

Same-Sex Civil Marriage

By Steve Greenberg

In five Canadian cities, Toronto, Montreal, Ottawa, Calgary and Winnipeg, legislation is being introduced to extend civil marriage rites to same-sex couples. I was asked to offer a short response, stating my opinion on the issue as an Orthodox rabbi. The opportunity to write about this matter triggered my own thinking about the areas where religion and public culture rub up against each other.

My Response

1. I am an ordained Rabbi of America's largest Orthodox Rabbinical Seminary, Yeshiva University's Rabbi Isaac Elchanan Theological Seminary. I held an Orthodox pulpit early in my career and have been a Senior Teaching Fellow at CLAL-The National Jewish Center for Learning and Leadership since 1985.
2. I have been asked to address the religious basis for the extension of civil marriage to homosexual couples. The usual split on this issue has been between the religious right and the secular left. The religious right desires to see certain religious values (in this case, exclusive heterosexual marriage) reflected in the society at large, while the secular left wishes to keep the public square free from specific religious values which undermine legitimate individual freedoms.
3. Marriage as an institution has deep roots in every religious tradition. However, the very idea of "civil marriage" was both a blow to the authority of the church (which until then was the only venue for enacting a marriage) and a direct import from religion into secular/civic affairs.

Orthodox Jewish Law - Halacha

4. The Hebrew halacha is translated as Jewish law. It is derived from the verb "to walk." Halacha is a society-building enterprise that maintains internal balance by reorganizing itself in response to changing social realities. When social conditions shift, the halachic reapplication is not experienced as "departure from the law," but as the proper commitment to the Torah's original purposes. While that shift in social consciousness in regard to same-sex relations has not occurred in Orthodox communities, it surely has in the larger society. Orthodox rabbis are beginning to understand that their gay and lesbian congregants are not freely choosing to be gay, but are simply discovering themselves to be essentially different.
5. Under Orthodox Jewish law as it currently stands, same-sex marriage is not permitted. The religious rites of kiddushin can only be enacted between two Jews, one male and the other female. While the rejection of homosexual

relations is still normative in most Orthodox communities, halachists are beginning to include in their deliberations the testimony of gay people who wish to remain faithful to the tradition. New halachic strategies, I believe, will, in time, appear under these changing social conditions.

6. Orthodox Judaism places many restrictions on marriage that differ from those placed on civil marriage. Interfaith couples cannot be married. Indeed, a number of couples that might desire the state of matrimony, under Orthodox Jewish law, could not be married. The traditional Jewish community does not marry a male member of the priestly lineage with a divorcee or a convert, nor can a child of an adulterous union marry any Jew at all.

7. Despite the fact that civil marriage is offered to each of these couples, one hears no protest from the Orthodox community over the violation of its sensibilities. Orthodox communities have grown accustomed to the challenges of living in secular societies. Orthodox synagogues in Canada, were they to hire an "improperly married" or intermarried individual, would recognize the civil marriage and provide the appropriate marriage benefits for such persons. Rabbi Novak's speculation that Orthodox Jews would reject civil marriage were same-sex marriages included runs counter to the Orthodox community's historical acceptance of civil marriage as an institution governed by secular society.

Marriage is not a natural institution.

8. Marriage is an institution structured by societies. All marriages are "according to the laws" of some communal body that honors them. They are a feature of civilization, not nature. Marking homosexual marriage as contrary to some natural laws is reminiscent of the justifications put forward in the U.S. for laws prohibiting interracial marriage.

Moreover, all sorts of ideas about marriage have changed. Abraham ended up with a wife and a concubine, Jacob with two wives and two concubines. In the Talmud, the famed scholar Rav would travel and call out, "Who will marry me for the day?" This custom of "day marriages" was common in Babylonia among those men who could afford them. While surely not ideal, the rabbis of the age did not protest this use of marriage by one of their most revered teachers. Families are always a subset of the society of which they are a part. Marriage, likewise, is conditioned by the values and sensibilities of the social context. As society has come to understand the essential unchosen nature of same-sex desire, the offering of new forms of matrimony that support such couples would seem consonant with a contemporary sense of justice and social responsibility.

Same-sex marriage, like marriage generally, is a conservative institution expressing lifelong commitment, caring, love and support. It is fundamentally not about rights, but about duties. Central to Orthodox Jewish teaching is the importance of family. The rejection of gay coupling is hardly an expression of

family values. Indeed, it is just the opposite. It is surely in the interest of families to support such unions that glue us all together by the force of our loving commitments to each other.

While it is true that procreation is one of the intents of marriage in our society, same-sex marriages would not prevent such endeavors any more than heterosexual marriages require them. Surely we would not claim that sterile couples or couples who choose not to produce children are not "really" married. Under Jewish law such couples might not be fulfilling the duty to reproduce, but that would have no bearing upon the legitimacy of their marriage. Moreover, adoption and surrogacy offer to gay couples the same potential as they do to heterosexual couples unable to reproduce.

Gay people cannot be asked to be straight, but they can be asked to "hold fast to the covenant." Holding fast to the covenant demands that gay people fulfill the mitzvot that are in their power to fulfill. Same-sex couples cannot procreate without outside assistance, but there are other ways to build a family and a marriage.

13. The wisdom of a religious practice lies not in the number of people that support it. Rabbi Novak raises the issue of the size of a religious community to impugn the views of Reform Judaism. It seems unimaginable to me that a Jew, a member of a religion that has endured such relentless persecution coincident with its minority status, should invoke this notion. As a minority religion in North America, the religious marriages of Jews are given civil recognition despite the fact that they are not in keeping with the beliefs of the majority. The comfort Rabbi Novak draws from allegedly being in the majority regarding religious views on same-sex marriage is frightening.

Civic institutions are crucial for religious freedom.

14. While religious organizations might have a hard time admitting it, the institution of civil marriage is one of the public frameworks that allow religious communities to thrive. It allows synagogues and churches to do what they do, to restrict or extend membership and offer or deny access to their services and rites according to their principles. Civil alternatives for contracting a legally recognized marriage insure the freedom of religious communities to shape their own rules. Without civil and diverse religious alternatives for contracting a legally recognized marriage, those who do not conform to religious rules would put great pressure on religious organizations to change.

15. Civil marriage provides an umbrella under which we all can live, despite our very passionate differences. The state ensures that marriage is not denied to anyone based on a couple's particular religious beliefs or their lack of any religious beliefs. Civil recognition is extended to secular marriages and to marriages according to diverse religious traditions, practices and beliefs,

including to persons who do not meet the criteria of one or more religions. Conversely, the state does not require any religion to marry anyone who does not meet its criteria (for example, an Orthodox rabbi cannot be compelled to marry a Jew to a Gentile). This situation is not a cause for concern, but rather for celebration. That the civil concept of marriage and diverse religious conceptions of marriage can co-exist not only demonstrates the ability of civilly recognized marriage to be flexible and to be separate from religious practice, but it also ensures the ability of religious marriage to choose its own course. That is certainly a victory for freedom of religion.