

but wonders if indeed the rabbi will be willing to fulfill his side of the bargain and fully accept gay and lesbian relationships.

Our rabbi admits that while he would prefer Joshua avoid anal intercourse, he cannot actually transmute a biblical sexual violation into a ritual infraction. Even though, formally speaking, adulterers and incest violators could not be charged with a capital crime without sexual intercourse, surely no one would want to openly permit, much less celebrate, sexual play that stopped short of intercourse in these circumstances. Joshua reminds the rabbi that the comparison is invidious. Incest and adultery directly violate the family in various ways; same-sex relations between consenting adult partners harm no one. Nonetheless, our rabbi, after consideration, is not very open to this proposal either.

O'ness—Duress

However, our rabbi is aware of another legal category that has been creatively employed by a few religious thinkers in order to address the question of homosexuality. These rabbis have suggested that the legal principle of *o'ness rahmana patrei* (literally: the Merciful One absolves anyone who acts under duress) ought to be used to mitigate the strength of the prohibition. Individuals under duress are not considered culpable for their actions. According to the law, no person can be held responsible for an act over which she or he has no control. Deprived of free will by a psychological condition, gay people could be supported to do the best that was in their power to do.

The classic source of *o'ness* describes a Jew being physically forced by pagans—presumably under mortal threat—to bow down to an animal.³⁸ Should individuals acquiesce under such circumstances, they would not be deemed responsible for their actions. Freedom of will was understood as a prerequisite for legal and moral culpability. From other textual sources it appears that an internal force, a psychological compulsion to act in a particular way, could also be seen as a form of *o'ness*.³⁹

Rabbi Norman Lamm, the former president of Yeshiva University, wrote an article on homosexuality in 1974 for the *Encyclopedia Judaica Year Book* in which he proposed the idea that at least some homosexuals might be considered “under duress.”⁴⁰ According to Lamm,

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those homosexuals who have repeatedly failed to overcome their same-sex desire would be considered under the “duress” of a psychological condition. The act would remain an abomination, but individuals afflicted with homosexual desire would garner extraordinary pastoral compassion, tolerance, and sympathy. Rabbi Lamm’s use of *o’ness* was obviously intended to ease the circumstances of homosexuals while keeping the religious and communal norms intact.

Lamm excluded what he termed “ideological” homosexuals from his ruling. Gay people “who assert the legitimacy and validity of homosexuality as an alternative to heterosexuality” would not be deemed “under duress” according to Lamm. Only those homosexuals who had attempted to overcome their desires and failed and who “readily admit its pathology could be considered under the duress of a psychological condition.” For Lamm, the defense of *o’ness* requires an acknowledgment of both the negativity of the sexual behavior and the pathology of the compulsion.

In 1993, in an article in the *Jerusalem Post*, Rabbi Shlomo Riskin, a prominent Modern Orthodox rabbi, educator, and community leader, suggested that an even broader application of the principle of *o’ness* might be possible. While homosexuals are portrayed in a rather negative light in the beginning and end of the essay, in the middle of the piece Rabbi Riskin waxes passionate in their defense: “But how can we deny a human being the expression of his physical and psychic being? If there’s a problem with the kettle, blame the manufacturer. Is it not cruel to condemn an individual from doing that which his biological and genetic makeup demand that he do? The traditional Jewish response would be that if indeed the individual is acting out of compulsion, he would not be held culpable for his act.”⁴¹ Rabbi Riskin was obviously troubled by the cruel theological conundrum of denying a person the expression of an inborn (read Divinely created) nature. He implies that, if homosexual desire is like heterosexual desire, an innate feature of a person’s physical and psychological makeup, then the category of *o’ness* should be applied widely to all homosexuals.

Our rabbi finds this reading of homosexuality to be compelling, but has misgivings. While one does not choose a sexual orientation, acting upon a sexual desire is generally understood to be free willed.

The characterization of sexual passion as beyond freedom of choice would seem to be counter-intuitive. Were *o'ness* to be widely applied to sexual violations it would undermine the culpability of any sexual offender. "I was out of control" would serve as a universal excuse for all sorts of sexual crimes.⁴² While overwhelming sexual desire hardly seems sufficient to justify a court's leniency in judging a sexual offense, the rabbi reminds himself that, at least in certain circumstances, uncontrolled sexual passions are considered a halakhically legitimate form of duress.

The Talmud uses the defense of *o'ness* for a married woman who was raped, and who in the process "consented" due to the arousal of her passions.⁴³ In this case the woman was to be considered as having refused the liaison despite her change of mind. Her later "consent" was to be deemed "under duress" and would not have the power to transform her rape into an act of adultery.⁴⁴ Ordinarily, a male claiming to be a victim of coercive sex with a female, could not be easily exonerated in a comparable situation because an erection was taken as proof of willingness.⁴⁵ For parity's sake, the rabbis conjure up a bizarre theoretical frame by which a man could be considered under duress. If he was aroused in a permissible fashion, for example, with his wife, but then forced to conclude coitus with a prohibited woman, then a man would, according to most authorities, not be liable.⁴⁶ These discussions reveal, among other things, that sexual passion can, in certain circumstances, be halakhically understood as a force beyond the control of ordinary individuals.

This approach to homosexuality as a unique condition of duress has not received resounding support among Orthodox halakhic authorities. However, a growing number of rabbis have been willing to use the category of *o'ness* as a hook for a policy of "special consideration." While not suffering from a full-fledged mental illness, the homosexual transgressor should be spared the full consequences of his sin on the grounds of a basic innate desire that is fundamentally not chosen.⁴⁷

O'ness provides Orthodox rabbis with a platform for distinguishing between toleration and social transformation, between sexual orientation and sexual liberation. Those physically and emotionally capable of functioning heterosexually would be duty-bound to

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marry and to fight temptation. Those who have no desire at all for the opposite sex and who are powerfully sexually attracted to members of the same sex would be considered “under duress” and given the opportunity to make the best of the situation.

The category of *o'ness* used in this way may contain within it a claim about celibacy. While limits on sexual expression are part of the fundamental framework of human civilization, the lifelong closing of all avenues of sexual expression would be understood as unrealistic. Rabbi Dr. Nathan Lopez-Cardozo, an Orthodox rabbi interviewed in DuBowski's film puts it this way. “It is not possible for the Torah to come and ask a person to do something which he is not able to do. Theoretically speaking it would be better for the homosexual to live a life of celibacy. I just would argue one thing—it's completely impossible. It doesn't work. The human force of sexuality is so big it can't be done.” *O'ness* is the halakhic category that best portrays the unrealistic demand of lifelong celibacy. Rabbis surely understand that were their heterosexual congregants offered membership in the community on the condition that they remain celibate all their lives, the overwhelming majority would not agree to the bargain.

O'ness provides the halakhic grounding for Hillel's common sense adage, “Judge not your neighbor until you stand in his place.”⁴⁸ Homophobic remarks are painfully common in traditional synagogues. Understanding homosexuality as *o'ness* helps rabbis to become public advocates of the protection of homosexuals from persecution and abuse, in the synagogue, in the local community and in the larger political arena as well.

Rabbis who are persuaded by the sincerity of the gay people who come to them for counsel can use the category of *o'ness* to ground policies that formally accept out gay people as full-fledged synagogue members. Gay and lesbian people, it can be argued, should formally be given the opportunity to fulfill what they can. While falling short of the ideal, monogamous gay partnering could be seen as the most holy life choice available to gay and lesbian people. The halakhic category of *o'ness* is perhaps the most creative frame presently available to Orthodox rabbis by which they can open their doors to gay couples without changing the fundamental rule on homosexual relations.

Captured Children

A parallel argument for toleration based indirectly on the principle of *o'ness* has been proffered by Rabbi Chaim Rapoport, an Orthodox congregational rabbi and a member of the cabinet of the chief rabbi of Great Britain and the Commonwealth. Rabbi Rapoport rejects the notion that practicing homosexuals are formally under the duress of a psychological condition. Instead, he relieves homosexuals from full agency and culpability by portraying them as victims of cultural miseducation. Rapoport describes the sexually active gay Jew as falling under the category of a *tinok shenishbah ben ha-akum*, a Jew captured and raised from infancy by gentiles.⁴⁹

The halakhic category was created in Talmudic times in response to real abductions of children who later needed to be integrated into Jewish communal observance. Such individuals, it was taught, could not be held accountable for their lack of belief or observance. The unruly behavior of people not reared in a Jewish environment or instructed in Jewish observance should be taken in stride. They should be embraced and moved gradually from ignorance to knowledge, and from disregard of the law to respect for it.

The Talmudic category was expanded by Maimonides as a broadly applied leniency when dealing with the children and grandchildren of heretics. The original Karaites, a sectarian group rejecting the rabbinic oral tradition, were to be harshly rebuked for having actively broken away from normative Jewish belief and practice. However, “their descendants are like children who have been taken captive among them. The status of this second generation is comparable to that of an individual who has been coerced. Even if such a person later learns that he is a Jew and becomes acquainted with Jews and their religion, he is nevertheless to be regarded as a victim of compulsion (*o'ness*), for he was reared in their erroneous ways. The same is true for those who follow in the footsteps of their misguided ancestors. Therefore it is proper to influence them to return in repentance and draw them near with words of peace until they return to the ever-flowing Torah.”⁵⁰

In 1849, Rabbi Zvi Hirsh Chajes, an Eastern European Orthodox rabbi of immense Jewish and secular erudition, denounced the

burgeoning Reform movement but limited his condemnation to the leaders of the movement. Rank and file Reform Jews were to be considered like “captured children.”⁵¹ Writing over a century later in the aftermath of the Holocaust, Rabbi Shimon Shwab, a leader of German Orthodoxy maintained that even “those who have been brought up in a Torah-true atmosphere” but have become disillusioned as a result of despair and nihilism ought to be treated as “captured children.” The lack of faith and observance due to the “total eclipse of Divine Providence” during the Holocaust was not to be considered a willful choice. Such rejection of traditional religious life, no matter how angry and insistent an individual might be, was to be a consequence of religious trauma rather than rebellion.⁵²

The contemporary Orthodox community has generally adopted this approach to non-observant Jews, considering them to be like “captured children” rather than blatant heretics. Rabbi Simcha Wasserman, a pioneer in Orthodox outreach initiatives directed to non-Orthodox Jews applied the category to “all those who had not been raised with Torah who should not be criticized for not living up to its standards.”⁵³

Rabbi Rapoport derives from these sources that even when a person has free will to choose right from wrong, he can only be considered guilty for choosing the latter if he was in a position to *know* right from wrong. Given this framework, sexually active homosexuals who have been seduced by the permissive strains of Western cultural values might very well be considered captured children. He writes, “A careful appraisal of the ‘conditioning’ of an individual sexually active homosexual may well lead to the conclusion that the person in question ought to be granted the status of *tinok shenishbah*, with its attendant ramifications.” Rabbi Rapoport argues that we ought to apply to him the verdict of Maimonides, who declares that “he is to be regarded as victim of compulsion” to whom we must reach out with “words of peace” and “thick bonds of love.”⁵⁴

Rabbi Rapoport describes gay Jews in this way in order to work against the standard Orthodox assessment that gay people are hedonistic renegades. In a sense, the category of *tinok shenishbah* is a sociological application of a psychological principle. *O'ness* refers to a physical or psychological condition of individuals that diminishes

their agency and so their culpability. *Tinok shenishbah* refers to a social condition that miseducates people and so likewise diminishes agency and culpability. *O'ness* treats gay people as psychologically deficient, while *tinok shenishbah* treats gay people as uniquely vulnerable to a morally deficient society.

Both Lamm and Rapoport have attempted to exonerate the individual homosexual while retaining the tradition's normative stance on homosexual sexual relations. A person can be pardoned for sins for which he cannot be deemed fully culpable; however, the behavior itself remains sinful, with all the attendant negativities. Both approaches might be seen as sophisticated versions of the oft quoted principle "hate the sin, love the sinner" used so extensively by contemporary Christian religious leaders dealing with the issue. The attempt to balance the ideal with the real, the divine with the human is similar, but these Jewish formulations above have little to do with either hate or love.⁵⁵ Lamm and Rapoport are suggesting something one might hear in a court of law as an argument for the defense: "admit that the law has been broken, but comprehend the context." The sin is formally a violation of the law, but it has been cleared of rebellion, detoxified by psychological or social explanations.

Despite the fact that Joshua prefers *o'ness* and *tinok shenishbah* to other halakhic conceptualizations of homosexuality, they still fall short of providing an adequate solution to his dilemma. These characterizations of his experience do not ring true to him. He feels neither under any duress nor captured by a gentile consciousness. He does not experience his sexual orientation as either a psychological illness or the result of libertine social values. Joshua wants to push the rabbi go further. "Why," he asks, "should a loving relationship between two same-sex adults be characterized in this way?"

Rav Noah

Joshua's frustration is of course, my own. I am both moved by these rabbinic attempts at compassion and deeply troubled by them. My first encounter with a similar sort of conditional tolerance happened when I was in the last few months of my closeted existence. A gay friend asked a favor of me. He wanted to know how his Rav would respond to the issue of homosexuality. His Rav was no ordinary Rav

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or Rosh Yeshiva. He was Rav Noah Weinberg, the founder and director of *Aish HaTorah*, which was founded in 1974 as a modest *ba'al teshuva yeshiva*, a religious academy for returnees to Orthodox Judaism. It now counts thirty branches worldwide, with teachers conducting classes for business people and seminars for young seekers. From Aish International in Jerusalem, Rav Noah continues to run his local yeshiva along with his expanding franchises.

He is a rough-and-tumble man from Baltimore, Maryland, where his father and then his brother once headed the *Ner Yisrael Yeshiva*. Rav Noah's American ease, his football coach manner, and his sense for the spiritual and psychological troubles of the baby boomers and their children have made him one of the most successful religious renewal efforts in North America and Israel.

Before I went to the meeting with Rav Noah, I sent ahead the article I published under a pseudonym in *Tikkun Magazine*, "Gayness and God," so that we would save time. I wanted him to know that my desire for an audience with him was not due to uncertainties regarding my gayness or my Judaism, just their interrelationship. The meeting was arranged as a conversation and not a counseling session. Self-protectively, I introduced myself as Rabbi Yaakov Levado.

The meeting began with Rav Noah's warm assurance that there was no way to know the weight of God's judgments. I asked him if he had had time to read the article. He said that he had read the article but that instead of responding directly to what I wrote he preferred to make a claim. "We all sin. You, like everyone else, struggle with the *Yetzer Hara* [evil inclination]. You win some, you lose some. You try to do the right thing, you fight it. That's all you can do. Do your best to fulfill the *mitzvot* [commandments]. That's all God asks of you."

He did not attack or condemn. He compared a Jew who has gay sex to a Jew who violates the Sabbath. Both sins call for the death penalty biblically, but people are encouraged to fulfill what they can and to do their best to always improve. He had no taste for the vilification of either sinner. In comparison to the demonization that one finds in Rav Feinstein's writings and in practice in some communities, this was indeed a remarkable achievement of empathy and understanding. In the beginning of my journey I would have been

very comforted and encouraged by Rav Noah. He was surely among the most understanding of the rabbis with whom I had spoken. However, for where I was in my journey I was no longer so impressed.

“Rav Noah, if you read the article you understand that I do not fight it anymore, I embrace it. Gay desire surely demands similar kinds of controls that heterosexual desire demands, but the desire and even the fulfillment is no longer fundamentally sinful for me.”

“Well, it’s understandable,” he replied. “Once you have accustomed yourself to live with a sinful behavior that you cannot overcome, it no longer feels like sin. Ok, so if you must sin, then do so. I just insist that you keep it to yourself, that you not turn sin into pride.”

He was trying very hard to be as generous as he felt he could be. Still unsatisfied, I told him that I wanted a life of love and of sexual fulfillment that would somehow fit into a Jewish framework. He appeared agitated at my refusal of his kindness. “I want a community where I can have a partner, not a private obsession.” No longer suppressing his frustration, Rav Noah insisted. “Look, you can’t openly come into the Shul [synagogue] with a lover. No, no! Let’s say a single man masturbates to pornography—hardly an attractive quality, but he’s single and he can’t help himself. Ok. So, that’s where he is. But would you think it appropriate for him to announce it, to wear an ‘I masturbate to pornography’ button in Shul? Would you claim publicly to be a proud masturbator?”

I sighed. How could I explain to Rav Noah how his example so utterly misrepresented my life. I was angry at the reflection of my desire for a shared intimate life with a partner as shameful or pornographic. I wanted to ask him why my partnered presence at a synagogue dinner would be any more sexually explicit than his presence with his wife? I calmed myself and thought for a moment about how to communicate to him on this point. I asked him if I might speak a bit personally, and he told me that I should speak my mind.

I asked him to imagine a circumstance. Suppose your wife goes to bed exhausted one night and the following morning she will have to wake up unusually early. When you get up she is still fast asleep, so you go to the kitchen and prepare her a cup of coffee just as she likes it. You set the cup down on the night table and then you wake

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her gently with kisses. Imagine how you might feel when she opens her eyes, when she reaches for your hand, when she sees the cup of coffee on the night table and smiles at you tenderly.

Without waiting for his response, I said to him, “Imagine now being told that these ordinary expressions of love, intimacy, and affection were pornographic, sinful, and abominable. Could you live with such a representation of the most tender and loving center of your life?” By this point Rav Noah had become agitated and upset. I, too, lost it, not in anger, but in humiliation and tears. The meeting concluded badly soon afterward.

Rav Noah did not explicitly talk about *o’ness* or *tinok shenishbah*, but his approach was intuitively grounded in both of them. He could understand how one might succumb to powerful sexual pressures, but the possibility of an alternative sexuality was simply unimaginable for him. What especially he could not abide was the possibility of integrating gay love into a coupled life, a familial life, a communal life, and ultimately, a holy life . . . and of course this is just what Joshua most genuinely needs and desires.

O’ness as Difference

Joshua feels confident that contemporary authorities have not fully mined the halakhic creativity available in the category of *o’ness*. Instead of an ugly pathology, he wonders, might gay people be “compelled” by their very difference? Rather than narrowing the text to a single act, could the text be narrowed to apply to only certain kinds of men and not to others?⁵⁶ Perhaps when heterosexual men have intercourse with men, such sexual excess is abhorrent. When homosexual men do so, it is not.⁵⁷

This reading marks gay people not as demonic, immoral, or sick, but as different, so different that they could not possibly be the ones about whom Leviticus is speaking. While people attracted only to their own sex do not appear in the traditional literature as a defined group, why should a “different sexuality” be so difficult to consider?

The Torah assumes only two sexes. However, we have seen that some rabbis were bold enough to imagine three sexes: male, female, and hermaphrodite. Was it not audacious of them to theorize a sex that appears nowhere in the sacred text? The answer is, of course,