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## GAY RIGHTS AND ORTHODOX RESPONSE

### I. WHERE WE ARE AND WHY

If the question presented was whether homosexuality is acceptable, the answer would be a simple, unequivocal and unembarrassed no. The Torah bans male homosexual intercourse.<sup>1</sup> No apologetics or creative reinterpretation can blink that fact.

That answer, so easy to give, is not easy for homosexual persons to abide. Religious commitments should not make one insensitive to the homosexual's plight.<sup>2</sup> Sympathy alone cannot permit what the *halakha* forbids, but *halakha* (except in the rarest of instances)<sup>3</sup> does not forbid genuine (not patronizing) compassion for those burdened by its proscriptions.

Homosexuality is not a new phenomenon. What has changed is that gay persons now insist on the full morality of their conduct and their entitlement to equal treatment in the allocation of social benefits irrespective of sexual practice. The problem of crafting an Orthodox response to homosexuality is directed at the public manifestation of homosexuality and the insistence on public acknowledgment of the full social and legal equality of homosexuals, not private sexual conduct. No one in the Orthodox community is performing bed checks as a condition for employment or urging the state to vigorously enforce sodomy laws. The Orthodox community's political concern is with the idea that homosexuality is moral, not its practice.

The personal and pastoral aspects of dealing with gays are different than questions of public policy. The former are no different than dealing with any sinner (and who among us is not?) Overlooking sin will not in contemporary circumstances be seen as condoning sin. Friendly relations with a gay fellow worker does not suggest that every act of that colleague is morally acceptable. In the public arena, matters are different. There the question is precisely social, moral, and legal attitudes towards homosexu-

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ality. Silence (unless otherwise justified) can convey acquiescence.

The question posed is not the relatively easy one of the permissibility of homosexual conduct, but far more complicated ones of how the American<sup>4</sup> Orthodox Jewish community should respond to the political and legal demands of homosexuals for special government protection because of their homosexuality (i.e., hate crime laws), equal treatment with heterosexual persons (i.e., anti-discrimination laws regarding employment, public accommodations, housing and acceptance in the military, gay marriages, adoption), educational equality (i.e., sex education classes teaching gay sexuality) and the decriminalization of homosexual acts (i.e., legislative repeal or judicial invalidation of criminal sodomy laws).

It is late to be asking these questions. A catalog of the “achievements” of the gay rights movement is impressive (or depressing), with much already settled in favor of gay rights. That trend, will at most be only marginally slowed, not reversed, by judges appointed by a conservative President and confirmed by a conservative Senate.<sup>5</sup> In the next few years, gays may score few further victories in Congress, but they will not have gains taken away either.

Further, there is substantial evidence of attitudinal changes in the general population. Polls indicate a trend toward favorable disposition to much of the gay agenda except (so far) for same sex marriage, to which an overwhelming majority of Americans remain opposed. The growth in acceptance of the gay political agenda—and toward homosexuality itself—has accelerated over the years, and is even more pronounced among young people. The latter trend suggests further victories for gay rights in the future.

### A. What Has Been Achieved

The gay rights movement in America is conventionally dated to the 1969 “Stonewall riot” in New York City, touched off when the police raided a gay bar. In the ensuing thirty years, three-quarters of the States have legislatively repealed laws against sodomy (or had their courts invalidate them) either on the grounds of personal autonomy<sup>6</sup> or that they do not satisfy John Stuart Mills’ limitation on government, that it may regulate only when conduct is actually harmful to others. Harm to the moral climate does not count as harm for these purposes.<sup>7</sup>

Texas, Louisiana and a few other states have, as of this writing, demurred from joining the trend toward abolishing sodomy laws—although even they do not regularly prosecute private consensual homo-

sexual conduct. As this paper is written, the United States Supreme Court is reviewing a Texas decision upholding sodomy laws. While predicting in print what the Court will do is risky, there is widespread speculation that it will reverse the Texas decision, and at least *de facto* undo its own earlier, contrary decision upholding Georgia's sodomy law, albeit against a differently-framed legal challenge.

Many states and municipalities, ban employment, housing and public accommodation discrimination against gays. Some cities and states offer fringe benefits (e.g., health insurance) to domestic partners of employees. Most of America's largest corporations do so as well.<sup>8</sup>

As yet unanswered is the question of whether entities accepting government funding are forbidden to practice discrimination against gays as a condition of accepting government funds.<sup>9</sup> That question plays a key role in the debate over charitable choice.

Several state courts have already considered claims that denying marriage rights to homosexuals denies them equal rights, and have indicated that the claims are to be taken seriously.<sup>10</sup> It was under a related theory, embodied in a local New York City fair housing ordinance, that the policy of Yeshiva University's Albert Einstein College of Medicine to limit access to married housing to heterosexual couples was successfully challenged on the theory that a "married only" rule had the inevitable consequence of discriminating against gays, who cannot marry.

Many states now permit gays to adopt and to retain custody of their own natural children even in preference to heterosexual former partners. The prestigious American Law Institute endorses these results in a proposed restatement of family law. It is, indeed, urging states to recognize same-sex marriage.

In many states, including New York, at the behest of a moderately conservative Republican governor,<sup>11</sup> "sexual orientation" has been added to the category of prohibited forms of discrimination. Courts have struggled with the question of whether "harassment" of gays in employment or education is proscribed, even if the relevant statutes do not specifically forbid "sexual orientation" discrimination.<sup>12</sup>

On the other hand, some few states do not permit gays to adopt children,<sup>13</sup> and in fewer, gay parents are at a marked disadvantage in custody proceedings. Congress has passed the Defense of Marriage Act (DOMA), purporting to exempt gay marriages from the requirement of Article V, § 1 of the Constitution that states give "full faith and credit" to the official acts of other states.<sup>14</sup> It also reiterates that, for federal law purposes, marriage is defined as a heterosexual relationship.

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### **B. Unpacking the Question**

To shape a possible Orthodox response to these developments, several questions need to be asked:

- What needs to be accomplished?
- What is the nature of the society?
- What are the possibilities for success?
- Which arguments will produce desired outcomes?
- What are the costs of successful or unsuccessful courses of action?

There often is no agreed-upon answer to these questions. Reasonable Orthodox Jews will disagree about what the ultimate goals are, where to draw lines, and whether a particular result is desirable or undesirable, likely or unlikely. It will often be difficult to foresee the consequences of a particular course of action, and even harder to judge how likely are those unhappy outcomes. A theory which gives rise to a result that is acceptable in one case may give rise to an opposite result elsewhere, often unpredictably. Nevertheless, there is a considerable difference between a contested exercise of judgment and a wholesale failure to exercise it. The latter is never excusable. No one can expect more from the former than an informed effort at a reasoned judgment.

Some may come to the conclusion that only a total war on the gay agenda is either likely to be successful or morally acceptable. Fine (although I disagree with both assessments), as long as that conclusion is reached only after sober religious, political and factual analysis, not hysterical overreaction resting on political, factual fantasy or invidious stereotyping.

There being no evidence whatsoever that gays are more likely to molest children than heterosexuals, arguments against employing gays as public school teachers ought not to rest on that canard, the equivalent for gays of the blood libel or Amiri Baraka's fantasy that the Jews knew in advance of the attack on the World Trade Center. Such hyperbole is easily discredited, never effective politically, and demeaning not to those wrongfully accused but to those who voice it. Invoking stereotypes also generates lingering resentment which will haunt the Orthodox community for years.

### **C. Looking Inward for Answers**

Any approach to these questions—one cannot fairly speak of a single binding answer—ought to come in the first instance from our own religious tradition and not from mindless mimicking of allies in other reli-

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gious communities.<sup>15</sup> There is a rich tradition that has long addressed the question of our relations with non-Jews who do not observe the Noahide commandments, not fully observant Jews, and of public enforcement of religious norms when they are not universally observed, that offers substantial guidance.

We should not turn first to others with different traditions, even though, realistically, any chance of success in defeating “gay rights” proposals depends on forging a coalition with others. That is not to say that the Orthodox tradition differs from those of other faiths on all or even most “gay rights” issues. It is to say that Orthodox Jews ought to first consider the entirety of their own tradition before forging common ground with other faith groups.

Moreover, aside from possible theological differences, there are demographic differences as well. As a shrinking minority, with a distinctly counter-cultural morality,<sup>16</sup> do Orthodox Jews’ overall interests lie in strengthening doctrines which protect minorities or those which minimize “gay rights”? Given the far greater number of Catholics and evangelicals, these groups might reach different answers to these questions than would Orthodox Jews.

There are, however, counter considerations of substantial weight. If non-Jews seek to implement biblical proscriptions against gay sex and Orthodox Jews do not, the result might be the perception that Orthodox Jews do not care about their faith (or American society) and are not prepared to risk anything for either.<sup>17</sup>

The desirability of intervening on this ground is heightened by the fact the non-Orthodox branches of Judaism are moving to a general acceptance of homosexuality, and are even considering blessing gay unions.<sup>18</sup> Orthodox silence runs the risk of acquiescence, the perception that all of contemporary Judaism regards homosexuality as morally acceptable. It is one thing to tolerate sin in the name of toleration and liberty; it is quite another to foster the impression that a sin is no sin at all.

The internal Jewish divide over whether the prohibition against homosexual sex has continuing validity is a dispute about the very notion of the Torah as an authoritative text and of Divine commands binding even where not understood by human reason. That is a fight worth fighting.

#### **D. Why Object to the Gay Rights Agenda?**

Gay rights activists do not by and large seek to encourage, much less compel, anyone to engage in gay sex. Political opposition to the gay

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agenda generally cannot rest on the need to avoid personal participation in morally reprehensible conduct. Not one of the 613 *mitsvot* specifically requires testimony in Congress or state legislatures against any or all gay rights legislation. No chapter in *Shulhan Arukh* demands the filing of friend-of-court briefs opposing gay rights claims. Historical practice does not compel intervention. Why then do American Orthodox organizations today feel obligated to intervene in *this* political dispute?

One possible answer is that the *mitsva* of *tokhaha* (rebuke) binds Jews to reprove non-Jews who do not comply with seven Noahide commandments, which, of course, including the ban on homosexuality.<sup>19</sup> If so, it would follow that Orthodox Jews are obligated to rebuke in any effective way anyone who would violate them.

Although most *Rishonim* do not acknowledge the existence of an obligation of rebuke with regard to the seven Noahide commandments, the late Lubavitcher Rebbe understood Rambam to require it. (Rambam plainly requires punishment of violators if possible, but that may be different than urging people before the fact not to sin.)<sup>20</sup> Practice seems not to accept that point of view.

The use of physical representations of God, which certainly is practiced by some world religions, is also forbidden to Noahides. Orthodox Jews and the organizations that represent them do not protest the erection of houses of worship where idolatry will be practiced. Orthodox organizations did not rush to the defense of the Taliban regime when it destroyed the historic Buddah statues at Bamiyan. Should Orthodox groups have lobbied the United States to veto a Security Council resolution condemning that destruction—a resolution at odds with explicit admonitions in the Torah to uproot idolatry? What makes homosexuality different?

Even if there is a *mitsva* of *tokhaha* generally, it is not clear that it applies to rebukes aimed at the general public as opposed to individuals. Ritva, explaining the dictum that (*Yevamot* 65a) “just as it is a *mitsva* to say what will be heard, it is a *mitsva* to refrain from saying that which will not be heard,” interprets the latter to a rebuke aimed at the public at large—although other sources quoted by Ritva<sup>21</sup> (in turn quoted by Rema to *Orah Hayyim* 608:2) require at least one rebuke aimed at the general public. A further view recorded by Ritva is that it is not merely desirable (*mitsva*), but an absolute obligation, to refrain from rebukes that will have no effect to avoid inciting danger to the Jewish community. Rashi understands the Talmud more simply to be referring to rebuke certain to be ineffective. Applying either of these standards requires considered judgment.

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Consistency is not the only relevant value, and perhaps not even a terribly important one. Gay rights claims are still not universally acknowledged in contemporary society, while those requiring toleration of idolatry are. It might, therefore, make sense, to protest one and not the other violation of the Noahide commandments.

Another, but very different, ground for speaking out is moral self-protection. The unquestioning acceptance of homosexuality inevitably has an effect on Orthodox Jews and *their* attitude toward homosexuality. This is particularly the case for those Orthodox Jews who are least isolated from the world, who read books and view television shows and movies in which homosexuality is portrayed as an acceptable private moral choice.

Most important, creating an atmosphere in which homosexuality is a contested moral value by people who are seen as mainstream will make it easier to secure the right to moral dissent, not only in theory, but in practice as well.

#### **E. What is at Issue in the Current Debate?**

The *Torah* forbids only homosexual acts, not the status of being “homosexual,” *i.e.*, having a preference or desire for persons of the same sex. In theory, then, while Orthodox Jews would have great difficulty seeking the repeal of sodomy laws or encouraging gay sex in the context of sex education classes,<sup>22</sup> since each of these directly endorses the activity the *Torah* forbids, they might have an easier time not opposing hate crimes legislation or expanding employment discrimination laws to encompass the bare fact of sexual orientation as a prohibited ground for private action. After all, no responsible organization representing Orthodox Jews has called for the disenfranchisement of homosexuals, treating them as less than full citizens,<sup>23</sup> or treating them as outside the protection of the law.

This is so “in theory.” In practice, every step taken towards “normalizing” the status of being homosexual inevitably is a step towards removing the taboo against same-sex sexual acts.<sup>24</sup> Gay rights organizations support civil rights laws banning sexual orientation discrimination in employment not only because they end economic hardship against gays, but because they remove some of the prejudice against gay sexuality. If it is no business of an employer who one sleeps with at night, it is but a short step—or maybe no step at all—to say its not the business of the landlord either, nor even the community’s, to define marriage as a heterosexual institution.

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Of course, affording gays equal protection of the criminal law ignores the fact of homosexuality. One is protected against murder or assault as a member of society, not as a gay member of society. Hate crimes laws, in contrast, sound precisely in the fact of sexual orientation. They confer “rights” or enhanced protection because of one’s sexual preferences and (since most human beings are not celibate) sexual practices.

For this reason, it likewise does not follow that because one is not personally obligated to discriminate in employment on the basis of sexual orientation—just as one is not personally required to discriminate against adulterers—that a law barring such discrimination or removing the stigma of adultery is acceptable. The former conveys no special approval of that which the Torah forbids; the latter, arguably, does.

### F. Are the *Arayot Hukim*?

In sorting out possible Orthodox responses, it is also worthwhile to give at least some consideration to whether forbidden sexual activities are classified as *mitsvot sikhliot*, rational commandments (in *Hazal*’s phrase, “*mitsvot* which if not commanded would be worthy of being written”) or *hukim*, *mitsvot* which if not given could not be conceived through human reasoning, i.e., *para aduma* (the red heifer) or the *sa’ir la-azazel* (the *Yom Kippur* scapegoat).

The *Rishonim* are ambivalent concerning the classification of the *arayot*. Rambam and Ramban both classify them as *hukim*—yet both go on to offer perfectly obvious rationales for this group of *mitsvot*, including the prohibition on homosexual acts. The *Hinukh*, too, offers an explanation for the ban on homosexuality that is distinctly rational.

The obligation to observe *mitsvot* does not depend on whether one comprehends their purpose. But it may well not be prudent to insist on observance of a *hok* by the larger community. Who would think of demanding that an American legislature ban the sale of *sha’atnez*, even though Rambam insists that the purpose of these laws was a repudiation of idol worship?

### G. What is Our Relationship to the Society Around Us?

The next step in determining a Jewish public policy towards the congeries of issues surrounding homosexuality is two-fold: (1) What is the nature of the political society in which we find ourselves? (2) What is our relationship to it?



Although here is no single, all encompassing, unanimously accepted, political theory of American democracy. Several factors do stand out. All citizens are entitled to equal treatment and protection by government unless the government has sufficiently important and relevant reasons to justify the disparate treatment. Concomitantly, every citizen has a right to a say in the making of government policy.

Other points are less clearly settled. Whether it is proper for government to enforce morality is a much mooted question. Liberals and conservatives have different answers, seemingly depending less on principle than their view of the underlying moral principle. (Libertarians are more consistent, seeing no role for government on moral issues.)

For most of the time since large-scale Jewish immigration to the United States, there was a common moral code. Acceptance of that code made it easy to accept the benefits of American society and obscured the differences between Jews and the surrounding society. People lived by similar values even if they worshiped in different churches or synagogues. That consensus began to dissolve with the social upheavals of the 1960's, including the sexual revolution.

As society becomes increasingly agnostic on moral questions, the relative calculus of benefits between toleration and morality changes. It surely needs to be asked whether Orthodox Jews can quietly accept a society formally agnostic about moral issues of the magnitude of abortion and homosexuality. On the other hand, it is a mistake to focus on sexual morality alone. A society that cares for the poor, provides health care for the elderly, worries about the environment, reduces crime and stands up to perpetrators of mass murder cannot easily be dismissed as immoral. In Sodom, homosexuality was accepted, but so was starving the poor. It was the latter, not the former, that sealed its fate.

I think we can accommodate moral agnosticism, but only if it is rejected at the level of principle and is treated only, to borrow from Father John Courtney Murray, the Jesuit who transformed the Catholic Church's teaching on church-state relations, as an article of peace allowing persons of different moral views to live together. Articles of peace do not require surrender of religious or moral beliefs, merely that citizens refrain from imposing them on others through the medium of government.

That obligation, though, must run both ways; not only must religious people not impose "traditional" morality on those with more "modern" views, but "modernists" have a reciprocal obligation not to impose their views on traditionalists.

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What are the advantages of this approach? For starters, it is achievable, where a victory on the merits is not. Second, it preserves a far greater degree of freedom for the Orthodox Jewish community than is likely under any alternative approach. Third, it does not threaten the fabric of toleration. Fourth, given the legal environment, nothing more is possible.

Several Colorado cities enacted ordinances banning discrimination on the basis of sexual orientation. A statewide voter initiative repealed those ordinances and prohibited enactment of gay rights legislation without amending the state's constitution. By a six to three vote, the United States Supreme Court held this referendum denied advocates of gay rights laws the equal protection of the laws. It, said, the Court, impermissibly "tolerate[d] classes among citizens." Justice Scalia dissented (517 U.S. at 644-45):

The Court's opinion contains grim, disapproving hints that Coloradans have been guilty of "animus" or "animosity" toward homosexuality, as though that has been established as un-American. Of course, it is our moral heritage that one should not hate any human being. . . . But I had thought that one could consider certain conduct reprehensible—murder, for example . . . and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional . . . . The Colorado amendment does not . . . prohibit giving favored status to people who are *homosexuals*; they can be favored for many reasons . . . it prohibits giving [homosexuals] favored status *because of their homosexual conduct*—that is, it prohibits favored status *for homosexuality*. . . . The Court's portrayal of Coloradans as a society fallen victim to pointless, hate-filled "gay-bashing" is . . . false . . . . Colorado not only is one of the 25 States that have repealed their antisodomy laws, but was among the first to do so. . . . But the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong . . . often, abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens. [italics in original]

Scalia closed by emphasizing 517 U.S. at 652 [citations omitted]:

But the Court today has . . . take[n] the victory away from traditional forces, but even . . . verbally disparag[ed] as bigotry adherence to traditional attitudes. . . .

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His views no doubt resonate with many religious citizens, but they represent the views of only three dissenting justices. The majority did not deign to respond to Justice Scalia's argument.

The narrow holding of *Roemer* is that states cannot make it hard to enact gay rights legislation, not that they must enact it. But from its tone and rhetoric, and the majority's failure to respond to Justice Scalia's criticism, *Roemer* likely presages the end of government action designed to preserve "traditional" sexual morality.

#### **H. What Sort of Society?**

It is worth considering what these results teach about the nature of American society. For Jews, America is a uniquely tolerant place, a tolerance that extends through the breadth and width of the Jewish community. That state of affairs is not just the product of specific constitutional provisions, although these obviously contribute. Neither is the product benevolent laws such as those barring discrimination in employment or housing, though these also contribute substantially. These laws enforcing tolerance and educating citizens to its values, would not have been enacted but for a pre-existing attitude of tolerance towards people who are different.

Tolerance and pluralism are at once robust and delicate in contemporary America. They are firmly grounded in American life, and do not seem immediately endangered. But at various times they have been lost quite rapidly. One must ask whether one can depart from tolerance and pluralism in one case—even in the name of advancing moral and ethical values—without endangering the larger framework.

There is no precise answer, and so the question remains. The value to the Orthodox Jewish community of tolerance—intangible and diffuse as it may be—must be weighed against the value of standing up for what is necessary to constitute a moral society. That is not a calculus lending itself to measurement by caliper; neither is it fixed and unchanging.

#### **II. WHERE SHOULD WE GO FROM HERE?**

The point of Orthodox public engagement in the political and legal processes ought to be two-fold: to advance the community's own interests; and to insure its own moral values remain clear. A course of action which advances neither is not worth the candle. Even where those causes are advanced, the gain inevitably comes at a cost. One needs always

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to ask whether the gain is worth the cost. The analysis will not be uniform across the range of issues. One might conclude that there is no gain in securing enactment of an act which is certain to be struck down by the courts, which will be perceived as rear-guard resistance (or bigotry), or which will never be enforced.

Making these decisions requires sober analysis of real possibilities and costs, not hot-house analysis in Anglo-Jewish periodicals. It means, first, counting votes. One needn't be absolutely confident of winning, but certain political suicide is not worthwhile. It also means knowing scientific or cultural facts. Do homosexuals abuse children? Does sex education encompassing homosexuality encourage it? These answers will not always be determinative, either because the facts are unknowable or because matters of value take precedence, but they need to be known.

The calculus must also take into account the long-term consequences of a particular course of action. Religious opposition to the anti gay employment discrimination bill (EDNA—End Discrimination Now Act), for example, has led gay groups to question efforts to enhance general protection for religious observance in the workplace.

As efforts to build support for enhanced religious accommodation requirements was gaining strength, gay rights supporters circulated a list of questions to members of Congress, the clear import of which was to suggest that the enhancement of religious rights would inevitably come at the expense of gay rights. Since there was some truth to the charge—although not nearly as much as gay advocates suggested—efforts to pass the legislation were complicated. Was the original opposition worthwhile?

During the course of efforts in Congress to ameliorate the effects of a Supreme Court decision gutting constitutional protection for religious liberty the most important organized opposition to the bill came from gay groups. Those groups harbored a deep anger at all “conservative” religious groups, as the introduction of that legislation followed closely publication of ads placed by evangelical groups urging gays to return to heterosexual behavior. Orthodox Jews had not placed these ads, but they were caught—and are still caught—in the backlash.

I suggested trading the opposition to religious freedom legislation for a dropping of opposition to including sexual orientation in hate crimes statutes. I was told that the Orthodox rabbinic leadership would not accept such a trade-off. I thought then—and think now—that this putative decision was wrong. A hate crimes law encompassing sexual orientation is inevitable, but there likely will not be another opportunity to enact sweeping religious liberty legislation.

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The blame is not one-sided. Gay groups, even as they preach tolerance, are not at all tolerant of those who disagree with them. They are not interested only in achieving broad recognition for gay rights or the right to equal treatment, but also in suppressing all criticism or denigration of gay sexuality.

All discussions of tactics depend on a reading of the future. For those of us not blessed with prophecy, this entails predictions about future political events and popular attitudes which can be only dimly perceived. The outlook for a conservative Senate seems promising for those opposing gay rights legislation. Some believe that the Republican sweep in 2002 presages a long-term realignment toward traditional values. But with the storm over Trent Lott's ill-fated praise of Strom Thurmond's 1948 segregationist campaign for president, the political landscape over equal rights shifted dramatically.

For myself, I think that the acceptance of claims by gays for equal treatment is by and large inevitable—so far, with the exception of marriage, and, less clearly, with regard to the education of children. The egalitarian pull in our society is strongly ascendant. No end of that trend is in sight either in the United States or elsewhere in the Western world. Far more troublesome than great gay equality is a growing tendency to suppress any suggestion that homosexual sex is immoral, as Senator Rick Santorum recently discovered.

An argument based on community values leaves open the possibility—no, likelihood—that in some communities homosexual activity will be treated as an available option, one wholly without moral taint. In such communities, the question for Orthodox Jews and others with like moral and religious views of homosexuality, is for example, whether they will be able to insist that their children not be exposed in schools to ideas which are antithetical to their beliefs.

The exposure to ideas with which one disagrees is often said by courts and commentators not to be a burden on religious freedom. Moreover, a right to opt out of the instruction about the moral neutrality of gay sex is said to “condemn” children to the ignorance or biases of parents. The state, the argument goes, has an interest in exposing children to a wide variety of views so that they can make their own choices. It has so far proven impossible to convey to courts with any success the notion that “mere” exposure to an idea somehow is defiling and degrading. Such claims fall on deaf judicial ears.

A related problem is whether schools or universities may punish students for insisting that homosexuality is immoral, particularly if the

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speaker makes the point to a known homosexual. Relatedly, several “gate-keeper” professional associations (i.e., social work and psychology) have sought to exclude from professional schools those who refuse to accept homosexuality as normal.

One’s first impulse is that such speech or beliefs are protected by the Free Speech Clause of the Constitution. That should be the right answer, but matters are not so simple. It is still true that an abstract statement in a class discussion or in a written exercise that homosexuality is immoral is fully protected speech, but matters are far less clear when the comment is directed to a fellow student, and even less so when a professional association insists as matter of ethics that persons religiously opposed to persons cannot treat gay people well.

If I am right about these trends, then the most urgent task before us is not to try and stop the proverbial runaway train, but to preserve a right to dissent from the emerging consensus that it is wrong, even immoral, to question any form of consensual private sexuality and that it *a fortiori* wrong under any circumstance to discriminate against people with that sexual orientation.

The Orthodox community’s most enduring interest is being able to preach and teach its views on moral issues and put them into effect within its own confines. If in present circumstances it cannot impose its view on others—and of course it cannot—it must insist on not being silenced and being allowed to live according to the dictates of its own beliefs. That right is in danger, if not imminently, at least in the medium term. Protecting this right should be the community’s highest priority, even if it means giving up on recruiting government in a crusade against homosexuality.

The right is not secured merely by enhancing the freedom of speech. Communal institutions should not be required to act contrary to their religious beliefs. Religious schools should not be forced to teach the acceptability of homosexuality, nor should they be required to hire homosexuals. Surely, they should be free to insist that their employees not indicate in any way their own dissent from the employer’s theological position while carrying out their official duties. (The obligation of reciprocity would allow gay organizations to impose mirror image obligations on those working for them.)

Should these rules of moral agnosticism carry over to the commercial sector? The accepted wisdom is that they should not, that all citizens should be able to compete for the economic benefits the society offers. Jews certainly have benefited from this attitude, but its applica-

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tion to the present controversy is problematic. Should a kosher caterer be required to cater a “wedding” of a gay couple in a state banning sexual orientation in places of public accommodation?

An agenda which accepted this analysis would not oppose hate crimes legislation. It would not oppose anti-discrimination legislation in employment so long as religious institutions enjoyed a broad right to refuse to hire persons whose presence would be inconsistent with the religious values the institution sought to perpetuate. It would seek (although with somewhat less chance for success) to extend this protection to religious institutions and organizations seeking funds under the faith-based initiative, and, at least, it would insist that such institutions could ban public proclamations of “gayness” by its his employees.

It would seek in that legislation to prohibit employers from penalizing employees who, in ways that fell short of excluding gay fellow employees from employment, express disagreement with homosexuality. This right to disagree is not at all secure in the face of various employers’ insistence on diversity training wherein tolerance of another’s sexual orientation is so often conflated with accepting it. Similar protection is desperately needed in academia.

This course of action would be important not only because it avoids a clash which Orthodox Jews are likely to lose. It would also amount to an official acknowledgment that gay sexuality is a contested moral issue and one of sufficient weight to justify a limited departure from the regnant egalitarian assumptions of our society. At the moment, that is the best we can do.

#### **AFTERWORD**

Since the body of this article was prepared, the picture has become clearer, and even less promising for those opposing “gay rights” claims. The Supreme Court invalidated Texas’s sodomy law on very broad grounds of personal autonomy, not the narrower equal-protection grounds (the law banned only sodomy among males) suggested by Justice Sandra Day O’Connor in her concurring opinion. The Massachusetts legislature has not been able to agree on a constitutional amendment to recognize domestic partnerships as a substitute for marriage.

Only a small handful of states have passed legislation or constitutional amendments (even in preliminary form) to define marriage as a heterosexual institution. A proposed federal amendment is languishing in Congress. A district judge recently refused to recognize a slander suit

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for calling someone a homosexual, refusing, she said, to dignify bias and bigotry.

Legislation to enhance protection for religious workers in the workplace has run into substantial opposition from the ACLU and gay-rights groups because it might be used as a shield against efforts to protect gay rights in the workplace—including employers' efforts to demand that employees recognize homosexuality as acceptable. The ACLU boasts of compelling a printer—shades of John Peter Zenger—to print invitations to a lesbian wedding.

To be sure, there have been some judges who have read the Supreme Court's sodomy decision (*Lawrence v. Texas*) narrowly so as to permit, for example, a ban on adoption by same-sex couples. These decisions appear to be inconsistent with the Court's decision and may not survive further review. They are, however, nothing more than straws in the wind. It would be a mistake to be misled by them.

More ominously, there is no groundswell of popular support to enact legislation to define marriage as a heterosexual institution. Those efforts need overwhelming support—it is not easy to enact a constitutional amendment, as it requires various supermajorities—and the controversy over the topic, much of it stemming from the American preference for tolerance, bodes ill for such an enactment.

In short, the handwriting is on the wall. Whether denominated marriage or domestic partnerships—or whether the state withdraws from recognizing marriage altogether—same-sex relationships recognized by the states are here to stay, if not immediately then in no more than a decade. (What difference does it make in halakhic terms if those are called marriages or domestic partnerships?) *A fortiori*, outright discrimination against gays is not going to be tolerated.

The Orthodox leadership appears oblivious to these developments, which have deep roots in American culture. It goes merrily along issuing broadsides against gay marriage and gay sexuality, enlisting in quixotic battles to turn back the clock to the public sexual morality of the 1950's. This is a campaign doomed to failure. There might still be time to carve out protection for Orthodox life and the right to vigorously and publicly criticize homosexual conduct. It is, however, awfully late in the day. Too much time, goodwill, and political clout has been frittered away on causes which feel good but in fact accomplish nothing, rather than on productive initiatives. It is time for an effective policy.



NOTES

1. Female same sex sexuality activity is only rabbinically prohibited. See *Yevamot* 76a, and Tosafot, *ad loc s.v. ba-mesolot*. Unless otherwise indicated, I elide this difference. It is impossible to draw a male/female distinction in public policy debates over homosexuality.
2. See *Vayikra Rabba* 32:7 (Margolioth edition). (On expressing sympathy with the plight of the *mamzer*).
3. With regard to *mesit*, however, see *Devarim* 13:7-12. See, generally, N. Lamm, "Judaism and the Modern Attitude to Homosexuality," *Encyclopaedia Judaica*, 1974 Yearbook, pp. 194-205, particularly p. 201.
4. I do not attempt here an effort to deal with these questions in an Israeli context.
5. There is a "libertarian" streak in American conservatism that objects to imposing morality by law. Barry Goldwater, whom no one would mistake for a liberal, thought gays should serve in the military without restriction.
6. For a list of states and the status of sodomy laws, see Lamda Legal, State by State Sodomy Law Update (July 16, 2002), available at the Lamda Legal website, [www.lamdalegal.org](http://www.lamdalegal.org). It is telling that many of the courts so holding have been in the Bible Belt, where one would expect courts to uphold laws tracking biblical morality so closely.
7. *Roemer v. Evans*, 517 U.S. 260 (1996).
8. See the list at [www.lamdalegal.org](http://www.lamdalegal.org).
9. See, e.g., *Bellmore v. United Methodist Children's Home of the North Georgia Conference* (Sup. Ct. Fulton County, Ga. 2002), regarding the refusal by a state-subsidized institution to hire gay persons). [The case has now been settled on terms favorable to gays.]
10. Most famous is Vermont, *Baker v. Vermont*, 744A.2d 864 (1999), but Hawaii and a lower court in Alaska too have reached similar results. In no case has a court yet actually struck a heterosexual only marriage law. In Hawaii, intervening legislation gave gay partners an arguably sufficient substitute. Alaska amended its constitution to define marriage as a heterosexual institution. Vermont famously allows for domestic partnership.
11. N.Y Executive Law, § 296.
12. Compare, in the context of public schools, *Schroeder v. Hamilton School District*, 282 F.3d 946 (7th Cir. 2002) with *Henkle v. Gregory*, (9th Cir. 2002) (settled). In the context of employment, even in the absence of a ban on sexual orientation discrimination in federal employment law, courts have found ways to ban sexual orientation discrimination. *Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002) (*en banc*).
13. See Lamda Legal, *Overview of State Adoption Laws as of 8/27/2002*.
14. The Supreme Court has hinted that it may be beyond Congress' power to enact such legislation in the face of the Constitution's command of full faith and credit. However, there are some earlier cases suggesting that full faith and credit need not be extended to marriages which violate a state's fundamental policies. These holdings arose in the context of interracial marriages. The fact that proponents of DOMA need to cite racial miscegenation cases augurs ill for the argument against mandatory inter-state recognition of gay marriage.

## TRADITION

15. Sources on the Catholic struggle with reconciling its belief that homosexuality is wrong with the humanity of homosexuals are cited in M. Stern, *On Egalitarianism and Halakha*, *Tradition* 36:2 (Summer, 2002).
16. As late as the 1960's, the official sexual morality of Orthodox Jews was not terribly different than that of the larger society. That is no longer the case—and the gap appears to be widening. In the Orthodox community, the reaction has been an ever-greater emphasis on the segregation of the sexes and modest dress. Whether actual behaviors have changed is a very different question.
17. Agudath Israel once brought a challenge to a New York City Executive Order forbidding municipal contractors from engaging in sexual orientation discrimination. It filed only after the Salvation Army brought a similar suit. The suit was filed, I was told, because of a fear of the perception that to comply with the order when Christian groups were challenging it would be a *hillul Hashem*.
18. *Resolution on Same Gender Officiations*, adopted by the Central Conference of American Rabbis (March 2000) (available online at [www.ccarnet.org/cgi-bin/resodisp.pl?file=gender&year=2000](http://www.ccarnet.org/cgi-bin/resodisp.pl?file=gender&year=2000)). The Conservative movement is now considering following the Reform movement's lead. For a somewhat dated survey told from a gay perspective, see *Mixed Blessings: Organized Religion and Gay and Lesbian Americans in 1998* (Human Rights Campaign 1998). See also, J. Plaskow, *Sexual Orientation and Human Rights: A Progressive Jewish Perspective* in S. Olyan and M. Nussbaum, *Sexual Orientation and Human Rights in American Religious Discourse* (1998) at p. 29. Professor (now Judge) Michael McConnell's piece in that same volume is particularly instructive.
19. M. Broyde, "Tikkun Olam: The Obligation of Jews to Seek Observance of Noachide Laws by Gentiles: A Theoretical Review," in D. Shatz *et al.*, *Tikkun Olam* (1997) p.103, citing *Hilkhhot Melakhim* 8:10, and 10:11.
20. See Rabbi J.D. Bleich, *Tikkun Olam: "Jewish Obligations to Non-Jewish Society,"* in Shatz, *supra*, p. 61, f.n. 22.
21. O.C. 608:2; Ritva, *Yevamot* 65a.
22. Here, too, life is complicated. It would surely be ideal, from the standpoint of *halakha*, if sexual education courses did not offer instruction on same-sex sexual techniques. What if, however, it were demonstrated that such instruction does not increase the likelihood of same-sex activity by adolescents, but does (a) remove the moral stigma attached to such activity; and thereby (b) makes it less likely that adolescents disposed to such activity will do so in ways that expose them to AIDS or the risk of suicide?
23. *Roemer v. Evans*, 517 U.S. 620, 634 (1996) (unconstitutional to deny a person the right to vote because of advocacy of illegal policies or because of their status as Mormons or gays).
24. See *Roemer v. Evans*, 517 U.S. 620, 646 (1996) (Scalia, J., dissenting), citing Jacobs, "The Rhetorical Construction of Rights: The Case of the Gay Rights Movement," 72 *Neb.L.Rev.* 723, 9 (1993). Justice Scalia there also discusses whether one can meaningfully distinguish between the status of being homosexual and homosexual acts.