

Rabbi David Fried

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I want to express my gratitude to Rabbi Fox for extending to me the opportunity to respond to his article. He is to be given tremendous credit for the effort he put into this topic and his desire to help those who experience pain and suffering as a result of these *halakhot*. The thoroughness of his research is to be commended, and his actively seeking out responses is a testament to his humility and intellectual integrity.

Unfortunately, I believe he makes several errors in his interpretation of the sources and overreads their relevance to his *halakhic* conclusion. Ultimately, then, his conclusion has no real precedent and is asserted on his own authority. Perhaps if several *gedolei haposkim* were to concur, it could be accepted, but I suspect this is unlikely to occur as it runs counter to the *halakhot* and sexual ethics we find in the Rishonim.

Rabbi Fox is certainly right in his assertion that the *sugyot* in the Bavli can be explained without reference to the Sifra, and that most Rishonim other than the Rambam (and those who quote him directly) did, in fact, interpret the *sugyot* that way.

One key analytical mistake that Rabbi Fox makes throughout the piece is in taking statements made by various commentaries to explain the rejected opinion of Rav Huna and applying it to the conclusion as well. Rav Huna maintains that נשים מסוללות are forbidden to marry a *kohen*. Generally speaking, for a woman to be forbidden to marry a *kohen*, in addition to having a sexual relationship with a man forbidden to her, there must also be a מעשה ביאה. Thus, if a married woman has a sexual relationship with a man who is not her husband, even though this is biblically prohibited sexual behavior,¹ she is still permitted to subsequently marry a *kohen* if her first husband dies since there was מעשה ביאה סו.

All of the commentaries that attempt to pinpoint a specific act to which Rav Huna refers when he uses the phrase נשים מסוללות are not in any way delimiting which behavior is forbidden. Rather, they are trying to pinpoint a specific act that Rav Huna could see as parallel to a מעשה ביאה. When the Gemara makes clear that our rejection

¹ Even Ramban, who generally views לא תקרבו as merely a דרבנן prohibition, agrees that with regard to adultery it is דאורייתא. See his glosses on Rambam's שגג תעשה סו.

of Rav Huna is even according to R. Elazar's opinion, it demonstrates that our rejection of Rav Huna is not because we don't consider a sexual relationship between two women forbidden but rather because there is no act between two women akin to a מעשה ביאה. Thus, the Gemara's conclusion of פריצותא בעלמא would encompass all sexual behaviors between two women,² not merely the specific behavior that a particular commentary, in their interpretation of Rav Huna, thought would render the woman forbidden to a *kohen*. Thus, for instance, Rashi's assertion that Rav Huna is referring specifically to two women who rub their genitals against each other, the Meiri's assertion that they secrete something into each other, or the Rivan's assertion that they secrete their husband's semen into each other, have no bearing on the question of what is forbidden or permitted behavior. They only comment on what Rav Huna might consider sufficiently similar to a מעשה ביאה to render a woman prohibited to marry a *kohen*.

Of far more interest to us is the question of why a sexual relationship between two women would be forbidden in the first place. It is in response to this question that the Rambam ingeniously brings in the Sifra. While none of the Rishonim Rabbi Fox cites other than the Rambam seem to reference the Sifra, neither do they provide any other explanation for why the relationship would be considered פריצותא, leaving it to the Acharonim to speculate. The fact that the Rambam is the only major Rishon to provide a basis for the prohibition may explain why the Shulchan Aruch rules like the Rambam (besides of course, his general affinity for the Rambam).

The Aruch LaNer's assertion that the prohibition refers specifically to a married woman and the adulterous nature of the relationship is certainly clever, but as we say in rabbinic Hebrew, עיקר חסר מן הספר, such a significant limitation should have been mentioned in the Gemara itself. It is thus no wonder that almost no one else accepts the Aruch LaNer's interpretation, and it would be extremely difficult to build a leniency on this approach.

The position that Rabbi Fox cites from the Kiryat Melech Rav -- that according to the other Rishonim, פריצותא בעלמא is not a formal prohibition but merely a דבר מכוער -- is not an implausible read. In fact, it may even be supported by the failure of other Rishonim to pinpoint a specific prohibition, *d'oraita* or *d'rabbanan*, as the source of the פריצותא classification. The modifier of בעלמא ("merely") might suggest this as well, though it could just mean that the prohibition is not as severe as Rav Huna thought it

² It remains an open question exactly how to define what constitutes a "sexual" behavior. My intent is merely to point out that it would certainly be broader than the specific act a particular commentary identifies in their interpretation of Rav Huna.

was. However, even if we accept this to be the simplest *pshat*, it still cannot serve as precedent for Rabbi Fox's ruling. Besides the fact that the Kiryat Melech Rav nowhere indicates that he would practically be willing to rule against the Rambam, since when are *poskim* in the business of encouraging people to do a דבר מנוער?

In analyzing the Dibrot Moshe, Rabbi Fox again falls prey to the trap of erroneously applying a statement made in explanation of Rav Huna to the conclusion of the *sugya*. Rav Moshe's assertion that a woman who has sex with other women has an overactive libido, and is therefore likely to commit adultery with another man as well, was said only to explain why Rav Huna would think she may not marry a *kohen* (or perhaps only the *kohen gadol*). It was not said to define why the act is פריצותא (such that we might say that if we know a woman isn't attracted to men at all, it wouldn't count as פריצותא). He comes up with this because, as we have established, פריצותא בעלמא would be insufficient to explain why a woman would be forbidden to marry a *kohen*. In addition, Rav Moshe, by Rabbi Fox's own admission, is unwilling to depart practically from the Rambam, so once again this cannot serve as precedent.

Furthermore, Rabbi Fox clearly misreads Rav Moshe. He writes, "Rav Moshe goes on to explain that, with two women, it is simply not possible to ever reach the level of a Torah prohibition, because, even for the Rambam, the Torah prohibition is only possible with two people who are considered by the Torah to be in danger of having relations that are *arayot*." He then quotes a piece from the Dibrot Moshe that supports this understanding. The problem is that if one looks at the entire piece in Dibrot Moshe, it is clear that Rav Moshe articulates the logic for both sides of the debate (whether the Rambam should be understood as a *d'oraita* or a *d'rabbanan*) without ever taking sides.³ The passage Rabbi Fox quotes is explaining one possibility, not Rav Moshe's conclusion. Ultimately, Rav Moshe is unsure if it is *d'oraita* or *d'rabbanan*, but there is no question for him that a prohibition exists. Even if he entertains the possibility that *d'oraita* there might be no prohibition where it can't lead to a *ma'aseh biah*, he has no doubt that *d'rabbanan* there can be such a prohibition.

The Vaya'an David (Dayan Weiss) is of crucial importance to Rabbi Fox's argument because he is the only *posek* R. Fox quotes who is willing to even consider practical exceptions to the prohibition on *nashim mesolelot*, allowing it, at least theoretically,

³ Rav Moshe is obviously aware of the well-known debate in the Acharonim about how to understand the Rambam, and that is why he did not want to take sides. While acknowledging that there are obviously *gedolei ha'acharonim* who disagreed, in my own humble opinion, I cannot possibly understand how anyone could say the Rambam doesn't think it's *d'oraita*. He not only quotes a *pasuk*, and, unlike the Gemara, the Rambam doesn't generally quote *pesukim* as *asmachta'ot*, but he quotes it in the Sefer Ha-Mitzvot, where as a rule, he only quotes *dinim d'oraita*.

באופן צנוע על ידי אשה צנועה.⁴ R. Fox wants to equate this case to his case of two women in a committed monogamous relationship, but, if anything, Dayan Weiss seems to be implying the opposite. In context, באופן צנוע על ידי אשה צנועה is clearly referring to a woman who will do this for the other woman in a purely clinical capacity, without any risk of becoming romantically involved with her. Might he be less concerned about the two women being romantically involved if the woman in question was not married to a man? Perhaps, but there is certainly no precedent for it from this *teshuvah* and we have this interpretation only on R. Fox's authority.

What remains is clear. There is no Rishon or Acharon who serves as an obvious precedent for Rabbi Fox's ruling. Even if we were willing to rule against the Rambam (which very few are practically willing to do), it remains within the category of פריצותא. Rabbi Fox's entire *psak* hinges on his assertion that, "When two women seek to build a Jewish home together, with love and commitment, this can no longer be called (even) *pritzut*." All of his analysis of Rishonim and Acharonim hide the fact that, on the point where he most needs precedent, he has none.

As I said at the outset, perhaps if several *gedolei haposkim* were to concur with Rabbi Fox's understanding of *pritzut*, we could accept it. However, an examination of another case in *halakha* that closely parallels this one will reveal why I believe this is unlikely to occur. The issue I am referring to is sexual relations between an unmarried man and an unmarried woman. After all, if R. Fox is right that a committed monogamous relationship is sufficient to remove something from the category of *pritzut*, why should that be true only for two women and not for a man and a woman as well? Like *nashim mesolelot*, there is a lone opinion (R' Elazar) who thinks that it would render the woman forbidden from marrying a *kohen*. Despite ruling against R' Elazar that the woman does not become a *zona* in the formal sense to render her forbidden to marry a *kohen*, the Talmud does routinely refer to all sexual behavior outside of the context of *kiddushin* as בעילת זנות.⁵ Again, similar to *nashim mesolelot*, the opinions on the level of this prohibition run the gamut from Torah prohibition⁶ to rabbinic prohibition⁷ דבר מכוּעַר.⁸

⁴ I have not had time to fully delve into this source and am relying on R. Fox's citation.

⁵ See Yevamot 107a, Ketubot 73a, Gittin 81b, et al.

⁶ Rambam Ishut 1:4 and Magid Mishneh ad loc., Rabbeinu Yonah Sha'arei Teshuvah 3:94, Shut HaRashba 4:314.

⁷ Shut HaRivash 398. (He acknowledges the possibility that it could be *d'rabbanan*, while seeming to prefer the opinion that it's *d'oraita*.)

⁸ *Shut HaRosh* 32:13. The Ramban, both in his glosses on the Rambam's Sefer Hamitzvot Shoresh 5 and in the *responsa* ascribed to the Rashba 284, asserts that a *pilegish* is permitted on both a legal and moral level, and does not require *kiddushin*. This position might actually serve as the best precedent for Rabbi Fox, and the only thing that would remove the *pilegish* from the category of פריצותא for the Ramban

The reasoning behind this is laid out by the Rambam at the beginning of Hilchot Ishut. He writes, “Before the giving of the Torah, a man could meet a woman in the marketplace, and if they wanted, he could take her home and have sex with her in private, and she would be his wife. When the Torah was given, Israel was commanded that if a man and woman wanted to marry, he must first betroth her in front of witnesses.” The Rambam adds “Before the giving of the Torah, a man could meet a woman in the marketplace, and if they wanted, he could pay her what she wants, have sex with her, and leave her, and this was called a *kedeisha*. When the Torah was given, *kedeisha* was prohibited.”⁹ We see from here two important details about the nature of Jewish marriage: it must be created in a public manner, and one partner cannot simply walk away from the other. For a sexual relationship to be sanctioned by the Torah, there must be *kiddushin*: the relationship must be created in a formal public ceremony, and there must be a legally enforceable mechanism to ensure that the responsibilities each party has to the other are maintained. Whether one thinks this is a formal *lav* in the Torah like the Rambam; whether one thinks it is implied from the *aseh* of *kiddushin*; or whether one thinks it is a rabbinic prohibition, or merely a *דבר מכוּעַר*; the basic ethic is the same. A mere stated commitment to each other without any mechanism to enforce it is insufficient to remove a relationship from the status of *pritzut*. As such, I would deem it unlikely that any major *posek* will endorse a relationship between two women as being not *פּרִיצוּתָא*, until such time as *halakha* can find a way to formalize the relationship in a manner akin to *קִידוּשִׁין*. At present, there does not seem to be any available *halakhic* mechanism for doing so, and even R. Fox has not suggested otherwise.

One might plausibly suggest that it is worse for a man and a woman because they have the option of *kiddushin* available to them, and it is specifically the rejection of *kiddushin* that creates the *pritzut*. Again, this would be highly speculative and without precedent, though perhaps if several *gedolei haposkim* were to get on board we could support it. Nevertheless, it would still run counter to the basic idea we find throughout *halakha*, that changing categories depends on formal *halakhic* status, not subjective intent. Furthermore, one could equally plausibly argue the opposite, namely that by not giving the option of *kiddushin* between two women, the Torah was proscribing the

is their subjective commitment to live in a monogamous relationship. The Ramban, however, is an extreme minority opinion. Most other Rishonim believe that a *pilegish* is either forbidden on a Torah or Rabbinic level, or else that it requires *kiddushin*, and is thus irrelevant to our discussion. Rema on Even Ha’ezer 26:1 does quote both opinions about *pilegish* without appearing to take sides. Chelkat Mechokek 26:1, however, reflects the consensus of most later *poskim* that it is forbidden, at least *mid’rabbanan*.

⁹ Hilchot Ishut 1:4.

possibility of a *halakhically* legitimate sexual relationship between them. This would be in line with the position of the Magid Mishneh that the *mitzvah* of *kiddushin* itself implies that it is the only context in which the Torah recognizes the moral/legal legitimacy of sexual behavior. It is once again clear that there is no precedent to permit, and a decision on this question cannot be made without the guidance of more senior *poskim* with shoulders broad enough to issue rulings that will be relied upon without clear precedent.

There is no question about the suffering gay people go through as a result of the *halakhot* surrounding same-sex sexual behavior. But, as R. Fox writes, “There may be instances in which, no matter how much time is spent in the cave, we still cannot find a way to integrate new thinking into the normative boundaries of *halakha*.)” R. Fox tries valiantly, but ultimately his effort here falls short. We are left with a heavy heart, but as R. Fox writes as well, “We dare not pervert the Torah.” Ultimately, we have no choice but to turn to God, who declares, in the piece R. Fox quotes from Vayikra Rabba, “It is on me to comfort them.”