

The Androgynos in the Laws of *Milah & Niddah*: A Potential Approach to Trans Halakha

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Introduction¹

The Bekhor Shor (Rabbi Yosef ben Isaac, a twelfth-century tosafist), commenting on the commandment of ברית מילה (*brit milah*, circumcision), wrote, “[Milah] is a sign that I am the Lord and you are my servants... Since the Holy Blessed One commanded milah of men (זכרים, *zakharim*) and not women (נקבות, *nekevot*), we learn that God commanded milah to be performed on the place of manhood (מקום זכרות, *makom zakhrut*, the penis) to seal the covenant. The blood of נידה (*niddah*, menstruation) that women observe... this for them is the blood of covenant.”² He positions milah and niddah as a halakhic dyad, a parallel set of bloody mitzvot that forge the covenant (דם ברית, *dam brit*, blood of covenant) between Jewish men, women, and God, just as the blood of the sacrifices at Mount Sinai forged the covenant between Israel and God.³ In one of Ezekiel’s prophetic visions, God passes by the baby Israel, covered in postpartum (niddah) blood, and declares: “In your blood, live; In your blood, live.”⁴ The repetition of this phrase, according to various midrashim, symbolizes the blood of both the Pesah (Passover) sacrifice and circumcision, the forging of the national and individual covenant.⁵ Liturgically, this verse is read during the Hasidic and Sephardi seder liturgy, some modern Ashkenazi seder liturgy, and in the Sephardi brit milah liturgy.⁶ In both midrash and liturgy, the bloods of niddah, milah, and covenant come together.

¹ Alyx is, at the time of writing, a student at Barnard College and the Jewish Theological Seminary. She is grateful to Laynie Soloman, Rabbi Becky Silverstein, Ariel Berry, Willemina Davidson, and the rest of the Teshuvah Writing Collective for their thoughtful feedback, support, edits, and encouragement in writing this teshuvah; Rabbi Aviva Richman for guiding her through the laws of niddah and sparking the idea for this teshuvah; Drs. Max Strassfeld and Sarah Wolf for showing her what the androgynos could be; and Jord Barnett for their constant support and helpful edits.

² Bekhor Shor on Genesis 17:11.

³ Exodus 24:8. All Tanakh translations NJPS.

⁴ Ezekiel 16:6.

⁵ Mekhilta d’Rabbi Yishmael 12:6, 13:1; Tanhuma Vayera 4:1; Pesikta d’Rav Kahana 17:4; Pirkei d’Rabbi Eliezer 29:2; Shmot Rabbah 17:3; Rut Rabbah 6:1, to cite just a few examples of a very popular midrashic tradition.

⁶ *The Scholar’s Haggadah*, 42-43, 291-92; *Book of Prayer According to the Custom of the Spanish and Portuguese Jews*, 415-16.

For many trans people today, these two embodied, gendered, and sexed rituals present a unique halakhic question. A transfeminine person who has a penis could potentially still be obligated in milah, even though they are not men.⁷ A transmasculine person who menstruates could potentially still be obligated in niddah, even though they are not women. Most modern poskim hold that they are still obligated in these mitzvot. R' Leonard Sharzer, who wrote a 2017 teshuvah approved by the Conservative movement's Committee for Jewish Law and Standards (CJLS), concluded that they were obligated as milah and niddah were sexed/anatomical mitzvot, not gendered ones.⁸ Orthodox poskim, such as R' Eliezer Waldenberg (Tzitz Eliezer) and R' Eden ben Efrayim, rule that trans people cannot halakhically transition from their assigned gender at birth without sex reassignment surgeries (also known as gender affirmation surgeries)—or at all.⁹ As I will explore in more depth, R' Sharzer's teshuvah relies on some assumptions about halakhic language. R' Eliezer's and R' Eden's teshuvot, while learned and thorough, are viewed by many trans people as disrespectful and transphobic.

This paper differs from previous works in several major respects. First, I must acknowledge that I am not a rabbi or a posek. I offer this paper not as authoritative halakhah but as an articulation of a potential halakhic solution to this question that can be taken up by rabbis and Jewish leaders as they offer pastoral and halakhic care to trans people in their communities. If, *b'ezrat hashem*, I ever receive *smikhah*, I may choose to offer an updated version of this paper as psak halakhah, but until then, it remains a halakhic resource, an articulation of possibilities rather than a definitive answer.

Second, I am a transgender woman. Until the creation of SVARA's Teshuva Writing Collective (TWC), there had been almost no public halakhic resources written by trans people about trans people. The people who wrote past piskei halakhah (halakhic rulings),

⁷ I use these terminologies ("transfeminine" and "transmasculine") differently from the general usage of the terms. Terminology around trans and nonbinary people is both everchanging and also largely individual. It is challenging to find a phrase that captures the exact segment of the community for which I intend this as a halakhic resource. For the purposes of this paper, I define transfeminine as someone who possesses or possessed a penis from birth but does not identify at all as a man, and transmasculine as someone who menstruates or menstruated from birth but does not identify at all as a woman. This differs from the general uses of those terms. The terms "AMAB" and "AFAB" (assigned male/female at birth) are insufficient as well, both because they are generally unpopular within the trans community and also do not exactly fit the demographic of which I am speaking.

⁸ Leonard Sharzer, "Transgender Jews and Halakhah," 2017.

⁹ ben Ephraim, *Dor Tahapukhot*; Waldenberg, Tzitz Eliezer 10:25:26, 11:78, and 22:2; for a more general Orthodox view, see J. David Bleich, *Contemporary Halakhic Problems*, vol. 1, 100-105; for more on Waldenberg's complex position, see Sinensky, "Demystifying R. Eliezer Waldenberg."

some of whom wrote with the utmost care for trans people, are not trans. The consequences of their psak do not fall on them. In some ways, I too am not the subject of this psak. But I know what it is like to be misgendered by Jewish ritual, Jewish law, and Jewish practice. Those experiences guide me in writing this paper. My goal is, as my colleague and teacher Laynie Soloman and their co-author Russell Pearce put it, to participate in “a core rethinking and restoration of halakha in which *nothing about us* can take place without *us*—the language and lives of the people are central, and those who are most directly impacted and implicated by halakha become halakhic actors.”¹⁰ My goal in this paper is to create a halakhic framework for trans people grounded in a trans history and to provide a resource for halakhic decisors, trans and cis, to approach trans people who are looking to explore niddah and milah.

Third, for the most part, R' Sharzer's psak to some extent elides the Talmud. He acknowledges that the Talmud acknowledges people outside the gender binary in its halakhic understanding of gender, but declares that they are “not relevant to this teshuvah since none of the people they mentioned are what we would recognize today as transgender.”¹¹ R' Sharzer is right that the androgynos (אֲנָדְרוֹגִינֹס, a rabbinic sex category I will define in more detail later) is not transgender. But that does not mean that they¹² are not relevant to modern halakhah. This paper is an attempt at translation—taking the concepts, categories, wisdoms, and people that our rabbis of blessed memory (*hazal*) had at their disposal and using them to understand the world and the people in it today. The notion of translation is not my own: I am indebted to the work of Dr. Max Strassfeld, who first articulated the idea of “translating” the androgynos to the reality of contemporary trans people.¹³ In this translation, I am not asserting that trans people are androgynos in some meaningful way; in crucial ways, as I will explore, they differ from the halakhic figure of the androgynos. To “translate” is not to assert that two concepts in different times, languages, and cultures are the same. Rather, to translate is, as Walter Benjamin wrote, “to find that intended effect [*Intention*] upon the language into which [they are] translating

¹⁰ Soloman and Russell Pearce, “Nothing About Us Without Us,” 63. As Soloman and Pearce mention, “nothing about us without us” is a term coined by disability justice activists.

¹¹ Sharzer, 4.

¹² I use “they” for the androgynos, as it is the standard neuter singular pronoun in English. However, a more accurate translation of the Hebrew sources would be to use “he,” as Hebrew lacks a neuter gender, though in Greek (which does have a neuter) it is gendered masculine as well, though the neuter in Greek is rarely used to apply to humans, and the grammatical gender of a word and its natural/real world gender do not necessarily match—after all, the word for “manliness” in Greek is also a feminine noun (ἀνδρεία).

¹³ Strassfeld, “Translating the Human,” 591.

which produces in it the echo of the original.”¹⁴ In encoding the androgynos, the rabbis intended that they would be included in the rabbinic halakhic system.¹⁵ So too, I wish to use an *echo* the intention of the androgynos and the laws created by the rabbis around the androgynos to create legal possibilities for trans people today—to say definitively that Torah can include trans people, our lives, and our wisdoms.

She'eilah

Are transfeminine people obligated in milah? Are transmasculine people obligated in niddah?

Teshuva

Methodology

In 2006, Rabbi Elliot Kukla published a short paper entitled “A Created Being Of Its Own: Toward a Jewish Liberation Theology for Men, Women and Everyone Else.” Kukla was the first openly transgender person to be ordained as a rabbi. This paper was one of the early published attempts by a transgender person to grapple with the Talmud, some of the earliest “trans torah,” as it were.¹⁶ Kukla writes:

The rabbis of the Mishna who lived in the first two centuries of the Common Era, (sic) identify at least four possible genders/sexes: the “*zakhar*” (male) and the “*nekevah*” (female), as well as two sexes that are neither male nor female, called the “*tumtum*” and the “*androgynos*.” They also had two other categories for gender identity that don’t appear at birth, but develop later in life. The “*saris*” is born male but later develops female traits; the “*aylonit*” is born female, but later develops male traits. All these genders appear frequently in classical Jewish texts – the *tumtum* appears 119 times in the Babylonian Talmud alone! And yet gender diversity is seldom discussed as an integral part of Jewish sacred texts or as a spiritual resource of our tradition.¹⁷

While there has been much discussion and discourse about this groundbreaking work since then, especially over Kukla’s framing of these categories as “gender identities,” few scholars have seriously pushed beyond Kukla’s initial thesis: these categories exist, and are of

¹⁴ Benjamin, “Task of the Translator,” 76.

¹⁵ Fonrobert, “The Human Body in Rabbinic Discourse,” 289.

¹⁶ Kukla was not the first to posit a relationship between the *tumtum* and contemporary trans and nonbinary Jews. One of the most notable earlier examples was Micah Bazant’s zine “*Timtum*.”

¹⁷ Kukla, 1-2.

symbolic importance for contemporary trans and nonbinary Jews and their inclusion in the Jewish community. Recently, Dr. Max Strassfeld wrote *Trans Talmud: Androgynes and Eunuchs in Rabbinic Literature*, a book that sheds a great deal of light onto how the androgynos and the tumtum were understood within rabbinic literature. But in the halakhic realm, the androgynos and their siblings have only really been used as halakhic sources in conversations about intersex people. While the symbolic importance of the androgynos matters, the heart of Talmud is halakhah; the reason the androgynos appears in the Talmud is to clarify their relationship to halakhah and its system of obligations. Using them as a symbol, while rhetorically important, reduces a rich tradition of sources and discussion within the Talmud about the androgynos to a mere fact of existence. I want to ask—what does the Talmud actually say in the 109 appearances of the androgynos in the Bavli?¹⁸

The goal of this paper is to “translate” the androgynos to the contemporary lives of trans Jews, and to thereby provide a relevant and insightful halakhic source into how trans Jews should practice the mitzvot of niddah and milah. I choose the androgynos specifically (not the saris, aytonit, or tumtum) because they are the most analogous to both transmasculine and transfeminine people—their halakhic gender does not match their genitals. They are not-men who have penises and not-women who menstruate. Therefore, they can serve as a halakhic source for both the mitzvah of milah and the mitzvah of niddah.

The Androgynos

The androgynos is one of the sex categories that are featured in rabbinic halakhic and aggadic material. The most famous and important of the texts about the androgynos and tumtum appears in Mishnah and Tosefta Bikurim after a conversation about halakhic hybrid animals:

א: אנדרוגינוס יש בו דרכים שוה לאנשים ויש בו דרכים שוה לנשים ויש בו דרכים שוה לאנשים ונשים ויש בו דרכים אינו שוה לאנשים ולא לנשים.

ב: כיצד שוה לאנשים מטמא בלובן כאנשים... ונושא אבל לא נישא כאנשים וחייב בכל מצות האמורות בתורה כאנשים.

ג: כיצד שוה לנשים מטמא באודם כנשים...

ה: רבי מאיר אומר אנדרוגינוס בריה בפני עצמה הוא ולא יכלו חכמים להכריע עליו אם הוא איש או אשה אבל טומטום אינו כן פעמים שהוא איש פעמים שהוא אשה.

¹⁸ Kukla, 8 n.2.

1: An androgynos: in some ways they are like men, and in some ways they are like women, in some ways they are like men and women, and in some ways they are like neither men nor women.

2: They are like men, because they are made impure by their semen like men... they marry and are not married like men; and they must observe all the laws in the Torah, like men.

3: They are like women, because they are made impure by menstrual blood like women...

5: Rabbi Meir says: androgynos is a category unto itself, and the Sages could not decide whether they were man or woman. But a tumtum is not like this, as they are sometimes man and sometimes woman.¹⁹

There are several things about the androgynos that can be gleaned from this passage. One crucial one is that they can be made impure by red (menstrual) and white (seminal) discharge. This means that in the rabbinic imagination, they are capable of both menstruation and semination. The *hermaphroditi* (Latin) or ἀνδρόγυνος (androgynos, Greek) are similar figures mentioned in contemporary Greco-Roman legal and philosophical texts, likely serving as the inspiration for the rabbinic incorporation of the androgynos into their legal system.²⁰ The androgynos is given legal depth in this Mishnah: they initiate the act of marriage within kiddushin (a role reserved for men) but cannot be taken as wives, and they are “made impure” by blood and semen. This would seem to imply that they also must participate in the system of niddah.

The Androgynos in Niddah

According to the Torah, women are obligated in niddah. The two main verses concerning niddah appear in Leviticus: first, the Torah states: “When a woman (השא, *ishah*) has a discharge, her discharge being blood from her body, she shall remain in her menstrual separation seven days; whoever touches her shall be impure until evening.”²¹ Notably, the Torah uses the language of womanhood (השא, the feminine of שיש/*ish*) rather than nekeivah (a term for women which is more semantically linked with vagina and zakhar) here. The second verse states: “Do not come near a woman during her menstrual period of

¹⁹ Mishnah Bikurim 4. Translation my own.

²⁰ Fonrobert, 284-286. Though the rabbinic term androgynos is clearly derived from the Greek, the rabbis' conception of the androgynos is not identical to the Greco-Roman one.

²¹ Lev. 15:19.

impurity to uncover her nakedness."²² These are the sources for the prohibition on having sex with a woman that is menstruating.²³

In the context of a discussion about how a mother must act after she gives birth, the Talmud goes into a somewhat lengthy discussion about how the androgynos and the tumtum are to behave with regard to the laws of purity.

אמר ר"נ אמר רב טומטום ואנדרוגיננוס שראו לובן או אודם אין חייבין על ביאת מקדש ואין שורפין עליהם את התרומה. ראו לובן ואודם כאחד אין חייבין על ביאת מקדש אבל שורפין עליהם את התרומה שנאמר: "זכר ועד נקבה תשלחו" זכר ודאי נקבה ודאית ולא טומטום ואנדרוגיננוס.

Rav Nahman says Rav says: In the case of a tumtum and an androgynos who saw a white discharge, for which a man is impure, or who emitted a red discharge (menstrual blood), for which a woman is impure, they are not liable for entering the Temple in a state of impurity. And one does not burn the teruma due to their contact. If they saw white and red as one, they are not liable for entering the Temple, but one does burn teruma due to their contact, as it is stated: "Male (*zakhar*) and female (*nekevah*) you shall send out, out of the camp you shall send them, so that they not impurify their camp, in the midst of which I dwell" (Numbers 5:3). Only a definite male (*zakhar vadai*) or a definite female (*nekevah vadai*) is liable, but not a tumtum or an androgynos.²⁴

Rav here is coming to a rather counterintuitive position: that androgynos are not liable for entering the Temple in a state of impurity. In Numbers, God commands the Israelites to remove "all those who discharge" (*khol-zav*) "from the males until the females" from the camp.²⁵ Rav concludes that, since the text specifies male and female, it is not including the in-between categories of androgynos and tumtum, even if they are part of those who discharge. Since the words male and female seem to be redundant in the source text, Rav has room to interpret. Close attention to language allows the rabbis to carve out an exemption for the androgynos, and potentially a highly significant one in the Temple purity world. However, one thing that is conspicuously absent from this discussion is niddah as it is practiced in the post-Temple world. The androgynos has been described as being made impure by red discharge, a clear reference to the purity laws of niddah and *zivah* in Leviticus 15, but nowhere has there been any discussion of whether the androgynos is covered by the prohibition of having sex with a niddah.²⁶ The rabbis discuss sex with the androgynos elsewhere in the Bavli:

²² Lev. 18:19.

²³ Tur YD 183.

²⁴ BT Niddah 28a-28b. All Bavli translations are from *The Koren Noe Talmud*. The bolded text is a close textual translation, while the unbolded is R. Steinsaltz's additions. I have adapted the translation to remove some of R. Steinsaltz's commentary, to remove redundancies, and for clarity and consistency.

²⁵ Num. 5:2-3.

²⁶ Lev. 18:19.

הוא דאמר כי האי תנא, דתניא, רבי סימאי אומר: אנדרוגינוס חייבין עליו סקילה משתי מקומות. מאי טעמא דרבי סימאי אמר רבא: בר המדורי אסברה לי: "ואת זכר לא תשכב משכבי אשה", אי זהו זכר שיש בו שני משכבות — הוי אומר זה אנדרוגינוס

Rav stated his opinion in accordance with the opinion of this *tanna*, as it is taught in the following *baraita*: Rabbi Simai says: Regarding an androgynos, one is liable to be stoned on his account for intercourse at two places. What is the reasoning of Rabbi Simai? Rava said: bar Hamedurei explained this to me: "And you shall not lie with a male as with a woman [*mishkevei isha*]" (Leviticus 18:22). The phrase *mishkevei isha* appears in the plural. What male has two manners of lying? You must say this an androgynos.²⁷

Rav here interprets Lev. 18:22, the source of the prohibition on male-male anal sex, as a reference to the androgynos, so much so that the Talmud must later re-clarify how the text additionally applies to male-male anal sex. This provides a potential reason for why the androgynos is not mentioned in relation to niddah: it is already prohibited for a male to engage in penetrative vaginal or anal sex with the androgynos. This prohibition underlies the earlier Mishnah's statement that the androgynos can only be a husband, not a wife. The assumption being made here is that the restrictions of niddah only apply to a case of a man and woman in the structure of marriage or heterosexual sex, and since an androgynos is not a woman, they have no need to participate in the broader strictures of niddah. If the rabbis believed the laws of niddah applied to the androgynos, they would have explicitly stated that a man who lies with an androgynos in niddah violates Lev 18:19 as they do with the prohibition of 18:22; since no such declaration exists, there is no source to support the idea that having sex with a menstruating androgynos is forbidden under *hilkhot niddah*. Since they are never wives, they are never in niddah, even if they are in a relationship with a man.

Based on these sources, it is possible to conclude that the laws of niddah are designed and commanded for women in cisgender-heterosexual couples; therefore they are not an obligation that is incumbent on transmasculine people. The rabbis had the chance to envision a system where two menstruants were in relationship to one another—an androgynos and a woman—and nevertheless chose to exclude the androgynos from the laws of niddah. Even if a transmasculine person is in relationship to a person with a penis, they are not halakhic women or wives, and so they should not be obligated in niddah. Their relationship is not analogous to a cisgender-heterosexual one in a halakhic sense. In sum, it is possible to conclude that a menstruating transmasculine person is not obligated in niddah.

²⁷ BT Yevamot 83b.

The Androgynos in Milah

The commandment of milah appears in Genesis, where God commands Avraham, “And throughout the generations, every male (זָכָר) among you shall be circumcised at the age of eight days.”²⁸ This is the source for the commandment to circumcise all Jewish men and boys.²⁹ Unlike niddah, which is commanded of the israh, milah is commanded of the zakhar, a term semantically associated with the penis, the point the Bekhor Shor makes in the comment I began this paper with. However, whether the penis is a mitzvah on the *gavra* (the whole person) or the *heftza* (the penis) has been debated by various authorities over time. A forthcoming teshuvah from another author in the Teshuvah Writing Collective, Rabbi Emily Aviva Kapor-Mater, will elaborate on this issue and, I believe, bolster this point. The language of zakhar is what leads R’ Sharzer to conclude:

What is meant by *zakhar*, usually translated as “male,” and does the category include someone who is female identified? The various dimensions of human sex and gender discussed above were unknown to our ancestors. For them, gender assignment was exclusively on the basis of genital anatomy. They understood the word *zakhar* to refer to someone with male genitalia... In short, the mitzvah of brit milah is based on anatomy rather than gender and applies to any person with a penis.

I believe R’ Sharzer is, for the most part, right based on the Talmudic sources. Following his logic, the androgynos, who has a penis, should be obligated in milah—as they in fact they are.³⁰ R’ Sharzer also concludes that trans women who have had sex reassignment surgery (SRS) are not obligated in milah, a conclusion I agree with and a case I will not discuss further in this paper. But the term zakhar does not simply mean “a person with a penis”—there is more nuance to it in the rabbinic imagination. This is evident in the sources about the androgynos.

The androgynos appears in discussions of whether milah should be done to a baby born on Friday, whose eighth day post-birth is Shabbat. The Mishnah (Shabbat 19:3) rules that, for the circumcision of a “*safek* and an androgynos, one does not violate the Shabbat. And Rabbi Yehudah permits an androgynos.” This Mishnah takes for granted that the androgynos should be circumcised, although not on Shabbat. The minority opinion of Rabbi Yehudah in fact agrees with R’ Sharzer that zakhar means anyone with a penis, concluding from the phrasing of “all males” (kol-zakhar) that the androgynos must be

²⁸ Gen. 17:12.

²⁹ Rambam MT Circumcision 1:1.

³⁰ Shulhan Arukh YD 265:3.

circumcised, even on Shabbat.³¹ However, even within that more expansive formulation, the androgynos is not a *zakhar vadai*, a true male, as the *stam* points to another case where an androgynos is not halakhically similar to a man. This phrasing of *zakhar vadai* was also critical to the earlier conclusion that the androgynos was not liable for entering the Temple. But Rabbi Yehudah is the minority opinion, and the majority opinion in fact concludes that, though the androgynos is obligated in *milah*, they have the status of *safek*, of doubt. Therefore, the Rambam, the Tur, and the Bet Yosef rule that, though the androgynos should be circumcised, one does not say a *brakhah* on their circumcision, because they are not a *zakhar vadai*. (שאינו זכר ודאי).³² The Raavad, however, objects to Rambam:

אם אנדרוגיננוס ספק מברך עליו מפני שהוא ספק דאורייתא ועל ספק דאורייתא מברכין:

If the androgynos is *safek*, say a blessing, because it is a *safek* regarding a Torah commandment, and on a *safek* regarding a Torah commandment we say a blessing.³³

The Raavad contests that the obligation to circumcise an androgynos is a Torah commandment (*d'orayta*), included within the commandment to circumcise *kol-zakhar*. It follows, therefore, that Rambam and the other Rishonim and Aharonim hold that the commandment to circumcise an androgynos, that is not a *zakhar vadai*, is a rabbinic enactment (*d'rabanan*). Only circumcision of a *zakhar vadai*, a certain male, is *d'orayta*. But what, according to the rabbis, does it mean to be a *zakhar vadai*? The Bet Yosef clarifies, drawing from the Talmud: "It could be the case that an androgynos is a *zakhar vadai*... [but this is not so]... Even though in this case [the prohibition on male-male intercourse or *milah*—it is unclear] we call him a *zakhar*, it is also possible that we do not call him a *zakhar* in all other cases, as if you say this in the case of valuations, he should be valued (which the androgynos is not, unlike a *zakhar vadai*)."³⁴ In other words, the androgynos' status as a *zakhar* in *milah*, *nisuin*, and other *mitzvot* is interdependent. The androgynos is a *sometimes* man, as we saw in the Mishnah.

While the androgynos can act as a *zakhar* in certain areas of halakhah, they are not truly a *zakhar vadai*. All the more so, a transfeminine person, who does not act as a *zakhar* in *any* other area of halakhah, cannot be a *zakhar vadai* in *milah*. They are not obligated in *milah d'orayta*. However, the sources make clear that even an androgynos is obligated in *milah*

³¹ BT Shabbat 137a.

³² MT Circumcision 1:7, 3:6; Tur YD 265, Bet Yosef YD 265:16, Shulhan Arukh YD 265:3.

³³ Hasagot HaRa'avad on MT Circumcision 3:6. Translation my own.

³⁴ BY YD 265:17.

d'rabanan, similar to a convert who was already circumcised, a comparison Rambam explicitly makes in MT Circumcision 3:6.

This may lead us to conclude that a transfeminine person is obligated in milah on conversion; however, this milah is d'rabanan. Therefore, if the procedure of milah poses a significant risk to the health, mental or physical, of the transfeminine person, it may be overridden and they can convert with *hatafat dam brit* or without milah at all.³⁵ However, the approach of the Talmud and the Bet Yosef to the gender of the androgynos indicates that this may not be the case.

On the face of it, the androgynos would seem to support an approach where a transfeminine person can be a woman in all areas of halakhah except for milah, since the androgynos acts as different genders in different areas of halakhah. However, this implies that milah can be taken as an isolated mitzvah, separate from other gendered areas of halakhah, like *nisuin* (heterosexual Jewish marriage). But in the Talmud Bet Yosef, the semi-zakhar status of the androgynos in milah derives from how they do not act as a zakhar in some halakhic areas such as valuations, but do act as a zakhar in others, such as Lev. 18:22.³⁶ They are, as the Mishnah puts it, “sometimes men.” Transfeminine people, however, are *never* men. They do not act as men in any other area of halakhah—not in valuations, not in obligation, not in any other mitzvah.³⁷ To insist that they are only men in the context of milah does a disservice to the rabbinic understanding of gender and our contemporary one. To be a zakhar is not just to have a penis, but to be a halakhic man, even to the Bet Yosef. Zakhar and ish are not terms that can be so easily severed by modern conceptions of a split between the concepts of sex and gender. This further underlines the point I made earlier about transmasculine people—they are *never* women, and so the laws of niddah may not apply to them. So too, transfeminine people should not be obligated in milah.

A Conclusion and a Reflection on Obligation

When the first generation of Jewish feminist halakhists approached the question of women and mitzvot, they did so by saying women were permitted, not obligated, to do mitzvot. According to Rabbi Pamela Barmash, Rabbi Joel Roth argued that women could voluntarily

³⁵ The permissibility of conversion for someone obligated in milah but who is unable to for medical reasons is discussed by Ariel Berry in their teshuvah, also published under the Teshuva-Writing Collective.

³⁶ BY YD 265:17.

³⁷ Matlow, “New Conservative Jewish Transgender Responsum.”

obligate themselves in the areas of Jewish law from which they had been traditionally exempted, and that this was the *de facto* position of the Conservative movement about women's obligation in time-bound positive mitzvot.³⁸ Rabbi Barmash, in a teshuvah adopted by the CJLS, ruled that women were obligated in these mitzvot. But in my (anecdotal) experience, the older view is the position of most Conservative and other halakhic egalitarian spaces, including synagogues, camps, schools, and more—men are obligated; women are allowed to opt-in to tefillin, tallit, leading services, and other similar mitzvot.

Even though I personally follow the opinion of Rabbi Barmash and others like her (such as Rabbi Ethan Tucker and the Hadar Institute), heterodox halakhah does always not need to expand the tent of obligations to be good halakhah, and people do not need to be obligated in mitzvot to do mitzvot. The Tosafot noted cases of women and other exempt people doing mitzvot, and even allowed them to make brakhot on those mitzvot without being obligated in them.³⁹ If trans people want to obligate themselves in milah and niddah, none of these sources preclude that. But I have demonstrated that the sources do not support creating an obligation where not explicitly exists. Transmasculine people are not women, and do not need to practice niddah, a mitzvah for women. Transfeminine people are not men, and do not need to undergo milah, a mitzvah for men.

³⁸ Barmash, 24.

³⁹ Tosafot on Rosh Hashanah 33a.