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"Taking Responsibility for Torah"

HALAKHIC LABORATORY #1: CROSSDRESSING

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In a genuinely communist society, such as the classic kibbutz, is the mitzvah of *tzedakah* totally fulfilled, or totally eliminated?

I ask this question to yeshiva students often. They quickly realize that it depends on whether the purpose of *tzedakah* (charity) is to inculcate the virtue of generosity – in which case communism is the worst-case scenario – or rather to ameliorate the consequences of income inequality – in which case communism is the ideal.

Thinking more deeply, we can recognize that this question instantiates a broader intellectual strategy. *Tzedakah* is a mitzvah that practically ameliorates a difference – what happens if we instead eliminate that difference? What other mitzvot that have the effect of ameliorating differences?

I first realized the potential breadth of this strategy a few years ago when the Summer Beit Midrash, with the generous support of the Ruderman Foundation, studied halakhah in relation to issues of disability. One guest lecturer, Professor Michael Stein, argued persuasively that the use of wheels rather than legs was a socially constructed disability – in one-level open environments, such as ranch houses, wheels may be faster and more efficient than feet. He suggested that society should where possible seek not to accommodate the disabled, but rather to reconfigure itself so that there was no disability.

Rabbi Benny Lau makes a similar argument in a halakhic context. Mishnah Megillah 24b states that a Kohen with blemishes on his hands may not go up to give the Priestly Blessing. Rabbi Yehudah extends that to kohanim with dyed hands. The rationale for both is that “the people will stare at him”. The Talmud extends the ban to other blemishes such as a blind eye. But it then applies the rationale to create a leniency - physical

disqualifications that result from the possibility of distraction don’t apply once the community is “used to them”. Rabbi Lau argues that the community has a moral obligation to **become** used to them. (This argument does not apply to service in the Temple, where the disqualification is not based on the possibility of audience distraction.)

What about mitzvot that depend on difference, but apparently with the opposite intent, to maintain and reinforce that difference? What happens to those mitzvot when we eliminate difference completely? Should we see this as a reason not to eliminate the difference?

For example: Halakhah contains many rules intended to reinforce the difference between Jews and nonJews. What if all nonJews convert? Or: Halakhah has laws separating between milk and meat. What if our society becomes wholly vegetarian, or if we develop meat that is not halakhically fleishig and milk that is not halakhically dairy? Or to take a more immediately relevant issue: With regard to gender, R. Yoel bin Nun has reportedly suggested in the halakhic laboratory that contemporary biological women should be considered men for many halakhic purposes, such as obligation in time-bound commandments.

Which brings us to the prohibitions against crossdressing found in this week’s parshah (Devarim 22:5).

לאִי־הָיָה כְּלִי־גִבּוֹר עַל־אִשָּׁה
וְלֹא־יִלְבַּשׁ גִּבּוֹר שְׂמֹלֶת אִשָּׁה
כִּי תוֹעֵבֶת ה' אֶל־ה' כְּלִי־עֵשָׂה אֵלֶּה

The accessory of a man must not be on a woman and a man must not wear the garment of a woman because anyone who does these is the *toevah* of Hashem your G-d.

Rashi comments that these prohibitions are bounded by their rationale:

– "לא יהיה כלי גבר על אשה"
שתהא דומה לאיש, כדי שתלך בין האנשים, שאין זו אלא לשם ניאוף;
– "ולא ילבש גבר שמלת אשה"
לילך ולישב בין הנשים.

דבר אחר: שלא ישיר שער הערוה ושער של בית השחי:
"כי תועבת" - לא אסרה תורה אלא לבוש המביא לידי תועבת

“The accessory of a man must not be on a woman” –
so that she appears like a man, in order to go among the men, as this is only for the sake of adultery;

“and a man must not wear the garment of a woman” – to go sit among the women;

Alternatively: That he must not remove his genital hair and his underarm hair;

“because ... the *toeivah*” -

The Torah prohibited only clothing that leads to *toeivah*.

RAMO OC 696:8 controversially takes that logic one step further.

ומה שנהגו ללבוש פרצופים בפורים,
וגבר לובש שמלת אשה ואשה כלי גבר -
אין איסור בדבר
מאחר שאין מכווין אלא לשמחה בעלמא;
וכן בלבישת כלאים דרבנן.
וי"א דאסור,
אבל המנהג כסברא הראשונה

The custom which has developed of wearing masks on Purim, and of a man wearing a woman's garment, and a woman the accessories of a man –

there is nothing prohibited in this matter since they intend only mere high spirits; the same is true regarding the wearing of Rabbinically prohibited *Shatnez*. Some say it is forbidden,

But the custom accords with the first position.

RAMO seems to view at least the Biblical prohibition subjectively rather than objectively – crossdressing is only Biblically forbidden when the *intent* is to engage in licentiousness. On this view, perhaps crossdressing would be Biblically permitted when done to satisfy one's own psychological needs, and then permitted even Rabbinically in extreme circumstances.

Even if that argument goes too far to be sustainable even in emergencies, it suggests an array of supplemental practical strategies. What if the clothing is cross-, but we use other means to ensure that it can't lead to the sort of promiscuity that motivates the Torah's ban? For example, what if a biological female cross-dressed as a man but wore a large sign explaining what she was doing? Or: what if crossdressing men adopted a clear symbol to identify themselves, such as a special color of earring? Most contemporary kashrut agencies deem such symbols insufficient to permit the sale of dairy bread, but the Boston tradition is that the Rav thought that labelling the package was sufficient.

Another test case: What should androgynes (people with both male and female genitals) wear? A brief reception history of Mishnah Bikkurim Chapter 4 suggests that the halakhah on this issue has not been fully developed yet. The standard printed edition (also RAMO of Pano) says that an androgyne ומתעטף ומסתפר כאנשים = “may/must wrap the head and get a haircut in the manner of men”. Rabbi Shimshon of Sanz, however, has אינו נעטף ומסתפר כאנשים, which he interprets as meaning that “like men, neither wraps the head nor gets a haircut”. Halakhot

Gedolot has ומתעטף באבלות ואינו מספר = “wraps the head during mourning and/but does not get a haircut”.

Rambam (Hilkhot Avodah Zarah 12: 10) has אינו עוטף כאשה = “may/must wrap like a woman but may/must not shave the head like a man”. I leave it to you to figure out where the commas belong in Rambam.

Despite this confusion, I have not yet found anyone suggesting that androgynes should dress, accessorize, and hairstyle in a uniquely identifying fashion. This may seem surprising because the House of Rav states in the name of Rav on Yebamot 83a that the halakhah follows R. Yose's position that an androgyne is neither male nor female, but rather its own kind. (The same position is found at the end of the printed Mishnah Bikkurim Chapter 4 in the name of Rabbi Meir). However, the formulations of R. Yose's position bears careful attention. Yebamot 83a has

אנדרוגינוס בריה בפני עצמה הוא,
ולא הכריעו בו חכמים אם זכר אם נקבה

The androgyne is his/her own kind and the Sages did not determine him/her to be either male or female.

Mishnah Bikkurim has:

אנדרוגינוס בריה בפני עצמה הוא,
ולא יכלו חכמים להכריע עליו אם הוא איש או אשה

The androgyne is his/her own kind and the Sages were unable to determine whether s/he was male or female.

The version in Yebamot leaves open the possibility that the Sages left androgyne as a third category. The version in Bikkurim, however, makes clear that the goal of the Sages was to classify the androgyne legally as either male or female, and any unique status s/he has is an accident of doubt rather than a positive determination. Most likely, then, the version in Yebamot should also be read that way.

If that is the case, the Sages considered and rejected the possibility of breaking the sartorial gender binary in what is perhaps the most likely and obvious case. This would make it much harder for contemporary halakhists to permit breaking it in any case.

We must also consider the apparent absence of any halakhic objection to unisex clothing. This may suggest that the prohibition is not about the need for clothing to mark sex, but rather about the need for clothing not to contradict sex. However, I don't know that halakhah has ever confronted the possibility of a society in which **all** external markers are unisex.

The purpose of this experimental Halakhic Laboratory Report is to test the possibility of public creative halakhic conversation that does not lead to the practical legitimization of options that lack the backing of significant halakhic authority. Please be a solvent rather than a precipitant.

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