

Religious Liberty, Same-Sex Marriage, and the Case of Reconstructionist Judaism

BY REBECCA ALPERT

The performance of the marriage ceremony by clergy provides an interesting location for a discussion of the ways in which religious claims on sexual practices are played out in the public sphere in the United States. Clergy routinely perform the civil function of marriage, which is delegated to them by the state. “By the power vested in me by the state of _____ and by my religious denomination, I now pronounce you husband and wife” are words included in wedding ceremonies performed by clergy. This speech act, accompanied by the signing of appropriate licenses, makes the clergy person an agent of the state. Civil and religious marriage in the United States are thus linked together.

This connection would be unremarkable, except in cases where the religious institution or the state approves of a type of marriage that the other re-

jects. Of course, clergy are not compelled to perform any marriage that their denomination deems inappropriate. Many clergy routinely refuse to perform intermarriages, for example, although the state permits them to perform any marriage, even if both participants are outside their church. But clergy also perform ceremonies that may be acceptable to the denomination, but not legal according to U.S. law — for example, those that are at too close a degree of consanguinity, or polygamous unions. Another example of marriage that, although to date illegal, has been deemed acceptable to some denominations is the category of same-sex marriage.

Same-Sex Marriage

Same-sex marriage has come to public attention in the United States because of highly publicized cases in Ha-

Rabbi Rebecca Alpert is Associate Professor of Religion and Women's Studies at Temple University. This essay originally appeared in *God Forbid: Religion and Sex in American Public Life*, edited by Kathleen M. Sands, copyright 2000 by Oxford University Press, Inc. Used by permission of Oxford University Press, Inc.

waii, Vermont and Massachusetts. In these cases, courts determined that it would be sex and gender discrimination to deny same-sex couples the right to marry, and legislative initiatives forestalled court mandates for same-sex marriage by, for example, creating a comprehensive reciprocal partners benefits bill in Hawaii, and civil unions in Vermont. In those cases, ballot initiatives were introduced to make sure that marriage would survive as a union between a man and a woman only.

Other states and the U.S. Congress have passed “defense of marriage” legislation that gives them the right not to recognize same-sex marriages should any state decide in favor of this practice.¹ Although no cases are currently pending, same-sex marriage remains on the public policy agenda of the United States, and concerned citizens must consider the question of same-sex marriage.²

A Religious Issue

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.

As would be expected, there is strong religious opposition to same-sex marriage. Some denominations, like the United Methodists for example, have banned ministers from performing these ceremonies, while individuals from these denominations, like Rev. Jimmy Creech, have gained national attention by challenging these rulings. Colleges with religious affiliations have refused same-sex couples the right to use their campus chapels.

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 of performing same-sex ceremonies over the past decade. The Society of Friends, 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.

Role for Denominations

If religious denominations are willing to endorse same-sex marriage, 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 as 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

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 illustrates this point.

Ancient and Contemporary Understandings

Clearly, not all denominations in Judaism support same-sex marriage. To understand what makes same-sex marriage problematic in Jewish tradition, we must examine ancient Jewish understandings of same-sex relationships. In biblical law, male homosexual acts are prohibited, while such acts between females are not mentioned. In rabbinic law, lesbian behavior is considered a minor infraction, but not enough to disqualify a woman who indulges in these practices from marrying a priest, which would be the case if she would have been understood to have lost her virginity through a lesbian act. In other words, homosexual behavior was forbidden. It was not understood in terms of relationships, but in terms of specific acts, at least as far as the law was concerned.

Another compilation of Jewish legal precept, Sifra, suggests an awareness of

same-sex marriage in other cultures. A gloss on Leviticus 18:3 suggests an interpretation for what is meant to be prohibited by the commandment against “copying the practices of the land of Egypt.” The commentary in Sifra defines these “practices” as “a man would marry a man, or a woman marry a woman.” Homosexual marriage was unknown in Egyptian culture, so the reference was probably to Roman practices known to the author (second century BCE).

This evidence is sufficient to prohibit same-sex marriage for Orthodox Judaism, which follows a strict interpretation of Jewish law. Because of the differences in the ancient laws, which are stricter for men, Conservative rabbis have suggested the possibility of accepting same-sex marriage for women more readily than for men. But in general, non-Orthodox denominations include a doctrine of “tradition and change” which requires that the wisdom of contemporary times must be weighed alongside the dictates of ancient law. These denominations would therefore consider the purposes and values of marriage before deciding whether same-sex marriage would be acceptable.

The organization of Reform rabbis, the Central Conference of American Rabbis (CCAR), made news at its 1996 convention by easily passing a measure supporting civil marriage for gays and lesbians and opposing any legislative enactment like the Defense of Marriage Act. Yet the CCAR did not vote in favor of religious marriage for gays and lesbians, but referred the discussion to committee, where it remained for sev-

eral years until its passage in 1999. A union of Orthodox rabbis immediately denounced the Reform initiative.

The Reconstructionist Approach

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. The case that Robin Shahar brought to the Supreme Court in *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.³

The official statement of the Reconstructionist Rabbinical Association (RRA) 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.⁴ 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 “give” his daughter in marriage to another man. Her economic value was determined by her

sexual status: Virgins were worth more than widows, and virginity had to be substantiated or the terms of the contract could be renegotiated. In exchange, the husband would provide the basic necessities of life for his wife, who was then his property.⁵ 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 *ketubah* contract (which is the only contract currently 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 marriage also provides 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 the 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. Equal partners exchange rings and vows; 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 ceremony. This egalitarian approach defines a 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 Jew-

ish 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.⁶ 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 the children if for no other reason.

Same-sex marriage promotes "family values"—pro-natalism, communal involvement and 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

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 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 hesitant 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.⁷

This reluctance is particularly mis-

guided 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 those values be 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 its 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.⁸

Free Exercise and the Right to Marry

The courts' rejection of free exercise arguments for polygamy in the past suggests 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,⁹ and it is not unreasonable to argue that the 1878 ruling on polyga-

my 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.¹⁰ 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.

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.¹¹ 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.¹² 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 of individuals to have their religious beliefs and practices accommodated by society, even if these are not the beliefs and practices of the majority.

Other Strategies

In addition to making the religious

liberty argument, religious groups might also employ other strategies to support same-sex marriage. Public protest and resistance would give religious people opportunities to express outrage about the injustice of the laws and attitudes that prohibit same-sex couples from marrying. They would demonstrate the prophetic function of religion: to show a society when its laws are unjust and must be changed.

There are several situations that would call forth such strategies. For example, legislators have proposed arresting clergy who perform same-sex marriages in states where these ceremonies are not legal. Clergy who would submit to arrest for performing a same-sex marriage could challenge this proposal. Such acts of civil disobedience would surely bring attention to this issue. Religious denominations could also consider challenging the Defense of Marriage Act in court, because it too could be viewed as religious discrimination against denominations that recognize same-sex marriages.

Public support (in the form of friends-of-the-court briefs) for Robin Shahar's stance in *Shahar v. Bowers* is another vehicle for making religious voices heard on this issue. And religious groups could be writing letters to the editor and opinion columns in the press to express their view that same-sex marriage is a matter of religious liberty.

Several groups have generated "declarations of support" for same-sex marriage, garnering hundreds of signatures. Supportive clergy could also perform highly visible same-sex ceremonies on college campuses where there has been

controversy over the use of chapels for such ceremonies, and particularly at Duke University, which ruled that only clergy whose denominations supported these ceremonies could perform same-sex marriages in their chapel. Clergy might also consider a more radical strategy suggested by Rabbi Jane Litman, who refuses to sign any marriage licenses for heterosexuals until same-sex couples are given the right to marry.

Together, these strategies for same-sex marriage based on religious liberty and in opposition to religious discrimination are critical for religious denominations to pursue. Such an approach based on religious values like economic justice and support for building family networks would strengthen the position of liberal religious groups in their efforts to take a role in deliberations over public policy. It would support the idea that religious liberty is a concept that needs to be broadened in scope rather than limited in our society. And it would establish the right to marry as a significant dimension of religious liberty. By publicly advocating same-sex marriage through legal and political strategies, religious denominations could create new possibilities for conversations in the public sphere that acknowledge the crucial role of religious ethics in determining public policy.

1. For an overview of the legal issues related to same-sex marriage and the Hawaii case, see William Eskridge, *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (New York: Free Press, 1996) and Mark Strasser, *Legally Wed:*

Same-Sex Marriage and the Constitution (Ithaca: Cornell University Press, 1997).

2. For articles about this debate, see two anthologies: Andrew Sullivan, ed., *Same-Sex Marriage: Pro and Con, A Reader* (New York: Vintage, 1997); Robert M. Baird and Stuart E. Rosenbaum, eds., *Same-Sex Marriage: The Moral and Legal Debate* (New York: Prometheus Books, 1997).

3. *Shahar v. Bowers*, 70 F.3d 1218, 1223 (11th Cir. 1995). Reconstructionist rabbi Sharon Kleinbaum performed the ceremony in question. 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 in the lower courts.

4. *Homosexuality and Judaism: The Reconstructionist Position. The Report of the Reconstructionist Commission on Homosexuality* (Wyncote, PA, 1993), 40-41.

5. Judith Wegner, *Chattel or Person? The Status of Women in the Mishnah* (New York: Oxford University Press, 1988).

6. See Christie Balka, "Thoughts on Lesbian Parenting and the Challenge to Jewish Communities," *Bridges* 3 (1993): 57-65.

7. See Robert Booth Fowler, *Religion and Politics in America* (Metuchen, NJ: The American Theological Library Association and Scarecrow Press, 1985), 175.

8. For a thorough discussion of the need for moral values in public debates, see Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990); Sissela Bok, *Common Values* (Columbia, MO: University of Missouri Press, 1995); Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Harvard University Press, 1996); Elizabeth Mensch and Alan Freeman, *The Politics of Virtue*

(Durham, NC: Duke University Press, 1993). See also Phillip E. Hammond, *With Liberty for All: Freedom of Religion in the United States* (Louisville, KY: Westminster John Knox Press, 1998). Hammond argues for an expanded concept of religious liberty that embraces the rights of conscience, suggesting conscience rather than religious freedom as the warrant for same-sex marriages; see pages 76-79.

9. 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).

10. *Ibid.*, 113.

11. The U.S. Congress responded to this case by passing the Religious 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.

12. *Employment Division v. Smith* 494 U.S. 872 (1990). For a fuller 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.

Same-sex marriage, the practice of marriage between two men or between two women.Â Religious and secular expectations of marriage and sexuality. Same-sex marriage and the law. International. United States. The future of same-sex marriage.Â In other cases, the cultural homogeneity supported by the dominant religion did not result in the application of doctrine to the civic realm but may nonetheless have fostered a smoother series of discussions among the citizenry: Belgium and Spain had legalized same-sex marriage, for instance, despite official opposition from their predominant religious institution, the Roman Catholic Church.Â Orthodox Judaism opposed same-sex marriage, while the Reform, Reconstructionist, and Conservative traditions allowed for it.