



Agudath
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אגודת ישראל באמריקה

בס"ד

July 16, 2001

Rabbi Dr. Norman Lamm
President
Yeshiva University
500 West 185th Street
New York, NY 10033

BY FAX: 212-960-0049

Dear Rabbi Lamm: *Chava*

I hope this letter finds you well.

This week's *Forward* carries a story about the recent New York Court of Appeals ruling in the lesbian housing lawsuit case. Their reporter spoke to me at length before writing the story, but mangled my comments. I have accordingly written a letter to the editor clarifying what I said, and I take the liberty of sharing an advance copy with you.

I hope you understand that my comments are intended in a constructive vein. I really think this is an opportune moment for Yeshiva University to make a serious *chesbon hanefesh*.

All good wishes.

Respectfully, *3/7/01*

David Zwiebel
Executive Vice President
for Government and Public Affairs

DZ/sk
Enclosure



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July 16, 2001

BY FAX & E-MAIL

Editor
The Forward
45 East 33rd Street
New York, NY 10016

Editor:

Your report on the New York Court of Appeals' reinstatement of the lawsuit by two lesbian students challenging Yeshiva University's student housing policy ("Gay Housing Suit Poses Dilemma for Yeshiva U.", July 13) confuses the context of my comment that recent court decisions would appear to permit government funding of religious schools, even those that are "pervasively sectarian", so long as the government funds are used for secular purposes. Please permit me to clarify.

Under New York law, the state's anti-discrimination provisions do not preclude a religious organization from "taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained." However, over 30 years ago, Yeshiva University decided to structure itself as a non-sectarian secular institution, despite its Orthodox Jewish roots and affiliation – in part, as your story notes, in order to be eligible for various streams of government funding not available to religious entities. Given that structure, it is not clear to me – and obviously was not clear to Yeshiva's attorneys – that the university could have availed itself of a religious freedom defense of its housing policy.

The better legal strategy in responding to the lesbians' lawsuit was to defend the university's "married-students-only" housing policy exactly as Yeshiva did: by pointing out that the policy impacted equally on all unmarried couples, heterosexual and homosexual alike, and thus did not constitute discrimination on the basis of sexual orientation. Two lower courts agreed with that reasoning. The Court of Appeals' ultimate decision to the contrary broke new legal ground and caught most observers by surprise.

And so, contrary to your story, I have no major argument with the strategy Yeshiva's lawyers adopted in defending the lawsuit as they did. Twenty-twenty hindsight is not a fair basis for criticism. I believe it is fair, however, to suggest that the time has come for the university to rethink its longstanding decision to shed its religious identity.

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For one thing, as I told your reporter, it is no longer clear as a matter of constitutional law that assuming a non-sectarian posture is a necessary condition for funding eligibility. Just last month, the U.S. Court of Appeals for the Fourth Circuit ruled that a recent shift in the Supreme Court's First Amendment "church-state" jurisprudence now permits even "pervasively sectarian" institutions to receive government grants for secular activities. While I do not pretend that the issue is without complexities of nuance for an institution like Yeshiva University, the recent trend toward greater legal leeway in the funding of religious institutions is at least worthy of the university's careful consideration.

Second, and far more fundamentally, the lesbians' victory in the New York Court of Appeals – as well as other troubling developments at Yeshiva University in recent years, such as the jarring presence of university-supported gay and lesbian clubs on campus, and the recent lawsuit by a disgruntled non-Orthodox employee claiming religious discrimination – make it increasingly apparent just how far-reaching are the consequences of Yeshiva University's legal inability to "take such action as is calculated... to promote the religious principles for which it is established or maintained." An institution that bears the title "Yeshiva" and yet is unable to maintain policies and practices that reflect Orthodox Judaism is an institution with a serious problem on its hands.

At the risk of belaboring a metaphor, I would suggest that what you characterize as "the flagship institution of Modern Orthodoxy" has been drawn by turbulence into choppy waters, far from its intended course. Its captains need to steer it back to its true home port and drop anchor.

Sincerely,



David Zwiebel
Executive Vice President
for Government and Public Affairs
Agudath Israel of America

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