

By Rabbi Michael Broyde

The decision by Jewish organizations to support, oppose, or remain neutral in a dispute where certain people desire to expand their civil rights is not determined solely by whether the group under discussion is one generally in compliance with Jewish law or morality. Thus, even though homosexual conduct violates Jewish law and morality, the question of the Jewish position on homosexual rights laws should be based on a balance between Judaism's mandate to make the world a better place and the realpolitik needs to avoid endangering Jews' well-being in America and to foster our own growth and success here. Applying this balance to the case of homosexual rights in America leads this author to conclude that it is in the best interests of Judaism to support the continued granting of basic civil rights to all, while making clear our moral opposition to the underlying conduct of those who exercise their freedom in violation of basic ethical norms of Judaism. We are providing no moral legitimization for an activity if we seek to prohibit firing a person from his or her job because of it. Orthodox Judaism should seek to prohibit people from being fired from their jobs or evicted from their homes for reasons unrelated to their suitability for the job or the place of residence. This rule is in our own best interest, whereas a rule which allows economic discrimination based on society's perception of a person's private morality or religiosity is not.

NOTES

1. See this author's own attempt at that in "An Orthodox View on Homosexuality" Atlanta Jewish Times, June 15, 1992 pages 7-9.
2. New York State has precisely such a law as of January 1, 1993. The new "legal activities law" essentially prevents a person from discriminating against employees or job applicants based on their participation in legally permissible activities unrelated to

employment outside of times and places of employment; see New York Law Journal "Employment Law Update," September 3, 1992.

3. There historically have been statutory exemptions for religious organizations from anti-discrimination laws; see Agudath Israel of America v. City of New York, 492 N.Y.S.2d 522 (1985) where the New York

der the law. The same law that protects all citizens protect homosexual citizens equally. The underlying point is this: Citizens have a right to not be involuntarily exposed to overt sexual behavior or preferences, whatever the nature. So-called rights of homosexuals really amount to a campaign to legitimize homosexuality to obtain society's stamp of approval. This is the real issue and it must be vocalized. The real issue is not individual rights for homosexuals, but collective coercion of everyone else to bend to the legitimization of homosexuality. Homosexual activists' goal is to subvert all of society's laws that protect or promote marriage and morality.

Essentially, I agree with neither the factual underpinning of this statement nor the policy it embodies. I say this not because the prohibitions involved in homosexual activity are unclear or minor (they are neither); but rather because the public policy decision to seek to deny political rights is fraught with many practical dangers. Like the proverbial double-edged sword, this weapon, once unsheathed in battle, can well be used to cause Judaism generally, and Orthodoxy specifically, profound harm.

My theme and thesis can be summarized as follows: Orthodox Judaism is providing no moral legitimization to an underlying

(Continued on page 74)

Bullets that Kill on the Rebound: Discrimination against Homosexuals and Orthodox Public Policy

An article appeared in the Winter issue of Jewish Action which discussed the implications of "homosexual rights" to the Orthodox Jewish community. In the article below, Rabbi Broyde questions one of the points outlined in that article. The authors of the original article respond on the following page.

Rabbis Marc Angel, Hillel Goldberg, and Pinchas Stolper, in their article "Homosexuality and the Orthodox Jewish Community" (Jewish Action Winter, 1992) outline ten different points that they think ought to be part of Orthodoxy's arsenal of weapons in the looming conflict over homosexuality within both the Jewish and secular communities. They make many very good points, both strategic (such as their insights as to terminology) and philosophical (that there is no sanction anywhere in the Jewish tradition of homosexuality). Indeed, it is important to remind our brethren of the clear Biblical mandate which unequivocally and directly prohibits any form of homosexual conduct. Particularly since other branches of Judaism appear unwilling to take a firm stand on this issue, the rabbinic position must be clearly voiced.¹

However, I would like to suggest that one of the points they advocate is an error of policy. In point four of the policy arena they state:

It is critical to object to the so-called gay-rights laws. They are paraded as innocent, indeed heroic, human rights protections for individuals. In fact, any homosexual who does not identify himself by his sexual practices or preferences is, both in theory and practice, already protected un-

(Bullets cont. from pg. 52)

activity when it seeks to prohibit firing a person from his job, or eviction from his house, because of that activity. This is the basic rule of civil rights. Like free speech, where we all understand that supporting the right of another to speak is not the same as agreeing with what the person says, supporting civil rights for people is not synonymous with morally approving of their actions. Thus, Orthodox Judaism should support the right of all individuals to be free from harassment and discrimination in their jobs and homes and to insure everyone's physical safety. Orthodox Judaism should seek to prevent or prohibit people from being fired from their jobs or evicted from their homes for reasons unrelated to their suitability for the job or as a tenant.²

First and foremost, there is a significant policy issue that needs to be addressed when one talks about homosexual rights and laws that guarantee it. Certainly, Judaism would oppose a law that seeks to give homosexuals a *preferred place* in the legal or social spectrum. So too, Judaism opposes granting moral equivalency to homosexual activity or relations when marriage and sexuality is taught in the schools or favored in the tax code and property laws. Thus, school curricula that teach the moral equivalency of homosexuality, governmental attempts to redefine marriage to include homosexual relations and governmental attempts to prohibit religious organizations from declining to hire overt homosexuals should be opposed.³ To the extent that any of these activities is what Rabbis Angel-Goldberg-Stolper meant to oppose, one is hard-pressed to argue. Indeed, it is a nearly

risk-free fulfillment of the Jewish people's mandate to be a moral "light unto the nations of the world."⁴

However, the policy advocated by the article appears to go much further than that. The decision to seek to deny basic civil (political) rights guaranteed to all based on a lack of observance of Jewish morality and *halachah*, or even to criminalize and incarcerate those who engage in homosexual acts, is fraught with political danger to religious Jews. While the rabbis state in their article:

In fact, any homosexual who does not identify himself by his sexual practices or preferences is, both in theory and practice, already protected under the law. The same law that protects all citizens protects homosexual citizens equally...

as a legal truism, it is patently false in nearly half of the United States. The state of Georgia (where this author resides) as well as 23 other States of the Union make sodomy between two consenting males a felony punishable by imprisonment and these laws have been upheld as constitutional by the United States Supreme Court.⁵ Indeed, the police in these states occasionally seek to entrap homosexuals by soliciting non-commercial homosexual sex, and private employers dismiss employees who are *suspected of homosexuality*, or have policies prohibiting the hiring of homosexuals. To maintain that such people are already protected by the civil rights laws of the states in which they reside is factually incorrect in those states that criminalize homosexual conduct. No state prohibits discrimination against homosexuality while at the same time labeling homosexual activity a crime.⁶

Indeed, as a more general position of American law, discrimination in economic activity by private companies is permitted unless explicitly prohibited by statute. Thus, the American legal system requires legislation to prevent discrimination against people or statuses that are frequent victims of such activity, like Jews, African-Americans and others.

Accordingly, many of the homosexual "rights" laws in these states seek to do two things. They seek to decriminalize consensual adult homosexual activity and to prohibit economic discrimination in public commercial activity based on sexual preference. Granting homosexuals these civil "rights" does not legitimize their status. It is no different from granting civil rights to diverse religious groups in the United States, including those that have the halachic status of "idol-worshippers," rights which Judaism generally, and Orthodoxy specifically, favors.

This becomes clear immediately if the word "Hindu" is substituted for "homosexual" or "gay" and "religious" for "sexual" in the Angel-Goldberg-Stolper paragraph. The paragraph would read:

It is critical to object to the so called Hindu rights law. They are paraded as innocent, indeed heroic human rights protections for individuals. In fact, any Hindu who does not identify himself by his religious practices or preferences is, both in theory and practice, already protected under the law...So-called rights of Hindus really amount to a campaign to legitimize Hinduism—to obtain society's stamp of approval. This is the real issue and it must be vocalized. The real issue is not indi-

conditioning our support for a general civil rights law on its presence.

4. *Perhaps the underlying issue in this dispute is how much risk need be undertaken in the process of being a "light unto the nations of the world." One could argue that even if the political analysis found in this article is correct, nonetheless, Jewish law compels one to take that risk so as to be a moral beacon. This author is at a loss to find halachic support for such a broad notion of the obligation.*
5. *Bowers v. Hardwick, 478 U.S. 186, 193 (1986) notes that 24 states and the District of Columbia make it a crime to engage in consensual homosexual activity. In Georgia, the maximum penalty for a single consensual act of sodomy is 20 years imprisonment, the same maximum penalty imposed for armed robbery. Thus, the statement in the article that "the real issue is not individual rights for homosexuals" is misleading; in 24 states the real issue is simply an individual's right to be free from criminal prosecution. Interestingly, the same Georgia statute appears to prohibit*

deviant sexual intercourse even between a man and a woman who are married to each other, although as noted in Bowers at 217, the state of Georgia conceded that enforcing the law in such a case would be unconstitutional.

6. *The next statement found in that paragraph, "Citizens have a right to not be involuntarily exposed to overt sexual behavior or preferences, whatever the nature" has no basis in American law, jurisprudence or history. Most types of "overt sexual behavior," such as kissing in public, is certainly legal in the United States when heterosexuals are involved. Even if that were not true as a matter of law, the rephrasing of the sentence "Citizens have a right to not be involuntarily exposed to overt religious behavior or preferences, whatever the nature" indicates why those of us who sometimes wear our prayer shawl (talit) to synagogue on the Sabbath without an overcoat to hide it might be opposed to such a rule.*
7. *This author is uncertain if Orthodox Judaism*

should specifically join a political campaign to legalize an actual form of worship or sexual practice that is halachically prohibited even to non-Jews; perhaps tacit agreement, but institutional silence, is the preferred course. Thus, while we should publicly and institutionally support the right of an idolatrous religious group to receive government money to spend on educational purposes, and to have full civil rights, a claim can be made, based on technical halachic grounds, that we must be silent on the issue of whether a law can prohibit animal sacrifice as a religious ceremony. Unquestionably, however, we should favor granting civil rights to practitioners of any form of worship or sexual activity, as civil rights for all religions and tolerance for all consensual activities is in our own best interest. Certainly, even in the case of animal sacrifice, we should not join with those seeking its criminalization and should tacitly favor its repeal. Interestingly, both the Union of Orthodox Jewish Congregations of America and the

vidual rights for Hindus, but collective coercion of everyone else to bend to the legitimization of Hinduism. Hindu activists' goal is to subvert all of society's laws that protect or promote freedom of religion.

Certainly, even if Hinduism were classified as idolatry according to Jewish law, we would favor a Hindu civil-rights law, as a matter of self-interest. This would be particularly so were those who discriminate against Hindus to be the same elements that have in the past sanctioned or encouraged anti-Semitism and discrimination against Jews. Orthodox society justifies this support for Hindus by asserting that mere political equality is not legitimization of the underlying action.⁷ As explained above, Orthodox Judaism should oppose discrimination in employment and housing for reasons unrelated to suitability for the job or house.

Indeed, the record is full of Orthodox organizations advocating support for religions and beliefs that are completely foreign to Jewish law or ethics. For example, in *Decker v. O'Donnell*, 661 F.2d 598 (7th Cir. 1980) the Union of Orthodox Jewish Congregations filed an amicus brief supporting the right of the Roman Catholic Archdiocese of Milwaukee to use taxpayer-provided money for job training. In *Webster v. Reproductive Health Services*, 429 U.S. 490 (1989), Agudath Israel of America filed an amicus brief arguing that a state's finding that human life begins at conception violated the First Amendment, but that the abortion right should only be fundamental in the exceptional cases of a threat to maternal life or an abortion mandated by sincere religious belief — presumably

whether such beliefs are Jewish or Gentile. It is hard to justify these and many other public positions except by asserting that our legislative agenda is not solely based on seeking to legislatively prohibit that which is prohibited by Jewish law. Rather, what we seek to codify into secular law must be based on a balance between Jewish law mandates and realpolitik factors.⁸

Legislative goals which do not necessarily seek to enforce Jewish law can be well-supported from a pure Jewish law perspective. For example, in 1977, Rabbi Moshe Feinstein was asked what statutory changes Orthodoxy should seek from the New York State government on the issue of time of death. He replied that Orthodoxy should seek a legislative mandate that allows each person (or family) to determine the time of death in accordance with their own religious or personal beliefs; he did not suggest that the proper governmental policy to seek is that New York State should be urged to adopt Jewish law in this area. The public policy advocated by Rabbi Feinstein in the context of time of death — one of Orthodoxy seeking to allow Jews to follow Jewish tradition, without forcing our standards on non-believers — was the preferred one. This was so notwithstanding the certainty that some people, given this new freedom, will adopt a standard for time of death which violates Jewish law by withdrawing care before a time permitted by Jewish law and thus commit suicide (or even murder). Rabbi Feinstein did not feel compelled to seek the enforcement of Jewish law by the secular state.⁹

Now comes the difficulty: Do we, as Orthodox Jews, seek to grant equal civil

rights to all, or should we join hands with those groups that seek to deny political rights to those engaging in a consensual, but immoral, activity? It requires nearly an act of prophecy to determine which position is in our best long-term interest. Frankly, this writer is inclined to answer that we should err on the side of more political freedom, rather than less.¹⁰ The fact is that many of the non-Jewish groups that seek to curtail the political rights of the homosexuals and others who deviate from the "Judeo-Christian" ethic, have historically been the profound enemy of the Jewish community and have participated in many a slaughter of our ancestors in Europe and elsewhere. These groups seek to use the law to make this country more of a "Christian nation." While that "nation" will not sanction homosexuality, it is unclear to this author if it will sanction Judaism, or Jews either, in the long run.

Thus we are confronted by a set of difficult choices:

1. We can politically join with those who practice immoral acts to protect our own political future; or

2. We can associate with those who have oppressed and murdered us in the past, and who we fear will oppress us in the future, (to make illegal an activity that we agree is immoral); or

3. We can decline to publicly involve ourselves in this dispute and adopt an institutional policy of silence while not actively opposing civil rights to all.

I would suggest that, as a matter of political expedience and survival, that the best path for Orthodoxy is to generally favor (and certainly not oppose) granting civil rights and political freedom to all,

Rabbinical Council of America apparently maintain that Orthodox Judaism should actively support in court the right of idolatrous religions under American law to be legally permitted to engage even in acts of animal sacrifice (which are a biblically prohibited form of idolatry even for non-Jews) if supporting those groups is in our own interest; see amicus curias brief of COLPA in Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, United States Supreme Court (No. 91-948) (which states in note 1 that both the Orthodox Union and the Rabbinical Council agree with the legal position taken in this brief). It is difficult to harmonize this position of the OU or RCA with a principled or halachic opposition to decriminalizing homosexuality.

8. The only doubt in this author's mind is whether a curtailment of sexual rights would in fact lead to a curtailment of religious rights. One could argue that such has not been the pattern of American Constitutional law and indeed, one would be correct in that analysis. However, the statutory protections

found in American law, such as Title VII, which prohibit commercial discrimination by individuals have been law for less than 30 years and do appear to be a product of the general governmental restrictions on discrimination by individuals based on private (religious, racial, sexual) conduct. The repeal of these recent protections, which have been vital to the economic vitality of Judaism, even if the formal Constitutional privileges remained, would return Judaism to the state in which it was languishing during the 1920s to early 1950s, when Sabbath-observant Jews found white collar employment difficult to find. The mere possibility that such would occur should be enough to indicate that a credo of non-discrimination for all should be our political maxim.

9. Letter of Rabbi Feinstein dated 8 Shevat 5737 provided to this author by Chaim Dovid Zweibel of Agudath Israel. See Chaim Dovid Zweibel (General Counsel, Agudath Israel), Determining The Time of Death: Legal Considerations, "Journal of Halacha and Contemporary Society," 17:49 (1989) who

ends his discussion of this issue by stating:

The principle of religious accommodation is one that has stood the American Orthodox Jewish community in good stead in a wide variety of secular legal contexts . . . For what is really at issue here is...whether it is in the interest of the Torah observant community to combat secular laws that preclude individuals from following the guidance of their individual halachic decisors. See also Amicus Brief filed by Agudath Israel of America in *Webster v. Reproductive Health Serv.*, 429 U.S. 490(1989), discussed above, affirming such a principle for secular laws that preclude individuals from following the guidance of their individual (presumably including Gentile) religious leaders.

10. This case is readily distinguishable from the abortion issue, as the fetus in that case is not consenting to its own abortion. From the perspective of Jewish law, the propriety of legalizing abortion — which is murder or near-murder in the eyes of some decisors in some circumstances — is a completely different matter as because it involves the

including those whose activity we find religiously repugnant, providing that the prohibited activity is one that is consensual and harms no one other than its voluntary participants;¹¹ hand in hand with that, we should seek to prohibit commercial discrimination against people based on factors unrelated to the commercial activity, such as religious affiliation, national origin, marital status, race or sexual orientation. This position is based not on the assertion that all such conduct or statuses are halachically acceptable (they aren't); but on the assertion — borne out by history — that many of those that seek to curtail activity based on a "religious" sense of ethics quite plausibly will seek, when they are in control, to advance the cause of "Christian ethics" in a way that will be incompatible with the continued successful existence of Judaism in the United States. If we do not seek to protect the civil and political rights of those with whom we theologically disagree, we may find these groups will not seek to assist us when our rights are settled. At the very least, Orthodox public policy should not publicly and institutionally oppose granting civil and political rights to all.¹²

We must realize that the political freedoms granted to minority religious communities through laws which prohibit religious, racial, and sexual discrimination in commerce are quite vital to the economic survival of Judaism in America. These laws are not guaranteed by the Constitution. They have been passed through the support of a broad consensus of minority religious and political organizations. Should each of these groups conclude that they no longer support civil rights for the other groups due to philosophical or theological opposition to

the underlying conduct, all of the groups risk losing the protection granted by law. In such a climate, one could easily imagine feminist groups supporting laws which discriminate against Orthodox Judaism based on their understanding of our ritual practices.¹³

There are those who will reply by asserting that I am understating the countervailing factor: the cultural influence secular society has on religious Judaism. The advocacy of governmental non-intervention in "private" matters will, these people claim, lead to a society so morally and socially disfavored by classical Judaism that our political freedoms will be of no value in such a society, as we will not be able to religiously function. That is a danger; however, it seems that historical precedent runs counter to the belief that such a danger is the most serious. While one can cite numerous examples of Jewish societies within the last thousand years that have been destroyed by cultural and religious intolerance (the Crusades, the expulsion from Spain, the many pogroms, the Holocaust), one is hard-pressed to cite a Jewish culture destroyed by pluralism. Indeed, the political, economic and cultural resurgence of Orthodoxy in America since the 1960's can be directly attributed to precisely the pluralism in American society. The ability to work as a white-collar professional while keeping kosher, taking off for the Jewish holidays and even wearing a yarmulke at work is a result of tolerance by the secular society for cultural deviance. While Judaism does face certain challenges in a morally pluralistic society, these are challenges that we can (and will) overcome through heightened observance and additional outreach to the unaffiliated. Governmental persecution,

possibility of physical harm to another without that one's consent.

11. The exact details of this approach are left to be spelled out later and it certainly does have some limitations. It is clear to this author that Orthodox public policy need not favor the legalization of prostitution and pornography under this rationale; as a general matter, activity entered into purely for financial gain creates a different set of issues unrelated to this one.

12. Thus, even in situations where the realpolitik factors indicate that advocacy of civil rights is in error (such as in a highly politicized environment where no matter which position one favors, there are significant consequences) institutional silence would be the preferred policy as it minimizes the fallout resulting from actively supporting the denial of rights. Indeed, it is clear that there might be cases where, for realpolitik reasons, institutional silence is the best policy.

13. This is even more true when one realizes that the laws of the United States can be repealed or changed with the consent of only two-thirds of the members of Congress without needing approval of the President. Thus, those who argue that the governmental protections granted to religion are unlikely to be curtailed (see note 8) miss the dangers to the statutory protections granted to us; see also note 14.

14. Some will additionally argue that they favor general rules which implicitly grant equality to homosexuals (such as that discussed in note 2) but cannot actively support a bill that grants even basic political rights to homosexuals specifically, as the conduct is so contrary to Jewish ethics. I can only reply to that by noting that many Jewish practices are considered deviant by the general secular culture and Orthodoxy frequently seeks specific affirmation of our rights. For example, in response to a number of

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massive societal anti-Semitism or significant commercial discrimination against Jews are obstacles that pose much greater danger and are frequently beyond our ability to overcome.¹⁴

The tenuous basis of our religious freedoms is continuously demonstrated. In 1990, the United States Supreme Court, in *Employment Division v. Smith*,¹⁵ ruled that when a State passes a criminal law, it need not exempt from prosecution people who violate the law even if they harm no one and are motivated by a sincere religious belief. Thus, according to current Supreme Court doctrine, a state could pass a law mandating that the humane slaughter of animals is required and then statutorily direct that to fulfill that mandate, all animals must be stunned prior to slaughtering. This would incidentally outlaw kosher slaughter.¹⁶ Political vigilance and networking is eternally required if Judaism wishes to remain successful.

In sum: Orthodox Judaism should not support the denial of civil rights or the criminalization of those whose victimless actions run contrary to Jewish law or morality, lest we too fall prey to those who disapprove of our own laws or morality. In order to vigorously protect our rights, we must be prepared to defend the rights of others — even others with whom we do not agree. Those who benefit from political pluralism and tolerance must be prepared to be politically pluralistic themselves if they wish to see continued benefit from pluralism. □

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European countries banning shechitah (kosher slaughter) in the early part of this century, Judaism sought and Congress passed a law which states "No method of slaughtering shall be deemed to comply with the public policy of the United States unless it is humane. Either of the following two methods of slaughtering and handling are hereby found to be humane: . . . or (b) by slaughtering in accordance with the ritual requirements of the Jewish faith"; See 7 U.S.C. 1902. If we adopt the principle of refusing to support legislation that explicitly violates any provision of Jewish law, can we really expect others to support our legislative needs that violate their ethical norms?

15. 494 U.S. 872 (1990).

16. Indeed, the expert witness who testified for the City in Church of Lukumi Babalu Aye, Inc. v. City of Hialeah (see note 7) explicitly stated that to be his desire.

Rending the Body Politic:

Where The Bullets REALLY Go

By Rabbis Marc Angel,
Hillel Goldberg and
Pinchas Stolper

Notwithstanding Professor Broyde's impressive learning and careful analysis, he has missed the point. He writes as if there were no difference at all between homosexuality and other issues in Jewish public policy. He writes as if there were no special challenges or conditions that homosexuality poses, as if it were the most normal thing in the world to ease homosexuality into the vocabulary of Orthodox Jews — and as if it is only Orthodox Jews who share the unease.

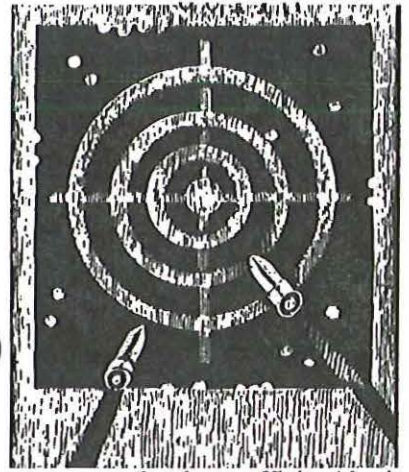
He writes as if it were already a settled issue in American law that homosexuality is a category deserving of civil rights protection, perfectly parallel to race, religion, and national origin; and already a settled issue in American society that homosexuality is a cultural norm, deserving of every legal dignity. He writes as if there were no debate about these matters, as if a clear majority in this country favors homosexual rights, such that to oppose them is to endanger Jews. He writes as if a majority of voters in Colorado and various cities around the country, most notably in Oregon, never voted to disallow ordinances designed to name homosexuals as a specifically protected class.

He writes as if the Orthodox Jewish community is a small, relatively unsophisticated group — as indeed we were in

this country some 50 years ago — such that we can only approach this issue on the defensive. He writes about safeguarding Orthodox interests, as if Orthodox Jews must presume that they can have no impact on the larger legal and social order. He writes, in short, as if homosexuality were a given, such that Orthodox Jews can do nothing other than figure out how best to make peace with it, to protect their interests by defending homosexuality on the basis of an American law now settled, fixed, determined, clear.

Nothing could be further from the truth. A critical part of the public debate on homosexuality is over how the law *should* rule. Is homosexuality, which is a behavior, legally equivalent to race, a genetic characteristic; or, is homosexuality legally equivalent to adultery, incest and any other choice of sexual behavior? This is the issue that exercises both sides of the homosexual debate and therefore exercises the courts. It is the Jews' job to use the legal system just as the homosexual lobby uses it — to bring the moral authority of the courts to bear on a moral question.

To cast the legal issue, as Professor Broyde does, in terms of *homosexuals* — people — rather than of *homosexuality* — a pernicious philosophy — is to be removed from the way the conflict is being waged, not just in the streets, not just in the media, but in the courts. There, too, the issue is *homosexuality*, for there



is no necessary (let alone sufficient) basis for naming homosexuals as a new protected class unless homosexuality is fixed, just like race or national origin. If homosexual activists advance their position on *homosexuality* in the courts, so must Orthodox Jews.*

Professor Broyde dwells on Orthodox Jewish interests as if only Orthodox Jews can, should and may be concerned about these interests, as if the homosexuality issue has no universal import. He writes as if it is only Orthodox Jews who care about the legitimization of this destructive philosophy. He writes as if there were no legal arguments — *separate from the moral issue* — advanced by non-Jews to defeat laws that name homosexuals as a separate class of protected persons. He writes as if no one were concerned — *apart from moral considerations* — about the fragmentation of American society, the Balkanization of culture, into competing, ever smaller groups of people. He writes as if no non-Jews were concerned about the specter of another basis for affirmative action. He writes as if there were no natural, common bond between Orthodox Jews and others whose theology is very different from our own. He writes as if most civilizations since antiquity did not recoil at homosexuality, as if this issue did not disturb people and families everywhere.

The present struggle over homosexuality is a critical social, moral, cultural —
(Continued on page 80)

* A recent study suggests that homosexuality is inborn. This does not alter the fact that behavior stems from moral, social, economic and political, as well as inborn, conditions. Morally, the paragraph of the original article remains intact:

"...Even if there were universal agreement [on a biological basis of homosexuality], the conclusion drawn by homosexuals — homosexuality is morally neutral — is fallacious. If homosexuality is an inborn predisposition in some people, it does not follow that they cannot or need not change.

Teshuvah is precisely the belief that one can and should alter inborn (and other) non-normative predilections. Everyone has some sort of deeply rooted biological or psychological challenge to deal with. Even granted that a given individual with an inborn predilection will change only minimally, it does not follow that the effort to change is morally valueless. Quite the contrary. The refusal to submit to an immoral impulse, even without the sublimation or transfiguration of that impulse, is, in Judaism, a very high moral achievement. The moral challenge

remains, even if a biological basis to homosexuality were substantiated."

Socially, a public acceptance of homosexuality reinforces the sense in "experimenters" (especially teenagers) that they can only be homosexual. This increases the number of homosexuals far beyond the number predicted even by certain scientific studies. Conversely, a public rejection of homosexuality decreases the number of homosexuals. Science alone neither should be, nor is, determinative. Values change the equation.

(Where Bullets Go cont. from pg. 53)

and public — battle that can, with difficulty, be won, or at least significantly altered. Professor Broyde seems to believe that the battle has already been lost; that, therefore, Orthodox Jews have nothing to do but pragmatically, humbly, defensively support homosexual rights, while inconsistently hoping that by adopting the other points of the agenda in our article, morality will be preserved. Knowledge of homosexual activists reveals that, to them, this is a battle for keeps, no holds barred, no quarter given, no tactic unseemly. In this philosophical battle, defenders of morality cannot give an inch and hope to prevail. Professor Broyde writes as if homosexual activists, should you side with them in one arena, will support you in another. This shows that even on the pragmatic grounds the professor favors, he is poignantly unaware of the dynamics of the battle.

Against the reality of these dynamics, and keeping in mind the Orthodox community's sophistication, the strength of its moral authority, and the large number of real or potential allies, we address some of the points he raises, preponderantly in the order he raises them.

• • •

1. Professor Broyde raises the issue of whether we ought "to seek to deny political rights." The issue is not the denial of political rights, but the *creation* of them. In virtually every municipal, state, and federal statute, "sexual orientation" does not appear as a category of law. Why should Orthodox Jews sit passively while homosexual activists try to amend every pertinent statute in order to sustain homosexuality — to taint public discourse, to undermine the family, to challenge civilization itself — by *creating* a new protected class?

Professor Broyde's answer is that if Orthodox Jews do not support homosexual rights, then, in the future, someone will seek to deny rights to Jews. This is strictly a pragmatic argument. It is an argument that presumes this reality: religion and homosexuality are so obviously equivalent in American society that if Orthodox Jews oppose the creation of a new protected class, that of homosexuals, then the bulk of American society will turn on American Jews. In reality, this has not been so. In the largest test case so far — Colorado's Amendment 2, which denied Colorado and its municipi-

palities the right to designate "sexual orientation" as a legally protected status — the majority of voters responded *favorably* to arguments against the creation of this new category of protection. Defenders of morality *won* the sympathy of the majority of voters, not the other way around. On the pragmatic grounds Professor Broyde sets forth, reality has disproven him.

Now, he might reply that the Colorado vote went the way it did because of Christian fundamentalists, and there is more to fear from them than from homosexual rights activists. Again, wrong. The majority of voters in Colorado are not Christian fundamentalists. They are people who knew they were "being had." They looked at the three Colorado cities that had earlier passed homosexual rights ordinances, which Amendment 2 would overturn. They saw that these three cities had passed these ordinances against a background of *no systematic discrimination* against homosexuals. They knew, just as we argue in our article, that when people keep their "orientation" to themselves, they are not fired, nor evicted (with, of course, an occasional exception). They knew that there was no *need* for these ordinances except to the extent that homosexual activists created the impression of one. They knew, in short, that the legal system was being exploited to advance a *philosophy* of homosexuality more than rights for *homosexuals*. So they voted no.

To be sure, among those who voted no were Christian fundamentalists. To be sure, these fundamentalists played an important leadership role in the vote. However, virtually no anti-Semitism was noticed among these fundamentalists. On the contrary, the opportunity to work for a common moral goal that raised none of the theological differences between Judaism and Christianity built bridges between Orthodox Jews and Christians. The risk-benefit analysis went the opposite way of Professor Broyde's prediction. Voters didn't categorize homosexuality as "general civil rights law." The last thing they did was regard support for Amendment 2 as grounds for repealing statutory protections such as those under Title VII.

Parenthetically, disastrous scenarios also proved to be unfounded concerning New York's 1993 Salute to Israel parade. As per our original article, the issue was

not whether to march with any Jew whose sexual behavior (like all sexual behavior) should be private; but whether to march with an institution that legitimated homosexuality. A tiny minority in the Orthodox community set forth its own risk-benefit analysis: support for Israel should take precedence over legitimation of homosexuality. To its credit, the Orthodox community, both those who worked for and against a compromise on the parade, correctly saw this risk-benefit analysis as submission to the homosexual agenda and recognized an overriding moral and public policy issue. The Orthodox stand against homosexuality, which put the parade in doubt, had the effect of illuminating just where the bulk of support for Israel (at least on the popular level) lay. Rather than casting doubt on Orthodox support for Israel, a stand on principle highlighted it. This case, though different from the vote on Amendment 2, had the same results. When people stand up against homosexuality, the stand is supported.

2. Professor Broyde equates "the basic rule of civil rights" with free speech, namely, that "supporting the right of another to speak is not the same as agreeing with what the person says." The professor ignores a critical distinction: between speech and action. Of course one defends the right to speak, no matter the content. One does not, however, defend any and every action. Free speech offers no analogy. The First Amendment has always been recognized as unique in scope. Nothing in it or in any other American law requires anyone to protect the right of anyone else to *act* in any imaginable way he or she chooses.

3. While backing homosexual rights in jobs and housing, Professor Broyde would deny them "when marriage and sexuality is taught in the schools or favored in the tax code and property laws." This distinction, valid to Professor Broyde, is invalid to homosexual rights activists. It is precisely the totality of society that these activists seek to transform. It is precisely a legal redefinition of marriage, of inheritance and of health care for which homosexuals activists battle. They do this in New York City, in Denver, in San Francisco — every day seems to bring a news story of some new "right" that homosexuals seek, somewhere. All of these rights have one goal: the rendering of homosexuality and het-

erosexuality utterly equivalent, legally, socially and morally.

Professor Broyde profoundly misunderstands the homosexual agenda by characterizing part of it as a search for "*a preferred place* [his italics] in the legal or social spectrum." The distinction between rights for jobs and housing, on the one hand, and between marriage, the tax code and property laws, on the other, is entirely spurious, according to homosexual activists. Professor Broyde's distinction has no place in the real world. Homosexual activists seek no "preferred place." To them, *all* homosexual rights, no matter their nature, are equal and indispensable. Activists struggle for the whole, not the parts. This is why Orthodox Jews must respond to homosexual activists on every level, including that of homosexual rights laws. They are just a tactic for a larger end.

The only proviso on all of this is that Orthodox Jews (and everyone else) should not impose any avoidable hurt. Certainly, a homosexual who keeps his or her "orientation" private deserves not to be penalized in job or housing — but then again, if "orientation" is kept private, he or she will, in the nature of things, not be penalized. There is no need for laws to insure such protection. And if homosexuals reply (as many of them do), "but I don't want to keep this private!" then there you have it: the struggle is over philosophy, over a vision of society, not over laws. The very seeking of such laws — and Professor Broyde's willingness to support them — advances homosexuality *per se*.

4. The criminalization of homosexuality in 24 states has little if any bearing on the issue, for three reasons:

- As Professor Broyde himself points out, the criminal offense is deviant sexual acts, not just homosexuality, and the criminal offender is anyone, not just homosexuals. As such, the homosexual is not discriminated against.

- Even when homosexuality is exclusively prohibited, these laws are virtually never enforced, precisely for the reasoning we support: when no one knows what you're doing privately, no one can penalize you for it.

- The issue today is not criminalization, it is decriminalization, legitimation, and promotion of homosexuality. Nothing in our article suggests that we favor public discrimination against homosexuals. Just

the opposite. Let homosexuals keep their practices to themselves, not only to preserve the moral atmosphere, but to eliminate the temptation for public discrimination. This approach reaffirms that of countless societies, Jewish and non-Jewish, for centuries. Note well: It is the homosexual rights laws themselves — the attempt to create a *new* category of persecuted minority — that feeds public resentment.

As for the "occasional" entrapment, Professor Broyde has indeed caught us on a technicality. He cannot, however, logically suggest that quiescent criminalization laws, in most places enforced infrequently if ever, require Orthodox Jews (or anyone else) to join homosexual activists in the legitimation of homosexuality at every level in the legal arena.

5. Professor Broyde writes, "The next statement [of ours] ... 'Citizens have a right to not be involuntarily exposed to overt sexual behavior or preferences, whatever their nature' has no basis in American law, jurisprudence or history." Really? American history has no tradition of modesty? Harry Truman, believing Christians, and decent immigrant families never existed? The contemporary age of overt, blatant, often obscene public display of sexuality is not unprecedented?

A professor of law, Professor Broyde apparently thinks that our use of the word "right" deserves only a legal analysis. The issue here is legal, yes, but also far more. Culturally, socially, and historically, American citizens have a right not to be involuntarily exposed to overt sexual behavior. To suggest some cogent equivalency between overt sexual behavior and wearing a *talis* in public is to assume an extraordinarily defensive posture — as if Orthodox Jews need to debase their own traditions out of fear that otherwise someone else will do so. As for American law and jurisprudence, the state regulation of such things as exposing oneself to another person is precisely the protection of citizens from the involuntary sight of overt sexual behavior.

6. Professor Broyde substitutes "Hindu" for "homosexual" in one of our paragraphs and thus reaches a conclusion that he takes to be patently obvious: the denial of rights to homosexuals is equally absurd as the denial of rights to Hindus. Several distinctions:



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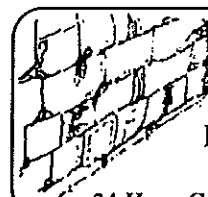
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• Religion is already a protected category. Homosexuality seeks to be created as one.

• Sexual behavior can be private in a way that religious identity cannot.

• Homosexuality is a behavior in a way that religion (and race and national origin) are not.

• The existence of idolaters in American society does not necessarily pose any threat to the moral fabric of either the idolaters or other Americans. The public legitimization of homosexuality does. The Hindu threat to theistic integrity, Jewish or non-Jewish, is limited, typically, to a gullible young person in a public airport. Homosexuality's threat to Jewish and non-Jewish integrity is pervasive, as homosexual activists seek the legitimization of homosexuality through the courts, the movies, the print media, the classrooms, the legislatures, the literary and television worlds — even public parades! Professor Broyde does not grasp the difference between a legal and religious aspiration, that of the Hindus, for example, and between a pervasively cultural, social, legal, moral, and psychological aspiration, that of homosexual activists. This difference means that support for Hindus need not equate to support for homosexual activists. Therefore, Professor Broyde's citation of cases in which Orthodox organizations advocate support for "religions and beliefs that are completely foreign to Jewish law or ethics" is essentially irrelevant. Baldly put: the issue is not the adoption of Jewish law by the government; it is the proposed adoption of immoral standards by the government — standards rejected not just by Jewish law but by most civilizations, religious and secular, throughout history. Believers and non-believers alike are repelled by homosexuality.

7. Professor Broyde draws analogies from Europe. "... many of the non-Jewish groups that seek to curtail the political rights of the homosexuals and others who deviate from the 'Judeo-Christian' ethics have, historically been the profound enemy of the Jewish community and have participated in many a slaughter of our ancestors in Europe and elsewhere." As if there were no difference between Europe and America! As if it were wise to base Jewish public policy

in the U.S. on pogroms in Europe; as if profoundly American geographical, ideological, theological, and political conditions have not significantly colored American Christianity; as if the professor's fear had any resonance in Colorado's Amendment 2 battle; as if there is no history in the U.S., particularly in the post-World War II era, of Jewish-Christian and Jewish-secular alliances on many issues!

It is specious to regard alliances with Americans, secular or Christian, who have a healthy moral sense, as necessarily joining hands with "those who have oppressed (and murdered) us in the past." While it is visceral to be eternally vigilant and skeptical, this alone would blind Jews to American reality. To distort this reality and thus to contemplate institutional silence on *the* moral issue in contemporary America, is to require Jews to withdraw to a mental ghetto.

Professor Broyde speculates that American Christians, in the future, could undermine Jewish existence in America. But now, not as a matter of speculation, homosexual activists try to do much the same. Rather than avoiding an alliance with a possible future enemy, it makes more sense to ally with those who want to fight a present danger.

8. Professor Broyde writes that any diminution of support by one group for the civil rights of another could endanger the legal protections of all groups. Just the opposite is the case. It is precisely the *reductio ad absurdum* of limitlessly multiplying "groups" claiming special protections that undermines the present legal protections. Because a gunman recently entered a California law firm and murdered a lawyer in cold blood, the head of the California Bar Association suggested that lawyers become a new class of persons. Outlaw lawyer jokes! Classify them as "hate crimes!" he seriously insisted. It is this "logic," stimulated by homosexual activists (among others), that threatens the legal fabric of minority protection. By resisting Balkanization, Orthodox Jews can contribute to the protections that genuine minority groups now enjoy.

9. The reason why one cannot cite a Jewish culture destroyed by pluralism is because, before America, there never has

been a truly pluralistic culture. As for the resurgence of Orthodoxy in America since the 1960s, Professor Broyde casts a narrow scope. He ignores the devastation of the majority of the American Jewish community. Cultural pluralism has multiplied intermarriage and deepened assimilation, *already* destroying part of American Jewry. Now, the last thing we oppose is political or cultural pluralism, but to suggest that if Orthodox Jews don't support homosexual rights, and, by implication, a limitless chain of other claimed rights, Jews might face "governmental persecution, massive societal anti-Semitism or significant commercial discrimination" is hardly a brief for pluralism.

Pluralism means you enter the fray. You defend what's right, whether it is held only by you or also by others; and you oppose what's wrong. Pluralism means: You speak up for what you believe in and promote what you need (*shechitah*, for example). Of course, pluralism also means political vigilance and wisdom. These, however, are not equivalent to accepting any claim for legal protection made by any party, without regard to the substance, the wisdom, or the universal import of the claim.

If there is a basis in our pluralistic society for fearing "massive societal anti-Semitism," it is backing away from the likes of the most critical legal-cultural-moral battle in American society today. As Rabbi Meir Simcha of Dvinsk so trenchantly observed, it is when Jews fall away from Torah that society falls on them. □

This response, drafted by Rabbi Hillel Goldberg, was jointly revised by Rabbis Goldberg, Marc Angel and Pinchas Stolper.

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