

Queering Ervah:

Halachic Conceptions of Gender-Based Nakedness for the Modern World

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Abstract: This paper examines rabbinic conceptions of ervah—the halachic category for nakedness—and explores their application to modern, egalitarian, queer, and gender-queer contexts. Ervah is defined through two basic paradigms: (1) the objective paradigm, where genitalia universally defines ervah regardless of gender or cultural norms, and (2) the subjective paradigm, where gender and cultural norms greatly influence the relegation of body attributes to this category. Drawing upon tannaitic, medieval, and modern halachic sources, the paper evaluates traditional positions on ervah using three paradigms of gender definition: (1) genotype, (2) genitalia, and (3) phenotype, considering each paradigm's impact upon transgender and intersex individuals. Further, it considers two primary interpretive approaches: (1) gender-inflexible, which assumes an all-encompassing heteronormative, cisgender framework, and (2) gender-expansive, which prioritizes the individual viewers' sexual orientation and agency over assumed norms. Ultimately, the paper argues for a more fluid, gender-expansive approach to defining halachic ervah.

Introduction

There are generally two words rabbis use to describe nakedness: ערומה (*arumah*) and ערוה (*ervah*). While tannaitic and amoraic texts employ the term *arumah* to describe a state of nakedness, most halachic discourse after the tannaitic period switches to the term *ervah*. *Ervah* is not merely a casual descriptor, but a bounded legal category with significant implications upon halachic religious practice and culture. This paper will examine the definition of *ervah*, how gender impacts this definition, and how different paradigms of defining gender create possibilities for an expanded discourse on *ervah* in modern, egalitarian, queer, and gender-queer settings.

What is Ervah? An Introduction to Nakedness

The legal category of *ervah* contains two paradigms: objective and subjective. The objective paradigm of *ervah* most consistently applies to genitals, equally to male and female, regardless of any experience of sexuality, or social norm. The subjective paradigm of *ervah* most often applies to female bodies viewed by men. While genitalia remain the foundational standard for defining *ervah*, other aspects of the female body come to be defined as nakedness as well.¹ These body parts, such as a woman's hair, calf, or voice, may temporarily become *ervah* and assume the legal status of genitals. Subjective classification of *ervah* is most sensitive to gender, gendered cultural norms, and most susceptible to shift based on definitions of gender.

Another way of discussing this halachic classification of body parts is through the legal theories of realism and nominalism. Realism is the belief that legal rulings should be in accordance with objective reality and legal fictions and assumptions should be minimized.² Applied to our context, genitals should be described as *ervah* because their exposure objectively defines nakedness. Nominalism is far more flexible; it prioritizes human perspectives and intentions when describing reality. These subjective labels can have little correspondence with reality itself, and as such, this system of law readily utilizes legal fictions and presumptions to determine legal outcomes.³ Under nominalism, non-genital body parts may seamlessly assume an equivalence of genitals, and their exposure creates similar halachic ramifications.

Michael Satlow, in his article *Jewish Constructions of Nakedness in Late Antiquity*, describes how the early rabbis discussed male nakedness as exclusively referring to exposure of the penis. Male *ervah* is defined under objective and realist criteria. Male *ervah* is problematized in the sancta — the spatial or temporal holy space created through Torah study or the utterance of God's name.⁴

¹ "Berakhot 24a." ; Satlow, "Jewish Constructions of Nakedness in Late Antiquity," 441.

² Christine Hayes, "In the West, They Laughed at Him," 139.

³ Hayes, "In the West, They Laughed at Him," 141.

⁴ Michael L. Satlow, "Jewish Constructions of Nakedness in Late Antiquity," 431.

However, Satlow argues that the rabbis rarely stigmatized the exposure of male nakedness, even in the presence of another male viewer.⁵ With female genitals similarly defined as foundationally *ervah*, their presence is also prohibited in the sancta. However, unlike the expected exposure of male genitals in the presence of other men, the rabbis of the Talmud exhort male viewers not to gaze at female genitals.⁶

We can best explore the gender implications of objective *ervah* in Mishnah Challah 2:3

הָאִשָּׁה יוֹשֶׁבֶת וְקוֹצָה חֲלָתָה עֲרֻמָּה, מִפְּנֵי שֶׁהִיא יְכוּלָה לְכַסּוֹת עֲצָמָהּ, אָבָל לֹא הָאִישׁ...

A woman [may] take challah (i.e. perform mitzvah of separation of *challah* with a blessing) sitting naked, since she is able to cover herself (i.e. her genitals). But not the man...⁷

The Mishnah's given reasoning—that a woman is able to cover herself in a way that a man cannot— indicates this discussion likely revolves around objective physical characteristics irrespective of any essentialist or socially constructed notions of gender. It is not because the man is a man that he is forbidden to do this, but that his penis is not so easily covered while naked. Arguably, following this read of the Mishnah, a transgender man without a penis may similarly recite blessings in this sitting position, while a transgender woman with an exposed penis may not.

However, this is not the end of the story. Trans women and others who may wish to temporarily feminize the appearance of the groin area may employ a technique called “tucking,” whereby the testicles are pushed upwards into the body, and the penis is pulled back and completely hidden from frontal view.⁸ While tucking, certain sitting positions would have neither the penis nor testicles exposed. Following the above interpretation of this Mishnah, someone who is tucking may be able to recite blessings while sitting — even if they are a cisgender man.

Further, how would surgically reconstructed genitals figure in discussions of *ervah*? Transgender individuals may pursue sexual reassignment surgery (SRS), which may involve a partial or complete reconstruction of their genitals. These include vaginoplasty, which uses penile tissue to create a vaginal canal, and phalloplasty or metoidioplasty, which artificially constructs a penis.⁹ R. Idan Ben-Ephraim, author of the 21st-century halachic compendium *Dor Tahapuchot*,

⁵ Ibid, 437.

⁶ Ibid, 441.

⁷ M. Challah 2:3 (translation my own).

⁸ Fenway Health, “Trans Health Tucking Guide,” 2.

⁹ “Vaginoplasty for Gender Affirmation.” ; University of Colorado Anschutz Medical Campus, “Gender-Affirming Surgery: Phalloplasty and Metoidioplasty.”

seems to think that surgically constructed sex organs do not count as “real” genitals under halacha. He writes:

וכל שכן לפי מה שהוברר שיצירת האיברים של אנשים אלו אין בה ממש ואיבריהם הינם
 "מלאכותיים" בלבדו ובודאי שאין כאן שינוי מהותו אלא שינוי חיצוני וקוסמטיו ואין
 דינם משתנה על ההלכה.

Moreover, according to what has been clarified, the formation of the organs of these people do not have real essence, and these organs are only “artificial.” Certainly, no real change occurred, rather only an external cosmetic change, and the verdict of halacha does not change.¹⁰

At first glance, Ben-Ephraim’s categorization of these genitals as merely artificial may imply that the genitalia of post-operative transgender people may not constitute *ervah* at all. In fact, Tzvi Sinensky, author of the dissertation “*Lo Yilbash* as a Case Study in Halakhic Conceptions of Masculinity,” seems to interpret it as above, asserting that incest cannot be committed with artificially reconstructed sex organs since they are not real genitals.¹¹ However, it is highly plausible that Ben-Ephraim considers post-operative genitals artificial only insofar as they do not change the person’s halachic sex, but not to the extent that they do not constitute genitals at all.

Subjective *Ervah*: Paradigms of gender definition applied

Our discussion so far has centered on the objective paradigm of *ervah*. This next portion will address gender-based *ervah* in the subjective and nominalist paradigms, using one defining Talmudic passage. In *Brachot* 24a, the Gemara writes:

אמר ר' יצחק: טפח באשה ערוה... לוֹמַר לָהּ כָּל הַמִּסְתַּכֵּל בְּאַצְבָּע
 קִטְנָהּ שֶׁל אִשָּׁה, כְּאִילוּ מִסְתַּכֵּל בְּמָקוֹם הַתּוֹרָף. אֵלָּא בְּאִשְׁתּוֹ וְלִקְרִיאַת
 שְׁמָע.

R' Yitzchak said: [the exposure of] a handbreadth in a woman is *ervah*... [As if] to say to you: all who look at the little finger of a woman, it's as if he looks at her genitals. Rather, [this is referring to] with his wife and the recitation of *shema*.¹²

Here, the Gemara concludes that any handbreadth of a married woman’s body — including customarily exposed parts like the fingers — becomes *ervah* in the context of her husband reciting *shema*. While this level of exposure is generally innocuous, the presence of the male viewer [husband]

¹⁰ Idan Ben-Ephraim, *Dor Tahepukhot*, 34.

¹¹ Sinensky, “*Lo Yilbash* as a Case Study in Halakhic Conceptions of Masculinity,” 236.

¹² “*Brachot* 24a,” translation my own.

in the sancta temporarily transforms it into the legal category of nakedness, forbidding its presence during the act of *kriyat shema*, the reading of the *shema* prayer.

This passage introduces the concept of “situational *ervah*.” when a certain element is introduced, something previously not in the category of *ervah* may come to be considered *ervah*. Medieval halachist Shlomo ben Avraham ibn Aderet, also known as the Rashba, affirms this view. Commenting on this Gemara, he writes:

ודוקא לאחרים ולאנשים ומשום הרהור, אבל לעצמה לא דהא קתני האשה יושבת
וקוצה לה חלתה ערומה.

[It is nakedness] only for others and for men because of [sexual] thoughts, but not for herself, as [the mishnah] taught that a woman can sit and take out challah naked.¹³

Consistent with Rashba’s interpretation, it is the male viewer whose gaze “activates” temporary *ervah* in the female body, while that body part does not objectively constitute *ervah* on its own. One can interpret this with a gender-inflexible approach, maintaining that this assumed cisgender and heteronormative formation remains the end-all-be-all of this halacha: male perception triggers situational *ervah* in the female body because men are assumed heterosexual. Under this gender-inflexible approach, cisgender male perception forever holds exclusive determinative power over the legal status of women’s — and trans people’s — bodies.

However, one may also interpret this with a gender-expansive approach. Since the reasoning for this halacha centers around the nature of one’s internal sexual thoughts, we can apply the ability to designate situational *ervah* to any sexual agent. A gender-expansive approach may grant modern women, recognized sexual initiators, the ability to activate situational *ervah*. Further, this formula becomes subject to change under homo-normative or bi-normative microcultures. Indeed, Rashba’s language may hint towards this more expansive approach. He writes that the body is rendered *ervah*, “only for others and for men, because of [sexual] thoughts/ולאנשים ומשום הרהור דוקא לאחרים.” While it is possible that he simply meant to specify the “others” as men with a literary redundancy, it is also plausible that Rashba— consciously or unconsciously— included within his interpretation the possibility of non-men who have sexual thoughts about women.

The Gemara continues with a further explication of “gendered *ervah*”—the rest of the paper will elucidate this passage exploring multiple paradigms of gender definition. Brachot 24a continues:

¹³ “Rashba on Berakhot 24a,” translation my own.

אמר רב חסדא: שוק באשה ערוה, שנאמר: "גלי שוק עברי נהרות", וכתוב:
 "תגל ערותך וגם תראה תרפתך". אמר שמואל: קול באשה — ערוה, שנאמר:
 "כי קולך ערב ומראה נאה".

אמר רב ששת: שער באשה ערוה, שנאמר: "שערך כעדר העזים".

Rabbi Chisda said: the calf of a woman is nakedness, as it says 'reveal the calf and cross rivers,' and it is written 'Your nakedness will be revealed and you will see your shame.' Shmuel said: the voice of a woman is nakedness, as it says 'because your voice is sweet and your appearance beautiful.'

Rav Sheshet said: the hair of a woman is nakedness, as it says 'your hair is like a flock of goats'¹⁴

Here we have three specific body attributes that, when found on a woman, are defined as *ervah*. Rashba also applies the reasoning of situational *ervah* to these as well: these parts do not constitute objective nakedness but are forbidden for men to gaze at while in the sancta.¹⁵ This paper will now turn to explore this gender-activated *ervah* using 3 paradigms of gender definition: (1) genotype (2) genitalia and (3) phenotype.

Genotype: Defining Gender by Chromosomes.

While the ancient rabbis mentioned nothing of chromosomal sex, a number of prominent Orthodox rabbis in the past century, including R' Moshe Feinstein, have asserted that genotype should resolve cases of disputed halachic sex.¹⁶ In other words, anyone with XX chromosomes is a halachic woman, and anyone with XY chromosomes is a halachic man. While this method may seem desirable for its straightforward and definitive answers, it imposes a strict binary on something that, at least occasionally, naturally defies such a binary. This could be incredibly burdensome for trans and intersex people. A defining Mishnah states:

רבי מאיר אומר אנדרוגינוס בריה בפני עצמה הוא ולא יכלו חכמים להכריע עליו אם הוא איש או אשה

R' Meir said: the androgynous is a creation unto itself, and the sages could not decide on him whether he is a man or a woman.¹⁷

While much may be said about the androgynous' relationship to trans and intersex people, it is clear that the rabbis set a realist precedent that

¹⁴ "Berakhot 24a," translation adapted from Sefaria.

¹⁵ "Rashba on Berakhot 24a."

¹⁶ Gray, "The Transitioning of Jewish Biomedical Law," 89.

¹⁷ Mishnah Bikkurim 4:5

acknowledges gendered existence beyond a binary.

Furthermore, applied to our case, we would find that the presence of any XX-chromosome person in front of an XY-chromosome person would trigger situational *ervah* in the sancta. Given that situational *ervah* is about the viewer's own internal sexual thoughts rather than the objective presence of nakedness, this formula creates an absurd equation when we consider trans and intersex subjects. The presence of a phenotypically male female-to-male (FTM) trans person would render another's act of *kriyat shema* prohibited, while the reciter receives no indication of their transgression.

Genitalia: Defining Gender by Current External Appearance of Genitals

Another possible method of determining halachic gender uses the current appearance of the genitalia to define sex. Notably, this would allow SRS to change a trans person's halachic gender. Rabbi Eliezer Waldenberg, leading 20th-century Jerusalemite medical ethicist and author of the halachic compendium *Tzitz Eliezer*, writes that a sex-change surgery does change one's halachic gender, to the point that it dissolves one's previously heterosexual marriage without requiring a bill of divorce.¹⁸ Applying this reasoning to the gender-inflexible interpretation of situational *ervah*, the male who can trigger situational *ervah* in a woman's body is anyone with a penis, including trans men who have undergone SRS, and lesbian or bi-trans women who have not.

With an opposing and yet sympathetic opinion, Ben-Ephraim holds that SRS does not change halachic sex but the trans person in question must act in accordance with their chosen gender in many matters of practical halacha.¹⁹ While both of these rabbinic authorities consider the halachic effects of SRS, others assert that it has no place under any system of Jewish law.²⁰ R. Hananya Yom Tov Lipa Teitelbaum of the Satmar community writes, "Anyone who acts thusly to surgically remove the male organs, in order to change to female... is no longer classified as a Jew...it is a mitzvah to ban and separate from and expel this person completely from the community of Israel."²¹

Phenotype: Defining Gender by External Appearance

When using current external appearance to define gender, one can refer to two primary indicia: the appearance of genitals, and secondary sex characteristics— i.e. how a person appears to others in daily life. Under the gender-expansive paradigm of situational *ervah*, it is how the person in question is perceived by the viewer that determines the possibility of sexual

¹⁸ Gray, "The Transitioning of Jewish Biomedical Law," 88-9. ; Sinensky, "Demystifying R. Eliezer Waldenberg on Sex Reassignment Surgery."

¹⁹ Ben-Ephraim, *Dor Tahepukhot*, 34.

²⁰ Gray, "The Transitioning of Jewish Biomedical Law," 83-4

²¹ Gray, "The Transitioning of Jewish Biomedical Law," 84

thoughts, not a hidden form of halachic sex (like genitals or genotype). Indeed, while Ben-Ephraim maintains that SRS does not change halachic sex, he advocates that the phenotypically assimilated trans person in question should act as their chosen gender in many matters of practical halacha. He reasons:

ואולם, בעניני הלכה מסויימים אין אנו מתחשבים בצורת בריאתו הראשונה של האדם, אלא מתייחסים אליו בהתאם למראהו החיצוני הנוכחי. וכגון, באיסור "לא ילבש", טפח וקול באשה ערוה, נגיעה, יחוד ועוד, משום שאיסורים אלו נובעים מחשש שיבוא האדם לידי עבירה...

However, in certain halachic matters, we do not consider the form at his first creation, rather we treat him according to his current respective external appearance. For example, with the prohibition of “he should not wear [the clothes of the opposite sex],” a handbreadth and the voice of a woman is *ervah*, touch, seclusion, because these prohibitions are derived from worry that a person will come to the hands of sin...²²

Because these halachot relate to human sexuality, which is far more fluid and aroused by much more than genitalia or genotype, gendered practice is defined by how the person appears to others. Consequently, even within the gender-strict paradigm, a trans woman’s calf, hair, and voice are subject to situational *ervah*, regardless of her genitalia or genotype. Inversely, the calf, hair, and voice of a trans man are not.

Conclusions

Rabbinic conceptions of nakedness include two general categories of *ervah*: that which remains objectively so at all times and that which may become subjectively and temporarily categorized as such by a viewer. While genitalia constitutes objective *ervah* regardless of gender, subjective *ervah* remains highly gender-based. In a gender-inflexible approach, the male viewer will always activate situational *ervah* in the female body. In a gender-expansive approach, all sexual agents have the capability to activate situational *ervah* in the person they are looking at, regardless of gender. One finds rabbinic support for all three paradigms of gender definition discussed: genotype, genitalia, and phenotype. However, because the underlying reason for situational *ervah* is the potential for sexual thoughts, even if one’s phenotype contradicts one’s “halachic sex,” phenotypic gender is most relevant when defining subjective *ervah*.

²² Ben-Ephraim, *Dor Tahepukhot*, 34. Translation adapted from Google Translate.

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