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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.

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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."

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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 צערת 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:

(A) 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]

(B) 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):

(A) 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

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[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.

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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.

(B) 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

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[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,

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[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.