

## Negotiating Civil Liberties: Inclusion for Some

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Last week, Lynn Schusterman, chair of the Charles and Lynn Schusterman Family Foundation, wrote an op-ed, "**Embrace LGBT Jews as vital members of the community**" calling on Jewish organizations to enact non-discrimination hiring policies that specifically mention sexual orientation, and called on funders to make their support contingent on the adoption and practice of such policies.

Adopting formal non-discrimination policies -- and ensuring their implementation -- will help us achieve two goals: 1, they will indicate to LGBT individuals that the Jewish community is committed to full LGBT inclusion; and 2, they will guarantee that our institutions are walking the talk when it comes to being welcoming and diverse.

This week, Nathan Diament, director of the Institute for Public Affairs of the Orthodox Union, wrote a response, "**Don't exclude in the name of inclusion**", arguing that the religious values of Orthodox organizations require them to practice discriminatory hiring based on sexual orientation. Therefore, Schusterman's suggestion, if fully enacted, would result in a severe reduction of funding to Orthodox institutions.

Logical.

As it happens, the government of the United States of America has this same problem!

For over a decade, some in Congress have been trying to pass ENDA (Employment Non-Discrimination Act), an act that makes sexual orientation and gender identity protected grounds for non-discrimination. As Schusterman, notes, thousands of Jews have lobbied in support of that act. As Diament notes, some of those Jews lobbied in support of an exception for religious organizations to permit them to keep legally discriminating based on sexual orientation and gender identity. (That exception is incorporated into the current version of the act).

According to Diament, that exception "protects the right of religious communities to make their own employment decisions in this sensitive area." In contrast, Schusterman's proposal to Jewish donors would "admittedly in the private sphere, champion gay rights over religious liberty without even acknowledging the competing values, let alone trying to strike a balance between them" and "expand some civil rights at the expense of others." In effect, he accuses Schusterman of hypocrisy.

In fact, several Jewish organizations (Anti-Defamation League, Jewish Council for Public Affairs, and the National Council of Jewish Women) recently collaborated on an **amicus brief**[pdf] (in a case about whether universities that receive government funding could provide support to student groups that practice discrimination), and specifically mentioned the spectre of the exemption of religious organizations that receive federal funding from non-discrimination requirements as an outcome to be *avoided*(in that case, discrimination based on religion, as opposed to sexuality).

So Shusterman is advocating for the same policy for Jewish funders as these Jewish organizations advocated for government funders. On the other hand, the Union of

Orthodox Congregations of America and Agudath Israel of America supported the [opposing amicus brief](#)[pdf].

I don't see hypocrisy here - I see different (and consistent) views on how the balance between religious liberty and gay rights (as Diament puts it) should be struck. The ADL, JCPA, and NCJW strike in favor of gay rights, and the OU and Agudath Israel strike in favor of religious liberties.

Because what Diament obscures ("The Orthodox Union is on record supporting carefully crafted initiatives that seek to ensure principles of tolerance, anti-discrimination and the fair treatment of all citizens") is that only one value can predominate. In both cases, *CLS v. Martinez*, and in the case of Shusterman's proposal, the OU is on the record supporting religious liberties over gay rights.

The OU's consistent position, whether with regard to public or private funding, makes it less surprising that would Diament would uncritically equate an act of the federal government to the act of a private organization. One key difference, of course, is that if Schusterman's proposal were enacted, Orthodox institutions could continue to seek funding from Orthodox donors whereas religious organizations could not so easily escape the jurisdiction of the American government.

But there is an even bigger problem with Diament's conflation of the religious liberties of religious organizations versus the government and the religious liberties Orthodox organizations versus private Jewish funders:

Diament is in fact arguing is that religious liberty should allow Orthodox Jews to discriminate against gays and lesbians, but that private Jewish (non-Orthodox) funders should not have the religious liberty to 'discriminate' in favor of civil rights for gays and lesbians.

**This position holds water if you believe that Orthodox Judaism represents a legitimate religious conviction worthy of protection and non-Orthodox Judaism does not.**

Diament also makes an ethical/fraternal argument that Jews who donate to Jewish organizations (whether \$5 to their local federation or \$2M in the care of their own foundation) have an obligation to support Orthodox institutions that discriminate against lesbians and gays - not doing so would "inflict real harm upon many already underfunded schools and other charities and those they serve [and] would drive a wedge through the heart of those institutions designed to bring our diverse community together." Yet, he makes no argument that Orthodox funding should support Jewish GLBT organizations and is actually arguing that Orthodox institutions must have the right to discriminate against lesbian and gay Jews.

**This position holds water if you believe that supporting and including Orthodox Jews is more important than supporting and including gay and lesbian Jews.**

I (personally) would suggest (beg, plead, shout, implore) that Lynn Schusterman and others not accept Diament's closing instruction that they must, "if their real goal is liberty and justice for all," follow the example of the Orthodox Union.

(Finally, I invite you to peruse some of BJPA's materials on [religious liberty and human rights](#) and [LGBT](#) issues which cover a fair variety of perspectives, whereas the opinions here are mine alone).

[Cross-posted at [Jewschool](#)]