someone who is deaf all the benefits and obligations of Jewish ritual life (such as being a legal witness) is unnecessary and unethical. In other words, Halakhah grows, and it grows more inclusive, as it encounters new and better information about the world. The chief impulses behind that growing inclusiveness are the traditional Jewish emphases upon *kevod habriot* and upon being created in God's image.

⁴ See Rabbi Dorff's book, Matters Of Life And Death: A Jewish Approach To Modern Medical Ethics (Philadelphia, Jewish Publication Society, 1998), that I will talk about below, especially the introduction and the appendix. He lays out systematically how Halakhah interacts with and is

theological and moral/ethical considerations often enter Halakhic deliberation because *Halakhah* is all about discerning the values by which God wants us to live! This is the case even and especially if we accept that “the Torah is completely divine and legally infallible”, as Rabbi Roth does. (For example, I can persuasively argue the opposite position that the perfect God's infallible Torah would never impose cruel and unusual burdens upon innocent people created in God's image.) Thus, though they are not the only criteria by which to decide the question of gay and lesbian enfranchisement, the theological positions of Rabbi Roth and others do matter a great deal here. (Below, at the end of my discussion of Rabbi Dorff's position, I will summarize what I believe is the chief difference between his and Rabbi Roth's approaches to homosexuality that leads me to favor Rabbi Dorff's approach.)

The Position Of Rabbi Elliot Dorff.

Rabbi Elliot Dorff's most recent *teshuvah* is an updated version of a prior ruling he issued (at the same time as Rabbi Joel Roth) in 1992, as well a number of subsequent articles he wrote supporting full religious enfranchisement of gay and lesbian Jews. It is co-written with two rabbinic colleagues, Rabbi Daniel Nevins and Rabbi Avraham Reisner.⁵ In his article on homosexuality found in his earlier book on Jewish medical ethics, Matters of Life and Death, (1998), Rabbi Dorff advocates rethinking the

the product of theological and moral values within Judaism. See also Louis Jacobs' book, A Living Tree, and Eliezer Berkovitz's book, Not In Heaven.

⁵ Elliot N. Dorff, Daniel s. Nevins, & Avram I. Reisner, "Homosexuality, Human Dignity &Halakhah" (New York, Rabbinical Assembly Committee On Jewish Law And Standards, December 6, 2006, pp. 1-36.)

traditional prohibition. He argues that we now understand (based upon new psychological and scientific knowledge) that being gay or lesbian in most cases is no more a matter of choice than being heterosexual. To condemn someone's sexuality (and more basically his or her humanity) because he or she is created by God with the impulse for same sex attraction is cruel, immoral and Jewishly counterproductive. Before providing details for this argument, (which I will outline below), Rabbi Dorff explains his rejection of Rabbi Roth's "textualist" (what I called above the "legal-positivist") reading of the two verses in the Torah prohibiting male homosexual behavior.⁶ Rabbi Dorff recognizes that two millennia of rabbinic interpretation of Torah unequivocally banning all homosexual behavior obviously cannot be dismissed lightly. However, he argues that continuing this ban on the assumption that the verses' simple meaning (their *peshat*) or our rabbis' later readings of the verses are the only possible readings is not a Jewish way to read the Torah for the purposes of making Jewish legal and moral decisions. Long standing precedent is powerful, weighty and authoritative, but it alone does not determine how we are to behave as Jews. Our ancient *tradition of interpretation* allows (using specific rules of interpretation) for the reinterpretation of

⁶ Concerning the biblical prohibitions against homosexual behavior, he writes, "...The rabbis of the Talmud and Midrash themselves often employed techniques that interpreted the text contrary to its plain meaning, narrowed its meaning or interpreted it completely out of existence...To insist on the literal meaning [of these verses] therefore demands justification...[S]imply quoting the text or even the later interpretations of it will not suffice; we must, as the Talmud says, subject the text in each generation to what the contemporary judges see with their own eyes. (See Dorff, Matters Of Life And Death, p. 141).

specific traditions and laws. There is ample testimony in ancient rabbinic literature that our ancestors engaged in this kind of bold reinterpretation regularly.⁷

Like Rabbi Roth, Rabbi Dorff is firmly committed to discussing Judaism and homosexuality within the context of halakhic process and tradition. However, unlike Rabbi Roth, he sees this aspect of tradition evolving towards a more inclusive position because he understands that process differently. New knowledge and competing traditional Jewish values have always had, and must have, a voice alongside of the Torah's specific words. In his most recent *teshuva*, after a thorough analysis of the Leviticus prohibitions and later rabbinic interpretations, Rabbi Dorff asserts that the Torah (as understood by the rabbis) specifically prohibits anal sex and nothing else. He recognizes that Jewish law later extends the Torah's prohibition to all homosexual activity, male and female. *However, these extended prohibitions are rabbinic extrapolations and additions, not original Torah legislation*⁸. An equally important and

⁷ Examples of this include reinterpreting the verses in Deuteronomy 21 that demand the death penalty for stubborn and rebellious children so that the law could never be followed (*Mishnah*, Tractate *Sanhedrin*, ch. 8); removing the exclusive power granted by the Torah to an ex-husband to issue his ex-wife a get and placing that power in the hands of the court when he refuses to give her the get (Babylonian *Talmud*, Tractates *Bava Batra* 48b, and *Gittin* 32-33); relaxing the rigorous Torah based rules about judges' qualifications for cases involving loans and debts so that lenders will not be deterred from giving loans, thus preventing poverty and economic stagnation (BT Tractate *Sanhedrin*, 2b-3a); Hillel The Elder's legal fiction of *Prozbul*, which allows a court to assume a person's debt repayment during the sabbatical year when the Torah requires all debts to be forgiven. By assuming the debt, the court maintains the law of the Torah by not asking the lender to go after the loan in those years, yet prevents lenders from not lending to poor debtors by assuring that loans will always be repaid by the court itself (*Mishnah*, Tractate *Sheviit*, ch. 10:1-3; The principle of *K'vod HaBriot* which can overturn rabbinic laws, edicts and stringencies in order to preserve human dignity (BT, Tractate *Brakhot* 19a-b).

⁸ This includes lesbian behavior. Rabbi Roth and Rabbi Dorff disagree about whether or not lesbianism is biblically prohibited based upon earlier disagreements between Nachmanides and Maimonides, the two towering intellects of medieval Jewry.

competing Jewish value to consider in rethinking homosexuality is the Talmudic concept of *k'vod habriot*, respect for the dignity of human beings that can even overturn rabbinic prohibitions and interpretations of the Torah! *K'vod habriot* can never overturn an explicit, Torah based law, but it can overturn a rabbinic ruling or extension of a Torah based law. On the basis of this rabbinic value, Rabbi Dorff argues the following. In our day, having confronted the painful testimonies of gay and lesbian Jews about the ways they have suffered because of orientations they did not choose and cannot change, the *rabbinic value* of *K'vod HaBriot* for them and their relationships must take precedence over the *rabbinic prohibitions* against male and female homosexuality. At the same time, we need to counsel gay men in relationships that the specific *Torah* prohibition mentioned above (anal sex) still applies, just as we would counsel any heterosexual couple about what is Jewishly permitted or forbidden in a relationship.

The principle of *K'vod habriot* holds sufficient weight for Rabbi Dorff to overturn established rabbinic rules prohibiting almost all male- and all female- homosexual behavior. This is the case for the following reasons. First, for whatever reasons of nature and nurture, gay and lesbian Jews are who they are, no more or less than Jews who are heterosexual. The current professional consensus is that being gay and lesbian is not a choice, neither is it a mental illness nor a freely chosen motivation to rebel against societal and moral norms. Further, gay and lesbian people are just as capable as straight people of forming lasting romantic and marital relationships, of adopting or bearing children through modern reproductive interventions, of raising them in loving, healthy environments, and of behaving according to a code of sexual and relational

ethics. They simply need to do these things *as gays and lesbians*, something that the rabbis of ancient times would not have understood.

Second, the stories that gay and lesbian Jews tell about themselves are their own best testimony in the eyes of contemporary *Halakhah*. They are stories of human beings' deep, often painful struggles to deal from early adolescence with sexual feelings and needs so different from and unacceptable to the majority of society. This often causes them to live with great self loathing, depression, and suicidal impulses out of fear of rejection, demonization, and abuse. Their continued marginalization from Jewish religious life grossly violates the principle of *K'vod HaBriot*. As noted above, Rabbi Dorff takes direct issue with many of Rabbi Roth's halakhic readings and interpretations. He also strongly rejects Rabbi Roth's theological assertion that a just and compassionate God could (or would) require gay and lesbian people to live in celibacy. Further, he critiques the hypocrisy of our society that tells gay and lesbian people their sexual and romantic desires cannot be channeled and sanctified through the normative institutions of relationship, marriage and family, then condemns them when they behave promiscuously on the margins of society. He unconditionally supports the Jewish religious and ethical values of channeling our sexual impulses into acceptable, holy behavior, and refraining from sexual behavior that is forbidden. Honoring marital fidelity, respect and kindness, refraining from sexually abusive behavior, protecting children from sexual predation, and refraining at appointed times from engaging in sex with one's partner or spouse are values that all people, straight and gay, must follow as sexual and moral beings in committed, fulfilling, intimate relationship. However, telling gay and lesbian people that they must also refrain

unconditionally from *all* intimacy and fulfillment for the rest of their lives is totally inconsistent with Judaism's basic emphasis upon authentic family values such as intimacy, marriage, family and children, and its rejection of lifelong celibacy. Rabbi Dorff also argues that lumping together homosexual impulses and predatory or pedophilic impulses as equally worthy of condemnation and repression is morally and intellectually wrong. The former can be fulfilled by consenting, unrelated adults in genuine relationship. The latter are what they are: pathologies that denigrate and damage the victims of the people who act upon them through the sundering of sexual boundaries, the violation of personal trust and security, and the destructive use of sexual activity as a tool of power and subjugation.

Finally, in an age of widespread promiscuity, soaring divorce rates, and rampant Jewish assimilation, Rabbi Dorff seeks to widen the embrace of marriage and family – and Jewish marriage and family in particular- to as many people as possible, regardless of their sexual orientations. In Rabbi Dorff's defense, I would argue that this last point is actually far more religiously and morally conservative⁹ than so-called “conservative” arguments prohibiting homosexual behavior. They privilege exclusively heterosexual behaviors and relationships while giving no thought to the larger ramifications of their exclusivism for the health of society and Judaism. In my opinion, this is one of the most

⁹ My use of the word conservative here is with a small “c”. It does not refer formally to the Conservative movement.

important arguments for religious enfranchisement for gay and lesbian Jews in the form of marriage and family memberships.¹⁰

I strongly support Rabbi Dorff's conclusions and much of his reasoning. However, for the sake of fairness and intellectual honesty, the following is my assessment of some of his reasoning. One almost gets the sense that by reading the biblical prohibitions of male homosexual behavior so narrowly, Rabbi Dorff is doing his best to "play the (restricted) game" of traditional halakhic interpretation, in order to be able to say that he "played by the rules." This is certainly understandable and admirable, given that *Halakhah* is set up according to a time honored process with rules and precedents that need to be followed. However, could we not counter Rabbi Dorff by saying that (as he puts it) "the established rabbinic understanding of the Torah" has, for millennia, gone well beyond his highly restrictive interpretation of what the Torah means, to include a whole constellation of sexual behaviors between people of the same sex? Certainly, Rabbi Roth argues this way in his *teshuvah*, thus at least calling into question the legitimacy of Rabbi Dorff's interpretive approach. Though I am not necessarily opposed to such innovative readings, they do not necessarily stand up to scrutiny as traditional Halakhah by some scholars of *Halakhah*. Precedent, though not the only factor in determining Halakhah, is not to be dismissed lightly, especially when it

¹⁰ I add here yet another "conservative" argument for full enfranchisement. Because of their fears of continued social stigma and the lack of normative marital options, some gay and lesbian people force themselves into heterosexual marriages, believing that they will somehow be able to "act straight." I believe that, ideally, a bisexual person who truly has the choice to do this should choose heterosexual family life: that is, after all, what Judaism privileges, and what the vast majority of the population does. However, when someone who is gay or lesbian makes this forced choice, the dishonesty, family dysfunctions, and ruined marriages that result are nothing short of *Hillulei HaShem*, desecrations of God's name.

concerns a substantive matter of interpersonal behavior. Further, I fear there is a lack of pragmatic realism to Rabbi Dorff's halakhic ruling. Does he really believe that if a rabbi counsels two men about to be married that their marriage can take place as long as they "promise/commit/swear" never to engage in a particular sexual behavior, they will necessarily follow this? He and others argue that such a condition is parallel to marrying a heterosexual couple on the condition that they refrain from relations during a woman's period or that they not commit adultery, despite the fact that it is entirely possible they will not follow these conditions. However, the parallel does not completely hold, in my opinion. Heterosexual marriage – all its potential for violations of Torah law notwithstanding- is not under scrutiny here, the unprecedented permission to perform same-sex marriages is. Rabbi Dorff is my teacher, and I certainly understand what he is trying to do here with respect to making this radical halakhic step religiously respectable, but it feels forced. Finally, an innovation of the type that Rabbi Dorff advocates always runs the risk of snowballing into our granting permission for changes in law anytime enough people claim that an aspect of *Halakhah* is morally or religiously wrong. All of the above arguments to the contrary notwithstanding, it is certainly possible to reinterpret *Halakhah* to such a point that anything forbidden becomes permitted, with the supposed sanction of *Halakhah*.

Why then do I accept his conclusions over Rabbi Roth's conclusions? Already in his earlier essays, Rabbi Dorff argues quite eloquently and passionately that we now know enough about homosexuality as an orientation to assert that it be considered an extended and permanent form of *Ones Rahmana Patrej*, the halakhic idea that the merciful God exempts a person from moral and legal liability for things over which he or

she has no control, that s/he is “compelled” to do or not do in temporary circumstances.¹¹ Simply put, we now understand that being gay or lesbian is an emotionally healthy orientation with the potential for expression in a holy, authentically Jewish framework. The Torah only forbids what you freely choose to do, not what you cannot choose. In his most recent *teshuva*, Rabbi Dorff extends this argument with the halakhic principle of *heikhah d'efshar, efshar*: only that which is feasible is feasible. Demanding of any person –gay or straight- that he or she behave according to rules of sexual ethics and self restraint is well within the halakhic bounds of feasibility. Demanding life-long celibacy of him or her is not, and is truly a violation of *K'vod HaBriot*. Like any straight person, a gay person would be expected to behave according to basic halakhic rules of interpersonal behavior that devolve upon anyone, howbeit as a gay person. And, let me state once again, his “argument from Ones” is not blanket permission for a person to act upon any sexual impulse or desire that s/he has. *Halakhah* is wise enough to recognize that one impulse may be perfectly holy and legitimate when channeled properly, or may need to be accommodated, while other impulses are thoroughly unholy because of their effect upon the actors, those they act upon, and others hurt in the process.¹²

¹¹ For more details about the Halakhic concept of *Ones*, see Matters Of Life And Death, pp. 145-147, as well as p. 367, notes 20 and 21.

¹² A superb analogy that Rabbi Dorff draws in his earlier article is allowing someone who is sick or pregnant to violate the prohibition against eating on *Yom Kippur* in order to preserve his or her life. (See *Mishnah*, Tractate *Yoma*, ch. 8.) We follow the lead of the individual in determining the extent of his or her compulsion or need to eat. So too, Rabbi Dorff asks us to recognize that gay and lesbian people's own testimonies about who they are and about the indelible nature of their sexual identities are the key to our understanding what they need. Certainly, we are creative enough to see that offering them the ability to channel, civilize and sanctify their

Like Rabbi Roth and Rabbi Dorff, I am deeply concerned that rabbinic authority, precedent, and traditional interpretation be preserved. They are what lend substance to the moral and religious boundaries established by the Torah that keep us together as a people and that help us to live out the Torah's values in a world that is often chaotic and lawless. Yet for precisely these reasons, I am willing to accept Rabbi Dorff's admittedly innovative and unprecedented interpretations of Torah and applications of rabbinic concepts. In the case of homosexuality as we understand it today –not as our sages understood it two millennia ago- we are faced with entirely new realities that present us with what my colleague Rabbi Gordon Tucker calls “hard cases of law” that have no genuine precedents. I appreciate Rabbi Roth's desire to preserve intact Jewish tradition as it has developed, especially since he believes that it truly reflects God's will as expressed in the Torah. However, Rabbi Dorff's mustering of traditional interpretations and concepts to address a genuinely new, and morally critical, matter affecting people's real lives is just better modern *Halakhah*. His approach to this and other issues accounts for what real Jews in the real world are saying about what life is really like for them, and it creatively responds to these realities with a *Halakhah* that is reasonable, principled and compassionate; Rabbi Roth's approach in this case is so two dimensional that, no matter how accurate his reading of texts and history may be, it fails utterly to address those realities. The most extreme example of this is his above noted call for gay and lesbian Jews to remain celibate all their lives. His almost rigid

inherent sexual impulses is no less a matter of life and death than allowing someone in genuine need the permission to eat on Yom Kippur.

insistence that contemporary science and sociology have nothing to say to Halakhic tradition concerning homosexuality is untenable.

Does Rabbi Dorff open up a potential Pandora's box for sanctioning further violations of the Torah's sexual ethics? Above, I argued that *Halakhah* and its expositors are wise enough not to allow that to happen, though admittedly the potential for this to happen always exists. However, not doing what is right and just and beneficial to others because you fear its possible consequences is not a Jewishly authentic way of approaching moral, religious and Halakhic action and decisions. If it were, the above mentioned cases of innovative rabbinic interpretation would never have come to fruition because our sages would have been too afraid to evolve the law. This does not mean that "anything goes" or that Rabbi Dorff is authentic and Rabbi Roth is not. Rabbi Dorff is certainly not advocating religious and moral chaos, and Rabbi Roth often makes clear that radical, innovative conclusions may be drawn from halakhic research as long as they follow certain specific rules. (Recall that his was one of the decisive *teshuvot* admitting women into the Conservative rabbinate.) Nonetheless, in this case, Rabbi Dorff's multi-pronged approach to *Halakhah*, his compassionate, realistic attempt to extend traditional Jewish commitments to people based upon who they are, and his willingness to integrate Jewish values and texts with the living "texts" of real people is preferable, in my opinion, to Rabbi Roth's approach. Finally, let me address the concern stated above, and by Rabbi Roth: can we really assume that a gay male couple will listen to a rabbi's counsel about refraining from anal intercourse, which for Rabbi Dorff is the core prohibition in the Torah? This is likely where Rabbi Dorff's argument is at its weakest, as I explained above. However, as a rabbi, I trust rabbis to

exercise sufficient moral and spiritual influence over couples during premarital counseling that any couple, gay or straight, will at least have an opportunity to reflect upon what sexual holiness in marriage means. Further, as hair splitting as this may sound, in *Halakhah*, witnesses are only obligated to give *hatraah* –fair warning of legal culpability for a potential violation of the Torah- to someone else when that individual is about to engage in the act itself. When a rabbi talks to a couple about sexual holiness in marriage, he or she plays the role of educator, not legislator or police officer, with them, whether they are straight or gay. To reject all the moral, communal, and halakhic benefits of same-sex marriage to avoid giving sanction to a violation of the Torah that one cannot even know will happen seems to me to be an overreaction.

HALAKHIC CONCLUSIONS.

In his *teshuva*, Rabbi Dorff makes clear that he is not ruling on the exact nature of a Jewish same-sex commitment or marriage ceremony, nor is he calling such ceremonies *kiddushin*, ceremonies sanctifying marriage according to established halakhic precedent. All he is doing is proclaiming most same-sex behaviors halakhically defensible within specific parameters, on the grounds of human dignity and the desire to strengthen Jewish family life. Note however what he then writes:

Nonetheless, we consider stable, committed, Jewish relationships to be as necessary and beneficial for homosexuals and their families as they are for heterosexuals. Promiscuity is not acceptable for either homosexual or heterosexual relationships. Such relationships should be conducted in consonance with the values set out in the RA pastoral letter on intimate relationships, "This Is My Beloved, This Is My Friend": A Rabbinic Letter on Human Intimacy. ***The celebration of such a union is appropriate.***¹³

¹³ Dorff, Nevins, Reisner, p.19.

The traditional Jewish marriage rite is an ancient, precious ritual, spiritual and halakhic tool that publicly celebrates a Jewish man and woman creating a new family before God and the community of Israel. It has its own liturgy, language, and symbols that deserve to be preserved as unique features of Jewish marital ideals and practices. As we chart an old/new course in Judaism by creating new marital opportunities for gay and lesbian Jews, we can find ways to celebrate publicly the equal holiness of their relationships that reflect the uniqueness of those relationships.¹⁴ They do not have to be, and in fact should not be, carbon copies of heterosexual marriage ceremonies. It could be argued that acceptance of gay and lesbian relationships need not and should not take the form of public marriage celebrations. To do so is to take too radical a step away from Jewish tradition and to make a mockery of traditional marriage and its ceremonies. Why not simply show kindness towards and acceptance of same-sex couples and families without undoing millennia of precedent? As I argued above, I firmly believe that this is not a radical step at all, but actually a very conservative one. I am calling for us to expand the rights, responsibilities and commitments of traditional Jewish marriage to include gay and lesbian couples, where both partners are Jewish. I also assert that Jewish gay and lesbian families should be embraced by the synagogue community as full member families. This is not merely to make them feel more welcome, and I am not advocating it out of a sense of liberal political correctness. It is because we are trying to strengthen the lives and commitments of all Jewish families,

¹⁴ Again, to be fully honest, Rabbi Dorff remains steadfast in his belief that, where possible, heterosexual relationship and marriage is the halakhic ideal. He would tell a bisexual person that, given his or her ability to choose, he or she should ideally choose heterosexual behavior and commitment. Nonetheless, he recognizes that the indelible and inherent nature of being gay or lesbian is what makes it equal, though different, from being heterosexual.

their orientations notwithstanding. As for concerns about mocking traditional heterosexual marriage, enough already exists in our wider culture that makes a mockery of traditional values such as fidelity and marital sanctity. If anything, extending and expanding the reach of traditional marriage and family status to gay and lesbian Jews sends a powerful message: these values matter for everyone and are for the good of Jewish and general society.

One important reminder: just as our movement has legitimized diametrically opposed approaches to the gay and lesbian "issue", we need to do so as well. Accusing one's fellow congregant of disrespecting traditional morality, or conversely of homophobia, should not be tolerated by our community. Though our community needs a definitive ruling about our *practices*, every member has a right and responsibility to hold fast to his or her *beliefs*, and to respect the beliefs of others.

Civil Marriage And Same-Sex Divorce.

In the course of my writing this *teshuva*, the question of same sex marriage by the civil authorities was brought to my attention. Specifically, should we require same sex couples to be married civilly before we marry them in religious ceremonies? Federal and state laws reflect society's vested interest in sanctioning the legal status of married couples for cultural, economic, and societal reasons. So much so that –at least in New York State- a clergyman is expressly forbidden –on pain of fine or imprisonment- from performing a religious marriage ceremony if the couple has not first been married civilly. In our congregation, we do not offer family memberships to unmarried heterosexual

couples. This reflects our respect for civil law and the seriousness with which we take marriage as an institution.

Applying the same restriction to same-sex couples is problematic because –for the most part- the law does not offer them access to legally sanctioned civil marriage. The federal Defense of Marriage Act (1996) defines marriage as being between one man and one woman, and does not require one state to recognize same-sex marriages performed by another state. Currently, same-sex civil marriages are performed legally in Massachusetts, Connecticut, Vermont, New Hampshire, Iowa, and Washington D.C. (A number of other states offer same-sex couples civil unions, which are supposed to be marriages in all but name; still others offer them more limited domestic partnerships, – available also in Albany, NY-, as well as reciprocal and designated beneficiary arrangements.) New York State does not offer civil marriage or civil unions to same sex couples. Should we require a couple in our congregation to obtain a civil marriage or civil union in another state or country before we perform a religious ceremony for them and offer them full family member status? This, especially when New York State law and federal law do not even recognize the legal validity of such marriages?

After some study and reflection, I have decided that we should require it, for the following reasons. First, though the circumstance is not ideal, same-sex marriages in nearby states are easily accessible. Many couples who want their marriages to possess some type of full legal validity cross state lines (or even get married in another country that offers civil marriage to same-sex couples) in order to take advantage of those states' marriage laws. This is especially the case in New York, which is so close to the above listed New England states that offer same-sex marriages. Though same-sex

couples are inconvenienced –and ultimately discriminated against- by having to leave New York to be married, being able to marry in nearby states is not impossible to do.

Some have argued with me that accessibility to states with legal civil same-sex marriages is meaningless as long as our own state discriminates against them and we have to send them out of state to do what New York does not give them the power to do. I understand the concerns for equality and full civil rights underlying this argument. However, I view the civil marriage component as being about much more than a statement of immediate equality. The gradually increasing number of states extending marriage and marriage-like benefits to same-sex couples reflects how supportive a growing number of Americans are about lending legal weight to those marriages. Americans who are supportive might be more motivated by a desire to apply the law justly and fairly than by concerns about the moral and spiritual value of widening the embrace of marital obligations to all couples. However, their underlying motivations are irrelevant. They have decided through their respective state governments to emphasize the legal, cultural, and moral institution of marriage for all couples. I want more, not fewer, states to follow suit, precisely because marriage matters for everyone. One way I/we can encourage more states to do this is by requiring all same-sex couples to be married civilly, even if for the time being they are required to jump through legal and geographic hoops that heterosexual couples do not. Third, if we take same-sex marriages as seriously as heterosexual marriages, why would we not insist that a same-sex couple be civilly married before we perform a religious marriage ceremony and they receive a family membership? Marriage ceremonies should not be treated as “marriage lite” – mere creative rituals that have no backing or standing from

civil law. This is especially the case since our goal is to expand and extend the rights and responsibilities of marriage to all couples in our community. Finally, as long as same sex couples have reasonable access to options for civil marriage (even if not yet in New York itself), exempting them from what we require of heterosexual couples actually creates an unfair and unnecessary double standard in the opposite direction. In this case, real equality is achieved, howbeit imperfectly, by treating both heterosexual and same-sex marriages with the same seriousness and substance before the law. I understand the argument that demanding another state's civil marriage for a same-sex couple residing in New York State is useless, and is, in itself, a double standard. Our state government does not recognize it and will not give that couple a single benefit or protection based upon it. However, as I alluded to above, my purpose in requiring their civil marriage is not necessarily practical or political, but moral. Being married in a civil ceremony is one of several substantive indicators that that same-sex couple standing before the rabbi sees itself, and is seen, as legitimately married and committed before God, the Jewish people, and (at least partly) a growing number of its fellow American citizens. It is extremely important for us to emphasize these values of marriage, even if the politics surrounding marriage continue to remain unequal and unfair to same-sex couples. Our task as a religious community is to ritualize and concretize our highest religious and ethical ideals, even if the secular state does not always do so. (Remember, of course, that a heterosexual couple does not need a separate civil marriage ceremony before being married halakhically. They need only have their civil license signed the day of the wedding by the officiant, who then marries them religiously and as an agent of the state. Once New York changes its laws, same-sex

couples will have that same opportunity.) One important additional note: I should make clear that we would only require a same-sex couple seeking to be married by Ohav's rabbinic leadership to be civilly married first. When a heterosexual couple comes to our congregation seeking a family membership only, we do not require them to prove that they have been married in a Jewish ceremony or that they have even been married officially at all. We have always trusted the integrity and honesty of couples seeking to join us, when they tell us they are married. So too with a same-sex couple: if when they seek to join Ohav they present themselves to us as a married couple, we would accept them as such, whether or not they could demonstrate that they were married Jewishly, civilly, or both.

The question of divorce has also come up. Specifically, if we perform marriages for same-sex couples, would we require them to go through a Jewish divorce as well? This question needs to be placed in context. Though ending a marriage with the giving and receiving of a *get* (bill of Jewish divorce) is a requirement of Jewish law, Ohav's rabbinic leadership cannot obligate couples to do so, unless they wish to be remarried by us. Though we work very hard to encourage and facilitate Jewish divorce ceremonies, our authority over this extends to cases of remarriage only. Nonetheless, Jewish law still maintains clearly that ending a marriage halakhically is as important as creating a marriage halakhically. As I noted above, the traditional Jewish marriage ceremony is an ancient and sacred rite whose symbols and rituals are intended specifically for the creation of heterosexual families; as we create new marital opportunities for same-sex couples, they do not need to be, nor should they be, carbon copies of the traditional rituals. This is also the case with divorces. Celebrations of

same-sex marriages are so new in the Conservative movement that the Rabbinical Assembly's Committee on Jewish Law and Standards has not even begun to standardize them; how much more so is that the case with a ceremony for same-sex divorce. The Law Committee should address this issue, but it may not do so in the near future. Yet this should not preclude us from developing such a ceremony, encouraging a divorcing couple to engage in it, and requiring it of a couple before performing future same-sex marriage ceremonies for either member of that couple. I am hesitant at this point to detail what a same-sex Jewish divorce would look like, though I am happy to write more about this in the future at the request of the Religious Life Committee. I believe that a *Tekes Preidah* (separation ceremony) with accompanying documentation would be desirable and should be required. Once again, if we are serious about extending the blessings, benefits, and responsibilities of traditional marriage to Jewish same-sex couples, we must be willing to extend them fully, including ending them in the context of Jewish tradition when, sadly, a marriage fails. Also, I assume that neighboring states offering civil same-sex marriages also require the dissolution of those marriages by civil law. Once again, I am happy to do future research on what civil same-sex divorce would mean for religious practice at Ohav Shalom. For now, whether or not we would require a civil same-sex divorce concurrent with a *Tekes Preidah* is of secondary relevance to the main topic of this paper: same-sex marriage.

The marital unions of gay and lesbian couples –where both partners are Jewish– should be celebrated and sanctified at Congregation Ohav Shalom. The exact form and structure of these unions is to be determined exclusively by the rabbinic leadership

as the halakhic decisors.¹⁵ The rabbinic leadership will also require of each couple that they receive premarital preparation and counseling no different from that required of straight couples. For the time being, we will also require that each couple be civilly married through another state or country before we perform a religious marriage ceremony. Should New York State begin to issue marriage licenses and perform civil marriages for same-sex couples, we will only require that a same-sex couple bring its license to the religious ceremony to be signed on the day of the wedding. (We can discuss the acceptability of a civil union or recognized domestic partnership at a different time.) Accepting these couples and their families for full family memberships follows logically and naturally from celebrating their unions publicly in the synagogue, though these membership policies must ultimately be decided by the membership committee and the board of trustees. We should do for and ask of these couples what we would do for, or ask of, any heterosexual couple we marry. In doing so, we will

¹⁵ Some members of the Religious Life Committee have expressed concern about the details of these same-sex religious ceremonies. In their most recent paper (as quoted above) Rabbi Dorff and his colleagues leave these details to the individual rabbi(s), at least for the time being. The committee and the congregation need to entrust these details to the rabbinic leadership of Ohav. Nonetheless, to address the concerns of some of our own committee members, let me explain the following. The traditional marriage ceremony reflects time honored legal and theological elements. The values underlying these elements, e.g., holiness in relationships and sexual behavior, exclusivity and fidelity, the continuity of the Jewish people and of humanity, will also find expression in same-sex ceremonies that we perform. Further, the structure of the traditional Jewish marriage ceremony is so well known and expresses these values so well. Thus, we likely will use that general structure in same-sex ceremonies. (For instance, some kind of a ring exchange, a symbolic rendition of a *ketubah*, seven blessings, a *huppah* or covering etc.) What we will not do is use the actual halakhic instruments of the standard ceremony for a same-sex union, specifically the language of the traditional *ketubah* and blessings. Over time, what the Conservative movement will grow is a new version of the halakhic wedding ceremony, specifically for same-sex unions.

rectify long standing injustices against a portion of God's children, as well as strengthen marriage, the Jewish people and the moral fabric of human civilization.

ויהי נעם א-דני א-לקינו עלינו ומעשה ידינו כוננה עלינו ומעשה ידינו כוננהו

May the favor of the Lord, our God, be upon us. Let the work of our hands prosper, O prosper the work of our hands. (Psalm 90:17)