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# Court Cases – LGBT Bully Pulpit



*Arthur Goldberg*

*JONAH Case*

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# Why this conversation?

Conspiracy theorist, nobody is doing conversion therapy,

One side of mental health makes you jaded

Feel trapped – only one way

If there are alternatives, they can feel better

Resolution to suicidality is to find new conclusions that are not trapped

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# Mission for JONAH

JONAH's initial thrust, as reflected in the original meaning of its acronym (Jews Offering New alternatives to Homosexuality), was to work with those with unwanted same-sex attractions by providing the community with educational outreach services, including counseling referrals, for affected individuals and their families.

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# Lawsuit Introduction

On November 27, 2012, plaintiffs filed an action against defendants Jews Offering New Alternatives for Healing ("JONAH") and others. It is alleged that JONAH is a nonprofit corporation dedicated to educating the Jewish community about the social, cultural, and emotional factors that lead to same-sex attractions. JONAH's clientele and counselors are not restricted to members of the Jewish faith. It is further alleged that JONAH uses counseling and other methods to assist individuals to purge unwanted same-sex attractions. According to plaintiffs, JONAH's business practices violate the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 to -20, by misrepresenting that homosexuality is a mental illness or disorder and that JONAH's therapy program is effective in changing the sexual orientation of clients.

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# Lawsuit

# Introduction

According to the complaint, JONAH provided conversion therapy and counseling services purporting to change plaintiffs' sexual orientation from homosexual to heterosexual. JONAH believes that homosexuality is a "learned behavior" that can be reduced or eliminated through psychological and spiritual help. See JONAH's

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# Several methods of therapy called ‘conversion therapy’

Plaintiffs described some of the individual and group activities the JONAH-affiliated counselor, Alan Downing (Defendant) used in his therapy and labeled them ‘conversion therapy’.

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# Fraud Claims

Plaintiffs' legal claim is that JONAH engaged in "unconscionable commercial practice, deception, fraud, false pretense, false promise, and misrepresentation[]" by claiming that homosexuality is a mental disorder and, in the face of empirical evidence to the contrary, that same-sex attractions can be reduced or eliminated through therapy. Id. at ¶¶ 38-40. Additionally,



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# Misrepresentations

(1) homosexuality is a mental illness or disorder; (2) JONAH could cure or treat that disorder; (3) JONAH could do so within some specified time period, such as two to three years, which differed from person to person; (4) JONAH's program had specific success rates, sometimes one-third and others times two-third or 70-75%; (5) JONAH's program theories and techniques were scientifically based and valid; (6) JONAH's program was capable of changing people from homosexual to heterosexual; and (7) JONAH used unconscionable business practices. Plaintiffs made clear that they do not intend



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## Not seeking to prove SOCE in general cannot be effective

business practices. Plaintiffs made clear that they do not intend to prove that sexual orientation change efforts ("SOCE") in general cannot be effective. They address solely the practices of JONAH's program specifically, rather than the universe of all possible efforts to change sexual orientation.

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# Claims of Harm

result, JONAH is liable for those costs. For example, Unger became deeply depressed and suffered an impaired ability to engage in physical and emotional relationships with men because JONAH conditioned him to view such relations as unnatural. Id. at ¶ 72. Bruck experienced depression, anxiety, and suicidal thoughts because of his therapy sessions with JONAH. Id. at ¶ 95. In short, each plaintiff sought one or more professional mental counselors following his experience with JONAH. Id. at ¶¶ 73, 85,

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## Plaintiffs seek recovery of original sums and later professional therapy costs

By way of damages, plaintiffs seek two sources of recovery. First, they claim they are entitled to restitution of all sums paid to JONAH. Second, they also claim that reparative therapy was necessary as a result of JONAH's services and that, as a result, JONAH is liable for those costs. For example, Unger became 98, 108. Consequently, plaintiffs assert that money expended for their post-JONAH therapy should be calculated as part of their ascertainable loss under the CFA.

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# Court didn't allow defense expert witnesses

Plaintiffs Michael Ferguson, Benjamin Unger, Sheldon Bruck, Chaim Levin, Jo Bruck, and Bella Levin ("plaintiffs") have moved to bar the testimony, either in whole or in part, of six defense experts, alleging that the threshold requirements for admissibility under N.J.R.E. 702 and 703 are not met because there is no reliable foundation for the opinion testimony. For the

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# **JONAH**

## **Defense Expert**

### **Testimony**

### **Dismissed**

1. A) Joseph Berger, MD
2. A) Christopher Doyle, M.A., L.C.P.C
3. A) Joseph Nicolosi, Ph. D
4. A) James E. Phelan, M.S.W. Ph. D
5. B) John Diggs Jr, M.D.
6. C) Rabbi Avrohom Stulberger

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# **New Jersey Requirements for Evidence 702**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

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# **New Jersey Requirements for Evidence 703**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the proceeding. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.”



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# A) Dr. Berger

Dr. Berger is a psychiatrist currently working in private practice in Toronto, Canada. He is a past assistant professor of psychiatry at the University of Toronto, as well as a past president of the Ontario Branch of the American Psychiatric Association. He has written articles on various subjects, including an article discussing psychotherapeutic treatment of male homosexuality, published in the American Journal of Psychotherapy and in the NARTH<sup>1</sup> Annual Conference Papers about bias. He guest-lectured at Bar-Ilan University in Israel on psychotherapy with homosexual patients and at various Israeli hospitals reviewing recent scientific studies on homosexuality.

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# A) Christopher Doyle\*

Mr. Doyle has been a licensed clinical professional counselor in the state of Maryland for one year. He is the director of the International Healing Foundation ("IHF"), where he has provided psychotherapy to clients experiencing unwanted same-sex attraction for the last five years. In that time, he has treated approximately 150 men experiencing conflicts with their sexual orientation. He also is the co-creator of several different therapeutic retreats at the IHF.

# A) Joseph Nicolosi

Dr. Nicolosi is a licensed psychologist in California. He founded the Thomas Aquinas Psychological Clinic and serves as its clinical director. His specialty is the treatment of men who wish to diminish their same-sex attractions. He is one of three founding members, and a former president, of NARTH.

<sup>1</sup> NARTH -- an acronym for National Association for Research and Therapy of Homosexuality -- was co-founded by Dr. Nicolosi (another of JONAH's proffered experts) and has less than 1,000 members, including non-mental health professionals such as counselors, teachers, and pastors.

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## A) Dr. Phelan\*

Dr. Phelan is a licensed clinical social worker currently working in private practice. He is also a MSW Field Practicum Instructor for Ohio State University. He is currently on the Health Practice Section Committee of NARTH.

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## B) Dr. Diggs

Dr. Diggs received his medical degree from the State University of New York at Buffalo School of Biomedical Sciences. Currently, he works as a preceptor for physician assistant students at the Massachusetts College of Pharmacy and Health Sciences. He was a lead physician for Christ's Hope International on an AIDS prevention project in Namibia. He authored an article titled The Health Risks of Gay Sex, which he describes in his curriculum vitae as a "widely read free publication."

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# C) Rabbi Avrohom Stulberger

Rabbi Stulberger is a graduate of the Rabbinical Seminary of America. He currently serves as a Dean of Valley Torah High School in California. He also currently serves as the president of the Yeshiva Principals Council of Los Angeles and has been a member of the Rabbinical Advisory Board to Aleinu Jewish Family Services for over a decade.

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# Dismissal Reason “A1.1”

based on two premises. First, plaintiffs assert that it is a scientific fact that homosexuality is not a disorder, but rather it is a normal variation of human sexuality, and thus any expert opinion concluding that homosexuality is a disorder is inadmissible. Plaintiffs support this assertion with the fact that, in 1973, the American Psychiatric Association (“APA”) removed homosexuality from the list of disorders in the Diagnostic and Statistical Manual of Mental Disorders (“DSM”), and major organizations both nationally and internationally followed suit.



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# Dismissal Reason “A1.2”

Plaintiffs contend that each of Drs. Berger, Nicolosi and Phelan, and Mr. Doyle proffer opinions based on the initial false premise that: (1) homosexuality is not a normal variant of human sexuality but instead is a failure to achieve full development into normal heterosexuality; (2) homosexuality is not a normal variation of human sexuality, but rather is a “clinical condition” caused by negative experiences; (3) homosexuality is a disorder and there is a universal heterosexual natural order; and, (4) homosexuality is not a natural variation of human sexuality.

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# Dismissal

## Reason “A2.1”

Second, plaintiffs further assert that, because the belief that homosexuality is a mental disorder is false and lacks any basis in science, any expert opinion that is derived from that false initial premise is unreliable and should be excluded. Additionally, because their belief that homosexuality is a disorder conflicts with the understanding held by every legitimate professional association, these experts have banded together under NARTH's umbrella.

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# Dismissal Reason “A2.2”

Plaintiffs also assert that each of JONAH’s experts derives the remainder of their expert opinions from this initial false premise. Specifically, Dr. Berger believes that homosexuals can become heterosexual through various psychotherapies and that some specific practices included in JONAH’s conversion therapy program may be defensible. Mr. Doyle opines that homosexuals benefit from conversion therapy and psychotherapeutic interventions are effective in changing sexual orientation. Dr. Nicolosi’s report proffers the opinions that homosexual desire is the result of trauma, that reparative and other therapies are effective in changing sexual orientation, and that the American Psychological Association (“ApA”) 2009 Task Force on Appropriate Therapeutic Responses to Sexual Orientation was unreliable due to influence by gay activists. Dr. Phelan believes that there is a compelling body of evidence showing that sexual orientation can be altered through a variety of methods, and that conversion therapy is a legitimate option that should be available to those who seek it.

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# Additional Dismissal Reasons “A2.3”

- Having about opinions on the plaintiff's credibility
- Lack of actual expertise in area [approved beliefs] results in unacceptable methods that render conclusions unreliable
- Cannot testify as to the credibility of gay people in general
- Relying on studies but not assessing their validity [plaintiff doesn't acknowledge validity of non-APA approved research]
- Opinions regarding efficacy of SOCE are inapplicable to the specific practices at issue in this case and should be excluded as irrelevant [be able to explain them?]

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# Dismissal Reason “A3”

Circle back and dismiss argument A2  
because A1 is fact and that trickles down

Notably, plaintiffs do not argue that these opinions by JONAH's experts are necessarily false. Rather, they argue that, because these secondary premises are derived from and rest entirely on each expert's initial false premise that homosexuality is a disorder, their testimony is nothing more than an inadmissible net opinion.

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# Dismissal Reason “A4”

Dr. Diggs’ opinions are not beyond the ken of the average juror. N.J.R.E. 702 (expert opinion must “assist the trier of fact to understand the evidence or to determine a fact in issue”). JONAH cannot legitimately argue that, today, jurors need an expert to explain to them that sexual activity, in any form, is potentially harmful.

# Dismissal

## Reason “A4.1”

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<sup>2</sup> Relevance alone does not suffice to render evidence admissible, for “even if relevant, evidence nonetheless ‘may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence.’” Brenman, supra, 191 N.J. at 30 (quoting N.J.R.E. 403). See also State v. Medina, 201 N.J. Super. 565, 580 (App. Div. 1985) (“[T]he more attenuated and the less probative the evidence, the more appropriate it is for a judge to exclude it.”).



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# Dismissal Reason “A5”

misrepresentations. Rabbi Stulberger's report -- which tenders opinions on Orthodox Judaism's view of homosexuality -- is irrelevant because this case is not about whether JONAH's statements or activities are consistent with Jewish law or about JONAH misrepresenting itself as a Jewish organization. Dr. Diggs and Rabbi Stulberger are barred from testifying as experts.

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# Dismissal Reason “A6”

The overwhelming weight of scientific authority concludes that homosexuality is not a disorder or abnormal. The universal acceptance of that scientific conclusion -- save for outliers such as JONAH -- requires that any expert opinions to the contrary must be barred.

# Ignored Rule 104

412, 432-33 (2002) (“The Rule 104 hearing allows the court to assess whether the expert’s opinion is based on scientifically sound reasoning or unsubstantiated personal beliefs. . . . In the course of the Rule 104 hearing, an expert must be able to identify the factual basis for his conclusion, explain his methodology, and demonstrate that both the factual basis and underlying methodology are scientifically reliable.”); see also Koruba v. Am. Honda Motor Co., Inc., 396 N.J. Super. 517, 523 (App. Div. 2007), certif. denied, 194 N.J. 272 (2008) (noting that trial court conducted Rule 104 hearing and determined that expert’s opinion was barred as net opinion). Although the court did not conduct a Rule 104 hearing, the standard remains the same and there was sufficient basis from review of the expert reports and deposition testimony to make an informed decisions.

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# General Acceptance makes it true

2002). In New Jersey, reliability of a scientific technique can be proven in most cases by showing its “general acceptance in the particular field in which it belongs.” Frye v. United States, 293

# DSM IS LAW

JONAH's suggestion that the court should ignore the DSM misapprehends basic New Jersey law. Under the general acceptance standard, the DSM is unquestionably authoritative in the mental health field; courts repeatedly have concluding this to be the case. See, e.g., State v. King, 387 N.J. Super. 522, 544 (App. Div. 2006) ("General acceptance of the DSM in the psychiatric community is beyond dispute"); Patterson v. Bd. Of Trs., State Police Retirement Sys., 194 N.J. 29, 41-42 (2008); T.H. v. Div. of Developmental Disabilities, 189 N.J. 478, 485-86 (2007); Brunell v. Wildwood Crest Police Dep't, 176 N.J. 225, 240-43; State v.

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# DSM POLITICAL?

Further, JONAH incorrectly characterizes the court's role in assessing scientific reliability. It argues that the APA's decision to remove homosexuality as a disorder from the DSM was a politically motivated decision made to de-stigmatize homosexuality, and was not based on science.<sup>3</sup> However, a "trial court should not substitute its judgment for that of the relevant scientific community." Landrigan v. Celotex Corp., 127 N.J. 404,

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# DSM POLITICAL?

subject"). JONAH hardly can argue that all of these organizations -- including a federal appellate court -- were the victims of manipulation by "gay lobbying" groups. Regardless, it is not up to this court to decide that question.

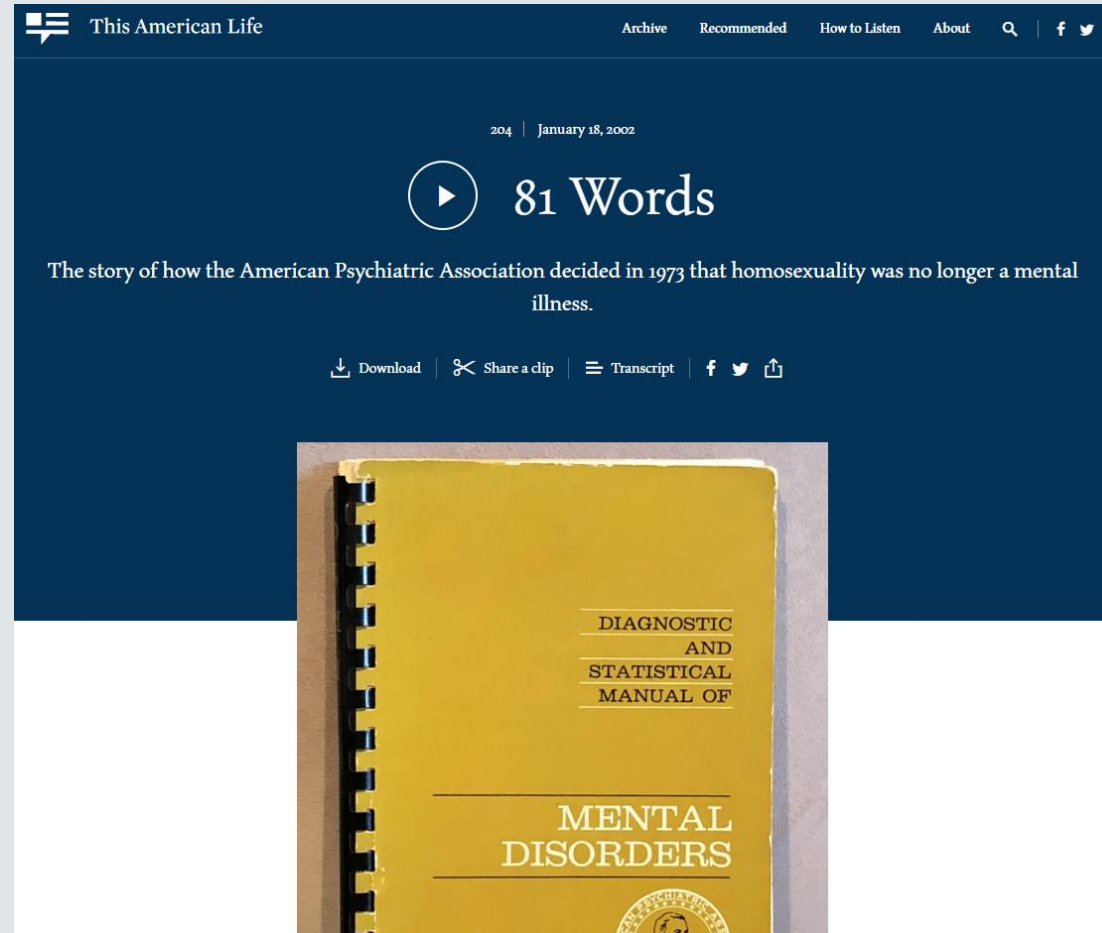


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# Flat Earth

In contrast to Rubanick, the theory that homosexuality is a disorder is not novel but -- like the notion that the earth is flat and the sun revolves around it -- instead is outdated and refuted. Homosexuality was listed as a mental disorder in the DSM until its removal in 1973. Although the DSM has added newly

# YES! DSM POLITICAL!



<https://www.thisamericanlife.org/204/81-words>

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# YES, APA REJECTS THE CREATOR.

Date created: 2007

## APA Adopts Policy Statement Opposing the Teaching of Intelligent Design as Scientific Theory

*The Council of Representatives of the American Psychological Association (APA) has adopted a resolution opposing the teaching of intelligent design as scientific theory and stating that teaching intelligent design as science undermines the quality of both science education and science literacy.*

WASHINGTON—The Council of Representatives of the American Psychological Association (APA) has adopted a resolution opposing the teaching of intelligent design as scientific theory and stating that teaching intelligent design as science undermines the quality of both science education and science literacy.

Read the journal article  
[APA Council of  
Representatives  
Resolution Rejecting  
Intelligent Design as  
Scientific and Reaffirming](#)

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# Science is based on distress?

<sup>3</sup> It should be noted that the APA does in fact provide a scientific reason for its decision to remove homosexuality as a disorder. A position statement regarding the then proposed change to the DSM defined a mental disorder as having at least one of two elements: (1) the illness must regularly cause subjective distress; and/or (2) it must regularly be associated with some generalized impairment in social effectiveness or functioning. The statement noted that homosexuality, per se, does not meet the requirements for a psychiatric disorder since many homosexual people are satisfied with their orientations and suffer no generalized impairment in social effectiveness or functioning. See Certification of Lina Bensman in Support of Plaintiffs' Motion for Partial Summary Judgment, Exhibit 6. The court also relies upon the numerous studies attached as exhibits to the Bensman Certification in support of Plaintiffs' Motion for Partial Summary Judgment, which support the contention that homosexuality is a natural variation of human sexuality.

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# **Take away from argument “A”**

Science is settled and anyone that disagrees or wants to pursue studies outside of the officially recognized state opinion is denied access to truth claims (recognized research) or testimony. Any evidence to the contrary is considered ‘proffering opinions’.