

## Same-sex Marriage and the Law

By Rebecca Alpert

Much of the legal debate about same-sex marriage ignores the religious dimension and concentrates on arguments related to definitions of marriage, gender and sex discrimination, and the reciprocal rights and responsibilities of states. Yet marriage is an important religious issue, both because the state supports religious marriage, and because religious communities have a stake in defining public policy about marriage from a moral perspective. In a pluralistic society, each religious group must have the right to determine who is eligible for marriage in that religion. For these reasons, it is imperative that the issue of religious freedom be considered part of the public policy debate on this issue.

Yet while we frequently hear about religious opposition to same-sex marriage, we rarely hear about those religious groups that have supported gay men and lesbians in their desire to have ceremonies to make public declarations regarding their long term committed relationships.

There is strong support in many religious communities for same-sex marriage, and religious leaders have taken the initiative themselves to perform same-sex ceremonies over the past decade. The Society of Friends, and United Church of Christ, Lutheran and Universalist-Unitarian ministers, Episcopal priests, Reform and Reconstructionist rabbis and Buddhist priests have all performed ceremonies of commitment for gay men and lesbians, including public ceremonies involving hundreds of couples at national marches on Washington in 1987 and 1992.

If religious denominations are willing to perform same-sex marriages they ought to have the right to confer the same societal benefits for those marriages as for those of heterosexuals. Despite popular opinion to the contrary, these religious ceremonies have no legal status because clergy only serve as functionaries, not arbiters of civil laws on marriage.

The connection between religious and civil marriage opens up the possibility for religious denominations to play a major role in this public policy debate. Rather than viewing these ceremonies as isolated “religious” events that have no bearing on public policy, religious denominational support of same-sex marriage creates an opportunity for progressive religious groups to express moral concern over this particular issue and to exert influence on public policy by demanding the right to perform same-sex marriages that have legal authority based on religious liberty.

### Religious liberty and same-sex marriage



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It can be argued that the free exercise clause of the First Amendment gives clergy the right to perform legally binding same-sex marriages as a matter of religious liberty. There are good reasons why religious denominations that support same-sex marriage might choose to make a claim that their religious liberty is being abridged because members of their faith community lack the right to legal marriage.

The free exercise clause suggests that the state must make accommodation to religion for a sincerely held and established religious belief, provided there is no compelling state interest in opposition. Same-sex marriage proponents have argued that the state has no compelling interest in prohibiting same-sex marriage. These marriages would harm no one in society, nor require any cost to the government. These marriages would even support government interests in the stability and support of children, and provide an efficient way to distribute health care benefits. Same-sex marriage can also be shown to be a sincerely held and established religious belief. The case of Reconstructionist Judaism will illustrate this point. The Reconstructionist movement, which has long been in the vanguard on the issue of gay and lesbian rights, publicly supports civil and religious ceremonies for same-sex couples.

Shahar v. Bowers\*\* cited the acceptance of same-sex marriage in Reconstructionist Judaism as support for a public employee who claimed that she was fired from her position because she participated in a same-sex marriage ceremony. The official statement of the Reconstructionist Rabbinical Association has left willingness to perform religious ceremonies up to the conscience of the individual rabbi, and expressed unequivocal support for efforts to legalize civil marriage for same-sex couples. In Reconstructionist Judaism, same-sex marriage is understood as a religious value because it provides economic justice, creates stable, committed relationships, and fosters support for child rearing.

### **Economic Justice**

Marriage in Judaism has an economic basis. As witnessed by the Jewish marriage contract, the ketubah, marriage began as an exchange of property: a man would A"give" his daughter in marriage to another man. In exchange, the husband would provide the basic necessities of life for his wife who was then his property.

While a notion of women as property is offensive to modern sensibilities, the Jewish marriage contract provided economic protection for women at a time when choices were limited. Jewish marriage contracts are clearly designed to establish economic well being for the parties involved.

The political and economic emancipation of women over the past few centuries has changed the terms of the economics of marriage. With those changes have come a variety of changes in the Jewish marriage contract. While traditional Jews still use the ancient contract (which is the



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only contract valid in Israel), contemporary contracts have been written that omit any economic factors, assuming that women no longer need these ancient protections.

In contrast, civil marriage still has great economic significance. For many gay men and lesbians, the reason to fight for same-sex marriage is indeed economic. Married couples automatically share property and inherit from one another, are defined as next of kin in medical decision-making, are allowed to adopt each other's children, receive pension and health benefits, can file joint tax returns and provide citizenship for immigrant spouses.

The absence of these benefits has caused severe financial hardship to gay and lesbian couples. The traditional Jewish recognition of the economic basis of marriage gives validation to Reconstructionist support of gay marriage on the principle of economic justice.

### **Public commitment**

Marriage has other purposes in Judaism. Marriage is also about love. It is an opportunity to give communal support to a committed partnership between two individuals. It is a chance to express faith in the relationship and in the community that supports it. Marriage celebrates the religious values of long-term commitment, faithfulness and the willingness to share life's joys and sorrows. The nature of the commitment may no longer be about a woman's protection by and subservience to a man but rather emphasizes equality between the partners, yet the committed nature of the relationship is paramount and enforces deeply held religious values.

There is no difference, in the case of these religious values, between heterosexual and same-sex marriage. The partners pledge the same commitment to love and devotion, in the presence of a loving community. And there is no evidence to show that the intent to make a lasting commitment is different in either case.

Same-sex couples seek to be married within the Jewish tradition for the same reasons that heterosexual couples do: they see this public declaration of their commitment in religious terms. Same-sex couples know that the state does not at this time validate their marriages, but they want to be considered married in the eyes of God and the Jewish people. They are looking to invest the ceremony with religious meaning. The principle of religious equality espoused by the Reconstructionist movement requires that these expressions of love be given the same societal validation, regardless of the genders of the partners involved.

Reconstructionist Judaism rejects differences based on gender in the wedding ceremony. Rings and vows are exchanged by equal partners; both parties sign the marriage contract and they are often pronounced life partners rather than the traditional husband and wife. Often, both partners break a glass at the conclusion of the wedding. This egalitarian approach defines a



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marriage ceremony that is a transaction of interdependence between equals and removes any assumption that those equals must have different genders.

### **Pro-natalism**

The other main purpose of marriage from a Jewish perspective is to control and encourage procreation. In today's society procreation outside of marriage is not stigmatized as greatly as it once was, although single mothers still receive serious approbation from society. Married people without children are also more common, and childlessness within marriage is more acceptable. But Jewish communal values are strongly pro-natalist. The shrinking of the Jewish community through the Nazi genocide on the one hand and factors of assimilation on the other produce a strong communal value in support of having and raising children. The Jewish population has remained stable over the past few decades. Jews form a very small percentage of the world population. The threat of extinction makes Jewish leaders passionately committed to population growth, despite larger societal concerns.

While many people assume that same-sex marriages are childless, this is far from the truth. Stereotypic notions of gay antipathy to children are slowly being eroded. The availability of children for adoption to single parents (and even to gay couples), the growing awareness and acceptance of alternative insemination methods, and the presence of children from previous heterosexual unions make children commonplace in gay and lesbian communities. In the Jewish community in particular, one can speak of a gay and lesbian baby boom. Gay and lesbian Jews are often attracted to involvement in the Jewish community because of their desire for children. And this desire is often connected to a wish to marry, for legal protection for children if for no other reason.

Same-sex marriage promotes "family values" — pro-natalism, communal involvement, monogamy. It is an issue of economic justice and gender equality. It is an issue of public policy that directly involves clergy, and individual clergy already perform ceremonies of commitment for same-sex couples that have yet to be recognized by civil law. These factors establish a warrant for Reconstructionist Judaism to define same-sex marriage as a deeply held religious belief, and on that basis to claim the right to perform same-sex marriages as a dimension of religious liberty. Similar arguments could be made by other denominations that have publicly performed and supported same-sex marriages.

### **A religious liberty approach to same-sex marriage**

Legal scholars interested in same-sex marriage have been reluctant to argue for same-sex marriage based on this strategy. Their reluctance stems from several factors. They are skeptical about using religious arguments for determining public policy. Efforts to establish the right to marry based on religious liberty have failed in the past. And recent court rulings have begun to



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place limits on claims of religious liberty. Yet it is precisely for these reasons that this strategy should be employed, in order to challenge restrictions on religious liberty and the role of religion in public life.

Many liberal religious denominations are reluctant to demand public policies that recognize their religious beliefs. In recent years, progressive religious people have been reticent to involve themselves in the public policy debate, while conservative religious people have spoken out strongly and decisively, powerfully influencing policies governing issues like abortion and gay rights. Perhaps the progressive voices have been silent because they believe that these are issues of privacy. Or perhaps they have forgotten the role that progressive religious voices played in issues like civil rights and U.S. interventions in Latin America. Or perhaps it is because of their understanding of the doctrine of separation of church and state.

This reluctance is particularly misguided in the case of marriage where religious leaders are given the authority to preside over a civil function. Furthermore, a religious liberty argument does not suggest that a particular religion's values be universally accepted; only that their values are recognized as valid and given respect in the public sphere.

A religious liberty argument also assumes the right of religious people to express their values in the public arena. It is an abdication of responsibility for religious leaders not to speak out about moral issues. The anti-establishment clause in the first amendment suggests that no particular religious belief should have the authority of state power. It nowhere implies that those with moral values based on religious commitment should not make a persuasive case in the public arena in favor of those values. It only suggests that no particular religious group has the power to determine public policy based on their beliefs. A democratic system requires the full participation of all its citizens in the making of public policy. And moral considerations cannot be omitted from democratic deliberation if we are to make policies that promote liberty and justice.

**Free exercise and the right to marry** The courts' rejection of free exercise arguments for polygamy in the past suggest that compelling state interest outweighs religious liberty as it relates to defining a right to marry. But there have been challenges to this judicial perspective, and it is not unreasonable to argue that the 1878 ruling on polygamy should also be reconsidered as an abridgement of religious liberty. Constitutional law professor Mark Strasser points out that Native American polygamous unions have been recognized by some states under full faith and credit.

Whether or not there is a compelling state interest against polygamous unions should not necessarily determine whether there is a compelling state interest in prohibiting same-sex unions, however. These unions should be viewed on their own merit on the basis of religious liberty strongly supported by religious values.



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## Limits on religious liberty

Another argument against this strategy is that recent court decisions have begun to limit religious liberty, as in the 1990 Employment Division v. Smith case that prohibited religious use of peyote by Native American churches. Constitutional scholar David Kairys suggests that this Supreme Court ruling has set a precedent that limits free exercise in the case of non-majoritarian and unpopular practices, and cautions us to be concerned about these limitations on religious freedom that the conservative court has begun to enact.

A religious liberty case on same-sex marriage would give supporters of a broader reading of religious liberty an opportunity to articulate their arguments publicly, and a chance to raise the right for individuals to have their religious beliefs and practices accommodated by this society, even if these are not the beliefs and practices of the majority. It's a strategy that religious denominations ought to ponder.

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Shahar v. Bowers, 70 F.3d 1218, 1223 (11th Cir. 1995). The ceremony in question was performed by Reconstructionist rabbi Sharon Kleinbaum. Shahar lost the case at the Federal district level, but has decided to appeal to the Supreme Court. If the court decides to hear the case, a religious discrimination argument will be part of the argument presented by Shahar's lawyers, as it was at the lower levels. . "Homosexuality and Judaism: The Reconstructionist Position. The Report of the Reconstructionist Commission on Homosexuality. " (Wyncote, PA, 1993) 40-41. . Wegner, Judith. Chattel or Person? The Status of Women in the Mishnah. New York: Oxford University Press, 1988. . See Christie Balka, "Thoughts on Lesbian parenting and the Challenge to Jewish Communities," Bridges 3 (1993): 57-65. . See Robert Booth Fowler, Religion and Politics in America (Metuchen, N.J.: The American Theological Library Association and Scarecrow Press, 1985), 175. . For a thorough discussion of the need for moral values in public debate see Iris Marion Young, Justice and the Politics of Difference (Princeton: Princeton University Press, 1990); Sissela Bok, Common Values (Columbia: University of Missouri Press, 1995); Amy Gutmann and Dennis Thompson, Democracy and Disagreement (Cambridge: Harvard University Press, 1996); Elizabeth Mensch and Alan Freeman, The Politics of Virtue (Durham: Duke University Press, 1993). . Mark Strasser points out that William O. Douglas in his dissent in Wisconsin v. Yoder 406 U.S. 205, 247 (1972) commented that this decision would eventuate in overturning Reynolds v. United States 98 U.S. 145 (1878) which banned polygamy. (65 n. 87). . Strasser, 113. . The U.S. Congress responded to this case by passing the Religious



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Freedom Restoration Act (RFRA 1993). The Supreme Court reiterated its position in *Boerne v. Flores* in 1997, which ruled that Congress exceeded its power in passing RFRA. RFRA was problematic legislation, as it shifted the burden of proof to the states to show compelling interest, rather than on the challenger to prove discrimination. . *Employment Division v. Smith* 494 U.S. 872 (1990). For a full discussion of the implications of this case for religious liberty of non-majoritarian traditions, see David Kairys, *With Liberty and Justice for Some: A Critique of the Conservative Supreme Court* (New York: Free Press, 1993), chapter 4.

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