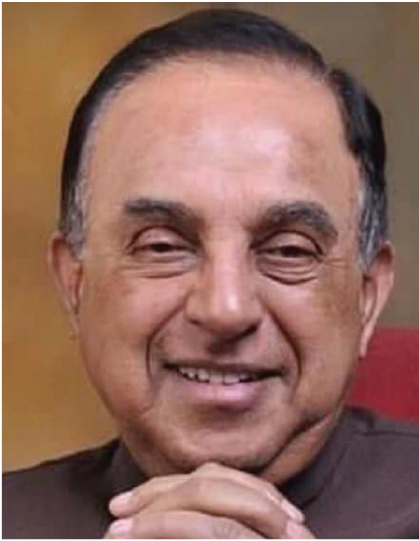


The Anglo-American LAWYER

MAGAZINE



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Prof. Michael Broyde on Law and Religion

Michael J. Broyde is professor of law at Emory University School of Law, the director of the SJD Program, and Berman Projects Director at the Center for the Study of Law and Religion at Emory University. He is a product of New York University School of Law, JD 1988; Yeshiva University: Rabbi Isaac Elchanan Theological Seminary, Ordination 1991; Yeshiva University: and from Yeshiva College, BA, cum laude 1984. He is also a core faculty member at the Tam Institute of Jewish Studies at Emory. His most recent books are *Setting the Table: An Introduction to the Jurisprudence of Rabbi Yechiel Mikhel Epstein's Arukh HaShulhan* (Academic Studies Press, 2021, co-authored with Shlomo Pill of the Center for the Study of Law and Religion), *Sex in the Garden: Consensual Encounters Gone Bad in Genesis* (Wipf & Stock, 2019), *Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the West* (Oxford Press, 2017) and *A Concise Code of Jewish Law for Converts* (Urim, 2017). He has written or edited thirteen books -- his next two books hopefully will be (1) *Splitting Hairs: The History, Law, and Future of Jewish Laws of Modesty and Women's Head Covering* (ben Yehuda Press) and (2) *Jewish Law and International Law: Sovereignty and Exogenous Authority in a Trans-national World* (Oxford, 2022).

Broyde is ordained (*yorehyorehve-yadinyadin*) as a rabbi by Yeshiva University and was a member (*dayan*) of the Beth Din of America, the largest Jewish law court in America, where he once served as director while on leave from Emory. He was the Founding Rabbi of the Young Israel synagogue in Atlanta, a founder of the Atlanta Torah MiTzionkollel study program. He served on boards of many schools and organizations in Atlanta, including more than 15 years as the chair of the medical ethics committee of Weinstein Hospice in Atlanta. Besides Stanford and Hebrew University, Broyde has been a visiting professor at many other places, most recently the University of Warsaw Law School in Poland and in the Interdisciplinary College of Law in Herzliya, Israel. He received a juris doctor from New York University and published a note on its law review. He also clerked for Judge Leonard I. Garth of the United States Court of Appeals for the Third Circuit.

The AAL Magazine; Professor, you have had a distinguished academic career and have authored around 200 literary works. You have also been a legal practitioner and had a stint at the U.S Courts of Appeals as a clerk. You are also a Professor of Law and a practicing Jewish Rabbi. Your exposure being a legal scholar and a religious leader must have given you a ring side view of how legal, social, religious and ethical issues intertwine in the society. It is indeed an opportunity to have a first-hand account of the clash of values in front of the blind Lady Justice where one's

emotions are not counted when it comes to dispensing justice. What exactly is justice in terms of Jewish theological reasoning and in general?

Prof. Broyde; The Jewish tradition has two models of law between people when there is a dispute – law and compromise -- and while compromise is preferred, the Jewish tradition recognizes that compromise can only be mandated when the parties consent to court imposed compromise. Of course, Jewish law – halacha (literally, the path) – also recognizes

that law is just one of the parts of justice, and that good and proper people frequently are called upon to conduct themselves beyond the letter of the law. Charity – the voluntary giving to help the poor is a classical example of that. When compelled, it is taxation and not charity. Jewish law wants one to choose to give.

The idea that people who are forced to be good – Justice Holmes’s ‘bad man’ rule – are less good than people who choose to be good is extremely important to the Jewish tradition. In this way, Jewish law has both a ‘good person’s rule and a ‘bad man’ rule at the same time. Jewish law scholars advise people all the time how to be the best that they can be, and not only what is so wrong so as to be prohibited.

The AAL Magazine; When you were teaching law at Emory University what sort of hurdles impediments did you come across being a Professor of Law and a practicing Rabbi. What I mean is whether your religion had any impact on the teaching you were supposed to undertake within the U.S constitutional context. Did you have to teach something which went against your own religion and whether it had clashed with your own religious values or academic freedom.

Prof. Broyde;Emory University and particularly its Center for the Study of Law and Religion has been a wonderful place to work. Never has the university created tensions between my faith and my job. I teach things that ‘clash’ with the values of my faith all the time, actually and I think that is important to do. I teach the law as it is, and not the law as I think it should be. That is the job of a law professor. I suspect that all academics in law school do not merely teach what the law should be in their view – we must teach out students what the law ‘is.’ That ‘clash’ is intellectually valuable and it is one of the advantages of teaching in a secular institution – one in which people are not

compelled to share each other’s theological or legal axioms.

Students challenge my view all the time. The Talmud (Taanit 7a) notes a great rabbi used to aver that He learned much from his teachers, more from his friends and the most from his student” and this is because excellent students challenge one’s world view in a constructive way. Echo chambers are rarely places of innovation or even of interest. Precisely because there is no legally enforced religious truth in America, the truth is more likely to be found.

The AAL Magazine;How do you see the practice of religion under U.S constitutional frame work for other religions such as Judaism, Islam and other religions. Do you think there is sufficient freedom to engage in religious activities in the Unites States?

Prof. Broyde;The United States is uniquely rare in that we embrace both free exercise and disestablishment – unlike England, we have no State church and unlike France, we have no mandatory secularism. This is much rarer than we think and it is the blessing of American religious freedom. I think there is sufficient freedom of faith in America and the American model of competing dual freedoms is very powerful for the faithful and the disbeliever as well.

The First Freedoms – Speech, Association, Press, Disestablishment and Religious Practice – have in total greatly contributed to the unique American culture of individual freedom, which – for better and for worse – is deeply engrained in the culture of America.

The AAL Magazine;As you are aware many U.S states created public school systems, and children’s moral development was viewed as a necessary corollary of education. There have been both proponents and opponents that public schools should not teach particular doctrines but instead they advocated Bible

study to cultivate morals based in what they thought were generally held Christian principles. Does this make any sense to you from your Jewish theological perspective?

Prof. Broyde;The purpose of the public school system is to provide a base education and – somehow related to that – is to establish a benchmark of the type of secular education that the many different private schools – parochial and not – need to provide. Members of minority faiths are entitled to have a public school system that does not indoctrinate their children against the faith of the parents, even as the public is deeply entitled not to have a public school system that is part of the community of the faithful. Developing suitable moral judgment is part of the mission of a public school, but that suitable judgement needs to be not parochial or violative of the duty for the secular government not to establish the truth of a particular faith.

The AAL Magazine;Do you think the Constitution of the United States has outlived its utility and do you think a fresh initiative must be made to review the Constitution.

Prof. Broyde;This is an exceedingly hard question and is not a binary one: The United States Constitution as an amendment process – which has been used numerous times – exactly because neither the Founders nor any generation after it thought that the document was perfect or unchangeable. Indeed, honesty requires us to recognize that the Constitution was founded on the bedrock of slavery being legal and only through the Amendment process was that moral wrong corrected. Change is part of law – even Jewish law – and changing conditions requires changing legal rules, sometimes. The Jewish tradition was in its Talmudic iteration 2000 years ago polygamous and now it is not. The real question is not whether change is needed in Constitutional law in America, but “what change is needed”?

The AAL Magazine;Which provisions of the Constitution do you think should be revisited or revised in order to secure a better cohesion and tolerance among various cultures and religions in the U.S. Can you articulate an ideal provision in the constitution which would ensure religious freedom to all.

Prof. Broyde;I think that the basic model in America which insures both that government does not establish itself as endorsing or beholden to a specific faith, while simultaneously insuring that all have the freedom to worship as they see fit, is the right fit for the religiously and culturally diverse United States. Congress needs to work harder statutorily to insure that both of these ideals are regularly manifest. The United States is not a nation with a single dominant denomination and – really! – never has been. Nor is it a nation racked by religious tensions or warfare based on faith. Thus it does not need French Laïcité or English establishmentarianism. Greater effort to insure that every faith and community has the space to flourish is needed, but that is hardly a recasting of the foundational rules.

The AAL Magazine;Let me now move on to LGBT rights under U.S constitution. Professor as you are aware LGBT rights have evolved significantly over time. There have been successes by LGBT Americans that they had won the right to marry in all 50 states. There have been instances where LGBT Americans had been explicitly protected from discrimination in employment, housing, and access to public accommodation. How do you see LGBT rights under U.S constitution and how does this square with a pluralistic society like United States. Should the American society be more tolerant towards LGBT rights?

Prof. Broyde;I think that the government needs to work solidly all the time to insure that people are not discriminated against in a variety of ways and diverse settings. I actually favor the New York rule which does not allow an employer to consider any conduct unrelated to employment in making hiring

and firing decisions. America was founded on the deep libertarian tolerance of the other – and the list of ‘others’ should continue to grow and expand. Society does not lose by expanding the rights given to others, so long as the government works hard to insure that people do not use their rights to oppress others. At the margins, sometimes rights infringe on others, but centrally expansive personal rights increase freedom and diminish tension. Exactly because religious controversy in America cannot turn into winner take all controversies – since our legal system never allows winners to take all in religious matters and establish themselves within the legal system – there is much more freedom and tolerance.

Of course, as the Supreme Court sometime reminds us (see for example both [Trinity Lutheran Church of Columbia, Inc. v. Comer \(2017\)](#) and [Espinoza v. Montana Department of Revenue \(2020\)](#)), neutrality in funding matters requires that the government truly be neutral and not engage in economic discrimination against the faithful. But, that does not mean that government can favor religion either.

The AAL Magazine; In *Lawrence v Texas* 203 Case, Justice Kennedy delivered an opinion which says that due process clause of the fourteenth amendment grants the full right to engage in private conduct without government intervention. The crux of the issue was that public ideas about morality cannot justify infringing the peoples constitutional rights. How would you justify this statement under U.S constitution and how does this impact on the theological aspects of Judaism.

Prof. Brody; Broadly speaking, I think Jewish morality does not seek endorsement from the secular law in the society that it is living in. Rather, it seeks from the secular society and its laws the tools to allow Jews to be good Jews and the freedom to live that life without

oppression or contempt. Unlike both Christianity and Islam, the Jewish tradition does not think that secular law ought to parallel Jewish law at all. Conduct can violate Jewish law and be permitted under the law of the nation Jews live in and conduct can be permitted according to Jewish law and be a violation of the law of the land. I think that the Jewish model wants government to insure that people are given the freedom to live their lives as they wish and see fit. It is enough that the law favors this, and if some use it to violate Jewish law, that is the freedom of conscience that the Jewish faith gives us all – even to be free to sin.

The Jewish tradition – with its strong religious idea that the law of the land is generally binding in commercial matters and more – lives comfortably in a society in which the government allows people to engage in private (or even public) conduct that the Jewish tradition might find repulsive. Secular law is not the source of religious morality in the Jewish tradition, but instead is a vehicle for enforcing peace and tranquility and allows all citizens to act in a way that is consistent with their faith without impacting others. There is another deeply important idea here. Of all the models of secular government that the Jewish tradition has encountered in its long journey in the diaspora – 2000 or more years --- none have proven as compatible with the Jewish tradition as those few where the government sought to be neutral on matters of theology and faith and religious practice. It was the ‘Golden Age of Spain’ for that reason and it might well be the golden age in America as well. Much as the Jewish tradition has deep and important religious values that it wishes people – frequently, Jew and non-Jew alike – would follow, history has taught the Jewish community that the American model of neutrality and agnosticism by the government on matter of faith, serves the Jewish community best.