

Inyanei ha-Mitzvot:
The *Tumtum* and *Androgynos*
in the Shulchan Aruch and Mishneh Torah

Submitted in partial fulfillment of the requirements for Ordination

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March 1, 2010
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Acknowledgments

My first deep thanks go to my thesis advisor, Professor Reuven Firestone, who has lent his open mind, generous soul, and sharp eye to this unwieldy project. I have been encouraged by his warmth, his experienced hand, and his supportive, if unfounded, belief that I can and should write a book on this topic.

Gratitude goes to Rabbi Elliot Kukla, my *chevruta* and friend in this learning and on this strange and blessed path. He is always available for consults and is single-handedly responsible for the Index to the Texts. Heartfelt thanks go to the fabulous crew of TransTorah, for your many contributions, including covering for me so often as I have attempted to graduate; to Dr. Stephen Passamanek, whose example helped me to love the law, and who answered my esoteric e-mail queries even on game days; to Rose Katz, to Rabbi Yoel Kahn and especially to my parents, Gail and Harold Zellman, who have supported the completion of my education far above and beyond the call of duty.

And, of course, to my beloved and tolerant partner, Erika Katske, who has spent many hours editing, formatting, and italicizing, who knows how to use a computer and how to give constant, challenging, generous and loving support in everything.

Preface and Dedication

Since being admitted to the rabbinical program of the Hebrew Union College-Jewish Institute of Religion seven years ago, I have received a lot of questions that I am not qualified to answer. As the first openly transgender student admitted to study for the rabbinate, I am blessed with an extraordinary number of people who share their stories with me: their struggles, their triumphs and their fears, and their visions for a Judaism and a world that will someday welcome us in a way that it does not today.

To receive these kinds of stories is one of the gifts given to people in this profession. My gift is perhaps more complex, because along with stories, I receive hundreds and hundreds of questions and requests for guidance on issues of gender identity and transgender and intersex experiences—areas that have only begun to be approached by our society. The current generations are slowly streaming out of the closet. Medicine, law, science, the arts, social theory and religion are only beginning to catch up.

Judaism, especially progressive Judaism, is slowly catching up as well. But most of the questions that I receive have not yet been addressed thoroughly, or addressed at all; and I am often unqualified to answer them. These questions come from parents, teachers, nurses and doctors, rabbis, social workers, synagogue volunteers and many others actively engaged in Jewish life. Either by intent or by happenstance, these people are engaging the reality of the intersex and transgender people all around us; and they want and need to have available the various texts and traditions of Judaism. Pastoral resources

are underway; the internet has made it possible to share resources as never before. But there is so much that needs to be done.

A lot of the questions I am asked are halakhic in nature—questions about Jewish law. Unfortunately, I am not a halakhist. Legal authorities from all movements of Judaism are just starting to undertake, from their own perspectives, the profound and marvelous Jewish questions that the transgender and intersex communities raise. I am looking forward to learning more from these authorities. At the same time, with haste or without, Jewish law and custom has tended to follow the firm will of its constituents. If we can equip all Jews with the tools of their tradition, accessible and comprehensible—and equally importantly, equip them with confidence to apply their minds, self-reflective capacities, Jewish values and love for God’s creation to the transgender and intersex people they encounter—then their decisions will, eventually, guide our experts.

In the meantime, I receive letters, e-mails and phone calls from around the world: a Conservative rabbi in Europe, uncertain whether a transgender convert to Judaism requires circumcision, or whether they can enter the covenant at all; burial societies in Canada and the Southwest asking me to advise them whether men or women should prepare a transgender person for burial; a plastic surgeon pondering the Jewish complexities of gender-reassignment surgery. The director of a Reform Jewish summer camp contacted me wanting to know whether a transgender camper should be housed in the girls’ cabin or the boys’. Congregations around the world ask for transgender-respectful liturgy for gender transitions, name changes, memorials and weddings. I have

listened to the director of a community *mikveh*, trying to figure out how to integrate transgender people into the day-to-day life of the Jewish ritual bathhouse; to closeted transgender people living “stealth” in Chassidic communities, who looked anonymously on the Internet for someone to whom they could tell the truth. They all have pressing questions, like the one from an attorney for a transgender employee at an Orthodox Jewish institution who asked whether it is true that Jewish law requires her employer to fire her. They are all struggling in different ways, like the dozens of rabbis, cantors, and Jewish educators—as well as ministers and priests—asking for help to welcome transgender congregants into their communities. Some are scared, like the parents of transgender people—and aunts, grandparents, children and friends—who want to know whether it is true that Judaism condemns transgender experiences. Occasionally they welcome the challenge, like the gay uncle calling to share his delight about a transitioning nephew, and asking how he can make sure that he offers all possible support.

Many transgender and intersex people call. Some need referrals to jobs, free health care, or counseling to recover from assault. Some are thriving in a world just beginning to open to them. Many have arrived recently in San Francisco from somewhere else and are looking for a toehold in a Jewish community. I and my colleagues receive hundreds of requests for educational literature, pastoral counseling, and halakhic advice. I have tried to offer the best guidance I can. Hundreds of times I have come up short of the knowledge or the availability that is needed. I have prayed to God many times for

strength and wisdom—or, even better, for the appearance of a large number of other people who have strength and wisdom on these questions!

To all of you who have asked for my help in the past, or may in the future, I offer this work, with my apologies for its failings and mine. To you, I say: there are few simple answers to the questions of our lives. Jewish tradition is immensely complex. It is often right and sometimes wrong. It has always been changing, and still is. It has many times become wider, truer and kinder, and it will again. You are made in the image of the Holy One—the God Who loves the marvelous questions and infinite human possibilities over which we labor, and Whose truth embraces and transcends them all.

This is the word of the Eternal God to the prophet Zerubbabel: “Not through might, and not through power, but through My spirit,” says the God of Heaven’s Hosts. Whoever you are, O great mountain in the path of Zerubbabel—turn into level ground! Someday they shall roll out the topstone, answering, “Beautiful, beautiful”...for who would despise a day of small beginnings?

Zechariah 4:6-7, 10

Introduction

“Gender is one of the fundamental categories through which we order and interact with the world. Most people absorb the fundamental ‘rules’ of gender at an early age, and these rules provide the basis for all relationships with others. There are two and only two genders, we are taught, male and female; all human beings who have ever lived are one or the other; gender is determined through visual inspection of a baby’s genitals at birth and remains unchanged throughout life; female/male dimorphism is natural, having nothing to do with social criteria or decisions, and so is individual membership in one gender or another. These assumptions are so basic to the way in which we understand reality that anything that threatens them—a baby with ambiguous genitalia, a person on the street whose gender is difficult to determine, a man who is cross-dressed, a butch woman—may evoke both anger and a profound sense of vertigo. Violations of gender norms seem to endanger the foundations of the earth, the walls of our only safe and certain home in the universe.”¹

The development of feminism since the 1960s and 1970s has established women’s experiences as not only a legitimate but a critical focus of study in numerous disciplines across the arts, sciences and humanities. Feminism brought to the world’s attention the necessity of studying and valuing an experience of human sex and gender that had typically been at worst maligned and at best overlooked. The impact of the feminist movement on the Jewish world and the Jewish academy cannot be overstated. The feminist imperative has led people of all genders to re-examine the full range of Jewish tradition and practice in radically new ways.

¹Judith Plaskow, “Dismantling the Gender Binary within Judaism: The Challenge of Transgender to Compulsory Heterosexuality.” In Heterosexism in Contemporary World Religion: Problem and Prospect. Edited Marvin M. Ellison and Judith Plaskow. Cleveland: The Pilgrim Press, 2007, p. 13.

Over the last ten years, the field of gender studies has begun to establish another new and significant path of inquiry. As the category of people known as “women” continue to struggle for parity with the category of people known as “men,” some have begun to ask even more fundamental questions: what are women? What are men? Do these two categories describe—as has often been assumed—the true totality of human gender experience? A growing movement of transgender and intersex people and allies is increasingly problematizing binary sex and binary gender, prompting new theory in the academy about the diverse possibilities of human biology, physiology, sexuality, and gender identity. These trends are challenging society to thoroughly reconsider its sexual and gender categories. In its more radical form, transgender and queer theory not only proposes more options for human identity, but also asks society to question the necessity and purposes of ascribing gender categories to human beings at all.

This emerging movement has only just begun to impact the Jewish world. Judaism and Jewish communities have long been perceived as highly stratified by gender. The rather astounding progress of Jewish feminism in challenging male dominance has opened new possibilities for women in a relatively short period of time. Now, Jews of intersex and transgender experience—Jews who may not fit the categories of “male” or “female”—are also beginning to seek an acknowledged place in Jewish life, to be respectfully included in Jewish communities and to place our concerns and contributions on the Jewish community agenda.

This emerging movement has led a small number of scholars and rabbis to turn to Jewish textual traditions, searching for answers to what seem to be new questions. What kind of precedent may exist in Jewish sources for sex or gender that is non-binary, or identities that are mutable? What values and approaches found in the sources might rightly be applied to the consideration of transgender and intersex issues in Jewish life? What are the implications of transgender lives for a halachic system deeply rooted in binary gender categories? How can traditional sources be understood or re-understood in light of sweeping changes in medical science, psychological understandings and social norms?

This study is still in its early stages. What is immediately clear, however, is that the sex/gender “system” of rabbinic literature is far more complex than simply “male” and “female.” In both its aggadic material and its halachic processes, the Sages of the Mishna, Tosefta and Talmudim account for—or imagine—a much wider variety of biological sex than what we acknowledge today. They greatly develop the Biblical figure of the *saris*, a castrated or feminine man; and they also discuss at length the *aylonit*, a woman with masculine traits. The Mishna and earliest midrashim introduce us to the *androgynos* and the *tumtum*—two figures whose sex/gender is neither male nor female, or is both, or is completely unknown. The *tumtum* and *androgynos* are the focus of this paper.

Rabbinic literature offers a complex matrix of possibilities for what human bodies look like and what kinds of behaviors and psycho-social gender identities may inhabit them. Talmudic scholar Charlotte Fonrobert explains, “Predominantly, the rabbinic sages

project an assumption of the existence of two kinds of human bodies as far as their sex is concerned, male and female. At the same time, rabbinic legal thinking admits to a greater variability of human bodies. There are male and female bodies, bodies that are both, and others that are neither... [T]hey did not consider these as external to the system they crafted, but they integrated them into the system.”² At this writing, the focus of scholarly and rabbinic attention has been, to my knowledge, almost exclusively on Tannaitic and Talmudic material. Scholars and rabbis such Sarra Lev (Reconstructionist Rabbinical College), Charlotte Fonrobert (Stanford University), Elliot Kukla (HUC-LA rabbinic thesis, 2006), Max Strassfeld (Stanford University) and Noach Dzmura (Graduate Theological Union) have investigated the “gender systems” and categories of this literature. In different ways, their research has attempted to systematically explain how one or more of the many sex/gender designations functioned or was understood by the Tannaim and Amoraim.

The Tannaitic and Talmudic Literature

Much of the discussion in this literature, on any topic, presumes the expected binary sex and gender system. Stories are told and law is debated primarily with expressed concern for, or with unspoken presumption of, either the male (*zachar/ish*, most of the time) or the female (*n'keivah/isha*, some of the time). But the rabbis also consider four additional sex/gender designations (the *androgynos*, the *tumtum*, the *aylonit* and the *saris*) frequently. In the Mishna, Tosefta and Talmudim combined, there are 149 references to

² Charlotte Elisheva Fonrobert. “Regulating the Human Body: Rabbinic Legal Discourse and the Making of Jewish Gender,” in The Cambridge Companion to the Talmud and Rabbinic Literature ed. Charlotte Elisheva Fonrobert and Martin S. Jaffee. New York: Cambridge University Press, 2007.

the *androgynos*, 181 to the *tumtum*, 80 to the *aylonit*, and 156 to the *saris*. (The midrashic literature contains a few hundred additional references.) These four additional sex/gender categories, and the status of the individuals that fall into them, are considered in regard to a wide variety of subjects: tort law, Temple service, commerce, inheritance, birth, attaining age of majority, marriage, permitted sexual behavior, and the status of their obligation *vis-à-vis* ritual *mitzvot* among others. There appears to be few or no significant areas of rabbinic inquiry in which sex/gender categories beyond male and female are not taken into some sort of account.

The extensive and wide-ranging references can be categorized into several more general lines of questioning or points of dispute within the literature. These include (but are not limited to):

- How should status of obligation to “gender-dependent” *mitzvot* be evaluated for an individual who is not clearly *zachar* or *n'keivah* in some relevant respect?
How should obligation be configured for each category of person—e.g., differentiating between Biblical and rabbinic *mitzvot*, determining obligation out of doubt, who can facilitate the fulfillment of a given mitzvah on whose behalf, etc.?
- What are the implications of the origin of an individual’s sex/gender status for his/her functioning within the halachic system? What are the halachic implications of a status that is “man-made” (for example the *chetzyo eved chetzyo ben chorin*, one who is part slave and part free) versus one that is “God-made” (e.g. most of these sex/gender categories)?

- Does the *androgynos* constitute a sex/gender category of its own, thus resulting in a fully tripartite (at least) system of sex/gender? Is the androgynos fully male in every way? Or should the *androgynos* be sometimes considered male and sometimes considered female, depending upon the situation at hand?
- How should the *tumtum* be incorporated into the system, given that the primary indicator of the *tumtum* is that their sexual status is invisible and cannot be determined?
- How should age of majority be ascertained for people whose physical maturity does not follow “normal,” gendered patterns?

Present-day scholars in the academy, as well as involved Jews of many backgrounds who are increasingly studying this material, have begun to raise different critical questions that are not addressed by the texts, but rather result from the reading of this material through the lens of modern life. Some of the central points of investigation and dispute are as follows:

- Is the inclusion of these sex/gender categories in Tannaitic and Talmudic literature a reflection of a biological and social reality of the literature’s time and place? In other words, do the rabbis write about tumtumim because there were tumtum-like people living in their world whose function in the community had to be assessed? Or are the various “less-binary” categories entirely invented by the rabbinic imagination in order to explore liminal areas of the law?

- Does the presence of, and/or the treatment of, these categories in the literature serve to destabilize or to affirm the binary nature of the rabbinic sex/gender world?
- Recognizing that in rabbinic literature physical categories often become models for discussing more abstract issues, and recognizing that rabbinic literature does not observe the very modern distinction between physical ‘sex’ and ‘gender identity’ per se, to what extent is it correct, justifiable or productive for these texts to inform our modern-day discussions about transgender experience and gender identity?
- In light of modern theory about what constitutes “gender,” should either the androgynos or tumtum properly be considered a separate sex/gender category in its own right? Are they more correctly understood as variations of “male” and “female?” To what extent should we constrain our answer to this question to the rabbinic mindset, and to what extent may our own modern-day outlook and assumptions circumscribe what we find to be possible in rabbinic literature?

The Codes

Investigation of gender diversity in Jewish texts is still in its infancy. More importantly for the purposes of this paper, it has thus far been confined almost entirely to the Tannaitic and Amoraic literature referenced above. It appears that none of the restatement literature has yet been examined specifically for its treatment of the *androgynos* or *tumtum*.

The restatement literature—better known as the Codes—refers to an entire category of Jewish literature, generally from the medieval period. The purpose of the various Codes that have been compiled since approximately 1000 C.E. is to provide a “digest” of Jewish legal thought. Developed primarily through the Talmud, Jewish legal thought is complex, multi-vocal, technical and detailed. It provides for nearly every arena of a Jew’s life. It varies significantly between different Jewish cultures, locations and time periods. Its sources are found scattered across different literatures and in different languages. Jewish legal thought is many things—and it is not “user-friendly.” Learning Jewish law from the Talmud and commentaries requires advanced education and a great deal of time—something that most Jews in most times and places have not had. The Codes attempt, in different ways, to make the basic rulings of Jewish law accessible to all.

The Mishneh Torah and the Shulchan Aruch

The *Mishneh Torah* of Moses Maimonides is “the most comprehensive and significant code of Jewish Law ever compiled...From a purely internal perspective, the Mishneh Torah was written in order to constitute a comprehensive and authoritative legal code.”³ Maimonides (the Rambam) lived from 1135-1204. Between 1177 and 1187, he composed his Code, which remains one of the most influential works in Jewish history. Today, however, the most widely-accepted law code, acknowledged as authoritative

³ Eliav Shochetman, “Jewish Law in Spain Before 1300,” In Hecht, N.S., et al. An Introduction to the History and Sources of Jewish Law. Oxford: Oxford University Press, 1996, pp. 277-278.

across much of the halachically-concerned Jewish world, is Joseph Caro's Shulchan Aruch, which appeared in print in 1565.⁴

The contents, attitudes and concerns of the Mishneh Torah and Shulchan Aruch have a major impact on today's Jewish "environment." In fact, one could argue that, on many subjects, the restatement literature overall has a greater influence on today's unfolding Judaism than the earlier literature on which it is based. It is these works that most halachically-concerned rabbis and laypeople consult when attempting to determine the best answer to a question. Transgender and intersex people seeking open participation in Jewish life, in all movements, present a myriad of questions. To seriously consider how to welcome and include transgender and intersex people in Jewish life, communities must be prepared to re-consider some of their most basic (and often unspoken) assumptions about how they function—from their requirements for *aliyot* to the Torah to the signs on the doors of their restrooms. For some Jews, the answers to these questions may be reached through various channels, and the opinions of Caro or Maimonides may be one concern of many. For these communities, an understanding of the major legal sources is necessary to make, and then to defend, Jewishly-informed decisions. For Jewish communities for whom traditional law forms a primary channel of community decision-making, the contents of the restatement literature, and how those contents might be interpreted, can determinative how transgender Jews will participate, or whether they will be able to participate at all.

⁴ Stephen M. Passamanek, "Toward Sunrise in the East," In Hecht, N.S., et al. An Introduction to the History and Sources of Jewish Law. Oxford: Oxford University Press, 1996, p. 339.

This paper examines the references to the *androgynos* and *tumtum* in the Mishneh Torah and Shulchan Aruch, to see what preliminary patterns, trends, disputes, lacunae, and information may emerge. Throughout this paper, when I say “the Codes,” I am referring only to these two preeminent works. There are other restatements of Jewish law that are not included here.

The most important preliminary note is that the nature and goals of these two law codes are different. Part of what makes Maimonides’ work so remarkable is that he chose to include in it all aspects of Jewish law developed to that point, including the voluminous regulations related to the operation of the Temple in Jerusalem. Several of the fourteen books of the Mishneh Torah are primarily concerned with laws that had become inapplicable long before Maimonides was born. The Temple in Jerusalem had been destroyed for 1300 years, and the Jewish people did not possess national sovereignty on any piece of land. There was no daily, practical need in the Jewish diaspora for the multitude of laws and practices that applied to the functioning of the Temple and the animal sacrifices that took place there. Nonetheless, all of these are treated with detail in the Mishneh Torah.

Joseph Caro (1488-1575) is the author of the *Beit Yosef*, an extensive and erudite commentary on Ben Asher’s *Arba’ah Turim* (“The Four Rows,” 1340.) One of the innovative contributions of the *Arba’ah Turim* was its system of organizing its contents. Ben Asher limited the scope of his work only to Jewish law that had practical, or potentially practical, application in his own day and time. Caro’s commentary naturally

followed from the structure and contents of the *Arba'ah Turim*; and the *Beit Yosef*, in turn, provided the great bulk of the material for Caro's later compilation of the much simpler Shulchan Aruch.⁵ Therefore, the Shulchan Aruch addresses matters of Jewish law that had practical application in the medieval period. Both the Shulchan Aruch and Mishneh Torah are masterworks of their genres, and their respective scopes are quite different.

The Shulchan Aruch as it exists today is really the product of two authors. The eminent Polish Rabbi Moses Isserles (c.1530-1572) read early editions of the Shulchan Aruch and "believed that the work was too terse and brief, excluding valuable opinions that were in his view extremely useful."⁶ Isserles interspersed extensive glosses to the main text of the Shulchan Aruch, and the work has been published with these glosses since 1580. The glosses serve multiple purposes. Sometimes Isserles disagrees with Caro's conclusion, and thus adds his own opinion; sometimes the glosses explain an unclear aspect of Caro's text. At other times, Isserles does not necessarily disagree, but felt it was important to add a layer of complexity to Caro's terse decisions.⁷ (Occasionally Caro himself records conflicting answers to the same questions.) It should be understood that the opinions recorded in this paper under "Isserles" are not always his opinion per se, but are opinions that he felt merited a presence in the Shulchan Aruch. Isserles' additions are indicated in italics in Appendix B.

⁵ Passamaneck p. 339

⁶ Passamaneck p. 340

⁷ Menachem Elon, *Jewish Law: History, Sources, Principles, Volume III*. Translated Bernard Auerbach and Melvin J. Sykes. New York: The Jewish Publication Society, 1994, p. 1363.

Who are the Androgynos and the Tumtum?

Androgynos is not a native Hebrew word. It is a composite of the Greek prefix for ‘man’ (andr-) and the word for woman (gynes)⁸ and was used in Greek thought since the ancients to describe a person with some combination of male and female traits.⁹ It is used similarly in rabbinic literature. While the term does not appear in the Hebrew Bible, it is found in the earliest midrashic works and the Mishna. Interestingly, there appears to be no plural form of the word recorded in the Codes literature, nor in any of the Hebrew texts that precede it. “The androgynos” is generally used as a singular noun denoting an entire category. This is easier to do in pseudo-Mishnaic Hebrew than in modern English. Thus, modern scholars who have written about the androgynos have tended to use the Greek plural androgynoi, borrowed from Herodotus and other early Greek writers.¹⁰ For the sake of clarity, I will use androgynoi as well. A detailed explanation of the androgynos is found in Part I.

The singular *tumtum*, an indigenous Hebrew-Aramaic word,¹¹ has the expected plural *tumtumim*.¹² Marcus Jastrow states that *alef-tet-mem* is a secondary root of *tet-mem-mem*. *Alef-tet-mem* has the meaning of “to obstruct, close, fill up,” and the passive particle *atum* means “filled up” or “solid.” Jastrow then defines *tumtum* as “stumped or shapeless.”¹³ When referring to a person, *tumtum* appears to mean a person whose

⁸ For more detail, see p. 76 of Fredrick William Danker’s A Greek-English Lexicon of the New Testament and Other Early Christian Literature, 3rd Revised Edition. Chicago: University of Chicago Press, 2000.

⁹ See, for a good example, the Introduction to the Symposium of Plato.

¹¹ Michael J. Sweet, “Talking About Feygelekh: A Queer Male Representation in Jewish American Speech,” Queerly Phrased: Language, Gender, and Sexuality, ed. Anna Livia and Kira Hall, New York: Oxford University Press, 1997, p. 120.

¹² For example, Babylonian Talmud *Yevamot* 64a-b

¹³ Marcus Jastrow, Dictionary of the Talmud. Jerusalem: Horev Press, p. 43.

genital region is “solid” or “shapeless.” It is an undifferentiated mass, covering and obscuring either male or female genitalia underneath. Jastrow explains tumtum as a reduplicative form of *tet-mem-mem*. This seems extremely likely to be the case, and further exploration of the term deserves a paper of its own. In brief, reduplication is an extremely common linguistic device in which part of a radical is copied and affixed for certain effects.¹⁴ In this case, if *tet-mem-mem* means filled-in, solid or shapeless, the tumtum is ‘really solid and shapeless’ or ‘always solid and shapeless’ or ‘filled in all the way.’ A much more detailed explanation of the tumtum is found in Part I. For the present, a tumtum is a person whose sex is invisible and therefore unknown.

There is, to my knowledge, no previously collected information or theories on these two figures in the Codes. There do exist, as mentioned above, some early and very intelligent attempts to analyze the role of the androgynos and tumtum in the Mishna, Tosefta and Babylonian Talmud. I will compare the Codes against these hypotheses to some extent. However, there is no secondary literature yet written about these figures in the Codes specifically. No theses or approaches exist that I might attempt to amplify or to refute. This paper is very much a beginning.

There are many important questions that should be asked about the androgynos and tumtum in the Mishneh Torah and Shulchan Aruch. Some of these questions might be:

¹⁴Francis Katamba quotes Sapir in explaining this well-documented linguistic phenomenon: “Nothing is more natural than the prevalence of reduplication, in other words, the repetition of all or part of the radical element. The process is generally employed, with self-evident symbolism, to indicate such concepts as distribution, plurality, repetition, customary activity, increase in size, added intensity, continuance.” The Mishnaic-style Hebrew that characterizes both the Mishneh Torah and Shulchan Aruch certainly employs reduplication as a common device (compare *gilgul*, *l’dakdeik*, *m’daldeil* and many others.) Francis Katamba, *Modern Linguistics: Morphology*, New York: St. Martin’s Press, 1993, p. 180.

- In relation to what subjects do the Mishneh Torah and Shulchan Aruch consider the androgynos and tumtum? Are there any discernible patterns of subject matter, internally or in comparison to the earlier literature? What terms and categories are associated with discussion of certain issues?
- What aspects of the Tannaitic and Talmudic discussions are preserved in the restatement literature, and which are not? Can any patterns or motivations be discerned?
- Does either work appear to reflect a particular perspective, pattern, philosophy or agenda of the codifier?
- Does this literature raise new questions not addressed by the earlier texts?
- What underlying social or biological issues or assumptions may have been in the minds of the codifiers?
- How might each codifier's individual milieu and influences (particularly Christian or Muslim influence) have affected their perspectives and choices?
- What role does this early restatement literature play in the historical evolution of Jewish thought on sex and gender? How does this literature fit into the progression of thought: from the Tannaim's open consideration of multiple gender categories to today's Jewish world in which these possibilities are rarely discussed?
- How might modern gender theory or queer theory illuminate the treatment of non-binary categories in these texts?
- To what extent do these texts address the contemporary questions being raised (such as those noted above)?

- What conclusions might be drawn from this literature about how today's Jewish communities can or should address the growing presence of openly transgender people? What approaches do these texts offer to our contemporary questions?

This paper will, of course, touch on only a few of the questions above.

The basic question at hand is: how does a literature and culture that presumes dichotomous male-female sex address the presence of people, like the androgynos and tumtum, who do not fit? This question is much too large to be answered here; but it is the tension underlying all of the more specific issues taken up. My hope is that the information presented here might be helpful to others attempting to answer their own questions.

Goals of this work

The goals of this paper are as follows:

1. **To make the Codes' discussions of the androgynos and tumtum accessible to a wider range of English-speaking people**, including those who offer Jewish guidance and support to transgender and intersex people and their families, those who want to make their Jewish communities more open-minded, and people of other faiths who want to know some of what Jewish legal texts have to say on these topics. To this end, I have translated every excerpt that I could find in the Mishneh Torah and the Shulchan Aruch that directly addresses the tumtum or the androgynos. I have attempted to present them in clear English, and to include in

brackets information that is not written in the passage itself, but is absolutely essential for a surface understanding of it. These translations are included as Appendices A and B. I have also included an index (Appendix C) of the relevant excerpts of the Mishneh Torah and the Shulchan Aruch by topic, so that a person seeking information or citations about, for example, circumcision of the androgynos, or whether a tumtum can serve as a witness in court, will be able to find it easily.

2. **To make this material more readily available to scholars.** I do not pretend to be an authority on either of the Codes under discussion in this work, nor on their esteemed authors. However, there are many who are experts. I hope to make this important material on the androgynos and the tumtum more readily accessible and organized for those who might undertake more complex halachic or academic analysis.
3. **To create more resource materials about the tumtum and the androgynos that are both accurate and respectful.** Please see ‘A Note on Language’ for a more detailed explanation of the problems of most existing translations of these and related texts. In brief, existing English translations of the Mishneh Torah tend to be inaccurate when dealing with the tumtum and androgynos, as well as off-putting to those who most need to read them. There is no complete English translation of the Shulchan Aruch, and wiki-type translation projects thus far

include sections far more popular than these. I hope that this will provide careful, accessible versions of these fascinating texts.

4. **To encourage these texts to be read more widely, to suggest the kinds of questions that they pose, and to point out some of the ways that this tradition can push our own society forward.** This paper is not intended to offer halachic opinions about the questions of intersex and transgender experiences. I am in no way an expert on *halakha*. In the future, there will be more transgender and intersex people who are. I hope that their important contributions to Jewish thought will come soon enough for me to know them.

My job, as I understand it, is much less erudite. I feel responsible for making it known that people like us even *exist* in Jewish tradition. I believe that Judaism has a great deal to teach us about respecting ourselves and about how others can respect us. If we take the time to study it, our tradition asks urgent questions about what human societies can and should be—and this includes, explicitly, people like us. I have witnessed over and over how the texts in these pages—the Mishneh Torah, no less!—have offered Jews a place amongst their people when they thought there was none. These texts have the potential to change Judaism’s understanding of many people, and to change those people’s understanding of Judaism. This is the work of many lifetimes, but the conversation has begun.

My goal is simply to encourage that these texts be read, to suggest the kinds of questions that they pose, and to point out where and how this tradition might push us forward—Jews and non-Jews alike--towards a broader, deeper and more appreciative way of thinking about the great diversity of bodies and expressions that exist in our world.

A Note on Language

When discussing sex and gender beyond “women” and “men,” one of the most formidable challenges is language. English itself does not acknowledge human beings outside of these two boxes. Pronouns are the most problematic; we can refer to people as ‘she/her,’ or as ‘he/his/him.’ ‘It’ is for objects only. Unlike some languages, we do not have in English a recognized third-gender or neutral option to use for human beings. This paper deals with the tumtum and androgynos, two figures who are important *because* we don’t know what pronoun to use for them. So how should we write or talk about these people, without being hopelessly inaccurate from the outset? To make matters worse, this paper tries to speak in English about material written in Hebrew. Translation at best is difficult, interpretive and inexact. And Hebrew is, grammatically speaking, far more thoroughly binary-gendered than English is. Not only are there only two pronouns, but nouns, verbs and adjectives are also coded for grammatical gender; the option of ‘it’ does not even exist. The grammatical masculine is the default option for referring to all people and objects, individuals as well as groups, which are not clearly and exclusively feminine.

Therefore the moment we approach the tumtum and androgynos we begin to have problems with language. Even an initial reading of Mishneh Torah *Hilchot Ishut* 2:24 reveals the complications: “One who has a male appendage and a female appendage—he is called an androgynos, and it is in doubt whether [he is] male and in doubt whether [he is] female. And he does not have any indication at all by which it might be known about him whether he is an unequivocal male or if she is an unequivocal female.”

In this excerpt, Maimonides explains that there is no way to know the sex of the androgynos. As he is declaring this, he is referring to the androgynos as ‘he.’ Is the androgynos called ‘he’ in this or another text because the writer actually conceptualized this person as a ‘he?’ Or is the androgynos called ‘he’ in this instance because ‘he’ is the default grammatical gender in Hebrew? For the reader’s part, does this grammatical reality prejudice us towards considering the androgynos ‘more male’ than we otherwise would? Is this prejudice more likely in English since the masculine is the default for most things that we have not thought about or do not know? Given the complexities present, is it the responsibility of the translator to somehow provide a corrective?

For this paper, I have translated all Hebrew text according to the grammatical gender present in the original. The translations that form Appendices A and B, which are then quoted throughout the paper, render the Hebrew *hu* as he and *hi* as she. The reader is then left to be as questioning and as vigilant about context as we have to be when looking at the Hebrew original. Sometimes ‘he/his/him’ refers to a male. Sometimes it is likely functioning as a default pronoun, referring to a figure who is explicitly more complicated

than the language available. We cannot, to put it frankly, take pronouns too seriously in this material. Where a pronoun clearly refers to an object and not to a human being, I have translated that pronoun as ‘it.’

In all original writing in this paper (as opposed to original translations), I have sought to avoid pronouns completely when discussing the *tumtum* and *androgynos*. It is usually possible to write about these figures without pronouns, but not always. Occasionally, I have found no alternative to ‘he/she,’ ‘him/her,’ or ‘his/her.’ I am uncomfortable with this option. It is extremely important that the process of talking about these figures does not require forcing onto them the very binary sex/gender categories that they, by definition, defy. I sincerely hope that nascent third-gender or gender-neutral pronouns (such as ‘zie’ and ‘hir’ in English) will someday become widely used and easily readable. In addition, I have chosen not to translate the names of the protagonists—the *androgynos* and the *tumtum*. I have found no English equivalent for either that is accurate, respectful and practical. There exist today a number of English translations of the Mishneh Torah, as well as of the Babylonian and Palestinian Talmudim and much of the midrashic literature. Each of these translations’ rendering of *tumtum* and *androgynos* presents problems. They often use terminology that is inaccurate and/or is offensive to the modern intersex and transgender communities. For example, the word ‘hermaphrodite’ is widely used to translate ‘androgynos.’¹⁵ Modern intersex communities almost universally reject this term because of its medical connotations and ridiculed history. Another existing translation, ‘double-sexed,’ is simply limiting. As we will see, the

¹⁵ For example, Fred Rosner, *Medicine in the Mishneh Torah of Maimonides*. New York: Ktav Publishing House, 1984, pp. 153-155.

androgynos is more complex than ‘male-plus-female.’ *Tumtum* is rendered in various places as ‘sexless,’ ‘undeveloped,’ and other translations that are equally inaccurate or disparaging. The result of this and similar language is a problem of ‘tone’--admittedly a subjective matter, but leading to an objective problem. A reader of some existing translations of rabbinic texts comes away with the sense that these characters are quite tragic, and perhaps slightly nefarious or incompetent. The original Hebrew discussions of the androgynos and tumtum are, overwhelmingly, completely matter-of-fact. Readers of the original texts or of Appendices A and B will note that these Codes are not disgusted by the tumtum and androgynos, do not find them funny or titillating, and do not feel sorry for them. Jacob Neusner’s translation of *tumtum* as “a person lacking revealed sexual traits” is commendably non-derisive and faithful to the figure of the tumtum as presented in rabbinic literature.¹⁶ But this is too long for repeated use here, and any other thoughtful translation of either *tumtum* or *androgynos* would be no shorter. For these reasons, I have left the names of these two central figures untranslated. The figures they describe defy any English word we might try; the reader is left to translate these terms *mente cordis sui*.

Two final terms need to be defined for the purposes of their use in this paper—the common but difficult words “gender” and “sex.” The history of these terms has filled many books and deserves a fuller treatment here. For now, let it suffice to say that I will use both terms as twentieth-century feminism divided them. In this paper, ‘sex’ refers to the physical equipment of bodies—including, but not limited to, primary and secondary

¹⁶ Jacob Neusner, The Babylonian Talmud: Translation and Commentary. Hendrickson Publishers, 2006, BT *Yevamot* 8:6

sexual characteristics. 'Gender' refers to everything *except* the physical: socially ascribed attributes and roles, such as 'tough' or 'nurturing;' internally felt identities (a person with a vagina and another person with a penis might equally claim a female gender identity); manners of human expression of gender, such as clothing, haircuts, or ways of moving or speaking. Feminism taught us that physical 'sex' and social/internal 'gender' do not inevitably correspond.

That distinction between the terms being made, it is necessary to point out that rabbinic literature often does not entertain a difference. Throughout this paper, I usually refer to a person's "sex/gender," because in the Mishneh Torah and Shulchan Aruch, these two concepts are not usually considered separately. Overall, "biology is destiny" in these works, which makes the question of the androgynos and tumtum all the more interesting. Whether classical rabbinic thought did not recognize internal gender identity or was just not interested in discussing it is a question that has been addressed by others. This literature clearly does recognize, and strictly prescribe, dichotomously-gendered roles and behaviors—this is the impulse that generates such quandaries when the androgynos and tumtum come along. But when it comes to these figures, decisions about their status is discussed strictly as a function of their physical selves. They are not asked how they feel or what they think of their own gender or sex. Their legal/social functioning and their anatomies are completely and automatically related; thus, we often find the Codes discussing the "gender" and "sex" of these figures in the same breath. I will use "sex/gender" when the circumstances of the conversation incorporate aspects of both, and it would be incorrect or misleading to use just one or the other.

Part I: Physical Descriptions of the Tumtum and Androgynos in the Codes

In his study of the tumtum and androgynos in the Mishna and Tosefta, Elliot Kukla comments that “it is hard to imagine what the Tannaitic rabbis have in mind when they are referring to a “*zakhar*,” or most literally, a person who is associated with a pointed piece of phallic anatomy...our bodies are laden with cultural meanings and it is hard to know how or why the Tannaitic rabbis identified certain individuals as phallus-owners (*zakhar*) or crevice-owners (*nekevah*).”¹ This observation applies equally to the rabbinic texts of the medieval period, and certainly to the Codes under examination here.

Studying the role of the tumtum and androgynos in this literature presents an intriguing difficulty. The categories of “androgynos” and “tumtum” are designations of physical bodies. People are called an androgynos or a tumtum entirely and exclusively because of how they look. The problem is that we do not really know how they look. We only know how they are *described*. And these descriptions are both scarce and difficult to understand. They definitely do not answer adequately the first question of most modern readers: “What did they look like?” Perhaps the codifiers presumed that readers were familiar enough with the tumtum and the androgynos that detailed descriptions were not needed. Perhaps more extensive explanation was beyond the scope of the practical, efficient volumes that these Codes wished to be. Or it may be that medieval Jewish readers and writers just did not care as desperately as we do about the specifics of gender-variant bodies. For whatever reason, from our modern perspective, rabbinic literature

¹ ‘A Created Being of Its Own’: Gender Multiplicity in Jewish Antiquity, Rabbinic Thesis, Hebrew Union College-Jewish Institute of Religion, February 2006, p. 35.

from antiquity through the medieval period definitely under-explains what it actually means when it calls someone a tumtum or an androgynos.

This section gives an overview of how the androgynos and tumtum are described in the Shulchan Aruch and Mishneh Torah. However, even a simple list of characteristics is complicated when translated from one language to another. It is impossible to render the Hebrew into English without some degree of interpretation; especially on the topic in Jewish literature that is under-studied, there is no question that some of these words, phrases and symbols could be translated another way. Even the words “androgynos” and “tumtum” themselves, as noted in the introduction, defy translation or even a full explanation.

The most problematic terms, in addition to *atum* (see the Introduction), are *nakvut* and *zachrut*. By all appearances, the Tannaitic and Amoraic literature uses the terms *zachrut* and *nakvut* to refer to a penis and a vagina, respectively.² The same appears to be true in the codified literature, and I have translated the excerpts from the Mishneh Torah and Shulchan Aruch accordingly. Therefore I state below that the androgynos has both a vagina and a penis, and that the tumtum is thought to have only one or the other. Given the historically conditioned limits of vocabulary and associated meanings that are inevitable in any language at any time, I believe that the translations of *nakvut* as vagina and *zachrut* as penis are reasonable, in order for the androgynos and tumtum to be more easily understood and treated by contemporary readers of English.

² See, for example, BT *Beitzah* 31b, BT *Yevamot* 83b

But it is critical to keep Kukla's point in mind throughout: that when Rambam says that the androgynos has *zachrut* and *nakvut*, we cannot assume that what we picture is the same thing that he was writing about eight hundred years ago. The definition of what has qualified as a penis versus a clitoris, for example, has varied dramatically over time.³ Similarly, we cannot assume that the codifiers' intended meanings of words like "breasts" or "white emission" are the same as the images and associations held by us, or for that matter by their rabbinic forebears, who preceded them by as much as fifteen hundred years. All the more so must we be wary of our assumptions about overtly subjective phrases such as "has a high voice" or "is not fit to procreate." The presence in our age of photography, mass media, advanced medicine and plastic surgery has made widespread images and ideas of human bodies that may or may not be similar to what Caro or Maimonides imagined.

Our ideas about the possibilities for the human form may also not correspond to what the medieval rabbis actually saw around them. It has been common for the androgynos and tumtum to be treated as mythical figures. Serious consideration has led some scholars to believe that the androgynos and tumtum are archetypes invented by the rabbis to explore social categories and play with the limits of the law.⁴ Simply dismissing non-binary sex has led others to the same assumption.⁵ This is a possibility, of course, but it is not a

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⁴ See, for example, Charlotte Fonrobert's comparison between *Tosefta Bikkurim* 2:3-7 and *Mishnah Bikkurim* 2:8-11 and *BT Hullin* 79b: "The parallelism between the two lists suggests that both the human "male-female" hybrid and the animal "wild-domesticated" hybrid operate primarily as theoretical test cases of the respective binary systems." ("Gender Identity in Halakhic Discourse," *Jewish Women: A Comprehensive Historical Encyclopedia*. 1 March 2009. Jewish Women's Archive. February 14, 2010.

⁵ This is typically the approach taken when these figures are encountered—which they are quite frequently—in the course of Jewish study in traditionally religious environments. Because of the great frequency with which these figures appear in Jewish literature from 200 CE through the late medieval

certain fact. Our modern tendency to understand the tumtum and androgynos as imaginary is not only because medical science generally erases intersex bodies from our sight. It also is important to recall that most Jewish communities, almost everywhere and until very recently, were small. Jews overwhelmingly married each other. Cousins, for example, often married each other and had children. Therefore we cannot reasonably assume that the genetic combinations existing today are the same as those of antique Palestine, the medieval period, or even the early 1900s. Today there are certain kinds of intersex people who are born quite commonly in certain societies where family members tend to marry.⁶ Even in the modern United States, with low frequency of consanguinity, an estimated 1.7 percent all infants is born intersex.⁷ Some subpopulations, including Ashkenazi Jews, have very high rates of specific types of intersexuality.⁸ These facts are largely made invisible by genital plastic surgery on these infants and children, powerful desire of doctors and parents to hide the truth, and general lack of acknowledgement that such people exist.

It is possible that the androgynos and/or tumtum were primarily or wholly imagined by the rabbis. It is possible that they are archetypes, distilling attributes of an array of intersex people that have, after all, always existed in Jewish societies. It is also possible that the tumtum and the androgynos were very real and not uncommon at all. This paper

period, it is impossible to have significant broad-ranging exposure to traditional Jewish texts without encountering the androgynos and tumtum. I have met dozens of people with a significant Jewish religious education who are quite familiar with these figures, or at least have heard of them in the literature, but never even considered the possibility that they really existed.

⁶ See, for example, *Sexing the Body* p. 109

⁷ *Sexing the Body* p. 51

⁸ The rate of congenital adrenal hyperplasia—a single form of intersexuality-- among Ashkenazi Jews is 37/1,000. *Sexing the Body* p. 54

will address these figures' presence in the Codes as if they are categories representing real, flesh-and-blood human beings. We will likely never know to what degree this is historically true. But it can be said with assurance that, if medieval Jewish communities were not actually populated by many tumtumim and androgynoi, the law is certainly written as if they were. For the purposes of learning about and from the approaches of the Sages, I would argue that it makes little difference, if any at all.

For all of the reasons mentioned, this section is entitled Descriptions of the Tumtum and Androgynos in the Codes. I do not pretend to know what these two figures "really" looked like or how their bodies were actually configured. But it is necessary to at least establish how they are *described*, since grappling with and analyzing the discussions about these figures relies on these descriptions. They are the baseline for understanding the people and characteristics being discussed. But these anatomical baselines must be relied on only for what they are—language used to describe and define a category—as opposed to the objective reality of that category. Just as this paper addresses the figures of the tumtum and androgynos in the Shulchan Aruch and Mishneh Torah as if they were living human beings, so does it proceed with their descriptions as if they were—whatever this may mean--true.

With these important cautions in mind, let us examine briefly the physical descriptions of the androgynos and tumtum put forward in these two Codes. The Mishneh Torah contains only ten references that indicate who, exactly, Rambam felt he was talking about. Taken together, these excerpts state or strongly imply the following:

The androgynos and tumtum share the following characteristics:

- Capable of seminal discharge.⁹
- Capable of menstrual discharge.¹⁰
- Both discharges can happen simultaneously or separately.¹¹
- Has hair on the head as any person does, at least sometimes.¹²
- Puberty/physical sexual maturation either does not occur at all, or it does not show any outward signs, or those indications are insufficient for a determination that puberty has taken place.¹³

In addition, the androgynos has the following characteristics:

- Has *zachrut k'zachar*, literally “maleness like a male”, as well as *nakvut k'n'keivah*, literally “femaleness like a female.”¹⁴ Elsewhere Maimonides describes the androgynos as having *ever nakvut*, an “appendage of femaleness,” and *ever zachrut*, literally an “appendage of maleness.”¹⁵

⁹ MT *N'zirut* 2:11, *M'chusrei Kaparah* 3:7, *M'tamei Mishkav uMoshav* 1:7

¹⁰ *ibid*

¹¹ MT *M'chusrei Kaparah* 3:7, *M'tamei Mishkav uMoshav* 1:7

¹² MT *Avodat Kochavim* 12:10

¹³ MT *Ishut* 2:25

¹⁴ MT *Milah* 1:7

¹⁵ MT *Ishut* 2:24

- Has a penis that is sufficiently similar to a typical penis (as Rambam understood it) that circumcision is possible and required, within the normal time frame for a healthy male.¹⁶
- Has no other physical indication that would suggest whether this person is male, female or something else.¹⁷
- Is not physically capable of impregnating a woman at any point in the androgynos' life.¹⁸
- Is capable of being a penetrating or a receptive partner in sexual intercourse, either anally or vaginally, with men, women or another androgynos.¹⁹
- Has this physical configuration from the time of birth.²⁰

In addition, the tumtum has the following characteristics:

- Has a genital area with no distinguishing sexual characteristics at all; it is *atum*, 'solid and shapeless.'²¹
- Either underneath, or concealed within the solid, shapeless area, at least some tumtumim have unambiguous genitalia or other sexual characteristics. If these were made visible, it would become clear whether this person is male or female.²²

¹⁶ The exception to this rule is if the eighth day of life, the normal time for circumcision, falls on Shabbat. In this case, MT and SA are in agreement that, due to the lack of certainty whether the androgynos is a male, the circumcision is postponed to the ninth day of life. See MT *Milah* 1:11 and SA YD 331:5. The premise is that Biblical law provides for this rare exception to the strict observance of Shabbat, because of the primacy of this mitzvah in Jewish tradition and the clear Biblical directive about its correct timing. Absent certainty that this directive definitively applies to the androgynos, the extraordinary provisions are suspended.

¹⁷ MT *Ishut* 2:24

¹⁸ MT *Yibum v'Chalitzah* 6:2, 6:8

¹⁹ MT *Issurei Biah* 1:15, *T'rumot* 7:16

²⁰ MT *Milah* 1:7

²¹ *Ishut* 2:25

- This solid area is sometimes “torn,” revealing the genitals underneath or within.
- In some tumtumim who are “torn”, what is revealed is a penis. If this happens, it is sufficiently similar to a typical penis, as Rambam understood it, that circumcision is possible and required.²³
- An animal that is a tumtum can potentially urinate from two places: from its ‘place of maleness’ [*mi-makom zachrut*] or its ‘place of femaleness’ [*mi-makom nakvut*].²⁴
- Potentially capable of impregnating a woman, if a male.²⁵
- Capable of being the receptive partner in sexual intercourse with a male. The body parts used in this intercourse are not specified.
- Has this physical configuration from the time of birth.²⁶

The Shulchan Aruch adds little more to these descriptions. In his gloss to OH 17:2, Isserles gives a succinct description of our figures’ genital anatomies that corresponds to Rambam’s: “...tumtum—it is not known whether he is male or female; and androgynos—he has maleness and femaleness.”²⁷ The text confirms that the tumtum and androgynos have hair on their heads (which they are forbidden to round off, as men are.)²⁸ Caro discusses the circumcision of the androgynos in three different passages, so

²² *Ishut* 2:25

²³ *Hilchot Korban Pesach* 9:9

²⁴ (I have seen no statement in any of the Codes or their commentaries about urination related to human beings.)

²⁵ *Yibum v'Chalitzah* 6:4

²⁶ *MT Milah* 1:7

²⁷ Gloss to *Orach Chaim* 17:2

²⁸ *Yoreh Deah* 181:8

he clearly agrees with Maimonides that the androgynos possesses an organ that could and should be circumcised.²⁹ He also describes an androgynos animal as a “doubtful firstborn,” since the status of the *b’chor* (firstborn son) is reserved for males, and the androgynos may or may not be male.³⁰ The Shulchan Aruch also contains some opinions that disagree with Maimonides’; these points of dispute are discussed below.

From the Codes’ thin and scattered discussions of the physical configurations of the androgynos and tumtum, four primary issues emerge: circumcision, maturation, sex, and reproduction.

Circumcision

In *Hilchot Milah*, Rambam establishes the basic position taken by our three codifiers and all whom they cite: “An androgynos—which is a person who is born having a penis like a man and a vagina like a woman—it is necessary to circumcise him on the eighth day.”³¹ The Shulchan Aruch agrees: “An androgynos, and one that has two foreskins, and one born by Caesarian section: they are circumcised on the eighth [day].”³² The premise, accepted in the Mishneh Torah, Tur and Shulchan Aruch—and undisputed by any of their sources—is that any person who has a penis is subject to the Biblical mitzvah of circumcision on the eighth day of life. In clarifying this issue, the Codes anticipate the

²⁹ OH 331:5; YD 262:3, 265:3

³⁰ *Yoreh Deah* 315:3

³¹ *Hilchot Milah* 1:7

³² *Yoreh Deah* 262:3

reader's question: Might the androgynos be exempt from circumcision, since their sex is in doubt? The united answer is a clear "no".

This simple statement serves as an important reminder about the difference between 21st-century understandings and rabbinic understandings of some "gender-dependent" obligations. We today would speak about circumcision as a mitzvah related to males. The Codes hold that it is a mitzvah pertaining to anyone in possession of the relevant genitalia. In the Shulchan Aruch and Mishneh Torah, possessing a penis and being a male are not one and the same. Rambam's rulings on many specific matters suggest his overall position that an androgynos is *briah bifnei atzmo*—a creation unto her/himself, in a separate sex/gender category from either men or women.³³ Caro, too, explicitly entertains this possibility in various sections of his work.³⁴ Whether one does or does not agree, today this is a foundational question for discussions about transgender people and gender-related *mitzvot*. For example, should a female-to-male transgender person who does not have a penis be considered obligated to *hatafat dam brit* upon conversion to Judaism? Could a male-to-female transwoman who does have a penis be considered exempt? The answer depends largely upon whether circumcision is a mitzvah for anyone with a penis, or whether it is a mitzvah for men.

Some commentators and codifiers dispute the position that 'androgynos' can be treated as a sex/gender category of its own. These thinkers hold the general opinion that *dino k'zachar l'chol davar*—"the law [pertaining to the androgynos] is as [the law] for a male

³³ The Ra'avad points this out explicitly in his commentary to *Hilchot Shofar* 2:3.

³⁴ See, for example, *Orach Chaim* 489:4 (on sounding the *shofar*) and 589:3 (on reading the *Megillah*)

in all matters.”³⁵ This dispute results in dissenting opinions on two issues related to circumcision: one, whether the circumcision of certain people may take place on Shabbat, and two, in which situations the blessings for circumcision should be said.

The primacy of the mitzvah of circumcision, and the explicit Biblical directive that it be performed on the eighth day of life, means that the normative practice requires circumcision on Shabbat if that is the eighth day: *uven-shmonat yamim yimol lachem, kol zachar l’dorotechem*—“every eight-day-old shall be circumcised, every male throughout your generations” (Genesis 17:12). For this ritual, rare exemptions are provided for necessities that would otherwise be clearly prohibited: cutting a foreskin, of course, as well as boiling water and other preparations that cannot be done before Shabbat. Should these rare and narrow exemptions from Shabbat observance apply to the circumcision of an androgynos? Rambam and Caro rule that they do not: the circumcision of an androgynos “*eino docheh Shabbat*”—does not ‘push aside’ Shabbat.³⁶ Caro adds to this list the child of a non-Jewish woman who converted to Judaism after the delivery, and a child born ‘between the suns’—that is, it cannot be determined with certainty what day of life is the eighth. Each codifier puts forth their own list of ‘exceptional’ situations, in which some atypical or ambiguous characteristic of the person, or of their birth, distances them sufficiently from the Torah’s directive that there is insufficient cause for Shabbat exemptions. The androgynos is such a person for all three.

³⁵ See *Even haEzer* 172:8 for one citation of this opinion. This was the firm stance of a number of authorities, preserved in many places, including in the Tur in the corresponding sections to many of the Shulchan Aruch passages included in this paper (see Appendix A). An example is Tur *Yoreh Deah* 266: “But Rav Alfasi wrote that we do trump [Shabbat]. And it is similar with Rabbi Yitzchak, who thinks that [an androgynos is] a complete male [*zachar gamur*].” Interestingly, those who rule that the circumcision of an androgynos should trump Shabbat do so on the basis of their argument that the androgynos is fully male—and not, as Rambam states, in another sex/gender category altogether.

³⁶ OH 331:5

The second question addressed in these Codes is whether the established blessings should be made for the circumcision of an androgynos (regardless of whether or not it takes place on Shabbat). Rambam argues that the blessing should not be made since the androgynos “is not an unequivocal male [*zachar vadai*].” He would seem to be arguing from the general rule that he states elsewhere: that an androgynos or tumtum should never say the blessing “who has commanded us to dwell in the *sukkah*,” since the status of their obligation to do so is doubtful, and “we do not say blessings out of doubt.”³⁷ The Shulchan Aruch quotes Rambam in agreement with this decision.³⁸

For others, who argue that the androgynos is treated as fully male (including the Tur),³⁹ there is no doubt present. The codifiers did not distinguish between a person’s physical sex and a person’s social gender in the way that we do routinely since the 1970s. But in this discussion they do recognize, although not explicitly, that physical status is not the only thing that determines one’s place in the halachic and social system. Rather, there are instances in which the social sex/gender category—in this case, whether one is or is not “male”—can be a serious point of discussion, when the physical attributes themselves are not in doubt. Even in a matter as seemingly straightforward as circumcision, the mere presence or absence of a penis does not tell the whole story. When an androgynos’ eighth day of life falls on Shabbat—wedging an infant between two towering

³⁷ *Hilchot Sukkah* 6:13

³⁸ *Yoreh Deah* 265:3

³⁹ In this matter, Ben Asher sides with those who rule that the androgynos is a complete male: “Rabbi Yitzchak ruled that he is a complete male, and is liable to stoning as a man is [for having sex with another man], and according to his words we do make the blessings over him.” In other words, if the androgynos is subject to the sexual restrictions of a male, then they must also be male enough to warrant the blessings for circumcision.

commandments of the Jewish tradition--it becomes a complex test case for exactly how “male” the androgynos is determined to be, and what, in this society, being male actually means.

The circumcision of the tumtum is, apparently, a much less frequent concern. It only becomes an issue in the small number of cases in which a tumtum’s genital region is “torn” and a penis is revealed.

The only—and very significant—difference between the Mishneh Torah and the Shulchan Aruch on the topic of circumcision is introduced by Isserles’ gloss to *Yoreh Deah* 266:10. Here, he introduces a question that is not addressed by Caro or Maimonides: what about circumcising a tumtum *she-nikra v’nimtza zachar*—a tumtum who is torn and found male? This will be discussed in Part VI, “The Tumtum Who is Torn.”

Physical Maturation

Today, a Jew becomes a fully participating adult member of the community when she or he reaches the chronological age of twelve or thirteen. The well-known ceremony marking coming-of-age as a *bat* or *bar mitzvah* is based upon some degree of learning in Jewish religious skills and subjects. But all Jews, regardless of educational accomplishment, are considered ‘of age’, an adult for all Jewish purposes, by age thirteen. The *physical* maturation of the young person—which obviously varies widely amongst people at that age—is not taken into account.

But puberty is of great significance in rabbinic law. The Codes and earlier rabbinic literature outline much more intricate criteria for determining when a person is considered a '*gadol/g'dolah*', an adult: a complex matrix of chronological age *and* evidence of physical maturity. In many other detailed discussions in the Codes and in the literature that preceded them, we can see that great care was taken to assess precisely when age of majority was reached, both for men and for women. Becoming an adult meant that a person became eligible or responsible for the *mitzvot* and basic activities of full Jewish life. For women, this primarily meant marriage. For men, it also meant owning property, appearing in court, engaging in commerce, and participating fully in communal religion, among other things. In the medieval Jewish world—as now—it was important to know whether a person had reached adulthood.

Chapter 2 of *Hilhot Ishut* is devoted to explaining which physical and chronological milestones qualify an individual for full adult participation in society. In this excerpt Maimonides explains how to determine whether a girl has come of age:

A girl, from the day of her birth until she is 12 complete years old, is called a *k'tanah* [a minor] or is called a *tinoket* [young child or baby]. Even if she brings forth a number of hairs within that time, they are [considered to be] just moles. But if she brought forth two hairs down below on the body—in places known for bringing forth hair—and she is 12 years and one day or older, she is called a young woman [*na'arah*]. And if she brought forth 2 hairs during this time, it is

called “the lower indication.” And after she brought forth the lower indication, she is called a *na’arah* until six full months [have passed]. From the beginning of the day that completes the six months and onward, she is called a mature woman [*bogeret*]. And there are only 6 months between *na’arut* and *bagrut*. If she has arrived at 12 years and one day, and has not brought forth two hairs—even if the indications of an *aylonit* are seen on her—she is still a *k’tanah* until 20 years [of age]. And when she brings forth two hairs—even in the twentieth year--she will be a *na’arah* for six months, and after that she will be called a *bogeret*. If she were twenty years old minus thirty days and has not brought forth two hairs, and (all) the indications of an *aylonit* are seen in her—she is an *aylonit*. And if (all) the indications of an *aylonit* are not seen in her, she is still a *k’tanah* until she brings forth two hairs, or until she is 35 years old and one day. If she has arrived at that time and has not brought forth two hairs—this [one] is called an *aylonit*, even if there is not seen on her a single indicator from among the indications of an *aylonit*. Thus you learn that the *aylonit* has no period of *na’arut*. Rather, from her girlhood she goes [directly] into adulthood.

And these are the indications of an *aylonit*: she does not have breasts. She has difficulty during sex. And her lower abdomen is not like women’s. And her voice is deep/heavy/coarse. And she is not recognizable whether she is male or female.⁴⁰ The young woman, and the adult woman, and the *aylonit*—each one of these three is declared to be of age [*g’dolah*]. *Hilchot Ishut* 2:1-2:6

⁴⁰ All English translations I have seen render this section as something like “and her voice is heavy, and it is not easily recognizable whether it [e.g. the voice] is male or female.” However *kol* (voice) is masculine,

At the very end of this full and exacting chapter about assessing the signs of puberty in women and then in men, Rambam adds a single sentence about the tumtum and androgynos: “A tumtum and an androgynos that are twelve years and one day of age—they are under the presumption of being adults [*g’dolim*], and we will refer to them as such in all places.”⁴¹

This stark and simple formula is rather surprising. As complex characters on the rabbinic stage, one might expect that determining age of majority for the tumtum and androgynos would require more consideration, not less. Why is an important and nuanced topic such as puberty entirely abandoned when it comes to the androgynos and tumtum? The detailed discussions in Chapter 2 make it clear that the Mishneh Torah does not shy away from detailed discussions (and judgments) of physicality and sexuality. Rambam’s one-sentence decision does not indicate reticence to explore the topic. And, as we have established, the frequent appearance of the androgynos and tumtum in the Mishneh Torah suggests no desire to avoid discussing them.

We are left to assume that Maimonides’ declaration is the best that he could do.

Apparently, he believes it is simply not possible to assess the physical maturity of an

which should therefore take a masculine adjective, *nikar*, rather than the feminine *nikeret*. This suggests that these two phrases may be separate, unrelated items in the list, rather than “her voice is...not recognizable,” etc. Several different Hebrew printed editions all have the second phrase with fully feminine grammar, *v’ainah nikeret*, which does not agree with *kolah*. It is possible that this is a simple mistake, but such errors are relatively infrequent in Rambam’s work, and the same issue appears elsewhere (see for example Shulchan Aruch, *Even haEzer* 172:4). It is most easily resolved by making the *aylonit* herself the referent, which in turn produces a more sweeping picture of her physical ambiguity, rather than describing only certain aspects of a person who might overall still appear female.

⁴¹ *Hilchot Ishut* 2:25

androgynos or tumtum. Chronological age is the only basis upon which he makes his decision, in place of the usual complex formulas combining age and physical growth. In turn, this suggests some important physical qualities of these figures. Either the typical changes in body shape, hair growth or vocal register do not happen to tumtumim and androgynoi, or they happen differently enough not to be recognized from the outside as indications of puberty. Clearly, if physical maturation does occur, it does not change the body in a way that makes it more definable according to the system of binary sex. There are no references to an androgynos or tumtum who grows up to be anything other than an androgynos or tumtum.⁴² If one is born an androgynos or tumtum, the Codes and their predecessors expect that they will remain that way. Furthermore, nowhere does rabbinic literature differentiate between younger and older androgynoi or tumtumim, as it does with men and women; I have found no mention in Tannaitic, Amoraic or later literature that discusses the coming-of-age process for these figures, or how their bodies or experiences change (or do not change) over the course of their lives. It is reasonable to presume that some puberty does take place in a tumtum or androgynos, since they are fully grown sexual and reproductive human beings. As discussed below, these figures are assumed by the Codes to be sexually active. The androgynos' penis can penetrate; some tumtumim can impregnate. But how this maturation happens is never mentioned directly. In his goal that "this work might collect the entire Oral Law,"⁴³ Maimonides had nothing to go on. This lacuna in the literature, and how the Mishneh Torah addresses it, is important background to how the tumtum and androgynos are treated.

⁴² The tumtum *she-nikra*—the "tumtum who is torn" by accident or by human intervention, and is revealed to be male or female—is discussed in Part VI. This person's physicality is only changed by "tearing" and not by natural physical maturation.

⁴³ Maimonides' Introduction to the Mishneh Torah, 42

Sex and Reproduction

Priyah urviah—“being fruitful and multiplying”—is considered the first religious duty given in the Torah. Producing children is assumed by the Codes to be a primary concern for all. This has major implications for sexuality and marriage in traditional Jewish law and society, including for the androgynos and tumtum (see especially Part V). If the androgynos’ *ever nakvut* (“appendage of femaleness”) and *ever zachrut* (“appendage of maleness”)⁴⁴ were accompanied by the required inner organs, the androgynos would potentially be able to impregnate and also to become pregnant. However, rabbinic literature generally assumes that the androgynos is not capable of producing children through either means. In the Mishneh Torah it is made explicit that the androgynos cannot successfully impregnate a woman.⁴⁵ I have found no discussions in rabbinic literature of the androgynos’ potential to carry children; apparently this was not considered possible. Sexually, however, the androgynos is described as fully functional both via the vagina and the penis. At different points, the Shulchan Aruch and Mishneh Torah refer to the androgynos as both a penetrating and a receptive partner in sexual intercourse, both anally or vaginally, with men, women or another androgynos.⁴⁶ It is evident that the Codes consider the androgynos’ penis as capable of having an erection and of having white discharge.⁴⁷ This does not necessarily refer to ejaculation, however.⁴⁸

⁴⁴ MT *Ishut* 2:24

⁴⁵ MT *Yibum v’Chalitzah* 6:2, 6:8

⁴⁶ MT *Issurei Biah* 1:15, *T’rumot* 7:16

⁴⁷ MT *N’zirut* 2:11, *M’chusrei Kaparah* 3:7, *M’tamei Mishkav uMoshav* 1:7

⁴⁸ Per *M’chusrei Kaparah* 2:1, the emission that renders one ritually unclean is not semen that is ejaculated sexually, but semen that seeps out when the penis is not erect.

How does the tumtum, with no visible genitalia, engage in sexual activity? Even today, with a generally more expansive view of what constitutes ‘sexual’ behavior, many people’s definitions of “sex” would be stretched to consider a person with no apparent primary sex organs. But there is no question that the Mishneh Torah and Shulchan Aruch consider the tumtum a fully sexual being. This is true both for the *tumtum she-nikra*—the tumtum whose genital area is opened and the hidden organs revealed—and for the majority of tumtumim, whose genitals remain concealed throughout their lives. In the case of the latter, Maimonides explains his position on the matter of a man having vaginal sex with a tumtum: “The tumtum is of doubtful status; therefore, if [a male]⁴⁹ has sex with the tumtum or with an androgynos [vaginally], we flog him with the flogging for rebellion.”⁵⁰ This is the only passage in the Mishneh Torah or Shulchan Aruch that discusses the mechanics of a tumtum’s sexual activities. And the syntax is highly ambiguous. The bracketed *derekh nakvuto*—literally “by way of his femaleness”—clearly refers to the androgynos as an antecedent, but may or may not also refer to the tumtum. Further, the bracketing of this phrase calls into question whether it was part of Rambam’s original work. If this phrase does not refer to the tumtum, then we are left to assume that Maimonides intends to frown upon, although not prohibit, anal penetration of a tumtum by a male.⁵¹ On the other hand, this bracketed phrase might indeed be taken to refer to the tumtum. If so, then Rambam provides no approval for vaginal sex with a

⁴⁹ All sets of brackets in *Issurei Biah* 1:15 are indicated in the referenced edition of the Mishneh Torah itself. In my translations for this work, I have occasionally inserted brackets for clarity; these, however, are all present in this edition of the Hebrew text.

⁵⁰ *Issurei Biah* 1:15

⁵¹ This conclusion is based upon Maimonides’ partial definition of “sex,” found in *Hilchot Issurei Biah* 1:11, as well as the Hebrew idiom present in *Issurei Biah* 1:15. *Ha-ba al ha-tumtum* indicates the male as the penetrating partner and the tumtum as the receptive partner in this case.

tumtum (although he does not prohibit it); but for our present purposes, the important point is that such sexual activity is obviously considered possible. What vaginal sex would mean with a person with no evident vagina is, to my knowledge, left unexplained anywhere in rabbinic literature.

In the case of the “tumtum who is torn,” if a *tumtum she-nikra* turns out to have a penis, then Rambam permits (although does not obligate) him to become a *levir*.⁵² This presumably means that Rambam considers a male *tumtum she-nikra* able to impregnate a woman, since that is the primary *raison d’être* of levirate marriage. Caro agrees, quoting the Mishneh Torah verbatim on this point. However, Caro complicates the question by including a dissenting opinion: “And there is one that says that he is of doubtful status, and strictness of the law should apply.”⁵³ In this case, “strictness of the law” on a matter of Biblical commandment—*sfeika d’oraita l’chumra*—would mean that a male tumtum she-nikra should not have the authority to choose to become a *levir*, because there is too much doubt about whether he would be able to fulfill the commandment (to impregnate his deceased brother’s wife in order to ensure that he has heirs) Here again, we see that not everyone agrees about the status of the *tumtum she-nikra*. If a tumtum is “torn and found male,” just how male—both physically and socially—is he? The specific questions raised by the tumtum she-nikra will be addressed in Part VI.

A similar fundamental question is reflected in Caro’s treatment of the androgynos. The Shulchan Aruch excludes the androgynos from *yibum* and *chalitzah*. But unlike

⁵² *Hilchot Yibum v’Chalitzah* 6:4

⁵³ *Even haEzer* 172:9

Maimonides, he does not state that this decision is because the androgynos cannot father children. Instead, Caro complicates the issue further by preserving a dissenting opinion in his text: “And there those that say that the law pertaining to [the androgynos] is as [the law] for a male in all matters.”⁵⁴ This raises a most interesting question. Both the Mishneh Torah and the Shulchan Aruch take the general stance that the androgynos is definitely not the same as a male, and they place the androgynos in a different legal status from men much of the time. But other noted commentators have taken the general position that the androgynos “is a definite male”⁵⁵ or that the law for men and for an androgynos should be identical.⁵⁶ The obvious question is whether this latter position has anything to do with the androgynos’ essential nature or not. Do they hold this opinion because they believe that the androgynos *is* a male? Or do they choose to *treat* them as male under the halachic system? Based upon the texts of the Shulchan Aruch and Mishneh Torah, this question remains unanswered. As here in EH 172:8, the controversy is allowed to stand, although Caro makes his own ruling clear.

But this question has profound implications for understanding how medieval Jewish law understood human sex/gender diversity. It may be that those who treat the androgynos as a “definite male” under the law actually have no disagreement with the belief that androgynoi are, fundamentally, creations unto themselves--a third sex/gender category entirely. Their ruling is simply a different approach to what to *do* about this reality—in this case, they should be lumped in with men under the legal system. If this was the case, it would reflect 1) an effort to preserve Jewish law as a strictly binary-sex/gender system.

⁵⁴ *Even HaEzer* 172:8

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Those who don't "fit" may be acknowledged socially or theologically, but in the application of the practical law, they are placed into a firmly existing category; or 2) a widespread belief amongst medieval codifiers and their commentators that there are people who, in their basic essence, are neither simply male nor simply female. This would be a profound challenge to twenty-first century understandings of the very topography of humanity.

On the other hand, if a significant number of influential thinkers opined that the androgynos is a male *in essence*—rather than simply 'as if' for legal purposes--then this conveys critical information about how these thinkers construed what it is to be "a man." In the case of the androgynos, this would pose some radical suggestions: a man may or may not have a vagina; a man may or may not experience any discernible puberty; a man may or may not menstruate. Any one of these three attributes present in a human being today would strongly undermine or invalidate the claim that that person is "male." This illustrates what contemporary scholars of gender and history have increasingly insisted upon: that the boundaries around the categories of sex as well as gender roles are historically conditioned, and have been drawn very differently in different times, places and cultures.⁵⁷

⁵⁷Historian of science Alice Dreger asks: "...what should we employ as the necessary and/or sufficient traits of malehood and femalehood? What makes a person a male or a female or a hermaphrodite? This is the problem...the answer is, in a critical sense, historical—specific to time and place. There is no "back of the book" final answer to what must count for humans as "truly" male, female, or hermaphroditic, even though the decisions we make about such boundaries have important implications." (*Hermaphrodites and the Medical Invention of Sex*, Cambridge: Harvard University Press, 1998, p. 9)

What They Don't Say

Sometimes, what is not present is even more revealing than what is. The Codes' statements and assumptions about the androgynos' and tumtum's bodies offer us a variety of insights into sexual and gender diversity in the medieval rabbinic mind. What the Shulchan Aruch and Mishneh Torah *don't* mention tells us equally important--perhaps more important--information. Fonrobert notes that "it appears that the halakhic literature on semiotics of the body is related closely to late antique physiognomy, a popular discipline of knowledge or "science" that similarly focuses on deciphering exterior features of a person. At the same time the two systems of knowledge differ significantly in that late ancient physiognomy has the purpose of interpreting human character, intelligence and virtue...the practice is based upon the belief that exterior traits reveal a person's inner life (Barton, 126)...by contrast, in rabbinic halakhic texts the semiotics of the body is entirely disconnected from the question of character and virtue."⁵⁸ Medieval Jewish literature is no stranger to evaluating peoples' character and abilities. The Shulchan Aruch and Mishneh Torah freely refer to those who are spiteful, untalented, morally deficient, unintelligent, cognitively disabled, or social pariahs.⁵⁹ But these attributes have no relationship to physical form. Specifically, people whose bodies violate dichotomous sexual categories are no more or less competent, ethical or healthy than anyone else. Being born an androgynos or a tumtum does not signal anything about the person's character or abilities. Living life in one of these bodies does not mean being socially ostracized nor psychologically distressed.

⁵⁸ Fonrobert, "Gender Identity in Halakhic Discourse"

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This is a critical understanding for we who are twenty-first century readers, because it is so different from what we expect to find. Today, in most of the world, sexual or gender ambiguity on the surface is considered either an indication or a cause of trouble beneath. We generally believe that people change their bodies or gender presentation as a result of mental illness: transgender people continue to be classified as having Gender Identity Disorder, codified in the DSM-IV.⁶⁰ People whose sex/gender presentation is ambiguous are often treated as unstable, unintelligent or dangerous. We also conclude automatically that an unclear sexual status—like a tumtum or an androgynos--is psychologically and socially untenable. If an individual possesses a vagina and testes, or if a woman has facial hair, for example, we presume that their physical characteristics will inevitably cause them psychic distress. This assumption is the basis for the modern medical approach to intersexuality. If a healthy baby is born today with characteristics of an androgynos or a tumtum, this is considered an urgent medical matter—not because the child's health is at risk, but because it is believed that their emotional well-being, and even their character, is at risk.⁶¹ We presume that a female-to-male transgender person, who wishes to be recognized as male in society, will certainly wish to have a penis surgically constructed, since the lack of a penis in a male person is imagined to be emotionally undesirable and socially unmanageable. The twenty-first century offers few examples of sexual ambiguity--of any type--that is *not* believed to be deeply and in inseparably tied to the psychic, emotional and spiritual status of that human being. The overt practice of physiognomy has long ago been entirely discredited. But its tenets are deeply lodged in our society's consciousness. Nowhere does it have more influence than

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upon people who transgress binary sex or gender norms; and this influence is so pervasive that it may be almost impossible for us to consider human sexual variation outside of it. Further, those of us who consider ourselves enlightened progressives often assume that this presumed link between the divergent body and the troubled mind must certainly have been enacted even more cruelly in the dark past.

Therefore, we may approach the Shulchan Aruch or Mishneh Torah expecting to receive what it does not give. These Codes and their commentators (and, as Fonrobert argues, earlier rabbinic literature from the time of the Mishna) provide a sharply contrasting paradigm for the social and legal approach to intersex people. Neither text offers any commentary whatsoever on the tumtum's or androgynos' emotional or psychological stability, their spiritual potential, their intellectual or moral capacities, or aspects of their character. We are left to assume—as we will see—that tumtumim and androgynoi lived perfectly normal lives. Governed by a mixture of laws and customs that combined those applying to women, those applying to men, and those designed for “creations unto themselves,” the androgynos and tumtum appear to have worked and loved and prayed and died just like the rest of medieval Jewry.

This is not to suggest that these Codes paint a picture of social and gender equality. Even a cursory familiarity demonstrates that this is far from the case. In this social and legal system—codified entirely by men--the unequivocal male body is privileged above all others. There is unquestionably a greater value placed upon being “male,” whatever this comes to mean. But there is no greater value placed upon being “clear” versus being

“unclear.” Forward-thinking twenty-first century societies do the opposite. We purport to value men and women equally; either sex is acceptable.⁶² The social, legal and medical upheaval begins if someone does not fit into one of these two categories. Our society places a premium on being able to check off one or the other sex/gender box without hesitation. As of now, the idea that humanity would be better represented by more boxes-- or no boxes--is limited to a tiny group of queer theorists and social radicals. By contrast, the medieval formulators of Jewish law were clear about which box they thought was the best; but they show little hesitancy to consider an array of boxes beyond “*zachar*” and “*n’keivah*”, and no judgment whatsoever about those who might need them.

Jewish communities today have the potential to marry the increasing enlightenment of our time and place with the under-appreciated gifts of our heritage. If we commit ourselves to honest self-reflection and to serious social and religious transformation, we have the possibility of valuing men and women equally *and* allowing real and non-judged space for everyone else.

⁶² Needless to say, evidence abounds in all arenas that men are still valued more highly than women. The comparison at hand addresses the self-conceptions of the different eras and cultures. Many societies today do not even claim to value women equally. However, it should be noted that some of these societies are the ones that are least fazed by intersex people in their midst. Whether these two characteristics are linked in any way is beyond the scope of this work; but it is worth considering whether these patterns indicate a general human tendency to create hierarchies by sexual category, and it is merely the specifics that vary between time and culture.

Part II: Overview of the Texts

“Rabbinic legal thinking, which provides much of the structural framework of subsequent Jewish cultures, aims first and foremost at instituting a rather pronounced dual gender grid, imposed on the social organization of Jewish society as the rabbis envisioned it. Most of the individual laws of rabbinic *halakhah* apply to either men or women. Differently put, in rabbinic legal thinking it is almost always important whether the halakhic agent is a man or a woman.”¹

There are sixty-nine passages in the Mishneh Torah, and twenty-eight in the Shulchan Aruch, that discuss or refer to the androgynos, tumtum or both. This section intends to present the essential content of these passages in two basic forms: according to the **topics addressed** and according to the “**gender treatment**” each figure receives in each discussion. Parts III-VI will attempt some preliminary analysis of this information; it is hoped that this “raw data” in Part II will provide useful material for others’ efforts as well.

Combined, all of the passages address ninety-three different legal/social questions or situations as they pertain to the androgynos and/or to the tumtum.² Some of these excerpts deal with commonplace questions. For example, both Codes attempt to sort out

¹ Charlotte Elisheva Fonrobert, “Regulating the Human Body: Rabbinic Legal Discourse and the Making of Jewish Gender,” in *The Cambridge Companion to the Talmud and Rabbinic Literature* ed. Charlotte Elisheva Fonrobert and Martin S. Jaffee. Cambridge University Press, 2007, p. 271

² This is by my own reckoning, and does not reflect any stated intention in this literature to address ninety-three separate issues. The Codes try to present the “upshot,” if you will, of more than a millennium of complex and sprawling Jewish legal and ethical thought. The difference between ‘two separate issues’ and two nuances of the same question is not always clear. There is no doubt that others might find slightly more or slightly less than ninety-three issues addressed here.

whether a tumtum or androgynos wears men's clothing or women's. Other *halachot*³ address more remote concerns. For example, we can turn to this literature to tell us--in the event that the Temple were rebuilt in Jerusalem, and subsequently a pure red cow with no blemishes were located and sacrificed there as a burnt offering—whether an androgynos or tumtum would be eligible to sprinkle the ashes of that cow, a ritual designated for men but not for women. As we have noted, medieval Jewish society was thoroughly divided by men's and women's roles and obligations. The laws and customs of that society generally presumed binary gender and sex. The essential question is: what do we do with people who are neither, or both, or whose sex we do not know?

Topics Addressed in Relation to the Tumtum and Androgynos

Those of us who consider ourselves progressive thinkers tend to imagine that the time known as “the past” was definitely less enlightened about many topics than we are. Whenever I mention my work on the tumtum or androgynos to almost anyone—in a class, in a casual conversation-- the overwhelming reaction is great surprise. How can literature from long ago so openly discuss human possibilities beyond male and female—and religious legal literature, at that? The surprise increases greatly when it is learned that these figures appear in many different kinds of discussions. In the twenty-first century, we tend to think about sex and gender diversity within very limited contexts. Intersex and transgender experiences are not yet normalized. The lives of transgender and intersex people are presented to the public's consciousness primarily in either medical or sexual contexts. Many people are not surprised to read of a transgender

³ A *halacha* (Mishneh Torah) or *seif* (Shulchan Aruch) is a paragraph or section—typically quite short—addressing a specific legal question or situation.

woman being arrested for prostitution, but are astounded to see one in the grocery store. Our present culture predisposes a reader of the Codes to expect these figures mostly in discussions of sex—or not to expect them at all. But in fact, we find that an enduring motto of the modern gay liberation movement applies to the Jewish Middle Ages: “they are everywhere.”

Figures 2.1 and 2.2 present the general topics of discussion in which the tumtum and androgynos appear in these two Codes:

Figure 2.1: Topic Groups Addressed in the Mishneh Torah

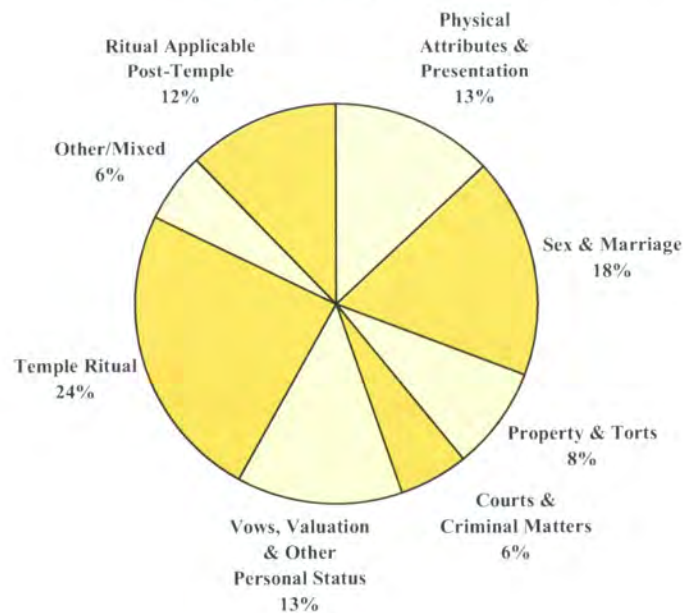
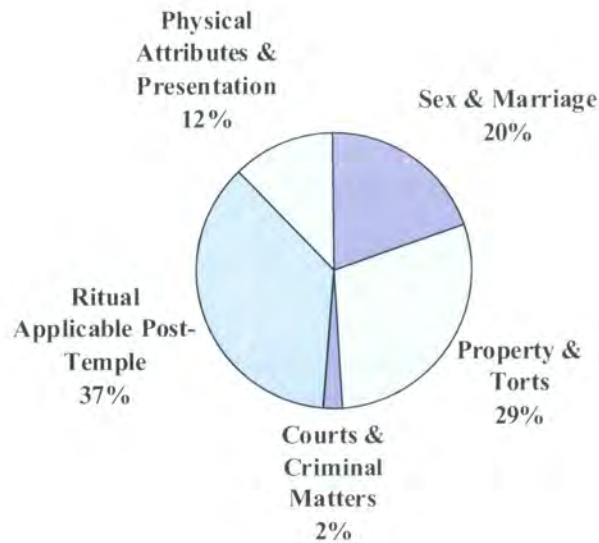


Figure 2.2:
Topic Groups Addressed in the Shulchan Aruch



In the Shulchan Aruch (Figure 2.2), twenty-nine percent of discussions involving the androgynos and tumtum are discussions about ownership of property, inheritance, or personal injury law (torts.) 37% of the time, the Shulchan Aruch is dealing with ritual questions pertaining to these figures. Only 20% total relate to sex and marriage combined; another 12% address questions such as whether the androgynos wears male or female attire. The sexual and physical issues that fascinate (some would say titillate) people today make up less than one-third of the Shulchan Aruch's or Mishneh Torah's

discussions. The significant majority of the Codes' interest is in fitting the androgynos and tumtum—intersex or gender-variant people--into the ritual and commercial life of medieval Jewish society. This is an effort that most societies today have not yet begun.

“Gender Treatment”

Figures 2.3-2.12 present the rulings in both Codes in two different ways. Figures 1-3 present all ninety-three situations in the order in which they appear in the works, and indicate whether Maimonides, Caro and Isserles discuss that issue in relation to the androgynos or tumtum. If so, I have indicated what decision they made about how to treat these figures when it comes to each subject. For example, in item 14 of Figure 2.4—representing the content of *Hilchot Sukkah* 6:1—Rambam addresses the question of whether a tumtum or androgynos should dwell in the *sukkah* during the festival of Sukkot. From the time of the Mishna, much of Jewish law had agreed on the principle that time-sensitive *mitzvot* such as dwelling in a *sukkah* are obligatory only for men.⁴ Certainly, Rambam and Caro generally upheld this notion.⁵ Since the tumtum and androgynos may or may not be male, are they obligated to observe this mitzvah? Or are they exempt, as women are? Figure 2.4 indicates the decision of the Mishneh Torah: that the tumtum and androgynos are treated as “Male-out-of-Doubt.” They are obligated to this mitzvah, but on the basis of uncertainty. We also see that there is no specific provision made here for the *tumtum she-nikra*; Rambam does not mention this figure vis-à-vis this topic. A few lines below in the same Figure 2.4, we see that the issue of these figures' obligation to read from the *Megillah* (the Scroll of Esther, on Purim) is not raised

⁴ Modern feminist challenges have drastically changed this approach in many Jewish communities.

⁵ See, for example, SA *Orach Chaim* 17:2

in the Mishneh Torah at all. Figure 2.8 indicates that that question is taken up later, in the Shulchan Aruch. For the purposes of easier comparison, Figures 2.4, 2.8 and 2.9 present the same list of ninety-three items for each decisor—even though Maimonides deals with most of them while Isserles' gloss addresses only a few.

Figures 2.5 and 2.10 present the same information, organized differently. These show the decisions of the codifiers according to “gender treatment.” Thus Figure 2.5 presents all of the instances in which the Mishneh Torah treats the androgynos or tumtum as male, followed by all those in which it treats them as female, then Male-out-of-Doubt, etc. Figure 2.10 gives the same information for Caro's text of the Shulchan Aruch.

Figure 2.13 presents Maimonides, Caro and Isserles side-by-side on the topic of the androgynos, and Figure 2.14, on the tumtum.

The *tumtum she-nikra*, the tumtum who is torn, will be addressed specifically in Part VI. Further comparative information from the sources is presented there.

It is critical at the outset to make clear the distinction that Maimonides establishes in his own words: “...an androgynos has in him ways in which he is like a man. And ways in which [he is] like a woman. And ways in which [he is] like neither a man nor a woman. And ways that are like a man and a woman. And all of these ways are regarding matters of the *mitzvot*, and do not refer to his [physical] nature or his birth...”⁶

⁶ *Hilchot N'zirut* 2:10-11

The “gender treatments” described and organized below, and discussed throughout this paper, are “regarding matters of the *mitzvot*.” They attempt to describe what *legal or social category* the androgynos or tumtum are placed into in a given situation. These “gender treatments” make no claim to understand the essential nature or ‘true identity’ of these figures. This approach, I believe, reflects the goal and worldview of the literature at hand. This very important distinction will be explored further at the end of Part V.

“Gender Treatment”: Explanation of the Categories

All of these charts use the same thirteen terms to express how the androgynos or tumtum is treated in a given situation. Each time one of these figures is discussed in relation to one of these issues, I have classified that discussion as falling into one of thirteen categories:

- | | |
|--------------------------|-------------------------------|
| 1. Male | 8. Male-Plus-Female |
| 2. Female | 9. Male-Plus-Female, Doubtful |
| 3. Male-out-of-Doubt | 10. Own Category |
| 4. Female-out-of-Doubt | 11. Any Person |
| 5. Not-Male | 12. Neither |
| 6. Not-Female | 13. Cannot Determine |
| 7. Not-Male-out-of-Doubt | |

It should be emphasized that **this system of thirteen terms is devised by me as a means toward organizing and analyzing this information. It does not reflect a self-conscious categorization scheme in the Codes themselves.** My simple goal is that the

charts below, and the categories that they present, accurately indicate the **results in effect** of the various rulings. But the fact that these many “gender treatments” are not laid out as such in the literature does not mean that they are random or unintentional. I do not suggest that this literature consciously espouses or prescribes a thirteen-tiered sex/gender “system.” But the rulings of the codifiers suggest that they may indeed have thought about the sex/gender of the androgynos and tumtum in a variety of different ways, and reflected those considerations in the law.

The primary purpose of the restatement literature is to be terse, prescriptive and clear. The Mishneh Torah gives limited explanations of *why* it rules as it does; the Shulchan Aruch generally gives no explanation at all.⁷ Their terse language, combined with their primarily casuistic rather than normative approach to lawmaking, means that it is often not clear which decisions are, or are not, the result of some underlying self-conscious process. Nowhere does any codifier comment that ‘Given that our laws and traditions presume binary sex and gender, I think the best way to deal with the tumtum and the androgynos in my law code is by treating them in thirteen different ways depending upon the circumstances, as follows...’ That would be delightfully illuminating, but is not how this literature works. Instead, we have a total of ninety excerpts that touch on ninety-three topics of great variety, and that prescribe these figures’ participation in those areas in a wide variety of ways. We are left to try to decipher what exactly these codifiers did,

⁷ Menachem Elon clarifies the difference in style between the two works: “Although Maimonides in his Mishneh Torah made no reference to the sources of the laws or to views contrary to those he codified, he stated the full particulars of each law and incorporated into his text the law’s rationale as well as relevant philosophic considerations...the Shulchan Aruch presents only the normative rule; in contrast to Maimonides and the Turim, it includes neither rationales for the law nor any philosophic considerations.” (Jewish Law: History, Sources, Principles, pp. 1338-1339.)

why they might have done it that way, and what effect that has now or may have had in the past. My thirteen-cornered scheme is an attempt to do that--in a way that is simple enough to be useful, but not so reductive that it obscures the fascinating complexities that are present. Some of these category terms—such as ‘female,’ ‘male,’ ‘own category,’ and the language of doubt—are present in the texts themselves, as language self-consciously denoting a category. Other terms, such as ‘Male-Plus-Female,’ are not designated as conscious categories by the language in the Codes, but I am using them to describe the practical reality of some of the Codes’ decisions. With some, such as ‘Not-Female’, it may be debatable whether this designation is a conscious category in the literature or simply a description of its contents. ‘Cannot be determined’ is a term that does not reflect any internal reality of the Codes at all, but rather indicates that *I* simply do not have enough information from this excerpt to categorize this situation any other way.

For example, let us take items 12 and 13 in Figure 2.8:

		Androgynos	Tumtum	Tumtum <i>she-Nikra</i>
12	Hearing <i>Shofar</i>	M	M	
13	Sounding <i>Shofar</i>	Own category	F	

These items reflect the contents of *Orach Chaim* 489:4: “An androgynos facilitates the fulfillment [of the mitzvah of hearing *shofar*] for his own kind. A tumtum—even for his own kind he cannot facilitate the fulfillment [of this mitzvah].” Hearing the *shofar* on Rosh HaShanah is of a genre of *mitzvot* from which, according to the Shulchan Aruch,

women are exempt. Accordingly, the preceding *seif* (paragraph), OH 489:3, explicitly exempts women from hearing the *shofar*: “Women are exempt, because this is a time-bound commandment.” 489:4 then answers the question: What about the androgynos and tumtum? Caro explains that the androgynos can sound *shofar* only for other androgynoi—*mino*, “his own kind.” With regard to this activity, then, androgynoi are clearly treated as their “own category.” Tumtumim, however, are not permitted to sound *shofar* on anyone’s behalf at all, just as women are not. Thus, the tumtum here is treated as “female (F).” It is quite clear that the passage presumes that both the tumtum and androgynos are obligated to hear the *shofar*, since this is the basis for discussing whether they may sound it. So on the question of *hearing shofar*, both are treated as obligated, just as men are (M).

The same information is presented differently in Figure 2.10:

	Androgynos	Tumtum
Male	<ul style="list-style-type: none"> Hearing <i>shofar</i> 	<ul style="list-style-type: none"> Hearing <i>shofar</i>
Female		<ul style="list-style-type: none"> Sounding <i>shofar</i>
Own Category	<ul style="list-style-type: none"> Sounding <i>shofar</i> 	

Several different charts below group together all the instances where each figure receives a specific “gender treatment”: all of the situations in which the tumtum and androgynos are treated as male, then as female, as Male-out-of-Doubt, etc.

The following are the criteria I have used to determine which of the thirteen categories applies to each issue discussed.

1. **Male:** A figure is “treated as male” when the codifier, with reasonable clarity, either 1) states explicitly that the law for males also applies to this figure, or 2) makes a ruling for this figure that is identical to the law for males in relation to this subject in this same work. For example, the Shulchan Aruch rules that “A tumtum and an androgynos are forbidden in rounding off [the hair on] the head.”⁸ In the Shulchan Aruch (and Jewish law generally), this prohibition applies to men and not to women. Thus, in this case, these figures are being treated as men are treated.
2. **Female:** A figure is “treated as female” when the codifier, with reasonable clarity, either 1) states explicitly that the law for women also applies to this figure, or 2) makes a ruling for this figure that is identical to the law for women in relation to this subject in this same work. For example, the Mishneh Torah states that “it is Scripture’s decree that a stubborn and rebellious son be stoned. But a daughter is not judged according to this law...as it is said, “a son” [Deuteronomy 21:18] and not a daughter, and not a tumtum or an androgynos.”⁹ Here Maimonides clearly places males in one category, and women, tumtumim and androgynoi together in another category.
3. **Male-out-of-Doubt:** A figure is “treated as Male-out-of-Doubt” when the codifier states that this figure is, in this situation, treated as males are; but this

⁸ *Yoreh Deah* 181:8

⁹ *Hilchot Mamrim* 7:11

decision is modified or ‘weakened’ by language of doubt. (See “Language of Doubt,” below.)

- 4. Female-out-of-Doubt:** A figure is “treated as female-out-of-Doubt” when the codifier states that this figure is, in this situation, treated as females are; but this decision is modified or ‘weakened’ by language of doubt (See “Language of Doubt,” below.)
- 5. Not-Male:** A figure is “treated as Not-Male” if one of the following two situations apply: 1) The codifier describes a situation in which the figure is determined to be “Not-Male” as its own distinct designation, or 2) When the practical effect of the law is that the figure is treated as female, but the particulars of the situation make it inaccurate to use the term “female”. For example, Rambam rules that the wife of an androgynos does not participate in the ritual of the *sota*, which tests whether a woman has committed adultery. He makes this decision based upon his reading of Numbers 5:29: “... ‘under her husband’ is to exclude the wife of a minor boy and the wife of an androgynos, who is not a man [*eishet androgynos, she-eino ish*].”¹⁰ Here Rambam makes it clear that the androgynos is “not a man”. But it would be misleading to state that in this circumstance the androgynos is treated ‘as a female.’ In the world as accounted for by the Mishneh Torah, women did not have wives, and this situation would be entirely inapplicable.¹¹ Similarly, Rambam rules that an androgynos priest does

¹⁰ *Hilchot Sota* 2:3

¹¹How this issue should be understood or applied in the unlikely event that a modern-day lesbian partner should wish to apply the laws of the *sota* would seem to be another matter.

not entitle her/his wife to eat consecrated foods.¹² The effect of this ruling upon the androgynos is that her/his wife cannot partake of these foods. Were the androgynos considered female, this outcome would theoretically be the same. But to say that the androgynos is “treated as female” in this circumstance does not make sense.

To categorize certain treatments as “Not-Male” instead of “female” may appear to be splitting hairs. However, it is important to be precise in the analysis. More importantly, Maimonides himself appears to establish “Not-Male” as a distinct category from “female” under his formulation of the law. In *Hilchot N’zirut* 2:10, he establishes six different ways that one might describe the sex/gender of an androgynos: ‘male’, ‘female’, ‘Not-Male’, ‘Not-Female’, ‘both male and female’, and ‘neither male nor female’.¹³ He goes on to affirm that all of these descriptions are valid and, in a legal context, potentially binding.¹⁴

6. Not-Female: *Hilchot N’zirut* 2:10, as described above, is the only instance in which either of these figures (the androgynos) is treated as “Not-Female.” In this situation, Rambam establishes “Not-Female,” like “Not-Male,” as its own category, distinct from any of the others. As with the category of “Not-Male,” there is no doubt expressed; rather, there is unequivocal negation of belonging to the category of female.

¹² *Hilchot T’rumot* 7:14. One of the privileges of being born into the priesthood was the entitlement to a share of the food offerings brought to the Temple. A male priest (a *kohein*) was generally allowed to extend that entitlement to wives and servants as well.

¹³ While one might dismiss this passage as one of Maimonides’ philosophical exercises, he clearly makes a distinction in this passage between these six categories. At the very least, it is clear that each of these terms holds its own meaning, and can be used in some contradistinction to the others.

¹⁴ The context is the swearing of a Nazirite vow. The basic conclusion here is that, if a person states that the androgynos is any one of these six sexes/genders, that person’s utterance is true and valid.

It should be noted that the categories of “Not-Male” and “Not-Female” are distinct from “Male-out-of-Doubt” or “female-out-of-Doubt.” This is because no language of doubt is present. In these situations, above, the figure is *unequivocally* “Not-Male” or “Not-Female,” as opposed to any other designation.

7. Not-Male-out-of-Doubt: A figure is “treated as Not-Male-out-of-Doubt” in very limited circumstances: when the specific language of doubt is used *and* when the practical effect of the law is that the figure is treated as female, but the particulars of the situation make it inaccurate to use the term “female”. (See “Not-Male,” above, and “Language of Doubt”, below. The only subject that seems to require this categorization is circumcision. Both Rambam and Caro rule that the blessings for circumcision are not said for the circumcision of an androgynos *mipnei she-hu eino zachar vadai*: “because he is not an unequivocal male.”¹⁵ It would be true, but misleading, to suggest that in this case the androgynos is treated “as women are.” Indeed, these blessings are not said over the circumcision of females. But Jewish tradition has at no time provided for the circumcision of females, so this would be an inappropriate categorization.

8. Male-Plus-Female: A figure is “treated as Male-Plus-Female” only in situations where both the laws or descriptions of a male *and* the laws or descriptions of a female are applied. This is only possible in a very limited number of circumstances. Most of the ninety-three situations addressed by the Mishneh Torah and Shulchan Aruch pose one of these two basic questions: 1) Does or does not the tumtum or androgynos participate in a certain sex/gender-linked mitzvah? Or 2) is or is not the tumtum or androgynos to be the beneficiary of a certain

¹⁵ *Hilchot Milah* 3:6

sex/gender-based entitlement? These are “yes-no” questions; and most of their possible answers are mutually exclusive. Men are required to appear at the Temple for the pilgrim festivals. Women are not.¹⁶ One cannot address the ambiguity of the androgynos or tumtum by combining both possibilities, and saying that these figures are both required and not required. Similarly, they cannot be both entitled and not entitled to inheritance.

But there are four instances (all in the Mishneh Torah) in which the answer is “both.” One of these rare cases is the postpartum purification time for a mother who has given birth to an androgynos or tumtum infant.¹⁷ The mother’s period of ritual uncleanness is, like most things, gender-dependent. The length of time is different for male versus female babies. But in this case, it is actually possible to require the mother to serve these terms consecutively, so to speak: she is considered impure first for one period of time, followed by the other. In rare cases like these, I have designated the figure treated as “Male-Plus-Female”: where the provisions for men and women are *both* applied to the androgynos or tumtum.

- 9. Male-Plus-Female, Doubtful:** This category applies when a figure is treated as “Male-Plus-Female” (see above), and language of doubt is present. (See “Language of Doubt,” below.) An example is found in *Hilchot Avodat Kochavim*: “A tumtum and an androgynos—they are of doubtful status. We place upon them

¹⁶ *Hilchot Chagigah* 2:1

¹⁷ See *Hilchot Issurei Biah* 10:18

the stringencies pertaining to a man and the stringencies pertaining to a woman in all cases; and they are obligated in everything...”¹⁸

10. Own category: A figure is “treated as own category” when one or both of the following circumstances apply:

1) When a codifier explicitly designates a separate category for that figure by use of one or more of the following terms: *mino*, “his own kind”¹⁹; *k’min bifnei atzmo*, “like a kind unto itself”;²⁰ *briah bifnei atzman*, “creations unto themselves”;²¹ *k’min acher*, “like another kind”.²²

2) When a codifier does not use this specific language, but does make specific provision for the androgynos and/or the tumtum that meets all of these criteria:

- a) An affirmative provision is made in the law for these figures in this circumstance (as opposed to these figures being simply not mentioned in the formulation of the law, or being specifically designated as non-participants in this area; the latter would be designated as “Neither”)
- b) This provision is different from what applies to either men or women
- c) This provision is not a simple compound of the provisions for men and women (this would be designated “Male-Plus-Female.”)

“Own category” is to be understood to the exclusion of any of the other categories. In these situations, the figures are not considered as doubtful forms of another sex/gender category; rather, they are affirmatively a category unto

¹⁸ *Hilchot Avodat Kochavim* 12:4

¹⁹ *Hilchot Shofar, Sukkah v’Lulav* 2:2

²⁰ For example, *Hilchot Yibum v’Chalitzah* 6:8

²¹ For example, *Hilchot T’rumot* 12:22

²² *Hilchot Isurei Mizbeach* 3:3

themselves, treated differently than any other. In *Hilchot T'rumot* we read:

“There are ten [groups of people] to whom we do not apportion consecrated foods on the threshing-floor, even though they may eat it, or may entitle others to eat it. And they are: The deaf person, the cognitively disabled person, and the minor child...the tumtum and the androgynos, because they are creations of their own...”²³

11. Any Person: A figure is “treated as any person” in situations where entitlement, obligation, restriction, or description is *not* determined or stratified by sex/gender. For example: Rambam rules, based upon a Torah verse, that both men and women are obligated to join in the communal gathering at the Jubilee year.²⁴ This requirement to gather is equal upon men and women, and a person’s obligation is not affected by their sex/gender. Rambam specifies that the androgynos and tumtum are obligated as well; as we will see, the tumtum and androgynos are always included in these circumstances. This inclusion is not due to being treated as one sex/gender or another; men and women in these situations are treated as the same. Rather, the tumtum and androgynos participate equally in the matter at hand by virtue of being human—treated as “any person” would be. The category of Any Person is the occasional exception to the general rule, as stated by Judith Plaskow, that “it is virtually impossible to talk about Jewish legal obligations without talking about gender.”²⁵

²³ *Hilchot T'rumah* 12:22

²⁴ *Hilchot Chagigah* 3:2

²⁵ Judith Plaskow, “Dismantling the Gender Binary within Judaism: The Challenge of Transgender to Compulsory Heterosexuality.” In Heterosexism in Contemporary World Religion: Problem and Prospect. Edited Marvin M. Ellison and Judith Plaskow. Cleveland: The Pilgrim Press, 2007, p. 18.

12. Neither: A tumtum or androgynos is “treated as neither” only when their indeterminate sex/gender status is dealt with by excluding them altogether from the concern at hand. *Hilchot Avadim* provides an example: “...the tumtum or the androgynos cannot be sold, not as a Hebrew bondsman, and not according to the laws of the Hebrew bondswoman either.”²⁶ In this instance, whereas Jewish men and women were potentially eligible to be sold into indentured servitude, the tumtum and androgynos were excluded from indentured servitude entirely. Jewish law prior to Rambam provided regulations for the buying and selling of women and men, but provided no mechanism for determining the requirements for the tumtum or androgynos in such a transaction. The Mishneh Torah preserves this “neither” as its solution. Similarly, the Isserles in the Shulchan Aruch brings the opinion that the tumtum cannot read *Megillah* for anyone—not even in fulfillment of her/his own requirement to hear it.²⁷ Here, the doubt about the tumtum’s status results in being excluded entirely from this aspect of the mitzvah.

13. Cannot determine: A figure is “treated as cannot determine” in very limited circumstances: in situations in which a person’s status *is* in some way determined by sex/gender, but the ruling does not tell us which of the twelve sex/gender categories above is being applied in this case. *Hoshen Mishpat* 253:27²⁸ describes the following situation: A father-to-be promises a certain amount of money as a gift to an unborn baby girl and a different gift amount for a baby boy. His wife gives birth to neither a boy nor a girl, but to a tumtum or androgynos. That child,

²⁶ *Hilchot Avadim* 4:1

²⁷ Isserles to *Orach Chaim* 589:3

²⁸ This *seif* cites, verbatim, MT *Hilchot Zechiyah u'Matanah* 8:6

according to Caro, receives the lesser of the two declared amounts. But the lesser amount could be designated either for the girl or for the boy, apparently at the father's discretion. Therefore, when the androgynos or tumtum child receives "the lesser amount," we do not know whether that is the "girl amount" or the "boy amount." There is no indication of what sex/gender category the child is being placed in. "Cannot determine" is distinct from "Neither"; "Neither" denotes the presence of information that affirmatively excludes a figure from some sphere, whereas "Cannot Determine" is a category based upon absence of sufficient information. "Cannot determine" is also distinct from "Any Person," in which a tumtum or androgynos is affirmatively *included* in an area where gender does not matter. "Cannot determine" indicates that sex/gender does matter in this case, but there is not enough information present in the text to choose one of the first twelve possibilities.

Language of Doubt

Categories 3, 4, 7 and 9 are distinguished by the presence of what I will call "language of doubt." Both Codes use the same set of expressions to indicate this doubt. Categories 7 and 9 demonstrate that these expressions can and do appear in passages where a figure is treated as "Not-Male" or as "Male-Plus-Female." Overwhelmingly, however, 'language of doubt' appears when the passage treats a tumtum or androgynos either the same way as a male or the same way as a female. An example is *Orach Chaim* 540:1: "Women and bonds people and minors are exempt from the *sukkah*. A tumtum and an androgynos are obligated out of doubt, and similarly one who is half-slave and half-free is obligated."

This passage concludes that the androgynos and tumtum must indeed fulfill the mitzvah of sitting the *sukkah*. In effect, they are treated exactly as men are on this specific question. But whereas men are certainly obligated, the status of the tumtum and androgynos is qualified: they are *chayavim mi-safeik*, “obligated out of doubt.” In this situation, both Codes conclude that, given the fact that their sex is unclear, obligating them to *sukkah* is the better solution. But they both use language of doubt as they convey this decision. Evidently, it is important to Caro and Rambam that readers of their work understand the true complexities and considerations at work in their decision-making.

Figure 2.3:
Language of Doubt

When treating the tumtum or androgynos as Male	When treating the tumtum or androgynos as Female
<i>chayavin mi-safeik</i> (“obligated out of doubt”) ²⁹	
<i>safeik</i> (“doubtful”) ³⁰	<i>safeik</i> (“doubtful”) ³¹
<i>b’safeik</i> (“in doubt”) ³²	<i>b’safeik</i> (“in doubt”) ³³
	<i>safeik isha</i> (“a doubtful woman”) ³⁴
	<i>mi-safeik</i> (“out of doubt”) ³⁵

²⁹ For example, *Hilchot Sukkah* 6:1

³⁰ For example, *Hilchot Ishut* 4:11

³¹ For example, *Hilchot Ishut* 4:11

³² For example, *Hilchot M’tamei Mishkav uMoshav* 1:7

³³ For example, *Hilchot M’tamei Mishkav uMoshav* 1:7

³⁴ For example, *Hilchot Bikkurim* 4:2

³⁵ *Hilchot Ishut* 4:11

Both codifiers appear to use the same set of various “doubt” phrases. At first inspection, the various types of “language of doubt” shown in Figure 2.3 all carry the same set of meanings. There are, of course, nuances. For example, a situation can be *safeik d’oraita*, doubtful per Torah law, or *safeik d’rabanan*, doubtful per [later and nominally less authoritative] rabbinic law. This distinction is rarely made in the Codes’ discussions of the tumtum and androgynos, but is often brought to bear by their commentators.³⁶

It is interesting to note that the language in Figure 2.3 is not precisely parallel. When treating these figures as female, we occasionally find the phrase *safeik isha*, ‘a doubtful woman.’ An example is *Hilchot Chagigah* 2:1: “Women and indentured servants are exempt from appearing [at the Temple for the pilgrim festivals]. But all men are obligated to appear, with the exception of a deaf person, a mute person, a cognitively disabled person, a minor, a blind person, one who limps, a ritually impure person, and an uncircumcised person...A tumtum and an androgynos are exempt because they are *safeik isha*, doubtful women...”³⁷ The phrase *safeik isha* is ambiguous both in English and in the original Hebrew. It means, as in this example, that a figure is “treated as a woman, but doubtfully.” In these Codes it is never used to treat a tumtum or androgynos as male because their femaleness is too doubtful.³⁸ Furthermore, in this corpus of texts there is no parallel phrase *safeik ish*. When treating the tumtum or androgynos as a male, but with doubt present, one of the other phrases in the left column of Figure 2.3 is used.

³⁶ For example Rambam, *Ra'avad* and *Kesef Mishneh* on *Milah* 3:6; Isserles on *SA Yoreh Deah* 265:3

³⁷ *Hilchot Chagigah* 2:1

³⁸ E.g. *SA Hoshen Mishpat* 175:47

Rulings that use ‘language of doubt’ are separated in this analysis from rulings that do not. I have done this with an eye to the possibility that the presence or absence of such language might be significant, although a detailed analysis of that question is not taken up in this paper.

Figure 2.4:
Rulings of the Mishneh Torah

		Androgynos	Tumtum	Tumtum <i>she-Nikra</i>
1	All stringencies	M + F out of doubt	M + F out of doubt	
2	Wrappings of a woman	M	M	
3	Shaving the head	F	F	
4	Wearing <i>Tzitzit</i>	M out of doubt	M out of doubt	
5	Blessings for <i>Tzitzit</i>	F out of doubt	F out of doubt	
6	All positive commandments from which women are exempt	M out of doubt	M out of doubt	
7	Blessings over positive commandments from which women are exempt	F out of doubt	F out of doubt	
8	Making the <i>Zimun</i>	Own category	Neither	
9	Circumcision on the Eighth Day	M		
10	Circumcision Trumps Shabbat	Not M out of doubt		
11	Blessings for Circumcision	Not M out of doubt		
12	Hearing <i>Shofar</i>	M	M	
13	Sounding <i>Shofar</i>	Own category	F	
14	Dwelling in <i>Sukkah</i>	M out of doubt	M out of doubt	
15	Blessing for <i>Sukkah</i>	F out of doubt	F out of doubt	
16	Hearing the <i>Megillah</i>			
17	Reading the <i>Megillah</i>			
18	Rounding off the Hair on the Head			
19	Age of [Presumed] Adulthood	F	F	

20	Torn and Found Male	--	--	M
21	Torn and Found Female	--	--	F
22	Betrothing a woman	M out of doubt	M out of doubt	
23	Being Betrothed by a Man	F out of doubt	F out of doubt	
24	Holding any levirate relationship	Own category		
25	Performing <i>Chalitzah</i>	Own category	M	If found M: M
26	Performing <i>Yibum</i>	Own category	F out of doubt	If found M: M
27	Their Wife Subject to <i>Chalitzah</i> and <i>Yibum</i>	Own category		
28	Their Wife Subject to Waters of <i>Sota</i>	Not M		
29	Receiving anal sex from a man	M	F	
30	Receiving Vaginal Sex from a Man	F	F	
31	Marrying a Woman	M		
32	A Man Having Sex with their Wife	Own category	Own category	
33	Postpartum purification period: single birth	M + F	M + F	
34	Postpartum purification period: twin with Male	F	F	
35	Postpartum purification period: twin with Female	Cannot be determined	Cannot be determined	
36	Seclusion with Women	M		
37	Seclusion with Men	M	M	
38	Validity of Nazirite vow made over a son	F	F	
39	Validity of Nazirite vow made over a child	Any Person	Any Person	
40	Validity of Nazirite vow made over a male	M		
41	Validity of Nazirite vow made over a female	F		
42	Validity of Nazirite vow made over a non-male	Not M		
43	Validity of Nazirite vow made over a non-female	Not F		
44	Validity of Nazirite vow made over a neither-male-nor-female	Own category		
45	Validity of Nazirite vow made over a both-male and-female	M + F		

46	Becoming ritually unclean through emission	M + F out of doubt	M + F out of doubt	
47	Eligibility for sale as a Hebrew bondsperson	Neither	Neither	
48	Punishment for one who kills them	Any Person		
49	Valuation	Neither	Neither	
50	Vows of Worth	Any Person	Any Person	
51	Child who is of priestly descent entitling their non-priest mother to eat consecrated foods	Any Person	Any Person	
52	Eating consecrated foods	M	M	
53	Entitling servants to eat consecrated foods	M	M	
54	Entitling wives to eat consecrated foods	Not M	Not M	
55	Disqualification from consecrated foods via vaginal or anal sex with disqualified man	F		
56	Disqualification from consecrated foods via vaginal sex with disqualified androgynos	F		
57	Disqualification from consecrated foods via anal sex with disqualified androgynos	M		
58	Apportionment of consecrated foods on the threshing-floor	Own category	Own category	
59	Bringing the first fruits	Any person	Any person	
60	Reciting declaration of first fruits	F out of doubt	F out of doubt	
61	Disqualification from entering the Temple	Cannot determine	Cannot determine	
62	[Animals] disqualification for the altar	Own category	Own category	
63	Eating from most holy offerings	F	M out of doubt	
64	Eating from the less holy offerings	M	M out of doubt	
65	Receiving portion of Temple offerings	F		
66	Circumcision entitles their father to eat the Paschal ram			If found male: M
67	Appearing at the Temple for the pilgrim festivals	F out of doubt	F out of doubt	
68	Gathering at the Jubilee year	Any person	Any person	

69	[Animal] firstborn that urinates as a male	F	M out of doubt	
70	[Animal] firstborn that urinates as a female	F	M out of doubt	
72	Mother's requirement to bring an offering for a miscarriage after the postpartum purification period for this baby	Own category	Own category	
73	As a substituted [animal] offering	Own category	Own category	
73	As offspring of consecrated animals	Own category	Own category	
74	Sprinkling the ashes of the red cow	F	F	
75	When afflicted with <i>tzara'at</i>	M	M	
76	Rendering themselves ritually impure through simultaneous red and white emissions	Any person	Any person	
77	Rendering someone else ritually impure through simultaneous red and white emissions	Own category	Own category	
78	Different gift amounts pledged to male and female children	Cannot determine	Cannot determine	
79	Eviction by adjacent landowner	F out of doubt	F out of doubt	
80	Receiving double portion of inheritance as the firstborn son			If found M: Not M
81	Diminishing the firstborn's inheritance			If found M: Not M
82	If an heir alongside a male	F out of doubt	F out of doubt	
83	If an heir alongside a female	F out of doubt	F out of doubt	
84	Property is sufficient for daughters' maintenance and sons' inheritance: If an heir alongside sons and daughters	F	F	
85	Property is sufficient for daughters' maintenance and sons' inheritance: If an heir alongside a son only			
86	Property is sufficient for daughters' maintenance and sons' inheritance: If an heir alongside a daughter only			

87	Property is only sufficient for daughters' maintenance: If an heir alongside sons and daughters	M	M	
88	Property is only sufficient for daughters' maintenance: If an heir alongside a son only			
89	Property is only sufficient for daughters' maintenance: If an heir alongside a daughter only			
90	Eligibility to serve as a witness	F out of doubt	F out of doubt	
91	Punishment by stoning for cursing a parent	Any person	Any person	
92	Punishment by strangling for striking a parent	Any person	Any person	
93	Treatment as a stubborn and rebellious son	F	F	If found M: F

Figure 2.5
Mishneh Torah: Gender Treatment of Androgynos and Tumtum

	Androgynos	Tumtum
Male	<ul style="list-style-type: none"> • Wrappings of a woman • Circumcision on the eighth day • Hearing <i>shofar</i> • Receiving anal sex from a man • Marrying a woman • Seclusion with women • Seclusion with men • Validity of Nazirite vow over a male • Eating consecrated foods • Entitling servants to eat consecrated foods • Disqualification from consecrated foods via anal sex with disqualified androgynos • Eating from less holy 	<ul style="list-style-type: none"> • Wrappings of a woman • Hearing <i>shofar</i> • Performing <i>chalitzah</i> • Seclusion with men • Eating consecrated foods • Entitling servants to eat consecrated foods • When afflicted with <i>tzara'at</i> • Property is only sufficient for daughters' maintenance, if heir alongside sons and

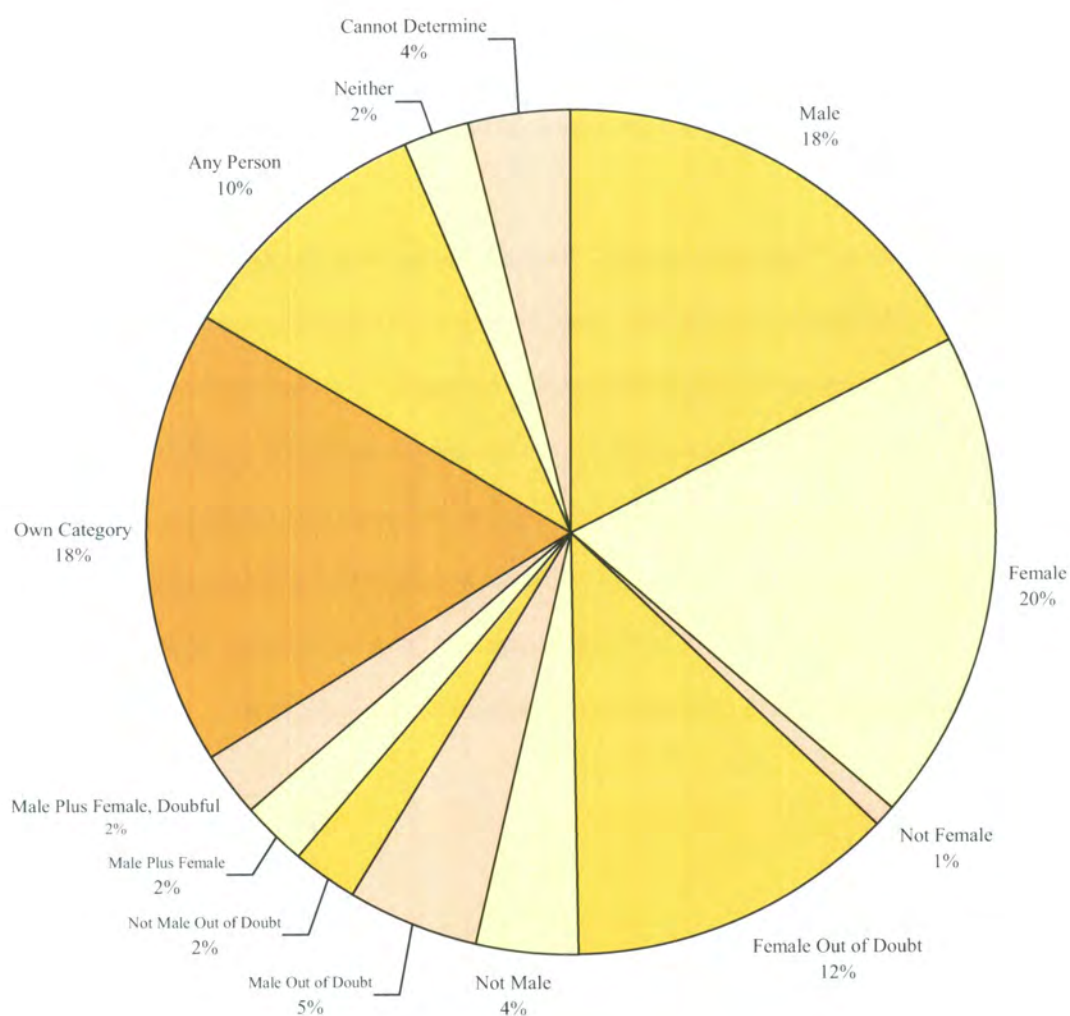
	offerings <ul style="list-style-type: none"> • When afflicted with <i>tzara'at</i> • Property is only sufficient for daughters' maintenance, if heir alongside sons and daughters 	daughters
Female	<ul style="list-style-type: none"> • Shaving the head • Age of presumed adulthood • Receiving vaginal sex from a man • Postpartum period if twin with a male • Validity of Nazirite vow over a son • Validity of Nazirite vow over a female • Disqualification from consecrated foods via vaginal or anal sex with disqualified man • Disqualification from consecrated foods via vaginal sex with disqualified androgynos • Eating from most holy offerings • Receiving portion of Temple offering • [Animal] firstborn that urinates as a male • [Animal] firstborn that urinates as a female • Sprinkling ashes of the red cow • Property is sufficient for daughters and sons, if heir alongside sons and daughters • Treatment as stubborn and rebellious son 	<ul style="list-style-type: none"> • Shaving the head • Sounding <i>shofar</i> • Age of presumed adulthood • Receiving vaginal sex from a man • Receiving anal sex from a man • Postpartum period if twin with a male • Validity of Nazirite vow over a son • Sprinkling ashes of the red cow • Property is sufficient for daughters and sons, if heir alongside sons and daughters • Treatment as stubborn and rebellious son
Male	<ul style="list-style-type: none"> • Wearing <i>tzitzit</i> 	<ul style="list-style-type: none"> • Wearing <i>tzitzit</i>

out of Doubt	<ul style="list-style-type: none"> • All positive commandments from which women are exempt • Dwelling in <i>sukkah</i> • Betrothing a woman 	<ul style="list-style-type: none"> • All positive commandments from which women are exempt • Dwelling in <i>sukkah</i> • Betrothing a woman • Eating from most holy offerings • Eating from less holy offerings • Animal firstborn that urinates as a male • Animal firstborn that urinates as a female
Female out of Doubt	<ul style="list-style-type: none"> • Blessing for <i>tzitzit</i> • Blessings for positive commandments from which women are exempt • Blessing for <i>sukkah</i> • Being betrothed by a man • Reciting declaration of first fruits • Appearing at the temple for the pilgrim festivals • Eviction by adjacent landowner • If an heir alongside a male • If an heir alongside a female • Eligibility to serve as a witness 	<ul style="list-style-type: none"> • Blessing for <i>tzitzit</i> • Blessings for positive commandments from which women are exempt • Blessing for <i>sukkah</i> • Being betrothed by a man • Performing <i>yibum</i> • Reciting declaration of first fruits • Appearing at the temple for the pilgrim festivals • Eviction by adjacent landowner • If an heir alongside a male • If an heir alongside a female • Eligibility to serve as a witness
Not-Male	<ul style="list-style-type: none"> • Wife subject to waters of <i>sota</i> • Validity of Nazirite vow over a non-male • Entitling wives to eat consecrated foods 	<ul style="list-style-type: none"> • Entitling wives to eat consecrated foods
Not Female	<ul style="list-style-type: none"> • Validity of Nazirite vow over a non-female 	
Not-Male out of Doubt	<ul style="list-style-type: none"> • Circumcision trumping Shabbat • Blessing for circumcision 	

Male Plus Female	<ul style="list-style-type: none"> • Postpartum purification period for single birth • Validity of Nazirite vow over a both-male-and-female 	<ul style="list-style-type: none"> • Postpartum purification period for single birth
Male Plus Female, Doubtful	<ul style="list-style-type: none"> • All stringencies • Becoming ritually unclean through emission 	<ul style="list-style-type: none"> • All stringencies • Becoming ritually unclean through emission
Own Category	<ul style="list-style-type: none"> • Making the <i>zimun</i> • Sounding <i>shofar</i> • Holding any levirate relationship • Performing <i>chalitzah</i> • Performing <i>yibum</i> • Wife subject to <i>chalitzah</i> and <i>yibum</i> • Man having sex with wife • Validity of Nazirite vow over a neither-male-nor-female • Rendering someone else impure through simultaneous red and white emissions • Apportionment of consecrated foods on the threshing floor • [Animal] disqualification for the altar • Mother's requirement to bring offering for miscarriage after postpartum period for this baby • As a substituted animal offering • As offspring of consecrated animals 	<ul style="list-style-type: none"> • Man having sex with wife • Rendering someone else impure through simultaneous red and white emissions • Apportionment of consecrated foods on the threshing floor • [Animal] disqualification for the altar • Mother's requirement to bring offering for miscarriage after postpartum period for this baby • As a substituted animal offering • As offspring of consecrated animals
Any Person	<ul style="list-style-type: none"> • Validity of Nazirite vow over a child • Vows of worth • Punishment for one who 	<ul style="list-style-type: none"> • Validity of Nazirite vow over a child • Vows of worth

	<ul style="list-style-type: none"> kills them • Child who is of priestly decent entitling their non-priest mother to eat consecrated foods • Gathering at the jubilee year • Becomes unclean through simultaneous red and white emissions • Punishment for cursing a parent • Punishment for striking a parent 	<ul style="list-style-type: none"> • Child who is of priestly decent entitling their non-priest mother to eat consecrated foods • Gathering at the jubilee year • Becomes unclean through simultaneous red and white emissions • Punishment for cursing a parent • Punishment for striking a parent
Neither	<ul style="list-style-type: none"> • Valuation • Eligibility for sale as Hebrew bondsperson 	<ul style="list-style-type: none"> • Making the <i>zimun</i> • Valuation • Eligibility for sale as Hebrew bondsperson
Cannot Determine	<ul style="list-style-type: none"> • Postpartum period if a twin with a female • Disqualification from entering the Temple • Different gift amounts pledged to male and female children 	<ul style="list-style-type: none"> • Postpartum period if a twin with a female • Disqualification from entering the Temple • Different gift amounts pledged to male and female children

**Figure 2.6: Mishneh Torah:
Gender Treatment of the Androgynos**



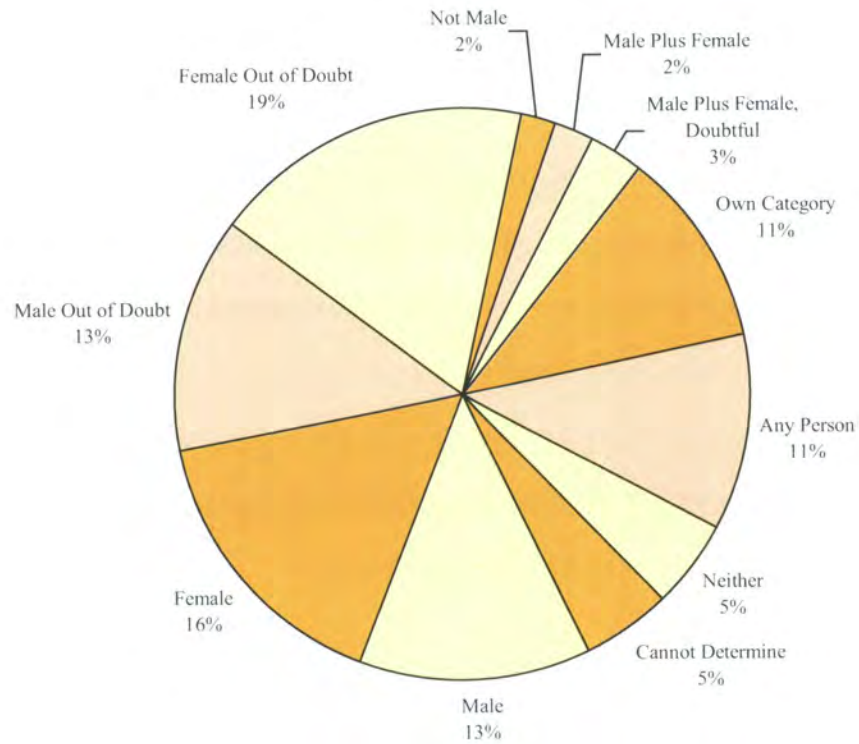
General Observations: Maimonides on the Androgynos

The Mishneh Torah addresses 86 different issues in relation to the tumtum and/or androgynos. Of these, all but 5 (94%) discuss the androgynos, either alone or together

with the tumtum. As the figure above demonstrates, the androgynos is treated as Male or Male-out-of-Doubt 23% of the time, and Female or Female-out-of-Doubt 32% of the time. In 4% of cases, this figure is subject to both the laws for women and the laws for men. In 18% of cases, the androgynos is treated as *sui generis*—in another sex/gender category entirely. In only 2% of the instances addressed, the problem of the androgynos is resolved by excluding her/him from participating in the activity in question.

The categories of "Male-Plus-Female," "Own Category," and "Neither" together account for 24% of the situations addressed. Thus, in 24 % of all cases discussed, Rambam's code explicitly establishes that neither the law for males nor the law for females adequately accounts for the existence of the androgynos. He therefore reflects three earlier traditions that attempt to provide a solution: adjoining the existing sets of laws to cover the androgynos' situation; establishing the androgynos as a member of a separate sex/gender category altogether, to which a third set of provisions apply; or removing the androgynos entirely from participation in a particular socio-legal arena.

Figure 2.7
Mishneh Torah: Gender Treatment of the Tumtum



General Observations: Maimonides on the Tumtum

The Mishneh Torah addresses 86 different issues in relation to the tumtum and/or androgynos. Of these, 62 (72%) discuss the tumtum, either alone or together with the androgynos. As the figure above portrays, the tumtum is treated as Male or Male-out-of-

Doubt 26% of the time, and Female or Female-out-of-Doubt 34% of the time. In 5% of cases, this figure is subject to both the laws for women and the laws for men. In 11% of cases, the tumtum is treated as *sui generis*—in another sex/gender category entirely. In 5% of the instances addressed, the problem of the tumtum is resolved by excluding her/him from participating in the activity in question.

The categories of "Male-Plus-Female," "Own Category," and "Neither" together account for 21% of the situations addressed. Thus, in 21% of all cases discussed, Rambam's code explicitly establishes that neither the law for males nor the law for females adequately accounts for the existence of the tumtum. He therefore reflects three earlier traditions that attempt to provide a solution: adjoining the existing sets of laws to cover the tumtum's situation; establishing the tumtum as a member of a separate sex/gender category altogether, to which a third set of provisions apply; or removing the tumtum entirely from participation in a particular socio-legal arena.

In the Mishneh Torah's approach to the two figures, the only significant difference (and not a very substantial difference) is that the androgynos is somewhat more likely than the tumtum to be explicitly or de facto treated as category of its own.

Figure 2.8
Rulings of Caro's Text of the Shulchan Aruch

		Androgynos	Tumtum	Tumtum <i>she-Nikra</i>
1	All stringencies			
2	Wrappings of a woman			
3	Shaving the head			
4	Wearing <i>Tzitzit</i>	M out of doubt	M out of doubt	
5	Blessings for <i>Tzitzit</i>	F out of doubt	F out of doubt	
6	All positive commandments from which women are exempt			
7	Blessings over positive commandments from which women are exempt			
8	Making the <i>Zimun</i>	Own category	Neither	
9	Circumcision on the Eighth Day	M		
10	Circumcision Trumps Shabbat	Not M		
11	Blessings for Circumcision	Not M out of doubt		
12	Hearing <i>Shofar</i>	M	M	
13	Sounding <i>Shofar</i>	Own category	F	
14	Dwelling in <i>Sukkah</i>	M out of doubt	M out of doubt	
15	Blessing for <i>Sukkah</i>			
16	Hearing the <i>Megillah</i>	Any person	Any person	
17	Reading the <i>Megillah</i>	Own category	Neither	
18	Rounding off the Hair on the Head	M	M	
19	Age of [Presumed] Adulthood			
20	Torn and Found Male	--	--	
21	Torn and Found Female	--	--	
22	Betrothing a woman	M out of doubt	M out of doubt	
23	Being Betrothed by a Man	F out of doubt	F out of doubt	
24	Holding any levirate relationship			
25	Performing <i>Chalitzah</i>	Own category	M out of doubt	If found M: M
26	Performing <i>Yibum</i>	Own category	F out of doubt	If found M: M
27	Their Wife Subject to <i>Chalitzah</i> and <i>Yibum</i>			
28	Their Wife Subject to Waters of <i>Sota</i>			
29	Receiving anal sex from a man			
30	Receiving Vaginal Sex from a Man			

31	Marrying a Woman			
32	A Man Having Sex with their Wife			
33	Postpartum purification period: single birth	F	F	
34	Postpartum purification period: twin with Male			
35	Postpartum purification period: twin with Female			
36	Seclusion with Women	M		
37	Seclusion with Men	M	M	
38	Validity of Nazirite vow made over a son			
39	Validity of Nazirite vow made over a child			
40	Validity of Nazirite vow made over a male			
41	Validity of Nazirite vow made over a female			
42	Validity of Nazirite vow made over a non-male			
43	Validity of Nazirite vow made over a non-female			
44	Validity of Nazirite vow made over a neither-male-nor-female			
45	Validity of Nazirite vow made over a both-male and-female			
46	Becoming ritually unclean through emission			
47	Eligibility for sale as a Hebrew bondsperson			
48	Punishment for one who kills them			
49	Valuation			
50	Vows of Worth			
51	Child who is of priestly descent entitling their non-priest mother to eat consecrated foods			
52	Eating consecrated foods			
53	Entitling servants to eat consecrated foods			
54	Entitling wives to eat consecrated foods			
55	Disqualification from consecrated foods via vaginal or anal sex with disqualified man			
56	Disqualification from consecrated foods via vaginal sex with disqualified androgynos			
57	Disqualification from consecrated foods via anal sex with disqualified			

	androgynos			
58	Apportionment of consecrated foods on the threshing-floor			
59	Bringing the first fruits			
60	Reciting declaration of first fruits			
61	Disqualification from entering the Temple			
62	[Animals] disqualification for the altar			
63	Eating from most holy offerings			
64	Eating from the less holy offerings			
65	Receiving portion of Temple offerings			
66	Circumcision entitles their father to eat the Paschal ram			
67	Appearing at the Temple for the pilgrim festivals			
68	Gathering at the Jubilee year			
69	[Animal] firstborn that urinates as a male	M out of doubt	M	
70	[Animal] firstborn that urinates as a female	M out of doubt	M out of doubt	
71	Mother's requirement to bring an offering for a miscarriage after the postpartum purification period for this baby			
72	As a substituted [animal] offering			
73	As offspring of consecrated animals			
74	Sprinkling the ashes of the red cow			
75	When afflicted with <i>tzara'at</i>			
76	Rendering themselves ritually impure through simultaneous red and white emissions			
77	Rendering someone else ritually impure through simultaneous red and white emissions			
78	Different gift amounts pledged to male and female children	Cannot determine	Cannot determine	If found M: M
79	Eviction by adjacent landowner	F out of doubt	F out of doubt	
80	Receiving double portion of inheritance as the firstborn son			If found M: Not M
81	Diminishing the firstborn's inheritance			If found M: Not M
82	If an heir alongside a male	F out of doubt	F out of doubt	
83	If an heir alongside a female	F out of doubt	F out of doubt	

84	Property is sufficient for daughters' maintenance and sons' inheritance: If an heir alongside sons and daughters	F	F	
85	Property is sufficient for daughters' maintenance and sons' inheritance: If an heir alongside a son only			
86	Property is sufficient for daughters' maintenance and sons' inheritance: If an heir alongside a daughter only			
87	Property is only sufficient for daughters' maintenance: If an heir alongside sons and daughters	M	M	
88	Property is only sufficient for daughters' maintenance: If an heir alongside a son only			
89	Property is only sufficient for daughters' maintenance: If an heir alongside a daughter only			
90	Eligibility to serve as a witness	F out of doubt	F out of doubt	
91	Punishment by stoning for cursing a parent			
92	Punishment by strangling for striking a parent			
93	Treatment as a stubborn and rebellious son			

Figure 2.9
Rulings of Isserles' Gloss to the Shulchan Aruch

		Androgynos	Tumtum	Tumtum <i>she-Nikra</i>
1	All stringencies			
2	Wrappings of a woman	M	M	
3	Shaving the head			
4	Wearing <i>Tzitzit</i>			
5	Blessings for <i>Tzitzit</i>	F out of doubt	F out of doubt	
6	All positive commandments from which women are exempt			
7	Blessings over positive commandments from which women are exempt			
8	Making the <i>Zimun</i>			

9	Circumcision on the Eighth Day			
10	Circumcision Trumps Shabbat			M
11	Blessings for Circumcision			
12	Hearing <i>Shofar</i>			
13	Sounding <i>Shofar</i>			
14	Dwelling in <i>Sukkah</i>			
15	Blessing for <i>Sukkah</i>			
16	Hearing the <i>Megillah</i>		Own category	
17	Reading the <i>Megillah</i>		Own category	
18	Rounding off the Hair on the Head			
19	Age of [Presumed] Adulthood			
20	Torn and Found Male	--	--	
21	Torn and Found Female	--	--	
22	Betrothing a woman	M		
23	Being Betrothed by a Man	M		
24	Holding any levirate relationship			
25	Performing <i>Chalitzah</i>			
26	Performing <i>Yibum</i>			
27	Their Wife Subject to <i>Chalitzah</i> and <i>Yibum</i>			
28	Their Wife Subject to Waters of <i>Sota</i>			
29	Receiving anal sex from a man			
30	Receiving Vaginal Sex from a Man			
31	Marrying a Woman			
32	A Man Having Sex with their Wife			
33	Postpartum purification period: single birth			
34	Postpartum purification period: twin with Male			
35	Postpartum purification period: twin with Female			
36	Seclusion with Women			
37	Seclusion with Men			
38	Validity of Nazirite vow made over a son			
39	Validity of Nazirite vow made over a child			
40	Validity of Nazirite vow made over a male			
41	Validity of Nazirite vow made over a female			

42	Validity of Nazirite vow made over a non-male				
43	Validity of Nazirite vow made over a non-female				
44	Validity of Nazirite vow made over a neither-male-nor-female				
45	Validity of Nazirite vow made over a both-male and-female				
46	Becoming ritually unclean through emission				
47	Eligibility for sale as a Hebrew bondsperson				
48	Punishment for one who kills them				
49	Valuation				
50	Vows of Worth				
51	Child who is of priestly descent entitling their non-priest mother to eat consecrated foods				
52	Eating consecrated foods				
53	Entitling servants to eat consecrated foods				
54	Entitling wives to eat consecrated foods				
55	Disqualification from consecrated foods via vaginal or anal sex with disqualified man				
56	Disqualification from consecrated foods via vaginal sex with disqualified androgynos				
57	Disqualification from consecrated foods via anal sex with disqualified androgynos				
58	Apportionment of consecrated foods on the threshing-floor				
59	Bringing the first fruits				
60	Reciting declaration of first fruits				
61	Disqualification from entering the Temple				
62	[Animals] disqualification for the altar				
63	Eating from most holy offerings				
64	Eating from the less holy offerings				
65	Receiving portion of Temple offerings				
66	Circumcision entitles their father				

	to eat the Paschal ram			
67	Appearing at the Temple for the pilgrim festivals			
68	Gathering at the Jubilee year			
69	[Animal] firstborn that urinates as a male			
70	[Animal] firstborn that urinates as a female			
71	Mother's requirement to bring an offering for a miscarriage after the postpartum purification period for this baby			
72	As a substituted [animal] offering			
73	As offspring of consecrated animals			
74	Sprinkling the ashes of the red cow			
75	When afflicted with <i>tzara'at</i>			
76	Rendering themselves ritually impure through simultaneous red and white emissions			
77	Rendering someone else ritually impure through simultaneous red and white emissions			
78	Different gift amounts pledged to male and female children			
79	Eviction by adjacent landowner			
80	Receiving double portion of inheritance as the firstborn son			
81	Diminishing the firstborn's inheritance			
82	If an heir alongside a male			
83	If an heir alongside a female			
84	Property is sufficient for daughters' maintenance and sons' inheritance: If an heir alongside sons and daughters			
85	Property is sufficient for daughters' maintenance and sons' inheritance: If an heir alongside a son only	Own category	F	
86	Property is sufficient for daughters' maintenance and sons' inheritance: If an heir alongside a daughter only	F	Not F	
87	Property is only sufficient for			

	daughters' maintenance: If an heir alongside sons and daughters				
88	Property is only sufficient for daughters' maintenance: If an heir alongside a son only	Own category	Not M		
89	Property is only sufficient for daughters' maintenance: If an heir alongside a daughter only	M	M		
90	Eligibility to serve as a witness				
91	Punishment by stoning for cursing a parent				
92	Punishment by strangling for striking a parent				
93	Treatment as a stubborn and rebellious son				

Figure 2.10
Shulchan Aruch (Caro Only):
Treatment of Androgynos and Tumtum by Sex/Gender Classification

	Androgynos	Tumtum
Male	<ul style="list-style-type: none"> • Circumcision on the eighth day • Hearing <i>shofar</i> • Rounding off hair on the head • Seclusion with women • Seclusion with men • Property is only sufficient for daughters' maintenance, if heir alongside sons and daughters 	<ul style="list-style-type: none"> • Hearing <i>shofar</i> • Rounding off hair on the head • Seclusion with men • Animal firstborn that urinates as a male • Property is only sufficient for daughters' maintenance, if heir alongside sons and daughters
Female	<ul style="list-style-type: none"> • Postpartum period for single birth • Property is sufficient for daughters and sons, if heir 	<ul style="list-style-type: none"> • Sounding <i>shofar</i> • Postpartum period for single birth • Property is sufficient for daughters and sons, if heir

	alongside sons and daughters	alongside sons and daughters
Male out of Doubt	<ul style="list-style-type: none"> • Wearing <i>tzitzit</i> • Dwelling in <i>sukkah</i> • Betrothing a woman • Animal firstborn that urinates as a female • Animal firstborn that urinates as a male 	<ul style="list-style-type: none"> • Wearing <i>tzitzit</i> • Dwelling in <i>sukkah</i> • Betrothing a woman • Performing <i>chalitzah</i> • Animal firstborn that urinates as a female
Female out of Doubt	<ul style="list-style-type: none"> • Blessing for <i>tzitzit</i> • Being betrothed by a man • Eviction by adjacent landowner • If an heir alongside a male • If an heir alongside a female • Eligibility to serve as a witness 	<ul style="list-style-type: none"> • Blessing for <i>tzitzit</i> • Being betrothed by a man • Performing <i>yibum</i> • Eviction by adjacent landowner • If an heir alongside a male • If an heir alongside a female • Eligibility to serve as witness
Not-Male	<ul style="list-style-type: none"> • Circumcision trumps Shabbat 	
Not Female		
Not-Male out of Doubt	<ul style="list-style-type: none"> • Blessing for circumcision 	
Male Plus Female		
Male Plus Female, Doubtful		
Own Category	<ul style="list-style-type: none"> • Making the <i>zimun</i> • Sounding <i>shofar</i> • Reading <i>Megillah</i> • Performing <i>chalitzah</i> • Performing <i>yibum</i> 	
Any Person	<ul style="list-style-type: none"> • Hearing the <i>Megillah</i> 	<ul style="list-style-type: none"> • Hearing the <i>Megillah</i>
Neither		<ul style="list-style-type: none"> • Making the <i>zimun</i>

		<ul style="list-style-type: none"> • Reading the <i>Megillah</i>
Cannot Determine	<ul style="list-style-type: none"> • Different gift amounts pledged to male and female children 	<ul style="list-style-type: none"> • Different gift amounts pledged to male and female children

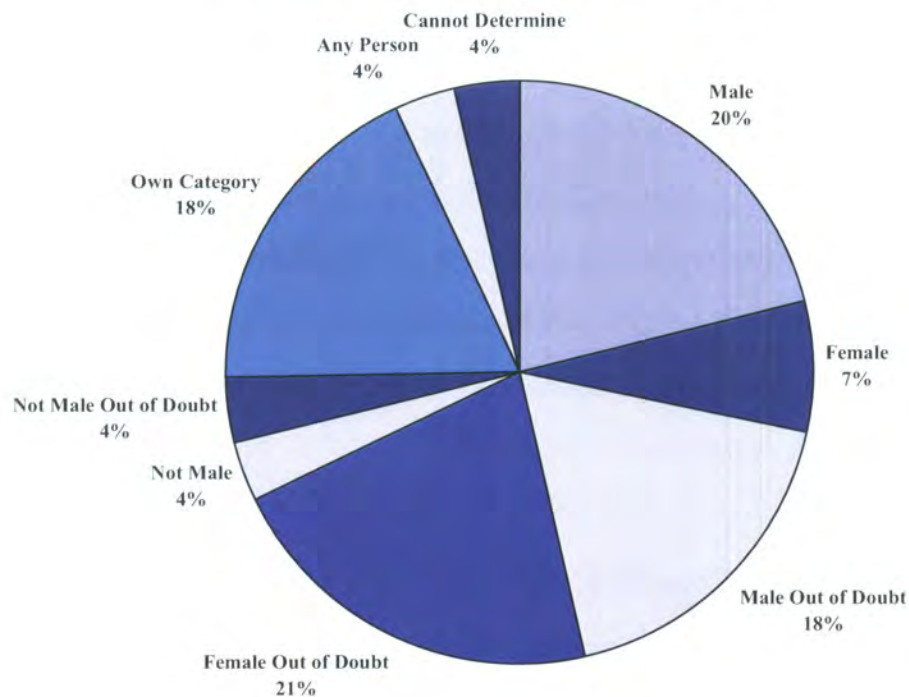
It is evident, especially when looking at figures 2.8 and 2.9, that a significant number of questions or situations addressed in the Mishneh Torah are not mentioned in the Shulchan Aruch at all. This is due, at least in significant part, to the different scopes of the two Codes (see Introduction). 24% of Maimonides' references to the tumtum and the androgynos are in the direct context of Temple-related law. Maimonides queries—among many other things—whether an androgynos or tumtum of priestly lineage is entitled to eat from the Temple offerings, whether an androgynos or tumtum animal is fit to be slaughtered as a sacrifice, and whether an androgynos or tumtum is required to travel to the Temple on pilgrim festivals. These are questions that the Shulchan Aruch had no intention of addressing.

In the figures below that compare the two works, all situations within this 24% have been removed. This is to allow the language and decisions of the two codifiers to be compared only in relation to topics that are actually or potentially within the scope of both.³⁹ Thus

³⁹ Some determination of context is necessary when excluding certain subjects for the purpose of comparison. For example, both MT and SA contain chapters entitled *Hilchot Sota*, Laws of the Woman Suspected of Infidelity. Rambam's concern is whether the wife of an androgynos would be subject to the ritual of the bitter waters, which in antiquity was alleged to determine whether she was innocent or guilty of a charge of infidelity. Caro did not address this ritual at all in his *Hilchot Sota*. It clearly belongs in the category of law that no longer had practical relevance in the late medieval period, and in fact was outdated long before Maimonides' time: "...the discussion of the ordeal of the *sotah* in the Mishnah is totally theoretical. The ordeal was certainly abandoned by the second Temple period, and possibly even during the first..." (Rachel Biale, *Women and Jewish Law*, p. 34). In this case, the language—the word *sota*—is

when we observe, for example, that the Shulchan Aruch does not address the status of the tumtum or androgynos on the topic of determining age of majority, it is a potentially significant omission, and is not simply because that topic is outside of the scope of the Code. All items that are, or arguably could be, within the scope of the Shulchan Aruch have been left in for comparison.

**Figure 2.11: Shulchan Aruch (Caro):
Gender Treatment of the Androgynos**



General Observations: the Shulchan Aruch on the Androgynos

shared, but the concept is not. When it comes to the subject of vows, on the other hand, the general topics of concern are similar between the two works, but language and specifics are different.

Caro's main text and Isserles' gloss together address 41 (30 and 11 respectively) different issues in relation to the tumtum and/or androgynos. Of these, all but 2 (93%) in Caro's text and all but 3 in the gloss discuss the androgynos, either alone or together with the tumtum. As the figure above demonstrates⁴⁰, Caro's text treats the androgynos as Male or Male-out-of-Doubt 39% of the time, and Female or Female-out-of-Doubt 28% of the time. In 18% of cases, the androgynos is treated as *sui generis*—that is, in another sex/gender category entirely. No passage in the Shulchan Aruch falls into the category of "Neither." Caro never addresses the difficulty of the androgynos by excluding her/him altogether from the situation at hand.

There appear to be two notable differences between Caro's and Maimonides' treatments of the androgynos. 67% of the time in the Shulchan Aruch, the androgynos is treated exactly as either women or men are treated. In the Mishneh Torah, this figure is 55%. Whether this fairly small difference reflects a fundamental difference of approach between the codifiers seems quite debatable, especially since both treat the androgynos as *sui generis* in 18% of instances.

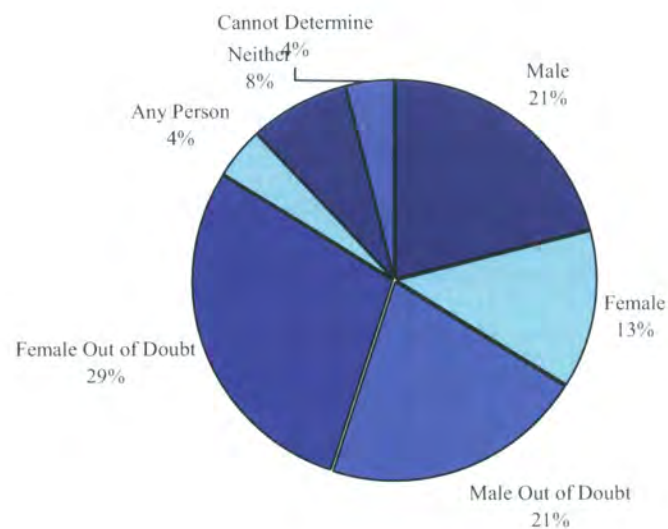
More dramatic is the difference between the codifiers' use of language of doubt. 42.5% of Caro's decisions about the androgynos are modified by language of doubt, compared to only 22.5% of Maimonides'. A preliminary look at the data indicates that this difference is not clearly attributable to the difference in the scope of the two works;

⁴⁰ Figures Q and S reflect Caro's main text only. Isserles' gloss includes only 11 total references to the androgynos and tumtum—8 mentions of each. With so few passages to work with, I have avoided presenting percentages that may be misleading. All of Isserles' rulings are presented amongst the figures above, and are included throughout this paper as they are relevant, or as they contribute points not raised by the other two writers.

Rambam uses doubt language in both Temple and non-Temple law. A larger comparison between the two codifiers' use of language and legal terminology might well shed light on this question.

Both of these differences between the works' approach to the androgynos merit further study.

**Figure 2.12: Shulchan Aruch (Caro)
Gender Treatment of the Tumtum**



General Observations: the Shulchan Aruch on the Tumtum

Caro's main text and Isserles' gloss together address 41 (30 and 11 respectively) different issues in relation to the tumtum and/or androgynos. Of these, 24 (80%) in Caro's text and 8 in the gloss discuss the tumtum, either alone or together with the androgynos. As

the figure above demonstrates, Caro's text treats the tumtum as Male or Male-out-of-Doubt 42% of the time, and Female or Female-out-of-Doubt 41.5% of the time. Thus, in 83.5% of cases, Caro treats the tumtum either like a woman or like a man—half the time applying the laws for one, and half the time the laws for the other. There are a variety of observations that may be made from comparison to the androgynos. We might suggest that Caro considered the tumtum “more female” than the androgynos. But we might also observe that the tumtum is never treated by Caro as his/her “own category,” as compared to 18% of cases in which the androgynos is treated that way. If Caro is uninterested in using that category for the tumtum, the tumtum then has to be dealt with another way, perhaps making it more likely that the tumtum ends up treated as either male or female. This might account for the fact that--according to this system of organizing the information--Caro considers the tumtum not only “more female” than the androgynos, but also more male. One might also point out that this symmetrical treatment of the tumtum is neatly aligned with the rabbinic understanding of the tumtum's physiology (see Part I.) Tumtumim are, the rabbis believe, either male or female. Presumably half are one and half are the other.⁴¹

It is also notable that, while the Shulchan Aruch never addresses the androgynos by excluding her/him altogether from the activity in question, this fate is not unlikely to befall the tumtum in this work. Some of the apparent reasons for this will be discussed in Part III.

⁴¹It is clear that, in the rabbinic understanding, some tumtumim are women and some are men. Whether the tumtum population would be expected to break down 50-50 is never addressed explicitly, as far as I have found.

In comparison to Caro's treatment of the tumtum, Maimonides offers a wider range of options. Most notably, Maimonides is quite willing to consider the tumtum as a category of her/his own (11%).

The language of doubt is again very notable with the respect to the comparative treatment of the tumtum. A full 50% of Caro's decisions about the tumtum are modified by language of doubt, compared to 34% of Maimonides' decisions. Again we observe that Caro's language is more "doubtful" overall than Rambam's, with respect to both figures. It is also clear that both codifiers consider the tumtum a more "doubtful" character than the androgynos. Their decisions about the tumtum are more likely to be modified ('weakened') by language of doubt. And both are more likely to understand the androgynos as a 'creation of its own.'

Figure 2.13
Comparative Treatments of the Androgynos:
Mishneh Torah & Shulchan Aruch

	Mishneh Torah	Shulchan Aruch	Shulchan Aruch (Gloss)
Male	<ul style="list-style-type: none"> • Wrappings of a woman • Circumcision on the eighth day • Hearing <i>shofar</i> • Receiving anal sex from a man • Marrying a woman • Seclusion with women • Seclusion with men • Validity of Nazirite vow over a male • When afflicted with 	<ul style="list-style-type: none"> • Circumcision on the eighth day • Hearing <i>shofar</i> • Rounding off hair on the head • Seclusion with women • Seclusion with men 	<ul style="list-style-type: none"> • Wrappings of a woman • Betrothing a woman • Being betrothed by a man

	<ul style="list-style-type: none"> <i>tzara'at</i> Property is only sufficient for daughters' maintenance, if heir alongside sons and daughters 	<ul style="list-style-type: none"> Property is only sufficient for daughters' maintenance, if heir alongside sons and daughters 	<ul style="list-style-type: none"> Property is only sufficient for daughters' maintenance, if heir alongside a daughter only
Female	<ul style="list-style-type: none"> Shaving the head Age of presumed adulthood Receiving vaginal sex from a man Postpartum period if twin with a male Validity of Nazirite vow over a son Validity of Nazirite vow over a female [Animal] firstborn that urinates as a male [Animal] firstborn that urinates as a female Property is sufficient for daughters and sons, if heir alongside sons and daughters Treatment as stubborn and rebellious son 	<ul style="list-style-type: none"> Postpartum period for single birth Property is sufficient for daughters and sons, if heir alongside sons and daughters 	<ul style="list-style-type: none"> Property is sufficient for daughters and sons, if an heir alongside a daughter only
Male out of Doubt	<ul style="list-style-type: none"> Wearing <i>tzitzit</i> All positive commandments from which women are exempt Dwelling in <i>sukkah</i> Betrothing a woman 	<ul style="list-style-type: none"> Wearing <i>tzitzit</i> Dwelling in <i>sukkah</i> Betrothing a woman Animal firstborn that urinates as a female Animal firstborn that 	

		urinates as a male	
Female out of Doubt	<ul style="list-style-type: none"> Blessing for <i>tzitzit</i> Blessings for positive commandments from which women are exempt Blessing for <i>sukkah</i> Being betrothed by a man Eviction by adjacent landowner If an heir alongside a male If an heir alongside a female Eligibility to serve as a witness 	<ul style="list-style-type: none"> Blessing for <i>tzitzit</i> Being betrothed by a man Eviction by adjacent landowner If an heir alongside a male If an heir alongside a female Eligibility to serve as a witness 	<ul style="list-style-type: none"> Blessing for <i>tzitzit</i>
Not-Male	<ul style="list-style-type: none"> Validity of Nazirite vow over a non-male 	<ul style="list-style-type: none"> Circumcision trumping Shabbat 	
Not Female	<ul style="list-style-type: none"> Validity of Nazirite vow over a non-female 		
Not-Male out of Doubt	<ul style="list-style-type: none"> Circumcision trumping Shabbat Blessing for circumcision 	<ul style="list-style-type: none"> Blessing for circumcision 	
Male Plus Female	<ul style="list-style-type: none"> Postpartum purification period for single birth Validity of Nazirite vow over a both-male-and-female 		
Male Plus Female, Doubtful	<ul style="list-style-type: none"> All stringencies Becoming ritually unclean through emission 		
Own Category	<ul style="list-style-type: none"> Making the <i>zimun</i> Sounding <i>shofar</i> Holding any levirate relationship Performing <i>chalitzah</i> 	<ul style="list-style-type: none"> Making the <i>zimun</i> Sounding <i>shofar</i> Reading <i>Megillah</i> 	<ul style="list-style-type: none"> Property is only sufficient for daughters, if an heir alongside a son only Property is sufficient for daughters and sons, if an

	<ul style="list-style-type: none"> Performing <i>yibum</i> Wife subject to <i>chalitzah</i> and <i>yibum</i> Man having sex with wife Validity of Nazirite vow over a neither-male-nor-female Rendering someone else impure through simultaneous red and white emissions [Animal] disqualification for the altar Mother's requirement to bring offering for miscarriage after postpartum period for this baby 	<ul style="list-style-type: none"> Performing <i>chalitzah</i> Performing <i>yibum</i> 	heir alongside a son only
Any Person	<ul style="list-style-type: none"> Validity of Nazirite vow over a child Vows of worth Punishment for one who kills them Gathering at the jubilee year Becomes unclean through simultaneous red and white emissions Punishment for cursing a parent Punishment for striking a parent 	<ul style="list-style-type: none"> Hearing the <i>Megillah</i> 	
Neither	<ul style="list-style-type: none"> Valuation Eligibility for sale as Hebrew bondsperson 		
Cannot Determine	<ul style="list-style-type: none"> Postpartum period if a twin with a female Different gift amounts pledged to male and female children 	<ul style="list-style-type: none"> Different gift amounts pledged to male and female children 	

Figure 2.14

Comparative Treatments of the Tumtum: Mishneh Torah & Shulchan Aruch

	Mishneh Torah	Shulchan Aruch	Shulchan Aruch (Gloss)
Male	<ul style="list-style-type: none"> • Wrappings of a woman • Hearing <i>shofar</i> • Performing <i>chalitzah</i> • Seclusion with men • When afflicted with <i>tzara'at</i> • Property is only sufficient for daughters' maintenance, if heir alongside sons and daughters 	<ul style="list-style-type: none"> • Hearing <i>shofar</i> • Rounding off hair on the head • Seclusion with men • Animal firstborn that urinates as a male • Property is only sufficient for daughters' maintenance, if heir alongside sons and daughters 	<ul style="list-style-type: none"> • Wrappings of a woman • Property is only sufficient for daughters' maintenance, if heir alongside a daughter only
Female	<ul style="list-style-type: none"> • Shaving the head • Sounding <i>shofar</i> • Age of presumed adulthood • Receiving vaginal sex from a man • Receiving anal sex from a man • Postpartum period if twin with a male • Validity of Nazirite vow over a son • Property is sufficient for daughters and sons, if heir alongside sons and daughters • Treatment as stubborn and rebellious son 	<ul style="list-style-type: none"> • Sounding <i>shofar</i> • Postpartum period for single birth • Property is sufficient for daughters and sons, if heir alongside sons and daughters 	<ul style="list-style-type: none"> • Property is sufficient for daughters and sons, if an heir alongside a son only
Male out of Doubt	<ul style="list-style-type: none"> • Wearing <i>tzitzit</i> • All positive commandments from which women are exempt • Dwelling in <i>sukkah</i> • Betrothing a woman • Animal firstborn that urinates as a male • Animal firstborn that urinates as a female 	<ul style="list-style-type: none"> • Wearing <i>tzitzit</i> • Dwelling in <i>sukkah</i> • Betrothing a woman • Performing <i>chalitzah</i> • Animal firstborn that urinates as a female 	

Female out of Doubt	<ul style="list-style-type: none"> • Blessing for <i>tzitzit</i> • Blessings for positive commandments from which women are exempt • Blessing for <i>sukkah</i> • Being betrothed by a man • Performing <i>yibum</i> • Eviction by adjacent landowner • If an heir alongside a male • If an heir alongside a female • Eligibility to serve as witness 	<ul style="list-style-type: none"> • Blessing for <i>tzitzit</i> • Being betrothed by a man • Performing <i>yibum</i> • Eviction by adjacent landowner • If an heir alongside a male • If an heir alongside a female • Eligibility to serve as witness 	<ul style="list-style-type: none"> • Blessing for <i>tzitzit</i>
Not-Male			<ul style="list-style-type: none"> • Property is only sufficient for daughters, if an heir alongside a son only
Not Female			<ul style="list-style-type: none"> • Property is sufficient for daughters and sons, if an heir alongside a daughter only
Not-Male out of Doubt			
Male Plus Female	<ul style="list-style-type: none"> • Postpartum purification period for single birth 		
Male Plus Female, Doubtful	<ul style="list-style-type: none"> • All stringencies • Becoming ritually unclean through emission 		
Own Category	<ul style="list-style-type: none"> • Man having sex with wife • Mother's requirement to bring offering for miscarriage after postpartum period for this baby 		<ul style="list-style-type: none"> • Hearing the <i>Megillah</i> • Reading the <i>Megillah</i>
Any Person	<ul style="list-style-type: none"> • Validity of Nazirite vow over a child • Vows of worth • Gathering at the jubilee year • Punishment for cursing a 	<ul style="list-style-type: none"> • Hearing the <i>Megillah</i> 	

	parent <ul style="list-style-type: none"> • Punishment for striking a parent 		
Neither	<ul style="list-style-type: none"> • Making the <i>zimmun</i> • Valuation • Eligibility for sale as Hebrew bondsperson 	<ul style="list-style-type: none"> • Making the <i>zimmun</i> • Reading the <i>Megillah</i> 	
Cannot Determine	<ul style="list-style-type: none"> • Postpartum period if a twin with a female • Different gift amounts pledged to male and female children 	<ul style="list-style-type: none"> • Different gift amounts pledged to male and female children 	

Introduction to Parts III-V: General Patterns and Tentative Observations

“Legally, the hermaphrodite is in an unfavorable position. He has all the obligations of a man but not all his rights; he does not receive a portion of inheritance from his father as do his brothers, nor is he supported from the inheritance as are his sisters. As a woman, he is not able to testify in court; if he is of priestly descent, he cannot partake of priestly gifts and allowances; he is also unfit to serve as a priest. He has all the religious (ceremonial) obligations of a man. On the other hand, perhaps to contrast with his legal status in other nations, Judaism intentionally emphasizes that he is to be considered as a human being throughout. If someone kills him intentionally, the killer is executed by strangulation; if unintentionally, the killer goes into exile. On the other side, he himself is stoned if he curses his parents. His legal advantages are minor; he cannot be sold as a slave and is not required to make the three yearly pilgrimages to Jerusalem...”¹

In his classic work *Biblisch-Talmudische Medizin* (Biblical and Talmudic Medicine, 1911), Julius Preuss offers this lachrymose portrait of the tumtum and androgynos’ status in the Talmudim. In this depiction, these figures’ intermediate sex places them into the lowest possible position on the gender totem pole: the requirements of men, but without the privileges; the restrictions of women, but without the protections. Other scholars (among the rather few who have who have investigated these figures’ position in rabbinic literature) have come to very different conclusions. For example, Charlotte Fonrobert finds that in the Mishna, the androgynos’ “default sex” is generally male.² That such

¹ Julius Preuss, Biblical and Talmudic Medicine. *Biblisch-Talmudische Medizin*, 1911. Translated by Fred Rosner. New York: Sanhedrin Press, 1978. Pp. 226-227

² Charlotte Fonrobert, “Gender Identity in Halachic Discourse,” *Jewish Women: A Comprehensive Historical Encyclopedia*. 1 March 2009. Jewish Women's Archive. February 14, 2010.

different conclusions can be drawn from the same body of texts indicates how complex and challenging the literature on these figures can be.

Whatever the “true” status of these figures is in the earlier literature, the information that I have gathered and organized from the *Mishneh Torah* and *Shulchan Aruch* appears to reflect neither of these two patterns.³ This study is preliminary, and the data presented in Part II requires much more thorough attention from a variety of perspectives. Initially, however, it appears that no general claim can accurately encapsulate the “standing” of the *tumtum* or *androgynos* in these Codes. These figures are not necessarily considered male by default— or female, for that matter. Their status is sometimes addressed with certainty and sometimes with great doubt. Some rulings pertaining to them seem to contradict the logic of other rulings pertaining to them. The *androgynos* and *tumtum* are treated as men, women, both, neither, a category of their own, and combinations of these.

Below, I outline three tentative observations about how these two figures are treated in these Codes. Part III addresses Preuss’ claim directly, querying how the *tumtum* and *androgynos* are treated in comparison to the Codes’ treatment of women and of men on the same issues. Part IV observes a pattern of categorizing the *androgynos* and *tumtum* according to the impact, or lack of impact, of that decision upon other people. Part V makes some initial observations of patterns that emerge in discussions of sex and marriage.

³ It is possible that the Codes’ approach is different than the *Mishna*’s or *Talmud*’s, which would explain why various observations of the earlier literature do not describe the works in question. However, as of yet, I see no evidence that the content and decisions of the *Mishneh Torah* or *Shulchan Aruch* depart significantly from the approach of their rabbinic predecessors. There appears to be no other assessment specifically of these Codes to which I might compare my observations.

Part III: As All People Do

The Jewish legal as well as ethical system is based, fundamentally, on the performance of *mitzvot*, religious commandments. Based upon interpretations of the written Torah, the rabbinic tradition has developed an intricate system that explains what Jews are commanded to do and not to do. The *raison d'être* of Jewish law is to determine how each mitzvah is to be carried out: who is and is not obligated to perform a certain commandment, in what manner, and under what circumstances.

In the system of Jewish law, the primary question about an individual's status *vis-à-vis* the *mitzvot* is the question of obligation. Cultural and religious "credit" for having fulfilled commandments is granted for carrying out *mitzvot* when one is *obligated* to do so. Historically, Judaism generally has not encouraged people to voluntarily perform *mitzvot* to which they are not obligated. There are not insignificant traditions in Jewish legal development that do permit non-obligated parties to take on some *mitzvot* if they choose to; and, of course, modern liberal Judaism has radically re-understood the notion of obligation to *mitzvot*. But historically, participation in *mitzvot* by non-obligated parties has been tolerated at best, and often scorned or prohibited as arrogant or inappropriate. In other words, Preuss' framing of "obligation" as burden or disadvantage is a profound misunderstanding of some basic values of the literature: *Gadol ha-metzuveh v'oseh mi-mishe-eino m'tzuveh v'oseh* ("Greater is one who is commanded to a mitzvah and does it than one who is not commanded to a mitzvah and does it."⁴)

⁴ Babylonian Talmud *Kidushin* 31a

Who is obligated to perform *mitzvot* under historical Jewish law? Primarily, this obligation is ascribed to free, adult Jewish males. The premium of the legal and socio-religious system upon obligation has resulted in a religious system highly stratified by sex. Men are the people primarily obligated to carry out the precious commandments given to the Jewish people by God. This basic understanding of obligation is absolutely pervasive, through all areas of the law. There are numerous *mitzvot* to which women are also obligated. But overwhelmingly, the acknowledged, public religious affairs of Judaism—the building blocks of the Jewish covenant with the Divine—are the exclusive provenance of men.

Obviously, this fact has enormous, encompassing implications for people of non-binary gender—for those in the texts at hand and for those living in the present day. The binary stratification of Jewish religious and community life along gendered lines means that the determination of a person's sex/gender is probably the most important decision of one's life. It is absolutely determinative, in the medieval period and now, of how a person will function under the historical system of Jewish law. Which set of rules will apply—the women's or the men's? How can a person who is not clearly male or female participate in a system that appears to offer two paths only?

Under this system, one might expect to find one of three trends as it addresses the existence of non-binary individuals. One possible impulse might be to keep the category of “obligated people” as small as possible. If maleness is one of the primary

characteristics that defines a human being's role in the covenant of Israel, then perhaps we would expect to see an effort to maintain the "purity" of the male category. In a system with a clear preference for maleness, might we find that the presence of *some* femaleness in the androgynos, or *possible* femaleness in the tumtum, demotes them from the obligated male category? A codifier could ensure that no person engaged in *mitzvot* to which they were not obligated by ruling, whenever possible, that the tumtum and androgynos are not male. This would certainly serve any social or political agenda that sought to keep the potentially less powerful from rising to more privileged classes.

Conversely, might we discover a tendency amongst one or both Codes to try to make the category of "male" as large as possible? If there is a possibility of obligating more people to *mitzvot* by considering them male, then might we find that the codifiers chose to do so? In a system with a clear preference for maleness, might we find that the presence of *some* maleness in the androgynos, or *possible* maleness in the tumtum, elevates them to the status of obligation wherever the codifiers deemed it viable? This would ensure that anyone who *might* be obligated to perform a mitzvah were more likely to do so.

The final trend that one might expect is the one that Preuss finds. In a system that presumes being simply male or female, we might anticipate that a person who is not clearly either one would be an outcast. Might we find that the androgynos and tumtum are left far worse off than anyone else?

Both Codes should be thoroughly examined to determine whether any of these three trends is present, and what this may reveal about the beliefs of the codifiers and how they understood the tumtum and the androgynos. My initial observation, based upon the texts, is that none of these approaches explains the decisions that the Shulchan Aruch or Mishneh Torah make. The question of when and why the tumtum or androgynos is included or not included in the category of “male” is addressed in many places throughout this paper.

The most important observation, for now, is that the treatment of the androgynos and tumtum in the Shulchan Aruch and Mishneh Torah appears to emphatically reject Preuss’ generalization. Preuss paints a picture of a hierarchy in which men are on top, women follow, and the tumtum and androgynos are on the bottom—left without the benefits of either sex and with the burdens of both. But this pitiable situation is far from what these Codes establish. In his discussion of the mitzvah of *hakhel* (gathering at the Jubilee year), Maimonides makes an unambiguous statement: “And the matter is clear that the tumtum and the androgynos are obligated, since women are obligated.”⁵ With few exceptions, this statement describes the overall stance taken by both Rambam and Caro. With regard to *mitzvot* to which women are obligated, the androgynos and tumtum are also obligated; and almost all situations that include women also include the androgynos and the tumtum. The textual evidence disproves the notion that these figures are even worse off than women under this social and legal system.

⁵ *Hilchot Chagigah* 3:2

This observation should not be understood to mean that the obligations upon women and upon the tumtum and androgynos are the same. This is often not the case; the figures in Part II demonstrate that these figures are often treated differently from women (and differently from each other.) It also does not mean that in every situation the tumtum and the androgynos are found to be at equal or greater advantage compared to women. There are several instances, both in the Mishneh Torah and Shulchan Aruch, where the androgynos and/or tumtum's intermediate sex/gender status actually places them at a disadvantage vis-à-vis both men and women. What is true in the Shulchan Aruch and Mishneh Torah is that almost every social, legal or community institution that provides for the participation of women also includes the tumtum and androgynos—such as gathering at the Jubilee or entitling a mother to eat consecrated foods.⁶ For anything that women are required or permitted to do, either that same requirement or permission applies to the androgynos and tumtum, or another parallel decision accounts for their behavior in that situation. In addition, the tumtum and androgynos are included in many obligations and institutions from which women are excluded, such as obligation to sit in a *sukkah* or hear the *shofar*. Overall, the Codes position these figures not 'below' both men and women, but somewhere 'between' the two.⁷

There are a few exceptions to the Codes' inclusion of the tumtum and androgynos in legal and social institutions. These are indicated by the category of 'Neither.' All situations that fall into this category can be seen most clearly in Figures 2.5 and 2.10. In the Mishneh Torah, there are two situations in which the androgynos and tumtum are

⁶ *Hilchot T'rumot* 6:12

⁷ For this reason, among others, the pervasive presence of the androgynos and tumtum in this literature seems to do little to challenge its male supremacist foundations.

explicitly excluded from a matter at hand in which everyone else—including women—are included. They are not eligible to be assigned a valuation by a vow,⁸ and they are not eligible to be sold as an indentured servant.⁹ Both of these exclusions are purportedly due to the fact that neither the androgynos nor the tumtum are mentioned in the Torah. The Torah establishes a procedure for determining the price, or monetary value, of men and of women in these situations; but how would the price for a tumtum or androgynos be decided? Thus they are not included in these activities at all. However we cannot attribute these rulings to what is or is not present in the Torah, since rabbinic literature provides for these figures at length with no explicit directions from the Torah whatsoever. When Maimonides explains his ruling in by saying that “the Torah only set a valuation for an unequivocal male or an unequivocal female,”¹⁰ further work is needed to look for his actual motivation.

In addition to these two decisions, Maimonides also excludes the tumtum from making the *zimun*, as does Caro.¹¹ The *zimun*, the “invitation” to recite the blessing after a meal, is the mechanism by which listeners fulfill their Biblical responsibility to bless God after eating.¹² Caro and Rambam exclude the tumtum from leading this blessing because women cannot make a *zimun* for men. Whereas a group of androgynoi eating together may make the *zimun* for each other, a group of tumtumim are presumed to represent a mixture of male and female tumtumim. Thus there is a fifty percent chance that the

⁸ *Hilchot Arachin v'Chormin* 1:5. See Leviticus 27 for the source of this Temple-related practice.

⁹ *Hilchot Avadim* 4:1

¹⁰ *Hilchot Arachin v'Chormin* 1:5

¹¹ *Orach Chaim* 199:9; *Hilchot Brachot* 5:7

¹² Deuteronomy 8:10

tumtum making the *zimun* is female, causing everyone present to have not fulfilled the mitzvah.¹³

The Shulchan Aruch never excludes the androgynos from any institution in which women are included. It does include a most interesting dispute about whether to exclude the tumtum altogether from one additional activity of society: the reading of the *Megillah* for her/himself. The tumtum is obligated, as everyone else, to hear the *Megillah*. Following the logic and language of Rambam's ruling about making a *zimun*, *Orach Chaim* 589:3 rules that the tumtum cannot read the *Megillah* on anyone else's behalf. But Caro and Isserles bring conflicting opinions about whether the tumtum can fulfill the obligation to hear the *Megillah* by reading it to himself/herself. Isserles brings a most interesting ruling in his gloss¹⁴: "There are those that say that he cannot fulfill this mitzvah even for himself, and he needs to hear [the *megillah*] from others." This is a fascinating ruling for multiple reasons—the most interesting of which is that it seems to rely on a completely different understanding of the tumtum than what rabbinic literature generally puts forth. (See the discussion of this comment in Part IV.)

Although these are examples of situations in which the androgynos and/or tumtum is left out of society altogether, we see that these represent a very small fraction (less than 4%) of all the situations addressed by these two Codes.

¹³ As noted elsewhere, the idea of asking a tumtum about their sex appears not to have occurred to the Sages. Today, this might seem like an obvious possible solution. But for the rabbis, if one's sex/gender cannot be determined by them, the lawmakers, then it cannot be known. This is the approach of rabbinic discourse towards many subjects, particularly towards women, slaves, non-Jews, people with disabilities, children, and others who are typically objects, not subjects, of classical rabbinic thought.

¹⁴ In his gloss to *Orach Chaim* 589:3

There are also certain situations in which it can be argued that this literature grants people of intermediate or unknown sex/gender status more freedom than either men or women have. This greater freedom is also suggested, in many instances, by explicit discussion of punishment for transgression of sex/gender-linked law. An example is the regulations of *yichud*, seclusion. In order to avoid sexual impropriety or the appearance thereof, traditional Jewish law provides that if a man and a woman are not married or closely related to each other, they should not be alone together. Based on this established understanding, Maimonides makes this ruling about how *yichud* applies to the androgynos and tumtum: “An androgynos may not be alone with the women. But if he is alone [with them], we do not flog him, because he is of doubtful status. But a man may be alone with the androgynos and with the tumtum.”¹⁵ (On this matter Caro later quotes Maimonides directly.¹⁶) In this instance, we see that the greater freedom permitted to intermediate individuals is codified via the punishment. Both works clearly state that an androgynos is treated like a man in the matter of *yichud*, and like a man, is prohibited from being alone with a woman to whom that androgynos is not married. A man is subject to *makat mardut* (disciplinary flogging¹⁷) if he is caught violating this rule.¹⁸ Unlike a man, however, the androgynos who violates this prohibition receives no punishment. Thus, while officially the androgynos is subject to the same restrictions on *yichud* as a male is, in effect the androgynos can be alone with anyone she/he wishes, without consequences.

¹⁵ *Hilchot Issurei Biah* 22:11

¹⁶ *Even haEzer* 22:12

¹⁷ Translation of *makat mardut* is per Elon’s *Jewish Law*, Volume 3, Glossary p.9

¹⁸

Rambam makes clear in this excerpt that the reason for withholding punishment is “because [the androgynos] is of doubtful status (*mipnei shehu safeik*).” This is consistent with Rambam’s more general position on punishment in questionable cases. In *Hilchot Eidut* (Laws of Witnessing), he explains that “we [e.g. the court] do not take money out of doubt, nor do we punish out of doubt. This is Biblical law.”¹⁹ However, it is important to note that in other cases, an androgynos or tumtum is explicitly held liable for punishment for apparently similar infringements. Post-facto exemptions from punishment are not uniformly applied in these Codes as a means of negotiating a “middle ground” for intermediate people in a binary legal system.

The category of Any Person indicates areas of life in which participation is not conditioned by sex/gender. In the Mishneh Torah this includes some extremely important provisions, especially in the area of criminal law. If a tumtum or androgynos is murdered, the killer receives the same punishment as would apply for any other victim.²⁰ On the other side, if an androgynos or tumtum is found guilty of cursing or striking a parent, they are subject to the same criminal proceedings and the same punishments by the court as anyone else.²¹ The ways in which these figures are treated as any other person are critical for establishing how the Codes, and classical rabbinic writing generally, regarded these figures. Jewish law treats the androgynos and tumtum as full human beings. Fundamentally, their lives are of equal value to anyone’s, and they are held equally responsible for their actions.

¹⁹ *Hilchot Eidut* 9:3

²⁰ *Hilchot N'zirut* 2:11

²¹ *Hilchot Mamrim* 5:1, 5:5

Further, the tumtum and androgynos are never considered exempt from the basic needs and functions that the Codes assume of all human beings. Following the earlier literature, the texts do not ever ask *whether* these figures ought to be included in the provision of food, the ownership of property, the laws of the family, or the observance of Jewish religious rites. The unspoken, universal presumption in the rabbinic law is that the androgynos and tumtum need to be accounted for in these arenas, just like all other Jews. The question on the table is *how* to include them. This unchallenged and unremarked assumption may be most remarkable in the areas of sex and marriage. The safest solution for Jewish law would have been to prohibit these figures from marrying or having sex with anyone. This would have avoided all possible sexual violations, one of the rabbis' major concerns. But marriage as a basic good of humanity is assumed by the rabbis, and the tumtum and androgynos are not exempt. It appears that rabbinic literature never even considering leaving them out of marriage, their most basic and cherished social institution. In Part V, we will see that the Codes and their predecessors prefer instead a risky and tangled solution that actually gives these figures more freedom to marry than anyone else.

Scholars have pointed out that this approach to the tumtum and androgynos is extremely humane within its historical context—unfortunately, unexpectedly so: “While Judaic law provided a means for integrating hermaphrodites into mainstream culture, Romans were

not so kind. In Romulus's time intersexes were believed to be a portent of a crisis of the state and were often killed."²²

It is in comparison to this broader context of Tannaitic literature that Charlotte Fonrobert offers an astute explanation for why the tumtum and androgynos are not treated exclusively as their own category. In other words, the project of integrating them into a binary halachic system could probably never be completed to anyone's satisfaction. Why bother? It is hard to know how to interpret the reality that, on one hand, they did try, and tried thoroughly and thoughtfully. On the other hand, these figures are still treated as a category of their own about fifteen percent of the time, on average, in the Shulchan Aruch and Mishneh Torah. One modern perspective holds this as a ray of great hope. That Jewish religious literature, from the Mishna and Midrash through the Codes, is able to conceive of more than two sex/gender categories for human beings could be a great contribution to a more liberated way of understanding sex and gender today. If the Shulchan Aruch has at least three categories, why must we have only two? For those wishing to open a Jewish conversation that questions and challenges binary sex, Own Category is a thrilling possibility. Fonrobert brings out that category's darker side: "Let us do some accounting of these tensions and try to sketch out the bigger picture: If rabbinic law had just contented itself with categorizing the hermaphrodite as "a creature in its own right," as one minority opinion would have it in our list of laws concerning the hermaphrodite,²³ the taxonomy of sexual identities would have remained neat and clean. In this case, the rabbinic legislators would have denied the hermaphrodite any legal

²² Anne Fausto-Sterling, *Sexing the Body*. New York: Basic Books, 2000, p.33.

²³ Here she refers to Rabbi Yosi, *Tosefta Bikkurim* 2:7

subject position (“and the sages could not decide whether he was a man or a woman”), which requires an unequivocal sexual identity. We may think here of the Roman equivalent of this logic, which was to consider him a freak creature with the respective consequences this entailed, such as drowning the baby in the earlier Republican period, or—according to Pliny—considering him as a figure of entertainment. But it is with the attempt to fit the hermaphrodite into the dual-sex grid holding rabbinic legal thinking in a tight grip that the question of his sexual identity is rendered unresolved and unresolvable.”²⁴

Gender liberation theology would benefit greatly from further understanding of the tumtum and androgynos. For now, suffice it to say that the Shulchan Aruch and Mishneh Torah have—against all odds—much to teach our own society about ascribing unquestioned humanity to people who violate sex and gender norms.

Julius Preuss’ portrait of the tumtum and androgynos as the most unfortunate sexes of all provides another example of the thought chasm that separates modern Western thought about sex and gender from rabbinic thought. He articulates well the situation that most of us would expect to find in the Codes. Sexual and gender ambiguity is viciously marginalized and erased in our own culture, so we tend to presume that it has always been so. Did Preuss come to his conclusions about these figures in the Talmud because that is what he expected to find? Or is it possible that he was right—meaning that the

²⁴ Charlotte Elisheva Fonrobert, “Regulating the Human Body: Rabbinic Legal Discourse and the Making of Jewish Gender,” in *The Cambridge Companion to the Talmud and Rabbinic Literature* ed. Charlotte Elisheva Fonrobert and Martin S. Jaffee. Cambridge University Press, 2007, pp. 282-283.

restatement literature, generally understood as a “digest” of the earlier legal works, actually takes a sharp departure from them in its treatment of these two figures? This latter question requires an extensive comparative study, and is beyond the scope of this paper. Initially, however, the answer seems to be ‘no’.

Instead, I take Preuss’ claim as a caution against seeing in a text what we expect to see. The only way to make his claim—to position the androgynos and tumtum as having all the burdens of both men and women, and few of the privileges—is to radically re-interpret the meaning of obligation, one of the foundations of rabbinic law and society. This seemingly bizarre statement by an educated man suggests the sheer power of our own perceptions of what is good and what is bad in the world of sex and gender. We do not just expect to find the tumtum and androgynos at the bottom of the hierarchy—we need them to be there. As noted in Part I, in our own society, to be a woman is, purportedly, fine. What is not fine is for one’s sex/gender to be unclear. This status is harshly punished, demoted below all other sex/gender possibilities. If we found that this were not the situation in rabbinic literature, it would contradict the foundations of our sex/gender world. Avoidance of this uncomfortable challenge is rarely intentional. It is a subconscious, visceral effort to enact in reality what has been made “natural” in our minds. At times, our impulse to privilege clear, binary-opposite sex and gender can be so strong that we will submerge almost any other reality in its service; and we will, probably without intending to, make whatever claim will erase a worldview that is different. The worldview of the Codes and its parent literature on the inclusion of the tumtum and androgynos is far from the one that Preuss shares with most of us.

Part IV: Between One Person and Another

Jewish tradition makes a distinction between two broad categories of commandments: commandments between a human being and God (*mitzvot bein adam l'Makom*), and commandments between one human being and another (*mitzvot bein adam l'chaveiro*.) These are sometimes characterized generally as ritual *mitzvot* versus ethical or social *mitzvot*. Examples of *mitzvot bein adam l'Makom* would be observance of *kashrut* (Jewish dietary laws), or requirements to say certain prayers at certain times. These types of commandments are understood to regulate and define the relationship between human beings and our Creator. The latter type, commandments between one person and another, are intended to regulate behavior and attitudes between human beings. Prohibitions against murder, or requirements about honoring elders, are examples of this type of *mitzvah*.

In the Shulchan Aruch, we can distinguish a clear pattern of decision-making about the androgynos and tumtum that is related to these categories of *mitzvot*. This pattern is not a self-conscious one in the Code; Caro never mentions the distinction between these types of *mitzvot* as an element of his reasoning about the tumtum or androgynos. Instead, this is a pattern that emerges when evaluating and describing his rulings.

Figure 4.1:
Caro, Shulchan Aruch on the Androgynos

No Effect on Other People	Potential Effect on Other People
Obligated to wear <i>tzitzit</i>	Makes <i>zimun</i> for “own kind” only
No blessing for <i>tzitzit</i>	Circumcision on the 8 th day
No blessings for circumcision	Circumcision does not trump Shabbat
Obligated to hear <i>shofar</i>	Sounds <i>shofar</i> for “own kind” only
Obligated to dwell in <i>sukkah</i>	Reads <i>Megillah</i> for “own kind” only
Obligated to hear the <i>Megillah</i>	May be betrothed by a man
Prohibited from rounding off hair	Does not perform <i>chalitzah</i>
May betroth a woman	Does not perform <i>yibum</i>
No seclusion with women	Mother has longer postpartum period
May be secluded with men	Receives the lesser gift amount
	Cannot be pre-empted from land purchase by prerogative of an adjacent landowner
	If there is enough inheritance for sons, is provided for as a female
	If there is only enough inheritance to provide for daughters, is considered a son
	Ineligible to serve as a witness

Figure 4.2:
Caro, Shulchan Aruch on the Tumtum

No Effect on Other People	Potential Effect on Other People
Obligated to wear <i>tzitzit</i>	Does not make the <i>zimun</i> for anyone
No blessing for <i>tzitzit</i>	Does not sound <i>shofar</i> for anyone
Obligated to hear <i>shofar</i>	Does not read <i>Megillah</i> for anyone
Obligated to dwell in <i>sukkah</i>	May be betrothed by a man
Obligated to hear the <i>Megillah</i>	Does perform <i>chalitzah</i>
Prohibited from rounding off hair	Does not perform <i>yibum</i>
May betroth a woman	Mother has longer postpartum period
May be secluded with men	Receives the lesser gift amount
	Cannot be pre-empted from land purchase by prerogative of an adjacent landowner
	If there is enough inheritance for sons, is provided for as a female
	If there is only enough inheritance to provide for daughters, is considered a son
	Ineligible to serve as a witness

The two charts above list (with the exception of one citation pertaining to animals) all topics regarding which the Shulchan Aruch deals with the tumtum and/or androgynos specifically. The left column lists those matters that have no direct impact on the status or property of anyone else; the right column lists those that do, at least in potential.

These lists illustrate the general pattern that can be observed: **in areas that are ‘between a human being and God’, both the androgynos and the tumtum are generally**

“promoted,” so to speak, to the status of male. In matters where the determination of the tumtum or androgynos’ status could directly impact the status or the property of another person, these figures are generally treated as whichever sex/gender category will not impact that status or property negatively.

Most of the items in the left columns are matters of personal religious practice: wearing *tzitzit*, dwelling in a *sukkah*, observing restrictions on cutting hair, etc. In most of these areas, the tumtum and androgynos are obligated as men are—either out of the presence of doubt, or unequivocally. In the right column, we see that the mother of an androgynos or tumtum infant has the longer postpartum purification period of girl babies, assuring that she has waited enough time no matter what the “true” sex of the child, and is not risking sex with her husband in an impure state. In matters of inheritance, whether there is more family wealth or less, the tumtum or androgynos receives the less desirable outcome: the protections of a daughter instead of the greater benefits of a son; or, if only the protections of a daughter are available, the androgynos or tumtum gets nothing along with the males. They cannot serve as a witness in court, and thus cannot influence the outcome of anyone’s legal proceedings.

The example of *yibum* and *chalitzah* is an interesting case. It generally fits the pattern, but presents complexities. The rulings regarding the tumtum are fairly straightforward. The tumtum does not marry a deceased brother’s wife, but does, when appropriate, perform the ritual of releasing that sister-in-law from levirate marriage, this permitting her to marry someone else. If a *levir* were to perform *yibum* but did not produce children

with the sister-in-law, this would negatively impact both the sister-in-law's status and the memory and property of the deceased brother. Having no heirs, his name would disappear and his property might leave his family—the situation that levirate marriage intends to prevent. In this case, the tumtum is excluded from performing *yibum*, thus removing this risk to others. If a tumtum performs *chalitzah*, however, this presents no negative impact to anyone's status or property. Rather, it positively impacts the sister-in-law by definitively releasing her from her tumtum-in-law's possible obligation to marry her.¹

It could be argued that this observation has nothing to do with the impact on others' status, but simply with the intrinsic nature of levirate institutions. It is questionable, at most, whether a tumtum would be physically able to impregnate a brother's widow, which is the purpose of levirate marriage. In the case of the great majority of tumtumim, whose reproductive organs are not apparent, one wonders whether they would be able to impregnate a woman even if their submerged anatomy were “male.”² Such an argument finds support in the rulings about the androgynos, who *eino bar chalitzah v'yibum*—“is not involved in *chalitzah* or *yibum*.”³ A tumtum might be able, at least theoretically, to impregnate a sister-in-law. The literature almost uniformly considers the androgynos

¹ Isaac Klein comments that “today this question is academic because it has long been established that *Halitsah* is resorted to in all cases of Levirate marriage.” (A Guide to Jewish Religious Practice, New York: Jewish Theological Seminary of America, 1979, p. 389.) He bases his statement on SA *Even haEzer* 165:1. I would argue that Caro does not in fact treat *yibum* as an entirely academic concern. But the thrust of the Shulchan Aruch here certainly positions *chalitzah* as at least an equally valid option. Thus, to permit the tumtum to perform *chalitzah* only may, in practicality, have meant treating the tumtum as a male.

² The only references in rabbinic literature that I have thus far found to a tumtum fathering children is to a “tumtum who is torn” and found to be male. See, for example, BT *Yevamot* 83b.

³ SA *Even haEzer* 173:8

unable to do so.⁴ There would be no reason to perform *chalitzah* if there had never been any possibility of performing *yibum*, as Maimonides makes clear. However, even Caro himself does not find this to be a straightforward matter. He goes on: “But there are those that say that the law for [the androgynos] is like a male in all matters.”⁵ It is interesting that the ruling given for the *tumtum* is not considered for the androgynos. It would seem that having the androgynos perform *chalitzah* would resolve any ambiguities of status, as with the *tumtum*, and would pose no problems for anyone else. This, then, appears to constitute an exception to the general rule (there is one other apparent exception, discussed below.)

Even with this exception, the overall pattern seems clear. But this general observation does require a few more points of refinement and caution.

First of all, we have to make this statement with careful attention to the worldview of the codifiers. If one is operating outside of the system of Jewish law, a number of the listed scenarios might appear to be relevant squarely between people and God, such as the sounding of the *shofar* or the reading of the *Megillah* (the Book of Esther, read on Purim). Certainly, these *mitzvot* are qualitatively more similar in character to observing dietary laws than they are to, for example, assisting a neighbor to lift up a fallen animal. But in traditional Jewish law, the person who sounds the *shofar*, reads the *Megillah*, or

⁴ There are rare *poskim* who opine that an androgynos is capable of making a woman pregnant. For details, see Alfred Cohen’s discussion of Eliezer Waldenberg, in “Tumtum and Androgynos,” *Journal of Halacha & Contemporary Society*, XXXVIII, Fall 1999, p. 8.

⁵ SA *Even haEzer* 173:8

leads the blessing after the meal does, in fact, have a direct impact on other people's status. Maimonides articulates the relevant principle in *Hilchot Shofar, Sukkah v'Lulav*:

Anyone who is not obligated in a matter cannot facilitate the fulfillment of that obligation by another person who *is* obligated. Therefore, a woman or a minor who sounds the *shofar*—one who hears [it] from them has not fulfilled their obligation.⁶

The Torah's commandment is to hear the sound of the *shofar*. Tannaitic literature exempted women from this obligation, with a general rule that women (among others) are exempt from *mitzvat aseih she-hazman grama*—positive *mitzvot* (of the “thou shalt” variety) whose execution is determined by time and season.⁷ Because women are not obligated to *shofar*, a man who hears a woman sound *shofar* has not fulfilled his own obligation. Rather, he has to hear it from someone who is also obligated: a free adult male. The status of the *shofar*-sounder vis-à-vis the *mitzvah* directly impacts other people.

The distinction at work here, then, is not precisely between *mitzvot bein adam l'Makom* versus *mitzvot bein adam l'chaveiro*. It is better described as the distinction between situations where the action of the androgynos or tumtum may directly affect another person, versus situations where it will not. **When the determination of sex/gender will have no effect on anyone else's status or property, then the androgynos and tumtum are almost always treated as male. In a situation where the determination of their**

⁶ *Hilchot Shofar, Sukkah v'Lulav* 2:2

⁷ *Mishna Kiddushin* 1:7. However, there are numerous exceptions to this general rule; see, for example, the recitation of the *Shabbat Kiddush*, Babylonian Talmud *Shabbat* 20b.

sex/gender may impact someone else, the androgynos and tumtum are treated as whichever gender will not risk harm to anyone else's status or property.

In the example of the *shofar*, there is clear potential impact on others' status. If one hears an androgynos sound a *shofar*, has he fulfilled his obligation or not? If he has not, then he needs to hear it from someone else promptly in order to be *yotzei*—to have fulfilled this important commandment. In this case, Caro treats the tumtum and androgynos as something other than male:

An androgynos facilitates the fulfillment [of the *mitzvah* of hearing *shofar*] for his own kind. A tumtum—even for his own kind he cannot facilitate the fulfillment [of this *mitzvah*].⁸

Caro's reasoning becomes clearer when we read the parallel discussion in the Mishneh Torah:

An androgynos fulfills [the *mitzvah* of *shofar*] for his own kind [*motzi et mino*], and cannot fulfill for anyone who is not of his own kind. A tumtum cannot fulfill for his own kind, nor for one who is not of his own kind; for the tumtum who is torn—it is possible that he will be found male, and possible that he will be found female.⁹

According to both Codes, both the tumtum and the androgynos are obligated to the *mitzvah* of hearing the *shofar*. In this matter—one which does not impact other people in

⁸ SA OH 489:4

⁹ *Hilchot Shofar sukkah v'lulav* 2:2

any way—they are treated as men. However, the androgynos’ *sounding* of the *shofar* is valid only for someone else who is an androgynos. (This is a clear example of a ruling that treats the androgynos as a sex/gender category of its own, as is stated by Ra’avad’s comment to *Hilchot Shofar*: “This is according to one who says that an androgynos is a creation of its own. But one who says that [an androgynos is] half-male—[in that case] he does not fulfill the obligation for his own kind, nor for one who is not of his own kind, as with one who is half-bondsman and half-free.”¹⁰) A tumtum who sounds *shofar* does not fulfill the *mitzvah* for anyone. Even other tumtumim who hear it have not fulfilled their obligation.

This reflects, as stated in Part I, a key difference between the two figures in rabbinic understanding. The androgynos is described as visibly both male and female. This description seems to apply to all androgynoi. This mixed status presents myriad questions and complications for a system of law deeply structured around binary gender. However, *within* the category of androgynos, they are all considered functionally the same. For halachic purposes, a group of androgynoi shares the same sex/gender, just as a group of women or a group of men do. Since the androgynos is obligated to hear *shofar*, then the above principle applies, and any androgynos—being so obligated—can also facilitate the *mitzvah* on behalf of another androgynos. By contrast, any given group of tumtumim do not necessarily share the same sex/gender characteristics. It appears that any individual tumtum is *either* female or male, but it is simply not visible which one is the case. Therefore, a tumtum who sounded *shofar* has (presumably) a 50% likelihood of being male. If they were male, then the men, androgynoi, and other tumtumim who are

¹⁰ Ra’avad’s gloss on MT *Hilchot Shofar* 2:2

also male will have fulfilled their obligation to hear *shofar*. Those women and tumtumim who are female, who may hear the *shofar*, have no obligation that needs fulfilling. But if that tumtum were female, then none of the people present would have fulfilled the *mitzvah*, since as a female that tumtum would not be obligated.

Maimonides makes it reasonably clear that, in the event that the genital region were somehow opened and the ‘true’ sex revealed, a tumtum is henceforward regarded as that sex in all matters (although he contradicts his own general statement several times—see Part VI, ‘The Tumtum Who is Torn.’)¹¹ Absent that clarification, the only way to ensure that no person’s obligation status is affected by the tumtum’s sex/gender classification is to remove the possibility of a tumtum sounding *shofar* on anyone’s behalf. This same legal reasoning explains Maimonides’ and Caro’s rulings about leading the blessing after meals (making the *zimun*, the invitation), and Caro’s additional ruling about reading the *Megillah*.¹²

In his gloss to *Orach Chayim* 589:3, Isserles adds an even more cautious opinion about the reading of the *Megillah*: “There are those that say that [the tumtum] cannot fulfill this *mitzvah* even for himself, and he needs to hear [the *Megillah*] from others.”¹³ This is a most interesting opinion, because it seems to suggest a very different understanding of the tumtum’s identity. This opinion appears analogous to Maimonides’ ruling about a

¹¹ *Hilchot Ishut* 2:25

¹² Shulchan Aruch *Orach Chayim* 589:3

¹³ Isserles’ gloss, *Orach Chayim* 589:3

person who is half-bondsperson and half-free¹⁴: “...he cannot fulfill even for himself, for the side of servitude that is in him cannot fulfill for the side of freedom that is in him.”¹⁵ Isserles seems to understand the *tumtum*, at least possibly, as one who is half-male and half-female, rather than definitely one or definitely the other. Caro obligates women to hear the *Megillah*, but adds that “there are those that say that women cannot facilitate the fulfillment of the obligation for men.”¹⁶ Presumably this is the concern at hand for Isserles, but it only applies if the *tumtum* is, so to speak, ‘half-and-half.’ If a given *tumtum* is female, she could read the *Megillah* for herself. If the *tumtum* is male, he can do the same. But if the *tumtum* were part male and part female, then Maimonides’ concern comes into play, because of the possibility (rather ephemeral) that the person’s ‘female side’ were the side doing the reading, in which case the ‘male side’ would not have fulfilled the obligation, according to those who argue that women cannot fulfill it on men’s behalf.¹⁷ Isserles’ comment here bespeaks what may be a fascinating discrepancy between the decisors’ essential outlooks on these two figures. It is deserving of further investigation. Let it suffice for now to re-iterate that, in nearly all of these cases, where other people’s status is at stake, the *tumtum* and androgynos are not considered male. Isserles takes this pattern a step further: the *tumtum* is not considered male even when that person’s *own* status is the only one that hangs in the balance.

This approach, if correct, would also explain the puzzling ruling about *kidushin*, betrothal/marriage, that is found in both the Mishneh Torah and Shulchan Aruch. Both

¹⁴ This status could occur if a bondsperson is jointly owned by two people, and one emancipated him and the other did not. See, for example, Babylonian Talmud *Gittin* 38a-44.

¹⁵ *Hilchot Shofar* 2:3

¹⁶ *Orach Chayim* 589:2

¹⁷ See, for example, *Orach Chayim* 589:2

Codes state: “A tumtum or an androgynos who betrothed a woman, or if a man betrothed them—these are doubtfully valid betrothals, and [in the event of divorce] they would require a divorce document out of doubt.”¹⁸ This is a surprisingly relaxed statement from a tradition that is generally quite concerned with the appropriateness of sexual relationships.¹⁹ It has been particularly concerned with avoiding sex between males, an act which Jewish law has generally viewed as Biblically prohibited.²⁰ In the presence of significant possibility that an individual is male, one would expect the *halacha* to wholly forbid sexual relationships between that individual and men. We would strongly expect the rabbinic tradition to allow the relationship to be doubtfully heterosexual, doubtfully lesbian, or doubtfully something else--but definitely not between men.²¹

What accounts for this surprising leniency that seems to allow an androgynos or tumtum to marry whomever they please? The answer may be found in the effect upon others’ status vis-à-vis the *mitzvot*. Both Codes obligate men to marry, primarily because this was the accepted forum for fulfilling the Torah’s first *mitzvah*: *priyah ur’viah*, being fruitful and multiplying. This is an obligation upon men.²² Women—although much of

¹⁸ MT *Hilchot Ishut* 4:11, echoed in SA *Even haEzer* 44:5

¹⁹ See, for example, Judith Plaskow, “Dismantling the Gender Binary within Judaism: The Challenge of Transgender to Compulsory Heterosexuality.” In Heterosexism in Contemporary World Religion: Problem and Prospect. Edited Marvin M. Ellison and Judith Plaskow. Cleveland: The Pilgrim Press, 2007, p. 18.

²⁰ Many modern thinkers have offered much more nuanced understandings of Levitical references to sex between men. See, for example, Steven Greenberg’s Wrestling With God & Men: Homosexuality in the Jewish Tradition. Madison: University of Wisconsin Press, 2004.

²¹ Sexual relationships between women have been ignored or frowned upon by Jewish law, but not prohibited. ‘Risking’ a sexual relationship between women would, under the system at hand, be the least problematic of the options. See Peter S. Knobel, “Reform Judaism and Same-Sex Marriage: A Halakhic Inquiry,” Gender Issues in Jewish Law: Essays and Responsa. Edited Walter Jacob and Moshe Zemer. New York: Berghahn Books, 2001, p. 178.

²² See, for example, SA *Even haEzer* 1:1

their imputed value in this society was their bearing of children—were not actually obligated to reproduce or to marry.²³

There is, as stated in Part I, remarkably little discussion in rabbinic literature about whether the tumtum or androgynos are able to produce children (although discussions about these figures—as would be expected--reveal procreation as a major underlying concern.) It seems clear that the androgynos is sexually functional both via the penis and the vagina, and the tumtum is considered at least potentially sexually functional with whatever equipment may be present.²⁴ Maimonides is clear that the androgynos does not have the capacity to impregnate a woman, but there appears to be no commentary in any genre that discusses whether the androgynos or the tumtum can become pregnant. Therefore, we are left to think that, in the eyes of the codifiers (and those before them) this might be possible. In this case, allowing a tumtum or an androgynos to marry a male could allow a partnership that fulfills that man's obligation to have children. Similarly, forcing a man to divorce an androgynos or tumtum spouse could result in removing the vehicle for that man's fulfillment of the *mitzvah*, thus affecting his status on a matter of high value in Jewish social thought. In this case, again, we see these figures being placed in the sex/gender category that poses the least threat to someone else's status. On the question of marrying a woman--where no other person's status is at stake--the androgynos and tumtum are treated as men. This also assures that *if* an androgynos or tumtum is male, then he has the possibility of fulfilling that *mitzvah* through marriage to a woman.

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²⁴ Opinions differ—*saris chamah*? Regular male? etc see 4444444444444444

This scenario makes an important point: some of the distinctions noted in Figures 4.1 and 4.2 are not simple matters of “effect on others” versus “no effect on others.” In this latter case, for example, classifying the androgynos and tumtum as “sufficiently female” to marry a man does carry the ‘risk’ to the man that he might be having sex with another man. This would certainly be a violation of Jewish law as Caro and Maimonides understood it. But the reality of this risk is unknown, and will probably never be clarified. Not having children is a demonstrable failure to fulfill the terms of the covenant as the codifiers saw it. So it seems reasonable to surmise that the latter concern could have outweighed the former. This is a complex problem that requires further study.

The question may then arise: if a man was not permitted to marry an androgynos or tumtum, wouldn’t that force him to marry a woman, thus increasing his likelihood of fulfilling the *mitzvah* of reproduction? This challenge is mitigated by two additional considerations. One is that the law already provides for the situation of a wife who is infertile. If a man *knows* that a potential partner is infertile, he can only marry her if he has already fulfilled the *mitzvah* of having children, or he has another wife with whom he can reproduce.²⁵ (This is how the Codes address the situation of the *aylonit*, a masculine woman who is believed to be infertile.²⁶) If a woman is presumed to be fertile, and after an extended period of marriage it becomes evident that she is not, the law prescribes what is to be done to ensure that the man’s obligations are met.²⁷ Presumably these post-facto provisions would also apply if a tumtum or androgynos ‘wife’ proved unable to bear

²⁵ Of course, this latter aspect is irrelevant today; polygamy is banned throughout the Jewish world.

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children. So in that case, the status of the male vis-à-vis the *mitzvah* is protected.

Certainly the latter before-the-fact restrictions would not apply, since in the androgynos or tumtum, it is precisely *not* known whether they will bear children. So the status of a man is not risked by marrying one of these figures, and the marriage might enable him to fulfill a very important *mitzvah*.

Although this current discussion is limited to the contents of the Shulchan Aruch, it is a significant complication that Maimonides appears to give two different rulings on this same subject. In *Hilchot Ishut* he accounts for the possibility of a tumtum or androgynos marrying either a man or a woman: “A tumtum or an androgynos who betrothed a woman, or if a man betrothed them—these are doubtfully valid betrothals, and [in the event of divorce] they would require a divorce document out of doubt.”²⁸

In *Hilchot Issurei Biah* 1:15 he gives a seemingly contradictory ruling: that “the androgynos is permitted to marry a wife.” By itself, this latter ruling might appear to restrict the androgynos to marrying women only. This would be in accordance with the earlier literature; scholars seem to be in agreement that the Mishnaic dictum is unchallenged across the Tannaitic and Amoraic literature: *androgynos nosei aval no nisa*—“the androgynos marries [a woman] but is not taken in marriage.” (*Mishna Yevamot* 8:6). However, Maimonides’ ruling is much less clear: *v’ha-androgynos mutar lisa isha*: “and the androgynos is permitted to marry a wife.” This language implies that the androgynos is not permitted to *be* a wife—but it does not say so. Maimonides was

²⁸ *Hilchot Ishut* 4:11

careful with language, and unquestionably knew the Mishna well.²⁹ That he alludes to the Mishnaic prohibition, but does not include it, suggests the possibility that he (and Caro) bring to their Codes a radically different approach to the question of the tumtum and androgynos in marriage.

There are other possible explanations for this difference. For example, it could be explained as the difference between the law before the fact and the law after; the language of the two opinions could support that reading. There is always the possibility that the Mishneh Torah really does contradict itself, or that an error in transmission has occurred. Nonetheless, this is an especially significant question because *Mishna Yevamot* 8:6 has been a foundational text for early scholarship on the position of the androgynos, and by analogy the tumtum as well, in rabbinic literature. A sharply differing opinion by the medieval scholars could cast a new light on some of our understandings of these figures.

When ‘Male’ Isn’t Better

There is another point of note to the general statement that the Shulchan Aruch classifies the tumtum and androgynos as whatever sex/gender poses the least threat to another’s status or property. As the charts demonstrate, the Code addresses situations in which the more fortunate status is actually not ‘male’. So protecting others’ status or property does not necessarily mean treating a tumtum or androgynos as women. Although it is

²⁹ Sarah Stroumsa, *Maimonides in His World: Portrait of a Mediterranean Thinker*. Princeton: Princeton University Press, 2009.

overwhelmingly the case that Jewish law and the medieval Jewish world privileged men in almost every way, there are certain provisions that provide for the care and protection of women, provisions to which men were not entitled. An example is the issue of inheritance and maintenance. Maimonides sets the stage for this question with his explanation:

We have already explained in *Hilchot Ishut* (Laws of Marriage) the law pertaining to the daughters, [as opposed to] the sons, regarding their maintenance and their dowry. And there we explained that the maintenance is among the conditions of the *ketubah*. In an instance where the property is abundant, the daughters only have their maintenance, and the sons inherit everything; but the daughters are supported with a tenth of the property, so that with this they should marry their husbands. And in an instance where the property is little, the sons get nothing; rather, everything is for the maintenance of the daughters.³⁰

In a situation where the parents' means are little, the priority for disposition of the estate is the support of their daughters. They are bequeathed whatever wealth is available so that they might be taken care of and have a dowry with which to marry. If the family has more wealth than what is needed for the daughters, the appropriate amount is left to them, and then the sons inherit everything else. Thus, if a family is not wealthy, the women are provided for but the men are left on their own. Here is the rare situation in which there is some advantage to being classified as female.

In this case, Caro determines that the tumtum and the androgynos are men. He writes:

³⁰ *Hilchot Nachalat* 5:2

If someone died and left sons and daughters, and a tumtum or an androgynos: in an instance where the property is abundant, the sons inherit, and they can push the tumtum to the daughters, and he is maintained as they are. But in an instance where the property is little, the daughters can push the tumtum³¹ to the sons, saying to him, “You’re a male, and you are not entitled to maintenance with us.”³²

This type of situation nuances the claim that our figures are treated as whichever sex/gender will pose the least threat to another person. This ‘threat reduction’ usually involves the androgynos and tumtum being ‘demoted’ to something other than male--but not always. Another example is circumcision. A father is required to circumcise his son, a *mitzvah* taken very seriously. ‘Promoting’ an androgynos child to the status of male, and thereby requiring circumcision, ensures that the father does not inadvertently fail in this obligation, protecting the father’s good standing (in the eyes of God and of Jewish society.) In the event that the child were ‘really’ female, or not entirely male—a determination that can never be made with certainty--the circumcision has no negative ramifications under Jewish law.

When the Category Choice is Unclear

The Code also addresses situations where it is not clear what sex/gender category the figures are being placed in, but it is clear that their treatment still results in the relative elevation of someone else’s status or property. *Hoshen Mishpat* 253:27 describes a

³¹ I am assuming, following the first sentence of this passage, that the entire passage refers to the androgynos equally, although he only mentions the tumtum.

³² *Hoshen Mishpat* 280:9

situation in which a father declares that a newborn son will receive a certain amount of money as a gift, and a newborn daughter will receive a different amount. The amount is not necessarily higher for the male; the father, apparently, may pledge whatever he likes. If the mother then gives birth to a tumtum or an androgynos, what amount should this child receive? Caro concludes that this child receives “the lesser [amount] of the two of them.”³³ This is a somewhat unusual case, in which the result—who receives more—is actually not linked, at least officially, to sex/gender at all. In this case, Caro does not attempt to decide which sex/gender category is appropriate. Instead, he requires the smaller gift amount. This ensures, once again, that no matter what sex/gender the child is—a question that likely will never be answered—the father may pay less than what he pledged, but he will not have to pay more. There is no danger that his assets will be impinged upon by the ambiguity of the child’s sex.

There is only one matter in which the Shulchan Aruch classifies the tumtum and androgynos’ sex/gender in way that advantages them, or disadvantages someone else. The Mishneh Torah (*Hilchot Sh’chenim*, “Laws of Neighbors” 12:15) and the Shulchan Aruch (*Hoshen Mishpat* 175:47) both include the tumtum and androgynos in their discussions of *dina d’bar metzra*. *Dina d’bar metzra* is the law pertaining to adjacent landowners. The rule holds that if a person wants to sell a parcel of land, the seller must first offer to sell it to the owner of a bordering piece of property. The principle is that the adjacent landowner, the *bar metzra*, might want to extend their contiguous property, so the bordering piece of land is uniquely valuable to them in a way it is not for any other

³³ *Hoshen Mishpat* 253:27

potential buyer. Thus it is “the right and the good”³⁴ to offer it to the neighbor first. If that adjacent landowner does not want to buy it, then the seller is free to sell it to someone else.³⁵

If the seller sells the parcel of land to a woman, however, *dina d'bar metzra* does not apply. In other words, the seller may sell the parcel of land to a woman “on the open market,” and is not required to offer it to the adjacent landowner first.

This is an interesting and ambiguous case. All of the Shulchan Aruch's other rulings about the tumtum and/or androgynos apply to situations in which either no other human being's status or property is affected, or *one* other person's/family unit's status or property are equally affected in the same manner. The determination of sex/gender for that purpose has a uniform effect, either to that other person's/group's advantage or to their disadvantage. In those cases, the sex/gender decision is that which will advantage or protect the other party. In the case of a land sale to an androgynos or tumtum, however, *two* other people's interests are at stake, and those interests are in direct competition with each other. The adjacent landowner would be advantaged if the androgynos or tumtum purchaser were considered male, because the law would be applicable, and would grant that neighbor the right of first refusal for the property. If the androgynos or tumtum purchaser is considered female, it is to the advantage of the seller, who is free to negotiate the sale with anyone he likes, presumably improving potential for

³⁴ Based on Deuteronomy 6:18, cited by rabbinic sources, including Maimonides, as the reason for the law.

³⁵ See, for example, BT *Bava Metzia* 108 for further details of *dina d'bar metzra*.

profit. The law must side with one individual or the other; either the *bar metzra* has right of first refusal or does not.

In this instance, both Maimonides and Caro state that “if he sold to a tumtum or an androgynos: the adjacent landowner cannot remove them [in order to purchase the property], since they are a doubtful woman.”³⁶ This decision benefits the seller, and also clearly benefits the tumtum or androgynos wishing to buy the land. In this situation, unlike in matters of inheritance, they do receive the protection afforded to women. This issue does not necessarily illuminate the observed pattern one way or the other; in this case there is no way for the sex/gender decision not to result in someone else’s loss and someone else’s gain.

This decision does, however, bring forward a critical aspect of both Rambam’s and Caro’s treatments of the androgynos and tumtum. In the case of the *bar metzra*, the decision made protects the tumtum and androgynos. This certainly does not indicate that the Codes were motivated to privilege these figures! As we have seen, others’ welfare generally takes precedence over theirs. But it does point out that specific desire to oppress the androgynos and tumtum through the law does not appear to be a motivating

³⁶ *Hoshen Mishpat* 175:47. *Mishneh Torah Hilchot Sh’chenim* 12:15 actually reads “the adjacent landowner *can* remove them, because they are doubtful women [emphasis added].” However, this would not be in accordance with Rambam’s decision in *Sh’chenim* 12:14 that the law does not apply to sales to women. (Also see “Language of Doubt, Part I.) The Tur records Maimonides’ decision as the opposite: “Wrote the Rambam: If one sells to a tumtum or an androgynos, the adjacent landowner *cannot* remove him, since he is a doubtful woman [emphasis added].” In his *Beit Yosef* to this section, note *ayin*, Caro states that this is what “the Rambam wrote in chapter twelve of *Hilchot Sh’chenim*, part fifteen,” and also writes that Maimonides and the Rosh agree on this point. Dr. Stephen Passamanek confirmed, in an e-mail on December 27, 2009, that standard editions of the *Mishneh Torah* appear to have a misprint in *Hilchot Sh’chenim* 12:15.

interest. If it were, the decision in the case of the *bar metzra* would presumably be different. This notion will be discussed further in the conclusion to this section.

Figures 4.1 and 4.2 show that the *tumtum* and *androgynos* are treated as male in situations where the sex/gender decision will not impact another person. There is only one clear exception to this pattern: the recitation of blessings for *mitzvot*. The *Shulchan Aruch* obligates both figures to wear *tzitzit*, as men do,³⁷ and obligates the *androgynos* to be circumcised.³⁸ However, these acts are to be performed without reciting the blessings that are prescribed prior to fulfilling these religious obligations: “Blessed are You, Adonai our God, Ruler of the Universe, who has sanctified us with Your *mitzvot*, and commanded us to wrap ourselves with *tzitzit*/to bring [this child] into the covenant of our father Abraham”/etc. Under typical circumstances, it would be entirely inappropriate according to Jewish law and tradition to perform these acts without the blessings. There exists significant dispute in the tradition about whether it is even possible to have fulfilled the obligation without saying the blessing.³⁹ The primary role of blessings in Judaism is not to explain the act, nor to set the mood; and blessings over *mitzvot* are neither spontaneous nor optional. They are fixed liturgical formulas for specific occasions that are integral to the performance of the sacred act itself. It is no minor diminution of status to be instructed not to say them.

³⁷ *Orach Chayim* 17:2

³⁸ *Yoreh Deah* 262:3

³⁹ See, for example, *BT Sukkah* 45

Rambam makes his stance clear in *Hilchot Sukkah* 6:13: *ein m'varchin mi-safeik*: “We do not say blessings out of doubt.” It is his opinion that whenever doubt is present about whether a person is obligated to a given *mitzvah*, blessings should not be said.⁴⁰

Mitzvot-plus-blessings form the only type of situation in Figures 4.1 and 4.2 where the act is ‘two-part.’ In other words, this is the only type of scenario in which one aspect could (theoretically) be performed separately from the other. This presents the type of option that Rambam takes regarding women: “...and similarly [with respect to] the other positive *mitzvot* from which women are exempt: if they want to do them without a blessing, we should not prevent them.”⁴¹ Here Maimonides withholds the recitation of blessings as a means of allowing these *mitzvot* to be performed by women, but ‘at a lower level.’ Similarly, the two-part nature of these *mitzvot* allow him to carve out a third position for the tumtum and androgynos. Men are obligated to wear *tzitzit* and recite the blessing. Women (and bonds people) are not obligated and do not recite the blessing. The ‘middle path’ is for the tumtum and the androgynos: they are obligated to the *mitzvah* as men are, but, like women, may not make the blessing over it. It is possible that there is something in the unique character of blessings that leads this to defy the pattern. More likely, in my opinion, is that the *mitzvah*-plus-blessing format simply allows the codifiers a way of reflecting non-binary sexes/genders in the law. Other civil and ritual matters do not have associated liturgy. Thus they do not offer this conveniently severable component which can be wagered against the presence of doubt. Exemptions

⁴⁰ His rival the Ra'avad disagrees on this point:

⁴¹ *Hilchot Tzitzit* 3:9

from (at least some) blessings still marks a significant exception to the observed pattern. But it is an exception with a plausible explanation.

If this observed pattern is correct, how might it be explained? What might it mean for our understanding of the tumtum and androgynos in the Codes?

In the Shulchan Aruch, it appears that the tumtum and androgynos are classified as male unless there is a reason not to. With significant exceptions, this pattern accords with Fonrobert's suggestion that "when a halakhic context requires decisiveness as to the gender identity of the doubly-sexed human or animal the default sex of the androgynos is the male."⁴² These rulings are the result of many complex factors. It may be impossible to discern the motivations with certainty. But it does seem possible to eliminate some possible motivations that are not supported by the texts. Contrary to what twenty-first century observers might expect, marginalizing these figures is in itself not a goal of the Shulchan Aruch. It is, however, often a consequence. As we have seen, the various rulings often have the effect of lowering the androgynos' or tumtum's legal or social status. But had Caro's goal been to keep the tumtum and androgynos subjugated or out of public view, his corpus of rulings about them would have to have been significantly different. This is especially true when we consider these figures' specific inclusion in *mitzvot bein adam l'Makom*—religious rituals such as wearing *tzitzit*, observing men's requirements for haircuts, and listening to the *shofar*. Rachel Adler points out that exemption from these very rituals has formed the halachic means of subjugating women

⁴² Fonrobert, "Gender Identity in Halakhic Discourse." Regulating the Human Body:

in Jewish tradition, and excluding them from an affirmative Jewish identity.⁴³ This mechanism is generally not used when it comes to the tumtum and androgynos. For the same reason, a desire to keep the category of “male” limited or ‘pure’ is also clearly not a motivation for Caro as he makes his decisions.

Further work is needed to probe why the Codes render the decisions that they do. But clearly, there is an effort to contain any impact of sex/gender variance on others. As long as other people are not adversely affected, the Shulchan Aruch evidently sees no reason to prevent them from the higher-status roles of “male.” Alfred Cohen explains similar tendencies as the desire of the tradition to make sure that one who might be male is able to perform all the *mitzvot* to which they are obligated.⁴⁴ Fonrobert attributes this to the “greater signifying power” of the penis versus the vagina or other female indicators. It would be well worth considering this pattern in the context of Suzanne Kessler and Wendy McKenna’s superb work on gender attribution—the process by which people decide about other people’s gender. In their article “Toward a Theory of Gender,” they explain: “The schema is not dependent on any particular gender cue, nor is it offered as a statement of a rule which people follow like robots. Rather, it is a way of understanding how it is that members of Western reality can see someone as either female or male. The schema is: *See someone as female only when you cannot see them as male.* (Emphasis original.) Earlier in this chapter we stated that in order for a female gender attribution to be made, there must be an absence of anything which can be construed as a “male only”

⁴³ Rachel Adler, “The Jew Who Wasn’t There.” In *On Being A Jewish Feminist: A Reader*. Ed. Susannah Heschel. New York: Schocken Books, 1983, p. 13.

⁴⁴ Alfred Cohen, “Tumtum and Androgynos,” *Journal of Halacha & Contemporary Society*, XXXVIII, Fall 1999, p. 2.

characteristic...”⁴⁵ Whether rabbinic literature or medieval Jewish society had a similar “schema” would be an extremely important part of the answer to why the Codes treat the tumtum and androgynos as they do. Further exploration of this question is a desideratum.

A Note on the Mishneh Torah

It is reasonable to argue for the presence of this pattern in the Shulchan Aruch: that the androgynos and tumtum are generally treated as men when it will not diminish anyone else’s status or property, but when the decision will impact another person, the androgynos and tumtum are treated in whatever way will minimize that negative impact. The Mishneh Torah does not appear to follow this pattern. This could be the result of a number of influences—attitude, milieu, scope of the works, or indeed happenstance. Further study might illuminate the answer.

⁴⁵ Suzanne J. Kessler and Wendy McKenna, “Toward a Theory of Gender,” The Transgender Studies Reader, ed. Susan Stryker and Stephen Whittle. New York: Routledge, 2006, p. 176.

Part V: Sex and Marriage

The Shulchan Aruch addresses the sexual and marital lives of the tumtum and androgynos in just a few short references, regulating whom they may marry (EH 44:5), with whom they are permitted to be alone (EH 22:12), and who is subject to *yibum* and *chalitzah* and under what circumstances (EH 172:8-9). The much greater scope of the Mishneh Torah provides many additional references to the androgynos and tumtum in sexual or potentially sexual contexts, not found in the Shulchan Aruch: rulings that regulate privileges of husbands, specify sexual prohibitions, and disqualify people from certain Temple offerings through sexual intercourse.

In order to maintain our view of the forest as we take apart the trees, it is important to remember here what is noted in Part III. There is something remarkable about the fact that a discussion needs to be had about the treatment of the tumtum and androgynos in sex and marriage. The easiest solution for Jewish law, by far, would have been to prohibit these figures from marrying or having sex with anyone. This would have avoided all possible sexual violations, one of the rabbis' major concerns. But the basic humanity of the tumtum and androgynos is an assumption that pervades all of these discussions. This assumption prevented rabbinic literature from even considering leaving them out of marriage, their most basic and cherished social institution. The Codes and their predecessors prefer instead a risky and tangled solution that actually gives these figures more freedom to marry than anyone else.

When we examine the Mishneh Torah's and Shulchan Aruch's combined rulings on sex and marriage, we find an interesting pattern: When positioned in relation to real or potential female sexual partners, the androgynos and tumtum are generally treated as, for lack of a better term, 'not fully male.'

Figure 5.1:
Mishneh Torah on the Androgynos

When [Potential] Sexual Partner 'Opposite' a Male	When [Potential] Sexual Partner 'Opposite' a Female
Can be betrothed by a male (out of doubt)	Can betroth a woman (out of doubt)
A male cannot have sex with them anally	No levirate tie to a widowed sister-in-law
A male can have sex with them vaginally	Wife not subject to levirate marriage
Disqualified from consecrated foods through vaginal or anal sex with disqualified man	Wife not subject to waters of <i>sota</i>
Disqualified from consecrated foods through vaginal sex with a disqualified androgynos	Can marry a woman
Not disqualified from consecrated foods through anal sex with a disqualified androgynos	Another man who inadvertently has sex with their wife is exempt from liability
	No seclusion with women
	Can be secluded with men
	Wife not entitled to consecrated foods

Figure 5.2:
Mishneh Torah on the Tumtum

When [Potential] Sexual Partner 'Opposite' a Male	When [Potential] Sexual Partner 'Opposite' a Female
Can be betrothed by a male (out of doubt)	Can betroth a woman (out of doubt)
A male can have sex with them vaginally	Can perform <i>chalitzah</i> for widowed sister-in-law
	Cannot perform <i>yibum</i> for widowed sister-in-law
	Another man who inadvertently has sex with their wife is exempt from liability
	Can be secluded with men
	Wife not entitled to consecrated foods

We see in Figures 5.1 and 5.2 that, for example, both figures may marry women. But once they do, the privileges and protections extended to married men generally do not apply. For example, there is no liability placed upon another man who has sex with a tumtum or androgynos' wife. (Note that this does not mean that such an action was considered morally acceptable; it only means that it was not punishable by the legal system.) The wife of an androgynos is not included in the institution of levirate marriage, and cannot undergo the dangerous 'test' of the *sota*, to prove whether or not she has committed adultery—even if she and her androgynos partner want her to. To the modern sensibility these two exclusions probably seem like no loss. (Indeed, both were probably academic discussions by the time of Maimonides—as mentioned elsewhere, the ordeal of the *sota* had been abandoned long before, and by the Middle Ages levirate marriage was

generally abandoned as well, in favor of the ritual exemption of *chalitzah*.¹ But Maimonides is concerned with them as he is with the full range of Jewish law, practically applicable in his time or not.) But these were among the few systems in place that could, at least theoretically, offer women some protection. Not eligible to drink the waters of the *sota*, Maimonides rules that she must be divorced, and she does not receive the provisions of her *ketubah*, the primary nuptial protection that a woman had.

More importantly, these systems were automatic provisions of Jewish marriages in their time, barring some disqualifying factor. These types of privileges and protections formed the social and legal approbations for a marriage, and especially served to uphold the husband's status as dominant over his wife. Thus, the exclusion of an androgynos and his wife from these provisions serves to undermine to some degree the validity and 'strength' of the marriage. Even more than that, it serves to diminish the androgynos' 'manhood.' Demanding that his wife drink the waters is a privilege extended to men; it is withheld from the androgynos. The obligation to produce children with a brother's widowed wife—whether a desideratum for a given individual or not—is an obligation automatically extended to men, and not extended to the androgynos. In addition, neither the androgynos nor the tumtum—if they are *kohanim* (of priestly lineage)—entitle their wives to eat consecrated foods, a privilege that male priests do enjoy. This is especially notable in contradistinction to the rest of Maimonides' provisions in *Hilchot T'rumat*. He explicitly permits tumtum and androgynos *kohanim* to eat consecrated foods (*trumah*) themselves, and to confer this privilege on any servants they may have. In these two respects, the androgynos and tumtum are afforded the same 'sacred status' as male

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kohanim. It is only in the marital relationship that the androgynos is treated as not fully male. An androgynos is 'holy enough' to eat sacred foods. An androgynos' master relationship with a servant is sufficiently valid that the privileges of the master are transferred to the servant. It is only when positioned in relation to a female sexual partner that the androgynos is no longer fully 'male'. Allowing the androgynos and tumtum to marry women, but diminishing their 'maleness' once they do, is another way that Maimonides shapes the law to reflect these figures' complicated sex/gender status.

Maimonides' approach is even more interesting when the tumtum or androgynos are positioned as a real or potential sexual partner 'opposite' a man. Rabbinic discourse about sex generally assumes a heterosexual paradigm in which men penetrate using a penis and women receive this penetration, usually vaginally but sometimes anally. (This is reflected in Maimonides definition of 'sex.'²) In the tumtum and androgynos, this paradigm is challenged by people who can evidently engage in sex 'as a man' and 'as a woman.' How are sexual permissions and prohibitions to be extended to all the possible combinations that these people present? Maimonides appears to take a practical and entirely event-specific approach. If you have sex 'as a man'—either by using your penis to penetrate someone or by receiving anal penetration from someone else—then you are legally considered a male in relation to that specific instance of the sex act. If you have sex 'as a woman'—that is, being penetrated via the vagina—then you are considered a woman in relation to that specific sexual connection. If an androgynos has 'heterosexual' sex with a man—in other words, receiving vaginal or anal penetration as a woman might—that androgynos is treated as a female. Hence, if that man is disqualified from

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eating consecrated foods, his disqualification is transferred to that androgynos, just as it would be transferred to a woman. Similarly, if an androgynos has 'heterosexual' sex with another androgynos, the one who penetrates is treated as male and the one who is penetrated vaginally is treated as female. Therefore, if the penetrating (momentarily 'male') androgynos is disqualified from consecrated foods, that disqualification is transferred to the penetrated (momentarily 'female') androgynos, exactly as it would be if the latter androgynos were a woman. You are, at least at that moment, whatever role you play in the sexual act.

Accordingly, a man is expressly permitted by Rambam to have vaginal sex with a tumtum. A tumtum who is penetrated vaginally is in essence considered female vis-à-vis that contact, and the sex is thus acceptably heterosexual.³ It is notable that Rambam does not make any statement about anal sex with a tumtum—either as penetrator or penetrated--although this would seem to be possible based upon the descriptions and rulings given.

Interestingly, however, "if [an androgynos priest] has sex with another androgynos...by way of his maleness—a male cannot disqualify a male from the priesthood."⁴ Here Maimonides makes it explicit: if two androgynoi have 'male sex', they both become men. An androgynos receiving anal sex from a man renders him female for this purpose; receiving the same from another androgynos renders him male. This demonstrates that, while the sex act itself is made critical in determining a tumtum or androgynos'

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⁴ *Hilchot T'rumah* 7:16

sex/gender, it is not the only factor. Rather, as reflected in the column headings above, whether they are a [potential] sexual partner ‘opposite’ a man, woman or an androgynos is also part of the consideration of which sex/gender rules the law will apply. Positioned opposite a man, the androgynos is subject to the sexual disqualification for a woman. Positioned opposite another androgynos, an androgynos is subject to the rules for a man. As in the case of the androgynos and his wife, the sexual relationship seems to possess influencing factors that other types of relationships do not. Even in the Mishneh Torah the information is sparse and terse, so it is impossible to discuss with certainty the complex dynamics at work. But there does appear to be something about these contexts that invites a comparative dimension into the assessment of the sex/gender of these figures. Once considered as the sexual partner of a man, they generally are adjudged as something ‘less than male.’ As husbands or sexual partners of women, they are basically treated as male, but this is mitigated by withholding many of the privileges and rites that are associated with male power in this society. “Side-by-side” comparison, so to speak, with the archetypes of male and female reveal the androgynos and tumtum to be not fully either one.

These sexual situations highlight another important dimension of how the codifiers understood the identity of the androgynos and tumtum. There is an elusive, but fascinating, ‘temporal’ aspect to how Jewish law classifies their sex/gender. This is because the sex/gender of an ambiguous person is determined by the situation, not by the individual. In the previous discussions, for example, an androgynos is treated as male when engaging in one type of activity but as female when engaging in a different activity.

These discussions manifest virtually no urge to determine “the real sex” of the tumtum or androgynos. There is no attempt to ascribe a single, true, final category. The Codes are entirely concerned with what the proper actions are *in a particular circumstance*. What governs this person’s actions when saying prayers? Buying land? Shaving? Having sex? Celebrating holidays? What happens if they witness a crime? What is to be done about inheritance when their father dies? Neither social nor legal institutions in the United States, for example, pose the questions this way. Sex/gender is something that is considered determinable on a per-person basis. Under American law, each person has one and only one legal sex, and that is their legal sex all the time, in every circumstance. One who tried to check off either the “M” or “F” box depending on the situation would quickly discover that the system does not allow for this way of looking at the matter. Sex is considered a fixed, immutable, indivisible characteristic of every person. Legal, social and government systems sort everyone into one of two groups, and that M or F follows you wherever you go.

More importantly for comparison, it is believed that the American legal system and its sex assignation *actually reflect the reality of each person*. Car insurance forms require an applicant to identify his or her sex with the presumption that this sex/gender identification is actually true, an authentic reflection of some essential quality of the applicant. In the United States, it is presumed that each person’s legal gender marks who they really are. Thus there is only one question to ask about a person’s sex. It is asked first and once: “what is it?”

By contrast, in the Codes the sex/gender of the tumtum and androgynos are fundamentally “when” questions, not “what” questions. According to Maimonides, Caro and Isserles, an individual androgynos or tumtum might wake up, kiss a husband or wife, don *tzitzit* as men do, engage in business dealings as a woman, celebrate a holiday with the men, and make love with a partner in a variety of fashions. The fact that this places a single person in multiple sex/gender categories throughout the day, let alone a lifetime, is a complexity that can be accommodated.

Part of this is probably attributable to the style of the Codes. Jewish legal scholar Menachem Elon explains: “Our previous discussion of the Mishnaic style noted that R. Judah Ha-Nasi formulated most legal rules in a casuistic style; rules were couched in the form of the concrete factual instances to which they applied, rather than as normative generalizations or abstract statements of a general norm not fleshed out by concrete examples...this essentially casuistic style is also typical of the entire post-Mishnaic halakhic literature.”⁵ It is the style of halachic literature to present decisions by the situation in which they are needed. This allows the multi-gendered day of a tumtum or androgynos to unfold in the literature, without the need to thoroughly reconcile each situation with each other. The decision to treat the androgynos as male for the purposes of sitting in a *sukkah* needs to be internally justifiable as a conclusion in itself. It does not need to be consistent, in some broad philosophical sense, with the decision to treat that same person as a woman for the purposes of land ownership, or even necessarily with a decision to treat that person as female for a different holiday observance.

⁵ Elon, Vol. III, p. 1211.

It would be incorrect to say that the tumtum and androgynos pose no difficulty for the Codes. They certainly do. But it is a problem of trying to provide in the law for the many and complex contingencies created when a thoroughly binary, sex/gender stratified *halacha* meets an ambiguous body. It is not a problem of trying to “figure out” this person’s “real” identity once and for all. This is the distinction so importantly made by Maimonides: “For an androgynos has in his ways in which he is like a man. And ways in which [he is] like a woman. And ways in which [he is] like neither a man nor a woman. And ways that are like a man and a woman. And all of these ways are regarding matters of the *mitzvot*, and do not refer to his nature or his birth.”⁶

One of the most profound lessons for our own day may be found here: in the comment of Maimonides, and as that approach is made into rabbinic law in hundreds of cases. The Codes address “matters of the *mitzvot*.” Today we are interested in matters of nature and birth, and we believe that law can, and does, reflect and contain those matters--the “truth” of human sexual identities. To state that “all of these ways are regarding matters of the *mitzvot*, and do not refer to his nature or his birth”⁷ is an acknowledgment, an admission, of the paucity of human legal and social categories before the infinity of the created world. Maimonides’ words reveal the halachic effort towards the androgynos and tumtum for what it is: an “as-if” project. The nature of the androgynos is actually unknown. But for the purposes of the law, for the functioning of society and of this person in it, a choice is made in each situation that the androgynos will be treated *as if*

⁶ *Hilchot N'zirut* 2:10-2:11

⁷ *ibid*

he/she were one category of sex/gender or another. The mystery of the “nature” of these human beings is beyond the work of Jewish law.

Moses Maimonides is not a figure known for humility. As a result, we should be stilled by his assessment of how far his own enterprise could really go in accounting for the variety of humankind.

Part VI: The “Tumtum who is Torn”

“...the tumtum who is torn—it is possible that he will be found male, and possible that he will be found female.”¹

Figure 6:
“The Tumtum who is Torn”

		Maimonides	SA: Caro	SA: Isserles
8	Circumcision Trumps Shabbat			M
18	Torn and Found Male	M		
19	Torn and Found Female	F		
23	Performing <i>Chalitza</i>	If found M: M	If found M: M	
24	Performing <i>Yibum</i>	If found M: M	If found M: M	
63	Circumcision entitles their father to eat the Paschal ram	If found male: M		
75	Different gift amounts pledged to male and female children		If found M: M	
77	Receiving double portion of inheritance as the firstborn son	If found M: Not M	If found M: Not M	
78	Diminishing the firstborn’s inheritance	If found M: Not M	If found M: Not M	
90	Treatment as a stubborn and rebellious son	If found M: F		

As suggested earlier, the basic questions posed by the tumtum and by the androgynos are simultaneously the same and different. The basic physical nature of the androgynos is some combination of male and female. The androgynos troubles the waters by insisting upon embodying, simultaneously, two categories that the system presumes to be opposite.

¹ MT *Hilchot Shofar* 2:2

This mixed status presents Jewish law and society with a visible, essential challenge to the binary gender system that cannot be easily resolved: “And he does not have any indication at all by which it might be known about him whether he is an unequivocal male or if she is an unequivocal female.”² The question of the androgynos is a ‘both’ question: how does Jewish law and society react when two halves of a supposed dichotomy are equally present in one being, and nothing at all can separate two identities that are supposed to be mutually exclusive?

The tumtum poses a very different question: a question of the unknown. Unlike the androgynos, the tumtum is not a mixture of different sexual identities. Each tumtum is definitely either male or female. The only complication is that this definitive piece of information is hidden from view. As described in Part I: Physical Descriptions, a tumtum’s genital area is undifferentiated, *atum*. The texts make it fairly clear that the “solid and shapeless”³ form of their genital region conceals the more informative anatomy that lies underneath.⁴ Perhaps, had anyone asked a tumtum what anatomy they felt they had (let alone what their gender identity was), that person could well have given an answer. It appears that such a question was never asked.

Unlike the androgynos, the non-binary status of the tumtum is not located primarily in the nature of the individual. It is, above all, in the eye of the beholder. A tumtum *is* either female or male. It is simply not visible which one is the case. The basic, marvelous challenge of the tumtum is about the presence of the unknown, in an area where knowing

² MT *Hilchot Ishut* 2:24

³ MT *Hilchot Ishut* 2:25

⁴ See Part I for further explanation of the tumtum’s physical characteristics.

really matters. The Mishneh Torah and Shulchan Aruch rely on the generally binary assumptions of rabbinic discourse to codify Jewish law. The tumtum forces them to legislate around what they do not know.

And then, once in a while, the unknown becomes revealed. The tumtum whose hidden sex becomes visible is called the *tumtum she-nikra*—the “tumtum who is torn.”

What does it mean for a tumtum to be *nikra*? The root of *nikra* is *kuf-reshe-ayin*, which means ‘to tear, cut, split.’⁵ Thus the *tumtum she-nikra* is a tumtum who has been torn or split open, as in *Hilchot Shofar* 2:2: “A tumtum cannot fulfill [the mitzvah of hearing *shofar*] for his own kind, nor for one who is not of his own kind; for the tumtum who is torn—it is possible that he will be found male, and possible that he will be found female.” It is evident that the tumtum *she-nikra* is a tumtum whose membrane or skin covering the genital region is somehow opened or removed. Therefore it becomes possible to see the male or female characteristics that the rabbis believed were present underneath. In the Mishneh Torah and Shulchan Aruch, in reference to the tumtum, this root appears only in the passive, *nikra*. *Nikra* contains an important ambiguity in its meaning. It could and might refer to an intentional action: ‘a tumtum who is cut open.’ It equally could and might denote an unintentional occurrence: a ‘tumtum who is torn’ by accident, such as an animal attack or, to use an anachronism, falling off a bicycle.⁶ Therefore, when discussing the tumtum *she-nikra* in these Codes, we have a general sense of the physical

⁵ For more detail, see Jastrow’s *Dictionary of the Talmud*, page 1424.

⁶ BT *Bava Batra* 168b attempts to define the difference between intentional and accidental tearing of a document. Both possibilities use the same root, *kuf-reshe-ayin*. There appears to be no similar discussion about intentional versus unintentional ‘tearing’ of a tumtum.

nature of the person we are talking about, but very little idea how they got that way.

This ambiguity is critical in assessing the rabbinic agenda regarding the tumtum, as is discussed below.

Figure 6, above, presents all situations in relation to which the Mishneh Torah and Shulchan Aruch deal with the tumtum *she-nikra*. Thus the first and most important observation about the tumtum *she-nikra* in both Codes is that she/he is quite uncommon. Sixty-two passages in the Mishneh Torah and thirty-two in the Shulchan Aruch discuss the tumtum, but only seven of those inquire about the status of the tumtum after that person's sex is revealed.

We might speculate that the tumtum *she-nikra* is rarely discussed because, once the person's sex is known, there is nothing further to discuss. However the texts that we do have indicate that this is not the case. There is significant disagreement and variety evident in the Codes about the status of the tumtum *she-nikra*—even after that person's “true sex” is “discovered.” The codifiers contradict each other, and themselves, trying to figure out what happens to a tumtum who is no longer *atum*.

Only Maimonides offers a general, or normative, statement about how this person should be regarded: “All those who have neither maleness [*zachrut*] nor femaleness [*n'keivut*], but rather is solid and shapeless—he is called a tumtum, and he is also in doubt. And if the tumtum is torn and is found male, then he is like an unequivocal male. And if he⁷ is

⁷ Sic. This verb *nimtza* (“is found”) is conjugated in the masculine singular. This is also the case in several other editions.

found female, then he⁸ is female.”⁹ Here Maimonides’ position seems clear. If a tumtum is ‘torn’ (through unspecified means), and that person’s ‘true’ sex is revealed thereby, then that person is henceforward considered to be that sex in all matters. Throughout the Mishneh Torah, we then find six specific cases in which this happens. In three of those cases, Maimonides decides according to his own general principle, and the tumtum who is discovered to be male is treated as any other male would be. He may perform all rites of levirate marriage, and is considered sufficiently ‘male’ that his father’s failure to circumcise him disallows the father from eating the Paschal ram. However, in the other three instances, a male *tumtum she-nikra* is not treated as men are. Despite the revelation of a male identity, this person is not entitled to all the inheritance privileges of either a firstborn son or a regular son. This person is also prohibited from being considered a *ben sorer u-moreh*—a ‘stubborn and rebellious son.’ So it would seem that Maimonides’ general statement only holds true in half of the instances in which he deals with the tumtum *she-nikra*. It is worthwhile to briefly examine why this might be the case.

Caro’s and Maimonides’ two parallel rulings about the firstborn *tumtum she-nikra* are not surprising. They are consistent with the overall pattern described in Part III. In this situation, parents with no sons give birth to a tumtum child. Sometime later, an unequivocal son is born. This boy is considered the *b’chor*—the firstborn male child, with certain unique rights and responsibilities. Most importantly, the *b’chor* receives double the inheritance of any other son in the family. Of course, the older tumtum child *might* be male and therefore the rightful *b’chor*, but also might not be. In the presence of

⁸ Sic. The pronoun is *hu*, the masculine singular. This is also the case in several other editions.

⁹ MT *Hilchot Ishut* 2:25

this doubt, the status is accorded to the firstborn definite son. But subsequently, the tumtum is torn and found to be male. Now what? Does the *b'chor* status now transfer to him, since he is, now, the oldest male child? Both Codes' answer is no. In Part III, I described a general pattern of decisions about the tumtum and androgynos: that they are almost always treated as whatever sex/gender will least impinge on other people's status or property. The situation of the *b'chor* falls squarely into this pattern. If the tumtum who is torn and found male were considered the *b'chor*, then an existing or future son would be stripped of that title and the extra inheritance that goes with it. In a similar vein, if a non-firstborn tumtum *she-nikra* were fully considered a son, then he would be entitled to inherit along with the other sons. Calling this person a son for inheritance purposes would diminish the inheritance available for his brothers.¹⁰

The Codes' rulings about the firstborn tumtum *she-nikra* seem fully consistent with the pattern of other treatments of the androgynos and tumtum. However the Mishneh Torah's final mention of the tumtum requires some explanation. Rambam writes: "It is Scripture's decree that a stubborn and rebellious son be stoned. But a daughter is not judged according to this law, since it is not her way to continually eat and drink, like a man; as it is said, "a son" [Deuteronomy 21:18] and not a daughter, and not a tumtum or an androgynos. A tumtum who is torn and found to be male cannot be treated as a

¹⁰ The formulas for inheritance in this literature can get complex and unclear. A simple example would be as follows: The Ploni family has \$100 in their estate and four children: three boys, Reuven, Shimon and Levi, and a tumtum, Tal. As long as Tal's sex is unknown, Reuven, the oldest, will receive \$50, Shimon and Levi will receive \$25 each, and Tal will inherit nothing. But if Tal is torn and determined to be male for inheritance purposes, then he, Shimon and Levi will each get \$20, and Reuven will only get \$40.

stubborn and rebellious son. As it is said, “If a man has a stubborn and rebellious son” [Deuteronomy 21:18]—he would need to be a son from the time of his appearance.”¹¹

Thus the Mishneh Torah exempts the *tumtum she-nikra* from the infamous provision for the *ben sorer u-moreh*—the “stubborn and rebellious son.” Deuteronomy 21:18 decrees that a *ben sorer u-moreh*—one who rebels seriously against his parents—is to be stoned to death. It seems to be a clear Biblical directive, and yet Rambam exempts the male *tumtum she-nikra*, even though he has stated this person is “like an unequivocal male.” Why? One could argue that the decision to exempt the *tumtum she-nikra* is in defense of others’ status or property. The loss of a son meant possible loss to the parents of labor, heirs and support in old age. But there is another possible explanation: that the *tumtum she-nikra* merely provides a convenient tool to chip away at a provision of the Torah that the rabbis had long found appalling, and had endeavored to make inapplicable. In other words, we must consider the possibility that this decision has nothing to do with how ‘male’ Rambam considered the *tumtum she-nikra*. Rather, Rambam was continuing the Mishnaic and Talmudic effort to whittle this heinous tradition out of existence altogether, by making it nearly impossible to be convicted, and by removing as many categories of people as they could from eligibility.¹² The *tumtum she-nikra* is one more arena in which to achieve this objective, entirely unrelated to gender or sex.

¹¹ MT *Hilchot Mamrim* 7:11-7:12

¹² For more details, see, for example, Elliot Kukla and Reuben Zellman, “To Wear is Human, to Live—Divine,” in *Torah Queeries: Weekly Commentaries on the Hebrew Bible*. Edited Gregg Drinkwater, Joshua Lesser and David Shneer. New York: New York University Press, 2009, p. 254.

Rambam takes advantage of this opportunity by bringing in a principle that is important for understanding the dynamics of the tumtum, as well as androgynos, in Jewish thought. He explains that, in order to qualify as a stubborn and rebellious son, the tumtum *she-nikra* “would need to be a son from the time of his appearance”—*ad she-yiyeh ben mi-shaat hitraah*.¹³ When discussing the tumtum and androgynos, rabbinic literature often draws a distinction between those who have always been male versus those who have not. This is the same reasoning, and nearly identical phrase, used to disqualify the male tumtum *she-nikra* from inheritance, as described above: *ad she-yiyeh ben mi-shaat leidah*—“he would need to be a son from the moment of birth.”¹⁴ A similar concept sometimes differentiates the status of the androgynos from other “questionably male” individuals, such as a *saris adam*, a man who has been castrated. These two figures are often treated differently in Jewish law, based on the assumption that the *saris adam* had, before the castration, a *sha’at ha-kosher*, a “period of fitness” for procreation, whereas the androgynos never did.¹⁵ This ‘temporal’ dimension, as it were, of the androgynos’ and tumtum’s experience is potentially fascinating, and worthy of further study.

What emerges from the question of the tumtum *she-nikra* and the stubborn and rebellious son is an important caution: not all discussions about the androgynos or tumtum are about sex or gender. In the case of the *ben sorer u-moreh*, the decision about the tumtum *she-nikra* may well be due to a rabbinic agenda entirely unrelated to gender or sex. Decisions about levirate marriage appear to have less to do with who is a “woman” or a “man,” and more to do with this culture’s emphasis on ensuring procreation and thus procreative

¹³ MT *Hilchot Mamrim* 7:11-7:12

¹⁴ MT *Nachalot* 2:3

¹⁵ For example, MT *Hilchot Yibum v’Chalitza* 6:2

partnerships, as they understood them. Today, sex or gender outside of the male/female binary is perceived as one of the most transgressive human possibilities that exist. These experiences and people are not at all normalized in our society. A consequence, as noted in Part I, is that we therefore tend to think of intersex or transgender people as existing only in relation to their gender or sex. Intersex people—people like the androgynos or tumtum—are not typically thought of as “normal” people with lives that include all of the “normal” things. Therefore, we as readers may be predisposed to assume that every discussion about these figures in the Codes would naturally be motivated by their troublesome sexual identities. It seems certain that this is not the case. Rabbinic literature, as any, is replete with histories, unspoken agendas, controversies, ideologies, personalities and goals. It is an important reminder that these other forces can be, and have been, considered more important than the project of clarifying people’s sexual or gender identities. The extent to which this is the case in this literature deserves further elucidation.

As is evident from Figure 6, Caro agrees with the decisions in the Mishneh Torah in matters of inheritance and levirate marriage. He also discusses the tumtum *she-nikra* on the question of parental gifts, which the Mishneh Torah does not. Caro concludes that if a parent pledges a certain gift amount to an unborn daughter and another amount to an unborn son, and in fact a tumtum (or androgynos) is born, then that child receives the lesser amount pledged. If the tumtum is subsequently determined to be male, then that child receives the male amount instead.¹⁶ It is hard to know what, if anything, to conclude from this addition to the corpus of the tumtum *she-nikra*. Clearly, as a tumtum

¹⁶ *Choshen Mishpat* 253:27

whose gender is completely unknown, the Shulchan Aruch's decision is the one that saves the family the most assets. If that ambiguity is taken away, Caro then indeed treats that person according to whatever sex is 'discovered.' Whether this is or is not to the benefit of that *tumtum she-nikra* we do not know; it appears to be case-specific.

Possibly the strongest claim about the identity of the *tumtum she-nikra* is put forth in Isserles' gloss to *Yoreh Deah* 266:10. Here Caro rules, in accordance with Maimonides, that "...an androgynos, and one born by Caesarian section, and a home-born bondsperson whose mother did not immerse until she gave birth: even though they are circumcised on the eighth [day], they do not trump Shabbat." To this, Isserles appends a possibility that neither Caro nor Maimonides address: the circumcision of a *tumtum she-nikra* who turns out to be male. He states: "A tumtum who is torn and found to be male: we do circumcise him on Shabbat."

Isserles' statement is as unequivocal as Jewish law can be. As noted elsewhere, meticulous observation of the Sabbath is held as a matter of highest sanctity. Only under extreme mitigating circumstances—such as a human life being endangered, or the need to fulfill a clear and specific commandment of the Torah—do the Codes instruct Jews to violate the normal Shabbat requirements. To perform a circumcision requires several actions (cutting, heating water, etc.) normally prohibited on Shabbat. But because the Torah so clearly requires circumcision "on the eighth day,"¹⁷ the rabbinic tradition requires boys to be circumcised on the eighth day of life even if it is Shabbat. Because these exceptions to Shabbat observance are rare, they become an arena in which issues of

¹⁷ Genesis 17:2

certainty and import are contested: what *categories* of action are pressing enough to warrant these exceptions, and how *certain* are we that a given instance falls into that category? In this assessment, The Shulchan Aruch, Mishneh Torah and the Tur agree that the androgynos does not make the cut.¹⁸ They are certain that circumcision of boys must be done on the Sabbath, but not certain enough that the androgynos is a boy that the Sabbath should be violated on the androgynos' account. Isserles, however, considers the *tumtum she-nikra* to be so thoroughly and unequivocally male that he is willing to require the suspension of Shabbat laws in order to circumcise him. Isserles' statement represents a claim of 'maleness' to the highest possible degree.

In the twenty-first century, the tumtum may be even more difficult for us to tolerate than the androgynos. The tumtum illuminates multiple chasms between rabbinic sex/gender worldviews and the prevailing attitudes of our own day. Specifically, these Codes' treatment of the tumtum *she-nikra* offer at least two extremely instructive comparisons to our own twenty-first century society. The first is about the relative importance of "gender clarity" versus other values in medieval Jewish law. The second, intimately related comparison is about the "right to know."

The tumtum *she-nikra* serves as a reminder of what was observed in part I: that the equivalences between social gender role and body parts is not the same in all places and

¹⁸ The Tur (*Yoreh Deah* 262) prohibits on Shabbat "any circumcision that is not within its [usual] time, for example a tumtum who is torn and found to be male, or a *mashuch*—which means he was circumcised already and drew the skin forward so his circumcision would be covered up—who needs to be circumcised another time, or one whom they did not circumcise in its [usual] time because of illness..."

times. The tumtum who is found to have a penis is not necessarily considered male at all times. Isserles' position probably corresponds best to conservative halachists' position that presence of male genitalia trumps all.¹⁹ Fonrobert also argues that "the presence of the male organ has greater signifying force than the female organ."²⁰ This is probably true, but it is not simple. In our culture, placing someone in a definite category is more important than almost anything. Isserles seems to feel similarly, at least in this case. For him, it is even more important to treat the androgynos as entirely male than to protect observance of Shabbat. This is not so for Caro and Rambam. They are more concerned with protecting the sanctity of the Sabbath than with making this person as "male" as possible. Similarly, treating the tumtum *she-nikra* as fully male is less important to Maimonides than his desire to write the *ben sorer u-moreh* out of history.

Today we will go to great extremes to make sure someone's status is one hundred percent clear. We use whatever is at our disposal to reinforce clear binary boxes: men's and women's color-coded earplugs; assigning sex to two side-by-side, identical, single restrooms; praising aggressive, even violent behavior in boys and promoting self-abasing behavior in girls. We will perform dangerous, permanent surgery on a healthy child. We require unambiguous sex and gender identification for driver's licenses and voter registration—areas in which gender makes no difference at all. In the effort to split society into two neatly-gendered halves, we will do almost anything.

¹⁹ Fred Rosner, Moshe D. Tendler, *Practical Medical Halachah*, Jerusalem: Jason Aronson Inc, 1997, p. 41.

²⁰ Charlotte Fonrobert, "Gender Identity in Halakhic Discourse". Jewish Women: A Comprehensive Historical Encyclopedia, Jewish Women's Archive.

The Codes, too, have a host of laws and means to deploy in creating their desired society. They did not hesitate to use them to keep women ‘in their place’ as second-class Jews. But as the tumtum *she-nikra* demonstrates, the codifiers did not necessarily use these means to ascribe clear sex/gender, even when they could have. In the case of the stubborn and rebellious son, Maimonides deals with the extremely unlikely possibility that a human being might be stoned because of having met the criteria of guzzling too much wine and meat in public in the presence of both parents etc. This remote future scenario is more problematic for him than the present ambiguity of the tumtum. I would argue that today, we would approach it differently. We would seize any opportunity to make this tumtum *she-nikra* “more male” in any way we could, including by exposing him to a potential risk to his life. Rambam is more interested in exempting him from a dangerous provision, and erasing an inhumane moment in the Torah. If the cost is a bit of sex/gender clarity, he is willing to pay it. In rabbinic law, concerns of human life and health take precedence over almost all other concerns. Here we see again that the project of establishing clear gender boundaries is less important.

This difference between the Codes’ approach and our own may be most surprising when we consider the question: why is the tumtum *she-nikra* such an infrequent character in the drama of the Codes, and of rabbinic literature generally? As we have seen, the tumtum is discussed frequently, but the tumtum *she-nikra* only occasionally. We might explain this by pointing out that, in theory, the tumtum *she-nikra* does not really exist. The moment that a tumtum is torn, they are, supposedly, no longer a tumtum. This person becomes whatever they are discovered to be—a man or woman like any other—and thereby

disappears into conventional categories. There is no longer anything to discuss. But if this were true, we might never have heard of the tumtum *she-nikra* at all. The many and fascinating details of the Codes' discussions of the tumtum *she-nikra* strongly suggest that, once torn, the tumtum still remains interesting. This person does not seem to easily disappear, settling comfortably into discussions of simple men and women.

I propose another explanation: that the tumtum *she-nikra* is only occasionally discussed because this figure represents a rare form of the tumtum. The great majority of discussions of the tumtum assume an individual who is not "torn." Most significantly, these Codes never suggest that the tumtum *should* be operated on; nor do they prohibit it. There is no discussion of the mechanics of opening or uncovering a tumtum's hidden genitalia; there is no endorsement or prohibition for doing so. Rather, the Codes clearly position the tumtum *she-nikra* as something of an afterthought. A small portion of the law addresses what happens *if* a tumtum is torn. But most discussions of the tumtum do not even account for this possibility. This accurately reflects the overall approach of rabbinic literature from the Tannaitic period on.²¹ Our own society's first reaction to sexual ambiguity is to operate in order to take it away. This course of action is almost absent from rabbinic thinking.

It is not absent entirely. Neither the Shulchan Aruch nor Mishneh Torah takes up this question directly, but occasionally their commentators do. Commenting on *Yoreh Deah* 262:3, Rabbi Akiva Eiger writes: "The tumtum—there is no obligation to tear or to

²¹ The Babylonian Talmud appears to contain only one mention of an "active" "tearing" of a tumtum, in *Yevamot* 83b.

circumcise him, and that is simple and straightforward.”²² Rabbi Alfred Cohen explains that “surprisingly, the *Rishonim* do not agree as to the correct *halachic* approach: Rashba opined that the child should be operated on if possible²³ and, if found to be masculine, should be circumcised. Tosafot, however, were of the opinion that there actually exists no imperative to perform surgery in order to determine the sex of the child...Tosafot specifically comment, “although it would seem reasonable [to obligate surgery to uncover the true status], he is not required to [undergo] surgery.” No explanation is given for this paradoxical conclusion.”²⁴ Rashba’s is the only opinion I have found that advocates proactive surgery on tumtumim. All others either explicitly state that it is not necessary, like Tosafot and Eiger, or—typically—they do not even consider the question, and proceed with the general assumption that the tumtum is not “torn” and probably will not be. This is the approach of the Mishneh Torah and Shulchan Aruch. In these, the preeminent Jewish law codes, the tumtum *she-nikra* is always *nikra* in the passive sense. They occasionally address what happens *if* a tumtum is torn, but never say that she/he should be. Surgery, our society’s first reaction to an intersex person, is the Codes’ last.

Contemporary halachists are only beginning to address how Jewish law regarding the tumtum should inform modern medical ethics and practice towards intersex people. As these conversations unfold, the “non-invasive” approach of these Codes should be an

²² *Chidushei haRa’aka* on SA *Yoreh Deah* 262:3

²³ Commentary to *Yevamot* 70a

²⁴ Alfred Cohen, “Tumtum and Androgynos,” *Journal of Halacha and Contemporary Society* XXXVIII, Fall 1999, p. 8. In Note 33 to his article, Cohen adds, “The Encyclopedia Talmudit brings the ruling that after a tumtum dies, it is forbidden to operate on his corpse (because of disrespect to the dead) to find out his true sexual identity (even for the purpose of determining whether his widow can remarry without *yibum*.” In other words, gender clarity for the living is less important than respect for the dead.

important consideration. This approach, in turn, reflects what may be an even more fundamental difference between rabbinic thinking about human sex and our own: the “right to know.”

Today’s outlook on sexual/gender identity incorporates as a basic principle what I will call the “right to know.” As discussed earlier, it is presumed in our modern society that the sexual identity of every individual should—must—be both unambiguous and immediately obvious. This is not only because our society believes, as it does, that sex and gender come in binary opposites, and that each of the two possible identities has its correct indications and behaviors. It is also due to the presumption that each person’s sex/gender identity is public information. An American walking down the street has learned that he or she should be able to *immediately and correctly* assess the sex/gender identity of every single person who passes by—whether or not that person is a complete stranger, and whether or not that person’s cultural or aesthetic norms or context are at all familiar to the beholder. This “right to know” is an unquestioned entitlement in the sex/gender system of today.

This “right” is not mitigated by any actual need to know—we consider ourselves entitled to instant and accurate information on this topic regardless of whether the answers affect us. For example, in order to board and ride a public bus along with other people, we do not actually need to know anything about their sexual or gender identity. The configuration of the other passengers’ genitals, or their feelings about their own gender, will have no qualitative impact on our bus ride. Nonetheless, people who present sexual

or gender ambiguity are constantly subject to panicked and angry inquiries at bus stops about what sex or gender they “really” are. This is the consistently-reported experience of many: transgender people, intersex people, women who happen to be very tall and are therefore suspected of being transsexual, and those whose fashion tastes do not conform to their culture’s gendered expectations.²⁵ This aspect of our sex/gender system profoundly shapes the lives of those who violate others’ “right to know.” Out of fear for their safety or to avoid humiliating interactions, these individuals often avoid using public restrooms, alter their clothing or haircuts to be less “ambiguous”, and avoid activities they would otherwise do—including calling the police or seeking health care when needed.²⁶

Our unquestioned “right to know” may make the idea of the tumtum almost intolerable. On an individual level, we cannot imagine interacting with a sex/gender-ambiguous human being without trying to find out what their identity “really” is. The idea that tumtumim in medieval Jewish societies were *not* subject to incessant clarifying questions is hard to comprehend. But in fact, we have no record of any such questions being asked. The idea that they knew that surgery could have “solved the problem”, and yet was not done, seems hard to believe. On a societal level, our medical establishment has codified this “right to know” into its practices towards intersex people. A tumtum infant born today would at the least be subject to batteries of tests, and likely to surgery, to reveal their true genitalia and ‘real’ identity. It is almost inconceivable, by our standards, to read a law code like the ones before us. The Mishneh Torah and Shulchan Aruch,

²⁵ See, for example, Riki Anne Wilchins, “What Does It Cost to Tell the Truth?” The Transgender Studies Reader, ed. Susan Stryker and Stephen Whittle. New York: Routledge, 2006, p. 548

²⁶ See, for example, Leslie Feinberg, Trans Liberation. Boston: Beacon Press, 1998, pp. 2, 10.

following the rabbinic literature before them, choose to structure law and society around the information they lacked, rather than asking or operating in order to find out the answer--when they could have.

The ubiquitous presence of the *tumtum* in the Codes is simultaneously a testament to rabbinic law's extraordinary tolerance for what it did not know—at least in comparison to the twenty-first century--and its stunning disinterest in involving most subjects of its enterprise in the debate about their own destinies.

Some Concluding Thoughts

“There are two simultaneous propositions that must be kept in mind: first, that this textual practice known as rabbinic Judaism has given rise (certainly in modern times) to oppressive social formulations vis-à-vis gender and sexuality; and second, that such oppressive social structures are not the only logically possible ones that could arise from this particular set of texts and significations, nor necessarily the only ones that have existed in the past. Nor is a matter of separating out “good” moments from “bad” ones. The very articulations that support gender domination are those that empower an alternative construction of gender and power...

In other words, two forms of critical work need to be engaged at the same time. One is directed at a critique of traditional Jewish culture and gender practice, while the other mobilizes aspects of that practice in order to demystify dominant ideologies of gender within the larger cultural and social context. One argues for the potential and necessity for radical change within traditional Judaism, while the other argues that that traditional culture has something to offer in the effort to produce radical change within the culture of “the West.” Without the former the latter is an ethical impossibility.”¹

In this passage from Unheroic Conduct, Daniel Boyarin reflects on his complex enterprise: reading classical rabbinic texts in the twenty-first century. When we look at the androgynos and tumtum in the Mishneh Torah and Shulchan Aruch, Boyarin’s point is critical to bear in mind. As we study them, we should be looking critically at the ways in which they fall short of our modern values about gender and human rights—which they certainly do in many ways, rather spectacularly when it comes to women. If we cannot

¹ Daniel Boyarin, Unheroic Conduct: The Rise of Heterosexuality and the Invention of the Jewish Man. Berkeley: University of California Press, 1997, pp. 357-358.

honestly see the shortcomings of our inheritance--especially in incredibly influential texts such as these-- we will never be able to move past them. To create a better, more just Judaism going forward, we have to have enough arrogance to say that there are areas in which we can do better. Simultaneously, as we read these Codes we must look critically at ourselves. Where does our own "advanced" society fall short of the values of our tradition? We have to have enough humility to ask what these texts might teach that we have yet to learn.

The Shulchan Aruch is considered by many as the guardian of "traditional Judaism" in today's world. This is the law book often cited to tell others, especially progressive Jews, what they are doing wrong. Many people believe that one who reads Moses Maimonides, and at the end of it is still progressive and is still transgender, simply did not understand him. Certainly, these books have nothing good to say about the freaks that are threatening, and worse, embarrassing our people. On the other side, today's gender pioneers tend to be skeptical that a culture as painfully misogynist, as overwhelmingly male-centered, as Rabbinic Judaism could possibly have anything useful to teach us about gender liberation. The Mishneh Torah and Shulchan Aruch are probably the most potent weapons that Judaism has had to destroy some of our lives. What help can we find in the books that are embarrassing, and worse, threatening our people?

Needless to say, both sides articulate the same belief about the capacity of our ancient texts to know more than we yet do. It is startling that those who profess to respect our sacred literature find it impossible for our ancestors to have conceived of certain

possibilities, just because those possibilities may not yet have occurred to us. Our society may feel unable to face the true complications of human sex, but this does not mean that the Talmudim, or Rambam, or the Shulchan Aruch felt the same way.

To my own generation of genderqueer Jews, and progressives of other faiths who look in part to us—I say that if we are going to sacrifice as much as we do to break down binary thinking, then we must not fall into it ourselves. As Boyarin eloquently reminds us, no culture, no literature, no religious law or tradition is all “good” or all “bad.” We can and must criticize what is wrong with these texts; we can feel both hurt and uplifted by them; and we can, if we are willing, allow their redemptive elements to rise. There is a way in which these elitist, misogynist men may have embraced human sexual diversity in a way that we have never seen in our lifetimes.²

Over the years many people, apparently trying to be helpful, have gently informed me that the transgender and intersex population is tiny. They then try to find a nice way to ask whether there are more than five people who care about the kind of questions I have asked in this paper.

My response is twofold. The intersex and transgender population is not tiny. It is approximately two percent of the world—as are Jews. Both communities have no choice but to believe that we can make the world better if we try hard enough. Much more

² Sarah Stroumsa describes Maimonides as “heir to an ancient and solid misogynous tradition in both philosophy and medicine...It is nevertheless noteworthy that Maimonides’ usually independent mind does not exert itself in this matter, where he adopts a rather conservative view, even for his times.” Maimonides in His World: Portrait of a Mediterranean Thinker. Princeton: Princeton University Press, 2009, pp. 115-116.

importantly, anyone who is interested in moving forward with the work of feminism (which should be everyone) must begin to account for people beyond ‘male’ and ‘female’. The challenging of binary sex and gender is necessary for everyone’s freedom—women, men and the rest of us. As Judith Butler puts it, “laughter in the face of serious categories is indispensable for feminism.”³

Anytime we take another culture seriously, we learn that our own way is not inevitable. Scholars of gender who have looked at the ancient Greeks, early Christians, the modern-day Dominican Republic, and Victorian England have all come to this same conclusion.⁴ The Shulchan Aruch and Mishneh Torah can illuminate, and help to change, many aspects of our sex/gender worldview: our “right to know” the sex/gender of other people; our beliefs about the lives of sex/gender-transgressors; our notions about what makes a woman, or a man, or something else; our vision of the body and its relationship to society, and to the spirit; our wild-eyed insistence on unambiguous binary identity for everyone, and the lengths to which we will go to enforce it; the values and goals—an intellectual effort, a theological outlook, human life and dignity--that a society *could* consider more important than sex or gender, if it wanted to.

³ Judith Butler, Gender Trouble: Feminism and the Subversion of Identity. New York: Routledge, 1990, p. viii.

⁴ See, for example, Alice Domurat Dreger, Hermaphrodites and the Medical Invention of Sex. Cambridge: Harvard University Press, 1998.

Appendix A

Translations: Tumtum & Androgynos in the Mishneh Torah

Rambam's Mishneh Torah contains 69 passages that refer to either the tumtum, the androgynos or both. Below are English translations of all of these excerpts. The 69 passages do not include a few other references to tumtum or androgynos animals that are specific to animal sacrifice. These do not seem to offer information or paradigms that might relate to the understanding of human beings and thus are not among the translations below. Only discussions of tumtum or androgynos animals that may shed light on the status of human beings are included here. The translations are presented in the order that they appear in Rambam's work.

Sefer Mada: The Book of Knowledge

Hilchot Avodat Kochavim: Laws of Star-Worship

12:4 A tumtum and an androgynos—they are of doubtful status. We place upon them the stringencies pertaining to a man and the stringencies pertaining to a woman in all cases; and they are obligated in everything. But if they transgress, they are not [punishable by] lashing.

12:10 A woman should not accessorize with the accessories of a man, such as putting a turban or a hat on her head, or wearing a coat of armor or such things, or shaving her head like a man. And a man should not adorn himself with the accessories of a woman,

such as wearing colorful clothes or gold bracelets in a place where only women wear these items or bracelets—everything is according to the custom of the land...A tumtum or an androgynos may not wrap [himself] like a woman, nor shave his head like a man does; but if he does this, he is not [punishable] by lashing.

Sefer Ahavah: The Book of Devotion

Hilchot Tzitzit: Laws of Ritual Fringes

3:9 ... Women and slaves and minors are exempt from *tzitzit*, [and the basis of this is] from the Torah. And from the Sages, any minor who knows how to put on *tzitzit* [properly] is obligated to [the mitzvah of] *tzitzit*, in order to educate him in the *mitzvot*. And women and slaves who want to put on *tzitzit*—they put it on, without the blessing. And similarly [with respect to] the other *mitzvot asei* from which women are exempt: if they want to do them without a blessing, we should not prevent them. A tumtum and an androgynos are obligated to all of them out of doubt. Therefore, they do not say the blessings; rather they do [the *mitzvot*] without a blessing.

Hilchot Brachot: Laws of Blessings

5:7 Women and bonds people and minors: we do not invite them [with the invitation to join in *Birkat haMazon*]. But they may invite themselves. However, there should not be a group of women *and* bonds people *and* minors, because of [concern about] licentiousness. Rather, women invite themselves, or bonds people [invite] themselves, as long as they do not make the *zimun* by [invoking God's] name. An androgynos may

make a *zimun* for his own kind, and does not make the *zimun* for women nor for men, because he is doubtful. And the tumtum does not make the *zimun* at all...¹

Hilchot Milah: Laws of Circumcision

1:7 An androgynos—which is a person who is born having a penis like a man and a vagina like a woman—it is necessary to circumcise him on the eighth day. And similarly, one born by Caesarian section or one who has two foreskins—we circumcise [both] of them on the eighth [day].

1:11 A child born already circumcised [e.g., without a foreskin], and one who is born in the eighth month of pregnancy, before his creation [development] is complete—he is like a stillborn because he will not live; and one born by Caesarian section; and an androgynos; and one that has two foreskins: [for these categories of births] we do not trump Shabbat. Rather they are circumcised on the first day after Shabbat, which is their ninth day [of life].²

3:6 A convert—whom we circumcise prior to his converting—and a child who is born already circumcised: when we extract from them a drop of the blood of the covenant, blessing is not needed. And similarly with an androgynos: we do not make a blessing over his circumcision, since he is not an unequivocal male [*zachar vadai*].

¹ It is also possible to translate the last sentence as follows: “And the tumtum is not invited at all.” Rambam’s non-vocalized text leaves open the possibility that the verb could be either the active [*piel*] *m’zamein*, “invites,” or the passive [*pual*] *m’zuman*, “is invited.” Translating this as an active verb renders parallel syntax with the other sentences in the passage.

² See *Hilchot Milah* 1:12: “...we do not trump Shabbat out of doubt.”

Sefer Z'manim: The Book of Seasons

Hilchot Shofar, Sukkah v'Lulav: Laws of Shofar, Sukkah and Lulav

2: 1 All are obligated to hear the sound of the *shofar*: Kohanim, Levites, and Israelites; and converts, and freed slaves. But women and slaves and minors are exempt. One who is half-slave and half-free, and a tumtum or an androgynos, are obligated.

2: 2 Anyone who is not obligated in a matter cannot facilitate the fulfillment of that obligation by another person who is obligated [*eino motzi et ha-chayav y'dei chovato*]. Therefore, a woman or a minor who sounds the *shofar*—one who hears [it] from them has not fulfilled their obligation [*lo yatza*]. An androgynos fulfills for his own kind [*motzi et mino*], and cannot fulfill for anyone who is not of his own kind. A tumtum cannot fulfill for his own kind, nor for one who is not of his own kind; for the tumtum who is torn—it is possible that he will be found male, and possible that he will be found female.

2: 3 And similarly with one who is half-slave and half-free: he cannot fulfill even for himself, for the side of servitude that is in him cannot fulfill for the side of freedom that is in him. Rather, how does he fulfill his obligation? When he hears [*shofar*] from a free man who sounds it for him.

6:1 Women and slaves and minors are exempt from [dwelling in] the *sukkah*. A tumtum and an androgynos are obligated out of doubt [*chayavim misafeik*]. And similarly, one who is half-slave and half-free is obligated. A minor who does not need his mother—a

child of about five or six—is obligated to *sukkah* by rabbinic law, in order to educate him in *mitzvot*.³

6:13 In this time, when we do two days of the festival, we dwell in the *sukkah* for eight days. And on the eighth day—which is the first day of Shmini Atzeret—we dwell in it, but we do not say the blessing “*leishev ba-sukah*.” And similarly a tumtum or an androgynos never says the blessing “*leishev ba-sukkah*,” since they are obligated out of doubt, and we don’t say blessings out of doubt.

Sefer Nashim: The Book of Women

Hilchot Ishut: Laws of Marriage

2:24 One who has a male appendage and a female appendage—he is called an androgynos, and it is in doubt whether [he is] male and in doubt whether [he is] female. And he does not have any indication at all by which it might be known about him whether he is an unequivocal male or if she is an unequivocal female.

2:25 All those who have neither maleness [*zachrut*] nor femaleness [*n’keivut*], but rather is solid and shapeless—he is called a tumtum, and he is also in doubt. And if the tumtum

³ In *Hilchot Shofar Sukkah v’Lulav* 7:19, Maimonides extends these same obligations to the mitzvah of waving the *lulav* (four species of plants bound together) on Sukkot: “Anyone who is obligated to *shofar* and to *sukkah* is obligated to the waving of the *lulav*. And anyone who is exempt from *shofar* and *sukkah* is exempt from waving of the *lulav*.” Thus the androgynos and tumtum are obligated to wave the *lulav*, but presumably do not say the blessings, in accordance with 6:13 in this same section. This study is limited to the specific instances in the Code where the androgynos and tumtum are mentioned explicitly; therefore the obligation of *lulav* is not included in the analysis. An exhaustive inventory of these works would likely reveal various other “extensions” of this type that would further establish the rights, obligations and limitations placed upon these figures.

is torn and is found male, then he is like an unequivocal male. And if he⁴ is found female, then he⁵ is female. A tumtum and an androgynos that are twelve years and one day of age—they are under the presumption of being adults [*g'dolim*], and we will refer to them as such in all places.

2:27 All of the terms whose meaning we have explained in these two chapters are twenty terms. They are:

Kidushin [betrothal]

Ervah

Shniah [secondary degree of relation *vis-à-vis* sexual contact]

Isurei Lavin [those forbidden by mitzvah *lo taaseh*]

Isurei Asah [those forbidden by mitzvah *asei*]

K'tanah [minor girl]

Naarah [young woman]

Bogeret [adult woman]

Aylonit

G'dolah [adult woman]

Siman ha-tachton [lower indication]

Siman ha-elyon [upper indication]

Katan [minor boy]

Saris chamah [*saris* by nature]

⁴ Sic. This verb *nimtza* ("is found") is conjugated in the masculine singular. This is also the case in several other editions.

⁵ Sic. The pronoun is *hu*, the masculine singular. This is also the case in several other editions.

Saris Adam [*saris* by human act]

Gadol [adult man]

Androgynos

Tumtum

Chereshim [deaf non-verbal people]

P'kachim [hearing people with typical cognitive function]

Place all of these terms in front of you always, and don't mix up each of their meanings, so that we will not have to explain each of these terms in every place that we refer to it.

4:11 A tumtum or an androgynos who betrothed a woman, or if a man betrothed them—these are doubtfully valid betrothals, and [in the event of divorce] they would require a divorce document out of doubt.

Hilchot Yibum v'Chalitzah: Laws of Levirate Marriage

6:1 There are brothers who are fit for *yibum* or for *chalitzah*. And there are brothers who are not fit for *yibum* nor for *chalitzah*, and they have no levirate relationship at all; rather, their *yevamah* [woman who they would normally be expected to marry under Levirate law] is permitted to a stranger. And there are brothers who are fit for *chalitzah* but are not fit for *yibum*; and there are brothers who are fit for *yibum* but are not fit for *chalitzah*.

6:2 And these are the [brothers] that have no levirate relationship at all: A *saris chamah*, and an androgynos, because they are not fit to procreate, and they never had a period of fitness [for this purpose].

6:4 And these [brothers] perform *chalitzah* but do not perform *yibum*: those in doubtful situations, for example [a potential *levir* whose sister-in-law] is prohibited to her brother as a first-degree relative out of doubt; one whose testicles are crushed [*p'tzua daka*] or whose penis is injured [*ch'rut shofchah*], or similar types of castration to these; and a man who is too elderly, whose strength is gone and who is impotent. If a *saris adam* has sex [with a *yevamah*], he does acquire her as a wife, since he did have a period of fitness for procreation. But he should send her away with a *get*, because he is prohibited from entering the community. And the *tumtum* performs *chalitzah* but does not perform *yibum*, because he is of doubtful status; and if he were torn open and found to be male, then if he wants he may perform *chalitzah* and if he wants he may perform *yibum*. All other brothers may perform *chalitzah* or may perform *yibum*.

6:8 And these are the people who are exempt from *chalitzah* and from *yibum*: the wife of a *saris chamah* or of an androgynos, and the wife of a cognitively disabled person, and the wife of a minor, and the *aylonit*, and a woman who is sexually prohibited [to a potential *yavam*] because she is a first-degree relative. As it is said: “So that his name will not be erased from the people Israel” [Deuteronomy 25:5]: [this verse] is to the exclusion of the *saris chamah* and the androgynos, whose names are erased [automatically, where the criterion is siring children]. Since they are not fit to procreate

from the beginning of their creation, they are like a category unto itself. “And the firstborn son that she bears”: [this verse] is to the exclusion of the *aylonit*, who is not fit to procreate from the beginning of her creation...

Hilchot Sota: Laws of the Woman Accused of Adultery

2:2 These are the women who are not fit to drink [the waters testing a *sota*], even if they want to drink, and their husbands want to have them drink. Rather, they must leave [their marriage] without the *ketuba*, once the witnesses to the seclusion [that the husband warned her against] have come forward, following the witnesses to the warning. And they are forbidden to their husbands forever. These are 15 women, and they are: the betrothed woman, a woman awaiting a *levir*, a minor who is the wife of an adult man, an adult woman who is the wife of a minor boy, the wife of an androgynos, the wife of a blind man, and the wife of a disabled or non-verbal man, or one who cannot hear, or whose hand is cut off; and similarly, the disabled woman, the non-verbal woman, and the blind woman, and the woman whose hand is cut off, and a woman who cannot hear. Each one of these is not fit to drink.

2:3 From where do we know that she not fit to drink? As it is said, “if she goes astray while under her husband...” [Numbers 5:29] “Under” is to exclude the betrothed woman and a woman awaiting a *levir*, for she is not “under her husband.” “Wife” is to exclude a minor girl. “Under her husband” is to exclude the wife of a minor boy and the wife of an androgynos, who is not a man...

Sefer Kedushah: The Book of Holiness

Hilchot Issurei Biah: Laws of Sexual Prohibitions

1:15 [A man who has sex with a male, or]⁶ has sex with an androgynos by way of his maleness, is liable. [But if he has sex with his by way of his femaleness, he is exempt.] The tumtum is of doubtful status; therefore, if [a male] has sex with the tumtum or with an androgynos [vaginally], we flog him with the flogging for rebellion. But the androgynos is permitted to marry a wife.

3:1 One who has sex with the wife of a minor—even if she were a *yevamah* who had had sex with a boy nine years and one day old—he is exempt. Similarly, a man who has sex with the wife of a deaf or cognitively disabled man, or the wife of a tumtum or an androgynos, or with a deaf woman or with a cognitively disabled woman who is the wife of a cognitively sound man, or with a woman who is doubtfully betrothed or doubtfully divorced—all of these [acts] are exempt. But if they did it intentionally, we flog them with the flogging for rebellion.

10:18 One who gives birth to twins, a male and a female, must sit [for the period of purification designated] for the female. If she gives birth to a tumtum or an androgynos, she sits for a male and for a female. If she gives birth to twins, and one is male and the second is a tumtum or an androgynos, she sits for a male and for a female. If one is female and the second is a tumtum or an androgynos, she sits for the female [time period]

⁶ All three sets of brackets in *Issurei Biah* 1:15 are indicated in the referenced edition of the Mishneh Torah itself. A number of brackets in this translation are inserted by the translator for clarity, but these are all present in this edition of the Hebrew text.

only. For the tumtum and the androgynos are of doubtful status; perhaps they are male, perhaps female.

22:11 An androgynos should not be alone with the women. But if he is alone [with them], we do not flog him, because he is of doubtful status. But a man may be alone with the androgynos and with the tumtum.

Sefer Hafla'ah: The Book of Assertions

Hilchot N'zirut: Laws of Being a Nazirite

1:17 One who says: “I will be a *Nazir* if I should have a son”—if a male child is born to him, then this [person] is a *Nazir*. But if a daughter is born to him, or a tumtum or an androgynos, this [person] is not a *nazir*. [If he] said: “I will be a *nazir* if I should have a child [*valad*]—even if a daughter or a tumtum or an androgynos is born to him, this [person] is a *nazir*. If his wife miscarries, he is not a *nazir*. If she gets pregnant again and gives birth, then this [person] is a *nazir*.

2:10 [Some people] were walking along the way, and they saw the *koi*⁷ from afar. And one of them said: “I will be a *nazir* if that is a wild beast [*chayah*].” And one said: “I will be a *nazir* if that is a domesticated animal [*beheimah*].” And one said: “I will be a *nazir* if that is not a wild animal [*she-ein zeh chayah*].” And one said: “I will be a *nazir* if that is not a domesticated animal [*she-ein zeh beheimah*].” And one said: “I will be a

⁷ “Probably a kind of bearded deer or antelope...the rabbis leave it undecided whether the *koi* belongs to the genus of cattle (*b'heimah*) or beasts of chase (*chayah*).” Marcus Jastrow, *Dictionary of the Talmud*, Jerusalem: Horev Press, *****P. 610. In other words, the *koi* is positioned as an animal species with characteristics of domestic animals and wild animals, of neither type, and of both types.

nazir if that is neither a wild animal nor a domesticated animal.” And one said: “I will be a *nazir* if that is both] a domesticated animal and a wild animal.” All of them are *n'zirim*. Because the *koi* has ways in which it is like a wild animal. And it has ways in it in which it is like a domesticated animal. And it has ways in which it is like a wild animal and like a domesticated animal [the aspects that overlap between the *behemah* and the *chayah*]. And it has ways in it in which it is not like a domesticated animal nor like a wild animal.

And this is the law if they saw an androgynos, and they disagreed over his whether he is a man or a woman. And they made a vow, in the same manner as those made a vow over the *koi*—[then] all of them are *n'zirim*. For an androgynos has in his ways in which he is like a man. And ways in which [he is] like a woman. And ways in which [he is] like neither a man nor a woman. And ways that are like a man and a woman.

2:11 And all of these ways are regarding matters of the *mitzvot*, and do not refer to his [physical] nature or his birth. And similarly, the ways of the *koi* are regarding matters of the *mitzvot*, and do not refer to its [physical] nature or its birth. How so? Its blood must be covered up, like a wild animal's, and its fat is prohibited, like a domestic animal. It is *kilayim* [resulting in a prohibited mixture of species, if mated] with the domestic animal, and similarly with the wild animal, as if it were not wild and not domesticated. And it must be ritually slaughtered as are both domestic and wild animals. And it has other ways, and each one of them will be explained in its place. And similarly, an androgynos renders himself impure with white, like men. And renders himself impure with red, like women. And is not sold as a Hebrew slave, unlike men or women. And one who kills

his is killed on his account, as is the case with men and with women. And there are other legal discussions pertaining to his, and each one will be written in its place.

Hilchot Arachin v'Chormin: Laws of Valuation

1:5 A tumtum and an androgynos do not have any valuation, since Torah only set a valuation for an unequivocal male or an unequivocal female.⁸ Therefore, if a tumtum or an androgynos says “My valuation is upon me [as a vow]”, or someone else vowed a valuation for his—that person is not obligated [to pay] anything.

1:9 [Vows of] worth are not like valuations. How so? If someone says, “My worth is upon me [as a vow], or “the worth of this [other person] is upon me [as a vow],” or “the worth of so-and-so is upon me [as a vow],” even if that so-and-so is a minor one day old, or a tumtum or an androgynos, or a non-Jew—he gives what he swore, one dinar or a thousand, as if he were a bondsperson for sale in the market.⁹

Sefer Zeraim: The Book of Agriculture

Hilchot T'rumat: Laws of Consecrated Foods

6:12 An Israelite woman who has offspring from a *Kohein* may eat [consecrated foods] for the sake of her child, whether the child is male or female, or even a tumtum or an androgynos; and even the child of that child, until the very end of the world, as it is said: “If she has no offspring...she may eat of her father’s food.” [Lev. 22:13]

⁸ See, for example, Leviticus 27:1-8

⁹ This type of vow is thus distinguished from vows of valuation: the person who made the vow of worth does have to pay, as opposed to if someone had vowed a valuation on an ineligible person, for which the vow-taker would need to pay nothing.

7:11 A [priest] born circumcised [with no foreskin] may eat of the consecrated foods.

The tumtum may not eat it, because he is doubtfully uncircumcised [*safek arel*]. An androgynos is circumcised and then he may eat it.

7:14 A person with crushed testes who is of priestly descent, who married the daughter of a priest—she does not eat [of the consecrated foods]. A *saris chamah*: he and his wife and his servants may eat it. A tumtum and an androgynos: their servants may eat of it, but not their wives.

7:16 An androgynos who has sex with a man who is disqualified from *trumah*—whether by way of his maleness or by way of his femaleness—he becomes disqualified from eating of the *trumah*, as women do. And his servants [also] may not eat it. Similarly, if he has sex with another androgynos, [and this second androgynos] would disqualify a woman through having sex with her, then [the first androgynos] becomes disqualified, and he cannot eat [*trumah*] nor entitle his servants to eat it. And this is provided that he has sex with him by way of his femaleness. But by way of his maleness—a male cannot disqualify a male from the priesthood.

12:22 There are ten [groups of people] to whom we do not apportion *trumah* on the threshing-floor, even though they may eat it, or may entitle others to eat it. And they are: The deaf person, the cognitively disabled person, and the minor child who does not know to spread out his hands, because these [three] do not have [appropriate] intellectual

capacity; the tumtum and the androgynos, because they are creations of their own; the slave—perhaps passers-by in the field will see him, and they will testify about him that he is a priest; and the uncircumcised and the impure, because they are in a rejected state; women, since perhaps she will get divorced, and because of [concern for inappropriate] seclusion; and one who marries a woman who is not appropriate for him, and [the authorities] have penalized him so that he does not get his portion on the threshing-floor until he divorces her. For all of these people, we send [their *trumah*] to them at their houses, and apportion [it] to them, as with the other holy things of the country—with the exception of the one who marries a woman not appropriate for him, and the impure person and the uncircumcised person, to whom we do not send it at all.

Hilchot Bikurim: Laws of First Fruits

4:1 Everyone who brings first fruits must [also fulfill the requirements of] an offering, and a Psalm, and waving [of the basket by the priest], and staying overnight [in Jerusalem]. However the declaration [*vidui*] is not an equal [obligation] for all; because there are those that are obligated to bring first fruits but do not recite [the declaration] over them.

4:2 These are the people who bring [first fruits] but do not recite: the woman, and the tumtum, and the androgynos, because they are doubtful women, and [therefore] they cannot say “that You have given me, Adonai” [Dev. 26:10]. And similarly with the guardian, the slave, and the agent, since they cannot say “that You have given me, Adonai.”

Sefer Avodah: The Book of Worship

Hilchot Biat haMikdash: Laws of Entering the Temple

7:1 All of the blemishes [*mumin*] that disqualify a person or an animal [from entering the Temple] amount to fifty, and this is their specification:

7:8 Twelve in the reproductive organs, and they are: one whose penis is injured, or crushed, or torn, or cut; one whose testicles are injured, or just one of them, or both or one of them is crushed, or torn, or cut off; a person who has only one testicle, even if he has two sacs; one whose two testicles are in one sac; the tumtum; the androgynos.

Hilchot Isurei Mizbeach: Laws of Prohibitions of the Altar

3:3 The tumtum and the androgynos [animal]—even though you do not have a blemish greater than these—they are disqualified for the altar through a different reason: because they are doubtfully male and doubtfully female, so they are like another kind entirely. And regarding offerings, it is said: “a male without blemish” [Lev. 1:3] and “a female without blemish” [Lev. 4:32], such that it would be an unequivocal male or an unequivocal female. Thus, even a bird that is a tumtum or an androgynos is disqualified from the altar [only major *mumin* disqualify a bird].

3:10 One who consecrates to the altar a tumtum or an androgynos [animal], or a *trefah* or *kilayim* or one born from the side—it is as if they consecrated wood and stones, since holiness cannot fall on their bodies, and they are not sanctified in any respect. They were

sold, and for their price [the owner] could bring whatever offering they wanted. They were not like [an animal] with a blemish, since [in the case of] a blemished animal, there is a [possible] offering from amongst its same species.

Hilchot Ma'asei haKorbanot: Laws of Making Offerings

10:9 All offerings—whether the holiest of the holy, or the less holy—only ritually pure, circumcised people may eat them. Even if his sun has gone down [on the day when one became ritually unclean], but he has not brought his atonement, he may not eat of the holy. And the tumtum is forbidden to eat of the holy things, because he is doubtful as to circumcision. But the androgynos—it would seem to me that he may eat of the less holy [offerings].¹⁰

10:17 A minor [priest] does not apportion [for himself] even of the less holy [offerings], even though it is permitted to feed him the holiest of the holy. Similarly with a woman and an androgynos—we do not apportion to them from the Temple offerings at all, as it is said: “A man as his brother...” [Lev 7:10]

Sefer Korbanot: The Book of Offerings

Hilchot Korban Pesach: Laws of the Paschal Offering

9:9 Just as [lack of] circumcision of his sons or his servants hinders a man from slaughtering the *pesach*, so does it hinder him from eating [it], as it is said: “...and you shall circumcise him [a newly-acquired slave], and then he may eat of it.” [Exodus

¹⁰ According to Menachem Elon, “it would seem to me” and similar expressions identify the 120-plus *halachot* that Maimonides added to his Code on his own, containing rulings that had not been established in the previous literature. Elon, Volume III, p. 1205.

12:44]. How so? He acquires a servant after the *pesach* is slaughtered. Or he has a son whose time to be circumcised only arrived after the slaughtering of the *pesach*. This [man] is forbidden to eat [the *pesach*] until he circumcises them. And how would the son be fit for circumcision after the slaughtering of the *pesach*, but would not be fit before the slaughter? For example if his fever dissipated, which needed seven days of time from the day of his healing. Or for example if his eye were wounded, and it was healed after the slaughter. Or if he were a tumtum, and he was torn open after the slaughtering of the *pesach* and was found male.

Hilchot Chagigah: Laws of Celebrating Festivals

2:1 Women and indentured servants are exempt from appearing [at the Temple for the pilgrim festivals]. But all men are obligated to appear, with the exception of a deaf person, a mute person, a cognitively disabled person, a minor, a blind person, one who limps, a ritually impure person, and an uncircumcised person. Similarly, the elderly and the sick and the tender and the very delicate, who are not able to go up on their feet—all these are the eleven [groups] that are exempt. But all other people are obligated to appear. The deaf person, even if he can speak, [or] even if he is deaf in one ear, is exempt from appearing. And similarly, one who is blind in one eye, or one who limps with one leg, is exempt. One who is mute, even if he can hear, is exempt. A tumtum and an androgynos are exempt because they are doubtful women. One who is half slave and half free is exempt because of the side of bondage that is in him. From where do we know that all of these are exempt from appearing? Behold, it says: “all of your males

shall appear” [Exodus 23:17]—which excludes women. *Mitzvot aseih* that women are not obligated to—indentured servants are [also] not obligated to it...

3:2 Anyone who is exempt from appearing [at the Temple for the pilgrim festivals] is exempt from the mitzvah of *hakhel* [gathering at the Jubilee year], except for the women, and the child, and the uncircumcised person. But the ritually unclean person is exempt from the mitzvah of *hakhel*, as it is said: “when all Israel arrives [to appear]” [Deuteronomy 31:11], and this person is not fit for arriving [to appear]. And the matter is clear that the tumtum and the androgynos are obligated, since women are obligated.

Hilchot Bechorot: Laws of the Firstborn

2:5 A first-born [animal] that is an androgynos has no particular holiness at all.

Therefore it is like a female, so it is nothing for the *kohein* [he has no claim to it]. We may labor with it and shear it, like other ordinary animals. If it is born a tumtum, it is a doubtful first-born, and it may be eaten by its owner if it has a blemish, whether it urinates from its place of maleness or whether it urinates from its place of femaleness.

Hilchot M'chusrei Kaparah: Laws of Those Who Remain Ritually Impure Until The Bringing of the Atonement Offering

1:9 One who gives birth to a tumtum or an androgynos, and after forty days from the day of his birth she miscarries, this [woman] brings an offering for this fetus—perhaps the first one is a male, and she miscarried after her full period [of postpartum purification]. But her offering is not eaten—perhaps the first is a female, so it was in the middle of her

period [of postpartum purification] that she miscarried—in which [case] she is exempt from the second offering.¹¹

3:7 The tumtum and the androgynos—we place upon them the stringencies pertaining to a man and the stringencies pertaining to a woman. They become ritually impure through blood, like women, and through white emission, like men.¹² But their impurity is of doubtful status. Therefore, if one of them has three sightings [of such flow], or saw blood three days in a row, this person must bring an offering, but it is not eaten. If he counts seven days clean of white emission, but sees red emission—or [seven days clean] of red emission, but sees white emission—this does not void [the clean days counted *vis-à-vis* the other emission].

Hilchot Temurah: Laws of Substituted Offerings

1:17 One who substitutes something that is mixed-species, or a non-kosher animal, or one born by Caesarian section, or a tumtum or an androgynos—no particular holiness falls upon them. [Therefore] this person is like one who substituted a camel or a donkey, since there cannot be an offering from their kinds, and therefore he is not flogged. What is the difference between these and an animal with a blemish? An animal with a blemish: there can be an offering from their kind; but these [others]—there cannot be an offering from their kinds.

¹¹ Per *M'chusrei Kaparah* 1:8, if a woman miscarries during the postpartum purification period, it counts as part of the original birth and no additional sacrifice is required.

¹² Per *M'chusrei Kaparah* 2:1, the emission that renders one ritually unclean is not semen that is ejaculated sexually, but semen that seeps out when the penis is not erect.

4:8 Offspring of consecrated animals that were born via Caesarian section, or if they gave birth to a tumtum or an androgynos, or a mixed-species or non-kosher [animal]: these must be redeemed, and one should bring for their price the offering that is appropriate to bring for the price of the offspring of this [kind].

Sefer Tohorah: The Book of Ritual Purity

Hilchot Parah Adumah: Laws of the Red Cow

10:6 All are fit to sprinkle [the ashes of the red cow—*cf* Numbers 19:9], except for the woman and the tumtum and the androgynos, and the minor who does not have cognitive understanding [of this mitzvah]. But a minor who does have this understanding is fit to sprinkle. And the uncircumcised person is fit to sprinkle, because the uncircumcised person is not ritually impure...

Hilchot Tum'at Tzaraat: Laws of Ritual Uncleaness via Tzara'at

10:9 A tumtum or an androgynos [who is afflicted with *tzara'at*] dishevels his hair and rents his garments and spreads a veil over his lips, because he is of doubtful status.¹³

Hilchot M'tamei Mishkav uMoshav: Laws of Making a Bed or Seat Ritually Unclean

1:6 A woman does not render ritual impurity through white [emission], nor a man through red; rather a woman [renders ritual impurity] via red, and a man via white.

¹³ Maimonides has already established that the rituals of the hair, garments and veil are required of men afflicted with *tzara'at* (see *Tumat Tzara'at* 10:6) but are not required of women in the same situation (ibid 10:8).

1:7 A tumtum and an androgynos: we place upon them the stringencies of a man and the stringencies of a woman. They render ritual impurity through white like a man, and through red like a woman. But their impurity is in doubt. Therefore, we do not burn the heave-offering [*trumah*] or sacred things [*kodshin*] on their account, and no one is liable on their account for the ritual purity of the Temple and its holy items. If he saw [their own emission of] white and red as one, then we do burn on their account the *trumah* and the *kodshin*. However no one is liable for entering the Temple or [contacting] its sacred appurtenances [improperly, in an impure state] on their account—as it is said, “from male to female you shall send them out [Numbers 5:3]”—this is only if the impurity is the impurity of an unequivocal man or the impurity of an unequivocal woman. Similarly, one who touches his white and red [emissions] as one [at the same time?] is not liable vis-à-vis entering the Temple or [contacting] its sacred appurtenances [improperly]. [But] if he touches his own white and red that he saw, then he is liable if he enters the Temple [while ritually impure].

Sefer Nezikin: The Book of Torts

[No Excerpts]

Sefer Kinyan: Laws of Acquisition

Hilchot Zechiyah uMatanah: Laws of Acquisition and Gifts

8:6 Someone said: “If my wife gives birth to a male, it will receive a mina; and if a female, two hundred [zuz].” If she gives birth to a male, he receives a mina; if she gives birth to a female, she receives two hundred. If she gives birth to a male and a female, the

male receives a mina and the female two hundred. If she gives birth to a tumtum or an androgynos, he receives the lesser of the two of them.

***Hilchot Sh'chenim*—Laws of Neighbors**

12:15 If one sells [land] to a tumtum or an androgynos, the adjacent landowner may evict them [with compensation of the sale price] because they are doubtful women.

***Hilchot Avadim*—Laws of Indentured Servants**

4:1 The female Hebrew indentured servant [*ha-ivriah*] is the minor female whose father sold her. And one who brings forth two hairs after the age of twelve years, and [thereby] becomes a *na'arah*—he cannot sell her, even if he still has authority over her, and he has the right to betroth her to whomever he wishes. But the minor girl who is an *aylonit* by her indications, and is not fit to bring forth two hairs—her father has the right to sell her the entire time that she is [considered] a minor. But the tumtum or the androgynos cannot be sold, not as a Hebrew bondsman, and not according to the laws of the Hebrew bondswoman either.

Sefer Mishpatim: The Book of Civil Law

Hilchot Nachalot: Laws of Inheritance

2:3 A firstborn son who was torn and found to be male does not receive a double portion of inheritance [as a firstborn son normally would]. A plain son who is torn and found to be male does not diminish the portion belonging to the firstborn, as it is said: “and sons

are born to him” [Deuteronomy 21:15]—he would have to be a son from the moment of birth.

2:4 How is it that he does not diminish the portion of the firstborn? If [a man] had a firstborn son, and two plain sons, and this one, the tumtum who was torn and found to be male: the firstborn receives a quarter of the money as the firstborn’s portion—as if he only had the two plain [brothers]. And three quarters, the remainder, the two plain sons split it with the torn one, and with the firstborn, equally.

5:1 This is the general rule regarding heirs: All pairs of two heirs, of which one of them is an unequivocal heir and the other is doubtful, the doubtful one gets nothing. And if both of them are doubtful—perhaps this one is the heir, or perhaps that one is the heir—they divide [the inheritance] equally. Therefore, if someone died and left a son and a tumtum or an androgynos, the son inherits everything, since the tumtum and the androgynos are of doubtful status. If he left daughters and a tumtum or androgynos, they [all] inherit equally; he is considered as one of the daughters.

5:2 We have already explained in *Hilchot Ishut* (Laws of Marriage) the law pertaining to the daughters, [as opposed to] the sons, regarding their maintenance and their dowry. And there we explained that the maintenance is among the conditions of the *ketubah*. In an instance where the property is abundant, the daughters only have their maintenance, and the sons inherit everything; but the daughters are supported with a tenth of the property, so that with this they should marry their husbands. And in an instance where

the property is little, the sons get nothing; rather, everything is for the maintenance of the daughters. Therefore, if one died and left sons and daughters, and a tumtum or an androgynos: in an instance where the property is abundant, the sons inherit, and they can push the tumtum to the daughters, and he is maintained as they are. But in an instance where the property is little, the daughters can push the tumtum to the sons, saying to his, “You’re a male, and you don’t get maintenance with us.”

Sefer Shoftim: The Book of Judges

Hilchot Eidut: Laws of Witnessing

9:2 Women are Biblically disqualified from serving as witnesses, as it is said: “from the mouths of two witnesses” [Deut. 19:15]—the language is masculine, and not grammatically feminine.

9:3 And similarly, the tumtum and the androgynos are disqualified, because they are doubtful women. And anyone who is doubtfully fit and doubtfully disqualified—they are disqualified, since the witness only comes in order to take money at their word, or to convict at their word; and we do not take money out of doubt, nor do we punish out of doubt. This is Biblical law.

Hilchot Mamrim: Laws of Rebels

5:1 One who curses their father or their mother is stoned, as it is said: “He has cursed his father or his mother; his blood is upon him” [Leviticus 20:9]. Whether they curse [them] during their lifetimes or after their deaths, this person is stoned. Witnesses [to the crime]

and warning are required, as with all who are liable to death by the court—whether a man or a woman, and similarly with the tumtum and the androgynos. This is provided that they are adults and [thereby] have entered the general category of those eligible for punishment [in this way].

5:5 One who strikes his/her/his father or his mother: his/her/his death is by strangling, as it is said: “If he strikes his father or his mother, he shall surely die.” [Exodus 21:15].

Witnesses [to the crime] and warning are required, as with all who are liable to death by the court—whether a man or a woman, and similarly with the tumtum or androgynos.

And this is provided that they have entered the general category of those eligible for punishment [in this way]. [This person] is not liable to strangling unless he/she/he causes injury to them [the parent]. But if he/she/he did not cause injury to them, then this person is like one who strikes any given [person] in Israel [as opposed to a parent]. One who strikes them after death is exempt.

7:11 It is Scripture’s decree that a stubborn and rebellious son be stoned. But a daughter is not judged according to this law, since it is not her way to continually eat and drink, like a man; as it is said, “a son” [Deuteronomy 21:18] and not a daughter, and not a tumtum or an androgynos.

7:12 A tumtum who is torn and found to be male cannot be treated as a stubborn and rebellious son. As it is said, “If a man has a stubborn and rebellious son” [Deuteronomy 21:18]—he would need to be a son from the time of his appearance.

Appendix B

Translations: the Tumtum and Androgynos in the Shulchan Aruch

Orach Chayim: “The Way of Life”

17 – Who is Obligated to *Tzitzit*

17:2 Women and bonds people are exempt, because it is a positive time-bound mitzvah.

Gloss: In any case, if they wish to wrap [tzitzit] and make a blessing over it, they are authorized to do that, as with other positive time-bound mitzvot.; but it seems like arrogance, and therefore they should not wear tzitzit, since that is not an obligation [even] upon a man. This means that he is not obligated to purchase a tallit for himself in order to be obligated to tzitzit. And further on in Chapter 19 he says “when he has a tallit of four corners.” A tumtum and an androgynos are obligated out of doubt, and they should wrap without a blessing. (This means: tumtum—it is not known whether he is male or female; and androgynos—he has maleness and femaleness.) (Gloss: And according to those whose practice it is for women to make a blessing over positive time-bound mitzvot, these people [a tumtum and an androgynos] can also make the blessing.)

199 – Who Makes the Invitation [to the Blessing After a Meal] and Who Does Not

199:8 An androgynos invites his own kind [to say the blessings], but invites neither men nor women.

199:9 A tumtum does not invite at all.

331 – Laws of Circumcision on Shabbat

331:5 An androgynos, and one born between the suns, and one born [already] circumcised, or by Caesarian section--or if a non-Jew gave birth and after that she converted to Judaism—or one who has two foreskins: their circumcision does not trump Shabbat.

489 – Who is Fit for the Sounding of the *Shofar*

489:4 An androgynos facilitates the fulfillment [of the mitzvah of hearing *shofar*] for his own kind. A tumtum—even for his own kind he cannot facilitate the fulfillment [of this mitzvah].

540 – Who is Exempt from Sitting in the *Sukkah*

540:1 Women and bonds people and minors are exempt from the *sukkah*. A tumtum and an androgynos are obligated out of doubt, and similarly one who is half-slave and half-free is obligated.

589 – That All are Obligated to the Reading of the *Megillah*

589:1 All are obligated to read it: men and women, converts, bonds people, and freed bonds people. And we teach the children to read it.

589:2 If one person is the reader, and one person hears [the *megillah*] from the reader, [the listener] has fulfilled their obligation, provided that they hear it from one who is obligated to its reading. Therefore if the reader were deaf or a minor or cognitively disabled, one who hears [the *megillah*] from them has not fulfilled their obligation. And there are those that say that women cannot facilitate the fulfillment of the obligation for

men. *Gloss: And there are those that say that if the woman reads it to herself, she makes the blessing “to hear the megillah,” since she is not obligated to reading.*

589:3 An androgynos facilitates the fulfillment [of the mitzvah of *megillah*] for his own kind, but not for one who is not of his own kind. A tumtum and one who is half-slave: even for his own kind he cannot facilitate the fulfillment [of this mitzvah]. *Gloss: There are those that say that he cannot fulfill this mitzvah even for himself, and he needs to hear [the megillah] from others.*

Yoreh Deah: The One Who Puts Forth Knowledge

181 – The Prohibition on Shaving the Sides of the Head

181:8 A tumtum and an androgynos are forbidden in rounding off [the hair on] the head.

182 – Things That Are Prohibited Because [of the verse] “A Man Should Not Wear The Clothing of a Woman” [Deuteronomy 22:5]

182:5 A woman should not accessorize with the accessories of a man, such as putting a turban or a hat on her head, or wearing a coat of armor or such things (*[these are] amongst the garments of a man according to the custom of that place*); or shaving her head like a man. And a man should not adorn himself with the accessories of a woman, such as wearing colorful clothes or gold bracelets in a place where only women wear these items or bracelets. *Gloss: And even one of these clothing items is forbidden, even if we can recognize via the rest of their clothing that this person is a man or a woman. A tumtum and an androgynos are forbidden to wrap [themselves] like a woman.*

194 – The Laws of One who Gives Birth or Miscarries

194:8 One who gives birth to a tumtum or an androgynos: we place upon her the [longer] postpartum purification period of a female [baby].

262 – The Time of Circumcision for the Well, for the Sick and for the Androgynos

262:3 An androgynos, and one that has two foreskins, and one born by Caesarian section: they are circumcised on the eighth [day].

265 – The Order of the Blessing for Circumcision and the Law of Circumcision on a Fast Day.

265:3 A convert who was circumcised before he converted and a child who was born [already] circumcised: when they take from him a drop of the blood of the covenant, they do not need a blessing. And similarly with an androgynos: we do not make a blessing over his circumcision, because he is not an unequivocal male. *Gloss: But when they go back to [remove the remaining] shreds of foreskin that invalidate the circumcision, it is necessary to go back and make all the blessings; but not to say “sustain this child”, etc.*

266 – Which Circumcision Trumps Shabbat and Holy Days

266:10 A child who is born [already] circumcised, and one who has two foreskins, and an androgynos, and one born by Caesarian section, and a home-born bondsperson whose mother did not immerse until she gave birth: even though they are circumcised on the

eighth [day], they do not trump Shabbat. (*A tumtum who is torn and found to be male: we do circumcise him on Shabbat.*)

315 – The Law of the Doubtful Firstborn and One Born by Caesarian Section and the Tumtum and the Androgynos.

315:2 One born by Caesarian section, and one born vaginally after him: neither of the two of them are [considered] a firstborn, even if [the mother] gave birth to a female first via Caesarian section, and a male vaginally after her, since another preceded him. A firstborn [animal] that is a tumtum—this is a doubtful firstborn, and may be eaten by its owner if it has a blemish. This is specifically if it urinates in its place of femaleness. But if it urinates in its place of maleness, then it is an unequivocal firstborn, and it is necessary to give it to the priest. (*Tur in the name of the Rosh, and not according to Rambam.*)

315:3 An androgynos: he is a doubtful firstborn, and may be eaten by its owners if it has a blemish.

Even haEzer: The Rock of Help

22 – The Prohibition of Seclusion, and With Whom it is Prohibited to Be Alone

22:12 An androgynos may not be alone with the women. But if he is alone [with them], we do not flog him, because he is of doubtful status. But a man may be alone with the androgynos and with the tumtum.

44 – Kidushin of the Deaf, the Cognitively Disabled, and the Minor, and Prohibited First-Degree Relatives, and Those Prohibited by a Negative Commandment

44:5 A tumtum and an androgynos—whether they contract *kidushin* [with someone else] or a man contracts *kidushin* with them—their *kidushin* are of doubtful status, and [in the event of divorce] they would require a divorce document out of doubt. *And there are those that say that an androgynos is an unequivocal male (Tur in the name of the Tosafot and the Rosh).*

172 – The Law of the Yavam Who is a Saris or Deaf, Cognitively Disabled or a Minor or a Tumtum; and similarly the Yevamah.

172:8 An androgynos is not involved in *chalitzah* or *yibum*. And there are those that say that the law pertaining to him is as [the law] for a male in all matters.

172:9 A tumtum performs *chalitzah*, but not *yibum*, because he is of doubtful status. And if he is torn and found male, if he wants he may perform *chalitzah* and if he wants he may perform *yibum*. And there is one that says that he is of doubtful status, and strictness of the law should apply.

Hoshen Mishpat: The Breastplate of Justice

35 – The Blind, Deaf, and Cognitively Disabled Person, and the Minor, are Disqualified [from serving as a witness in judicial proceedings]

35:14 A woman is disqualified. And a tumtum and an androgynos are disqualified out of doubt. And anyone who is doubtfully fit and doubtfully disqualified—they are

disqualified. *Gloss: And all of these disqualified people—they are disqualified even in a place in which men fit to testify are not found. (the Rashba in a responsum, and the Rambam in Chapter 8 of Hilchot Nezikin Monetary Injury?]; and thus also writes the Beit Yosef. And all of this is a matter of law. But there are those that say that an enactment of the [kadmonim] earlier scholars is that in a place in which men are not accustomed to be, such as in the women’s bathroom, or in another matter to which the woman is accustomed, but not men—such as saying that ‘such-and-such woman wore these clothes, and they are hers’, and men are not accustomed to being meticulous in this [type of thing]—women are believed...*

175 – Brothers who Want to Apportion and All the Laws of the Adjacent

Landowner

175:47 One who sells [land] to a woman or to orphans who are minors (*but [this law] does pertain to adult orphans, or minors who are not orphans, because he is the owner of adjacent property*) (*Beit Yosef in the name of the Magid, Chapter 12*): [in relation to them] there is no ‘because of the law pertaining to the owner of adjacent property.’¹ If he sold to a tumtum or an androgynos: the adjacent landowner cannot remove them [in order to purchase the property], since they are a doubtful woman.

¹ Rabbinic law developed a legal concept known as *dina d'bar metzra*, literally “the law of the adjacent landowner.” This pertains to a landowner whose property is bordered by another piece of land belonging to someone else. If the owner wants to sell their piece of property, they are required to first offer to sell it to the person who owns the land next door. That adjacent landowner has right of first refusal. If the adjacent landowner (the *bar metzra*) does not want to buy it, then it can be sold to someone else. See, for example, *Bava Metzia* 108a.

253 – What Language Effectuates a Gift: If One Says, ‘Give One Hundred Zuz to So-and-So, and Two Hundred to So-and-So, and 300 to So-and-So.’

253:27 If one said: ‘If my wife gives birth to a male, he will receive a *manah*, and if a female, two hundred’--and she gives birth to a male, he receives a *manah*. If she gives birth to a female, she receives two hundred. If she gives birth to a male and a female, the male receives a *manah* and the female 200. If she gives birth to a tumtum or an androgynos, he receives the lesser [amount] of the two of them. And if [the tumtum] is torn after that, and found to be male, he receives a *manah*.

277 – The Firstborn Receives a Double Portion; and Who is a Firstborn for Inheritance; and a Doubtful Firstborn

277:4 A firstborn who is born a tumtum, and afterwards is torn and found male, does not receive a double portion of inheritance [as a firstborn son normally would]. And similarly (a plain son who is torn and found to be male) does not diminish the portion belonging to the firstborn, as it is said: “and sons are born to him” [Deuteronomy 21:15]—he would have to be a son from the moment of birth. How is it that he does not diminish the portion of the firstborn? If [a man] had a firstborn son, and two plain sons, and this one, the tumtum who was torn and found to be male: the firstborn receives a quarter of the money [as the firstborn’s portion]—as if he only had two plain [brothers]. And the remaining three quarters: the two plain sons split it with the torn one, and with the firstborn, equally.

280 – If One says: ‘This is Our Brother’; or Someone Comes Along and Says ‘I Am Your Brother.’

280:7 If someone died and left a son and a tumtum or an androgynos, the son inherits everything, since the tumtum and androgynos are of doubtful status.

280:8 If he left daughters and a tumtum or androgynos, they [all] inherit equally; he is considered as one of the daughters.

280:9 If someone died and left sons and daughters, and a tumtum or an androgynos: in an instance where the property is abundant, the sons inherit, and they can push the tumtum to the daughters, and he is maintained as they are. But in an instance where the property is little, the daughters can push the tumtum to the sons, saying to him, “You’re a male, and you are not entitled to maintenance with us.” *Gloss: And there are those that say that, with a daughter and a tumtum--if the property is abundant—the tumtum receives one-third of the share, and the daughter one-quarter. But if the property is little, the tumtum gets nothing. And if there is a daughter and an androgynos, and the property is abundant, they divide it equally; and with little property, the androgynos gets nothing. If there were little property, and he left a son and a tumtum, the tumtum receives one-third of the share, and the son one-quarter. If there were abundant property, the son inherits everything, and the tumtum is maintained like a daughter. But an androgynos gets nothing in place of a son—whether with abundant or little property.*

Appendix C

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Mishneh Torah & Shulchan Aruch on the Tumtum & Androgynos

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