

Rabbi Ysoscher Katz

Rabbi Ysoscher Katz is the Chair of the Talmud department at Yeshivat Chovevei Torah and the past Senior Rabbi of the Prospect Heights Shul. He studied at the Satmar, Brisk, and Beit Yosef Navaradok yeshivot and has taught Talmud and halakha at a wide array of institutions.

In addition, he has directed the Lindenbaum Center for Halakhic Studies, composed responsa on vital contemporary halakhic issues, and writes extensively on matters pertaining to Jewish society for publications including the Forward, Jerusalem Post, Makor Rishon, and the Times of Israel.

It was a pleasure and *zechut* to read R. Fox's thorough and comprehensive analysis of the *nashim mesolelot sugya* (Yevamot 76a, Shabbat 65a), which is the primary basis for the presumable *halakhic* prohibition of sexual intimacy between two women.

While that Gemara is the primary rabbinic source, there is also the text from Midrash Halakha (Sifra, Acharei Mot parsha 8) that interprets the pasuk (Vayikra 18:3) כמעשה ארץ מצרים אשר ישבתם בה לא תעשו וכמעשה ארץ כנען אשר אני מביא אתכם שמה לא תעשו ובחקתיהם לא תלכו as applying to same-sex intercourse.

R. Fox granularly examines these two texts, *mi'svara u'mi'kra*, textually and conceptually. He explores the various *lomdish* and conceptual angles of these two sources, and at the same time examines the overwhelming majority of observations, comments, and questions raised in the Rishonim and Acharonim on these two foundational texts of the presumed *issur*.

His arguments *le'heteira* in the case of a committed relationship between two women who are naturally inclined toward same-sex attraction are compelling and persuasive. The only obstacle—albeit surmountable—standing in his way, however, is the fact that the Mechaber explicitly prohibits it.

Traditionally, the bar for repudiating a *halakha* codified by the Mechaber is higher than it is for other *poskim*. R. Fox scales that bar with a two-pronged approach. First, he presents a litany of *poskim* who either explicitly or implicitly disagree with the Mechaber's view. Second, he employs the “cultural contingency,” arguing that cultural context is significant when determining the eternality of a codified *halakha*. Rav Yosef Karo, z”l, was writing at a time when our understanding of human sexuality was vastly different than it is now. The notion of sexual attraction, and particularly the idea of same-sex attraction, was not a factor when deciding *halakhot* pertaining to sexual matters.

While I left reading the *teshuva* feeling compelled by the arguments and convinced by the conclusion, I can't shake the sense of its overwhelming audacity. The cost of accepting R. Fox's *psak* is to negate the explicitly stated view of the Tur and Mechaber, and one that is seemingly also accepted by the *nos'ei keilim*. None of the classical *nos'ei keilim* reject the Mechaber's *psak*. Their silence suggests acquiescence.

While the *halakhic* argument is audacious, R. Fox's final words are courageous. Contrasting the term *pritzuta*, used in the *sugya* in reference to two women who engage in sexual intimacy, he writes, "When two women seek to build a Jewish home together, with love and commitment, this can no longer be called (even) *pritzuta*. Rather, given the vacuum to be filled, this should be understood as *tzniuta* (modesty) and perhaps even *kedushata* (holiness)." I couldn't agree more. Queer women's quest for *halakhic* legitimacy is a sacred pursuit.

Lost in this debate is the fact that these discussions are not about identity and personal preference. When members of the queer community turn to Orthodox *poskim* and thought leaders, they are not asking to justify their choices or to provide a green light for the way they live and with whom they partner. That is a forgone conclusion. They are merely turning to us to see if there is room for them in the Torah-true observant community. They want to know if a case can be made that *halakha* is able to embrace their whole selves and treat their hopes, desires, and aspirations the same way it treats those very same feelings among people who identify as straight.

That is a sacred request and something that should be celebrated by those who love and cherish *halakha*. They are pushing us to expand the tent of Torah and widen its doors so that people who have been expelled in the past can be invited back in. Such a pursuit is indeed sacred and praiseworthy.

In the spirit of *להגדיל תורה ולהאדירה*, I want to add two points to the discussion, one *le'ma'ase* and one merely an ironic observation regarding the development of the various views on this issue.

1) It is important to point out that even if we were not to accept R. Fox's claim and instead adopt the conventional view that there is an across-the-board *issur* for two women to engage in lesbian sex, the prohibition is very limited. Rashi says explicitly that the prohibition only refers to mutual genital-to-genital stimulation. Other Rishonim seem to agree. Meiri defines the word *משפשות* as an act that is *דרך ביאה*, intercourse-like, a term that fits best if we are referring to mutual genital-to-genital stimulation. Similarly, in his *Peirush Hamishna*, when describing the prohibition of

lesbianism, Rambam uses language that suggests that he too limits the prohibition to one specific act, mutual genital-to-genital stimulation.

Granted, regarding conventional sexual prohibitions, the *pasuk* (Vayikra 18:6) לא תקרבו לך ולא אשה לרעהו extends the Torah's sexual prohibitions, banning even non-penetrative sexual intimacy. There are numerous Rishonim and Acharonim, however, who believe that the extension introduced by this *pasuk* does not apply to homosexuality. According to them, we apply the concept of אין לך בו אלא חידושו as regards the prohibition of same-sex intimacy. Meaning, only that which is explicitly prohibited is not allowed. Therefore, actual penetration for two men, and the female equivalent for women (mutual genital-to-genital stimulation), is prohibited, but other forms of sexual intimacy are possibly allowed.

2) Many years ago, there was a vehement debate among *poskim* about whether a couple who struggles with infertility is permitted to resort to IVF treatment, whereby she would be inseminated with the semen of someone other than her husband. The primary interlocutors in this debate were Rav Moshe Feinstein, ז"ל, who permitted it, and the Satmar Rav, Rabbi Yoel Teitelbaum, ז"ל, who prohibited it.

For those who were opposed, one of the primary sources marshaled for support is our *sugya*, the Gemara that seemingly prohibits sexual intimacy between two women. While most commentators believe that the Gemara is referring to female same-sex intimacy, there is a small cadre of Rishonim (see Tosafot s.v. *Hamesolelot*) who offer an alternative understanding. They believe that the Gemara is referring to women who transfer their husband's semen from their womb to someone else's. The *poskim* who ban artificial insemination believe that this is what the *sugya* of נשים המסוללות is about, and infer from this understanding that transfer of non-spousal semen is, to a degree, a form of adultery.

The unintended outcome of their interpretation is that there is no statement from Chazal addressing sexual intimacy between two women. This, in turn, means that, according to them, it is not prohibited. In other words, according to Rabbi Teitelbaum, ז"ל, and those who like him thought that artificial insemination is prohibited, there is nothing in Chazal that prevents two women from engaging in sexual intimacy.

P.S. I do have two minor critiques on particular claims made in the *teshuva*. They are, however, minute and technical. I will therefore spare the reader and only share them with R. Fox privately.