

Women, Divorce, and Mamzer Status in the Israeli State

(From: Love, Marriage and Jewish Family: Paradoxes of Social Revolution (Sylvia Barak Fishman, ed) pp. 256-284)

Susan Weiss

“If someone wants to understand and feel how horrible is the fate of the *mamzer* in the eyes of our sages and how his suffering is unbearable, it is enough to consider the *halakha* as it is set forth in the Shulkhan Aruch (Yoreh Deah, Siman 265, Seif 4). There it is written that, in contradistinction to the newborn male child for whom it is our custom to beseech [the Lord] to have mercy on him and to pray for his survival and long life, we do not say this prayer for the *mamzer*!” Judge Zvi Weitzman, Kfar Sava Family Court, 2012 (rejecting a woman’s petition for paternity and child support).¹

Introduction

Sometime in 1999, a client informed me that she was pregnant. Though the fetus was perfectly healthy and the client very much wanted the baby, news of the pregnancy was the source of great distress. For the past seven years she had been trying unsuccessfully to obtain a Jewish bill of divorce, a *get*, from her husband. The husband was not the baby’s father. This meant that the fetus would be a *mamzer* according to Jewish law--which is also the law of the land in Israel with respect to marriage and divorce². A *mamzer* is a child conceived of a relationship between a married woman and a man who is not her husband, regardless of whether the husband is a convict, missing, held hostage, unconscious, or is refusing to divorce his wife unless he receives a king’s ransom. If the father of the fetus is not the mother’s lawful husband, the state, through its rabbinic courts and the institution known as the “Chief Rabbinate,” will ostracize the child and his progeny for all generations, prohibiting them from marrying a fellow Jew unless that Jew is also a *mamzer* or a convert.

In Israel, rabbinic courts and the “Council of the Chief Rabbinate” (henceforth “Rabbinate”) are part of the state’s legal apparatus. Both are financed by the state and governed by laws passed by the state legislature (the “Knesset”). By law, the state cedes authority to rabbinic courts to decide

matters of “personal status”— marriage and divorce-- in accordance with “din torah” (the law of the Torah).³ By law, the state acknowledges the authority of the Rabbinate to engage in “activities aimed at bringing the public closer to the values of Torah.”⁴ Applying Torah laws and Torah values incorporated into Israeli statutory laws, rabbinic judges can declare a Jewish child a *mamzer*, and the Rabbinate, in coordination with the rabbinic judges, can keep track of those *mamzerim* (plural for *mamzer*), as well as other persons deemed ineligible to marry, creating a blacklist of untouchables and making the very ancient taboo of *mamzer* a real fact of the modern life in the State of Israel. Worried that her child might be placed on the state-backed blacklist, my client wondered-- should she abort the baby? Two out of three rabbis with whom she consulted said “yes.”

This chapter explores the way the Israeli state has responded to the *mamzer* taboo. It shows that the state has promulgated laws, published regulations, set up blacklists, and established special tribunals that have reified the troubling prohibition, legitimating it and keeping it very much alive. This chapter demystifies the social construction of *mamzer*, explaining how it is a man-made idea that has changed over time. I describe the place of the *mamzer* taboo under contemporary Israeli law and expose how the Israeli state’s elaborate system of dealing with *mamzer* enables the taboo and its accompanying rules to seed disorder, to delay stigmatization rather than avoid it, to sustain a discriminatory divorce regime, and to symbolize the dangers that the rabbis imagine threaten Jewish People. I suggest that the presumptions adopted by the state through legislation to ameliorate the problem of the *mamzer* are “weak” fictions that do not do justice for innocent children. And I conclude by calling for the state to repeal all regulations, legislations, courts, and blacklists that perpetuate the notion of *mamzer*.

...

Danger: to the purity of the Jewish people.

Mamzer is the conceptual keystone of a rabbinic meaningful order --a “nomos”-- that is structured in such a way to keep women subordinate to men.⁵ This gendered order may be disintegrating, fragmenting, unstable, “a system at war with itself,” more symbolic than diabolic.⁶ It may be the product of good men trapped in conceptual apparatuses who are trying to keep their

nomos whole and coherent,⁷ and not the invention of evil misogynists who want to dominate and oppress women. But this gendered order does, nonetheless, result in the subordination of women to men and the discrimination against women in favor of men.⁸ Any threat to this order of things is said to be “dangerous.” *Mamzer* and its implicit, looming danger is the taboo that anthropologist Mary Douglas⁹ might suggest, functions to keep the gendered order in place.

In the spirit of Douglas, I further posit that for the rabbis--and for many Jewish citizens of the Israeli state--- the body of a married Jewish woman is a symbol for the whole of the Jewish people. The *mamzer*, a child born to a Jewish woman as a result of a foreign man invading her body, stands for the “polluting” dangers that can invade the Jewish people (the “admixture of bastards“ in the words of Maimonides)¹⁰ and threaten their physical and spiritual integrity, or “holiness”— damage to the “vineyards” of Israel.

That the rabbis see their job as protecting the integrity of the Jewish people --their holiness—and keeping them separate, apart, and pure is articulated in astonishing clarity in what was, until recently, the introduction to the website of the rabbinic courts. Chief Rabbi Amar wrote:

By the grace of God, we have been blessed with a legal system that operates according to the laws of our *holy* Torah, and this is the rabbinic court system in the Holy Land, which was founded by our brilliant sages to serve the *holy* people of this land, a system which is incredibly organized and well managed, and which respects our People and our Land, which was passed down from our forefathers. All of the *People of Israel in this Land and in the Diaspora* can be proud of this court system. It directs the paths and ways of the rabbinic courts and rabbis of Jews wherever they are found. It is a system that protects the fundamentals of Torah and the *purity of the lineage of our People* and its *holiness*.¹¹ (emphasis mine—s.w.)

In 2006, a Tel Aviv Rabbinic Court made the direct connection between the *mamzer* taboo and the holiness of the Jewish family and purity of the Jewish people in response to learning that a woman had sued for damages for get refusal in family court. Claiming that they could not arrange a *get* so long as the wife had sued her husband for damages, the Tel Aviv District Court noted that the very sanctity of the Jewish family was at stake. They asserted:

One must leave all matters ancillary to the obligation of a *get* and its execution or enforcement to a rabbinic court. It alone knows how to operate in accordance with the *halakha* and it alone knows how to take into consideration the sanctity of the Jewish family and to make sure that the release of a wife into the public sphere will be done without blemish (alluding to that which makes the carcass of an animal unkosher and to the *mamzer*—s.w.).¹²

In 2011, a Netanya Rabbinic Court echoed similar sentiments, again in response to a woman who had filed for damages for *get* refusal in family courts:

...This court will do everything in its power not to injure the “vineyard of Israel” as a result of the delivery of a forced divorce that is void, and whose consequences lead to *mamzerut* and the destruction of the family unit which, by itself, causes damage to the vineyard of Israel.¹³

Another member of the Netanya tribunal expressed his worry about the “proliferation” of the (polluting) damage claims “without restraint”:

...[W]e are talking about issues that among the most substantive and serious ones in our personal status laws – the validity of the *get*, and the possibility of *mamzer*. Should this difficult phenomenon expand and proliferate without restraint—who can imagine what all this will lead to?¹⁴

So powerful were the words written by the Netanya Court that they were quoted in full by Rabbi Shimon Yaakobi, the legal advisor to the rabbinic courts in a “response” filed with the Israeli Supreme Court.¹⁵ The Netanya Court also expressed clearly the “danger” that rabbinic courts feel by the possibility of the proliferation of *mamzerim*. Rabbi Yanai, wrote:

But to my regret, with the proliferation of the phenomenon of damages claims with regard to personal status we are reverting to the “Dark Ages” of jurisdictional struggles and wars.... Only this time, the war has taken on a more severe shape. ...Unfortunately, this is not just any battle, but, on the contrary, it is a “World War.”¹⁶

Mamzer, a religious concept that should have no Israeli legal status

The “gospel truth” is that *mamzer* and presumptions that sustain it should be rejected by the Israeli state. A democratic, state government dedicated to civil liberties should not be punishing innocent children for the “sins” of their parents, conducting *mamzer* trials, maintaining *mamzer* blacklists, or passing legislation to that end. It should, instead, be protecting the right of children to support and to know who their parents are, as well as the rights of biological fathers to have contact with their children. In fact, Israel expressed its commitment to those universal, human rights when it signed the UN Convention on the Rights of the Child. At the very least, the secular arm of the state, including its courts, should be conducting business without attempting to take into consideration the *din torah*, *halakhic* determinations of its religious arm, the rabbinic courts. This is what the Tel Aviv District Court did when it overturned the Family Court decision that deferred to the taboo to reject a father’s petition for paternity. This is what Judge Weitzman of the Kfar Sava court, the author of the epigraph to this paper, did *not* do when he denied a woman child support and quoted the *Shulhan Aruch* to back up his decision. The value system and priorities of the two courts are not, and should not necessarily be, in sync.

False: *din torah* presumption that “most fornication occurs with the owner/husband” protects the *mamzer*

Arguably, the state should also protect children from the harmful stigma of *mamzer* imposed by religious traditions and its resulting infringements on human rights. But neither the secular nor the religious arm of the state does this by incorporating the *din torah* marital paternity presumption that is rebuttable and tantamount to a “fiction” that the rabbis themselves do not believe. . The *din torah* presumption that “most fornication occurs with the owner/husband (*ba'al*)” – what I have often referred to more delicately as the “marital paternity presumption” but which I will refer to here as the “fornication presumption” -- is a legal fiction that, paraphrasing Jeremy Bentham (1748-1832), is of no use in the doing of justice. It is a false statement made with only “partial consciousness” of its falsity, and with only the most vague understanding of what use and purpose it is meant to serve. It does not protect children from stigmatization.

The presumption that “most fornication occurs with the owner/husband” is false because even if it were absolutely statistically true that “most fornication occurs with the owner/husband,” that truth would not necessarily and conclusively lead to the determination that a particular child is the offspring of a particular owner/husband. To the extent that the presumption is conclusive, or not subject to rebuttal, it is still a false presumption. It is simply false to say that because of X (most fornications) then Y (the child is the husband’s). A simple blood test would accurately test paternity.

The rabbis are what Fuller¹⁷ would refer to as only “partially conscious” of the fact that the fornication presumption is false since they appear to be equivocal about whether, and to what extent, the presumption is rebuttable. If the rabbis were fully conscious that the presumption is false but useful, they would deem it irrefutable. It would not matter that “because X then Y” is false, since Y --the child is the husband’s-- is the outcome desired; and that outcome cannot be rebutted whether by genetic testing, registration, or circumstantial evidence. But since the rabbis are only partially conscious that the presumption is false, they equivocally allow for rebuttal while at the same time they claim to “protect the presumption.”

Civil legislation passed by the Israeli legislature is an example of such equivocation. §22 of the Population Registration Law of 1965 protects the presumption by requiring children born within 10 months of a divorce to be registered on the names of their mother’s ex-husbands, but at the same time the rabbis and courts do not recognize that registration as conclusive. Such registration can be rebutted by substantiated petitions to family court for support or paternity, by genetic testing, as well as by “information” from whatever source derived and brought before the attention of a rabbinic court—even after that court has made a determination that a child is kosher. Similarly, the Genetic Testing Law of 2008 is meant to protect the presumption, but it at the same time can be refuted by violation of the law itself—undergoing genetic testing. Thus the very passing of the Genetic Testing Law underscores the fact that the presumption is rebuttable.

To the extent that the fornication presumption is rebuttable, the presumption is of no use in protecting a suspected *mamzer* from stigmatization. Support of legislation that buttresses such

“weak” legal fictions would appear to be supporting just that-- the fictions and the institutions that propagate those fictions-- and nothing else. A weak legal fiction is like no fiction at all.

There are those who argue that the fornication presumption is not rebuttable and hence a “strong” fiction – unabashedly false-- that could protect a child from *din torah* stigmatization by attributing paternity to the husband. This is the position taken by Judge Shneller of the Tel Aviv District Court who claimed that even if a family court were to decide that a third party was the child’s father, this would not rebut the presumption nor in any way compromise a rabbinic court finding that, for *din torah* purposes, the husband was the child’s father. Shneller would “split the status” of the child and suggests that *the din torah* fornication presumption is only rebuttable by conclusive 100% proof- i.e., beyond any doubt at all, a factual impossibility but a strong legal fiction.¹⁸ This would appear to be also the position taken Rabbi Aviner who suggests that, according to *din torah*, microscopes and telescopes cannot prove a person to be a *mamzer*, though Rabbi Mordechai disagrees with him.¹⁹

Indeed it would appear that most rabbis disagree with Shneller’s and R. Aviner’s strong conceptualization of the fornication presumption. They treat the presumption as “weak” and rebuttable, certainly by genetic testing. It would also appear that the rabbis would rebut the fornication presumption if the mother herself admitted that the child was not her husband’s or ex-husband’s and such admission was corroborated by his unequivocal denial of having had sexual relations with her at the time of conception.²⁰ And here, perhaps, lies the rub. The historical origins of the *din torah* fornication presumption would seem to be with the aim of protecting a husband’s patriarchal rights to decide whether or not to recognize a child as his, and not to protect the child from stigmatization --hence the *fornication* presumption and not a *marital paternity* presumption. This would explain a number of things-- why the presumption is weak; why, even in the most complicated cases that are resolved, the rabbis will deem a child the husband’s and not the lover’s; and, why, as described above, the taboo is serving a gendered and rabbinic hegemonic order of things rather than justice for the innocent child.

True: we are all *mamzerim*

In order to protect innocent children from unfair stigmatization; in order to make sure children know who their fathers are and that those fathers support them; in order to respect the paternity rights of fathers; and in order to hold the privacy of women in highest regard, rabbis should reject the notion of *mamzer* completely. This is essentially what Rabbi Spitz of the Conservative Movement has done by advocating to “render *mamzerut* inoperative” and refusing to consider any evidence of *mamzerut*. He declares: “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.”²¹

Other policies might emerge from rabbinic leaders. Rabbis could also redefine the notion of *mamzer*, eliminating it almost completely, by adopting “strong” fictions that were irrefutable and whose “falseness” the rabbis are fully conscious of. Rivkah Lubitch has suggested a series of such fictions.²² For example, rabbis could adopt the presumption that all contemporary Jews fall into the status of *mamzerim* – a presumption that is in all likelihood a statistical truth.²³ Or they could presume that we were all conceived through in vitro fertilization and *not* through sexual intercourse, a pre-requisite to *mamzerut* under *din torah*.²⁴ Lubitch has also suggested that rabbis could allow Jews to marry “conditionally” in a way that would allow the rabbis to void the marriage retroactively if a *mamzer* were suspected. But, as Lubitch notes, this last suggestion would solve the problem for children of adulterous relations, but not incestuous ones.

Whether by rejection or redefinition, there appears to be ways for the rabbinic establishment to eliminate the stigma of *mamzer* in a manner that would allow for the recognition of the paternity of biological fathers if that were indeed their *din torah* will.

The goal of this chapter has been to demystify the stigma of *mamzer*, uncover its constructed and gendered roots, and to urge the state of Israel to reject all legislation, regulations, and courts that support this unfortunate notion and the witch hunt that it has, perhaps inadvertently, engendered. In this chapter, I have described the social construction of *mamzer* and the errors of its embrace by the Israeli state. I hope that in so doing I have convinced the reader that the state must cut itself loose of the idea and let *mamzer* languish in the dustbin of cultural wrongs—along with female genital mutilation and foot binding, for example.

The state cannot justify the taboo. It serves no reasonable end. Worse, embracing the taboo, the state infringes on human rights of Israeli citizens, men and women, old and young. It compromises the rights of Jewish women to privacy, property and divorce; it denies Jewish men access to their biological children; it refuses Jewish children's requests for support and to know who their fathers are; and it punishes innocent children for the "sins" of their parents. To improve the condition of Israeli society as well as the lives of those affected directly, it would be well for rabbis to look for ways to redefine *mamzer* in manners that render it inoperative-- perhaps by adopting the empirical fact that, statistically, we are all *mamzerim* and therefore can marry each other. But until the rabbis figure out what to do about *mamzer*, the state must take no part in it at all.

¹ FamCt. 32690/09, Plonit, et. al. v. Ploni, et.al., (Nevo Database, by subscription), (Kfar Saba, July 16, 2012) (Hebrew).

² Rabbinic Court Jurisdiction (Marriage and Divorce) Law, 1952 (Hebrew).

³ Yüksel Sezgin, "The Israeli Millet System: Examining Legal Pluralism Through Lenses Of Nation-Building And Human Rights," *Israel Law Review* 43 (2010): 631- 654 (describing at length the confessional system referred to as the "millet system").

⁴ "Chief Rabbinate of Israel Law, 5740-1980," <http://www.israelawresourcecenter.org/israelaws/fulltext/chiefrabbinateisrael.htm>

⁵ See argument that keeping women in their place is symbolic of theological order that God: Man as Man: Woman, Susan Weiss, "Not Just Words: The Tort of Get Refusal" (unpublished PhD diss., Tel Aviv University: December 2012), Chapter VII, *Priests 170-185*.

⁶ Gerda Lerner, *The Creation of Patriarchy* (New York: Oxford University Press, 1986) (distinguishing between subordination and domination and describing the power of symbols to sustain subordination).

⁷ Lon L. Fuller, "Legal Fictions" *Ill.L.Rev.* 25(4) (1930-1931): 363-399, 513-546, 877-910 (explaining how persons who adopt legal fictions may be caught in an "existing conceptual apparatus" (513-546), adhering to rules that make their world seem "coherent" and "simple" (877-910)).

⁸ It must also be noted that the taboo hurts female *mamzerim* more than it hurts male *mamzerim*. A male *mamzer* can put an end to the stigma attached to his progeny by marrying a gentile woman (or "maidservant") and then converting her and their gentile children (Kid, 69,a.) (Mishnah Torah, Prohibited Unions 15:3,4) . This legal loophole is used to this very day. A similar loophole is not available to women. Gentiles do not bear the stigma of *mamzer* even when they are the offspring of incestuous or adulterous relationships.

⁹ Douglas, *Purity and Danger*.

¹⁰ Maimonides, *Guide for the Perplexed*, Chapter XLIX, p. 377

¹¹ Rabbi Shlomo Amar (n.d.), "Greetings from the President," (Hebrew), [Israel] Rabbinic Courts [of Israel], accessed June 13, 2012, <http://www.rbc.gov.il/president/index.asp>. (link has since expired.)

¹² RabCt 027862614-21-1 (), K. v. K. (Tel Aviv, December 6, 2006), unpublished, on record with author.

¹³ RabCt. 272088/6 Ploni v. Plonit, Law and its Decisor 27 (2011), no. 5, (Netanya, January 23, 2011), also available at. *Da'at (Herzog Academy, Gush Ezion)*, <http://www.daat.ac.il/daat/psk/psk.asp?id=521>

¹⁴ Ibid. The language of the rabbinic court is especially curious since, in the case at hand there was no chance of *mamzerut* at all. The wife had three adult children and was past childbearing age when the rabbis ruled.

¹⁵ FamApp. 2374/11 N. v. N. (Israel Supreme Court, July 12, 2011), *Rulings, Interim Orders, And Protocols of State of Israel*, http://www.ruling.co.il/%D7%91%D7%A2%22%D7%9E-2374-11-%D7%A4%D7%9C%D7%95%D7%A0%D7%99-%D7%A0-%D7%A4%D7%9C%D7%95%D7%A0%D7%99_d253521c-78cc-6a3f-25cf-391db091df9e

¹⁶ File No. 272088/6, *supra*.

¹⁷ Fuller, "Legal Fictions."

¹⁸ File No. 24955-03-11, *supra*.

¹⁹ Rabbi Shlomo Aviner and Rabbi Mordechai Halperon. "Tissue Testing to Determine Paternity" (Hebrew), *Da'at (Herzog Academy, Gush Ezion)*, <http://www.daat.ac.il/daat/psk/psk.asp?id=388>. accessed December 31, 2013. <http://www.daat.ac.il/daat/kitveyet/assia/kviat-4.htm>.

²⁰ See Yev. 47a; Maimonides, above section II;
Rabbi Elie Kaplan Spitz, "Mamzerut," *Responsa of the CLJS 1999-2000*, 559, 572-3, March 15, 2000, *The Rabbinical Assembly*, <http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19912000/> *mamzerut.pdf*.
Michael Wigoda, "Investigating Suspicions Regarding the Purity of Genealogy in Rabbinic Courts" (Hebrew), *State of Israel, Justice Department, Mishpat Ivri*, (2000), <http://www.daat.ac.il/mishpat-ivri/havat/45-2.htm>.
(urging rabbinic courts to limit investigation into the concept of *mamzer* but noting that it is sometimes unavoidable, for example, upon declaration of husband that child is not his). Compare this with position taken by Passamanek, "Medieval Problems," 135-145) (arguing that medieval decisors try to limit ability of father to declare his child a *mamzer*).
RabCt. 4981-31-1 Plonit v. Ploni (Haifa, April 19, 2009) (unpublished, available from author)
(denying admission of mother that child was not her husband's and corroboration of husband, but only after allowing woman to rescind her testimony and after husband admitted that he had had sexual relations with mother a few weeks before the *get*); RabCt. 9830-63-1 Plonit (Netanya, May 21, 2007), *Da'at (Herzog Academy, Gush Ezion)*, <http://www.daat.ac.il/daat/psk/psk.asp?id=388>. (denying admission of mother and corroboration of husband, but only after hearing testimony that would suggest that husband might have been the father and that child might have been conceived from relations with a non-Jew).

²¹ Spitz, "Mamzerut," 586.

²² Lubitch, "Mamzeruth."

²³ Avi Rosenthal, "We are All Mamzerim" (Hebrew)," (May 12, 2013), VeTashar Devora, http://vatashardevoraivrit.blogspot.co.il/2013/05/blog-post_12.html.

²⁴ Lubitch, "Mamzeruth." 11, fn. 20