

Rabbi Aryeh Klapper

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Introduction

The pain experienced by people who sincerely wish to live in accordance with *halakha*, and who experience *halakha* as denying them any hope of a fulfilling sexual relationship, is a primary moral challenge facing the contemporary Orthodox community and its *halakhic* decisors. We are also accountable for those whose relationship with *halakha* broke under this stress.

Framing the challenge generically exposes one of the difficulties in addressing it. From an internal *halakhic* perspective, not all non-cisheterosexual relationships are alike. But from a political and sociological perspective, attempts to make distinctions based on *halakha* can be seen as avoiding the real issue or as attempting to play one group against the other. Rabbi Jeffrey Fox therefore deserves our gratitude for his courageous willingness to treat lesbian relationships in *halakhic* isolation.

The opportunity he provides is partially undermined by the parentheses in his paper's coda accusing "too many great *rabbanim* and *poskim*" of "viewing Torah through a lens that destroys the lives of gay women (and men)." That coda also risks amplifying a separate chilling effect on *halakhic* discourse – anyone disagreeing with his *halakhic* conclusions is presumptively a destroyer of lives, and anyone weakening the social or intellectual force of his arguments is abetting destruction. People reasonably avoid engagement that carries the risk of such accusations.

I don't pretend that Rabbi Fox's rhetoric is a significant contributor to that effect. On the contrary, his willingness to engage in a nominally open-ended *halakhic* conversation on this issue is another courageous contribution. I therefore feel responsible to engage with his work in the hope that such engagement still has constructive potential and will be received in that spirit.

The best prior *halakhic* discussion of female homosexuality that I'm aware of is in footnotes 13-22 of Rabbi Chaim Rapoport's *Orthodoxy and Homosexuality*. Rabbi

Rapoport concludes unequivocally that lesbian sexual behavior is forbidden and that the specific behavior of *mesolelot*¹ is Biblically forbidden according to most authorities and rabbinically forbidden according to all others.

The bulk of Rabbi Fox's paper is devoted to expansive presentations of primary and secondary sources that Rabbi Rapoport explained rather telegraphically, and to reweighting or reinterpreting some of those sources. He nonetheless reaches a conclusion diametrically opposed to Rabbi Rapoport's. My evaluation of his argument will therefore rest mostly on whether I find his reweightings and reinterpretations compelling, plausible, or mistaken.

Rabbi Fox's presentations of these sources comprise three arguments for the position that lesbian sexual acts violate at most rabbinic prohibitions. I'll discuss those arguments first, then move to Rabbi Fox's arguments for why those rabbinic prohibitions don't apply to contemporary lesbian couples.

Three Arguments that Lesbian Sexual Acts Violate No Biblical Prohibitions

Argument #1

Let's lay out the key texts as necessary to understand Rabbi Fox's reasoning.

a. Leviticus 18:3 prohibits Jews from acting *like the deeds of the land of Egypt in which you dwelled*. Sifra 8:12:8 identifies four marriages as *deeds of the land of Egypt* that Jews must not imitate: a man to a man, a woman to a woman, a man to a woman and her daughter, and a woman to two men. Since *halakha* doesn't recognize any of these marriages, any attempt by such couples to engage in *kiddushin* is *halakhically* meaningless. The limitation forbidden by Sifra must therefore be a sexual relationship. Sifra thus forbids some or all forms of lesbian sexual relationships as *like the deeds of the land of Egypt*. Possibly the prohibition applies only or especially if the sexual relationship parallels the expectations of *halakhic* marriage, for example if it entails sustained sexual exclusivity.

b. The Talmud in two places (Shabbat 65 and Yevamot 76) discusses Rav Huna's statement that the lesbian sexual behavior *mesolelot* makes the women involved

¹ Rashi Yevamot 76a defines *mesolelot* as genital-to-genital rubbing. Tosafot Yevamot 76a cite Rivan, defining it as mutually placing husbands' semen into each other's vaginas. Other versions of Rashi have a combined definition. Rashi Shabbat 65a might have a more expansive definition including mutual arousal without genital contact. Some cited versions of Rivan, and of the combined definition, might refer to women's "seed" rather than semen being secreted into each other's vaginas. Very little of this matters for Rabbi Fox's arguments. I'll point out when something is relevant.

ineligible to marry a *kohen*. Rashi on Shabbat 65 understands Rav Huna as making them ineligible only to marry a *kohen gadol*. Tosafot rejects this position of Rashi as incompatible with Yevamot 76.

c. Rambam asserts *mesolelot* is prohibited by the phrase in Leviticus 18:3 *like the deeds of the land of Egypt*. Tur and Shulchan Aruch follow Rambam.

d. Rashi, Tosafot, and the commentators from the school of Ramban do not cite Sifra or Leviticus 18:3 in their discussion of *mesolelot*, or anywhere else in a related context.

e. The failure of Rashi, Tosafot, and the commentators from the school of Ramban to cite Sifra or Leviticus 18:3 indicates that they disagree with Rambam and do not hold that Leviticus 18:3 prohibits *mesolelot*.

Rabbi Fox argues, based on the above, that Rambam is a minority opinion among Rishonim, even an isolated opinion -- “almost the only one.”

This argument misses positions that explicitly agree with Rambam and makes too much of the silence of those who don't cite him.

Rambam's position that *mesolelot* is forbidden by Leviticus 18:3 is cited without objection among Rishonim by (at least²) Orchot Chaim,³ Sefer Mitzvot Gedolot,⁴ Tur,⁵ Etz Chaim l'Rabbeinu Yaakov b'Rabbi Yehudah Chazan MiLondrotz,⁶ and Mabit.⁷ It is codified by Shulchan Aruch,⁸ and no commentator on the standard Shulchan Aruch page or indexed to this *halakha* by the Bar Ilan Responsa Project raises any *halakhic* objection to it. It is also codified by Aruch HaShulchan⁹. I am not aware of any *halakhic* code that rules otherwise or mentions any alternative to Rambam's position.

All the works of Rishonim listed above are mitzvah-lists or *halakhic* compendia. So far as I can tell, no Rishonic commentary on the Talmud either mentions Leviticus 18:3 or engages with Rambam. This is specifically true of Ramban's school, as Rabbi Fox notes.

² This list excludes Rishonim who cite Sifra but do not explicitly call the lesbian behavior it forbids *mesolelot*.

³ Hilkhhot Issurei Biah 27.

⁴ *Lo Taaseh*# 26.

⁵ Even HaEzer 20.

⁶ Hilkhhot Niddah ush'ar Arayot, Chapter 12.

⁷ Hilkhhot Issurei Biah 21:119.

⁸ Even HaEzer 20:2.

⁹ Even HaEzer 20:18.

Rabbi Fox contends that they must all disagree with Rambam. I see this as overreaching.

There are at least four possible explanations for a Rishon's failure to cite an apparently relevant precedent from a source they regard as authoritative:

- a. they might think the precedent is superfluous;
- b. they might be unaware of it;
- c. they might think it is not relevant;
- d. they might disagree with it.

I think option d is generally the least likely. The standard reaction in *halakhic* tradition to a contrary precedent is to cite it and disagree.

Certainly, failure to cite Sifra or Rambam is not by itself evidence of disagreement. One needs to explain why the omission is significant. We'll discuss the proposed explanation below. However, I think the most likely reason that Sifra and Rambam are not cited in the commentaries is that the Talmud never discusses whether the action of *mesolelot* (or any other lesbian activity) is forbidden. Sifra and Rambam are therefore irrelevant for the purposes of commentary.

Shabbat 65a-b and Yevamot 76a cite and discuss Rav Huna's statement that women who are *mesolelot* become ineligible to marry *kohanim*. But there is no necessary connection between the prohibition/permission of the activity and the eligibility/ineligibility of the woman performing the activity. Some sexual behaviors invalidate women for these purposes despite being permitted,¹⁰ and some forbidden sexual behaviors do not invalidate them.¹¹ So explaining Rav Huna does not require mentioning Sifra or engaging with Rambam.

Therefore, the commentators of Ramban's school may agree with Rambam's understanding of Sifra. Alternatively, they may disagree with Rambam and understand Leviticus 18:3 and Sifra as forbidding lesbian activities other than *mesolelot* or as forbidding *mesolelot* only in the context of a sustained relationship. Or they may see no reference to lesbian behavior in Leviticus 18:3. Their silence tells us nothing.

¹⁰ For example marital sex with a *chalal* (son of a kohen and a woman whom he was not permitted to marry).

¹¹ For example, sex while *niddah*.

Bottom line:

Rambam's *halakhic* position that Leviticus 18:3 forbids the action of *mesolelot* is explicitly assented to by all codifiers among Rishonim and thereafter, as well as several Rishonic mitzvah-lists and *halakhic* compendia. Rabbi Fox does not cite a single Rishon who explicitly disagrees with Rambam's position or mentions any alternative to it. He is therefore incorrect to describe Rambam's position as minority, let alone as isolated.

Argument #2

Rava (Talmud Yevamot 76a) rejects Rav Huna's position that *mesolelot* become invalid to marry *kohanim*. The Talmud¹² explains that this rejection holds even if one accepts the Tanna Rabbi Eliezer's¹³ position that nonmarital sex with a man whom she could *halakhically* marry invalidates a woman to marry *kohanim*. Even Rabbi Eliezer's position relates only to male partners because women being *mesolelot* is mere licentiousness, *peritzuta be'alma*.

Does the phrase *peritzuta be'alma* tell us anything about whether *mesolelot* is forbidden, biblically or rabbinically? Rabbi Fox correctly suggests that we look at the other two Talmudic passages in which the phrase appears, Gittin 89a and Sotah 26b.

Rava states on Talmud Gittin 89a that a woman's public reputation for having engaged in forbidden sex does not affect her *halakhic* marriageability to *kohanim*¹⁴ because the reputation may stem from people having observed her engaging in *peritzuta be'alma* (and not forbidden sex or an activity that creates a legal presumption of forbidden sex.)

The Talmud then states that Rava's position aligns with a dispute among Rabbi Meir, Rabbi Akiva, and Rabbi Yochanan ben Nuri. Rabbi Meir rules that a wife must be divorced as a presumptive adulteress if she eats, struts, or nurses in the marketplace; Rabbi Akiva says that she need not be divorced "until the women who spin by moonlight converse about her;" Rabbi Yochanan ben Nuri states that since this would lead to an epidemic of divorce, one rather needs "something clear." Rava presumably aligns with Rabbi Yochanan ben Nuri.

Rabbi Fox argues that since the behaviors listed by Rabbi Meir are not considered immodest behavior in all contemporary *halakhic* communities, it follows that *peritzuta*

¹² Or Rava himself.

¹³ Some texts have *אליעזר* rather than *אליעזר*.

¹⁴ According to Rashi. Other Rishonim think we are discussing an issue of adultery. I see no difference for our purposes.

be'alma can refer to behaviors that violate socially contingent modesty norms rather than objective *halakhic* rules. Therefore, just as spinning wool in public would (presumably) be permitted nowadays, we can similarly argue that the activity of *mesolelot* should be permitted nowadays, assuming that socially contingent norms have changed in relevant ways.

This argument puzzles me, for three reasons.

First, neither Rava nor the Talmud categorizes the actions listed by Rabbi Meir as *peritzuta be'alma*. Rashi in his explanation of Rava provides two examples of *peritzuta be'alma*, and neither is drawn from Rabbi Meir.

Second, even if we understood Rava to be responding specifically to Rabbi Meir's cases rather than as making an independent statement, that would not be evidence that every prohibition categorized as *peritzuta be'alma* is socially dependent.

Third, the social dependence of Rabbi Meir's cases is about whether these actions that are not intrinsically sexual still carry the implication of promiscuity, not about whether intrinsically sexual actions are permitted.

The other Talmudic use of *peritzuta be'alma* is on Sotah 26b. Rava there interprets a Biblical verse to say that a wife does not become a *sotah* if she violates her husband's demand that she not be intimate with another man "by way of limbs." Abaye responds that "by way of limbs" is *peritzuta be'alma*, and therefore a verse is not needed to exclude it. Rather, Abaye says, the verse is intended to exclude a woman who violates her husband's demand that she not be intimate with another man via "*neshikah*" (=genital-to-genital contact without penetration).

Rabbi Fox contends that "by way of limbs" includes "kissing, mutual masturbation, and oral sex." He adds that, because "the gemara here is referring to actions that might take place in public," "presumably, then, they are imagining kissing and touching each other's bodies."

I do not understand how Rabbi Fox reached the conclusion that kissing is included in sex "by way of limbs." So far as I can, tell this is false. For example, Rambam Issurei Biah 21:1 explicitly distinguishes "by way of limbs" from kissing. In any case, Rambam states there that for a married woman and a man other than her husband to erotically hug or kiss is a biblical offense for which they receive lashes. Therefore, even if one

understands “by way of limbs” as referring to kissing, Abaye would still be using the phrase *peritzuta be’alma* to describe an action that is Biblically forbidden¹⁵.

Rabbi Fox cites Keren Orah as stating that *peritzuta be’alma* relates only to the *sotah* issue and does not describe a broader prohibition, and that “the same might be argued in the *sugya* in Yevamot 76a. The use of the phrase ‘*peritzuta be’alma*’ is not intended to refer to a broader prohibition but is only לענין פסולי חיתון קאמר (was only said with regard to marriage ineligibility).” This apparently suggests to him that Keren Orah does not prohibit *mesolelot*.

If so, Rabbi Fox has gotten Keren Orah exactly backward. Keren Orah was afraid that readers would take *be’elma*, meaning “mere,” as implying that there is no biblical prohibition and therefore read the Talmud as rejecting Sifra. He thus explains that the phrase means only that the woman does not become forbidden to her husband. It does not imply that there is no biblical prohibition.

Similarly, saying that *peritzuta be’alma* in Yevamot is only said in reference to marriage ineligibility avoids the implication that the activity described is biblically permitted, thus avoiding a possible conflict with Sifra and Rambam.

Bottom line:

These texts provide no evidence that the use of the term *peritzuta be’alma* on Yevamot 76 means that *mesolelot* do not violate any Biblical prohibition or that the prohibition against *mesolelot* is societally contingent.¹⁶

Argument #3

Mishnah Yevamot 8:6 discusses an androgyne, a person with both male and female genitalia. For various legal purposes, is an androgyne considered male, female, possibly male and possibly female, or its own category?

Rabbi Shimon and Rabbi Yosei rule that if an androgyne who is a *kohen* married an Israelite woman, she may eat *terumah*. The Mishnah later states anonymously that an androgyne may marry (*nosei*) a woman but not a man.

¹⁵ Issurei Biah 21:1. I am not claiming that all Rishonim agree with Rambam about the status of kissing, nor that all texts of the Talmud include the word *be’alma* in all three contexts. But Rabbi Fox provides no evidence that any Rishon understood *peritzuta be’alma* as excluding the possibility of biblical prohibition.

¹⁶ *Peritzuta be’alma* may not relate to the degree and type of prohibition at all; or it may refer to a biblical prohibition, or to a rabbinic prohibition that is not societally contingent; or it may be an umbrella term for a category including multiple levels and types of prohibition.

The wife of a *kohen* is permitted to eat biblical *terumah*. On Talmud Yevamot 81a, Resh Lakish and Rabbi Yochanan dispute whether the position of Rabbi Shimon and Rabbi Yosei applies to biblical or rather only to rabbinic *terumah*. Resh Lakish says that it applies only to rabbinic *terumah*.

Talmud Yevamot 82b challenges Resh Lakish on the basis of the anonymous but undisputed statement in the Mishnah that an androgyne may marry a woman.

Rashi understands the challenge as follows: By forbidding the wife to eat biblical *terumah*, Resh Lakish indicates that the marriage is only valid *post facto*. The Mishnah's language, however, implies that the marriage is permitted *ab initio*. If an androgyne is permitted to marry a woman, then the androgyne must be considered *halakhically* male, so why wouldn't his wife have all the biblical-law privileges of a male *kohen's* wife?

Tosafot reject Rashi's understanding of the challenge:

אבל אין לפרש
דמדקדק מדשרי לכתחלה לישא
ולא אסרינן ליה לכתחלה מספק נשים המסוללות זו בזו,
דמאחר דמאכיל לר"ל בתרומה בזמן הזה דרבנן
לא מסתבר לאוסרו בתחלה מטעם זה

One cannot explain this by saying that the challenge is based on a derivation from the Mishnah permitting the marriage *ab initio* and not forbidding it *ab initio* out of doubt of “women *mesolelot* with each other,” because since according to Resh Lakish the androgyne “feeds” his wife rabbinic *terumah*, it would not be reasonable for him to forbid the marriage *ab initio* for that reason.

Tosafot therefore explain that the Mishnah's language implies that this marriage has all the legal effects of ordinary marriages, including allowing the wife to eat biblical *terumah*. This directly challenges Resh Lakish.

Tzofnat Paaneiach (R. Yisroel Rosen, the Rogatchover Gaon) explains that Tosafot must hold that *mesolelot* violate only a rabbinic prohibition. Otherwise, why wouldn't it be reasonable to ban the marriage because of the biblical concern of *mesolelot* and nonetheless permit the wife after the fact to risk violating the rabbinic rule against eating rabbinic *terumah*?

Rabbi Avraham min Hahar, who is for some reason not cited either by Rabbi Fox or Rabbi Rapaport, explicitly takes the position that Tzofnat Paaneiach attributes to Tosafot. However, no other Rishon mentions *mesolelot* in his commentary.

There are other ways of understanding Tosafot.¹⁷ One might, for example, say that Resh Lakish would not incentivize a marriage he thought was forbidden *ab initio* by permitting the wife to eat rabbinic *terumah*. On that understanding, nothing in Tosafot's discussion relates to our issue.

Tosafot's question also seems to ignore the reality of the androgyne's male genitalia. Even if one forbids lesbian sexual activity as *like the deeds of the land of Egypt*, and even if one thinks an androgyne is or might be considered female, there is no proof that an androgyne and a biological female violate this prohibition via the androgyne's male genitalia. I suspect this is why the other Rishonim don't mention *mesolelot*.

Finally, there are reasons other than Tosafot's for rejecting Rashi's reading of the Talmud's challenge to Resh Lakish.

Rabbi Fox misunderstands Lechem Mishnah, Noda b'Yehudah, and Cheker Halakha as suggesting that Rambam also accepts Tzofnat's Paaneiach's point and therefore that Rambam must also agree that *mesolelot* are not violating a Biblical prohibition.

Lechem Mishnah, Noda b'Yehudah, and Cheker Halakha do suggest that Rambam adopts Tosafot's explanation of the Talmud's challenge rather than Rashi's. But they do not suggest that Rambam rejected Rashi's approach for the same reason that Tosafot did. Rambam's reasoning, as they reconstruct it, is completely irrelevant to the question of what degree of prohibition *mesolelot* violate.¹⁸

¹⁷ Note that Piskei Tosafot records this Tosafot as ruling like Rava that women *mesolelot* are prohibited to marry a *kohen*!

¹⁸ Explaining what I understand to be Rabbi Fox's error clearly might take several pages, but here is an attempt at doing so briefly. Lechem Mishneh notes that Magid Mishneh understands Rambam as ruling that an androgyne's marriage to a woman is valid only out of doubt, because the androgyne might be considered female, and nonetheless Rambam permits the marriage. This is incompatible with Rashi's explanation of the Talmud's challenge to Resh Lakish, which reads the anonymous Mishnah as stating that the marriage is permitted, and then claims that this disproves Resh Lakish's position that the marriage is valid only out of doubt. Therefore, Lechem Mishneh etc. argue Rambam must understand the challenge as reading the anonymous Mishnah like Tosafot, as saying that the Mishnah's language implies that the wife may eat even biblical *terumah*.

However, the argument that Tosafot holds that *mesolelot* only violate a rabbinic prohibition is not based on Tosafot's explanation of the Talmud's challenge but rather on Tosafot's explanation of why they rejected Rashi's explanation of that challenge. Lechem Mishneh gives Rambam a different motive for rejecting Rashi, and therefore Lechem Mishneh has no implications for Rambam's position regarding *mesolelot*.

Bottom line:

Tosafot Yevamot 82b can plausibly be read as agreeing with Rabbi Avraham Min HaHar that lesbian sex acts, including *mesolelot*, are only rabbinically prohibited. Tzofnat Paaneiach read Tosafot this way.

Note that the argument in Tosafot cuts both ways. Tosafot hold that if one reads the challenge as Rashi does, one must hold that *mesolelot* violate a Biblical prohibition. Rashba and Ritva in fact do read the challenge as Rashi does, and I have not found any Rishon other than Rabbi Avraham Min Hahar who explicitly reads it otherwise. It follows that Rashi and Ritva, who is from the school of Ramban, agree with Rambam that *mesolelot* violate a Biblical prohibition. Using this argument to cast Tosafot as relatively lenient (holding *mesolelot* is rabbinic) therefore further undermines Rabbi Fox's claim that Rambam represents a minority opinion, and especially his claim that the school of Ramban disagreed with Rambam.

Arguments for Complete Permission

So far we've addressed Rabbi Fox's arguments for the possibility that lesbian acts violate only rabbinic prohibitions. These arguments were apparently made on the premise that it is always easier to claim that a law no longer applies because of changed circumstances with regard to rabbinic law rather than biblical law.¹⁹ We'll move now to Rabbi Fox's two arguments for how circumstances have changed and why the law should therefore not apply.

The first argument is grounded in Rav Moshe Feinstein.

Rav Moshe understands the Rishonim as offering two definitions of *mesolelot*. Rashi to Yevamot 76 defines it as genital-to-genital rubbing; Rivan cited by Tosafot Yevamot defines it as exchanging husbands' sperm from vagina to vagina.

a. Working with Rashi's definition, and within Rashi's comment on Shabbat 65 that Rav Huna only invalidated *mesolelot* from marrying the *kohen gadol*, Rav Moshe argues in Dibrot Moshe to Shabbat that this invalidation must only be rabbinic.²⁰ Why would the rabbis create an additional invalidation? Rav Moshe suggests that the Torah's requirement that the *kohen gadol* only marry a virgin suggests that he should not marry

¹⁹ I do not necessarily endorse that premise, certainly not without carving out exceptions. But this is not the place to discuss the issue at length.

²⁰ The only biblical requirement for a woman to marry a *kohen gadol* (as opposed to an ordinary *kohen*) is that she be a *betulah*/virgin. Rav Moshe assumes that only a *maaseh biah* can make a woman cease to be a *betulah* and further assumes that a *maaseh biah* is impossible without a male participant.

a woman with an overactive libido and that for an unwed woman to be *mesolelet* suggested to Chazal that she had an overactive libido.

b. In a letter to Rabbi Yaakov Breisch, author of *Shu"t Chelkat Yaakov*, Rav Moshe responds to a claim that Rivan's definition of *mesolelot* forbids artificial insemination by a non-husband donor for married women. His response is that the prohibition of *mesolelot* is categorized as *pritzuta* and therefore does not apply to circumstances where the intent is childbearing and there is no sexual stimulation.²¹

Rabbi Fox suggests that Rav Moshe's explanation of the prohibition of *mesolelot* according to Rivan should also be applied to Rashi's explanation but without the proviso against sexual stimulation. In other words, actions that would otherwise be categorized as forbidden *pritzuta*, such as lesbian genital-to-genital rubbing, should be permitted if done with the intent of childbearing. Because that form of lesbian sex is irrelevant to conception, he further suggests that the requirement of procreative intent should apply to the overall joining of a couple rather than to specific actions. This yields the outcome that lesbian couples who intend to have children are not engaged in *pritzuta*.

This argument takes so many steps beyond what Rav Moshe said that it cannot in any way be given his authority. I will leave it to readers to evaluate its intrinsic merits.

Rabbi Fox's second argument for permission is grounded in Prisha.²²

Prisha tries to find a common denominator between the four cases that Sifra categorizes as *like the deeds of the land of Egypt*: marriage of one man to another, marriage of one woman to another, marriage of a woman to two men, and marriage of a man to a mother and her daughter. His (to my mind highly implausible) solution is that all of them involve marriages intended for sex without procreation. Thus male and female homosexuality, and two cases where (he claims that) a husband will sleep with a wife but try to avoid impregnating her.

Prisha also suggests that Tur, and perhaps even Rambam and Sifra, regard *mesolelot* as only a rabbinic prohibition, and Leviticus 18:3 as an *asmakhta* for that prohibition. This suggestion seems implausible in light of their clear formulations. For example, Rambam Issurei Biah 21:8 states:

²¹ Chelkat Yaakov found this argument risible – "דברים כאלו מביאין לידי גיחוך". Deborah Klapper argues that Rav Moshe's logic is incoherent even within Rivan: "There's no conceivable reason for women to do what Rivan describes unless it's to get pregnant."

²² Rabbi Yehoshua Falk, 1555-1614. Commentary on Tur.

נשים המסוללות זו בזו - אסור
וממעשה מצרים הוא שהוזהרנו עליו
שנאמר כמעשה ארץ מצרים לא תעשו

Women who are *mesolelot* with each other – this is forbidden
and it is from *the actions of Mitzrayim* that we are cautioned about this
as scripture says: *Like the actions of the land of Mitzrayim you must not do.*

Rabbi Fox argues that in our age, when technology allows procreation without sex, Prisha's rationale is no longer a sensible reason to forbid lesbian marriages, especially if the couple intends to raise children together.²³ (This argument generates complete permission even within Prisha only if one identifies the prohibition of *mesolelot* with Leviticus 18:3 and Sifra; otherwise, the prohibition against *mesolelot* may have an entirely different basis.)

Again, I leave it to readers to evaluate this argument on its own merits, but it self-evidently cannot in any way be given the authority of Prisha.²⁴

Bottom Line

Rabbi Fox presents two rationales for saying that lesbian sex in the context of ambitions to rear children together no longer violates *halakha*, while conceding that it did in the past. These arguments are made by taking rationales offered by Acharonim for prohibiting lesbian sex and arguing that those rationales no longer apply. Rabbi Fox does not pretend that the Acharonim who offered those rationales would agree with him that they no longer apply.

²³ Deborah Klapper notes that this logic, applied consistently within Prisha, should also lead to permitting the other three cases. However, Prisha would concede that the other cases are biblically forbidden by verses other than Leviticus 18:3, and perhaps the other prohibitions have different rationales.

²⁴ Rabbi Fox additionally quotes an obscure contemporary book of *responsa* regarding the following case. A married woman has been sexually abandoned by her husband and is experiencing overpowering sexual urges. She asks whether she can have sex with a woman to quell those urges. The author reports that he considered permitting her to have a “modest woman” come in once a week to masturbate her although he ultimately did not permit this. Rabbi Fox seeks to derive from here a position that lesbian activity is permitted when done in a modest fashion.

Leaving aside the question of whether this source carries any *halakhic* authority, especially within the Modern Orthodox community, it seems to me most likely that the respondent's logic is that the woman is otherwise likely to commit adultery to satisfy her sexual urges and that he considered permission was based on the logic of Sefer Chasidim as cited in Chelkat Mechokek (EH 23;1), which permits a man to masturbate to ejaculation to relieve sexual pressure when it seems that the likely alternative is adultery or sex with a woman who is a *niddah*.

Summary: The State of the Argument and the Evidence, and Where We Go from Here

The previous sections established that many Rishonim held like Rambam that the action of *mesolelot* is biblically forbidden. The only known exceptions are Rabbi Avraham min Hahar and Tosafot as read by Tzofnat Paaneiach. This is contrary to Rabbi Fox's assertion that Rambam's position is held by a minority of Rishonim, that he is "almost the only one."

Furthermore, Rabbi Fox cites no precedents among Rishonim or Acharonim for the idea that the prohibition is societally dependent, regardless of whether it is biblical or rabbinic.

Finally, the criteria for assessing relevant social change that Rabbi Fox extracts from Acharonim do not apply to the lesbian couples he seeks to permit.

I reiterate that Rabbi Fox deserves credit for arguing within the frame of normative *halakha*. He might, for example, have argued that past *halakha* simply erred in treating lesbian sex as forbidden, or even as less valuable than heterosexual sex. Or he might have followed Rivan and argued that *mesolelot* means the transfer of husband's semen from one vagina to another and that other lesbian activities are not prohibited at all.

Somewhat less radically, Rabbi Fox might have argued that the need of the hour justifies relying even on an isolated Rishon rather than conceding the need for a majority. As noted in the body of this response, Rabbi Fox cited Tzofnat Paaneiach and other Acharonim who read Tosafot Yevamot 82b as holding that *mesolelot* violate a rabbinic rather than a biblical prohibition. He also cited Prisha's highly implausible claim that Tur and perhaps Rambam agreed. Finally, Rishon Rabbi Avraham min Hahar takes that position explicitly, probably on the grounds that Tzofnat Paaneiach attributes to Tosafot.

Of course, even after making that argument, Rabbi Fox would, in my humble opinion, still need a much stronger *halakhic* argument for eliminating the rabbinic prohibition than his paper presents. He would also have to discount the possibility that Sifra prohibits something other than *mesolelot*, perhaps precisely the sort of marriage-like relationship that he seeks to permit.

The hard truth is that only broadly acceptable *halakhic* arguments can address the pain and needs of people who wish to live in the communities that define themselves by such arguments. Other sorts of arguments will leave them still outside the communities to which they seek to belong.

Coda

There is no obligation to believe that *halakha* as currently practiced and decided is perfect. I support Rabbi Fox's right to assert that current *halakha* regarding lesbian couples is morally wrong and to continue to seek *halakhic* arguments that will convince individuals and communities with *halakhic* authority and integrity to change their practices and decisions. For the reasons set out in the body of this response, I don't believe that his present paper is likely to accomplish this.

However, Rabbi Fox's arguments for complete permission accomplish something very important: they make clear that Orthodoxy currently lacks a coherent articulation or account of a *halakhic* sexual ethic. As Rabbi Fox points out, if we permit and sometimes even encourage married women to become pregnant without sex from men other than their husbands, how can we say that the connection between marriage, sex, and procreation is inviolate?

Many similar questions can be asked – about single mothers, frozen gametes, IVF, and more. Technological advances, *halakhic* compassion, and realism about what restrictions the community will accept have made once-standard claims about the connection of sex to procreation, procreation to sex, procreation to marriage, and marriage to procreation difficult to sustain. What remains is a claim that the connection between marriage and sex is absolute and that the definition of marriage is unchangeable despite all the other changes.

This does not mean that lenient, compassionate decisions on infertility issues etc. are wrong or should be undone.²⁵ But we need to acknowledge that they have left us in ideological tatters. Until we redevelop a clear, coherent, comprehensive, and compelling account of what *halakha* says about sex and sexuality, the pressure to do anything and everything necessary to relieve immediately visible suffering will intensify, whether or not the advocated-for measures are likely to diminish that suffering.

We also need to acknowledge that for many Orthodox Jews, especially those born in this century, the failure of Orthodox ideology to adequately address homosexuality goes well beyond the moral challenge posed by suffering. They simply don't understand why this is an issue.

²⁵ Although we must acknowledge the possibility that some leniencies will be rolled back, and that this too will have a significant cost in human suffering.

At the end of the day, I think those who oppose completely permitting lesbian coupling – and on a larger scale, who oppose the complete unwinding of *halakhic* cisheterocentrism -- will need to produce a rationale for prohibition that is intelligible to much of the upcoming Orthodox generation. “*Chokification*”²⁶ is not a viable strategy here for any length of time.

I don’t have such a rationale formulated. But recognizing that my response might make things worse, by obstructing the application of an intellectual fig leaf, I owe at least an attempt at the beginnings of an approach.

Rambam²⁷ grants that *halakha* may hurt innocent people, more in some times and places than others, just like – the analogy is his – the laws of nature sometimes result in people being injured. He maintains that the job of *halakhists* is to minimize the number and severity of injuries while maintaining the law²⁸ because loss of the law will cause greater harm than the law causes.

This seems to me the first principle of any viable approach. **It means that we cannot blame the victims of the law. Rather, we must do all we can to mitigate its negative effects on them.**

It is in the nature of Maimonides’ framework that the harms of staying the course are often immediately evident whereas the harms of change often manifest in the long term. This is an element of the larger challenge of making good public policy for a broad community while displaying a decent regard for the needs and experiences of those most directly affected.

Granting that some of the *halakhot* regulating sexual behavior directly injure some people, and granting the possibility that they injure more people in our time and place than they had in previous times and places, we must still ask how best to diminish the number of people harmed and the severity of the harms done while maintaining the law.

²⁶ *Chokification* refers to the process of relating to a mitzvah previously thought to be rational as instead commanded for no humanly intelligible purpose. See e.g. <https://moderntoraleadership.wordpress.com/2015/07/03/chok-mishpat-and-obergefell/comment-page-1/>.

²⁷ Guide 3:34. See also Mishneh Torah Hilkhhot Mamrim 2:4.

²⁸ “Maintaining the law” is a difficult idea. I understand Maimonides to mean both the specific law, conceived of very abstractly, and also the overall structure of legal authority. The two are connected via Plato’s idea that any change to the law diminishes its perceived authority.

Rabbi Fox's arguments for permission make no claim that sexual orientation is immutable, nor would they limit the permission to women who reasonably believe that their orientation is exclusively and immutably homosexual. They apply to any woman of any sexual orientation.

While Rabbi Fox's specific arguments apply only to ciswomen and lesbianism, I assume²⁹ that the aspiration is to permit all women and men to choose their romantic partners without regard to physical sex or social gender. I honor his integrity in implicitly acknowledging that no viable *halakhic* arguments for those next steps are available.

Those of us who contend that fully unwinding cisheterocentrism will have dangerous long-term effects must make every effort to gather corroborative data and be open to the possibility of being proven wrong. We are entitled to demand the same of those who disagree with us and to subject claims of short-term harm to rigorous empirical and statistical scrutiny. No serious and honest moral or *halakhic* conversation can take place on this issue unless each side's narrative is challengeable.

My hope is that competing but also complementary urgencies – to mitigate the immediate harms in our times and places caused by *halakha* as currently decided and practiced, and to construct and live with integrity by a sustainable vision of the overall good toward which *halakha* strives – will inspire all of us to do our best Torah work in a genuine effort to convince each other, and that pragmatically useful and spiritually satisfying truths will emerge from a dispute for the sake of Heaven. But we have a very long way to go.

²⁹ See his parenthesis mentioned in my Introduction.