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Mamzerut

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The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.

שאלה

Is mamzerut operative in our community?

תשובה

Why is this תשובה necessary? At first impression, the issue of mamzerut in the Conservative movement is settled. The Rabbinical Assembly Committee on Law and Standards has held on two occasions that "the institution of mamzerut is inoperative." This halakhically pivotal holding is contained in the minutes of the meeting of June 23, 1970, and was reaffirmed by the smaller Steering Committee on February 14, 1977. There is no record of the votes and only a sparse written discussion. No responsa on mamzerut were ever submitted. The lack of written analysis conformed to the workings of an earlier era of the Committee on Jewish Law and Standards.

Since 1985, a responsum is written prior to a CJLS vote. Responsa provide legal analysis and focal points of discussion. Such a written record serves to explain our rationale to our colleagues and to educate our larger constituency. The reasoning and decisions of the CJLS define who we are as a halakhic movement. There is a need to revisit mamzerut with a thorough analysis because this halakhic question goes to the core of how we as Conservative Jews address the clash between a Torah precept and moral sensibilities. The purpose of this responsum is to decide anew and to provide the underlying halakhic reasoning of our movement's stand on mamzerut.

Who is a Mamzer and What are the Consequences?

Torah Origins

Deut. 23:3 condemns the mamzer:

לא יבוא ממזר בקהל ה׳ גם דור עשירי לא יבא לו בקהל ה׳.

> A mamzer shall not enter into the congregation of the Lord; none of his descendants, even in the tenth generation, shall be admitted into the congregation of the Lord.

This is the only place in the Torah in which the term mamzer is used. Many of the concepts in this verse are unclear, eliciting a variety of questions: Who is a mamzer? What does it mean to be prohibited "from entering the community?" Is the ostracizing literally for ten generations? And why is the punishment for the mamzer so severe?

The Ambiguity of the Term "Mamzer"

The word mamzer appears in only one other place in the Tanakh, Zechariah (9:6):

וישב ממזר באשדוד והכרתי גאון פלישתים.

> And a mamzer shall dwell in Ashdod, and I will cut off the pride of the Philistines.

The obscurity of the term led to a variety of interpretations. The Septuagint translated mamzer as "offspring of a harlot."[1] Abraham Geiger attributed the origin of the word to מעם זר, "belonging to a foreign nation," which he understood as a condemnation of progeny of a non-Jewish father and a Jewish mother.[2] Both the Jerusalem and Babylonian Talmuds contain Rabbi Abahu's definition of mamzer as a conjugation of מום זר, a "strange blemish," suggesting a defect in a newborn's pedigree.[3]

The Rabbinic Definition

By the first half of the second century there was a consensus that a mamzer was the offspring of a forbidden union, but the Rabbis disagreed in defining the nature of the forbidden union. The Mishnah of Yevamot 4:13 reads:

> Who is a mamzer? "[The offspring of] any union of near relationship to which the term 'he shall not come' applies." These are the words of R. Akiva. Simeon of Teman says, "[the offspring of] any union for which the penalty is excision at the hand of Heaven (כרת)." And the halakhah is in accord with his words. R. Joshua says, "[the offspring of] any union for which the penalty is death at the hand of the Court." Said R. Simeon b. Azzai: "I found a family register in Jerusalem, in which it was recorded: 'So-and-so

[1] The reading is a result of changing the final ר into a ן. Louis Jacob's "The Problem of the Mamzer," in *A Tree of Life* (Oxford, England: Alden Press, 1984), p. 257.

[2] *Urschrift and Übersetzungen der Bibel* (Breslau, 1857), pp. 54-55, cited in David Novak's "The Conflict between Halakhah and Ethics: The Case of Mamzerut," *Halakhah in a Theological Dimension* (Chico, CA: Scholar's Press, 1985), p. 13. Novak relates that this early definition of mamzerut changed with Ezra's promulgation of a shift to the mother as the source of religious identity.

[3] J. Kiddushin 3:12, 64c, attributed to Abahu. The same idea is presented anonymously in Yevamot 76b.

> is a mamzer, because he is the offspring of a married woman,' which confirms the words of R. Joshua."[4]

The Mishnah states that the halakhah follows the opinion of Simeon of Teman. His criteria of sexual acts prohibited by כרת became the accepted definition of mamzer in the post-Mishnaic period and the rule is treated as a given in an anonymous mishnah.[5] In addition, Rabbi Joshua's holding that the offspring of sexual acts that warrant the death penalty also became accepted law. By the third century,[6] a mamzer was defined as the issue of a couple whose sexual relationship is forbidden according to the Torah and is punishable by כרת or death. Consequently, the definition of mamzer as contained in the Codes[7] encompasses the following three scenarios:

1. A child born as a result of incest, namely where the union is prohibited by Jewish law (עריות) subject to the punishment of excision כרת or the death penalty;[8]
2. A child born of the sexual intercourse of a married woman with a man other than her lawful husband;[9] and,
3. The child of a woman who, acting on the assumption that her husband had died, remarried and had a child from the second husband. When her first husband is proved to be alive, the child from the second marriage is a mamzer.

The Rabbis applied the Biblical verse to both men and women.[10] Although Simeon of Teman defined mamzer as the offspring of any union punishable by כרת, which would include sex with a menstruant woman, the Gemara exempted such a child as belonging to the category of mamzerut.[11] Finally, a mamzer is not properly translated as a "bastard," which in English is an illegitimate child, a category that does not exist in rabbinic Judaism.

What Does it Mean to be Kept Out of the "Assembly Of The Lord"?

On the surface, the Biblical phrase might restrict access to the Temple,[12] but the Rabbis understood the phrase more broadly due to the context of the surrounding verses.[13] The Rabbis interpreted to be "kept out of the assembly of the Lord" as prohibiting the marriage between a mamzer and an Israelite. A mamzer could thereby only marry another

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[4] The content of this mishnah is presented in an expanded form in Sifre Deuteronomy 248.

[5] Kiddushin 3:12.

[6] In Yevamot 45a, the third century Amora, Rabbi Dimi speaks in the names of Rabbi Isaac ben Aboudimi and Yehudah HaNasi as saying that "if an idolator or slave had intercourse with the daughter of an Israelite, the child born of such a union is a mamzer."

[7] S.A. Even HaEzer 4:13.

[8] Kiddushin 3:12; Yevamot 4:13. The categories of incest are listed in Lev. 18:6-18, 20.

[9] Yevamot 45b; Maimonides, M.T. Issurei Bi'ah 15:1; Tur and Beit Yosef, Even HaEzer 4; S.A. Even HaEzer 4:13.

[10] Yevamot 4:13; Sifre Deuteronomy 248.

[11] Yevamot 49a-b.

[12] As used in the following Biblical parallelism in Lam. 1:10 – כי ראתה גוים באו מקדשה אשר צויתה לא יבאו בקהל לך – "for she has seen that heathen nations invade her sanctuary, those whom you did forbid to enter into your congregation."

[13] Kiddushin 4:1; also see Yevamot 8:2, 76a, 78a; Kiddushin 72b.

mamzer,[14] a convert or a freed slave,[15] or a non-Jew.[16] If a mamzer married an ordinary Jew, the penalty was lashes and immediate divorce,[17] and their offspring were mamzerim.[18]

Except for the prohibitions of marriage, a mamzer was considered a full member of the Jewish community and was required to carry out all religious duties, including procreation. A mamzer was deemed a son and brother in respect to rules of inheritance, levirate marriage, and conduct towards parents.[19] His birth released his father's wife from the obligation of levirate marriage and חליצה. The mamzer was eligible to hold any public office, including service as a civil judge[20] and even theoretically becoming a king.[21] The Sages comment that a mamzer could achieve the status of a scholar, who took precedence over an ignorant High Priest.[22]

And yet, there was also ambivalence as to the full participation of mamzerim in communal life. The Mishnah in Soferim (1:13) says that some hold that a Torah scroll written by a mamzer is unfit for use in the synagogue.[23] Rabbi Moses Sofer (1762-1839) wrote that although a mamzer may receive ordination as a rabbi, a community should not appoint a mamzer as its rabbi.[24] Even more amazing and cruel is the ruling of Ismael ha-Kohen of Modena (Italy, 1723-1811), who permitted the branding of a child's forehead with the word mamzer, despite the rabbinic prohibition of tattoos, in order to prevent a violation of the biblical prohibition of marrying a mamzer. The twentieth century Munkacser Rav, Zevi Hirsch Shapira of Czechoslovakia, mentioned in a responsum the extreme measure of tattooing the mamzer's forehead and approved of it in theory.[25]

What Does the Torah Mean by an Exclusion for "Ten Generations?"

The Talmud understands "ten generations" as meaning forever.[26] Although the child of a mamzer and another Jew is considered a mamzer,[27] the rule allows for a loophole. The child

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[14] Yevamot 45b; Kiddushin 69a; 74a; Maimonides, M.T. Issurei Bi'ah 15:33; S.A. Even HaEzer 4:24.

[15] Kiddushin 73a, note Rashi there; Maimonides, M.T. Issurei Bi'ah 15:7; S.A. Even HaEzer 4:22.

[16] "Although it is generally prohibited for a freeman [even a freeman who is prohibited from marrying into the congregation] to cohabit with a Canaanite slavewoman, a mamzer is permitted to do so; see Kiddushin 69a. See Tosaphos below 79a ד"ה ונתינים for a reason as to why a mamzer is different in this regard." B. Yevamot 78a, the Schottenstein Edition (New York: Artscroll/Mesorah, 1999), n. 30.

[17] The Talmud records that the penalty for falsely calling someone a mamzer is lashes (Kiddushin 28a). The Tosafot comments, the penalty for the false accusation is commensurate with the penalty for a mamzer marrying a Jew. This rule gets codified in Isserles' S.A. Hoshen Mishpat 7:2. The requirement of an immediate divorce is stated in S.A. Even HaEzer 4:18; 22:24; 154:20.

[18] J. Kiddushin 3:12, 64a; Yevamot 78b.

[19] Yevamot 22a; Maimonides, M.T. Nahalot 1:7; S.A. Hoshen Mishpat 276:6.

[20] Sanhedrin 32b; Kiddushin 76a. Maimonides holds that this applies even if all three judges were mamzerim – M.T. Sanhedrin 2:9; also S.A. Hoshen Mishpat 7:2.

[21] Tosafot to Yevamot 45b comments that a mamzer remains "thy brother," which satisfies the requirement of Deut. 17:15 – "From among your brethren shall you set a king over you."

[22] Horayot 3:8; 13a. Neither the Mishnah, nor the Talmud's explication, define the term "takes precedence" in this specific case. The preceding Mishnah used the term "take precedence" to signify that the person would be saved first from danger; it is used in other mishnayot to refer to which has priority in terms of recognition.

[23] See S.A. Yoreh De'ah 281:4.

[24] Hatam Sofer, Even HaEzer pt. 2, no. 94.

[25] *Darkhey Teshuvah* 190:1, cited in Jacobs, "The Problem of the Mamzer," p. 265.

[26] Yevamot 8:3. This understanding is based on a גזרה שווה, an association of like words here and in the laws against Amonites and Moabites – Sifre Deuteronomy, Ki Tetze, sec. 249.

[27] Kiddushin 67a.

of a male mamzer and a non-Jew is born a non-Jew, who is therefore not a mamzer[28] and may convert to Judaism.

The Ethical Problem

A child is born a marital pariah due to no fault of his or her own, but rather for the sins of his or her parent. The unfair anguish inflicted by this halakhah is already voiced in Midrash Vayikra Rabbah as follows:

> "And I returned and considered all the oppressions that were done under the sun; and beheld the tears of those that were oppressed, and they had no comforter; and on the side of their oppressor there was power, but they had no comforter (Eccles. 4:1)."
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> Daniel (Hanina) the Tailor interpreted this verse: "all the oppressions," these are the mamzerim. . . .Their mothers committed a sin and these humiliated ones are removed?! This one's father had illicit sexual relations – What did he [the child] do? Why should it make a difference for him?
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> "They had no comforter," but "from the hand of their persecutors there is strength," this is the Great Assembly of Israel which comes against them with the power of the Torah and removes them based on "no mamzer shall enter the congregation of the Lord (Deut. 23:3)." Thus, God says, "I have to comfort them," because in this world they are refuse (פסולת), but in the Messianic Age (לעתיד לבוא). . .they are pure gold.[29]

Daniel the Tailor's sympathy for the mamzer is reflected in a legal debate over whether the mamzer will be purified in the Messianic era and be permitted to marry freely. Rabbi Meir said no and Rabbi Jose said yes.[30] The Jerusalem and Babylonian Talmuds are split as to whose opinion is correct. The former holds by Rabbi Meir and the latter by Rabbi Jose, with both citing the same Rabbi Joseph for concurrence![31] This debate reflects an ongoing split between those who interpreted scripture as literal and eternally binding regardless of an apparent moral grievance and those who were troubled by the moral implications and were willing to consider a promise of change, even if it had to wait for the Messianic era.

Daniel the Tailor's sympathy for the mamzer is linked to a Torah value emphasized by the prophets. The Torah says, "The fathers shall not be put to death for the [sins of their] children, nor children for [the sins of their parents]; every person shall be put to death for his [or her] sin."[32] At the same time there is a second strand in Torah, at least on the literal level, which deals harshly with innocent children. We are told that God remembers wrongdoing until the third or fourth generation.[33] The Moabites, the Torah declares, can never enter the people of Israel.[34] We are commanded to wipe out the Amalekites in every

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[28] Kiddushin 3:12.

[29] Midrash Vayikrah Rabbah 32:8; and in a shorter version, Ecclesiastes Rabbah 4:1.

[30] T. Kiddushin 5:4, ed. Zuckermandel, p. 342 – cited by Louis Jacobs, "The Problem of the Mamzer," p. 267.

[31] J. Kiddushin 313m, 64d and B. Kiddushin 72b.

[32] Deut. 24:16.

[33] Exod. 20:5 and 34:7; Num. 14:18.

[34] Deut. 23:4-8; Neh. 13:1.

generation, because of what their ancestors did to us.[35] And there is the law of mamzerut, which would keep the child of an illicit relationship outside the community.[36]

In the later Biblical writings the idea of protecting innocent children from the sins of their parents is emphasized. In the words of Ezekiel (18: 1-4; 18-19):

> The word of the Lord came to me: What do you mean by quoting this proverb upon the soil of Israel, "Parents eat sour grapes and their children's teeth are blunted"?[37] As I live – declares the Lord God – this proverb shall no longer be current among you in Israel. Consider all lives are Mine; the life of the parent and the life of the child are both Mine. The person who sins, only he shall die. . . .To be sure, his father, because he practiced fraud, robbed his brother, and acted wickedly among his kin, did die for his iniquity; and now you ask, 'Why has not the son shared the burden of his father's guilt?' But the son has done what is right and just, and has carefully kept all My laws: he shall live!

In Ketuvim we find a softening of the literal reading of the prohibition of future generations of Moab marrying an Israelite.[38] Ruth, the Moabitess, marries Boaz, an Israelite.[39] Even more remarkable, we read in the postscript to Ruth that her husband's ancestor Peretz was born from the union of Judah and Tamar. Peretz is ostensibly a mamzer, because Tamar was betrothed to Judah's third son, Shelah, according to the mandate of levirate marriage. Tamar's bethrothed status explains Judah's initial outraged response on hearing of Tamar's pregnancy.[40] He condemned her to death by burning. Nonetheless, not only are the offsprings of Peretz, and Tamar and Boaz, not barred from the people of Israel, among their descendants is King David, and his descendant is none other than the Messiah![41]

Protecting children from suffering due to no fault of their own seems to conflict with the thrice-repeated Biblical statement that God remembers the sins of fathers for three or four generations.[42] Once again, rabbis in the Talmud,[43] midrash,[44] and many classic commentators,[45] rejected the literal reading of the verses and, like Ezekiel, stated that God only punishes children if they acted wrongfully themselves, thereby imitating their sinful parents.

The rule of mamzerut conflicts with the evolving moral challenge that each person is to be punished for his or her own acts. In the words of Louis Jacobs, "Even though the law does not necessarily see it as a penalty, the fact remains that it is a disability of the most

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[35] Exod. 17:14; Deut. 25:19.

[36] Deut. 23:3.

[37] This folk expression is also condemned in Jer. 31:29 and Ezek. 18:2.

[38] Deut. 23:4-8; Neh. 13:1.

[39] The mishnah and Talmud parse the Torah prohibition as a restriction only on the marriage of male Moabites; see Yevamot 76b-77a.

[40] Gen. 39:24.

[41] Ruth 4:18-22.

[42] Exod. 20:5 and 34:7; Num. 14:18.

[43] Sanhedrin 27b.

[44] Mekhilta BaHodesh 6: "This only applies to those sons who themselves are wicked like their fathers." Also see Tosefta Yoma 5:13 on Exod. 34:7, ed. Zuckermandel: "A person sins once, twice, three times and is forgiven, as it says, 'forgiving iniquity, transgression, and sin' – three times, but thereafter God no longer remits punishment."

[45] Rashi, Sforno, and Ramban.

serious nature, intolerable within a legal system that prides itself on its passion for justice."[46] There is an additional moral problem with mamzerut as understood by the Rabbis. It deprecates the status of converts by permitting a mamzer to marry a convert, but not a native born Jew.[47] This conflicts with the moral value stated in the Talmud that a person is not to be reminded that he or she is a convert, lest it cause embarrassment (אונאת הגר).[48]

In recent years, the numbers of people who qualify as mamzerim have proliferated. In America, there are many who are married by a rabbi, receive a civil divorce but no *get*, and remarry a Jew – either with a Justice of the Peace or a Reform or Reconstructionist rabbi. The children of the subsequent marriage are technically mamzerim, although rarely was it the intent of the parents to knowingly violate the religious law.

In response to the halakhic problem of many Jews remarrying without a *get*, Rabbi Moshe Feinstein ruled that non-Orthodox weddings were not binding.[49] This solved the mamzerut question for the Orthodox. It only underscores our problem as a Conservative movement. We recognize as religiously binding the marriages between Jews when performed according to halakhic standards regardless of our colleagues' denomination. When those marriages end in civil divorce and no *get* is issued, a subsequent marriage poses the problem of mamzerut.

In light of the State of Israel's ingathering of Jews, there is an increased array of potential mamzerim. Rabbi Seymour Siegel was prescient when he wrote close to twenty years ago:

> The imposition of this norm causes untold difficulties, especially in the absorption of groups of Jews who have been removed from the main body of Israel, such as [India's] Bene Israel and the [Ethiopian] Falashas. As these groups have not been instructed in the specifics of religious divorce laws, they are presumed to include mamzerim within their numbers. The problem of mamzerut is bound to be exacerbated when large scale immigration occurs from the communist-bloc countries. Many women, it is to be assumed, married without religious divorces and therefore technically gave birth to mamzerim.[50]

Consequently, in the words of Rabbi Louis Jacobs, "There is a frightening proliferation of technical mamzerim on a scale that is completely unknown or even imagined in the classical period of the halakhah. In addition, there is the creation of a caste of untouchables, which further divide the Jewish community."[51] The risks are more than theoretical. The following are two cases from recent decades.

The Oshry Case

Rabbi Ephraim Oshry, a leading posek on the Holocaust and its aftermath, records in his collection of responsa the following case:[52] A young rabbi came to him for halakhic guid-

[46] Jacobs, p. 265.

[47] Kiddushin 73a and see Rashi there; Maimonides, M.T. Issurei Bi'ah 15:7; S.A. Even HaEzer 4:22.

[48] Bava Metziah 58b.

[49] משה פיינשטיין, "בקידושי רעפאמער," ספר אגרות משה, אבן העזר, חלק ג, סימן כה, דף תמז (1970). Although this תשובה is written about the halakhically inoperative quality of Reform weddings, Orthodox rabbis have also applied the holding to Conservative rabbis.

[50] Seymour Siegel's "Ethics and the Halakhah," *Conservative Judaism and Jewish Law* (New York: Rabbinical Assembly, 1977), p. 129.

[51] Jacobs at p. 271.

[52] אפרים אשרי, *שאלות ותשובות ממעקים*, חלק ג, סימן ט, דף עג (Brooklyn, NY: Modern Linotype, 1959). An English translation, "The Case of the Mamzer Rabbi," is found in Ephraim Oshry's *Responsa from the Holocaust* (New York: Judaica Press, 1989), pp. 190-193.

ance. The young man's mother had married before the Holocaust. Her husband was taken away by the Nazis and did not return after the war. She remarried and had a son, who became a rabbi. Decades after the war, the woman's first husband found "his wife." He was outraged that she had remarried and in anger, he publicized that her son, the rabbi, was a mamzer. The son, who lived in Australia and was married with several children, wrote the famous posek for guidance.

Rabbi Oshry examined the responsa literature and with a confession of pain concluded that the young man was, unfortunately, a mamzer. He advised that the man should cease to be a rabbi so as not to profane the Divine Name (חילול ה׳) and implied that, as a mamzer, he should not be married to a Jewess.

Goren's Langer Case

The most publicized case of mamzerut in recent decades was the predicament of the Langer children.[53] The background was as follows. In August, 1951, Avraham Borokovsky, a convert, appeared with his wife Chava Borokovsky-Langer, before a bet din in Tel Aviv and applied for a religious divorce. Although the couple had lived in Israel for close to twenty years, they had not lived together for many years. The religious court learned that in the intervening years, Chava had married a second man, Otto Langer, and had done so by lying about her marriage status to the rabbi who performed the second marriage. Chava and Otto Langer had two children, Chanoch and Miriam. The bet din of Tel Aviv granted Avraham and Chava Borkovsky a divorce in November, 1955 and declared that Chanoch and Miriam Langer were mamzerim.

In May, 1966, Chanoch Langer applied to marry, which began a series of hearings and remands. The bet din of Petach Tikvah in 1967 held that Chanoch's status as a mamzer remained unchanged and he could not marry his Jewish fiancee. The Supreme Religious Court affirmed the decree in 1970. The case received a great deal of coverage in the Israeli and Jewish press. It was decried as a travesty of justice that a native Israeli, a man who had a bar mitzvah and had served in the Israeli army, should be prohibited from marrying a Jew, because of the misdeed of his mother.

On November 19, 1972, then-chief Ashkenazic rabbi Shlomo Goren issued a ruling in his own name and in the name of eight other rabbis, whose names he refused to reveal, permitting the Langers to marry. He justified his reversal of the earlier courts on the basis of new evidence that Avraham Borokovsky was an insincere convert, which meant that his Jewish marriage was nullified *ab initio* and hence the children were in no way tainted.

Jewish legal authorities protested Goren's finding because of his violation of normal halakhic procedure. Among the irregularities were the following:

A. Goren failed to give Borokovsky the opportunity to refute the charge that he had renounced his conversion to Judaism by having reverted to Christianity. In fact, there was much evidence that he had conducted himself as a practicing Jew.

B. When there is "new evidence," the normal procedure is to remand the case to the original bet din, which was not done here.

C. Goren refused to reveal the names of the other rabbis who issued the decree removing the stigma of mamzerut from the Langer children.

[53] An analysis of the Langer case is presented in J. David Bleich's *Contemporary Halakhic Problems* (New York: Ktav, 1977), pp. 167-176.

The Langer case reveals that there are many rabbis who feel bound by the law of mamzerut and are willing to enforce it. Regrettably, the court system in Israel continues to keep lists of people who are labeled mamzerim. Moshe Zemer, a prominent Israeli legal scholar writes: "The Israel religious councils and official rabbinate use a central computer bank to trace the descendants of persons accused of alleged adultery or incest a generation ago or more."[54] There are many Jews in our day who are technically mamzerim and for some there are real consequences. Before discussing how this injustice can be corrected let us look at the reasons offered for the law and the attempts to ameliorate its impact.

The Rationales of Mamzerut

There are two reasons offered for the law of mamzerut: deterrence against illicit sex and the need to maintain the purity of Israel.

Deterrence Against Promiscuity

Jewish tradition emphasizes the sanctity of the marriage bond. Adultery is the seventh of the Ten Commandments[55] and the penalty for violation of this command is death.[56] The following midrash emphasizes that marital faithfulness preserved the Israelites:

> "A closed garden":[57] Rabbi Pineas said in the name of Rabbi Hiyya bar Abba that because Israel protected themselves in Egypt from sexual immorality (מן הערוה), they were redeemed from Egypt. . . because there was none among them who was promiscuous (פרוץ ערוה), except, you should know, one woman, and Scripture publicized her, that is, "Shlomit bat Dibry of the tribe of Dan. . . ,"[58] "bat Dibry" – R. Isaac said that she brought pestilence on her son.[59]

Two things are learned of the Rabbis' perception of the generation who received Torah: adultery was rare, and when it occurred there were severe consequences for the children. The threat of punishment on children was viewed as a powerful and successful deterrent against sexual violations. In a later generation, Maimonides (Spain-Egypt, 1135-1204) wrote:

> Why is a mamzer penalized because of the immoral behavior of his parents? This was meant to be a deterrent against immoral behavior. In other words, the man and woman who have illicit relations should realize that because of their immorality their children will be penalized by society and severely limited in their choice of a mate.[60]

In the times of the Torah, the Talmudic period, and even the Middle Ages, mamzerut may have served as a check against improper sexual relations. In those times people lived in a closed society, and the only form of marriage was religious. In our open society, mamzerut is no longer a deterrent.

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[54] Moshe Zemer, "Purifying Mamzerim," *Jewish Law Journal* 10 (1992): 99.

[55] Exod. 20:13; Deut. 5:17.

[56] Lev. 20:10.

[57] Song of Songs 4:12.

[58] Lev. 24:10.

[59] Vayikra Rabbah 32:5; also see J. Kiddushin 1:4; Sifra, Kedoshim, 90d; Yevamot 37b.

[60] Maimonides, *Sefer HaMitzvot*, lo ta'aseh 354; see also M.T. Issurei Bi'ah, ch. 15.

Although the original intent of mamzerut may have been to limit adultery, the Rabbis, acting out of sympathy for the innocent victims, almost eliminated its application to infidelity. The Talmud says that a child of a married woman, whose husband was absent during the gestation, is presumed to be the lawful father.[61] Toward that end, Rabbi Tosfaah, a seventh-generation Babylonian Amora, held that a woman, whose husband was away on travel, was able to carry a fetus for a full twelve months.[62] This ruling, a clear violation of medical experience, was maintained by later codes, including Maimonides' Mishneh Torah.[63]

An accuser had the burden of proof of mamzerut,[64] which required two witnesses to substantiate the charge. Even if adultery was demonstrated, the presumption remained that the lawful husband had conceived the child. On the general principle that a person's confession of his or her turpitude is not admissible as legal testimony the wife and mother could not by her assertion alone classify her child as a mamzer. It was and is the rare case of a husband willing and able to demonstrate with witnesses that his wife's offspring are not his own. In our time the mother's husband might even demonstrate the absence of paternity for purposes of mamzerut by DNA testing, a possibility that has not yet been addressed in the responsa literature.

In our day, mamzerim are overwhelmingly created as a result of Jewish ignorance or apathy, and not promiscuity. Mamzerim are technically produced when a woman has children with a subsequent husband, having failed to obtain a *get* after her first marriage. In contrast to an earlier day, couples in our time are married civilly by a Justice of the Peace or by rabbis who are self-defined as non-halakhic. Rather than flaunting immorality, such couples are making a commitment to monogamy. If the rationale of mamzerut was to prevent promiscuity, it no longer does so, and, if anything, simply punishes the children of the ignorant who are committed to marriage.

Communal Purity

Communal purity is not mentioned in the Talmud as a justification for mamzerut, but it is advanced among medieval and even contemporary commentators. The clearest expression is found in *Sefer HaHinukh* (anonymous, sixteenth century):

> The very conception of the mamzer is exceedingly evil, having been brought about in impurity, abominable intention, and counsel of sin, and there is no doubt that the nature of the parent is concealed in the child [כי טבע האב צפון בבן]. Consequently, God, in His love, has kept the holy people away from him [the mamzer] just as He has separated us and kept us far away from all that is evil.[65]

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[61] Sotah 27a.

[62] Yevamot 80b.

[63] M.T. Issurei Bi'ah 15:19 – Maimonides adds that the period is not longer than twelve months. Halakhot Gedolot does not accept the twelve month limitation. The S.A. (Even HaEzer 4:14) records both the twelve month limitation and its rejection and holds that since the authorities differ, a child born more than twelve months after the husband's departure from his wife is considered a "doubtful mamzer." Louis Jacobs cites a mystical, magical explanation for how a woman could get pregnant with her husband's child during her husband's apparent absence. The medieval explanation is that the man could have returned swiftly and secretly through the use of the "divine name." Louis Jacobs, pp. 263-264, citing Rosh to Kiddushin, beginning of ch. 4 and Tosafot to Kiddushin 73a, s.v. מאי איכא.

[64] Kiddushin 76b; see also Bava Kamma 35b.

[65] *Sefer HaHinukh*, mitzvah 560.

Ben Zion Uziel, a prominent, contemporary Israeli rabbi, asserts that the concept of communal purity is the underpinning of mamzerut. He writes, "A mamzer's base status should not be seen as a punishment for the sin of his parents, but is rather quasi-physical."[66] Leading medieval rabbis express a link between mamzerut and communal purity. Although Maimonides (Spain-Egypt, 1135-1204) explains the reason for mamzerut as deterrence, he also writes, "The noble people of Israel has to be protected from any adulteration of its purity."[67] Nahmanides (Spain-Israel, 1194-1270) develops this idea:

> The Jew attaches great importance to the strength of the family unit. It is inconceivable to him that an element which might reduce the strength of this valuable asset be admitted into the family. No chances must be taken because too much is at stake.[68]

"Communal purity" rings false in our day. We are not a "pure people." Although Jews may share a greater likelihood of certain genes, such as Tay-Sachs, there is no gene unique to Jews. In regard to breeding, we do not possess a record of pedigree, referred to in some classical sources as *Megillat Yehusin*. In fact, mamzerim have mixed into the community for generations. Already, the Talmud records, "A family that has assimilated [into the community] may remain assimilated."[69] Similarly, Rabbi Eliezer ben Hyrcanus (Palestine, 40-120 C.E.), who is normally known for his stringency, states in the Talmud that if he were asked to rule on the genealogy of a third generation female mamzer, he would declare her pure.[70] The principle of refraining from identifying mamzerim in the community was codified and explained by Moses Isserles (Poland, d. 1572) in his gloss to the Shulhan Arukh:

> It is forbidden to reveal the blemish of a family that is not public knowledge. If the family has been assimilated, it should be left with its presumption of validity, for all families are valid in the Messianic age.[71]

In sum, we, as a people, are mixed with mamzerim. We cannot justify punishing people for the sins of their parents because of the false assertion of purity. Due to the hardship imposed by the label mamzer, rabbis of previous generations sought to narrow the category.

Partial Solutions

The following are a variety of proposed solutions to mamzerut, each of which is fundamentally incomplete. Implicit in all these attempts is the desire to remove the stigma of mamzerut. The survey demonstrates that past generations were stymied by the challenge of changing this Biblical law.

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[66] Mishpetei Uziel 4, Even HaEzer, no. 3.

[67] Maimonides, *Guide for the Perplexed* 3:49.

[68] Nahmanides' commentary to Deut. 23:3.

[69] Kiddushin 71a-b.

[70] Yevamot 78b. A justification for not examining a person's lineage for mamzerut was the claim in the Talmud Yerushalmi that a mamzer does not live for more than thirty days, which meant that mamzerim were not available for marriage. A variation of this assertion is debated in the Babylonian Talmud, which distinguished between a "completely unknown" mamzer, who some say does not survive at all, and a "somewhat known" mamzer, whose taint is allowed to continue for only three generations, attributed to Rabbi Eliezer (Yevamot 78b).

[71] S.A. Even HaEzer 2:5.

Purification – Rabbi Tarfon's Approach

The Talmud offers a legal loophole to give at least a male mamzer's children entry back into community:

> Rabbi Tarfon says that male mamzerim can be purified. How? A mamzer marries a non-Jewish slave woman (שפחה) and the child born of this union will thus have the status of a slave. Let him then free him (שחררו) and his son will have the status of a free Jew (בן חורין). Rabbi Eliezer says that he will have the status of a slave who is a mamzer.[72]

Both Talmuds and the codes hold according to Rabbi Tarfon.[73] Simultaneously, there is a debate in the Talmud whether such a marriage is permitted at the outset (לכתחילה) or only after the fact (בדיעבד). Maimonides rules that such marriages should be permitted at the outset, because of the need to rectify the status of the children.[74]

Whether Rabbi Tarfon's solution is applicable in our own day is largely a theoretical question, because we live in a monogamous society and we do not have a legal category of concubines. In a Yeshiva law-review-like article written in 1994, Rabbi David Katz examines the contemporary value of Rabbi Tarfon's proposal as a solution to mamzerut.[75] Katz ruled out intermarriage as a Jewish option and focused instead on whether a woman in our day could become a concubine (שפחה). After thirty-one pages of analysis, he concluded that it is "a tenuous option for our day." The major obstacle, he said, was that our society does not permit any forms of slavery.[76] As Conservative Jews, we also reject the category of concubine relationships and the demotion of a woman to such a lower status.

Rabbi Tarfon's "solution" fails to resolve the mamzerut dilemma for another reason, too. Tarfon's recommendation only purifies the offspring of a mamzer (man) and not a mamzeret (woman). He encourages a man to marry a non-Jew, because the children of a non-Jewish woman are non-Jews, who may then convert and be considered as Jews, untainted by their father's status. This "remedy" fails for a mamzeret, because her child is Jewish and therefore a mamzer. In addition, his approach would restrict Jews to non-Jews, a particularly troublesome alternative for our day when the greatest challenge to the Jewish community is intermarriage.

Nullification by the Maharsham's Legal Loophole

There is another legal loophole that in theory enables nullification of marriages that were performed legally, which would provide a possible solution for a child of an illegitimate second marriage. This theoretical construct begins with a husband's right, as described in the Talmud,[77] to appoint a proxy to deliver a *get*. The husband would remain married if he annulled the proxy at any point prior to the delivery of the *get*. Rabban Gamaliel feared that the proxy might unknowingly give an invalid *get* to an

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[72] Kiddushin 3:13.

[73] Kiddushin 67a and J. Kiddushin 3.15/64d/bottom, which quotes Rabbi Yehudah in the name of Shmuel holding that the law is according to the opinion of Rabbi Tarfon. Also, see Rashi on Kiddushin 67a; Maimonides, M.T. Issurei Bi'ah 15:3; Tur and Beit Yosef Even HaEzer 4; S.A. Even HaEzer 4:20.

[74] M.T. Hilkhot Issurei Be'ah 15:4; also see Karo's S.A. 4:20.

[75] David Katz, "The Mamzer and the Shifcha," *The Journal of Halacha and Contemporary Society* 28 (1994): 73-104.

[76] Moreover, for a Jew to marry a slave he must first sell himself into slavery.

[77] Gittin 32a.

unsuspecting woman, which could lead to the proliferation of mamzerim. Consequently, he prohibited a man from canceling the proxy unless the proxy was physically present. To enforce Rabban Gamaliel's decree, the Talmud held that a bet din could annul a marriage retroactively if the husband cancelled the proxy prior to the delivery of the *get*. The Tosafot noted that Rabban Gamliel's decree could in theory legitimize acts of adultery, with the cooperation of the husband, thereby exempting an adulterer and adulteress from punishment.

The Maharsham, Rabbi Shalom Mordecai Schwadron (Galicia, 1835-1911) quotes the Tosafot in response to a question on mamzerut.[78] The case was as follows: A man from Odessa went abroad. After twelve years and no communication with his wife, his family notified her that her husband was dead. Her brother-in-law performed חליצה and she later remarried with permission of the bet din. During her pregnancy, she received word that her first husband was still alive and that he had lent his passport to another man who had died and was mistakenly identified as her husband.

The rabbi of Odessa asked the Maharsham for a determination of the fate of the woman and her child. The Maharsham concluded that she needed a divorce from both her husbands and that her child was a mamzer. In the Maharsham's discussion he noted a theoretical solution to remedy the status of the child. The first husband could have divorced his wife with a proxy and then cancelled the proxy privately, which would have given the bet din grounds to annul the first marriage. Unfortunately, the Maharsham conceded that his elegant solution of rectifying the child's status was inapplicable because the first husband had already divorced his wife.

Justice Moshe Silberg proposed using the power of annulment as a solution to mamzerut.[79] Rabbi David Novak supports Silberg's proposal as a remedy when the status of the child cannot be ignored. Novak writes:

> The main argument against this solution, as we saw before, was that the Tosafists feared it would lead to sexual immorality since any violated marriage could be annulled retroactively. However, the answer to this objection today is threefold: (1) In today's atmosphere of unprecedented ignorance and apathy among the majority of the Jewish people, fear of the consequence of mamzerut is no longer operative in their sexual decision making; (2) Improperly initiated second marriages, which can easily be performed under either secular or non-halakhic Jewish auspices, are not considered "fornication" by the majority of the Jewish people; and, (3) Any situation which could lead a segment of the Jewish people to believe that intermarriage is the only solution to their personal and familial dilemma must be rectified since intermarriage and its attendant assimilation pose today's greatest threat to the survival of both the Jewish people and Judaism. As the mishnah noted in a famous passage, changes in the law are called for when worse results will emerge from staying with the status quo, "'It is time to act for the

[78] Teshuvot Maharsham, vol. 1, no. 9, cited and discussed in J. David Bleich's *Contemporary Halakhic Problems* (New York: Ktav, 1977), pp. 162-167.

[79] "ביטול החוק למען קימו," *Panim el Panim* 705 (12 Jan. 1973): 14ff. Cited by David Novak, "The Conflict between Halakhah and Ethics: The Case of Mamzerut," *Halakhah in a Theological Dimension* (Chino, CA: Scholars' Press, 1985), p. 28.

> Lord; they have violated your Torah.' (Ps. 119:126). R. Nathan said,[80] 'violate the Torah because it is time to act for the Lord!'"[81]

Although Novak makes a strong case for taking dramatic action in response to mamzerut, his annulment approach fails as a general solution, for the following reasons:

A. If a child was born of an adulterous relationship prior to the retroactive annulment of the marriage the children are mamzerim.[82]

B. It would require the full cooperation of the first husband, which is difficult to count on.

C. If a woman obtained a *get* from her husband after the birth of the illicit child, the husband cannot give her a second *get*, as in Maharsham's actual case.

D. The annulment process requires the cooperation of the wife, a cooperation that we cannot always rely on.

Beyond theoretical problems, there is the ethical rub. Novak acknowledges that even with annulment the children would remain with an informal social stigma as being children of *de jure* "fornication," which, he adds, would "prevent some others from marrying them."[83] In sum, Novak's annulment solution may not cover all cases, is unwieldy in many cases, and leaves the child with a "social stigma." Novak acknowledges that until now the annulment approach was only theoretical because of fear of abuse, but is worth implementing due to the exigency of the situation. Yet, Novak stops short of using the same legal construct of "It is time to act for the Lord" to uproot the concept of mamzerut. He refrains from this more complete change because, he writes, "The authority of any legal system cannot tolerate picking and choosing which institutions are to be upheld and which are to be dropped."[84]

Silberg's Civil Marriage Solution

Professor Moshe Silberg, formerly a justice of the Israeli Supreme Court, advocates a system of civil marriages for mamzerim.[85] He does so in response to a close reading of Maimonides. Silberg points out that Maimonides, in the Mishneh Torah, only prohibits the marriage of a mamzer and a Jew,[86] which Silberg asserts leaves open the possibility of concubines or civil marriage.

Rabbi Judah Dick writes that Silberg's analysis of Maimonides is mistaken.[87] Although Maimonides is silent on concubines in the paragraph on mamzerut, Dick writes, "Maimonides is explicit on limiting concubines to kings,"[88] and prohibiting sex

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[80] M. Berakhot 9:5.

[81] Novak, p. 28.

[82] Nahmanides, Shitah Mekubezet, and Meiri to Ketubbot 3a, cited in Bleich, p. 164.

[83] Novak, p. 28.

[84] Ibid., p. 27.

[85] Moshe Zemer, "Purifying Mamzerim," *Jewish Law Annual* 10 (1992): 99-113.

[86] Maimonides, M.T. Hilkhot Issurei Bi'ah 15:2.

[87] See Judah Dick in *HaPardes* (Tishri 5732), cited in Bleich, pp. 160-161.

[88] M.T. Hilkhot Issurei Bi'ah 15:2; Louis Jacobs in "The Problem of the Mamzer" (pp. 271-272) notes that Silberg would respond to critics that Maimonides would allow non-royalty to have sexual relations with a concubine. But, Jacobs counters, even so, it would not help a mamzer who is prohibited by Maimonides from a Jewish concubine.

outside of marriage.[89] Even if Silberg's reading of Maimonides is correct, his solution permits a "marriage," but the offspring are mamzerim. Moreover, a "solution" which would deny a Jew a traditional marriage under the huppah and would perpetuate the exclusion of the mamzer from normal Jewish life is not a solution.

Nullification of the First Marriage

The most common approach to "solving a mamzerut" case is to find a way to nullify the first marriage on a case-by-case basis. This is precisely what Rabbi Goren did in the Langer case by his holding that the first husband was not Jewish, due to later acts which demonstrated fraud at the time of "conversion," and hence no Jewish marriage had taken place. On a broader level, Rabbi Moshe Feinstein addressed the widespread, contemporary problem of mamzerut by holding that the weddings of non-Orthodox rabbis were invalid.[90] Since the non-Orthodox marriages were not binding, there was no need for a *get* and children of the marriages were untainted.

Nullification does not work for Conservative rabbis unless there is an actual defect in the original marriage. It is inadequate as a general approach, because not all marriages are performed improperly. Unlike Rabbi Feinstein, we accept the marriages conducted by Reform and Reconstructionist colleagues who have complied with halakhic standards.

Circumvention through Narrow Rules of Evidence

Many post-Talmudic rabbis circumvented mamzerut through applying narrow rules of evidence. Rabbi Louis Jacobs provides the following examples:[91]

A. When a mother confessed that her son was not her husband's, Benjamin Zeev of Arta (sixteenth century) did not accept the confession.[92]

B. Rabbi Moses Sofer (eighteenth century) would not conclude that a child born years after a man had left his wife was a mamzer.[93]

C. Rabbi Moshe Feinstein (twentieth century) ruled that a mother is not believed when she declares that she had been previously married and that her son from her second husband is a mamzer.[94]

Each of these examples reveals a desire to avoid the label of mamzerut and is explained by the rules of evidence as presented in the Shulhan Arukh. Regarding the case of Benjamin Zeev of Arta, a mother's confession is not acceptable testimony to impugn the status of her son.[95] Moses Isserles explains in his gloss that for a married woman, a presumption exists that any offspring are those of her husband. In the matter before Rabbi Moses Sofer, the rabbis were prepared to engage in medical (and mystical) fictions to explain how a legitimate child could have been conceived despite the apparent absence of

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[89] M.T. Hilkhot Ishut 1:1.

[90] משה פיינשטיין. "בקידושי רעפאמער," ספר אגרות משה, אבן העזר, חלק ג, סימן כה, דף תמז (1970).

[91] Jacobs, p. 270.

[92] Responsa, Binyamin Ze'ev, vol. 1, Even HaEzer, no. 136.

[93] Hatam Sofer, Even HaEzer, no. 10.

[94] Moshe Feinstein, *Iggrot Moshe*, Even HaEzer, pt. 3, no. 8, pp. 424-425.

[95] Even HaEzer 4:29. Moses Isserles adds that although there is a presumption that a married woman's offspring are those of her legal husband, there are those who hold that the presumption does not hold for an engaged woman (ארוסה).

the husband. Rabbi Moshe Feinstein could rely on the Talmudic principle that a person should not be believed to impugn him or herself (אין אדם משים עצמו רשע).

Yet, there are other evidentiary circumstances that are not reflected in these cases, where statements provide *prima facie* proof of mamzerut according to the Shulhan Arukh. If a man said, "This is not my fetus or my son," he is believed.[96] If a person says, "I am a mamzer," his testimony is accepted and his son is also classified as a mamzer.[97] The man is believed, because his confession does not impugn his own guilt. He is addressing the conduct of his wife or his parents and his claim is accepted. This was precisely the predicament that Rabbi Oshry faced; a man said that his wife's son was a mamzer, and the rules of evidence made that a compelling and binding claim on the judge. Hence, there are limits to a judge's ability to circumvent mamzerut through evidentiary rules alone.

Implicitly Ignoring Mamzerut

There was a consistent effort in the past to narrow the application of mamzerut by restricting the types of evidence that were admissible to prove adultery. Many rabbis went even a step further and ignored evidence of mamzerut. In the words of Rabbi Louis Jacobs:

> Since the majority of Jews who wish to marry are not mamzerim, the rule of probability can and should be relied upon. There are even rumors, quite persistent, that in prewar days some Orthodox Rabbis would drop broad hints to known mamzerim that they should emigrate to a community where they were not known and marry there.[98] . . .Nevertheless, a very good case can be made out for at least avoiding any investigation the purpose of which is to uncover the identity of mamzerim. This is certainly the norm among the Orthodox in most parts of the United States where cases of mamzerut rarely occur because the Orthodox rabbis are intentionally perfunctory in their investigation.[99]

In the aftermath of the Holocaust, for instance, it is remarkable how few cases of mamzerut arose. The Langer and Oshry cases are exceptions that prove the rule. The rabbis in Israel and America actively ignored the issues of mamzerut, which we may surmise occurred in many cases in the shadow of those horrific years.

We too may choose to ignore the category of mamzerut, but halakhic integrity demands that we justify our action. We need to give guidance to colleagues and congregants on this vexing problem when it arises. A clear statement as a halakhic movement is all the more urgent in the context of rabbis in Israel who keep the category of mamzerut alive, including the maintenance of computer records on mamzerut suspects. We need to address mamzerut precisely because it raises the question whether we will enforce a Torah law that strikes us as unconscionable in light of other Torah values. Mamzerut is a real problem for which only incomplete answers have been offered. In the words of Professor Ze'ev Falk, former rector of the Seminary's Beit Midrash in Jerusalem:

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[96] Even HaEzer 4:29.

[97] Even HaEzer 4:30.

[98] A precedent for rabbis encouraging suspected mamzerim to go where they are not recognized is in Yevamot 45a, in which both Rav Yehudah and Rava tell men to go where they are unknown. But, in those cases, as Rashi points out, the respective rabbis did not agree with the definition of mamzerut that was applied to the men, namely that a mamzer was the product of relations between an idolator or slave and a Jewish woman.

[99] Jacobs, p. 275.

> Injustice was felt, but there was not enough courage to change the law. Although doubts had been raised long ago as to the purity of pedigree of most people, the rules of impediments were nevertheless applied against those who were unfortunate enough to be known as mamzerim.[100]

Morality and Halakhah

Although mamzerut is morally reprehensible, it has remained operative in Jewish law because of systemic fears. The fear is that to make a change on moral grounds is to impugn God, which would unravel the system. Dr. David Weiss Halivni, Professor of Talmud at Columbia University, has stated that contemporary morality is not the basis for change in halakhah. In his article, "Can a Religious Law be Immoral," Weiss wrote:

> Even when the Rabbis altered a law, they never abrogated it. They retained the integrity of the law. By integrity I mean partial applicability. They did not totally eliminate the law. It still remained valid and pertinent to an extreme and rare situation. That was necessary in order not to impugn the Lawgiver with a lack of moral sensitivity which may undermine not only this law, but laws in general. Once one has formulated, as in the case of bastardy, mamzerut, the need for changing the law because of moral exigency, any subsequent change will be interpreted as an admission that initially there was no moral sensitivity, imputing to the Lawgiver a defective moral awareness. The Rabbis instinctively shied away from such a formulation.[101]

When Rabbi David Novak examined the problem of the mamzer, he acknowledged a moral problem, but only looked for a case-by-case solution. Maharsham's annulment strategy, which Novak presented as the best solution, fails to resolve all mamzerut cases. Novak hesitated to change the law on explicitly moral grounds because of the fear that it might lead to the unravelling of halakhah. In his words: "Once it is posited that a Toraitic institution does not exist one cannot talk about a normative process at all any more. The authority of any legal system cannot tolerate picking and choosing which institutions are to be held and which are to be dropped."[102]

It is true that the rabbis in the past did not explicitly use morality as the basis for change or interpretation of a law. In explaining the Torah's statement "an eye for an eye, a tooth for a tooth,"[103] for example, the Rabbis of the Talmud offer ten separate hermeneutic proofs that the verse calls for compensation and not mutilation.[104] Each of the proofs is indirect and tenuous, which explains why so many "proofs" are offered. Underlying the ingenious arguments is an implicit matter of conscience regarding the taking of body parts. In the words of Rabbi Eliezer Berkovits, "The reference to the

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[100] Ze'ev Falk, *Religious Law and Ethics* (Jerusalem: Mesharim Publications, 1991), p. 147.

[101] David Weiss HaLivni, "Can a Religious Law be Immoral?", *Perspectives on Jews and Judaism: Essays in Honor of Wolfe Kelman* (New York: Rabbinical Assembly, 1978), pp. 165-167.

[102] Novak, p. 26.

[103] Lev. 24:20; Exod. 21:23-25.

[104] Bava Kamma 82b-84a.

overruling ethical principle is not always explicit in halakhic decisions. It is, however, obvious that it plays a decisive role in the final conclusion."[105]

A reliance on hermeneutic rules of interpretation and legal loopholes emerges from the view that Torah embodies an all encompassing, eternal wisdom. There is a price paid, however, for only looking inwardly for the justification of change. The hermeneutic rules may fail to provide a comprehensive solution, as in the case of mamzerut. Preserving the system may begin to look more important than acting justly and halakhah may begin to look more like a chess game than a system of religious striving. In the words of Rabbi Gordon Tucker: "Halakhah is a theological legal system. Separating law from moral principle in such a system, as positivists would be wont to do, is to separate moral principles from God, and that is theologically untenable."[106]

While Conservative Judaism would affirm that the Torah is Divine in its origin, the revelation at Sinai is seen as the beginning of a relationship and not the final word. Interpretation is understood as our communal attempt to understand the will of a compassionate Divine partner. As we mature we are able to understand God's will for us more clearly. If a law appears unconscionable, we would say that the shortcoming is either our previous understanding or that circumstances have so changed that the rule no longer meets its intended result. In the words of Rabbi Elliot N. Dorff:

> The Orthodox would not consider modern ethical sensitivities as sufficient grounds to change the law: for them, the law as it has been formulated over the centuries must be binding. The Conservative movement maintains that the purpose of the law in the first place is largely to concretize moral values, and so the specific form of the law can and should be changed if it is not effectively doing that. In other words, the aggadah should control the halakhah.[107]

When asked if a law of the Torah can be immoral we would respond, no! It is precisely because we see God as the source of morality that we cannot accept that a Jewish law would lead us away from morality. In that light, we say in our collective statement of principles, *Emet ve-Emunah*:

> In some cases changes are necessary to prevent or remove injustice, while in others they constitute a positive program to enhance the quality of Jewish life by elevating its moral standards or deepening its piety. . . .We affirm that the halakhic process has striven to embody the highest moral principles.[108]

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[105] Eliezer Berkovits, *Not in Heaven: The Nature and Function of Halakha*, (NY: Ktav, 1983), p. 20.

[106] Gordon Tucker, "God, the Good, and Halakhah," *Judaism* 38 (summer 1989): 371.

[107] Elliot N. Dorff, *Conservative Judaism: Our Ancestors to our Descendants* (NY: United Synagogue, 1977; revised 2d ed., 1996), p. 160 of 1st ed. The same point is made in Elliot N. Dorff's "The Interaction of Jewish Law with Morality," *Judaism* 38 (summer 1989): 455-466; Gordon Tucker, "God, the Good, and Halakhah," *Judaism* 38 (summer 1989): 365-376; Bradley Shavit Artson, "Halakhah and Ethics: The Holy and the Good," *Conservative Judaism* 46 (spring 1994): 70-88; Siegel, "Ethics and the Halakhah," p. 128, in which the author writes: "The law must be revised in light of the ethical values. . . .We have a responsibility toward the historic norms which we have inherited, but this responsibility does not extend so far that we must accept them when they result in unethical situations."

[108] *Emet ve-Emunah: Statement of Principles of Conservative Judaism* (New York: JTS/RA/United Synagogue, 1988), p. 24.

Mamzerut poses a moral problem. It punishes an innocent child for the sins of his or her parent. We are concerned for the plight of innocent children because of the teachings of Tanakh and our rabbinic predecessors. Our generation is part of a chain that expresses grave concern over implementing the rule of mamzerut. Daniel the Tailor, in a relatively late midrash, described God shedding tears for the mamzer and promising a cleansing in the Messianic era. The Rabbis narrowed the rules of evidence and posited medical absurdities. Many solutions were offered, but none sufficiently narrowed the category of mamzerut.

We remain with halakhic dilemmas. When we know that a congregant obtained a civil divorce and did not obtain a *get* and the child of the second marriage stands before us ready to get married, what do we do? When we are confronted with a father who says, "This child is not mine!", what do we do? Do we hold that these children are mamzerim and refuse to marry them? We are left with the challenge posited by Rabbi Seymour Siegel: "Let us do now what the *Kadosh Barukh Hu* is to do in the future."[109]

To choose not to implement mamzerut requires humility, both in deference to Torah and to the generations of rabbis who struggled with the moral implications of mamzerut. And yet, mamzerut challenges us to speak with courage and clarity about how Judaism unfolds and how laws do change. Mamzerut is an opportunity to make explicit what was until now implicit, that morality is at the center of the halakhic process.

Toolbox of Halakhic Change

Throughout the generations, the implementation of the Torah's commands has evolved. There are many examples and the following provides a sampling:

(A) Leviticus omits explicit permission for a kohen to bury his wife,[110] which the rabbis read into the text as a requirement.[111]

(B) Numbers offers an actual case of a gatherer of sticks on Shabbat who was publicly stoned for the offense.[112] There are no anecdotes of such a severe penalty for Shabbat violation in the Talmud.[113]

(C) Deuteronomy states that one cannot exempt oneself from a vow,[114] yet the Rabbis allow for rabbinic annulment of unwise vows.[115]

(D) Despite the strong language compelling the death penalty for murder,[116] the Rabbis avoided it through crafting high procedural hurdles, such as: confessions were inadmissi-

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[109] Siegel, p. 130.

[110] Lev. 21:3 states regarding death and the priest: "None shall defile himself for any [dead] person among his kin, except for the relatives that are closer to him: his mother, his father, his son, his daughter, and his brother, and also for his virgin sister. . . ." Rabbi ben Meir, a 12th century explicator of the literal meaning (פשט) commented: "No husband from among the kinship [of the priesthood] may defile himself for his wife."

[111] The Sifra comments that "except for the relatives that are closer to him" refers to his wife, a position that is also held by Rashi and Abraham ibn Ezra. This idea is codified in Maimonides' M.T., "As regards the wife of the priest, one must render himself impure, even against his will. . . .The Scribes gave her the status of a 'dead person' whom he is commanded to bury."

[112] Num. 15:32-34.

[113] The law is codified in M. Sanhedrin 7:4, "These are they that are to be stoned. . .he who profanes the Sabbath," but no cases are provided in any of the lengthy Shabbat discussions of any such execution.

[114] Deut. 23:24, "That which goes out of your mouth you shall observe and do."

[115] Sanhedrin 68a; M. Haggigah 1:8, "Release from vows hovers in the air and they have nothing on which to lean."

[116] Gen. 9:6, "Whoever shed the blood of man, by man shall his blood be shed, for in God's image did God make man." Num. 35:33, "You shall not pollute the land in which you live; for blood pollutes the land, and the land can have no expiation for blood that is shed upon it except by the blood of him who shed it."

ble; the defendant needed a warning prior to the commission of the crime; and, two trustworthy eyewitnesses were required.[117] These tough procedural requirements gave context to the statement of Rabbis Tarfon and Akiva: "Had we been in the Sanhedrin, no one would ever have been put to death."[118]

There are a variety of halakhic tools that have shaped the Jewish understanding of Torah and have enabled the changing of a halakhic practice.

Interpretation

Interpretation is the major tool for implementing a law differently than its literal reading. In the words of Rabbi Joel Roth, "The meaning of the Torah is determined by the sages and. . . their interpretations alone are normative."[119] There are three cases in the Talmud in which Torah commands are interpreted as only theoretical in their origins. The three cases are the rebellious child (בן סורר ומורה), the idolatrous city (עיר הנדחת), and צרעת of a house (לבית צרעת) – a kind of fungal infestation, all of which are addressed in Sanhedrin 71a. Regarding each law there is a description of practical impediments barring implementation, followed by a baraita that states, concerning the law:

לא היה ולא עתיד להיות ולמה נכתב דרוש וקבל שכר.

> It never was and never will be. And why is it written? Learn it and you will receive a reward.

And for each law there is a statement made by a Rabbi that he knows of an actual case in which the law was administered. A closer look at these three cases is warranted, because it is tempting to add mamzerut to the list of hypothetical laws.

The Mishnah in Sanhedrin debates the requirements to qualify as a "rebellious son," (בן סורר ומורה) for which the Torah's penalty is death by stoning.[120] The Talmud requires a finding that the child would unquestionably grow to lead a life of crime. To demonstrate fearless, easily repeated, moral depravity, a child needs to steal from his father and consume large quantities of meat and wine in a stranger's domain. The Talmud goes one step further by closely examining the language of the Biblical law. Not only must both parents bring their son to the elders at the gates and agree with the desired outcome, but neither the mother nor father can have any physical handicap and both parents must have a similar voice and physical appearance.

The Talmud quotes the baraita acknowledging that the requirements for "a rebellious son" will never be met. We may infer that the motive in crafting such impossible standards was that the Rabbis found it morally unacceptable that a child would get the death penalty, let alone that his parents would choose to have their child executed. They are willing to see the Torah as providing laws that are only theoretical. At the same time, there are those who prefer to read the Torah more literally, such as Rebbi Yonatan who dissents and is quoted in a baraita saying, "I saw a [rebellious son], and I sat on his grave."[121]

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[117] M. Sanhedrin 5:1-2; regarding inadmissibility of confessions see Sanhedrin 9b.

[118] M. Makkot 1:10. And yet, there is also a dissent expressed by Rabban Gamaliel.

[119] Joel Roth, *The Halakhic Process: A Systemic Analysis* (New York: Jewish Theological Seminary, 1986), p. 153.

[120] Deut. 21:18-21.

[121] There are two practical problems with this attribution. First, it is improper to sit on a grave. Secondly, Rabbi Yonatan was a kohen, which would have prevented him from going into a cemetery.

To qualify as an "idolatrous city" (עיר הנדחת) the majority of the residents of a town in the land of Israel must worship idols. As a penalty the Torah states that the guilty parties must be killed, and the buildings in the city and the property of all the residents is burned, and the town may never be rebuilt.[122] A baraita asserts that there never was such a town. The statement is attributed to Rabbi Eliezer who said that even one mezuzzah in town barred its classification as an "idolatrous city," and that there never was a town in Israel that failed to have at least one mezuzzah. Again, Rebbi Yonatan is quoted as disagreeing by saying, "I saw [an idolatrous city] and I sat on its rubble."

Leviticus details the laws of a house that contracts a צרעת, discoloration of its walls.[123] The house becomes an object of ritual impurity, which conveys impurity to people or objects within it, and must be destroyed.[124] A baraita declares that there never was such a צרעת-inflicted house. It is attributed to Rabbi Elazer the son of Rabbi Shimon, who declared that the צרעת must be found on all four walls and the discoloration must meet at the corner. He makes this claim based on an interpretation of the relevant verses. In rebuttal there are two Rabbis who testify to each having seen a ruin of a house in Israel – one in Gaza and the other in the Galilee – that were identified by local residents as a צרעת-inflicted house.

Each of these Biblical laws teaches a foundational lesson. "The rebellious child" underscores that disrespect for one's parents is tantamount to blasphemy and likewise warrants the death penalty. The law of the "idolatrous city" conveys that a person, particularly in Israel, is responsible for the faithfulness of his or her neighbors, because their idolatry could lead to destruction of the entire city. The "צרעת house" is more obscure, both in terms of the nature of the tainted growth and the value lesson. Nonetheless, the Rabbis understand צרעת as a product of speaking ill of others (לשון הרע), as shown by Miriam's צרעת after she spoke critically of her brother Moses.[125] Hence, the law of the "צרעת house" teaches that hurtful speech may even lead to destruction of your familial home.[126] At the same time, the actual administration of these laws could lead to unconscionable results, such as the capital punishment of a child, the destruction of an entire town, including the possessions and community of innocent people, and the demolition of a family's home as a result of wrongful speech.

Apparently prompted by moral concerns, most Rabbis understood that these laws were only hypotheticals. The Talmud justifies this outcome by presenting practical impediments, which are tenuously derived from the original Torah verses. There is unquestionably a "picking and choosing" of both how to interpret these verses and the holding that these verses were never meant to be implemented. At the same time, there are dissents, illustrated by "actual cases" of administration of the law that offer a literal reading and make no moral judgment.

In dealing with mamzerut, most Rabbis sought, on a case-by-case basis, to ingeniously avoid labeling a person as a marital pariah. As with the three "hypothetical" laws, evidentiary hurdles were crafted that made the application of mamzerut far more cumbersome than expected from a literal reading of the text. Yet, the Rabbis did not go as far as to say that "the law never was and never will be." The Rabbis failed to assert a decisive, practical impediment that would have consistently barred application of the law. Perhaps the Rabbis felt that there was merit in keeping the law alive, even in a weakened state, due to social efficacy. A second

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[122] Deut. 13:13-19.

[123] Lev. 14:33-57.

[124] Lev. 14:33-53.

[125] Num. 12:1-15.

[126] Arakhin 15b, also cited as a rationale by Maimonides, Nahmanides, and Sforno.

lesson from the above debate is that there have always been dissenters regarding morally problematic laws who choose to apply the Biblical law in a literal fashion.

It would solve a lot of practical problems to classify mamzerut as a "hypothetical law." We regrettably have a long history of application of the law that does not allow us to say, "the law was never implemented." The most important idea to come out of the survey of Sanhedrin 71a is that there is justification for having a law on the books as a value lesson, even when the law is not administered. When and if we utilize a halakhic tool to bar application of mamzerut, it does not mean that the law is meaningless. In addition, we may anticipate a dissenting opinion in a debate over mamzerut, a dissent that says that the law is in the Torah and therefore must be implemented. To change the precedent of the past, which saw mamzerut as operative, we must look to halakhic tools other than reinterpretation alone.

Communal Legislation – The Takannah

The Torah provides the sages with authority to administer the Law: "You shall act in accordance with the instructions given you and the ruling handed down to you; you must not deviate from the verdict that they announce to you either to the right or to the left."[127] The sages understood this verse as giving them the responsibility to interpret the law and to engage in legislative change.[128] As Rabbi Joel Roth has written: "In the final analysis, the decision of an authority to exercise his legislative function is itself judicial, not legislative."[129]

The methodology and nomenclature for legislative-type change has evolved. Among the Tannaim (Rabbis of the 1st to 3rd centuries, CE), there is no discussion as to the extent and guidelines of legislative action.[130] Changes were made with undefined, broad categories, such as the following:

> עת לעשות לאדני הפירו תורתך – "It is time to act for the Lord; they have violated Your Torah" (Ps. 119:126).

A sampling of changes justified with this Biblical verse include:

(A) In response to sectarians who denied a "world to come," the conclusion of a ברכה recited in the Temple was changed from "forever" (מן העולם) to "forever and ever" (מן העולם ועד עולם).[131]

(B) Although only a priest was permitted to wear the formal priestly garb, Shimon the Righteous dressed as the priest to meet with Alexander the Great in order to seek his reversal of a decree giving the Samaritans permission to destroy the Temple.[132]

(C) Although the Rabbis understood the Torah as mandating that "things intended to be oral may not be transmitted in writing,"[133] Rabbi Yohanan and Resh Lakish put the Aggadah into writing to prevent it being forgotten.[134]

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[127] Deut. 17:11.

[128] Rashba relies on Deut. 17:11 to say that it is a mitzvah to obey the Sages' changes of Torah – Rosh Hashana 16a, s.v. למה.

[129] Joel Roth, p. 155. Also see Menachem Elon, *Jewish Law: History, Sources, Principles* (Philadelphia: Jewish Publication Society, 1994), pp. 497-499.

[130] Elon, *Jewish Law*, p. 504.

[131] M. Berakhot 9:5.

[132] Yoma 69a.

[133] Gittin 60b.

[134] Gittin 60a.

מוטב תעקור אות מן התורה – "It is better to uproot one letter from the Torah."

This phrase is often coupled with the goal of the "sanctification of God's name." It was employed to justify specific acts by Israelite royalty that violated Torah precepts, such as:

(א) King David's turning over seven of Saul's sons for punishment to the Gibeonites[135] in violation of the Torah standard that "sons should not die for the sins of their fathers."[136]

(ב) Saul's concubine delaying the burial of a person who was executed[137] in violation of the Torah precept that a person was not to be left hanging after nightfall, "but must bury him the same day."[138]

פעמים שבטולה של תורה זהו יסודה – "Sometimes the cancellation of Torah is its foundation."

This principle was used by Resh Lekesh to justify Moses' shattering of the first set of tablets. Although not the violation of an explicit halakhah, Moses' act is an example of abrogating God's apparent initial intent.[139]

These three broad phrases were largely used to justify, after the fact, one time, exigent acts. Nonetheless, the general category of legislation was also used to support an ongoing change that was felt necessary to preserve the Jewish tradition as a whole. "It is time to act for the Lord; They have violated your Torah," was employed in connection with preserving the Aggadah, the oral explanations of the Biblical narrative, despite a Torah prohibition to do so. Afterwards, the Rabbis continued to write down Aggadah and it constituted a precedent that enabled Rabbi Yehudah HaNasi (Palestine, second to third century C.E.) to compose the Mishnah, a record of the "oral law."

It is tempting to sweep aside mamzerut with the use of a broad phrase acknowledging that there is an exigent need to act. Yet, there is reason to pause and explore if there is a more precise category to justify overturning a Biblical law. It is always best to use no more force than necessary to make a change. Like the drilling of a hole, the skilled carpenter tries to find the bit size that most accurately matches the need. In fact, as the halakhah developed the broad categories were narrowed into more precise rubrics, which warrant a close look.

During the period of the Amoraim, the Rabbis of the third through fifth centuries, the Sages crystallized a number of basic principles that more clearly defined the scope and authority of their legislative activity. For purposes of our discussion there are two relevant categories of "uprooting a Biblical law" (עקירה):

(א) שב ואל תעשה – "Sit and don't do." This principle was largely used to refrain from the communal performance of a mitzvah due to changed circumstances and a countervailing Torah precept. Hence, in order to protect against the violation of carrying from the private to the public domain on Shabbat, the Rabbis prohibited the following activities on Shabbat: the blowing of shofar, shaking of the lulav, and reading of the Megillah of Esther.[140] In addition, the Rabbis said that it was no longer necessary to

[135] 2 Sam. 21.

[136] Deut. 24:16; Yevamot 79a.

[137] 2 Sam. 21:10.

[138] Deut. 21:23; Yevamot 79a.

[139] Menahot 99a on Exod. 34:1.

[140] Sanhedrin 19a.

place a blue thread (תכלת) on the four corners of one's garments.[141] Consequently, talitot for the past eighteen hundred years have customarily had white threads only.[142] The reason for this social legislation is unclear, but seems to have arisen at a time when the Romans made it illegal or prohibitively expensive to acquire the blue dye. It led to both hardship in fulfilling a mitzvah and encouraged the sale of counterfeit dyes. The Rabbis' ability to override a clear Torah command, recited in the daily recitation of the Shema, demonstrates once again the Rabbis' authority to alter how a Torah law is implemented in response to changing conditions.

(ב) קום ועשה – "Get up and do" [despite it being a violation of the Torah]. The right of the court to permit action in outright violation of the Torah was debated among the Amoraim. Rabbah held that such action was beyond the scope of rabbinic authority and Rav Hisdah said that it was permitted.[143] Nonetheless, in the Talmud's discussion of Elijah's active violation of the law by setting up an altar on Mount Carmel, the prophet's behavior is justified as a response to the exigencies of the moment (שעה הוראת), the need to turn the people away from idolatry by a dramatic act.[144] Later poskim justified the use of "get up and do" in response to a "crisis," even when the implications of the change were ongoing,[145] such as believing a woman when she said that her husband had died[146] and the rabbi's authority to release a person from an oath.[147]

עקירה, "uprooting," was rarely employed, and when used, there was a preference for the less radical, "sit and don't do." The hesitancy to use "communal legislation" was out of respect for precedent and the belief that the laws of the Torah were given by God. עקירה was only justified in the context of a countervailing principle at stake (פנים וטעם בדבר) and an urgent need (הוראת שעה). In 1997, in response to the issues of "Solemnizing the Marriage between a Kohen and a Divorcee," presented by Rabbi Arnold M. Goodman, we of the CJLS permitted the "uprooting" of the Torah law as an act of קום ועשה – "get up and do," based on "the exigencies of the hour," specifically, our concern for Jews marrying Jews (endogamy). Our setting aside a דאורייתא law affirmed our confidence as a bet din in the face of the changed circumstances of our day.

Mamzerut poses dramatic challenges, too, that at first impression warrant a bold response. Due to relatively new opportunities for an array of non-halakhic wedding ceremonies, many Jews are being remarried without a *get*. There is a proliferation of mamzerim, who are largely the products of ignorance or apathy rather than promiscuity. In addition, there are rare cases where Jews are having children in defiance of the law and if mamzerut is enforced, their children would be left to suffer as marital pariahs. Punishment of children for the sins of their parents conflicts with a countervailing Torah principle as important as the need to preserve Shabbat, which overrode other Biblical laws. In our day,

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[141] Num. 15:37-41; Menahot 4:1; 38a.

[142] Menahot 43b. Rabbi Meir held that the omission of a white thread was an even more serious transgression than blue, because white was readily available.

[143] Yevamot 89a-90b.

[144] Yevamot 90b.

[145] HaMeiri (Rabbi Menahem ben Solomon ha-Meiri, 1249-1316), Beit ha-Behira to Yevamot 89b, 90b; Ritba (Rabbi Yom Tov ben Avraham Ishbili, 1250-1330) to Yevamot 90b, s.v. ונגמר; Rambam (Rabbi Moshe ben Maimon, 1135-1204), M.T. Hilkhot Mamrim 2:4. Maimonides justifies dramatic halakhic action by analogy to an amputation needed to save a human life.

[146] Tosafot to Nazir 43b, s.v. והאי מת. Additional citations in Tosafot that affirm the rabbinic power of עקירה: Yevamot 24b, s.v. אמר; Yevamot 110a, s.v. לפיכך; Ketubbot 11a, s.v. מבטילין; Bava Batra 48b, s.v. תינח.

[147] Maimonides, M.T. Hilkhot Nedarim 3:9.

mamzerut fails to achieve an objective of deterrence against forbidden sexual relationships and it cannot be justified on the basis of "communal purity." As with the marriage between a kohen and a divorcee, we are committed to enabling the solemnization of marriages between Jews. There are grounds for the תקנה of uprooting the law of mamzerut, but there is a narrower category of halakhic change that is better suited. It is wise to operate in a halakhic realm in a way that meets our objectives and causes the least challenge to the larger system. In addition, this final category of halakhic change, the barring of a law through a procedural mechanism, has a history that is closely tied to concerns with evolving social and moral concerns.

A Procedurally Inoperative Law

There are several examples cited in the Talmud of a Biblical law that was made inoperative due to a procedural decision. In each of the cases, a rationale for the change is offered but no express claim is made that the ruling is an uprooting of a Biblical law. Yet, the impact is the same. The following are three examples of judicial discretion that prevented implementation of a Biblical law:

Avodah Zarah 8b states that "Forty years prior to the destruction of the Temple, the Sanhedrin abandoned [their normal place for hearing cases] and held its sittings in Hanuth" [a non-dedicated space for judicial use, also located on the Temple grounds]. Rabbi Nahman ben Isaac says the Sanhedrin's decision resulted in the cessation of capital cases:

> Why? Because when the Sanhedrin saw that murderers were so prevalent that they could not be properly dealt with judicially, they said, 'Rather let us be exiled from place to place than pronounce them guilty [of capital offenses], for it is written (Deut. 12:10), "You shall carry out the verdict that is announced to you from that place that the Lord chose," implying that it is the place that matters.

When the Rabbis stopped considering capital punishment, they did so despite the repeated Torah directive that execution was the just sentence for an array of crimes. They made the change with a procedural act. As they understood the law, a court could only impose capital punishment when the twenty-three-person Sanhedrin held its seat on the Temple grounds, לשכת הגזית, a place that straddled the sanctity of the inner space of the Temple and the courtyard.[148] The Sanhedrin decided to move from its place of authority, thereby barring the hearing of capital cases. The Sanhedrin's motive for making the law inoperative was, to quote the Talmud, because "murderers were so prevalent that they could not be properly dealt with judicially."[149]

There are three possible explanations of their stated concern: capital punishment no longer served as a deterrent, or that the large number of cases could have led to incomplete examination of testimony and consequently unjust verdicts, or that the large case load could have led to unequal administration of who was tried for a capital crime. There is also a historical context to the Rabbis' action: the Romans had officially taken away their authority to hear criminal matters. Regardless of which explanation or combination is chosen the bottom line remains the same: The Rabbis explained their suspension of a Biblical directive on ethical grounds.

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[148] Tosafot on Avodah Zarah 8b, s.v. מלמד שהמקום גורם.

[149] Avodah Zarah 8b.

Moral concerns also prompted the Rabbis to refrain from administering the Torah mandated laws of "breaking the neck of the heifer" and the sotah-water test. These changes are presented in Mishnah Sotah 9:9:

> When murderers increased in number, the rite of breaking the heifer's neck was abolished. . . .When adulterers increased in number, the application of the waters of jealousy ceased; and Rabbi Yohanan ben Zakkai abolished them as it is said, "I will not punish your daughters when they commit harlotry nor your daughters-in-law when they commit adultery, for they themselves [their husbands, commit adultery, too]" (Hos. 4:14).[150]

The law of "breaking the neck of the heifer" is stated in Deut. 21:1-9 as follows:

> If, in the land that the Lord your God is assigning you to possess, someone slain is found in the open, the identity of the slayer not being known, your elders and magistrates shall go out and measure the distances from the corpse to the nearby towns. The elders of the town nearest to the corpse shall then take a heifer which has never been worked, which has never pulled in a yoke; and the elders of that town shall bring the heifer down to an everflowing wadi, which is not tilled or sown. There, in the wadi, they shall break the heifer's neck. The priests, sons of Levi, shall come forward; for the Lord your God has chosen them to minister to Him and to pronounce blessing in the name of the Lord, and every lawsuit and case of assault is subject to their ruling. Then all the elders of the town nearest to the corpse shall wash their hands over the heifer whose neck was broken in the wadi. And they shall make this declaration: "Our hands did not shed this blood, nor did our eyes see it done. Absolve, O Lord, Your people Israel whom You redeemed, and do not let guilt for the blood of the innocent remain among Your people Israel." And they will be absolved of bloodguilt for the blood of the innocent, for you will be doing what is right in the sight of the Lord.

Despite the clarity of the Biblical mandate, the Rabbis decided not to administer the law "when murderers increased." Although the exact reasoning is unstated, it appears that the increase in murders meant that the dramatic ritual and public disavowal of responsibility no longer had social efficacy. Their decision to stop administering the law of the "breaking of the neck of the heifer" has meant that the law is inoperative down to our own time.

The sotah-water ordeal, named sotah for the tractate of the Mishnah that deals with the topic, is described in Num. 5:11-31.[151] When a husband accused his wife of adultery and she denied it, the priests were directed to administer a lie-detector test. The priest prepared a potion of sacral water and earth from the floor of the tabernacle in an earthen vessel. The priest declared before the accused woman that if she spoke the truth no harm

[150] This is the prevalent understanding of the reason that the sotah-water proved ineffective. See the commentaries of Maimonides and Chanoch Albeck. Albeck also cites the explanation of the Tosefta that the test proved ineffective because the adultery was public rather than secretive, see Albeck, M. Sotah 9:9 (תל אביב: מוסד ביאליק–דביר, תשל"ח).

[151] For an analysis of the topic, see Julian Morgenstern, *HUCA* 2 (1925): 113-143.

would come to her when she drank of the holy potion, but if she were lying then the waters would cause her belly to distend and her thigh to sag and she would be cursed among the people of Israel. She was bid to answer "Amen, amen" to the priest's description of the potential curse. The priest's words were written down and then rubbed off into the water of bitterness, including the name of God, and the priest gave the mixture to the woman to drink. This test served to strengthen marital bonds as a deterrent to a woman's secret unfaithfulness and as a remedy against a man's unjustified jealousy.

The priests' refusal to administer this Biblically mandated law testifies to their sense of confidence and responsibility. The Mishnah explains that they stopped utilizing this ritual when "adulterers increased in number." Again, the exact reasoning is left to speculation. Some later poskim wrote that the test itself became ineffective when the husbands were hypocrites, having committed adultery as well. In this explanation, the priests had no choice but to stop using the test since it no longer worked. In light of the other cases of Rabbinic discretion, such as regarding capital punishment and the breaking of the neck of the red heifer, there is reason to believe that the priests made a unilateral decision based on moral and social concerns. The sotah-water test was only administered to women. When marital infidelity increased, it likely struck them as unfair to only put women through such an ordeal and as pointless, since the test no longer served as a societal deterrent against promiscuity. The suspension of the sotah-water ordeal demonstrated the priests' willingness to set aside a Biblical law when it no longer served to meet its intended result and when its administration led to injustice.

As members of our community's law-making body, we are asked to reconsider whether or not mamzerut should have legal efficacy. Our predecessors on the CJLS held that the Biblical law was "inoperative," but they did not offer a halakhic explanation. The length of this תשובה demonstrates the complexity of the matter. Yet, the bottom line remains the same. It is within our authority to refrain from using certain procedures which effectively make the Biblical law inoperative. We have the precedents of Rabbis and priests who refused to hear capital cases, who chose to no longer administer the sotah-test, and who ceased to perform the ritual of breaking the heifer's neck. In each of these cases, the prerogative of making a law inoperative was explained as a response to a change in the social situation that made the Biblical mandate ethically unacceptable or ineffective as a social mechanism.

In our day, mamzerut is both unconscionable and ineffective as a deterrent against sexual misdeeds. When we say that children should not suffer for the sins of their parents, it is not a morality of the hour, but an ethical perspective firmly rooted in our tradition. Admittedly, there are poskim who choose to read the Torah as calling on punishment of innocent children – whether the offspring of former neighboring nations or the children of illicit sexual relations. They are able to point to verses that said that God remembers the sins of parents on their children for generations. Yet, there is another strand in the rabbinic tradition that interprets the Bible to say that God only punishes children when they behave the same way as their parents. Rabbis throughout the generations have sought on a case-by-case basis to undermine the clear intent of the mamzerut law and effectively undermined its implementation in most cases. Yet, they did not solve the problem entirely.

In our day, we have witnessed a proliferation of mamzerut cases, most commonly as a result of ignorance rather than defiance of Jewish tradition. Branding a child as a marital outcast regardless of the parent's intent troubles us. We have made a commitment in the past to enable Jews to marry other Jews even in the face of Biblical prohibitions. To disregard the behavior of parents in our decision to perform the marriage of a Jewish child is not a radical act, but simply an affirmation of our ruling close to thirty years ago.

Our decision, then and now, is to refuse to consider evidence of mamzerut, because the law in our day does not serve as a deterrent to sexual misconduct and instead undermines respect for Torah.

We have a found a way to make mamzerut functionally inoperative. By refusing to entertain evidence of mamzerut, a choice that is our judicial prerogative, we have created an impediment to holding that a person is a mamzer.[152] Consequently, if a person comes to us and says, "My Jewish mother thought my father was dead or divorced without a *get*, remarried, and then had me. What is my status?" We must answer, "I did not hear and will not hear anything that you say regarding your possible status as a mamzer. You are a full Jew. In the Conservative movement, we do not consider the category of mamzerut as operative, because we are committed to judging each person on his or her own merits as a result of the moral teachings of our tradition." Even if we know that a woman in our community divorced without a *get*, remarried, and had a child, we do not consider the status of the child as other than as a Jew.

When we read the verse in Deuteronomy that describes mamzerut, there is still an opportunity to teach a moral lesson. The law of mamzerut conveys the profound seriousness with which the Torah presented the laws of sexual misconduct. Parents were warned with the most frightening threat: If you violate the norms of sexual behavior, your children will suffer. Nothing scares a parent more than harm to his or her child.[153] The importance of sexual restraint remains a lesson implicit in mamzerut, even when choosing not to implement the law. Mamzerut becomes a theoretical teaching, parallel to the laws of the rebellious child, צערת of a house, or the idolatrous city. Unlike those precedents, we cannot say that the rabbinic tradition never enforced this law, but we may say that we no longer do so.

As a Movement we are committed to the Torah being our moral guide, precisely because we take its Divine origins seriously. We cannot conceive of God sanctioning undeserved suffering. At the same time, we approach the halakhic system with respect and a desire to make changes in as small increments as necessary to meet our halakhic goals. As shapers of a life of Torah we are more ready to trim Torah's branches than to cut at her roots unless necessary. Through the procedural mechanism of making mamzerut inoperative we effectively prune a dangerous thorn. We are prompted to act due to a need to harmonize the moral teachings of Torah with her laws.

When we place the Torah in the ark we sing עץ חיים היא למחזיקים בה – "It is a tree of life to those who hold fast to it."[154] The image conveys that the Torah offers spiritual nutrition and comfort in times of need. Torah is also rooted and grounded and thereby defines our distinctive place in the world. Yet, the image conveys that, like a tree, Torah is also alive and growing. We are Torah's gardeners. It is our duty to prune and shape the branches,

[152] Another common example of judicial discretion is the widespread refusal of rabbis to consider the evidence of intentional suicide regarding burial. The law in the Talmud and the codes is that an intentional suicide is to be denied the honors of the dead, which was later understood to include burial in the Jewish cemetery (Semahot 2:1; M.T. Hilkhot Avel 1:11; S.A. Yoreh De'ah 345:1). This harsh punishment was rooted in the conviction that intentional suicide denied God's sovereignty. Yet, a presumption was forged that a suicide lacked premeditation (Semahot 2:3; M.T. Sanhedrin 18:6). So far as minors are concerned the presumption was irrebuttable (Semahot 2:4-5; Yoreh De'ah 345:3). In practice rabbis have not sought to rebut the presumption for adults either, in part for concern that the finding would cause distress for the mourners.

[153] Similarly, we find in the Kitzur Shulhan Arukh a related threat concerning masturbation: "Occasionally, as a punishment for this sin, children die when young, God forbid, or grow up to be delinquent, while the sinner himself is reduced to poverty."

[154] Prov. 3:18. I am indebted to Rabbi Bradley Shavit Artson for drawing this analogy to my attention.

which allows it to remain healthy and fruitful. Our prayer continues: דרכיה דרכי נועם – "Her ways are the ways of pleasantness."[155]

When a law of Torah conflicts with morality, when the law is "unpleasant," we are committed to find a way to address the problem. As a halakhic movement we look to precedent to find the tools with which to shape Torah. For the most part, we rely on the strategies of old. At the same time, we are willing to do explicitly what was largely implicit in the past, namely, to make changes when needed on moral grounds. It is our desire to strengthen Torah that forces us to recognize explicitly the overriding importance of morality, a morality which we learn from the larger, unfolding narrative of our tradition. We affirm the holding of the CJLS of the past that mamzerut is inoperative in our time. We affirm that when mamzerut is applied in our day it fails to meet a goal of deterrence and at that same time leads to an unconscionable hardship on innocent people. We affirm that we will not entertain any evidence of mamzerut and instead judge each Jew who stands before us as a person who is only responsible for his or her own wrong-doings.

Conclusion – פסק דין

We render mamzerut inoperative, because we will not consider evidence of mamzerut. We will give permission to any Jew to marry and will perform the marriage of a Jew regardless of the possible sins of his or her parent.

[155] Prov. 3:17. The word נועם, translated as "pleasantness," is consistently used in the Tanakh in the context of relationships.