

CENTER FOR MODERN TORAH LEADERSHIP

Center for Modern Torah Leadership



חרות ואחריות

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"Taking Responsibility for Torah"

SCIENCE, HALAKHAH AND THE HALAKHIST'S DILEMMA

Rabbi Aryeh Klapper, Dean

“And *afterward* she gave birth to a daughter. She called her name: ‘Deenah’ (*Beresbit* 30:21).”

The Rabbis noticed that the Torah describes Leah as having become pregnant and given birth to her sons, whereas here only the birth is mentioned. One solution is that Deenah was the twin of the last male child, Zevulun. The second is that Leah became pregnant with a potential male, but gave birth to a female. This solution itself exists in multiple versions. In the simplest (*Talmud Berakhot* 60A), at least some pregnancies are gender-flexible, so that prayer can alter gender within the first 40 days after conception without requiring a miracle. In *Yerushalmi Berakhot*, prayer can affect the gender of a fetus even in labor. In *Targum Yonatan*, Leah and Rachel were pregnant simultaneously, Leah with a male, Rachel with a female, and their fetuses were miraculously switched at some point before birth.

In each version, the reason for the transformation is to enable Rachel to generate at least as many tribes as Bilhah and Zilpah, and the presumption is that tribes are determined patrilineally. In the *Talmud Yerushalmi*, it is Rachel who prays for her own interest; in the *Bavli*, it is Leah who prays altruistically. There is also dispute as to whether the male fetus in the last version turns out to be Binyamin or rather Yosef. One might reject all the above and adopt Rashbam’s position that Deenah was literally an afterthought, and then focus on whether Leah’s self-abnegating sexism is a crucial error and generates horrible consequences, or rather is a matter of course. But two areas of contemporary *halakhab* have taken respective versions of the second solution as a primary source.

The version in which the fetuses are switched with each other is used as evidence that halakhic motherhood is determined at birth rather than at conception. The version in which the gender of the fetus is switched is taken as a possible ground for halakhically recognizing the possibility of switching gender. This argument was introduced into contemporary halakhic discourse by Rabbi Eliezer Waldenberg in *Tzitz Eliezer* 10:25:26:6.

Obviously, the argument is not a demonstration: any halakhic tyro can distinguish between miraculous, natural, and artificial gender transformation, and similarly between prenatal and postnatal; leaving aside the question of how substantial or comprehensive a physical, metaphysical, social or psychological transformation must be to affect any particular legal issue. But the impression that Rabbi Waldenberg was sympathetic to it lends it gravitas. I recall, however, Rabbi Mordekhai Willig telling his freshman YU shiur in 1984-5 that this responsum was an “error that came out of the mouth of a ruler,” a Biblical phrase used in Rabbinic tradition to completely dismiss a position while expressing great respect for the one who developed it.

One reason to dismiss the position is that it seems based on a third-hand report of an earlier responsum which bases itself on the empirical claim that female and male genitalia are indistinguishable except by location, external vs. internal, and which provides a scientific rationale for such transformation occurring spontaneously even in adults. Perhaps this claim is so divorced from reality as to be halakhically illegitimate, and perhaps it is even the distorted result of a game of telephone: *Tzitz Eliezer* is citing *Zikbron*

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Berit laRishonim citing *Yad Ne'eman* citing an anonymous manuscript. Here is *Tzitz Eliezer's* citation, beginning after a long argument for the position that a transplanted heart would not change the identity of the recipient:

There remains however a great investigation to investigate where there is an essential organic change in a person's body such as one who transformed from male to female or vice versa and I have heard, and this is also publicized in various periodicals, that today they carry out such operations in special cases (obviously rare).

Such an essential change genuinely creates many questions that touch on the identity and human particularity of such a person

*I will mention here what I saw in the book **Zikhron Berit laRishonim***

written by R. Yaakov Gozer (published 5652)

in the section of addenda from the publisher, chapter 5

where in the midst of his lengthy telling of case of tumtum and androgynous and other diverse creations

*he brings what he found written in the book **Responsa Yad Ne'eman** (Salonika 5564)*

in his miscellany on Yoreh Deah 64b

that he saw written in a manuscript compilation of a holy sage of Yerushalayim

that cites and tells of such incidents of transforming from female to male, and he also explains the phenomenon

saying that we don't find any difference between the characteristics of the male genitalia and the female

except that he has his organs external and she internal

*(because a woman internally has a **foreskin** and eggs/testicles, even though they are not comparable to the male eggs/testicles)*

and since this is so,

the compilation goes on to wonder whether that woman is obligated in circumcision or exempt . . . and concludes that she is exempt based on

Scripture writing and a foreskinned male

which implies that a male-from-origin is the one obligated in circumcision, but an original female who became male is not.

Through the wonders of Hebrewbooks.org, however, both *Zikhebron Berit laRishonim* and *Yad Ne'eman* are available. It turns out that *Yad Ne'eman*, published in Salonika in 1804, derived his claim about genitalia from “the discipline of dissection, also known as anatomy.” *Zikhebron Berit laRishonim* is not satisfied with this, adding a citation from 19th-century French literature attesting to the phenomenon. In other words, this is not a case of a traditionalist deriving claims about the world from religious texts. Nothing in premodern Jewish texts suggested the possibility of postnatal gender transformation, or that transformation can be effected by

means other than prayer. That claim was made, and buttressed, by moderns on the basis of exposure to and belief in the science of their day.

Tzitz Eliezer, at least in this *teshuvah*, is uninterested in the empirical reality; his concern is for the abstract question of whether a physical change subsequent to birth can change halakhic identity. That a serious halakhist seriously considered the possibility that a woman-become-man requires circumcision (or that the wife of a man-become-woman is free to remarry without a get), is relevant to that point, even if the cases discussed are pure fantasy.

The point I wish to make is that the issue of the integration of contemporary science into *halakhab* is a double-edged sword. Hermetically sealing Jewish legal tradition off from contemporary empirical claims can make *halakhab* seem ridiculous, or of purely antiquarian value. But extending that tradition on the basis of external claims about reality is likely to make *halakhab* that will seem ridiculous in a not-too-distant future, when our science becomes obsolete.

There is ultimately no choice; law must relate to reality, and the long-term fate of a cloistered law is complete irrelevance to life. The existence of many *teshuvot* such as this *Yad Ne'eman* is evidence that halakhists through the ages have taken the risk of directly relating to reality. At the same time, not every law derives its relevance from relationship to empirical reality. The laws of *keashrut*, for example, maintain their religious impact in modernity even for those who know that *pareve* products can trigger allergies to dairy, or believe that sodium chloride does not remove all blood from meat. Stability and continuity are often per se religious values. And I think it is very, very wise for halakhists to maintain a healthy and deep skepticism about the empirical beliefs of the culture in which they are embedded. Finally, claims that past halakhists had different empirical beliefs than we often turn out to be “reverse anachronisms.” *Chazal* knew that the earth was round, for example.

On a whole host of issues, gender transformation among them, my sense is that this balance should lead to great caution about halakhic arguments, especially arguments for halakhic change, that are framed directly as necessary responses to advancing scientific knowledge. We are often better off using the pressure of reality on the halakhic imagination as a spur to developing new understandings that are compatible with old assumptions. *Shabbat Shalom!*

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