

Halakhic Issues Facing Non-Binary Jews

RABBA ALIZA LIBMAN BARONOFSKY

Question: How can halakhically observant Jews who identify as non-binary make halakhic choices in a fundamentally binary system?

Some of our children look in the mirror and know for a fact that they are neither male nor female. Depending on where they live, they may find a community that welcomes them with open arms or one that disputes the very fact of their identity. *Halakhic* Judaism is fundamentally gendered. From the very first verse that describes creation, the rabbis have interpreted humanity as fundamentally binary as Genesis 1:27 says, “וַיִּבְרָא אֱלֹהִים אֶת-הָאָדָם בְּצַלְמוֹ יוֹקֵד וְיֹקֵדָה” — “Male and female [God] created them.” This binary carries through a plethora of laws, where the rabbis discuss how the Torah applies differently to men and to women. In our critical text, Bikkurim 4, the rabbis ask, “how do we classify someone who does not fit?” Every categorization is along the gender binary. How should *halakhically* observant Jews who identify as non-binary or whose children identify as non-binary navigate the inherent cultural and *halakhic* issues that arise?

Our motivation here is clear: people who identify as non-binary exist in our families and communities. The scientific community continues to acknowledge this phenomenon as having scientific basis though they cannot yet fully explain it. In the *Journal of Endocrinology*, biochemistry professor Charles Roselli writes, “The establishment of gender identity is a complex phenomenon and the diversity of gender expression argues against a simple or unitary explanation.”¹

Gender non-conforming members of our community, particularly youth,

1. Roselli CE. Neurobiology of gender identity and sexual orientation. *J Neuroendocrinol.* 2018 Jul;30(7):e12562. doi: 10.1111/jne.12562. PMID: 29211317; PMCID: PMC6677266.

are at particular risk if not fully welcomed into our communities: “Suicide risk among transgender and nonbinary (TGNB) youth is a public health crisis... existing research consistently finds that TGNB youth have worse mental health and greater suicide risk compared with cisgender youth, including cisgender lesbian, gay, bisexual, queer or questioning (LGBQ) youth.”² Writing in the peer-reviewed journal *Transgender Health* in 2021, Price and Green conclude that gender identity acceptance by peers and adults is associated with lower rates of suicide attempts. This preliminary data should be sufficient for us to take action in our communities to accept non-binary youth fully for who they are. The primary question is how we can do so within the *halakhic* system.

One possible approach is consider a case where *halakha* recognized that some humans were not definitively male or definitively female. This approach could help establish a *halakhic* framework for thinking about people who don't fit the binary. How did *chazal* handle gender difference? The Talmudic category of the “*androgynous*” (אַנְדְּרוֹגִינּוֹס) is fertile ground for this discussion. The Mishnah and later texts, including the Talmud in Yevamot and elsewhere, Maimonides in his Mishneh Torah and Rabbi Yosef Karo in his Shulchan Aruch recognize that someone could be born with the biological characteristics of both men and women such that that there may never be a way to determine (using their medical knowledge) into which biological category this person fits.

Categorization is extremely important: many aspects of a person's life in the times of the Mishnah were defined by biological sex. Mishnaic and rabbinic sources cover everything from marriage and intercourse to personal purity, financial valuation, and performance of *mitzvot*. The rabbis see the world in a gendered way and feel compelled to classify this person so that they know how the law applies to them. There are three ways it is possible to classify the אַנְדְּרוֹגִינּוֹס:

1. The אַנְדְּרוֹגִינּוֹס is a *halakhic* male. In this reading, the presence of a penis defines a person as male, and the additional presence of female reproductive organs does not change this person's fundamental status.

2. Myeshia N. Price and Amy E. Green. Association of Gender Identity Acceptance with Fewer Suicide Attempts among Transgender and Nonbinary Youth. *Transgender Health*. <http://doi.org/10.1089/trgh.2021.0079>.

2. The אנדרוגיניוס is a case of doubt (*safek*), and we will never be able to resolve this doubt one way or another.
3. The אנדרוגיניוס is a third category of human altogether.

It is noteworthy that there is no classical opinion that suggests that an androgynous individual is female, in what is likely the converse of opinion #1: If a person has a penis, the rabbis cannot imagine any way to see this person as fully female.

If *poskim* are willing to rule *halakhically* for the third position, we can begin to map out a framework for how a person who is definitely not male and definitely not female can fit into the *halakhic* system. Living in a Jewish community, the questions that may arise regarding the non-binary individual include, but are not limited to, how one should dress; whether one may shave their *peyot* and beard (if applicable); whether one may have *yichud* (isolation) with a man or with a woman; whether one is obligated in positive, time-bound *mitzvot*; and whom one can *halakhically* marry. The most challenging issues are the biblical ones, like marriage, where we cannot simply rule leniently in a case of doubt.

Fundamental Challenges Inherent in this Approach

In the classical sources, discussion of the gender binary revolves entirely around observable biological differences. In this case, we are looking to make space in Jewish tradition for those whose gender identity is different from their biological designation by not conforming to the binary established by society and by traditional Jewish practice. The rabbis of the Talmud spoke only of biology, but in our era the scientific community recognizes that gender identity is separate from biological sex, leaving us with a *halakhic* conundrum. In our era, religious leaders who search in the classical texts for help resolving questions about gender and *halakha* must rely on texts that only consider biology. When modern rabbis do so, they apply gender to cases that only considered biology. To say that one applies to the other requires a cognitive leap.

It is clear in certain cases that the rabbis rely heavily on biological reality in their decision making: in many cases, the presence of a penis and the rabbinic bias to associate male identity with a penis is a major driver behind their rulings. We will have to contend with this fact as we study the אנדרוגיניוס.

Mishnaic Sources

The fullest treatment of the case of the אנדרוגינוס is found in the fourth chapter of Masechet Bikkurim. However, this chapter may not truly be from the Mishnah; despite some textual differences, it largely comes from the Tosefta Bikkurim. This chapter's omission from all authoritative editions of the Mishnah means that many classical Mishnah commentaries never discuss it. Having fewer commentaries and less well-developed discussion of it also limits how much material we have to work with as we analyze this chapter.

We'll first consider the appearance of the אנדרוגינוס in other tractates of Mishnah before returning to the comprehensive discussion in Bikkurim. As outlined above, in some cases in the Mishnah, the אנדרוגינוס is treated as definitely male while, in other cases, the אנדרוגינוס is treated as a *safek* (unresolvable doubt) or as a third category. The difference between the latter two can be subject to dispute based on the scant information present in most *mishnayot*.

The best evidence for the אנדרוגינוס being definitely male is that the Mishnah in Yevamot 8:6 allows the אנדרוגינוס to marry a woman, and if this person is a kohen, enables her to eat *teruma*:

רבי יוסי ורבי שמעון אומרים, אנדרוגינוס כהן שנשא בת ישראל, מאכילה בתרומה... אנדרוגינוס נושא, אבל לא נשא. רבי אליעזר אומר, אנדרוגינוס חייבים עליו סקילה, כזכר:

Rabbi Yose and Rabbi Shimon say: A priest who is an androgyne, married an Israelite woman, enables her to eat *teruma*... An androgyne may marry a woman but he may not be married by a man. Rabbi Eliezer says: If [a man] had intercourse with an androgyne, he is liable to receive the punishment of stoning on his account as if he had had relations with a male.

In this Mishnah, three different pieces of law all rule that the case of an אנדרוגינוס is the same as that of any man. Most other sources in the Mishnah don't suggest the אנדרוגינוס is definitely male. If an אנדרוגינוס child is born to someone who vowed to be a *nazir* if he had a male child, he is not a *nazir* (Nazir 2:7). An אנדרוגינוס person cannot be valuated for the purpose of donating their value to the *mishkan*, as discussed in Arachin 1:1, since "שאינו נערך אלא זכר ונדאי ונקבה ונדאית," "we only value definite males and definite females." In Chagigah 1:1, the אנדרוגינוס is listed as a person who does not have a *chiyuv* (obligation) in *aliyah*

le'regel (pilgrimage to Jerusalem) in contrast to a man who does. In general, the *mishnayot* outside of Bikkurim mostly point away from option (1) where the אַנְדְרוֹגִינּוֹס is a *halakhic* male, but it is not clear whether the Mishnah thinks this is for reasons of doubt or because the אַנְדְרוֹגִינּוֹס is their own category.

Fundamentally, the Mishnah in Zavim 2:1 tells us, this person is dealt with stringently to avoid potential sins:

טמטום ואַנְדְרוֹגִינּוֹס, נוֹתְנִין עֲלֵיהוֹן חֻמְרֵי הָאִישׁ וְחֻמְרֵי הָאִשָּׁה...

With regard to a *tumtum* and an androgynous [person], they place upon [the androgyne] the stringencies for a man and the stringencies for a woman..."

The *mishnayot* in Bikkurim begin with a statement that:

אַנְדְרוֹגִינּוֹס יֵשׁ בוֹ דְרָכִים שְׁנוֹה לְאֲנָשִׁים, וְיֵשׁ בוֹ דְרָכִים שְׁנוֹה לְנָשִׁים, וְיֵשׁ בוֹ דְרָכִים שְׁנוֹה לְאֲנָשִׁים וְנָשִׁים.
(יֵשׁ בוֹ דְרָכִים אֵינּוֹ שְׁנוֹה לֹא לְאֲנָשִׁים וְלֹא לְנָשִׁים. (ביכורים ד'א, תוספתא ביכורים ב'ב'))

The androgyne is in some ways like men, and in other ways like women. In other ways [the אַנְדְרוֹגִינּוֹס] is like men and women, and in others ... like neither men nor women.³

Each subsequent Mishnah enumerates examples for each of the four categories. In Bikkurim 4:2–3 (corresponding to Tosefta 2:3–4), there is discussion of *halakhic* distinctions between men and women in how the אַנְדְרוֹגִינּוֹס is classified in areas of ritual purity, particularly concerning the Temple, general biblical commandedness, aspects of appearance including hair and clothing, marriage and appropriate sexual conduct, and financial issues. When reading these sources, it is important to note the difference between versions. Two of the extant versions are called Nusach Ha'Gemara (the Version of the Gemara, the first version listed on Sefaria) and Nusach HaRashash (the version chosen by the Artscroll Mishnah Series). There are some key differences between the texts, particularly in the areas of shaving and *yichud*, two major areas that could impact the day-to-day lives of non-binary Jews who have passed the age of *mitzvot*.

3. Bikkurim 4:1; Tosefta Bikkurim 2:2.

Version of the Gemara	Tosefta	Version of the Rashash
<p>Bikkurim 4:2</p> <p>פיצד שְׁוֹה לְאִנְשִׁים: מְטָמָא בְּלִבְוֹן פְּאָנְשִׁים, וְזוֹקֵק לְיָבוּם פְּאָנְשִׁים, וְגַמְתְּעִטֵּף וּמִסְתַּפֵּר פְּאָנְשִׁים, וְנוֹשָׂא אֶבֶל לֹא נִשְׂא פְּאָנְשִׁים, וְחַיֵּב בְּכָל מִצְוֹת הָאֲמֹרוֹת בְּתוֹרַת פְּאָנְשִׁים:</p>	<p>Bikkurim 2:3</p> <p>דרכים ששוה [בהן] לאנשים מטמא בלובן כאנשים נושא אבל לא נושא כאנשים ואין מתייחד עם הנשים כאנשים ואינו נתון עם הבנות כאנשים [ואין מטמא למתים כאנשים] [ועובר על כל תקיף ועובר על כל תשהית כאנשים] וחייב בכל המצוות האמורות בתורה כאנשים.</p>	<p>Bikkurim 4:2</p> <p>שוה לאנשים כיצד? מטמא בלובן כאנשים ונושא אבל לא נושא כאנשים ואינו מתייחד עם הנשים כאנשים ואינו ניוון עם הבנות כאנשים ואינו נעטף ומספר כאנשים ואינו מיטמא למתים וחייב בכל תקיף ובכל תשהית כאנשי' וחייב בכל מצוות האמורות בתורה כאנשים:</p>

Version of the Gemara: "In what ways is [the androgyne] similar to men? Like a man, [the androgyne] is considered unclean through semen; is required to perform *yibbum* (levirate marriage) like a man; dresses **and cuts hair** like a man; marries others and is not married off, like a man; and is obliged to perform all the commandments in the Torah, like a man."⁴

Version of the Rashash: "...He may not be secluded with women, like men. He is not maintained with the daughters, like men; **He transgresses the law of: "You shall not round" (Leviticus 19:2) and "You shall not defile for the dead," (Leviticus 21:1) like men;** And he must perform all the commandments of the Torah, like men."⁵

Version of the Gemara

Tosefta

Version of the Rashash

Bikkurim 4:3

Tosefta Bikkurim 2:4

Bikkurim 4:3

פיצד שְׁוֹה לְנָשִׁים: מְטָמָא בְּאֹדָם כְּנָשִׁים, וְאִינוּ מְתִיחֵד עִם הָאֲנָשִׁים כְּנָשִׁים, וְאִינוּ עוֹבֵר עַל "בַּל תְּקִיף" וְלֹא עַל "בַּל תִּשְׁהִית" וְלֹא עַל "בַּל תִּטְמָא לְמֵתִים" כְּנָשִׁים, וּפְסוּל מִן הָעֲדוּת כְּנָשִׁים, וְאִינוּ נִבְעֵל בְּעֵבִירָה כְּנָשִׁים, וְנִפְסָל מִן הַכְּהוּנָה כְּנָשִׁים:

דרכים ששוה לנשים מטמא באודם כנשים ואין מתייחד עם האנשים כנשים ואין זוקק ליבוים כנשים ואין חולק עם הבנים כנשים ואין [חולק] בקדשי קדשים כנשים ופסול לכל עדות שבתורה כנשים ואם נבעל בעבירה פסול [מן הכהונה] כנשים.

שוה לנשים כיצד? מיטמא באודם כנשים ואינו מתייחד עם האנשים כנשים ואינו זוקק ליבוים כנשים ואינו חולק עם הבנים ואינו חולק בקדשי המוקדש כנשים ופסול לכל עדות שבתורה כנשים ואינו נבעל בעבירה כנשים ופסול מן הכהונה כנשים:

4. Sefaria community translation.
5. Mishnah Yomit, trans. by Dr. Joshua Kulp.

Version of the Rashash/Tosefta: “In what ways is he like women? He causes impurity with red discharge like women; **and he must not be secluded with men, like women**; and he doesn’t make his brother’s wife liable for *yibbum* (levirate marriage), like women; and he does not share [in the inheritance] with the sons, like women; and he cannot eat most holy sacrifices, like women. ... and he is disqualified from being a witness, like women. If he had illicit intercourse, he is disqualified from eating *teruma*, like women.”⁶

Appearance

With regards to the issues of appearance, we see that all three versions to some extent require the אַנְדְרוֹגִיטוֹס to maintain an appearance similar to that of men. Both the Tosefta and Nusach Ha’Rashash explicitly obligate the אַנְדְרוֹגִיטוֹס to follow the bans on shaving while the Nusach Ha’Gemara takes the opposite *halakhic* tack: the אַנְדְרוֹגִיטוֹס is explicitly NOT banned from shaving, just like a woman. However, both versions contain an overall statement of “וּמִסְתַּפֵּר כְּאֲנָשִׁים” — “cuts their hair like a man” (Artscroll translates this as “grooms himself like a man.”) While the two versions of the Mishnah describe diametrically opposing views on shaving, all three sources are unified in the אַנְדְרוֹגִיטוֹס needing to look like a man.

Relatedly, the two Mishnah versions both describe the garments of the person using the term עֲטִיפָה (wrapping). The Nusach Ha’Gemara version says “מִתְעַטֵּף” — to wrap him/himself like a man — without a direct object, necessitating commentary and analysis. The commentary of the Yachin U’Boaz says that “וּמִסְתַּפֵּר כְּאֲנָשִׁים,” meaning that the אַנְדְרוֹגִיטוֹס may not wear women’s clothes. In contrast, the Nusach Ha’Rashash has the text as “וְאֵינוֹ נִעְטֵף” — “does not wrap him/himself like a man.” Does this mean that the אַנְדְרוֹגִיטוֹס does not wrap himself like men don’t wrap themselves, or that the אַנְדְרוֹגִיטוֹס does not wrap himself like a man *would* wrap himself? (The latter is likely rejected because the purpose of this Mishnah is to point out similarities with men, not differences from them.) In what manner do men not wrap themselves, then? The Rash (Rabbeinu Shimshon of Sens), who was one of the Tosafists, comments on Nusach Ha’Rashash, writing:

6. Sefaria community translation.

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ואינו נעטף ומספר כאנשים. כלומר אינו נעטף כאנשים ומספר כאנשים וכללם לפי שטעם אחד לשניהם דדרך אשה לעטוף את ראשה ולכסותו בצעיף ואין דרך איש כן. דרך איש לספר ואין דרך אשה לספר אלא מגדלת שער כלילית ובענין שניהוג בעצמו בתספורת ומלבושים כעין איש שלא יבא לינשא אם יתנהג כאשה וחשו לינשא יותר מלישא כדפרישית אבל אין לפרש דתנא מספר כאיש משום פיאות דהא תנא ליה סיפא: (ר"ש משאנן על משנה ביכורים ד'ב')

That is to say, [the אנדרוגיניס] does not wrap like men and grooms [themselves] like a man and [these laws] are included together since they have one reason: it is the way of women to wrap their hair and cover it with a scarf, and this is not the way of a man. The way of a man is to cut his hair and the way of a woman is not to cut her hair, rather she grows it like Lilith. In this matter, [the androgyne] should have the customs of hair-cutting and dress that are like a man, so that [the androgyne] will not come to be married by [a man] if [they] behave like a woman. [The Rabbis of the Mishnah] worried more that [the androgyne] would be married [by a man] more than that [they] would marry [a woman], as has been explained; however, [the Mishnah] when it says “מספר” like a man should not be interpreted as [referring to the prohibition of shaving] the corners [of the face], since the Mishnah discusses that later.⁷

More broadly, we can ask, is this עטיפה a specific *halakhic* requirement for the אנדרוגיניס (which seems unlikely in the context of the many ways the אנדרוגיניס is not included in normative male *aseh mitzvot*, positive commandments) or a cultural norm to present as male? The Rash looks at this in the latter context, living in a world where all dress and hair presentation is coded as “male” or “female.” Even if this person is neither male nor female, we need to choose a category to lump them into. The Rash says that since this person can marry as a man but not as a woman (“נושא אָבֵל לֹא נִשָּׂא כְּאִנְשִׁים” in all three versions), we don’t want them to dress or cut hair as a woman does so as not to attract offers of marriage from men.

The *halakhic* issue of marriage is thorny, involving a biblical law. In contrast, the cultural issue is weaker in our era: where men and women sport a wide range of hair lengths and some broader clothing choices, a need to assign appropriate appearance strictures for cultural reasons seems less relevant. If

7. Rash MiShantz on Mishnah Bikkurim 4:2.

these appearance laws are cultural, the *posek* has more room to maneuver when other *halakhic* issues hang in the balance.

Yichud (Seclusion)

In the context of the previous laws requiring the אַנְדְרוֹגִינוֹס to dress like a man, the unanimity that the אַנְדְרוֹגִינוֹס cannot be secluded with other men “like a woman” is puzzling: “וְאֵינוּ מִתְיַחֵד עִם הָאֲנָשִׁים כְּנָשִׁים”. After all, isn’t the whole point of presenting as a man to keep them away from those they may eventually marry? Is this person supposed to be “passing” as a man? If so, the prohibition on *yichud* with men makes no sense culturally.

Given the unanimous opinion that the אַנְדְרוֹגִינוֹס cannot seclude with men, we would expect that they would be allowed to seclude with women. Both the Tosefta and the Nusach Ha’Rashash forbid this, writing “וְאֵינוּ מִתְיַחֵד עִם הָאֲנָשִׁים כְּאֲנָשִׁים”. This puts the אַנְדְרוֹגִינוֹס in a tricky position of not being able to have a roommate, go on a shared trip, and the like. For our discussion, it is relevant in the context of navigating camp, *shabbatonim*, dorm life, and the early years of adulthood. It’s clear from the bigger picture of the sources that this is a concern based on the biology of the אַנְדְרוֹגִינוֹס; possessing both types of genitalia, the אַנְדְרוֹגִינוֹס could have heterosexual intercourse with both men and women which concerns the rabbis. This worry is relevant to us as we think through limitations imposed upon non-binary people as a result of *their* biology. Fundamentally, a life of isolation, where one cannot be trusted to be alone with any other person, does not seem viable.

There are also some ways in which the Mishnah says the אַנְדְרוֹגִינוֹס is like both men and women:

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Nusach Ha'Gemara	Tosefta	Nusach Ha'Rashash
<p>Bikkurim 4:4</p> <p>כיצד שונה לאנשים ולנשים: חייב על מפתו ועל קללתו פאנשים וכנשים, וההורגו שוגג גולה ומזיד נהרג פאנשים ונשים, ויושבת עליו דם טמא ודם טהור פאנשים וכנשים, וחולק בקדשי קדשים פאנשים וכנשים, ונוחל לכל הנחלות פאנשים וכנשים, ואם אמר "הריני נזיר שזה איש ואשה" הרי זה נזיר:</p>	<p>Tosefta Bikkurim 2:5</p> <p>דרכים שווה [בהן] לאנשים ולנשים חייבין על נזקו [בין איש בין אשה] ההורגו במזיד נהרג בשוגג גולה לערי מקלט [אמו יושבת עליו בדם טהור כאנשים] וכנשים ומביאה עליו קרבן כאנשים וכנשים [ונוחל בכל נחלות כאנשים וכנשים חולק בקדשי הגבול כאנשים וכנשים ואם אמר הריני נזיר שזה איש ואשה הרי זה נזיר].</p>	<p>Bikkurim 4:4</p> <p>שוה לאנשים ולנשים כיצד חייב על נזקו כאיש ואשה חייב בכל הניזקין כאיש ואשה וההורגו במזיד נהרג בשוגג גולה לערי מקלט ואמו יושבת עליו דם טהור כאנשים וכנשים ונוחל בקדשי הגבול כאנשים וכנשים והאומר הריני נזיר שזה איש ואשה הרי זה נזיר:</p>
<p>"In what way is he like both men and women? One who strikes him or curses him is liable, as in the case of men and women; one who unwittingly kills him must go into exile, and if on purpose, then [the slayer] receives the death penalty, as is the case of men and women. His mother must [at his birth] bring an offering, as in the case of men and women. He has a share in holy things that are eaten outside of the Temple; and he may inherit any inheritance, as in the case of men and women. <u>And if he said, "I will be a nazirite if he is a man and a woman," he is a nazirite.</u>"⁸</p>		

Nusach Ha'Gemara	Tosefta	Nusach Ha'Rashash
<p>Bikkurim 4:5</p> <p>כיצד אינו שונה לא לאנשים ולא לנשים: אין חייבין לא על מפתו ולא על קללתו לא פאנשים ולא פנשים, ואינו נעדר לא פאנשים ולא פנשים, ואם אמר "הריני נזיר שזה לא איש ולא אשה" אינו נזיר. רבי מאיר אומר: אנדרוגינוס בריה בפני עצמה הוא ולא יכלו חכמים להכריע עליו אם הוא איש או אשה. אכל טמטום אינו כן, פעמים שהוא איש פעמים שהוא אשה:</p>	<p>Tosefta Bikkurim 2:6</p> <p>דרכים [שלא] שוה [בהן לא] לאנשים [ולא לנשים] אין חייבין על [חטאתו] ואין שורפין על טומאתו ואין נעדר לא כאנשים [ולא כנשים] אין נמכר לעבד עברי לא כאנשים [ולא כנשים] אם אמר הריני נזיר שאין זה איש ואשה הרי זה נזיר ר' יוסי אומר אנדרוגינוס בריה [לעצמו] ולא יכלו חכמים להכריע עליו [אם איש הוא [אם] אשה [הוא] אבל טמטום אינו כן אלא או ספק איש או [ספק] אשה.</p>	<p>Bikkurim 4:5</p> <p>אינו שוה לא לאנשים ולא לנשים כיצד? אין חייבין על טומאתו ואין שורפין על טומאתו ואינו נעדר לא כאנשים ולא כנשים ואינו נמכר בעבד עברי לא כאנשים ולא כנשים ואם אמר הריני נזיר שאין זה איש ואשה הרי זה נזיר ר' יוסי אומר אנדרוגינוס בריה בפני עצמה ולא הכריעו בו חכמים אם איש אם אשה אבל טמטום אינו כן אלא ספק איש ספק אשה:</p>

8. Adapted from Sefaria community translation.

Version of the Rashash: “And in what way is he different from both men and women? He is not liable for entering the temple while impure; one does not burn *teruma* if it came into contact with his discharge; he cannot be evaluated, unlike men or women. He must not be sold as a Hebrew slave, unlike men or women. If one says: “I will be a nazirite, if he is neither a man nor a woman,” then **he becomes a nazirite**...

Version of the Gemara: “...Rabbi **Meir** says: the hermaphrodite is a unique creature, and the sages could not decide about him. But this is not so with a *tumtum* (one of doubtful sex), for sometimes he is a man and sometimes he is a woman.”⁹

In the final two *mishnayot*, we are given additional ways to understand the אַנְדְּרוֹגִיטוֹס. Mishnah 4 perplexingly suggests that perhaps this person is *both* a man and a woman by classifying them as both when the law is different for men and women. First, it requires the mother of an אַנְדְּרוֹגִיטוֹס to observe the post-birth *tahara* rituals for both a boy and a girl; second, if a person makes a vow that if the child born is “אִישׁ וְאִשָּׁה”, that person is a nazir upon the birth of an אַנְדְּרוֹגִיטוֹס child. In the first instance, we might say that it seems like the Mishnah is ruling that the mother of the אַנְדְּרוֹגִיטוֹס needs to observe both sets of practices because the Mishnah is attempting to cover its bases and rule stringently in the case of doubt, similar to what was stated explicitly in the Mishnah in Zavim above.

The second case is more ambiguous. Does the phrase “אִישׁ וְאִשָּׁה” mean this person is “a man and a woman,” or do we interpret it differently? Taken at face value, it seems to say that the אַנְדְּרוֹגִיטוֹס has the status of both a man and a woman *at the same time*. The commentary מלאכת שלמה does not take this Mishnah literally, writing “הריני נזיר שזה איש ואשה. כלומר שזה איש או אשה”. This commentary changes the crucial word “and” to “or,” suggesting a *psak of safek*. Perhaps this change is the result of Melechet Shlomo’s unwillingness to accept what the Mishnah seems to be saying when it implies that the אַנְדְּרוֹגִיטוֹס truly has the status of both male and female.

The fifth Mishnah does not help us resolve the ambiguous nazirite case: It says, “ואם אמר הריני נזיר שאין זה איש ואשה,” — “If one said, ‘I am a nazir if this person is not a man or woman,’” the version of the Rashash tells us “הרי זה נזיר” — he becomes a Nazir. The version of the Gemara instead writes, “אֵינוֹ נְזִיר” — he

9. Adapted from Sefaria community translation.

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is not a Nazir. This underscores the Mishnah's difficulty in determining the status of the אנדרוגינוס.

In that same fifth Mishnah in Bikkurim ch. 4, we first see the position that suggests that an אנדרוגינוס is a third category. In the Tosefta and both versions of the Mishnah, we see a version of the following statement:

ר' יוסי אומר אנדרוגינוס ברי' בפני עצמה ולא הכריעו בו חכמים אם איש אם אשה

Rabbi Yose says: The אנדרוגינוס is a creation of its own; the rabbis did not determine whether they are a man or a woman.

This is of interest in that, if the *halakha* is willing to consider a third category, it is helpful to us as we think about people who don't consider themselves men or women. We will see this statement of Rabbi Yose developed further in the Talmudic sources.

A Third Category *L'Halakha*

Many references to the אנדרוגינוס in the Talmud seem to categorize them as a *halakhic* male or as enough of a *safek* to rule stringently. There is evidence, though, that at least some rabbis thought a third category could or did exist. The Talmud in Yevamot 83a states:

ליתה למתניתין מקמי כריתא דתניא רבי יוסי אומר אנדרוגינוס כריתא בפני עצמה הוא ולא הכריעו בו חכמים אם זכר אם נקבה

The Mishnah here, is not to be relied upon in the presence of a *baraita* that teaches otherwise. As it is taught in a *baraita* that Rabbi Yose says: An androgyne is a creature unto himself, and the Sages did not determine whether he is a male or a female.

This text attempts to resolve a contradiction between the Mishnah (Yevamot 8:6) and a *braita* (which we see reproduced in the Mishnah and Tosefta in Bikkurim). That Mishnah suggested in the name of R. Yose and R. Shimon that an אנדרוגינוס kohen has enough male status to allow their wife to eat *teruma*. Given that we rule stringently in the case of biblical *safek*, if we believe the rules of *teruma* are biblical in origin, then this person must be a definite male and not a *safek*.

The Gemara in Yevamot says we must reject that Mishnah (Yevamot 8:6)

in light of the *braita* where Rabbi Yose says an אנדרוגינוס is its own category. Rabbi Yose can't say both things! The two parts of Rabbi Yose's statement pose a challenge to us. The second clause "ולא הקריעו בו חכמים אם זכר אם נקבה" might be interpreted as evidence that the אנדרוגינוס has the status of *safek*, except for the preceding clause where Rabbi Yose declares definitively his opinion that in fact the אנדרוגינוס is some third category: "בריה בפני עצמה הוא".

In interpreting this text *halakhically*, early Rishonim (including Rashi and Tosfot) used the latter clause to say that this person has the status of *safek*. Ramban disagreed with their position:

כן באנדרוגינוס לפי שלא הכריעו עליו בסימנין של איש לעשותו כאיש ולא בסימנין של אשה לעשותו כאשה לפיכך הוציאוהו מכלל שניהם ועשאוהו בריה בפני עצמו (הידושי רמב"ן על יבמות פ"ג א:א)

Similarly, for the androgyne, since they did not determine using physical characteristics that [the androgyne] is male, and did not determine using physical characteristics that [the androgyne] is female, therefore [the Rabbis] took [the androgyne] out of both categories and classified [the androgyne] as a creation unto him/themself.¹⁰

Ritva cites Ramban and follows his approach:

אבל רבינו הרמב"ן ז"ל סובר וכן שמעתי על רבינו מאיר הלוי ז"ל שהשיב על רבינו שמשון ז"ל דלמ"ד אנדרוגינוס בריה בפני עצמה היא הוא מין בפני עצמו ולהכי קרי ליה בריה (ריטב"א על נדה כ"ח ב)

However, our teacher Nachmanides, of blessed memory, reasoned, and so I also heard of Rabbeinu Meir the Levi, of blessed memory, who responded to Rabbeinu Shimshon, of blessed memory, that according to those who say an androgyne is a creation unto itself, [the androgyne] is a type unto itself and that is why it is called a creation.¹¹

In contrast with Nachmanides and Ritva, Maimonides rules that the אנדרוגינוס has the status of ספק (doubt) in the Mishneh Torah.

מי שיש לו איבר זכרות ואיבר נקבות הוא הנקרא אנדרוגינוס והוא ספק אם זכר ספק אם נקבה. (הלכות אישות כ'כד)

A person who possesses both a male sexual organ and a female sexual

10. Chiddushei Ramban on Yevamot 83a.

11. Ritva on Niddah 28b.

organ is called an *androgynous*. There is doubt whether such a person should be classified as a male or as a female.¹²

The position of *safek* (doubt) in general results in a *psak* that is similar to a man's, with certain notable exceptions.

Fulfillment of *Mitzvot*

With regards to the fulfillment of *mitzvot*, Maimonides generally says to do the *mitzvah* without a *bracha*, such as in the case of *tzitzit*:

טמטום ואַנדֶרוֹגִינֹוס חֲבִיבֵי בְּקֶלֶן מִסַּפֵּק לְפִיכָד אֵין מְבַרְכִין אֶלָּא עוֹשִׁין בְּלֹא בְּרַכָּה: (משנה תורה, הלכות ציצית ג:ט)

Persons of doubtful sex and an androgyne are under the obligation to fulfill all the precepts because of the doubt. Hence, they do not recite the blessing, but fulfill the duty [of wearing *tzitzit*] without pronouncing the blessing.¹³

He rules similarly in the case of *Sukkah*:

וכן טומטום ואַנדֶרוֹגִינֹוס לעולם אין מברכין לישב בסוכה מפני שהן חייבים מספק ואין מברכין מספק: (משנה תורה, הלכות שופר וסוכה ולולב ו:יב)

Similarly, a *tumtum* and an אַנדֶרוֹגִינֹוס never say the *bracha* “to dwell in the *Sukkah*” because they are obligated by doubt, and we do not say blessings in cases of doubt.¹⁴

Attire, *Peyot*, and General Appearance

Maimonides seems to follow the lead of the Tosefta in requiring that the אַנְדֶּרוֹגִינֹוס refrain from wrapping their head like a woman would and refrain from shaving their hair like a man must refrain. However, his statement that this is not punishable suggests that the prohibition is lesser due to the *safek* (or

12. Mishneh Torah, Laws of Marriage, 2:24.

13. Laws of Tzitzit, 3:9.

14. Mishneh Torah, Laws of Shofar, Sukkah and Lulav, 6:12.

perhaps due to this being a cultural requirement rather than a strictly *halakhic* one.)

טמטום ואַנדֶרוֹגִינּוּס אִינוּ עוֹטֵף כְּאִשָּׁה וְלֹא מְגַלַּח רֹאשׁוֹ כְּאִישׁ וְאִם עָשָׂה כֵן אִינוּ לוֹקֵה: (משנה תורה, הלכות עבודה זרה וחוקות הגויים יב:)

A *tumtum* and an *androgynous* may not wrap their heads as women do or cut [the hair of] their head as men do. If they do [either of the above], they are not [liable for] lashes.¹⁵

Exceptions: *Zimmun* and *Shofar*

In two cases, Maimonides rules that the אַנדֶרוֹגִינּוּס has a separate law than men and women: *zimmun* (an invitation to say grace after meals) and *shofar*. Generally, we rule that a man can make a *zimmun* for three or more other men (and whoever else is present) while a woman can make a *zimmun* for three or more women. The אַנדֶרוֹגִינּוּס fits in neither category and thus cannot lead either of the aforementioned *zimmunim*, writes the Rambam in 1:10:

אַנדֶרוֹגִינּוּס מְזַמֵּן לְמִינוֹ וְאִינוּ מְזַמֵּן לֹא לְנָשִׁים וְלֹא לְאֲנָשִׁים מִפְּנֵי שֶׁהוּא סֶפֶק.

An *androgynous* may make a *zimmun* among his own kind but should not be included among a *zimmun* either of men or of women.¹⁶

If Maimonides is being consistent, this *psak* presumably reflects the same ruling that the אַנדֶרוֹגִינּוּס has the status of סֶפֶק. However, Maimonides did first state that the אַנדֶרוֹגִינּוּס can lead a *zimmun* for other אַנדֶרוֹגִינּוּס people, which, practically speaking, creates a third category by default, “מְזַמֵּן לְמִינוֹ”, which suggests that different אַנדֶרוֹגִינּוּס people all fit into the same category together and are not evaluated individually. Even though Maimonides is unwilling to give the אַנדֶרוֹגִינּוּס the definite status of עֲצֻמָּה בְּפָנֵי עֲצֻמָּה, he implies they are in the same category together.

In the laws of *Shofar* (2:1), Maimonides does not exempt the אַנדֶרוֹגִינּוּס or qualify their *chiyyuw* (obligation) by saying to blow *shofar* without a *bracha*.

15. Mishneh Torah, Laws of Foreign Worship and the Ways of the Nations 12:10.

16. Mishneh Torah, Laws of Brachot 5:7.

Though they do appear to be fully required to blow the Shofar, they are still grouped differently, as he explains in 2:2:

כל מי שאינו חייב בדבר אינו מוציא את החיוב וְדִי הוֹכֵתוּ. לְפִיכֵךְ אִשָּׁה אוֹ קָטָן שֶׁתִּקְעוּ בְּשׁוֹפָר הַשּׁוֹמֵעַ מִהֶן לֹא יֵצֵא. אֲנָדְרוֹגִינִים מוֹצִיא אֶת מֵינוּ וְאֵינוּ מוֹצִיא אֶת שְׂאֵינוּ מֵינוּ. (משנה תורה, הלכות שופר וסוכה וולוב ב:ב)

Whoever is not [himself] obligated regarding this matter cannot facilitate the performance of the mitzvah for one who is obligated. Thus, if a woman or a minor blows the shofar, one who hears does not fulfill his obligation. An *androgynous* can facilitate the performance of the mitzvah for one of his kind, but not for one who is not of his kind.¹⁷

The nature or degree of the obligation for the אֲנָדְרוֹגִינִים is not the same as that of a man and, consequently, they cannot blow the shofar and discharge the obligation of anyone who is not an אֲנָדְרוֹגִינִים. However, they can discharge each other's obligation, which suggests a commonality between them all.

Yichud (Seclusion)

אֲנָדְרוֹגִינִים אֵינוּ מִתְיַחַד עִם הַנְּשִׂימִים. וְאִם נִתְיַחַד אִין מִכֵּין אוֹתוֹ מִפְּנֵי שֶׁהוּא סִפְקָא. אֲבָל הָאִישׁ מִתְיַחַד עִם הָאֲנָדְרוֹגִינִים וְעִם הַטְּמֻשִׁים: (הלכות איסורי ביאה כב:יא)

An *androgynous* may not enter into seclusion with women. If [the androgynous] does, he is not given physical punishment, because his status is doubtful. A man may enter into seclusion with an *androgynous* or a *tumtum*.¹⁸

Maimonides acknowledges our difficulty with the version that appears in the Tosefta and the Nusach Ha'Rashash, ruling that the אֲנָדְרוֹגִינִים is forbidden from *yichud* with women but permitted to have *yichud* with men. This follows logically from the rulings and assumptions that the אֲנָדְרוֹגִינִים is more like a man and required to marry a woman. As a result, the laws of *yichud* categorize them as a person who can have *yichud* with a man.

17. Mishneh Torah, Laws of Shofar, Sukkah and Lulav 2:2.

18. Mishneh Torah, Laws of Forbidden Intercourse 22:11.

We should note here that Maimonides completely ignores the three main versions of the Mishnah and Tosefta we saw earlier, overriding their prohibition on the אַנְדְּרוּגִינִים being in seclusion with a man. Does Maimonides do so because it is more consistent in framing the אַנְדְּרוּגִינִים as needing to “code” (or present as) male, or because Maimonides recognizes that it is not manageable for a person to live a life without normal interpersonal relationships with at least one category of people? The latter, we hope, can give us more flexibility to consider the person when making decisions with non-binary people.

Marriage

Maimonides' position on marriage is puzzling. In the Tosefta and Mishnah, we saw that the initial ruling is that an אַנְדְּרוּגִינִים may marry a woman but not be married by a man (Tosefta Bikkurim 2:3; Mishna Bikkurim 4:2). The Mishnah is followed by a discussion in Bavli Yevamot 82b where the discussion concludes that an אַנְדְּרוּגִינִים may only marry a woman *bedieved* (after the fact) and may not marry a man. If they did marry a man, the marriage is invalid even after the fact, and the man who marries the אַנְדְּרוּגִינִים is liable for the death penalty for having intercourse with them. Though the Talmud later concludes “הֲלָכָה כְּרַבִּי” on 83a, that does not give them flexibility in who they can marry.

In his Mishneh Torah, we saw already that Maimonides rules in הלכות אישות that the אַנְדְּרוּגִינִים is a case of doubt. In 4:11, Maimonides adds:

טמטום ואַנְדְּרוּגִינִים שֶׁקְדְּשׁוּ אִשָּׁה אוֹ שֶׁקְדְּשׁוּ אִישׁ הֲרֵי אֵלּוּ קְדוּשֵׁי סֶפֶק וְצָרִיכִין גַּם מִסְפֵּק: (משנה תורה, הלכות אישות ד:יא)

A *tumtum* or אַנְדְּרוּגִינִים who betrothed a woman or who was betrothed by a man; their betrothal is one of doubt and they need a divorce based on the doubt.¹⁹

It seems here that Maimonides does not follow the lead of the Talmud: first, he equates the אַנְדְּרוּגִינִים's marriage to a woman with their marriage to a man, whereas the Mishnah, Tosefta and Talmud all differentiated between them. He also does not object to these marriages to a man as we might expect he would, given the Talmud's discussion of the death penalty. In the next law,

19. Mishneh Torah, Laws of Marriage 4:11.

Maimonides discusses someone who marries one of his עריות (biblically forbidden relationships) and says about that marriage, “לא עשה כלום” — he has not done anything. This marriage has no effect. In contrast, Maimonides seems to believe it is technically possible for an אנדרוגיניוס to marry either a man or a woman and for the קדושין (legal betrothal) to take effect.

In contrast, in הלכות איסורי ביאה א:טו (Laws of Forbidden Intercourse 1:15), Maimonides echoes the position that a man having intercourse with an אנד־ in the manner of “זכרותו” (his maleness, presumably anal intercourse) is liable to the death penalty, and affirms in the same law that an אנדרוגיניוס may marry a woman. Given this conclusion, we are left to wonder why Maimonides ruled it was possible for them to marry a man in הלכות אישות ד:יא (Marriage 4:11), since forbidden relationships that lead to marriage are generally invalidated. This question is posed by the Ra'avad, who writes in his glosses on the Mishneh Torah:

כתב הראב"ד ז"ל ולמה הם צריכים גט מספק והלא אינם ראויים להנשא כלל עכ"ל: (השגות הראב"ד על משנה תורה, הלכות אישות ד:יא)

The Ra'avad (of blessed memory) wrote, ‘And why do they need a divorce out of doubt, and behold they are not fitting to marry at all!’²⁰

Family Status

Relatedly, Maimonides rules that the אנדרוגיניוס does not participate in levirate marriage either in the male or female role:

ואלו הם שאין להן זקה כלל. סריס חמה ואנדרוגיניוס מפני שאינן ראויין לילד ולא היה להן שעת הכשר: (הלכות יבום וחליצה ו:ב)

With regard to the following, [the deceased's wives] have no obligation at all: a *saris chamah* and an *androgyn*e, for they are not fit to father children, nor had they been at any time.²¹

Maimonides also ruled that the אנדרוגיניוס inherits with the sisters if there are no brothers (Laws of Inheritance 5:1). Thus, in three related areas, the אנדרוגיניוס's

20. Hasagot HaRaavad on Mishneh Torah, Marriage 4:11.

21. Mishneh Torah, Levirate Marriage and Release 6:2.

safek status in the eyes of Maimonides leads them to marry as a man, inherit as a woman, and not participate in levirate marriage at all. The wide variation in the ways the *halakha* applies to this person could be challenging for practical implementation.

Revisiting Maimonides' Position

Maimonides's rulings sometimes suggest that the אַנְדְּרוֹגִינִים is its own category. When discussing animals of this nature, Maimonides writes in הלכות איסורי המזבח ג:ג that “לפי שהן ספק זכר ספק נקבה הרי הן כמין אחר” — they are disqualified from being offered on the altar because they are doubtful male and doubtful female animals; thus they are like another type.²² While we don't prefer to make analogies from animals to humans, it is interesting that Maimonides says this about animals but won't say it about people. “הרי הן כמין אחר” is much closer to “בריה בפני עצמה” than we have seen from others who rule the status of a human אַנְדְּרוֹגִינִים is a *safek*.

Maimonides' positions on *zimmun* and *shofar* also lend credence to the idea that the אַנְדְּרוֹגִינִים is a third category; by allowing them to make a *zimmun* together and blow *shofar* for each other, we suggest that whatever they are, they are in that category together. Each אַנְדְּרוֹגִינִים is not an individual *safek* based on their particular situation; rather, they are all אַנְדְּרוֹגִינִים together despite any potential physical distinctions.

A Final Challenge

Fundamentally, all discussions of the אַנְדְּרוֹגִינִים are based around observable biology. The *halakha* attempts to create a framework for how this person must behave based on their sex characteristics. To map this framework on to gender identity raises questions that may be harder to resolve.

First, once we have established that there is such a thing as “בריה בפני עצמה”, who is to say that this applies to gender identity where it is contradictory to biological sex? In fact, we have not fundamentally established yet that Judaism

22. Mishne Torah, Laws of Things Forbidden on the Altar 3:3.

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recognizes gender identity as a *halakhic* factor. These are questions that are incumbent on *halakhic* leaders to engage with so that we can help non-binary people live full *halakhic* lives. The practical matters here are the core of the issue that we face: when we try to decide where our non-binary children will daven and where they will room at camp and on school *shabbatonim*, our decisions will telegraph to them and to others how seriously we take these challenges. As we navigate these issues, we can draw guidance from these texts and their attempts to sort out these complexities.

Which of our three initial positions on the אנדרוגינוס is most helpful to the *posek* weighing these issues? Seeing the אנדרוגינוס as a third category helps us affirm the identities of non-binary Jews: rabbinic Judaism recognizes that it is possible to be neither male nor female *l'halakha*. However, the argument of *safek* might also allow for some flexibility. In cases of rabbinic laws and lower-level prohibitions, we can use the principle of *safek d'rabbanan l'kula* and rule leniently. Additionally, bringing in the factor of *kavod ha'briot* can further tip the scales in our decision making. The Talmud in Brachot 19b tells us:

גדול כבוד הבריית שדוחה [את] לא תעשה שבתורה

Great is human dignity, as it overrides a prohibition in the Torah.

This principle is used sparingly, only to override rabbinic prohibitions in certain cases, but perhaps it can allow us to override lower-level prohibitions as we guide non-binary Jews to decisions that affirm who they are as people.

Conclusion

The *halakhic* sources show that there is a strong tradition in Judaism recognizing that it is possible to exist in some category that is neither male nor female. As we encounter in our communities people whose gender identity does not neatly fit into the 'male' or 'female' binary, we are obliged to take them seriously and treat them with the respect owed to anyone created in the image of God. As the science of gender identity is still evolving, we need to navigate these cases with sensitivity. *Halakhic* leaders must attempt to answer the unanswered questions here in a way that is livable and inclusive. First, we must find a way to *halakhically* recognize the truth of who these people are. Next, we must find

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halakhic solutions for them that are not isolating and don't oblige them to act in ways that are contrary to their identities. If we believe that every Jew can be brought closer to the divine through Torah and *mitzvot*, we must create ways for non-binary Jews to live authentic *halakhic* lives.