

Rachael Fried

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A Note on Language

Before sharing my response and thoughts on this *teshuva*, I believe it is essential to discuss the language used here. While this may seem like a small detail to some, for others it is the difference between this *teshuva* directly applying to their lives or being completely irrelevant.

Understanding the difference between descriptions and identities is necessary in order to have a productive conversation about LGBTQ individuals. A description is something tangible and objective that can be seen and characterized, and it can include definitions of actions, behaviors, body parts, and more. Identity, on the other hand, cannot be seen. One can only know another person's identity if that person proactively shares it with them, similar to a name. People can have more than one name, they might use different nicknames in different contexts, and they can hate certain versions of their name altogether. The only way to know about someone's name or identity is to ask or to be told by that person.

One cannot know the identity of an individual based on their actions, behaviors, or body parts, and vice versa. A person's behaviors cannot be assumed just based on knowing someone's identity.

It is deeply bothersome when one concludes that any LGBTQ identity is only about a person's sexual activities, desires, or body parts. Conflating identity and the description of bodies and actions sexualizes individuals inappropriately and minimizes identities into desires alone. Each of the letters of the LGBTQIA+ community is about how a person describes themselves in their identity and not about who they want to sleep with or how.

There are very few times when descriptions should be used over identity language. One example of such a time is in medical care. There, the anatomy of an individual and the activities in which they engage with their bodies matter. It is respectful for a

medical professional to ask about a person's identity, but at the end of the day, it is more important for them to understand the person's physical being so that they can understand and medically treat their patients accordingly.

Another time when descriptions of bodies and actions apply in a way that they do not apply elsewhere is in *halakha*. *Halakha* is all about actions and, to my understanding, cares very little about how a person identifies. For example, *halakha* is less concerned about whether a person identifies as a kind individual but cares very much about whether that person's actions are in accordance with the *ben adam l'chaveiro mitzvot* (interpersonal commandments) they are given. Examples of this include not speaking *lashon hara*, not cheating in business, not taking revenge, giving *tzedakah*, paying workers on time, taking extra care of widows and orphans, and so on. So too, *halakha* does not care about the queer identity of an individual but the individual's actions.

With that in mind, it seems clear to me that this *teshuva* is about actions and bodies rather than identities. The concept of "*nashim mesolelot*" is concerned with two individuals – both of whom were assigned female at birth and have vulvas – having some kind of sexual interaction with each other. This description can apply to a plethora of identities including (but not limited to) cisgender lesbian women, bisexual cis women, some trans men, nonbinary individuals who were assigned female at birth, women who have sex with women (WSW) who do not identify as queer, and many others. It might not apply to cis women who are on the asexual spectrum, trans women, or a number of other queer-identified folks.

For the sake of including all of the relevant individuals and identities, I use the *halakhic* term "*nashim mesolelot*" as much as possible rather than writing out the more graphic description of the relevant body parts and actions each time I refer to these individuals. Language is limiting, and a shorthand term for this specific interaction with these particular individuals does not feel easily accessible or sufficient.

Assumptions and Generalizations

I once gave a presentation to staff at an all-girls school and asked the audience to articulate the first question that came to their minds when they thought of an LGBTQ Orthodox teen. One brave rabbi slowly raised his hand and answered, "Is he active?"

I appreciated his honesty and suggested we unpack his answer a bit. We were at an all-girls school having a conversation about potentially queer students, and yet the assumption in the room was that we were talking about cis gay men and whether they were sexually active or not. We were supposed to be talking about teenage girls, but

we did so through the lens of an adult male interaction.

This way of thinking about queerness is unfortunately more the norm than the exception. In conversations throughout various Orthodox communities, when LGBTQ topics come up, the conversation is almost always framed around cis gay men and their sexual desires or actions. As a person for whom that conversation does not personally apply, I find this framing confusing at best. It never made sense to me that a person could engage in a debate with me about queerness in Orthodoxy while centering an experience that they almost certainly assume has nothing to do with me. Cis gay men are only a fraction of the LGBTQ community, yet *halakhic* conversations almost exclusively revolve around that fraction.

Outside of the social conversations, much of the Torah focuses on men and largely ignores the experience of individuals who are not men. It is a new level of gaslighting to discriminate against a whole community based on something that isn't written in the Torah at all. Two sentences in Vayikra specifically talk about a man lying with a man as he would with a woman. I have considered the fact that I almost wish the *pasuk* did include women so that at least I could be part of the narrative. Instead, women are treated as if the Torah prohibitions apply to them directly when they aren't even written in the story. To me, this represents one of the worst kinds of erasure. Discrimination without true *halakhic* backing is prejudice disguised as Torah, and it weaponizes our Torah.

After exploring the sources, it seems clear to me that sex without a penis involved is not considered *halakhic* sex at all. Because of this, *nashim mesolelot* is considered “mere licentiousness” at worst. I am conflicted about this answer. On the one hand, it is nice for us to permit as many LGBTQ-positive interactions as possible. On the other hand, the reason it isn't clearly *assur* is because it is basically not considered real. This is yet another form of erasure.

It would behoove us to check our assumptions in this dialogue. While the LGBTQ community is one larger community, there is a different *halakhic* conversation to be had around each letter. Focusing on just part of the “G” does everyone a disservice.

Women as Sexual Beings

As a girl growing up in same-sex Orthodox schools and environments, the messaging I received over and over again was that I had to abstain from certain things so as to not inadvertently tempt the men around me. I was taught that girls should not show their elbows, knees, or the separation of their two legs, and they should not sing out loud lest a man be aroused by the sight or sound of them. As a young person, being

the rule follower that I am, I obeyed these rules and did what I was told.

As I got older, I wondered why it was that I had to restrict myself in so many ways while the men around me did not. They could show more of their limbs and sing aloud beautifully without reservation. Men playing sports or being loud was even celebrated whereas, for women, the same behaviors were considered immodest. This taught me two important messages about women: 1. Women do not have sexual desires and are not sexual beings. No one has to worry that a woman might be attracted to someone else for the things that they did, said, or wore because those things were simply irrelevant. 2. It is women's responsibility to make sure that men are not inappropriately attracted to them. It was more important to teach me to cover my elbows than it was to teach the men around me to not sexualize women – elbows and all.

Reading this *teshuva* was a new experience for me, one where I finally heard *halakha* acknowledge women's desires as real, important, and relevant. Regarding *nashim mesolelot*, it is said "A man should keep his wife away from this matter. He should stop women who are known to engage in this behavior from coming into his home, and keep his wife from going to them." Some women might have such strong desires, in fact, that it is on the husbands to protect their wives from this uncontrollable lust that their wives might experience. The strong and unruly urge that I was taught exists in all men might also apply to women, and it is men's responsibility to stop that from happening. This is an interesting gender role reversal that *almost* feels progressive in this context.

Rav Moshe Feinstein also acknowledges that there must be at least some women who are sexual beings since he describes *nashim mesolelot* as individuals who have such an incredibly strong sex drive that they must want to have a sexual encounter with every type of person they meet, regardless of gender. Of course, this is considered a bad and shameful quality in women. Meanwhile, as a child I was taught almost this exact same logic about men in a matter-of-fact way with no accompanying stigma.

Rabbi Chaim David Yosef Weiss reinforces this idea in response to a question he received regarding a woman whose husband would not have sex with her. The question asks whether or not she is permitted to be intimate with another woman given that her needs are not met by her husband. His answer is that we should strongly rebuke the husband (as if this will make the husband more likely to want to engage sexually with his wife) and that sexual intimacy between two women is "*pritzus*." He says that this should only be done when there is a great need, in a humble way with a humble woman. Rabbi Weiss then continues on to change his mind in his final sentence, taking back what he wrote in the previous one. It is as if he is saying never mind... this is only hypothetical, and actually it isn't allowed anyway.

Regardless of the outcome, this was the first time I'd heard of some *halakhic* acknowledgment of women having their own desires and interests in other people. In this way, these conversations among the sages feel oddly validating.

Social Norms Versus *Halakha*

I have long hypothesized that much of the conversation around queerness in *halakha* has grown from a place of societal norms and communal fears more than from *halakha* itself. There are a number of sources in this *teshuva* that further prove this idea for me.

A most fascinating example is the case of an “*androgynos*” – a person with both male and female genitalia. This is what is now referred to as an intersex individual. The Intersex Society of North America defines intersex as “a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn't seem to fit the typical definitions of female or male.” It is what the “I” in LGBTQIA stands for.

While it may sound uncommon, it is estimated that roughly two percent of the general population is intersex. This is the same percentage of individuals who have red hair. Two percent might sound small, but I would venture to guess that the majority of individuals in the US either know or know of more than one person who has red hair. Seeing a new person with red hair might be noteworthy, but is likely not so uncommon that running into a redhead would cause shock. An intersex person can present with all kinds of gender expressions, including, but not limited to, more traditionally masculine or feminine presentations. It is quite likely that most individuals unknowingly have at least one intersex person in their life.

An intersex individual, according to the Mishnah, can marry a woman but cannot marry a man. The Mishnah is so emphatic on this count that it states that a man who has intercourse with an intersex person should be stoned. The broader topic of intersex individuals, as R. Fox mentions, is outside the scope of this *teshuva*. It is relevant, however, when considering the concept of social norms versus *halakha* in the case of *nashim mesolelot*. An intersex individual could present as a cis woman or a cis man, and they can *only* marry a woman regardless of how they look on the outside. The idea that a person could present as a woman and only be permitted to marry a woman is quite radical.

It is not uncommon for a person to find out they are intersex later in life. This means that if someone who identifies as a lesbian finds out she is intersex, she can marry a

woman *with kiddushin*. Furthermore, but that lesbian individual is forbidden from marrying a man even if she wants to. While this may be the *halakha*, an intersex person who presents as a woman would be more accepted in any Orthodox community if she married a man despite the fact that it may be punishable by stoning. This is because, if we are honest with ourselves, social norms and communal expectations are very strong and can overpower *halakha*. The appearance of a lesbian couple is far more taboo than the appearance of a straight couple, regardless of whether or not their relationship falls within a forbidden category.

In another example, Rashi, Tosafot, and Rishonei Sefarad say that *nashim mesolelot* is only prohibited when the individuals are married to others and engage in this sexual behavior on the side. According to this, *nashim mesolelot* is not about intimacy between two unmarried individuals.

The irony of this delineation is that many rabbis and community leaders promote the idea of gay men and lesbian women marrying each other so that they can be part of the community and live “normal” lives. In these arrangements, it is often understood that those two individuals will have extramarital encounters. There are *shadchanim* (matchmakers) who specifically arrange such relationships despite the fact that they might be even more prohibited than two unmarried women being intimate with one another.

Rabbi Navon is another example of someone who assumes that “*nashim mesolelot*” is not allowed. In fact, he is surprised when he looks in the Torah and finds no such prohibition. It is noteworthy that he assumes this action was not allowed until he could not find anything otherwise. Why would he assume something that he has not seen prohibited is certainly not allowed? And why would he be so shocked when discovering that there is no Torah prohibition?

This is exactly where the Modern Orthodox community is today. Orthodoxy assumes that all queer individuals engaging in any kind of sexual behavior is equal to violating the Torah prohibition, and yet the prohibition is not always there. If we focused more on Torah than we did on communal norms, lesbian women would be treated differently and spoken about in a different way than gay men are. In my experience, almost all queer individuals are discriminated against in the same way, which leads me to believe these prohibitions are based on a social construct and have little to do with actual *halakha*.

I can appreciate that both groups threaten Orthodox systems in a similar way. What does *shomer negiah* mean when we acknowledge that perhaps not everyone identifies as the gender others assume them to be? Or that some people are not romantically

interested in the gender that others expect them to be? What happens to *mechitza* and *yichud* and Jewish summer camps? These are all valid questions that we should contemplate, but we can be brave enough to be intellectually honest with ourselves. Orthodoxy has systems built based on these assumptions, and admitting that those foundations might not work for everyone is scary. Feels of fear or threat are very real, but hiding under the cloak of Torah prohibition is not the answer.

Prejudices and Loopholes

Rashi says that the behavior of *nashim mesolelot* “is not the way of the world.” I am curious on what that comment is based because it seems possible that it is rooted in a feeling that Rashi had. It is interesting to me that so many men are willing to write so confidently about an issue that does not involve them at all. It is unlikely that these individuals would know what the “way of the world” is, practically speaking, for a population and a private action that does not include them.

Furthermore, Rambam states “that offensive act that happens between women who lie one with the other...it is an abominable act...but has no punishment from the Torah or from the Rabbis.” This sounds like he is talking about a behavior that feels offensive and abominable to him but one that isn’t explicitly stated anywhere else as such and has no consequences. This sounds more like name-calling based on a general feeling of ickiness (i.e. bias) than anything else.

In the Mishneh Torah, Rambam also says “...even though [*nashim mesolelot*] is forbidden, the court does not give lashes for it, because there is no specific prohibition and there is no actual intercourse. Therefore she is not prohibited from marrying a priest due to *z'nut* and she is not prohibited from [being with] her husband...because there is no [issue of] *z'nut* here. And it is appropriate to hit them with blows of rebellion, since they have committed a violation.” This whole paragraph seems to be a contradiction in and of itself: the act itself is not real and therefore there is no violation against it. However, if it happens, it is appropriate to hit them because they have committed a violation. What could they possibly have violated, given that Rambam just said in the previous sentence that no violation occurred? This again sounds like it is written based on personal bias rather than on any *halakha* or text.

Even in the most right-wing circles, Orthodoxy is a branch of Judaism that relies heavily on creative loopholes. I have always appreciated that the community makes room for innovation within very specific boundaries. My favorite example regards eating meat during the nine days before Tisha B'Av when eating meat is prohibited. Friday night and Shabbat day are exceptions where meat is encouraged, so there are

actually only seven days (or fewer, depending on how the days fall out during the week) when eating meat is not allowed. This seems easy enough, especially today when there are so many kosher meat alternatives available to the masses, and yet, Orthodox Jews *must* find a way around this restriction every year. If someone finishes learning a specific set of texts and holds a *siyyum* in celebration, all who are present can eat meat along with them. Many learn for months leading up to the nine days so as to be able to hold a *siyyum* then. Some meat restaurants remain open during those seven days, assuming that there will be numerous celebrations each year so that meat can be eaten.

Similarly, it is prohibited to carry outside the walls of a city on Shabbat, and for this we have a huge loophole: we build an *eruv* (invisible fishing wire fences) in almost every community so that we can carry within those city “walls.” It is also prohibited to own *chametz* during *Pesach*, but we’ve found a way around this as well. Rather than discarding all the *chametz* one owns, one can sell it (or sometimes even sell entire houses that contain *chametz*) to a person who is not Jewish. It is understood that those items will be sold back within hours of the holiday ending, so that people can resume eating their favorite snacks in their homes as they typically would.

These examples continue on in amazing ways. The question that I am left with is this: for whom do we go out of our way to find these loopholes?

The Prisha in Even Haezer discusses marriages between two people who cannot procreate; in his example, these are two cis men or two cis women who marry each other. The problem he sees is that these marriages are not formed for the purposes of procreation. According to the logic of this source, any couple who knows that they cannot procreate (for example, a straight heterosexual couple where the woman has no uterus) would also fall under the same category of prohibited marriages.

Today, two straight people who knowingly cannot procreate can marry without having the stigma that queer couples face in Orthodoxy. There are loopholes for them because the idea of a man and woman getting married, even if not for the sake of procreation, feels “normal” to community leaders and members. Perhaps we are relying on science, which allows for various kinds of procreation for people who have not been able to have children in the past. Notably, this technology is also available to same-sex couples.

So again I ask, who are the people for whom we are finding loopholes and who are the people not afforded that privilege? I believe that pre-existing biases and personal prejudices play a major role in determining the answer to this question. There is a greater willingness to create loopholes for those who are considered more

“mainstream,” and there is a major barrier for any person or situation who might make Orthodox leadership even slightly uneasy.

Conclusion

I believe that *nashim mesolelot* should be a straightforward loophole for Orthodoxy to find its way around. It is telling that it took this long for a rabbi to formally write about this subject in this way, and I am grateful to Rabbi Fox for taking this leap, knowing it will likely be an unpopular opinion – one that makes other leaders quite uncomfortable.

We jump through hoops to carry on Shabbat and bend over backwards to double wrap our food so we can heat it up in non-kosher ovens. If we can do *halakhic* gymnastics to keep our carbs for the one week we aren't supposed to own them, surely we can figure out a way for *nashim mesolelot* to be dignified members of the community with opportunities for *simcha* and fulfillment.