ON EGALITARIANISM AND HALAKHA

JEWS CHOSE EQUALITY

Shreveport, Louisiana’s Sunday Blue Law required all stores to be closed after 9:00 a.m. Sunday. Somewhat atypically for the time (1874), the ordinance exempted storekeepers who kept their stores closed on the Saturday Sabbath. The provision substantially equalized the position of the observant Jewish shopkeeper and his Christian competitor, who otherwise would have enjoyed a significant competitive advantage by keeping his shop open on Saturday, when his Jewish competitor’s business was closed. A Jewish storekeeper, Levy, opened his store both Saturday and Sunday. Fined $10.00 for violating the blue laws, Levy challenged the law on the ground that it granted a special privilege to Sabbath observing Jews and was therefore unconstitutional.

The Louisiana Supreme Court agreed, striking the statute as a breach of the requirement for the equal treatment of all citizens. 35 years later, the same court, relying on its decision in Levy, and its insistence on religious equality before the law, held that public schools could not compel Jewish students to participate in Christian religious exercises because such exercises denied them equal treatment with their Christian schoolmates.

Were Jews better off because the earlier decision insisted on formal equality of Jews and non-Jews? Did the cost to shemirat Shabbat (the economic pressures on Saturday Sabbath observance were in part responsible for the decision of extreme reformers to “move” Shabbat to Sunday and certainly led many American Jews to abandon shemirat Shabbat) outweigh the benefits of a shield against official favoritism toward Christianity? What about the benefits of an official reaffirmation of Jewish equality at a time when equality was not a highly prized

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value in the highly Christianized American South? How do we weigh the economic penalty for shemirat Shabbat against the benefit of not exposing vulnerable and probably not Jewishly well-educated schoolchildren to Christian preaching? How should Jews at the time, not blessed as we are with hindsight, have reacted?

In a regime of equal citizenship, these are difficult but necessary questions. A few years ago, a friend was honored for many years of service to the Jewish community. The speaker, the former director of the National Jewish Community Relations Advisory Council (NJCRAC, now the Jewish Council on Public Affairs, JCPA), recalled—in a startling and perhaps not fully historically accurate admission—that in the immediate aftermath of World War II Jews decided to push for full equality. In taking this decision, he said, Jews knew that the pursuit of equality would increase the likelihood of assimilation. Yet they went ahead anyway.¹

Should they have acted differently? Should Jews have tolerated inequality in order to forestall assimilation? Should they have left in place quotas limiting their admission in large numbers to Ivy League schools or left unchallenged restrictive housing covenants that severely restricted their choice of places to live? Most American Jews, and the organizations representing them, thought then that all of these restrictions should be challenged. And, in fact, their challenges were successful. Is that a bad thing?

Should Jews have left intact Christmas celebrations in the schools in order to keep Jewish children uncomfortable and thereby discourage assimilation into hostile surroundings? (Or, perhaps, encourage it as schoolchildren sought to conform to avoid the hostility of their peers?) The Agudas Harabonim as early as 1904 thought not, joining with the Reform rabbinate—naturally not in the same statement—in saying no. Were both groups misguided?

Finally, consider, particularly with regard to our community’s struggle to respond to the gay community’s demand for equality, the following from the debate in the English Parliament over the granting of full citizenship to Jews in 1835. Responding to an opponent of granting Jews equal political citizenship who denied that he sought to persecute Jews or deny them equal economic rights, Lord Macaulay said:²

But why a man should be less fit to exercise [political] powers because he wears a beard, because he does not eat ham, because he goes to the synagogue on Saturday instead of going to a church on Sundays, we cannot conceive.

²
The points of difference between Christianity and Judaism have much to do with a man’s fitness to be a bishop or a rabbi, but they have no more to do with his fitness to be a legislator, or a minister of finance, than with his fitness to be a cobbler. . . . Any man would rather have his shoes mended by a heretical cobbler than by a person who had subscribed to all 39 articles but had never handled an awl. Men act thus, not because they do not value religion, but because they do not see what religion has to do with the mending of shoes. Yet religion has as much to do with the mending of shoes as with the budget and the army estimates.

Presumably, few American Jews today would fail to agree with Lord Macaulay that Jews cannot be only a little bit equal. Surely Jews would be suspicious of a candidate who thought Jews should be equal citizens only in some regards, or that important private institutions should be free to discriminate against Jews. Agudath Israel loudly backed the claim of the so-called Yale Five that they were denied equal access to Yale when Yale refused to make an exception for them to its egalitarian, gender integrated, housing policy. The point is not who had the better of the argument, but that Agudath Israel rested its arguments on a claim to equal treatment. How then can we deny gays the same right of equal access to Yale? It is not illegal to advocate a denial of protection of economic and social equality to some group; whether such advocacy is compatible with the rules of liberal democracy is another question.

It is important, of course, to distinguish between equality in the economic and social sphere and approval of gay sexual practices as such. Gay rights laws purport to address only the former. However, advocates of gay rights laws seek to enact gay rights laws not only because they will eliminate economic discrimination, but because they expect such laws will ultimately lead to the erosion of beliefs hostile to gay sexuality.

THE COSTS OF EQUALITY

The move toward equality has conferred important benefits, but it has not been without social costs for Orthodox Jews. The feminist movement, for example, has done women in general and Orthodox women in particular much good. It would be wrong to deny the value of the increased economic, medical and social opportunities available to women as a result of the feminist movement, because that movement also advocates policies and behaviors with which Orthodox Judaism has the most profound of disagreements.
There is no denying that the feminist movement has created many difficulties that Orthodoxy has not yet resolved. However, the trend toward equality for women is in many ways hundreds of years old. Our generation's efforts to grapple with the new set of problems modern feminism poses can at least draw upon ample halakhic precedents. The social problems posed by equality of the sexes are not inevitably insoluble. A generation ago, the Bat Mitzva was unheard of among Orthodox Jews; today it is ubiquitous. Of course, equality does not always lead to progress—today, both boys and girls expect extravagant parties.

The problem of gay rights is not one on which we have precedents to guide us beyond the fact that the Torah unambiguously condemns male same-sex sexual activity. What does the social commitment to equality (coupled with a respect for autonomy in private matters) imply for an Orthodox position toward gay citizens?

Do we try and fashion a little bit (or almost) equal policy, disregarding in this instance Lord Macaulay's strictures? Does it follow, if the answer is that there is no middle ground, that we must insist on no quarter at all for gay fellow citizens as a mark of our commitment to the Torah's denunciation of male homosexuality? Perhaps we must take a public position against protecting gays from social and economic discrimination even though the halakha as such does not compel a position one way or the other on these subjects, because in contemporary circumstances lack of opposition would be taken as acquiescence in the underlying sexual behavior.

Only when those passing on these questions on behalf of the Orthodox community understand the deep-rooted egalitarian background to these dilemmas can they be expected to reach credible decisions. My impression is that many in the rabbinate view claims for gay rights laws only as an attack on conventional sexual morality, and thus miss a substantial part of the contemporary debate.

One could argue that the commitment to equality applies only to political rights, and that Orthodox Jews do not oppose equal political rights for gay citizens. However, this argument fails. The commitment to equality in 21st century America extends far beyond governmental activity. It extends to equal access to important institutions of social, economic, and cultural life. Would we consider ourselves equal members of society if we could vote, but could not get jobs or seek admission to Harvard or Yale? The Pale of Settlement was based in large measure on economic and social restrictions. I doubt that many American Jews are prepared to return to that crippling social and economic regime.
Marc D. Stern

Could we then perhaps draw the line at marriage? Perhaps, and here we for the moment enjoy broad popular support for such a limitation. Nevertheless we cannot avoid grappling with the problem of equality even as to gay marriage. Andrew Sullivan has powerfully argued that, because the state defines marriage, and marriage as an institution is so central to American life, gays cannot be truly equal citizens without access to it. Orthodox Jews cannot accept this argument. The question is why and how to justify that opposition in a society committed to equality.

During the course of the 2000 presidential campaign, vice-presidential candidate Senator Joseph Lieberman was asked whether he would allow his child to intermarry and whether he recited daily the blessing “Who has not made me a woman.” His answers (yes to the first, no to the second) upset many in the Orthodox community. However, it went largely unremarked that these questions probed the candidate’s uncritical acceptance of the prevailing egalitarian ethos. It is difficult, perhaps impossible, to run for high office and insist that one’s fellow citizens (and voters) are unfit to marry one’s children, or that women are inferior to men.

If, on the other hand, we commit ourselves to the full equality of all citizens before the law, are we limited to enforcing the Torah’s prohibition only in our personal sexual behavior, perhaps not even allowing those views to be enforced in quasi-public communal institutions or in, say, our capacities as landlords? For example, can an Orthodox landlord demand exemption from fair housing laws because those laws violate the landlord’s religious obligation not to facilitate a same sex relationship? Should Jews oppose fair housing laws because they might require such results?

The absence of a commitment to equality in the Orthodox community goes beyond halakhic objections; it appears to be a matter of unthinking reflex. This reflects ignorance of the roots of Jewish acceptance in late 20th century America. The protection of religious observance in the workplace would have been impossible without the substantial achievements of the black civil rights movement, the premier egalitarian movement of our time.

The relevant legislation protecting Sabbath observers was enacted on the coattails of the 1964 Civil Rights Act. It could not have been enacted standing alone. No group is louder and more assiduous in claiming its rights under this statute than Orthodox Jews. Yet Orthodox Jews are at best ambivalent and often openly hostile to other manifestations of egalitarianism, up to and including, in some cases, racial equality.
Is the tolerance for bigotry in our midst a practical political stance? Is it a moral one? There is something wrong, seriously wrong, when we are not moved by the suffering of those denied access to the benefits society has to offer. Yet some Orthodox Jews, it is fair to say, are not so moved, certainly not to the point of taking political steps to address those problems.

While leaders of Reform, Conservative and secular Jewry took an active role in the struggle for civil rights (albeit nowhere nearly as important as they proclaim), Orthodox Jews were mostly silent. Can it really be that we had nothing to say—after the Holocaust—about the shameful treatment of blacks in the South? If adolescent memories can be relied on, many in the Orthodox community mocked the struggle, and certainly the participation of rabbis in it. Few Orthodox Jews actively participated in the struggle for civil rights.\textsuperscript{11}

The problem is not unique to American Orthodoxy. My wife remembers a teacher at her Israeli seminary challenging one of her classmates for expressing concern over the plight of starving people in Biafra. There are exceptions of course. Rabbinical students at Yeshiva University in the 1970s recall how Rabbi Aharon Lichtenstein scheduled shaharit and his regular shiur at an early hour so he and his students could attend a morning rally supporting the impoverished Biafrans.

At any rate, one’s response to the aforementioned questions might depend on why one thought egalitarianism a binding norm.\textsuperscript{12} At least four justifications suggest themselves:

1. Legal: The post civil war constitution and numerous civil rights statutes, presumably binding as dina de-malkhuta dina.

2. Pragmatic: Equality advances Jewish interests on the whole. In a negative formulation, opposition to equality is likely to be fruitless and generate hostility not outweighed by any contrary interest. There may be, however, cases where the interest in some other civic good requires unequal treatment of citizens.

3. Moral: Derived either from religious sources (\textit{i.e.} the story of the creation of man), or alternatively derived from general moral principles not contradicted by religious sources.

4. Empirical: Jews are biologically, psychologically, intellectually, or morally no different than others, and thus have no claim to special treatment.

There are obvious differences among these rationales. If the commitment to equality is merely one of dina de-malkhuta (and if dina de-
malkhuta extends this far) then there is no obligation to extend the obligation beyond strict requirements of law, and we are free to seek to minimize the scope of such laws through the ordinary democratic processes. We would have no obligation to teach children of the value of equality or to reprimand them when they express bigotry in verbal form (except as we might train them to be generally law abiding, or avoid other rude behavior that is likely to impede their success).

On the other hand, if the obligation were moral or empirical, we might wish to promote ethical standards beyond that required by law. We surely would not have justification for seeking repeal of laws guaranteeing equality. Most important, if the arguments for equality are either dina de-malkhuta or pragmatic there would be no occasion to examine normative religious practice to determine if it could be more closely aligned with equality norms. If, however, equality norms are rooted in moral or empirical principles, there might be occasion to do so.

For one example: if we have a moral or empirical basis to believe in equality, should we refuse humrot beyond what binding halakha requires with regard to the production of kosher wine or stringencies in bishul akum, which will result in employment discrimination to non-Jewish workers in plants producing kosher food or wine?

**EDUCATIONAL DILEMMAS**

Whatever our answer to these questions about public affairs, how do those attitudes play out with regard to the education of children, both in school and in the home? Are children, or most of them, capable of dealing with anything but black and white positions? Could they accept the idea that Orthodox public policy must for pragmatic or legal reasons allow for positions different from what the Torah might require in a perfect Torah society? Or will they see such positions as concessions that the Torah is imperfect or that we really do not mean what we say when we teach and preach Torah? Would preoccupation with these worries lead to a distortion of Torah in favor of too great a rejection of egalitarian values? What of the danger that without full throated commitment to equality, children will grow up as bigots, or at least unable to cope with the egalitarian society of which they will be part? Which is the greater danger?

How do we tell our children that non-Jews are in important ways our equals and yet our intercourse with them must be limited? Or to put it the other way, can we inculcate the importance of separateness
without also tolerating, even encouraging, raw and ugly bigotry? The Rav in Confrontation insisted that we do both, but the evidence (including the widespread refusal to recognize the universalism present in Confrontation) unfortunately is that we cannot, or, at least have not.

If an untutored devotion to the particular is a problem for much of the Orthodox community, untutored devotion to universal values is a problem in other segments of the community. Some Orthodox Jews are so anxious to demonstrate their openness to the value of equality that they find it difficult to say no to any overture in the name of equality and equality.

At the height of the crisis over pluralism in Israel, some prominent Orthodox Jews tripped all over themselves to demonstrate their commitment to pluralism—the equal dignity of all religious views—as a Jewish value. Their statements were popular in the Anglo-Jewish press and with Jewish organizations anxious to avoid offending major donors and demonstrate their institutional commitment to Jewish unity and pluralism. The expressions of devotion to equality were not reflective of any serious effort to grapple with the problem of sustained and intentional deviations from halakha as a matter of religious principle.

Much the same phenomenon was evident at the advent of the Enlightenment. Then some Jews were willing to forego equality to prevent the assimilation they knew would inevitably follow equal rights. Others were anxious to demonstrate that they shared universal human traits with predictable results in intermarriage and loss of religious distinctiveness. The Enlightenment was not the first occasion for this. For example, Moshe Halbertal has recently traced a somewhat analogous phenomenon in Me’iri’s Provence.

Perhaps tainted by years of working for a liberal Jewish organization, I believe in the most fundamental of ways in the fundamental equality of human beings regardless of race, sex, or religion. The clash between egalitarian values and halakha is not just another clash between desire (e.g., the desire to eat a cheeseburger) and the halakha (which demands that I do not fulfill that desire). It is between fundamental commitments.

One is reminded of Professor Blidstein’s well-known discussion with the Rav concerning the morally insufficient basis of the heter of mishum evu (preventing inter-group strife) for Jewish doctors saving non-Jewish lives on Shabbat. The patient probably does not care about the moral problem, so long as he or she is attended to, but we ought to care.
Moral arguments at the level of principle are unattractive and not compelling in our community, convinced at a deep level of its own moral, ethical and religious superiority. So let me try and make the case at the level of the pragmatic. There are important reasons to reinforce the community's commitment to equality.

First, it is unrealistic to expect Jews to give up the economic security equality has brought. If the Orthodox community is conflicted about the importance of the equality of all human beings, the bulk of the Jewish community is not. The Orthodox community is nevertheless unequivocally committed to insuring that its own right to equal treatment is not slighted. That is not a politically viable position.

Awareness of the problem is not new, even if it seems not to have broad contemporary resonance. Hazal, in a famous passage in Bava Kamma, relate that the Romans studied Jewish law to see if it was just. The Roman inspectors concluded it was, except for certain discriminatory rules against non-Jews in tort law. I suspect (I hope wrongly) that more yeshiva students think of this sugya with regard to its citation by the Yam Shel Shelomo to define the issur of Ziyufa shel Torah than what it means for our relations with non-Jews. Characteristically, Me’iri explains that the discriminatory tort rules do not apply to moral non-Jews. Rashi on Ekha comments that the rules of kashrut which separate Jews and non-Jews in the common human experience of dining, engender anti-Semitism, as indeed they did. It is not as if the subject is not raised by rabbinic authors sensitive to its dimensions; it is that their writing seems to be ignored.

The self-censorship of Jewish texts (i.e. with regard to the use of different terms in the Gemara as it is printed to refer to non-Jews, or the Arukh ha-Shulhan's use of the word mitri [Egyptian] to refer to all non-Jews as invalid witnesses), demonstrates the rabbinic authorities' awareness of the problem. Awareness seems not to have touched off any substantial examination of the question of attitudes toward non-Jews. It is at once easy and proper to excuse Jews living from pogrom to pogrom from the charge that they spent insufficient time worrying about the equality of their oppressors. We in America do not have that excuse.

But if the problem of excessive particularism and the bigotry it engenders were to disappear tomorrow, we would confront the opposite and equally dangerous problem in spades—the openness of our society, and its pervasive equality between members of all religions. That openness can easily lead to the total breakdown of any uniquely Jewish sphere. For much of American Jewry, it already has.
Interruption, as Hazal knew full well, follows from social intercourse as equals. Hence, they insisted on a string of issurim regarding food and living patterns—even play patterns—to discourage such mixing. How do we balance that message with the message of intolerance to bigotry? Me’iri, who rendered irrelevant many prohibitions of doing business with non-Jews and abrogated rules of legal inequality of non-Jews, left untouched rules against social and friendly intercourse. Does this work other than as halakhic ipse dixit?

What are we to make of fifteenth-century Italian Jewry that consumed stam yenam, and at least some of German (Czech) Jewry that did the same? Ramah, who records a series of kulot with regard to doing business with non-Jews, was not prepared to unambiguously condemn this practice, much as he sought to discourage it. It would be interesting to know of the assimilation and intermarriage rates of these communities.

Interruption is the pressing problem for the American Jewish community. Increasingly, it is gaining popular acceptance. In my youth, a non-shomer Shabbat Jew would have been crushed to have an intermarriage in the family. No longer. According to the latest American Jewish Committee study, the change in attitude has even intruded into the Orthodox community (albeit at a lower rate than the general Jewish community). The problem is not to be discussed as a lack of Jewish content in people’s lives or the Reform movement doing its assimilationist thing again. Rather, it is a manifestation of the American commitment to the equality of human beings which makes intermarriage acceptable. The fact that Jews are no longer regarded as the devil’s children, and Judaism is just another way of serving God, makes intermarriage acceptable amongst non-Jews. Conversely, the fact that Jews are accepted in American life makes intermarriage thinkable for non-Jews. And, indeed, the American Jewish Committee found that more than half of American Jews believe it racist to condemn intermarriage.

Important segments of Jewish communal leadership are fully prepared to accept interruption. Several years ago, Rabbi Shlomo Riskin was the keynote speaker at the Federations’ General Assembly. He spoke of the dangers of interruption. The speech was poorly received, so much so that the published summary of the Assembly ignored the fact that it had been given at all.

The Orthodox community, though in lesser percentages, is not immune from interruption, particularly among those of our children who attend the best secular colleges. My impression is that the discovery that
non-Jews are fundamentally not different from Jews fuels these occurrences. These are manifestations of the egalitarian principle that graduates of yeshiva high schools are ill-prepared to confront.

As a further indication of the depth of the national commitment to equality, it is appropriate to note that even evangelicals who overwhelmingly disapprove of homosexuality support by overwhelming margins the rights of homosexuals to equal employment opportunity. The Catholic Church has struggled to reconcile its refusal to accept homosexuality with its commitment to equality. More recently, it has struggled to reconcile the Church's claim to having a uniquely valuable way to the salvation of souls with its commitment to respecting other faiths. A recent document of the Congregation on Faith, asserting the Church's unique role, has received largely a negative reception among American Catholics because it departs from the notion of the fundamental equality of persons of all faiths. That belief makes it difficult if not impossible to accept the corollary that persons outside the Church are doomed to hell.

This idea that all faiths are valuable and largely equal is not purely an egalitarian one—it reflects a large measure of skepticism about religious truth—but it has unmistakable egalitarian overtones. We are, in short, not the only group struggling with conflicting commitments and we could do worse than study how others struggle with the same problem.

THE NON-EGALITARIAN HALAKHA

The corpus of Jewish tradition is not easily reconciled with the thoroughgoing egalitarianism of modern Western society. First and foremost, although the question often gets lost in the buzz over newer questions such as feminism and gay rights, the question is pressing with regard to our relations with non-Jews.

Not long ago at my office, someone showed me an anti-Semitic screed that listed, *inter alia*, the complaint that Jews regard non-Jews as horses, citing the Talmud. A colleague laughed at the absurdity of such a charge. I cringed because the *Gemara* in *Yevamot* and *Sanhedrin* does just that. Of course, it does so for a halakhic purpose (and Rabbenu Tam was once tempted to invoke this source as a way of avoiding *mamzerut* for the child of an adulterous relationship between a married Jewish woman and her non-Jewish paramour), but it does so just the same.
What about explaining why Jews in Williamsburg allegedly sought, in violation of fair housing laws, to exclude non-Jews from buildings in the Jewish area of that neighborhood? If you think there is no moral or pragmatic justification for Hasidim engaging in such behavior (there in fact is), what was wrong with holding that even on Keren Kayemet lands, Arabs could not be excluded from housing? Can we justify ourselves with no more than a reference to Lo Tahanem? 18

If anyone believes both that the Hasidim are morally and pragmatically right to do what they do, and the Israeli Supreme Court was morally and pragmatically wrong to insist that Arabs could purchase homes in Jewish neighborhoods, then what was wrong with the town of Airmont, New York trying to exclude Jews from the rest of Monsey from moving into “their” town, in part on the ground that Orthodox Jews were clannish and would not contribute to the existing sense of community? Is the town of Tenafly, New Jersey right to refuse an Orthodox community permission to build an eruv because of the demographic changes the eruv will likely bring? My question, I should add, is not primarily legal; it is moral and practical. I suppose one could say that whatever aids Jews is acceptable, and what hurts them is not, but that is not a defensible public posture.

THE SITUATION IN ISRAEL

The problem of egalitarianism is by no means a challenge only in America. Egalitarian notions are deeply ingrained everywhere in the world, even if imperfectly implemented. Those principles are enshrined in international covenants on human rights to which both Israel and the United States are signatories and are a part of political discourse everywhere. Listen to what Amnon Rubenstein, a prominent Israeli, has to say on the subject in objecting to Haredi conceptions of the state of Israel: “Indeed, Israel should be involved in the construction of a different kind of house . . . building a place to live, the home of Jews who will share it in equality with other Jews and non-Jews. . . .” 19

After rehearsing the discriminatory treatment of non-Jews in Jewish law, which he calls “paper vengeance against the non-Jew,” he concludes: “It is clear how the Orthodox rabbinical establishment . . . responded to the Zionist Revolution. They took the anti-Gentile halakhic injunctions and sometimes applied them, with even greater intensity, in the state where the Jews represent the majority of the population.” He concludes: “The majority of the Jews in the world live as equal citizens in democratic
countries, where human rights are respected. But in their own country, Jews are being forced to fight to maintain a democratic system in an atmosphere of soaring nationalism.” Amnon Rubenstein is not a fringe figure. We ignore his challenge and his conception of the future of the Jewish state at our peril.

The failure to appreciate the importance of equality as a foundational principle of the modern social order also pervades discussion of religious pluralism. To judge from afar, much of the Orthodox response to demands for religious pluralism in Israel is premised on the assumption that the problem is purely theological or church-state related. I do not minimize theological differences or the battle over church-state relations, but there is a dimension to the problem that the religious view of the matter misses. That dimension is equality. It is difficult to explain to an egalitarian public why some rabbis are better than others or why some types of Judaism are officially preferred.

Some years ago, after Baruch Goldstein massacred Arabs at prayer, the Israeli education ministry required Israeli (Jewish) public school students to meet with Arab counterparts. The Mamlakhti Dati schools were thrown into turmoil. Should they participate or not? Would such meetings lead ultimately to intermarriage, if not before peace then after? Should they have cross-gender meetings? As far as I know, the Hinukh Atsmat schools did not participate altogether.

It would be wrong to minimize the dilemma religious school officials faced. But the dilemma is not one sided. The problem is not only how to immunize our children against the lure of the other and liberation from the confines of the Jewish community. The other side of the dilemma is that in a modern state citizens of different faiths must treat each other as equals. Although advocates of diversity regularly exaggerate the difficulty of doing so and the need for “diversity education,” it remains a skill to be learned. It would be equally wrong to dismiss the need altogether, particularly as the Orthodox community becomes ever more insular ideologically and residentially.

I do not profess to be an expert on the Israeli Supreme Court, but it is evident that many of its decisions—on women at the Western Wall, Arabs buying land, lesbian mothers, punishing hate speech, and the like—stem from its egalitarian commitment. In the Orthodox community, there seems to be no understanding that this salutary motive is in play, let alone any appreciation of the positive value we ought to place on equality. Given the Orthodox establishment’s failure to appreciate the importance of equality in contemporary culture, it is hardly surpris-
ing that “Orthodox” causes do badly in Israel. Things are likely only to get worse.

Consider the following—which reads as if Amnon Rubenstein wrote it to prove his point. The Bet ha-Levi comments on the verse in Genesis, “Save me from my brother, from Esav,” that the duplication (Ya’akov has only one brother) means that Ya’akov is concerned both with Esav’s enmity and his friendship. The Bet ha-Levi then comments, in an obvious reference to early Haskala and religious reform in Russia, that Jews can be tempted from their faith either by the enmity of non-Jews or too close a relationship with them. Not particularly unusual. But consider the following extrapolation from the Bet ha-Levi’s comment in a popular contemporary sefer on the Parshiyot ha-Shavua, Yalkut Lekah Tov: “Gedolei Yisroel in all generations worried always about equal rights that were bestowed on us by the gentiles. Assimilation and following in the paths of the nations, which are a direct result of equal rights, justified their fears.”

The editor of the anthology (who appears unaware that rabbinic leaders were in fact divided on this question, unless opposition to the Enlightenment is now a requirement of gadlut) then cites Rabbi Yisrael Salantar’s comment in response to an early (1844) Reform rabbinic conference in Brunswick, Germany permitting intermarriage, that, as a punishment for this decision, the Germans will forbid Jews to marry them. And so it was, the editor reports, 90 years later—a reference to the Nuremberg laws, which he acknowledges were “racist” laws.

The editor is opposed not only to intermarriage, but to any attempt by Jews to be accepted by non-Jews. He describes religious persecution as a good thing because it keeps Jews separate. If so, what could be wrong with the Nuremberg laws? The irony of bemoaning the loss of religious sanctions against intermarriage and in the same paragraph condemning the Nuremberg laws escapes him.

The debate over equality is not about details at the margins. It goes to the heart of the conflict between those who want a Jewish state and those who want a state of the Jews, or perhaps a secular state. In the former, equality is not a particularly important principle; a Jewish state does not and cannot afford all citizens perfect equality. A state of the Jews comes much closer, and a secular, pluralistic state would insist on equality.

Orthodox Jews, presumably, want a Jewish state and not a state of the Jews. We must accordingly wrestle with the problem of equality and
limit the practical effects of the resulting inequality. But above all, we
cannot bury our heads in the sand and pretend the problem of ineq-

ulity does not exist.

Israel, after all, is a state which at least from its Declaration of
Independence (and even before, in the debates over the ideas of a plu-
ralist state advanced by Judah Magnes), has wrestled with the problem
of reconciling being a Jewish state, with a Jewish calendar, Jewish sym-
bols, and a Law of Return that is the sort of ethnically based immigra-
tion law which prevented so many Jews from fleeing Hitler (and which
American Jews fought for decades) on the one hand, with guarantees of
equality for all citizens, including Arabs, on the other.

It is no accident that Palestinian spokesmen now repeatedly label the
Law of Return racist, and that some Israelis agree. It is this that makes
the arguments over returning Palestinian refugees to Israel such a power-
ful public relations tool for the Palestinians and why human rights
groups like Human Rights Watch have endorsed a right of return.

We may prefer not to think of the problem, but it will not be
blinked away if only because some Israelis, Jewish and non-Jewish, keep
raising it, and post Zionism, little more than a reincarnation of the de-
ethnicized reform Judaism of 19th century Germany, has captured the
minds of too many Israeli intellectuals (and a small but vocal group of
American Jews). If we do nothing more than insist that demands of
equality are inconsistent with a Jewish state, we will lose, and lose badly.

To be sure, there is self hatred and self loathing, and it appears from
here in the Diaspora, where the price of those burdens is less, a desire
to be rid of the burden of being different. We err seriously, though, if
we dismiss the phenomenon as simply more assimilation. Much of the
movement to strip the state of its Jewish character is founded in a pro-
found commitment to equality of all human beings.

It was in the case of an Israeli Arab seeking to purchase an apart-
ment in a building standing on Keren Kayemet land, that Chief Justice
Aharon Barak, acknowledging the conflict between a Jewish state and
the universalist claim of justice for all citizens, famously remarked that
the claim of the Israeli state to be a Jewish state must be read at the
most abstract level, with the particular having to yield to the egalitarian
principle in practice.

We are right to be perturbed by the easy jump to universalism of
Justice Barak, and his refusal to give much weight to the particularistic
side of the equation. But it will not suffice to simply rail against that
tendency. We must strive for positions that are loyal to tradition, intel-

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lectually satisfying, politically practicable, and simply fair. Such positions will not satisfy everyone, but they will persuade many.

Fortunately, the tradition is not implacably hostile to the regnant egalitarianism. There are sources which are sufficiently universal as to give us ground upon which to stand, being careful not to become thoughtless, wholesale, and uncritical egalitarians. We must mine these sources diligently, and insist that they be considered along with (not instead of) the more well known particularistic ones. At the founding of the state, there were concerted efforts to do so. Again from a distance, it appears as if religious circles in Israel by and large do not care about these issues any longer.

We must not abandon the field to those who would dehumanize the other, just as we must be diligent not to yield to those who refuse to use their da'at to make havdalah between Jew and non-Jew, men and women, and those who live by the Torah and those who flout it. We face twin, mirror image dangers. In our determination to fight the one, we must not lose sight of the other.

EQUALITY IS HERE TO STAY—
THE EVIDENCE FROM CONSTITUTIONAL LAW

Some social trends are little more than fads, no more lasting than the hoola-hoop or this year's hem length. If there are those hoping that the egalitarian trends are going to reverse themselves, and that therefore the Orthodox community should not adjust to those trends, they are certain to be disappointed. Equality of all human beings regardless of their color or sex and increasingly, sexual orientation, is a bedrock principle of civilized societies. It is not going to be displaced by some other principle. It is no passing fad; it is a fundamental principle of all Western societies.23

American law is simply typical in this regard. It would be hard to overstate the importance of equality in contemporary American life. The fact that the Presidency was decided because Florida did not guarantee voters in different counties an equal method of counting should be an object lesson. A brief survey of constitutional law underscores the point.

In the nineteenth century, Justice Holmes, one of the true giants of American law, could dismiss the equal protection clause of the Fourteenth Amendment as the last refuge of the desperate lawyer. Not today. The struggle for black civil rights culminating in Brown v. Board of Education was a struggle for legal equality. Who would now not list Brown as the single most important decision of the past century?
Despite all the defects in the reasoning of that decision as an example of the judicial craft, no one could today get confirmed to the Supreme Court questioning the correctness of the decision. The drive for black civil rights movement spawned in turn movements for women’s equality and that of all sorts of other classes, including illegitimate children, aliens, the poor, and now gays. All of these are substantially more equal today than they were 30 or 40 years ago.

For decades, lawyers and others fought over the meaning of the proscription of established churches. Between World War II and, say, 1980, the battle was fought over history. Those seeking to permit a greater degree of government involvement with religion invoked history to support their arguments. They lost, and lost badly. Then lawyers had the simple idea of insisting that the limitations on government aid to religion had the effect of denying religious persons equality with secular speakers and actors.

Those claims succeeded and have revolutionized the law of church-state relations. This may be good or bad (the same commitment to equality has led the court to refuse to grant special privileges to religion under the rubric of free exercise), but it is a fact. Free speech law, too, is pervaded with the idea that all speech ought to be treated equally, regardless of viewpoint or subject matter. Even criminal sentencing has now been reduced to a relatively mechanical process in furtherance of the goal of insuring equal sentences for similarly situated offenders.

Of course, equality is not the only constitutional value. Occasionally, some other value will collide with the national commitment to equality and sometimes, but rarely, will trump the equality right. That was the case with the right of Boy Scouts to exclude gay scoutmasters, *Dale v. Boy Scouts*. Dale was an Eagle Scout. He signed up as an assistant scoutmaster, a position in which he performed well. Then it came to the attention of the Scouts that he was gay. Dismissed as assistant scoutmaster, he sued under the New Jersey Law Against Discrimination, claiming that he was discriminated against on the basis of sexual orientation in a place of public accommodation. The Scouts claimed that as an ideological association they had a constitutional right to not associate with gays. The New Jersey Supreme Court sided with Dale, dismissing the Scouts claim as bigotry in drag.

A closely divided United States Supreme Court reversed *Boy Scouts v. Dale*, holding that the right of association trumped. Many religious groups welcomed the result, but it was the product of a 5-4 Supreme
Court decision, reversing a unanimous New Jersey Supreme Court. It is not a decision that marks the retreat of the egalitarian hordes. It would be a mistake to read too much anti-egalitarianism into the decision.

Editorial comment in Dale was almost all hostile to the Scouts. Since the decision, many corporations that formerly supported the Scouts have withdrawn their support. Public schools that sponsored the scouts are in many places withdrawing their support. I would be surprised if the Scouts anti-gay policy survives another ten years.

Just a few terms earlier, the Court had invalidated an anti-gay rights referendum in Colorado on the stated grounds that it discriminated against a class of people in the political process. The opinion comes close to announcing that legislation against gays will be treated as presumptively invalid, just as legislation targeting racial minorities is.

Some think a conservative court will seriously erode the law's commitment to equality. Quite the contrary. Some of the profoundest changes worked by this Court rest on claims of equality. This is true, as noted, of the Establishment Clause. It is also true of the Court's holdings in speech cases.

In academia, the commitment to equality runs even deeper. Most of the important constitutional theorists have written about and from deep commitments to equality. Defenders of inequality are few and marginal. There are critics of particular egalitarian policies, but not of egalitarianism as such. Even affirmative action, a highly debatable form of equality, has become almost sacrosanct in polite society.

The commitment to equality is not limited to decisions of the Supreme Court. When Jewish and other defenders of religious liberty sought to prove statutory protection for religious liberty, those efforts ran up against twin objections rooted in equality. First, that by insulating religious observers from neutral laws one was favoring religion over non-religion and discriminating against non-believers.

The second obstacle proved insurmountable. It was the charge that such protection would weaken the civil rights laws. That is, citizens could claim under that law that their religion required them to discriminate against some protected class in employment or housing. Not a single Democrat, and only a very few Republicans, were prepared to fight this fight, led by gay rights groups. No member of Congress was willing to say categorically that equality is not as important a value as religious liberty. Not one. (Similarly, the most potent arguments against President Bush's faith-based initiative are those about funding institutions which discriminate on the basis of religion.)
The gay groups were so confident of victory, even after a religious liberty bill had passed nearly unanimously in the House of Representatives, that they never once entered into serious negotiations with those who supported a broader bill. They correctly assessed the strength of their claim to equal rights.

Almost all non-Orthodox Jewish organizations were horrified, truly horrified, that religious groups would even consider sanctioning discrimination, even if only to the point of asking that the burden on religious liberty imposed by civil rights laws be justified in particular cases. It is true that many of these organizations have only the most ephemeral commitment to religious liberty, but they ordinarily feel obligated to at least go through the motions. But not at the expense of equality.

Dr. Laura Schlessinger’s television program was boycotted because she expressed the view that homosexuality is wrong. Many corporate sponsors fell away, and Dr. Laura was forced to apologize for her views, saying she did not mean to offend anyone. Efforts to boycott corporations that offer domestic partnership benefits to gay couples fall flat. Equality sells; inequality is rarely sustainable as a public position.

In some ways the United States (with its tolerance of individualism) is more tolerant of private inequality than many European countries. In the United States, racist groups like the Ku Klux Klan often insist that the law guarantees their racist speech equal treatment with more socially productive speech. Not so in most of the world, where hate speech is a criminal offense because it undermines the fundamental equality of human beings.

HALAKHIC RESPONSES TO EGALITARIANISM

Religious leaders, like most people, can fall prey to the trendy and to the fad du jour. When the ecology movement burst on the scene, every Jewish magazine rushed into print with articles demonstrating that Judaism was at least as ecologically minded as Greenpeace. The halakhic support for the proposition was often weak but it was essential to be seen as up to date. We can do without the trendiness. The Orthodox community must carefully guard against—must resist vigorously—the tendency to sway with every breeze and to pronounce that a crisis is upon us, that the halakha is out of date and must be instantly updated.

Other Jews have gone that route and have little but failure, assimilation, and a Jewish Universalist-Unitarianism to show for it. The conservatism of halakha can be frustrating, but that conservatism is an important
safeguard against pandering to trendiness, to say nothing of tolerating
the most intolerable departures from Torah morality.

The opposite danger is that for much of our community, and espe-
cially the rabbinate, being counter-cultural and anti-egalitarian is trendy.
That, too, is a trendiness we cannot afford.

The egalitarian trends halakhists confront are not limited to issues
in the political sphere. They extend well into private and communal
spheres, and indeed may be more intense there. Here the issues are not
those of relations between Jews and non-Jews, but between men and
women. The changes in family structure—from the Ozzie and Harriet
family of one homemaker to the two-income family—is a product not
only of economic factors, but egalitarian ones as well. How many of our
fathers did laundry or changed diapers? How many women would truly
be happy with lives devoted solely to housekeeping and raising chil-
dren? How do those new demands on men to share equally in house-
hold chores square with the special male obligation to learn Torah?
Who is raising our children? Hard questions, but all raised by the broad
but quiet implementation of a deeper egalitarianism.

The profound changes in the education of women were started by a
woman, but gained the endorsement of as conservative a religious fig-
ure as the Hafets Hayyim. Hasidic girls are now learning more seriously
than ever, in some cases actually studying Humash inside, a change
from even a decade ago. Stern College now has an advanced Talmud
program for women.

There are many aspects of Orthodox life that have not adjusted to
these changes. In all too many communities, shiurim for women are
infantile outpourings of primitive and unreflective emotion, as if women
were incapable of understanding anything more complex. Talented
women have been lost to the Orthodox community as they rebel or
reject this infantalization of their gender. The fight over equality has
not yet been won, even within the realm of what is without question
halakhically acceptable. How many shuls have been built in the last gen-
eration that reflect both a concern for mehitsa and the ability of women
to feel as if they are participants in the davening?24

It is a commonplace in the Orthodox community to denounce fem-
ininism, but that movement has worked profound positive changes, more
or less without objection, although often with a good deal of denial. Is
it not good that our daughters are better educated than their grand-
mothers (and in many cases their grandfathers)? Who wishes to return
to the days when Jewish women were illiterate homemakers? Don’t
men have better relations with their children because they are now involved in all aspects of their lives? There should be no denying that these changes trace back to impulses generated by the feminist movement. Why then do we routinely and unthinkingly denounce feminism, regardless of the merits of any particular policy?

In many other instances feminism has brought about changes that halakha would insist upon, but about which it never would have been heard to influence public policy. Do we oppose equal pay for equal work for women (though too many yeshivot do not implement that policy in paying teachers, which may help explain a shortage of women teachers in yeshivot)? Are we for tolerating sexual harassment of women in the workplace? Do we advocate the unrestricted availability of pornography? Substantial progress has been made against these unacceptable behaviors, not because the Shulhan Arukh forbids them but because feminists fought against them in the name of equality.

The attack on sexual harassment would not have been brought about by citing Even ha-Ezer, nor the war on pornography won by invoking hilkhot tseni'ut. (One such effort by Agudath Israel to remove offensive ads from subway cars has gone on for years unsuccessfully, running up against cries of censorship and religious impositions.) Such efforts would have run athwart the libertarianism of John Stuart Mill and would have died. Not so when they were cast as claims for equality.

Should we oppose these achievements—achievements of equality—because other manifestations of feminism are irreconcilable with halakha? And how do we determine what is a permissible accommodation of the demand of women for equal treatment and what is illegitimate? Is it legitimate to nudge the tradition along?

Hazal long ago recognized that women wanted a fuller and more equal access to ritual observances than would have been the case had they observed only mitsvot they were obligated to perform. They accordingly permitted women to perform semikha on korbanot "in order to give pleasure to women," even though this involved looking away slightly from a rabbinic prohibition. Yet they are explicit: it was the demand of the women for equal roles that moved Hazal. Yet those same impulses today generate rabbinic disdain and condemnation.

It does not follow that Orthodoxy can accept equality blindly. Equality is a powerful force, and does not easily satisfy itself with less than its full realization. If we increase the level of Torah study for women, can we expect women to confine themselves to less than equality with equally (or less) learned men? Have we thought through
what will be the career paths of those women? If the halakhic objections to women’s prayer groups are not irrefutable, the impulse to ban such efforts may be justified on the reasonable intuition that the participants in those groups will not long be satisfied with less than full participation in the synagogue. Yet we continue to arrange the ezrat nashim in ways that make women feel unwanted. If we are serious about both halakha and equality, why not seek to satisfy both impulses where possible?

If, contrary to populist claims, it is not true—as it is not—that where there is a rabbinic will there is a halakhic way, neither is the counter aphorism true, i.e., that the Torah is never changing. No one who has learned a serious amount of Shas and Posekim could easily defend the latter claim. It was a useful shorthand to define the difference between Orthodoxy and non-Orthodox movements, but it is a slogan, not halakhic principle.

NEW EGALITARIANISM AND HALAKHIC CHANGE

This brings me directly to a second question—that of the ways in which halakha, and to a lesser extent aggada and hashkafa, adapt themselves to the sort of profound change which the egalitarian movement represents.

One could write about this subject from a historical point of view, as many have. One can write about the problem jurisprudentially—what devices and limitations does halakha employ to respond to changed circumstances? One can write about it theologically—what does halakhic change as documented by the historian of halakha mean for beliefs in Torah min ha-shamayim, the perfection of Torah, or the significance and sanctity of precedent. And one can write about it from a polemical point of view with the intention of dispelling false notions of the process.

Each has its place, but each should not be allowed to intrude on the role of the other. It would be wrong to allow the historian to pasken a new she’ela because his historical studies convince him that an earlier, contrary pesak is explainable by historical circumstances. It would be equally wrong to have the posek act upon the polemicist’s cry that halakha does not change as an excuse for not grappling with a new problem where the halakha’s own internal methods permit “change.”

The egalitarian trend that might have been dismissed in the middle of the last century as a fad cannot be so dismissed today. That being so, the question which must be asked is: can and should posekim take note of this phenomenon in shaping responses to halakhic problems present-
ed to them? Some of the ways *posekim* take note of the problem are unremarkable, except perhaps for the matter of fact way in which the egalitarian principle is assumed. Thus, in considering the ways in which a bank operated by observant Jews could deal with the problem of interest, R. Moshe Feinstein casually dismisses the possibility of charging only non-Jews interest as impossible. Indeed it is.  

The question has a technical aspect. One must of course distinguish between Torah and rabbinic laws, and between both of those and customs, and even customs of different significance. One must take note of the fact that some *mitsvot de-rabbanan* have been allowed to fall out of use, notably the practice of tying or overturning beds and wrapping the head during *shiva*, as well as the special *birkat ha-mazon* for the *bet avel*. So too the *tenai ketuba* of *issur nekhasim* is no longer practiced.

Nor should we ignore the number of legal devices used to avoid the potentially harsh effect of Torah laws. The most obvious is, I suppose, *mekhirat hamets*, a device made necessary by the Jewish dependence on the trade in liquor, but it is hardly alone. The *Shabbat* clock, the slow cooker, the *heter iska* and the electric shaver are others. None of these devices cancel or abrogate a Torah law, but the effect is the same. And in each case, one has to be concerned about the impact on the spirit of the law, as Rabbi Moshe Feinstein was, apparently without effect, with regard to the *Shabbat* clock. Our conception of the Jewish family was changed irrevocably by the *takkanot* of Rabbenu Gershom abolishing polygamy and (more crucially) unilateral male divorce. These changes raise not so much halakhic problems but theological and social concerns that need to be addressed fortrightly.

What devices did the Torah confer on *talmidei hakhamim* to adjust to changing circumstances? There are many: legal fictions; *sha’at ha-debak*; reliance on a *shitat yahid* in cases of need;*30* changed circumstances (such as the practice of levying against personal property instead of real property in collecting a ketuba); impossibility;*31* or compelling public necessity (as with the amelioration of the rabbinic prohibitions against doing business with gentiles on their holidays advanced by the *Ba’alei ha-Tosafot*, changes explicitly resting on economic need) or cost.*32* Rabbenu Tam was famously unrepentant when challenged about these leniencies. It was, he said, a *mitsva* to allow Jews to earn a living. It would be ironic if economic realities could affect halakha, but not moral ones.*33*

The well-known *Gemara* in *Betsa* (5a) states the general rule that a formally enacted rabbinic rule needs a formal abrogation, even where
the reason for the original rule no longer pertains. However, even a cursory study of the rule and its application reveals wide differences of opinion on its scope, some more conservative than others. For example, does the rule apply only where *Hazal* do not state a reason or even where they do? Does it apply only to some rules, and not others? Then too, a *posek* confronted with a rule which seems ill adapted to contemporary circumstances could and often would use more general, but less radical, halakhic techniques such as narrow interpretations of rules which seemed not to fit current circumstances.

The easiest case is that of changed facts or changed scientific understanding. When tobacco reached Europe, some *posekim* prohibited smoking on *Yom Tov* because it was medicinal. No one could conceivably think that today, because our understanding of medicine, and the effects of smoking, has changed. Similarly, the prohibition against drinking uncovered liquids is no longer generally observed because of changed external circumstances.

The harder case is presented by instances of social changes or changes in values. They are more problematic both because ascertaining sociological facts or assessing the depth of changes in values is a far less precise matter than determining whether tobacco causes cancer and because the rules we seek to change may not be aimed at physical acts, but values different than the ones sought to be accommodated.

Just recently, Rabbis Michael Broyde and Avi Wagner published an article in which they insist that it is now permissible to take a hot shower on *Yom Tov*, because in our day a shower is a *davar ha-shaveh le-khol nefesh*, something it was not during the time of *Hazal*, or even a hundred years ago. In these cases, the halakha could be said to remain the same; external changes, neutral with regard to religion, worked a change in the matrix to which the halakha is applied.

Ever since the Reform movement burst on the scene, and perhaps more urgently with the rise of the Conservative movement, the question of halakhic change has been a sore point. Even where a halakhic case could be made using standard halakhic principles, one has to worry whether those permissible changes will give rise to the notion that anything is possible. Years ago, Rabbi Shimon Schwab argued against *ruzvin* in large cities not because he thought they were necessarily invalid, but because he thought they would give rise to the view amongst poorly educated American Jews that any prohibition could be circumvented by the rabbinate if only it wished to do so.
Marc D. Stern

But taken too far, the prevailing halakhic conservatism threatens to leave Orthodoxy incapable of responding to real needs and even to abuses of halakha. Had somebody not thought to ask a posek of the stature of Rabbi Shelomo Zalman Auerbach the week before he died about an unfortunate ketana whose father (embroiled in a nasty divorce with the child’s mother) claimed to have betrothed her to an anonymous husband, it is doubtful that this girl could ever have married.

To the best of my knowledge, no one has attempted a serious study of the problem of halakhic change, one which is both theologically acceptable and historically tenable. It may have made sense to pass over the problem in silence in the 1950’s when Orthodoxy came close to being swept away by Reform and Conservative Judaism. But when Orthodoxy’s place is secure, a refusal to confront new problems and new conditions leads to impossible difficulties. Real people pay a real price for persevering in fighting a long ago won battle. What is said of generals is equally true of rabbis—too many are fighting the last war.

In the 1950’s, Orthodox rabbis rejected a suggestion to solve the problem of the aguna with an amendment to the ketuba. The particular formulation may have been problematic, but the idea of confronting the problem of aguna with a voluntary agreement is hardly radical (the Nahalat Shil’a suggests such an agreement). It is indeed what the Rabbinical Council of America has proposed in the form of pre-nuptial agreement.

Apparently, the only reason the pre-nuptial agreement is not embodied in the ketuba where all would have to accept it is the need to differentiate it from the Conservative agreement embodied in their ketuba. It should not have taken 40 years to be confident that the Orthodox version would not be mistaken for the Conservative one. How many agunot is an acceptable price for that differentiation?

The Rabbinical Council of America prenuptial agreement contains a provision that allows the parties to have equitable division of property in the event of divorce. This provision has met far more resistance than the rest of the agreement, and not on halakhic grounds. It somehow seems to be “unhalakhic”. But this position stems from a refusal to take into consideration changes in both marital and economic facts (wives now contribute more substantially to the economy and net worth of a household) favoring gender equality in marital property divisions. And although our ketuba recites admissions about dowry, the fact is that these are theoretical statements, not reflecting reality. But they once did, and the real force of ketuba then had the effect of protecting women
against capricious divorce. The form ketuba used today, with its relatively trivial amounts, does no such thing. On the contrary, if we were to enforce only the ketuba as written, we would be encouraging divorce.

It turns out, though, that our form ketuba reflects changes to protect women and overcome several halakhot that treated them unequally with regard to inheritance. Women do not inherit their husbands according to halakha, so thirteenth and fourteenth century German Jewish men whose wives’ contributions to the household were great, wrote ketubot far in excess of their net worth to insure that their wives would inherit their estates.

This was not the only change adopted to protect women in ways greater than the halakha itself provided. Daughters could not inherit, so men lavished large dowries on their daughters and wrote shetarei hazi zakhar and gave mattanot hari and shekhiv mera to equalize the treatment of sons and daughters. Posekim seem not to have objected, even though the implementation of each of these procedures had the effect of minimizing the import of the default rule the Torah laid down. If we take the default rule as laying down an ideal division of property and of roles the sexes should play, posekim should not have accepted and facilitated these practices. They, however, did just that.

The Gemara prohibits men from doing business with married women on the ground that what they sell might be stolen from their husbands. Already Ra’avan rejected the no business with women rule as not reflecting contemporary reality. Presumably in reliance on Ra’avan, dress stores in Boro Park and Monsey do business with women in the absence of their husbands. Nevertheless, the author of Halikhot Beta, a popular Israeli work on mitsvot applying to women, rejects a pesak of the Lubavitcher rebbe, permitting the acceptance of large charitable donations from women. The halakha excuses most women from the mitsva of hesuba, but Ashkenazic poskim ruled long ago that our women are all “important” and should recline during the seder.

These sources and others do not require that posekim enlist themselves as willing warriors in the egalitarian revolution in an unthinking fashion. The halakha should not be rewritten willy-nilly so that we are fashionable or trendy or up to date, or even to avoid any conflict with the government or the zeitgeist. We should certainly not assume that every egalitarian value is morally, religiously or practically sound. Neither should we assume that a principle that rests ultimately on the concept of every human being as a reflection of his or her Maker is a
deadly danger. To do so is to cast doubt on the wisdom of the *boreh olam* who created all humans (and not just Jewish men) in His image.

* * * *

I do not have a fully thought out program to respond to the challenges I have described. Some things appear to me obvious. We must make a concerted effort to simultaneously purge our community of crude bigotry, yet reinforce our separateness.

Jews must stop thinking of themselves as eternal victims, doomed everywhere to being perpetually hated (a de-emphasis on the Holocaust would help here). Jewish history should be taught in conjunction with world history, so that students have some sense that Jews are often not alone and share much in common with others. Texts which address these problems such as the Rav’s *Confrontation* and R. Ahron Soloveitchik’s *Jew and Jew, Jew and non-Jew* should be required reading in day schools and *yeshivot*. So should an explication of the boundaries and limits of relations with non-Jews, and the need to maintain Jewish distinctiveness.

We must emphasize those ways in which Jews must remain apart, and, more importantly, why they must do so. The centrist community has not devoted enough energy to this problem, as our more separatist Orthodox brethren have devoted insufficient attention and energy to universal obligations. We must also stop regarding every egalitarian development as if it were a clear and present danger to Yahadut.

No one should be able to complete years in yeshiva without a serious introduction to responsa, in which *posekim* grapple with application of law to a kaleidoscope of problems and changed conditions. More emphasis needs to be paid to the rules by which halakhic decisions are made. A serious effort must be made to explain the limits of change, including not only a study of the relevant general rules such as Rambam’s controversial formulation in the second chapter of *Hilkhot Mamrim*, but as applied by *posekim* throughout the *Shulhan Arukh*.

More generally, we must stop fearing ambiguity. We can neither cast out our fate as *gerim* nor repudiate our responsibilities as *toshavim*. It is far easier to be one or the other. It is our lot to be both.
The views expressed are obviously my own and not those of AJ Congress.


2. The quote itself is from T.B. Macaulay, Miscellaneous Essays and Poems, pp. 598, 599. I came across it in Andrew Sullivan’s essay in favor of gay marriage (The Case for Gay Marriage, 1999). Sullivan (who is far more tolerant of people who for religious reasons cannot accept gays than most gay rights advocates) asks whether and how one can distinguish the present day political and social situation of gays from the situation of the nineteenth century English Jews. Orthodox opponents of equal rights for gays must answer the question. Obviously, one could argue on the basis of revelation, but that argument will not persuade in public arenas.

3. The Orthodox Union, whose members were far more likely than adherents of Agudath Israel to aspire to send their children to Yale, was silent about the suit. I assume that the silence was due in part to a desire not to offend Yale and make it reluctant to accept Orthodox Jews. It is a fair question whether the desire to send children to Yale and similar schools reflects an insufficient weighting of the danger of the egalitarian ethos prevailing at that and similar institutions.


8. The intermarriage remark also caused a storm in the larger Jewish community.

9. Senator Lieberman acknowledged later that he had misspoken on the question of intermarriage.

10. Equality is not the only idea at work in the struggles over gay rights and abortion. Each of these also has substantial roots in the long-standing debate about individual autonomy and communal enforcement of moral norms that are not rooted in preventing harms to others. Without denying the importance of that philosophical debate, I think it is true that today notions of equality are more dominant in the public debates.

11. However, see Rabbi J.B. Soloveitchik, “Confrontation,” (1965) reprinted in A Treasury of Tradition (1996) pp. 55-79, which mentions civil rights as a project in which Jews and non-Jews should work together towards civic betterment.

12. I am grateful to Dr. David Shatz for calling my attention to this point and suggesting this taxonomy of motivations for equality.

13. For a review of the literature on this subject, see D. Frimer and A. Frimer, “Women’s Prayer Groups,” Tradition 32:1 (1998). Paradoxically, or perhaps not, the Yam Shel Shelomo on this sugya serves as a springboard for the condemnation of women’s prayer groups in Tse’i Lakh be-Ikvei ha-Tson.

15. Me'iri, of course, had little impact on the halakha. Perhaps this was simply because he lacked the masal that even the sefer Torah in the hekhal needs, but perhaps it is also because Jews had the intuition that, under the circumstances, acceptance of Me'iri's views would have led to assimilation.

16. See Teshuvot Rama no. 124; Maharam Padua, no. 76.

17. I know of no study of Orthodox Jewish opinion on this subject. Both Agudath Israel and the Orthodox Union oppose equal rights legislation.

18. It is possible to justify special protection for minority religious groups on the ground that they have an interest in preserving a small culture from loss. I am not persuaded, perhaps because I am too much of an egalitarian. However, those wishing to accept this notion should also be prepared to accept Afrocentrism, separate dorms for African American students at universities and the like.

19. A. Rubenstein, From Herzl to Rabin: The Changing Image of Zionism (2000). More recently, an artistic exhibit in Tel Aviv presented art works some of which challenged the very notion of a Jewish state, depicting the Israeli flag with a ship instead of a Jewish star. Some of the artists called for considering a right of return for Palestinian refugees.


22. The problem will become more acute vis-à-vis Israel's Arab citizens if a comprehensive peace is reached and it holds.

23. Even Muslim societies are beginning to feel the push for equality. Egypt has now created a procedure for Moslem women to divorce their husbands.

24. About a decade ago, my wife and I attended the dedication of a yeshiva's new building. When the time came for the ceremonies to begin, the Rosh Yeshiva's wife turned to mine and said, "Let us go upstairs to our prison." There is something amiss when even a woman of undoubted orthodoxy feels this way, even granted the humorous tone of the remark.

25. Hagiga 16b; Eruvin 96a.

26. Probably no slogan has so slowed genuine grappling with difficult and pressing problems as the claim that where there is a rabbinic will there is a halakhic way.

27. See, for example, the discussion of Rambam's view in Hilkhot Mamrim, 2:1 that any Bet Din can change a pesak derived from the thirteen interpretive principles if it believes it has a better way of applying them.

28. Several years ago the Supreme Court was considering a case involving the immunities of states from lawsuits. It adopted a broad reading of the immunity under the Eleventh Amendment, pointing to some early cases that read the Amendment in a particular way. The dissenters objected that those decisions reflected unique political pressures on the Court and should not be taken as authoritative. The dissent's history was surely correct, but there is much force to the majority's response that legal precedents cannot be so easily dismissed.
29. The Fair Credit Act contains no religious exemption. Courts have almost never allowed religious liberty claims to trump civil rights laws in commercial cases.

30. See Eduyot 1:5, Tosefat Yom Tov and Tiferet Yisrael ad loc.

31. See Yoreh De'a 119:15, and Taz, ad loc, in the name of Maharshal.

32. Kesef Mishneh to Terumot 1:11 reports on a herem issued because a hakham insisted on a stringency with regard to yashan (with a firm basis in the Gemara) over the contrary lenient but difficult ruling of Rambam, accepted in Bet Yosef’s time in Israel. The reliance on Rambam is in large part said by the Kesef Mishneh to rest on financial considerations. Even the Bet Yosef’s considerable authority could probably not enforce a herem against a humra today.

33. I am not unaware of the midrash rebuking Shaul for worrying about the morality of killing all of Amalek. Wherever the Torah itself commands discrimination, we cannot rebel. It is a different matter to suggest that where halakha itself allows us wriggle room, we ought not to take advantage.


35. See, however, Teshuvot ha-Rosh (no. 21:8), forcefully rejecting halakhic objections to an eruv and threatening to put an objecting rabbi in herem if he persisted in opposing the eruv. Rosh points out that the eruv saves many people from hillul Shabbat. Here as elsewhere we are forced to consider the costs versus the benefits in each particular case.