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A Concurring Opinion Regarding Mamzerut

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This paper was submitted as a concurrence to "Mamzerut" by Rabbi Elie Kaplan Spitz. Concurring and dissenting opinions are not official positions of the Committee on Jewish Law and Standards.

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.

I concur with the conclusions drawn by Rabbi Elie Kaplan Spitz in his sensitive and thorough responsum circumscribing mamzerut, the declaration that the offspring of certain forbidden unions are forever unmarriageable by Jewish law.[1] Rabbi Spitz has already reviewed many of the sources and rationales offered for this biblical commandment. He has also demonstrated the classical rabbinic discomfort with this rule, which punishes children for the sins of their parents, a notion usually disavowed in biblical and rabbinic statements.[2]

As Rabbi Spitz notes, poskim have, over the course of two millennia, generally sought to limit the application of this rule, even as they have refrained from declaring it to be inoperative.[3] After considering the possibility of asking the CJLS to validate a motion to uproot this category from the Torah, Rabbi Spitz concludes that it is better to declare that we shall no longer accept any evidence of mamzerut, thereby depriving the rule of its power even as it is retained *de jure*.

My goal is to strengthen the case for keeping this difficult rule on the books while exploring the established methods available for preventing its application. There are both ideological and practical benefits for respecting this rule in theory even as we act to deprive it of practical power. Although this position may be more explicit than that of earlier poskim, it is consistent with their application of narrow rules of evidence that

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1 על פי הכתוב, דברים פרק כג פסוק ג, "לא יבא ממזר בקהל ה' גם דור עשירי לא יבא לו בקהל ה':" ובתלמוד בבלי, מסכת יבמות מט, ע"א וכו'.

2 לדוגמה, במלכים ב פרק יד, פסוק ו, "ואת בני המכים לא המית ככתוב בספר תורת משה צוה ה' לאמר לא יומתו אבות על בנים ובנים לא יומתו על אבות כי אם איש בחטאו ומות יומת:" (וכן במקביל בדברי הימים ב, פרק כה, פסוק ד), ובגמרא סנהדרין כז ע"ב.

3 Rabbi Spitz also shows that some medieval and even modern sources have vigorously supported strict application of the mamzer rule, reflecting concern for טהרת ישראל, a quasi-racial definition of Jewish identity.

protected innocent children from the mistakes of their parents. It is also worth detailing some of the interpretive methods that are available for rejecting what might otherwise appear to be compelling evidence of mamzerut.[4]

The Ideological Limits of Rabbinic Power

On an ideological level, the law of the mamzer reminds us that we are not the authors of our tradition, but only the latest generation of its devoted interpreters. Indeed, the mamzer law has long fulfilled this function, as Rabbi David Hartman has shown in his book, *The Living Covenant*.[5] There he describes a dialectic of power and powerlessness of our covenanted people vis-à-vis God. Going back to Avraham Avinu, who argued valiantly in defense of the cities of Sodom and Gomorra, but was silent on his own son's behalf, and extending to rabbinic stories such as *tanur shel Achnai*,[6] our predecessors have alternated postures of vigorous assertion and humble submission before God. The law of the mamzer is a statute which the rabbis have, generation after generation, sought to circumscribe without presuming to eliminate altogether. Hartman cites the same Vayikra Rabbah text[7] quoted by Rabbi Spitz as an example of the Rabbis' frustration with this law but their ultimate submission to the authority of the Torah. Hartman concludes that, "It was bold of the rabbis to protest against a law that they saw as fundamentally unjust. Nevertheless, they accepted it with the proviso that in the world to come, God will correct the injustice."[8]

While we modern rabbis may be less comfortable deferring the justice of a wronged individual to the next world, we should acknowledge that God's law is beyond our authority simply to eliminate. Indeed, the interpretive method is far better established and more compelling than the legislative options listed by Rabbi Spitz. Professor Judith Hauptman has argued in her book, *Rereading the Rabbis*, that a similar dynamic obtained in other cases such as the sotah, which the Rabbis supported in theory, but severely circumscribed in practice.[9] She writes:

> On the surface, this tractate appears to endorse and develop the ritual of the bitter waters as set down by the Torah, but in reality, in all of its elaborate expansion, the rabbis eliminate this ancient ritual, paragraph by paragraph, until, almost anticlimactically, at the end of the volume, they supply a historical note that the waters were, in fact, abolished by R. Yohanan b. Zaccai.

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[4] My focus here is on remarriage without a *get* rather than on cases of incest.

[5] David Hartman, *A Living Covenant: The Innovative Spirit in Traditional Judaism* (New York: The Free Press, 1985), especially ch. 2, "Assertion Versus Submission: The Tension Within Judaism."

[6] בבא מציעא נט ע"ב.

[7] ויקרא רבה (מרגליות) פרשה לב ד"ה [ח] ושבתי אני. (גירסת 7.0 מפרויקט השו"ת של בר–אילן)

> [ח] ושבתי אני ואראה את כל העשוקים (קהלת ד,א). חנינא חייטא פתר קרייה בממזרים. ושבתי אני ואראה את כל העשוקים, אילו הממזרים. והנה דמעת העשוקים (שם/קהלת ד',א'/), אימותיהן שלאילו עברו עבירה ואילין עליביא מרחקין להון. אביו שלזה בא על ערוה זה מה עשה וזה מה איכפת לו. ואין להם מנחם אלא ומיד עושקיהם כוח (שם/קהלת ד',א'/), זה סנהדרין גדולה שלישראל/של ישראל/שהיא באה עליהן בכוח התורה ומרחקתן, על שם לא יבא ממזר בקהל י"י (דברים כג,ג). ואין להם מנחם (שם/ דברים כ"ג, ג"/), אמ' הקב"ה עלי לנחמן. לפי שבעולם הזה יש בהן פסולת אבל לעתיד לבוא אמ' זכריה אנא חמיתיה אולוכרוסון דדהב נקי.

[8] Hartman, p. 59.

[9] Judith Hauptman, *Rereading the Rabbis: A Woman's Voice* (Boulder, CO: WestviewPress, 1998), p. 28.

There is ample reason to adopt a similar approach in the case of mamzerut. While it might be more emotionally satisfying to make declarations of our heightened moral sensitivity, such statements are unlikely to convince others who are committed to halakhic process that our conclusions are justified.

Practical Reasons to Retain the Category of Mamzerut

As Rabbi Spitz shows, in antiquity the mamzer law functioned as a limit upon promiscuity and incest, since the lawless couple would have to face the tragic implications of their forbidden union. Rabbi Spitz argues that this practical benefit of mamzerut is no longer relevant, but I am not so sure. Moreover, I believe that mamzerut is part of the foundation for our steadfast insistence on *gittin* in cases of civil divorce. Based on conversations with colleagues in the Reform rabbinate, I believe that our concern over mamzerut motivates some of them to mention and even advocate for the "option" of obtaining a *get* before remarrying a divorced man or woman. Were we to declare the entire category of mamzerut to be inoperative, it could become more difficult to convince remarrying couples to obtain *gittin* prior to their new marriage. Of course, Conservative rabbis would still be forbidden to officiate at such a marriage, but the couple would have one less motivation to comply with the halakhah.

Were we to declare this entire category to be inoperative in our Movement rather than content ourselves to restricting it radically as has been done before, there would be yet another challenge for marriages between Conservative and Orthodox Jews. Moreover, our responsa should not be written only for Conservative Jews, but should be thoroughly grounded in the same sources and methodologies used by other halakhically committed Jews. Interpretation and the restriction of evidence are the established tools for dealing with mamzerut.

Rabbi Spitz includes a substantial section entitled "Toolbox of Halakhic Change" which gives an overview of various methods – some interpretive, some legislative – used by the Rabbis to develop Jewish law. What seems more urgent in our case is a toolbox of halakhic methods for disqualifying evidence of mamzerut, should it be presented to a rabbi. Before proceeding to describe such a toolbox, it is worthwhile to study an actual case and see how a contemporary posek nullified evidence of mamzerut.

Available Options: A Case Study from Rabbi Ovadiah Yosef

A responsum sent by Rabbi Ovadiah Yosef to Rabbi Grubner in Detroit is striking for its factual clarity, which would apparently necessitate application of the law of the mamzer:[10]

> א) והנה גופא דעובדא אודות אשה שלפי דבריה נישאת לבעלה הראשון בחופה וקידושין כדמו"י על ידי רב חרדי, וילדה לו שלשה בנים, ולאחר מכן נפרדו בגירושין אזרחיים על ידי הערכאות, ולא קבלה ממנו גט, ושלשת הבנים נשארו אצלה להחזקתה, באופן שהבעל ישלם לה דמי מזונותיהם. והבעל הזה התנצר ונשא לו אשה נכריה. ואף היא הלכה ונישאת ע"י הערכאות לאיש אחר וילדה לו בנים ובת אחת אשר זכתה להתחנך "בבית יעקב" החרדי, ומתנהגת למופת בצניעות ובכשרות ככל בנות ישראל הכשרות, ועתה כשהגיע פרקה להנשא לבחור ירא שמים, קמה וגם נצבה השאלה אם מותר לה לבוא בקהל ה', מאחר שלפי דברי אם הנערה שלא קבלה גט כדת מבעלה הראשון כל בניה מהבעל השני פסולים לבא בקהל.

[10] שו"ת יביע אומר (חלק ז–אה"ע סימן ו ד"ה א) והנה.

> The matter in its essence presented with a woman who, according to her words, was married to her first husband with huppah and kiddushin according to the laws of Moses and Israel by a Haredi rabbi, and she gave birth to three children. Afterwards, she separated from him by civil divorce arranged by the courts, but she did not receive a *get* from him. The three children remained with her, with the father paying child support. The husband then apostatized and married a non-Jewish woman. She too went and remarried by the civil authorities and had sons and a daughter who managed to be educated at the Haredi *Beit Yaakov*. She [the daughter] is distinguished by modest and proper behavior as any proper daughter of Israel. Now that the time has come for her to marry a God-fearing young man, the question of whether she can enter the Lord's congregation has arisen, since by the mother's account, she had not received a religious *get* from her first husband, and thus all of her children from the second husband are unfit to enter the Lord's congregation.

On the face of it, we have here clear evidence of mamzerut. After all, the young woman has presented the question of her status, and her mother admits that she was married the first time by a Haredi rabbi, and that this daughter was born after a second, secular marriage, with no *get* in the interim. This is the type of case that Rabbi Spitz has accurately identified as increasingly common in modern times.

Rabbi Yosef never indicates discomfort with the category of mamzer per se, but he goes to extraordinary lengths to prevent its application in this case. The mother's testimony is immediately disqualified, based upon the Shulhan Arukh.[11] While the father's testimony would be accepted in certain circumstances, the Shulhan Arukh gives numerous reasons to exclude his testimony, especially if there are complicating factors such as grandchildren.[12] In this case, the local court failed to get the father's testimony, apparently after one adversarial phone conversation with his non-Jewish wife. Although the original wedding was performed בחופה וקידושין by a Haredi rabbi whose signature is present on the civil marriage license, his testimony is likewise rejected as עד אחד, an unconfirmed witness. Rabbi Yosef states that even if he were alive and testified before the court, the Haredi rabbi's words would not be accepted without the ketubbah, which has somehow been lost. There is no description of a search to locate this document. Thus we have a legal doubt whether the first couple was even married.

Later in the responsum, Rabbi Yosef relates that the girl's mother testified to the bet din that her first husband continued to visit, and even to be intimate with her, after their civil divorce and her civil remarriage. This is enough to introduce doubt whether the girl's father is indeed the second man.

Rabbi Yosef's presumption is buttressed by various Talmudic statements. In Yevamot 80b, Rabba declared kosher a baby born to a woman whose husband had been abroad for twelve months prior to the birth, on the assumption that the pregnancy may have been prolonged up to three months.[13] In Sotah 27a it is asserted that even if a woman were known to carry on extra-marital sexual liaisons, any child can be presumed to be from her

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[11] אבן העזר סימן ד סעיף כט. "אשת איש שאומרת על העובר שאינו מבעלה, אינה נאמנת לפוסלו." ועיין ברמב"ם, הל' איסורי ביאה, פ' טו, הלכות יד–טו.

[12] שם. "אבל האב שאומר על העובר שאינו ממנו, או על אחד מבניו שאינו בנו, נאמן לפוסלו והוא ממזר ודאי. ואם יש בנים לבן, אינו נאמן אף על הבן. ואם היא אומרת: מעובד כוכבים או העבד נתעברתי, הולד כשר שאין הבעל יכול להכחישה בזה."

[13] ועיין בשו"ת אגרות משה חלק אה"ע ד,סימן יז ד"ה והנה מפורש.

husband, for most of her sexual unions are presumed to be lawful.[14] The Talmud indicates that even if the lawful husband was observed abroad when his wife conceived, we must still allow for the possibility that a "speedy camel"[15] could have brought him into the proximity of his wife at the time of conception. Presumably the advent of jet planes has further buttressed this consideration.

In this case, even though the mother was civilly divorced from her halakhic husband and living with her civil-marriage second husband, her subsequent children are not assumed by Rabbi Yosef to be mamzerim.[16] Rabbi Yosef is aware that the woman's exonerating testimony of continued intimacy with her first husband is suspicious[17] – and that similar testimony had been discounted by an earlier responsum of the גנת ורדים.[18] Nevertheless, he finds support for believing the mother. Thus he has established doubt whether the girl's social father is also her biological father.

In summary, here is a case in which all parties admit that the mother was married to her Jewish husband by a Haredi rabbi, and that after a civil divorce and remarriage to another man she had more children who were raised as the children of her second (civil marriage) husband. But in the absence of legally sufficient evidence of the first marriage, and in the presence of continued contact between the mother and her first husband, there is a double doubt, ספק ספיקא, about the child's status, and the daughter is allowed to marry.[19] The responsum is full of many other arguments which are worthy of study.

Confronting Possible Evidence of Mamzerut

As Rabbi Spitz has written, there are many such cases in which poskim used narrow rules of interpretation to clear a person of the status of mamzer. Responsa have generally been applications of general principles and relevant precedents to specific cases, rather than sweeping new codifications of the law. Rabbi Yosef would probably not list his methods as a general protocol for pulpit rabbis. He has, however, shown that there are many methods available to protect a person from פסול – the damaging identification as a mamzer.

Does such an array of defenses increase the likelihood that a true mamzer will indeed enter קהל ה' through marriage, and thereby lead to violation of the biblical command? Or, do we say that unless a person has exhausted all possible defenses against the evidence of mamzerut, that he or she is not essentially a mamzer, and should be welcomed under the huppah by the rabbi with a full heart? The latter perspective is more in keeping with

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[14] "אשת מזנה – בניה כשרין, רוב בעילות אחר הבעל."

[15] "גמלא פרחא," ראה במכות ה/א.

[16] Rabbi Yosef does not discuss the possibility of DNA paternity testing in this undated responsum. It is possible that even such scientific proof would be discounted since it does not meet the standard of שני עדים המעידים בפני הבית דין. Rabbi Yosef also does not recognize that in this case, רוב בעילות אחר הבעל would likely apply to her current (civil) husband, and not to the man whom she divorced, who himself remarried, but who is still halakhically her husband.

[17] One wonders if the bet din somehow suggested to the mother that she might have had some physical contact with her first husband during his periodic visits to pay child support and have visitation with their children.

[18] האה"ע כלל ד ס"ס כט.

[19] In his conclusion, Rabbi Ovadiah Yosef writes:

> ועכ"פ אפילו אי יהבינן שלא יצא הדבר מידי ספק, הרי יש כאן ספק ספיקא, וכמו שביארנו לעיל, שמא נישואיה לבעל הראשון לא היו בחופה וקידושין כדת, ואת"ל שהיו בחופה וקידושין שמא הבת היא מבעלה הראשון, וגם אפשר שנתגרשה ג"כ בגט כדמו"י, ואין האשה נאמנת לפסול את בתה, בטענה שנתקדשה ולא נתגרשה כדת. וכבר כתבו הפוסקים להתיר פסולי קהל בספק ספיקא.

halakhic method, and with that in mind, I shall summarize some of the exclusionary techniques available to the rabbi faced with evidence of mamzerut:

A. *Was the possible mamzer's mother really married to a man other than his/her father at the time of his/her conception?*

1. The possible mamzer is not qualified to testify that his or her mother was previously married to a man other than his father.[20]

2. The mother and her first husband are not themselves qualified to testify to the legitimacy of their wedding ceremony, and thereby to doom her offspring from a subsequent man to the status of mamzer.

3. The rabbi who officiated at the first couple's wedding is not qualified to testify that it was a proper wedding, and thereby to doom her offspring from another man to the status of mamzer.

4. Damning evidence such as a ketubbah need not be sought out.

5. Marriages performed by reputable rabbis may be assumed to be valid until a question of mamzerut for the offspring is introduced.

B. *Is it legally certain that the halakhic husband is not the real father?*

1. Geographic separation is not determinative.

2. The mother may be believed to testify on behalf of the child's halakhic legitimacy, but not against it.

3. Scientific paternity tests such as DNA matching need not be sought out, and may be inadmissible as evidence for פסול.

C. *Whose business is it anyway?*

1. Neighbors, civil servants and other interested parties are not allowed to investigate the ancestry of a possible mamzer. This is a rank form of רכילות, or forbidden gossip. Unwarranted בדיקה is a form of אונאה, as it impugns the eligibility for marriage of a Jew.

2. It takes two legitimate witnesses, who can testify to the halakhic marriage of the first couple, *and* to the mother's certain conception of this child by another man, before mamzerut proceedings can even be *initiated*. These witnesses obviously cannot be related to the potential mamzer or to any of the family, and must meet all of the other stringent criteria of Jewish witnesses.

Summary

The law of mamzerut is Biblical and should not be abrogated by the CJLS. Indeed, Conservative rabbis should use their powers of persuasion to encourage non-halakhic rabbis to obtain a *get* prior to performing a remarriage. However, there is ample precedent for restricting the evidence of mamzerut to the point that it would be next to impossible for a rabbi to conclude that a man or woman is inadmissible to קהל ה׳ by means of נשואין כדת משה וישראל, a proper Jewish marriage. Rabbis are encouraged to use the above list (and other exonerating factors) to set aside evidence of mamzerut. We should further discourage rabbinical authorities such as the Israeli Rabbanut from assembling data bases to expand the number of Jews impugned as mamzerim.

וכך נלע״ד.

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[20] The codes do allow a person to testify that he is himself a mamzer (S.A. Even HaEzer 4:30; M.T. Isurei Biah 15:16), despite the general principle of אינו נפסל עד שיהיו שם שני עדים שאין אדם משים את עצמו רשע (M.T. Edut 12:2). This testimony is not, however, sufficient to impugn his children as mamzerim. Moreover, it is not evident how a child can testify to the validity of his mother's marriage since he was not yet born!