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Women, Divorce, and *Mamzer* Status in the State of Israel

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]

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 divorce.[2] 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 refuses 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* (pl. of 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 Israel 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 Israel's elaborate system of addressing 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 the 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.

Mamzer, a Social Construction

The State of Israel takes the legal concept of mamzer seriously—supporting a blacklists of mamzerim (section 11A), establishing special rabbinic tribunals that adjudicate if a person is a mamzer (section 11B); passing laws meant to limit the number of mamzerim (section 11C); and issuing circulars and regulations—all of which are meant to make sure that mamzerim do not marry non-mamzerim. For Israel citizens, mamzer is not an irrational, antediluvian taboo. It is a normative, taken-for-granted, commonsensical institution grounded in revered

texts and traditions, as well as in state laws and regulations. It just is, covered by a sacred, legal, symbolic, and complex canopy of legitimation, and it appears immutable: "[A]s if [it] were something else other than a human product—such as . . . [the] result of cosmic laws, or manifestations of divine will."[5]

CONSTRUCTION OF MAMZER STATUS IN THE BIBLE AND RABBINICAL LITERATURE

However, the stigma of mamzer is *not*, in fact, written in stone. Rather, it is an idea that has changed over time, a man-made social construction that is, theoretically at least, in the hands of Israeli society to want or to will away. The parameters of mamzer have adjusted over the millennia—as reflected in the Bible, the Mishnah, and the codices.

In the Bible it is written that "No mamzer shall be admitted into the Congregation of the LORD."[6] Rabbinic authorities have historically referred to this passage as proof text in support of the idea that a "mamzer" is the child of a forbidden union who is not permitted to marry a fellow Jew. But Biblical scholars have questioned this definition in the Biblical context. For example, Jeffrey Tigay, the author of the JPS commentary to Deuteronomy, argues that there is "no evidence that the term [mamzer] refers to a bastard." He writes:

> The meaning of Hebrew *mamzer* is not certain. Derivation from a root m-z-r, "rot," has been suggested. There is no evidence that the term refers to a bastard, a child born out of wedlock. Talmudic exegesis holds that it refers to the offspring of incestuous or adulterous intercourse. The Septuagint and Targum Jonathan understand the terms as referring to the offspring of a prostitute, while others take it as a term for foreigners or the name of a particular foreign nation.[7]

Tigay also claims that the term "Congregation (*kahal*) of the Lord" refers to the national governing assembly of Israelites, not to the rite of matrimony. He explains that "assembly" is a more suitable translation for the Hebrew word kahal than the JPS's term "congregation." Hence the Biblical rule barring certain people from entering the Assembly of the Lord is about who is entitled to *citizenship*, not who is entitled to *marry*. He states:

> [The term *kahal*] refers to the national governing assembly of the Israelites, that is, the entire people, of all the adult males, meeting in a plenary session, and perhaps sometime to their representatives acting as an executive committee. This Assembly convenes to conduct public business such as war, crowning a king, adjudicating legal cases, distribution of land, and worship. . . . This Assembly seems to have been of a type similar to popular assemblies in the ancient world. . . . Eligibility for membership in the Assembly seems to have been tantamount to eligibility for full citizenship.[8]

Thus, the plain reading of the biblical text in Deuteronomy suggests that the rule barring mamzer from the Assembly of the Lord refers to a type of person or ethnic group ineligible for citizenship in the Israelite polity. It's about preventing foreigners or persons of other liminal status from owning land, conducting businesses, or having a say in how the polity operates. In a similar vein, the next sentence in the Bible states that "no Ammonite or Moabite or any of their descendants may enter the Assembly of the LORD."

In other words, in the Bible, the mamzer rule would appear to be the attempt to guard against dangerous foreign elements infiltrating the *external* cohesive boundaries of the Israeli body politic. It is not about ordering the *internal* boundaries that distinguish different sects of Jews or that define sexual conduct and mores of Jewish men, punishing dangerous infractions to those boundaries. Indeed, sexual conduct is monitored under other passages in the Bible where infringements are punished directly by death or excommunication, not indirectly by imposing taboos on innocent children.[9] As it is written, with regard to adultery: "If a man is found lying with another man's wife, both of them—the man and the woman with whom he lay—shall die. Thus you will sweep away evil from Israel."[10]

By late antiquity, rabbinic literature uses the term mamzer not to refer to undesirable foreigners who wanted to join the Israelite polity, but to a taboo imposed on children who are the product of "forbidden unions." Scholars note that different Jewish[11] sects from the Second Temple period may have had different opinions about what type of forbidden sexual unions would result in the mamzer stigma.[12] It is possible to discern a glimpse of these different opinions in the dialectics set forth in Mishnah Yevamot, chapters 4–7. One opinion related in Mishnah Yev. 4:13 is that of R. Akiva. For him, mamzer is the child of a union with a relative with whom cohabitation is forbidden by a biblical commandment that begins with the words: "thou shalt not lie." This reading would confine the mamzer stigma to children born of sexual relations with a "consanguine," or blood relative, such as a mother or sister. Adulterous relations or sexual relations with a person who is not related by blood but only by "affinity"—an in-law, for example—would not be included in Akiva's category.[13]

A second opinion in the same Mishnah is that of R. Shimon HaTimni. He maintains that mamzer is a child born of a union that carries the punishment of *karet* in the Bible—excommunication or death at the hands of God.[14] This has been interpreted as meaning children born of *all* sexual unions forbidden in the

Bible—whether of adulterous relations or incestuous ones, be they consanguine or affinal. A third opinion in the same Mishnah is accredited to R. Yehoshua. According to him, mamzer is a child born of unions that carry the *punishment of death*. This would limit the mamzer stigma to children born of relations with another man's wife,[15] in particular the wife of one's father,[16] or one's son;[17] or to a child born to a man who has had licentious relations with a mother and daughter at the same time.[18] Still another opinion stated in Mishnah Yev. 7:5 suggests that some Jews may have considered a child born to an Israelite woman and a gentile to be a mamzer.[19] Yet another ruling, reflected in Mishnah Yev. 4:12, states that a child is also a mamzer if born to a man and his prohibited ex-wife, or to a man and his ex-sister-in-law who he manumitted in a levirate ceremony.

Just as different sects in late antiquity disagreed on definitions of mamzer,[20] so too did they disagree about punishment. Bar Ilan describes the Qumran sect as barring mamzerim from entering the Sanctuary and perhaps from the sect itself.[21] Some Jews compared mamzerim with lepers and forbade them from entering Jerusalem, learning Torah, or inheriting;[22] others marked mamzerim in ways that made them readily recognizable—by painting their graves and houses with white plaster,[23] or by shaving their heads in a circle so that their hair could not grow back.[24]

However construed and however punished, the notion of mamzer in late antiquity appears to have been fluid—a matter of debate, change, and social construction. In addition, mamzer may indeed have been a way that different sects of Jews distinguished among themselves. While biblical mamzer rules created boundaries that set apart foreigners from members of the Israelite polity, Mishnaic mamzer rules created boundaries that set apart one group of Jews from the other.

In the middle ages, codifiers of Jewish law resolved the Mishnaic debate regarding mamzer. Rabbi Moses Ben Maimon (1135–1204) and Rabbi Yoseph Karo (1488–1575) agreed that the mamzer stigma applied to children born of *all* unions that were forbidden in the Bible, whether adulterous or incestuous, including children born of relations entered into under duress or rape, that is, without specific intent to commit adultery or incest, but not to children born of relations with menstruating women.[25] What's more, the codifiers gave broad discretion to husbands to impose the mamzer taboo or to ignore it. On one hand, they held that a husband could deem his child a mamzer simply by declaring that the child was not his (*din yakir*).[26] On the other hand, they ruled that a husband could discredit any claim made by his wife,[27] or anyone else, regarding the child's paternity, relying on the marital paternity presumption that most of a wife's sexual activity must, statistically, have been with her husband.[28]

In his "Guide for the Perplexed," Maimonides rationalized the mamzer taboo. With regard to forbidden relations with relatives, including in-laws, Maimonides explained that such relatives were very accessible and thus a source of temptation. Clear lines had to be drawn to govern proper sexual activity and to inculcate a sense of "chastity."[29]

Regarding adultery, Maimonides explained that the taboo guarded against this "horrible act" that is "universally condemned," as well as ensured the purity of the "seed" of the Jewish people:

> In order to create a horror of illicit marriages, a bastard was not allowed to marry an Israelite woman . . . the adulterer and the adulteress were thus taught that by their act they bring upon their seed irreparable injury. In every language and in every nation the issue of licentious conduct has a bad name; the Law therefore raises the name of the Israelites by keeping them free from the admixture of bastards.[30]

Rabbi Karo called on the mamzer taboo to buttress the mandate of religious authorities to oversee marriage and divorce, warning that secular officials—increasingly involved in the conduct of marriages and divorces[31]—could not be expected to handle Jewish marriages and divorces in ways that would protect against the taboo: "Anyone who is not an expert in matters of divorce and betrothal should not deal with such issues, since it easy to err and thus to allow for abominations which may lead to mamzerim."[32]

Thus, in the Middle Ages, the mamzer taboo regulated the sexual activity of Jews, keeping the patriarchal unit intact with Jewish men in control and Jewish women under their thumb, making sure that the *internal* borders between Jews were clear. Few married women probably had the courage or economic independence to leave a failed marriage, let alone enter into adulterous relations that might result in a stigmatized child. If a wife were unfaithful, or simply out of favor with her husband, he could wield the taboo to discredit her and her children. With the mamzer taboo codified, Jewish men were given a powerful tool with which to control the sexual lives of their wives. And just as the taboo consolidated the power of men over their wives, so too did it consolidate the power of rabbinic authorities over marriage and divorce.

MAMZER, AS CONSTRUCTED IN THE CONTEMPORARY JEWISH STATE

The modern state of Israel could have discarded mamzer as an ancient, religious taboo that was not worthy of inclusion in its legal repertoire. Instead, the state embraced the taboo when it adopted the "millet" (religious community) system of the Ottoman Empire as the law of the land.[33] Under the millet system the

governing body rejects the notion of one "territorially" bound law for all persons under its jurisdiction. Instead, the state delegates authority to religious communities and their clerics to determine marriage, divorce, and personal status according to their respective religious rules. From the establishment of the state between 1948 and 1971, Israel formally rendered such power onto fourteen religious millets and their clerics.[34] All the clerics of those recognized millets are male, and they impose religious rules on the men and women who appear before them without regard to the religious sensibilities of those persons. Israel does not recognize marriages conducted within its territory between persons of different millets (intermarriages), nor will it recognize marriages officiated by clerics of unrecognized millets.[35]

With regard to Israeli Jews, the state has promulgated laws that specifically authorize rabbinic judges to apply *din torah* religious rules[36] (also referred to often as *halakhah* or Jewish law). According to din torah, a Jewish woman remains married until her Jewish husband agrees to deliver a *get* to her of his own free will.[37] A forced divorce is invalid.[38] If a husband is missing, incapacitated, or simply refuses to deliver a get, his wife remains anchored to her failed marriage indefinitely, an *agunah*. If an agunah has a relationship with a man who is not her husband while waiting for a get, any child born of that union is a mamzer. So are children born of any "forbidden relations" set forth in the Bible, whether conceived intentionally or as a result of rape (except a child conceived during the forbidden menstruating period). Thus, in the state of Israel today, a mamzer and a mamzer's progeny forever cannot marry a fellow Jew unless the intended partner is another mamzer or a convert.[39] In contrast, a child born to a married man who had an adulterous relationship with a single Jewish woman is not similarly assigned the status of mamzer and is not condemned by din torah or by Israeli law.

In addition to deferring to rabbinic courts in the matter of mamzer, the state sustains the construction of the taboo in a variety of ways through its civil courts, laws, and public offices. The state Attorney General's Office has acknowledged the right—indeed the obligation—of rabbinic judges to determine if a person is a mamzer.[40] Submitting to the general provisions of the Chief Rabbinate Law, the state has allowed the Rabbinate to issue regulations that permit marriage registrars to ferret out mamzerim from among persons requesting marriage licenses. Both the Attorney General's Office and the Chief Rabbinate have joined forces to set up special tribunals that conduct trials to establish if a child is a mamzer. The Knesset has passed a variety of civil laws meant to mitigate the harsh results of the taboo, but instead entrench it. Most disturbingly, the Rabbinate maintains a "blacklist" that includes the names of persons who the rabbis

declare are, or may be, mamzerim. Referred to euphemistically as a "list of those prevented from marrying," the list can, at any given time, contain the names of gentiles, converts, adulteresses, married persons masquerading as singles, as well as mamzerim.[41]

Before 1951, there was no official, state-sponsored blacklist. Information regarding persons "unfit to marry" was gleaned informally, often from persons bearing ill tidings in response to marriage announcements placed by the state in local newspapers. In 1951, the Ministry of Religious Affairs directed marriage registrars to keep "special notebooks" that would include the names of persons suspected of being unfit to marry, from whatever source derived.[42] In 1954, the ministry took responsibility for the administration of those notebooks. By 1976, 2,218 persons were on the blacklist.

In 1976, State Attorney General Aharon Barak (later president of the Supreme Court) decided to review the legality of the list. Did rabbinic courts have authority to keep such lists? And if so, were the lists being managed in a manner consistent with due process? In an internal memo referred to as Directive 6.4501,[43] Barak proclaimed that since rabbis had jurisdiction to determine who is able to marry in accordance with din torah, they also had, ipso facto, the authority to prevent persons from circumventing din torah and hence were entitled to keep the blacklist. With respect to due process, he adjured the marriage registrars to refrain from putting a person on the blacklist if that person had not requested a marriage license. The rabbis and their emissaries, Barak explained, must not act as if they were the police: "Moreover, the authority of the Marriage Registrar arises only when a person requests to register a [future] marriage. If there is no such request, there is no authority. The status of the Marriage Registers is not the same as the status of the Police who collects information about potential criminals."[44]

By 1989, 8,379 persons were on the list. Despite Barak's adjurations, it contained third parties who had never appeared before a marriage registrar or rabbinic court for any purpose, including children. The ombudsman called for reform. In 1994, 5,200 persons were on the list. Determined to lower that number, MK Shimon Shitrit and Chief Rabbi Bakshi-Doron pared the list down to 200, eliminating children and third parties. At the same time, they recommended that no persons be placed on the blacklist without a full hearing or without a final determination as to their status. Their recommendations were not adopted.[45]

In 2003, the Ministry of Religious Affairs issued a circular outlining how marriage registrars should go about collecting and evaluating information regarding persons applying for a marriage license. The circular gave broad authority to registrars: to question applicants;[46] to examine witnesses;[47] to engage in independent inquiry regarding written evidence;[48] to withhold the right of a person to marry

if the applicant was already on the blacklist,[49] or should be on the blacklist.[50] In 2009, the blacklist had burgeoned to 4,334 persons. This included 93 mamzerim.[51] In 2013, the state controller reported that the blacklist had included 4,865 persons as of March 2011, and 5,397 persons as of August of 2012.[52]

In 2003, at the same time the Ministry of Religious Affairs published the circular defining the scope of the power of marriage registrars, the High Rabbinic Court asked to convene a special committee with the Justice Department to establish directives on how to deal with mamzer children. Could a marriage registrar who established that a person is a mamzer also place that person's child on the blacklist? If a rabbinic judge suspected that a pregnant litigant had committed adultery, could he put her unborn child on the list? In both cases the minor had not asked to marry or divorce and, as such, the matter was not directly within the jurisdiction of the rabbinic courts. If it were permissible to blacklist a child, what were the procedures for doing so? On December 23, 2003, a special committee made up of nine men[53] issued two and a half pages of directives titled "Procedural Guidelines for the Ineligible for Marriage."[54] Despite the exhortations of Barak to limit the blacklist to persons who requested a marriage license, the guidelines took for granted that rabbinic courts had authority to conduct trials regarding children. Asserting laconically in a way that echoed Barak's general acceptance of the blacklist in his 1976 directives, the committee announced that such authority arose from the rabbis' power to decide who can marry.[55] Though lamenting the awful plight of the mamzer, the committee proclaimed that sometimes a rabbinic court had "no choice" but to decide such matters.[56]

The 2003 guidelines outlined the procedures for determining whether a child is a mamzer. They required that a separate file be opened; a special tribunal be convened; an attorney from the Social Welfare Office be present at all hearings to protect the "best interests" of the child; a determination of legitimacy be final and not subject to appeal, whereas a determination of mamzer could be appealed and, if affirmed, reopened when the minor reached majority.[57] In the guidelines, the committee also clarified that if the state waited till a child reached majority to conduct a trial, important evidence might be lost,[58] and authorized the social welfare officers to collect such evidence. All this, it proclaimed, to protect the best interests of the child while at the same time protecting the "interests of the public" from unwittingly marrying a mamzer.[59]

In addition to blacklists, regulations, and tribunals that allow rabbinic civil servants to hunt out mamzerim of all ages, the Knesset has passed civil legislation that further ensconces the taboo even as it attempts to limit the number of persons declared mamzer. These laws incorporate the spirit of the din torah mar-

ital paternity presumption. According to section 22 of the Population Registration Law of 1964, a child born within 300 days (ten months) of his mother's divorce must be registered as the child of his mother's ex-husband. Paternity cannot be attributed to anyone else except by court order. According to section 28 (E) of the Genetics Testing Law of 2008, a court cannot order a paternity test without first receiving the expert opinion of the chief rabbis that such test would not raise the specter of mamzer. If mamzer is suspected, testing is not permitted except in matters of "life and death, or serious, irreversible disability."

Mamzer in Israel, a System at War with Itself

In the modern state of Israel, the mamzer taboo operates within a social arena that Mary Douglas might refer to as "a social system at war with itself,"[60] or that Berger and Luckmann would refer to as a "universe" that is looking "strange and uninhabitable."[61] Drawing on twenty-eight cases brought, hesitatingly and surreptitiously, to the attention of the Center for Women's Justice (CWJ) by mamzerim or their mothers, as well as published decisions, I posit that the embrace of the mamzer taboo by the state has seeded moral disorder and abdication of familial responsibilities; has punished innocent children for fabricated sins, delaying their stigmatization but not preventing it; has buttressed what has become the keystone of the state's gendered and discriminatory marriage and divorce regime; and has exacerbated the great symbolic weight still given to the taboo as somehow protecting the threatened boundaries of the Jewish people from dangerous infiltrators.

DISORDER: LEGAL INCONSISTENCIES IN ISRAELI POLICIES

In Israel today, the mamzer taboo is not instrumental in guiding Israelis toward "proper" sexual mores or familial responsibilities. Disorder prevails. The taboo does not prevent women from having extramarital sex. Nor does it prevent "incestuous" sexual relations between relatives. Rather, the taboo confounds the proper order of things, sometimes allowing men to escape their responsibilities to support their children and, at other times, preventing them from having any contact with their biological children.

If a Jewish woman in Israel has had an extramarital relationship, and if she and her husband agree to stay married, her marriage will remain intact and the taboo will not be imposed on her children. Her children—and by implication her own sexual activities—will be "legitimated" by the marital paternity presumption. This assumes, of course, that her lover, the child's biological father, makes no claims to paternity or connection with the child. In such cases, the taboo and paternity presumption will not have prevented extramarital sex but

instead will have exonerated it. Similarly, if an unhappy Jewish wife wants a divorce from her Israeli husband, she is free to physically leave him and engage in extramarital sex while waiting for a get if her religious conscience permits her to do so. So long as she has no children, the state will not punish her activities. In this situation too, the taboo will not prevent extramarital sex, though it could very well encourage the use of birth control. It may also provide, as described above, an incentive for an abortion—entered into with the blessing of rabbis.

The taboo is ineffectual in preventing incestuous relations, whether the consanguine type or affinal type. It would appear obvious that the taboo will not prevent malevolent fathers or brothers from forcing incestuous sexual relations on their vulnerable daughters or sisters. Nor will it prevent relations with distant relatives or in-laws. Most people are unaware that the taboo applies at all in such cases. Today, most states outside of Israel allow marriages between distant blood relatives and in-laws.[62] Aunts may marry nephews, just as uncles may marry nieces. Men may marry the widows or ex-wives of their brothers. They may also marry the sisters of their ex-wives.

In contrast to the modern latitude and freedoms with respect to relations with distant relatives, din torah law is not only out-dated, it is also not rational to the modern mind. Under din torah rules, a man *must* marry his brother's widow if his brother died without children.[63] But he is *prohibited* from marrying her if his brother died with children.[64] He is also prohibited from marrying his ex-wife's sister, but only if his ex-wife is still alive.[65] Thus, in Israel today, children born to a man who has had sexual relations with his brother's widow or with his ex-sister-law under prohibited din torah circumstances will be blacklisted and ostracized by the state's Chief Rabbinate, rabbinic courts, and marriage registrars. In one case brought to the attention of CWJ, an Israeli rabbi actually married a man and his ex-sister-in-law. When the rabbi asked them if they were related, they (correctly) said, no. Only many years later did the rabbi discover his error. By that time the couple had numerous children, all mamzerim. Though CWJ could not corroborate whether the children had actually made the blacklist, it has confirmed that the rabbi who performed the wedding informed the parents of his mistake and of the resulting, devastating consequences.

Moreover, and perhaps most importantly, the taboo confounds the proper ordering of responsibilities between family members. Because of the taboo, children are denied child support and are kept from knowing who their fathers are,[66] and men are denied contact with their children. From my experience, if a woman is divorced or estranged from her husband, she will not sue him to support someone else's biological child. It does not matter that the state has registered the child as his under the Population Registration Law of 1965. First, because registration

is not proof of paternity,[67] and second, because such estranged husbands or ex-husbands can defend against a support claim simply by denying paternity and thus raising the specter of the mamzer taboo. This would cause the mother to immediately withdraw her claim. Mothers will similarly hesitate to sue biological fathers for support. Like an estranged husband or ex-husband, the biological father can avoid responsibility by denying paternity and wielding the threat of the taboo. Moreover, he can invoke the Genetics Testing Law of 2008 to prevent any definitive proof that he is indeed the father.

A case brought by a mother before the Kfar Sava Family Court illustrates the support conundrum well. A judge dismissed a mother's petition for child support brought against a child's alleged biological father and *not* against her ex-husband. The judge held that the best interest of the child was to deny presentation of any evidence that might link the child to the defendant. Quoting the din torah opinion of Chief Rabbi Amar that the judge himself had solicited, the court ruled that a civil court support obligation would be dispositive proof of the defendant's paternity and would result in the stigmatization of the child. Thus, despite acknowledging the clear adverse economic consequences to the single mother of two, the judge rejected the petition for support. He wanted to avoid the mamzer stigma, literally at all costs. In defense of this position, the judge cited the wisdom of the Shulkan Aruch quoted in the epigraph to this chapter that suggests that a mamzer is better off dead. The judge rationalized that the child was doing well enough:

> The bottom line in the case at hand . . . is that the child before us is being nurtured, well taken care of, and is socially adept. And so it appears, on the face of things, that despite his mother's economic difficulties, she is able through her resourcefulness, conduct, and by girding her loins, and perhaps also with the good help of friends and family, to raise a child who is the source of pride and joy, without anything substantial lacking from his everyday needs.[68]

In another difficult case, a Jerusalem family court judge rejected a man's petition for visitation rights with a child over whom he claimed paternity. Fearing the mamzer stigma, the judge refused to allow the father to introduce any evidence that might prove paternity. Referring to the Genetic Testing Law, the judge held that, the "legislature has taken away any discretion of the court and placed the halakhic status of the minor as its single priority."[69]

A Tel Aviv family court similarly refused to accept a man's paternity claim in the case of a child who was calling two men "*abba*."[70] Intent on avoiding the mamzer taboo but unable to ignore the fact that the child had been conceived when the petitioner had been living with the mother and was being raised by

him, the judge declared the petitioner to be the "psychological parent" of the child but not the child's biological father. The father appealed. In August 2012, the Tel Aviv District Court accepted the appeal. Not only did the district court award paternity to the petitioner, it also ordered the Population Registrar to register him as the child's biological father. Taking express issue with the state's way of handling mamzer cases and noting the implicit human rights violations, the judge held that the family courts must separate civil law from din torah rule. He ruled that if a family court determines by a preponderance of the evidence that a man is the biological parent, this does not mean that a rabbinic court must similarly rule. Arguably, the standard of proof under din torah to construct a mamzer is different and much greater than the standard necessary to prove paternity. And most interestingly, the court underscored the disorder and chaos that reigned in the life of a child who called two men "abba." Quoting the expert psychologists who had implored the court to "establish certainty" and to "make order," the court wrote: "The most important thing to do here is to 'make order' in the minor child's life and to base that order on realistic data."[71]

DELAY: COMPLICATIONS RESULTING FROM DELAYED CONFRONTATION

In addition to seeding disorder, state involvement in the mamzer taboo fails to protect innocent children from stigmatization. At best, state involvement delays stigmatization. At worst, it can exacerbate it.

It is the prevalent assumption that section 22 of the Population Registration Law of 1964 prevents stigmatization of a child. It is supposed that registering a child as the offspring of his mother's ex-husband is a modern adaptation of the din torah marital paternity presumption, and that such registration and presumption are absolute and not subject to rebuttal. Such assumptions are wrong. By law, registration is not legal proof of paternity, just as registration is not irrefutable proof of any other fact alleged, such as religion, nationality, or even sex.[72] Registration is always open to rebuttal by evidence brought before a court of law. According to din torah, the presumption is also rebuttable. In the Kfar Sava case described above, the chief rabbi held that any evidence brought in support of a child-maintenance claim would be enough to refute the presumption.

Thus registration of a child under the name of the mother's ex-husband provides little protection. Such registration is a lie. And it is a fragile lie held in place by an even more fragile, and in many ways deceptive, din torah "fiction." The forced paternal registration is a fragile lie because "everybody" knows when the child does not belong to the reputed father, including the child's mother, biological father, reputed father, and extended (and not-so-extended) family and friendship circles. Those who know the truth may also include teachers, doctors, health-care professionals, population registrars, rabbinic court officials, immigration officers, and often the child himself or herself. The registered father may not even know that the state has registered the child as his in the Population Registry. Most often the child's family will ignore registration and refer to the child by the biological father's surname for most purposes, requiring awkward maneuvering when official purposes reveal the child's "true/false" identity. Other times, a (hidden) mamzer will participate all his life in the lie, waiting anxiously for it to be revealed.

Rivkah Lubitch, a rabbinic *toenet* (advocate or pleader) who conducted many conversations with mamzerim and their family members, describes the feelings of grief and anxiety that this lie engenders in the people forced to take part in it. They live on edge, waiting for the lie to be uncovered and for the stigma, which they know to be "true," to erupt.[73] Unveiling of the lie and eruption of the stigma can occur when a rabbinic court has "no choice" but to examine the facts. This can happen, for example, when a woman is pregnant during the course of a divorce and her husband claims that the child is not his. On such occasion, state rabbinic courts have authority by virtue of the 2003 Procedural Guidelines to summon the mother, the husband, and the suspected father, as well as any other relevant witness, to appear before the "special rabbinic tribunal" and subject all of them to intense cross-examination, mostly about the mother's sexual habits. An attorney from the state will then appear on behalf of the child and try to perpetrate more lies or raise more legal fictions and loopholes to exonerate the suspected mamzer. For example, there have been cases where the state attorney has suggested that the mother had sex with the Arab gardener because if the biological father of the child is a non-Jew, the child is not a mamzer.

Unveiling of the lie and eruption of the stigma may also occur at the moment of birth. If a mother objects to the automatic (false) registration of her child as her ex-husband's, she is precluded by law from listing any other man as the child's father. (Many women are unaware of why they cannot accurately report who the child's father is and will adamantly refuse to attribute paternity to their ex-spouse!) The registration will be left open, literally marking this child as special and announcing to all with access to the registry that there is a question regarding the child's paternity. If the mother then asks for a marriage license while the child is still a minor, the marriage registrar who has easy access to the Population Registry will refer her and the child to the special tribunal to determine who the father is. The special tribunal will then initiate the inquisitorial fact-finding and cross-examination mandated by the Procedural Guidelines.

Unveiling of the lie and eruption of the stigma are very likely at the moment a (still hidden) mamzer appears before the marriage registrar asking for permission

to marry. At that point the marriage registrar can ask questions, examine papers, inspect the Population Registry, and make enough inquiries to reveal the lie and raise the specter of mamzer from its long, but temporary, rest. For example, the registrar could summon the person's registered "father" as witness to the person's genealogy. The "father" will be hard-pressed to continue perpetrating the lie and will in all likelihood refuse to appear. The (still hidden) mamzer would be best to avoid marrying in Israel altogether, even though it is, among other things, to ensure this very right to marry that he has been hiding all his life. Alternatively, the mamzer can continue to participate in the lie before the marriage registrar, making excuses for why the registered "father" cannot appear and waiting for the lie to be revealed at still another time, perhaps when the mamzer's child wants to marry—or perhaps when the registered father writes a will disinheriting his "child," asks a court for a declaratory judgment that he is not the child's father, or refuses to take part in the "adoption" of "his child" by the person who is the child's biological father, the method preferred by the Social Welfare Office to "correct" the situation. Even if exonerated by the special rabbinic tribunal at some juncture, the child is still not safe. Attorney Eddie Weiss, legal advisor for the state Social Welfare Office who has represented many mamzerim, informs me that determinations of the special tribunal are never final, regulations notwithstanding. The stigma can erupt again, and the lie, now hidden by another lie, can be unveiled if new facts are "discovered" by a rabbinic court. The tribunal is even authorized to solicit such evidence, including medical records, for example.

Sometimes registration will create a mamzer where one does not exist in fact. If a child is conceived *after* a divorce but is born within three hundred days (ten months) of divorce, the child will still be registered on the name of his mother's ex-husband. This requires parents to take legal steps to rebut the false registration and to prove that the child was premature or conceived immediately subsequent to the get.

Moreover, the marital paternity presumption is of no help at all if a mother is not married at the time of conception. A child of a man who has had sexual relations with his daughter, his ex-wife's sister, or with his brother's widow when he is helping take care of his nieces and nephews will not be helped by the presumption. And there is no dissimulating registration. The taboo is forever.

In short, the state mandates a lie at the point of birth and registration, apparently to try to prevent stigmatization of innocent children for the "sins" of their parent.[74] And then it authorizes rabbinic bureaucrats to "reveal" that lie at various junctures of the child's life or to engage in further lies and fictions to try to

bury the truth once again, until those bureaucrats decide that they have no choice but to confront the lie at yet another juncture.

Registration of a child on the name of the ex-husband does not remove the stigma of mamzer. It, at best, *delays* it, and only in cases where the mother is married.

DISCRIMINATION: AGAINST WOMEN

In addition to seeding disorder and delaying stigmatization, state rabbinic court involvement with the mamzer taboo disciplines and punishes women, keeping them, if you will, in their proper "subordinate" place. The taboo punishes unfaithful wives for their marital transgression but does not similarly punish unfaithful husbands, and it inhibits women from making valid legal claims against both ex-husbands and recalcitrant husbands. Mamzer is the ultimate "trump card" that men hold against their wives in cases of divorce.

Historically, rabbis have applied the mamzer taboo only to the offspring of unfaithful wives, not to the offspring of unfaithful husbands if those husbands restrict their extramarital relations to single women. If a husband has extramarital relations with a single woman, such sexual activity is not unlawful fornication prohibited under the Bible, and, hence, under din torah. It is only unlawful if the Jewish man has relations with a Jewish *married* women, thus infringing on what is effectively the property rights of another Jewish man.[75] As such, a child born of a Jewish man's adulterous relationship with a single woman is not stigmatized by the state (nor, for that matter, is it necessarily grounds for divorce[76]).

In a recent spate of cases, rabbis called on the taboo not only to punish wayward, adulterous, wives but also to prevent divorced women from breaching their divorce agreements or from suing to set them aside. The rabbis declared that husbands would not have agreed to the get if they had known that their wives would contest or breach their divorce agreements. The rabbis announced that *gittin* delivered under such "fraudulent" or "mistaken circumstances"[77] were void, effectively making mamzerim of the children born to these women after they received the "mistaken" get. One such holding was rebuked and overturned by Rabbi Dichovsky who wondered: "Will we go to such extremes as to establish *mamzerut* [status of religious illegitimacy preventing marriage to Jews under Jewish law] even after a woman has had children with another man? . . . It seems to me that we have to separate completely between the arrangement of the *get* and all other matters, as did authorities in the past who were responsible for arranging the *get*."[78] Notwithstanding Rabbi Dichovsky's objections and express reproach

regarding the misuse of mamzer by disgruntled ex-husbands, many such decisions have stood unchallenged and the threat of repealed gittin remains.[79] A similar threat does not hover over men who breach or challenge divorce agreements. They are not only free to breach and challenge, but to even set the terms for divorce.[80]

In similar spirit, the High Rabbinic Court has called on the mamzer card to prevent women from suing their husbands for damages for get refusal in family courts. The High Rabbinic Court has held that no rabbinic court should arrange a get so long as a damage claim is outstanding. Rabbi Hashai warned that if a man was forced to give a get under such conditions, "such get is not a get and the children are mamzerim."[81] In an analogous case in 2011, Rabbi Amos of the Netanya Court explained: "This is the place to express dissatisfaction with regard to legal proceedings in the form of 'damages claims,' whose purpose is to force husbands to divorce against the laws of the Torah, indirectly and 'through the back door,' actions that lead to invalid forced divorces and the surge of mamzerim." Dov Frimer, a law professor and prominent Israeli divorce attorney, agrees. In an academic article written in support of the position that women who file damage claims are exerting "unlawful compulsion" and putting both their get and children at risk, he argues:

> It must be stressed that the legal and halakhic ramifications of "unlawful compulsion" are extremely severe: the *get* is void, i.e., the couple is still considered *halakhically* married, even retroactively, and the woman's subsequent children from another man would be considered offspring of an incestuous or adulterous union (*mamzerim*). These are not consequences that any responsible rabbinical authority can take lightly.[82] (Frimer 2012, 45–46)

In general, rabbis draw on the taboo to prevent women from putting any type of pressure on their recalcitrant husbands to deliver a get—lest the get be invalid, a woman remarry, and the resulting child a mamzer. Rav Elayashiv (1910–2012), a modern decisor who set the tone for Israeli rabbinic courts, warned rabbinic judges that using even the slightest force against recalcitrant husbands would result in mamzerim: "All of the ahronim [early rabbinic religious authorities] hesitated to use force even when the law would allow for it . . . thus it is appropriate to follow their opinion and to refrain from applying force since it is likely to lead to an [invalid] forced divorce and mamzerim" PD"R 4: 164 (1950).

The taboo is often called into play to deny proposed systemic solutions to the agunah problem in Israel and abroad. Take, for example, Michael Broyde's threatening use of mamzer to support his sweeping dismissal of Aviad HaCohen's proposal to allow rabbinic courts to declare marriages void if entered into on the basis of mistake: "Courage implies taking risks with one's own status. But Hacohen's courage entails inflicting the possible status of mamzerut on the children of women who rely on these unorthodox approaches. Advising women to take that risk for their children is not courageous but irresponsible."[83]

Rabbinic pleader Rivkah Lubitch calls mamzer the "trump card" that a man holds over his wife in matters of divorce.[84] If not for the threat of mamzer, women could dismiss the need for a get and continue on with their normal lives. The mamzer taboo is a great inhibiter on women's autonomy. Women will not put their children at risk, even for the sake of their freedom.

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.[85] This gendered order may be disintegrating, fragmenting, unstable, "a system at war with itself," more symbolic than diabolic.[86] It may be the product of good men trapped in conceptual apparatuses who are trying to keep their nomos whole and coherent,[87] and not the invention of 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.[88] Any threat to this order of things is said to be "dangerous." Mamzer and the dangers it represents are the taboo that anthropologist Mary Douglas might suggest function to keep the gendered order in place.[89]

In the spirit of Douglas, I further posit that for the rabbis—and for many Jewish citizens of the State of Israel—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[90]) and threaten their physical and spiritual integrity, or "holiness"—that is, damage 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*.[91]

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. The court asserted that

> [o]ne 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].[92]

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 court:

> 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.[93]

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?[94]

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.[95] The Netanya court also expressed clearly the "danger" that rabbinic courts register at the possibility of the proliferation of mamzerim. Rabbi Yanai wrote:

> [T]o 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."[96]

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 State of Israel. 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 chapter, 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 Fuller 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.[97] 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 claiming to "protect the presumption."

Civil legislation passed by the Israeli legislature is an example of such equivocation. Section 22 of the Population Registration Law of 1965 protects the presumption by requiring children born within ten months of a divorce to be registered in 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, and 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 advocate 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 percent proof—that is, beyond any doubt at all, a factual impossibility but a strong legal fiction.[98] This would appear to be also the position taken by 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.[99]

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.[100] 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 reading would explain several 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 an innocent child.

TRUE: WE ARE ALL MAMZERIM

To protect innocent children from unfair stigmatization, to make sure children know who their fathers are and that those fathers support them, to respect the paternity rights of fathers, and 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."[101]

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.[102] 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.[103] Or they could presume that we were all conceived though in vitro fertilization and *not* through sexual intercourse, a prerequisite to mamzerut under din torah.[104] 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 appear 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 State of Israel. 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 the 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, rabbis would do well 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.

NOTES

1. FamCt. 32690/09, *Plonit, et. al. v. Ploni et.al.* (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): 631–54 (describing at length the confessional system referred to as the "millet system").
4. "Chief Rabbinate of Israel Law, 5740–1980," www.israellawresourcecenter.org/israellaws/fulltext/chiefrabbinateisrael.htm.
5. Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality* (New York: Anchor Books Doubleday, 1966), 89.
6. Deut. 23:3 (JPS trans.).
7. Jeffrey H. Tigay, "Adultery," in *Encyclopedia Judaica Jerusalem* (Jerusalem: Keter Publishing, 1972), 313. For further discussion, see Simcha Fishbane, "The Case of the Modified Mamzer in Early Rabbinic Texts," in *Deviancy in Early Rabbinic Literature: A Collection of Socio-Anthopological Essays* (Leiden: Brill, 2007), 4–15 (supporting the idea that the term mamzer referred first to reviled ethnic groups and only later to children of forbidden relations).
8. Jeffrey H. Tigay, *The JPS Torah Commentary, Deuteronomy* (Philadelphia, PA: Jewish Publication Society, 1996), 210.
9. Rules regarding prohibited adulterous and incestuous sexual behavior are set forth in three places in the Bible—twice in Leviticus (18:8–18; 20:11–21) and briefly in Deuteronomy (22:22, 23:1, 27:20–23). Forbidden incestuous relations include both "consanguine" (blood) relations, as well as "affinal" (in-law) relations. For further discussion, see Baruch A. Levine, "Excurses 5," in *The JPS Torah Commentary, Leviticus* (Philadelphia, PA: Jewish Publication Society, 1989), 253–55 (claiming that biblical incest rules underwent "considerable development" and "can be understood as an attempt to prevent too much inbreeding within families that were otherwise bound together as social units"). For a completely different understanding of biblical incest rules, compare with Calum M. Carmichael, *Law, Legend and Incest in the Bible: Leviticus* 18–20 (Ithaca, NY: Cornell University Press, 1997) (claiming that conduct of biblical ancestors inspired the "idiosyncratic" incest rules in Leviticus); L. William Countryman, *Dirt, Greed, and Sex: Sexual Ethics in the New Testament and Their Implications for Today* (Minneapolis, MN: Fortress Press, 1988) (maintaining that rules of forbidden relations can be understood only in the context of the purity and property rules of the priestly sect).
10. Deut. 22:22 (JPS trans.); see also Lev. 20:10.
11. Compare the term "Jewish" with the term "Judahist," Donald H. Akenson, *Surpassing Wonder: The Invention of the Bible and the Talmuds* (New York: Harcourt Brace, 1998), 28 (preferring the term "Judahist" to "Jewish" when referring to the spectrum of religious expression that thrived in ancient Israel prior to the destruction of the Second Temple in 70 CE, and which he argues must be used to distinguish between what later became known as Rabbinic Judaism).
12. See Meir Bar Ilan, "The Attitude Toward Mamzerim in Jewish Society in Late Antiquity," *Jewish History* 14 (2000): 125–70.
13. Expanding on this point, see Simcha Fishbane, "The Case of the Modified Mamzer in Early Rabbinic Texts," in *Deviancy in Early Rabbinic Literature: A Collection of Socio-Anthropological Essays*, Simcha Fishbane (Leiden: Brill, 2007), 4–15.

14. Levine, "Excurses 5," 41–42 (defining *karet*).
15. Lev. 20:10.
16. Lev. 20:11.
17. Lev. 20:12.
18. Lev. 20:14.
19. For the opposite opinion, compare with *tosefta* Yev. 6:9 (Lieberman ed., 21), cited in Bar Ilan, "Attitude Toward Mamzerim," 131. The Babylonian Talmud concludes that a child born to a Jewish woman and gentile man is not a mamzer (Yev. 23a, 45a). For a historical survey of the attitude toward intermarriage, see Christine E. Hayes, *Gentile Impurities and Jewish Identities: Intermarriage and Conversion from the Bible to the Talmud* (New York: Oxford University Press, 2002), 184 (describing the consistent, chronological trend toward legitimation of a child born to a male Israelite and female Gentile).
20. Jacob Neusner, *The Evidence of the Mishnah* (Chicago: University of Chicago Press, 1981) (stating that the Mishnah is a compendium of different sectarian opinions).
21. Bar Ilan, "Attitude Toward Mamzerim," 132–34.
22. Ibid., 134–35.
23. Ibid., 136–39.
24. Ibid., 139–41 (noting that the ways of punishing mamzer were eventually limited to the marriage prohibition, perhaps as a result of exposure to Graeco-Roman democratic values).
25. Rambam, Mishnah Torah, Laws of Forbidden Unions 15:1,16, 19; Caro, Shulkhan Aruch, Even Ha'Ezer, Peria Ve'Rivia, siman 4, seif 13.
26. There are those who claim that the power given to husbands to declare a child a mamzer was circumscribed; see Stephen M. Passamamneck, "Some Medieval Problems in Mamzeruth," *HUCA* 37 (1966): 121–45 (showing how medieval authorities tried to limit the power of married men to deem their children mamzerim).
27. Maimonides, Mishnah Torah, "Laws of Forbidden Unions" 15:19.
28. Caro, Shulkhan Aruch, Even Ha'Ezer, Peria Ve'Rivia, siman 4, seif 15.
29. Maimonides, "Guide for the Perplexed," chap. 49, 376, trans. Friedländer (1904), www.sacred-texts.com/jud/gfp/gfp185.htm.
30. Ibid.
31. See Mary Ann Glendon, *The Transformation of Family Law: State, Law and Family in the United States and Western Europe* (Chicago: University of Chicago Press, 1989), 30–34 (describing the gradual secularization of family law beginning from the sixteenth century).
32. Caro, Shulkhan Aruch, Even Ha'Ezer, Ishut siman 49, seif 3.
33. Ron Harris, "Absent-Minded Misses and Historical Opportunities: Jewish Law, Israeli Law and the Establishment of the State of Israel" [Hebrew], in *On Both Sides of the Bridge: Religion and State in the Early Years of Israel,* eds. Mordechai Bar-On and Zvi Zameret (Jerusalem: Yad Ben Zvi, 2002) (describing the "absent-minded" ways that the millet system was embraced by the new state).
34. Before the establishment of the state, the following eleven communities were recognized millets under the Palestine Order in Council: Sunni Muslim, Eastern Orthodox, Latin Catholic, Gregorian Armenian, Armenian Catholic, Syrian Catholic, Chaldean Uniate, Jewish, Greek Catholic Melkite, the Maronite, and the Syrian Orthodox. After the establishment of the state, three more communities were officially recognized: the Druze, the Evangelical Episcopal Church, and the Baha'i. See Sezgin, "The Israeli Millet System," 632nn2 and 4.
35. But all marriages conducted outside of Israel will be registered by the minister of interior, HCJ 143/62 *Funk-Schlesinger v. Minister of Interior*, IsrSC 17(1) 225, 1962. But this does not

mean that couples who marry abroad will avoid religious courts upon divorce; see Zvi H. Triger, "Freedom from Religion in Israel: Civil Marriages and Cohabitation of Jews Enter the Rabbinical Courts," *Israel Studies Review* 27, no. 2 (2012): 1–17.
36. Rabbinic Court Jurisdiction (Marriage and Divorce) Law, 1953 [Hebrew].
37. Yev. 112b.
38. Git. 88b.
39. Sulkhan Aruch, Even Ha'Ezer 4, seif 20, 24. A male or female mamzer can marry a convert, but the child will still be a mamzer (seif 20), but if a male mamzer marries a *shifcha*, a servant woman, the children obtains the status of a servant and not a mamzer. Upon manumission, the child of a mamzer and servant woman can then marry an "untainted" Israelite (seif 24). There have been Israeli men who have taken advantage of this loophole to end the stigma attributable to them. Israeli women have no similar loophole.
40. Israeli Department of Justice, Directive no. 6.4501 of Attorney General (List of Those Prevented from Marrying) [Hebrew], 1976, updated 2003, http://index.justice.gov.il/Units/YoezMespati/HanchayotNew/Seven/64501.pdf. Special thanks to Akiva Miller who, on behalf of CWJ, did much research on the history of the blacklist and how it operates.
41. Ibid. (outlining the history of the blacklist).
42. Ibid., section18: "All [marriage] registrars must conduct a special notebook in which they list, in alphabetical order, the names of persons who they ascertain, through the newspaper or other sources, are prohibited from marrying in the Jewish manner; and they must consult that notebook with regard to all persons wanting to marry in order to make sure they are not on that list."
43. Ibid.
44. Ibid., section16.
45. Shimon Shitrit, *The Good Country: Between Power and Religion* [Hebrew] (Tel Aviv: Yedi'ot Aharonot, 1998), 265–74.
46. Ministry of Religious Affairs, circular of CEO 2003, rule 12 [Hebrew], www.dat.gov.il/NR/rdonlyres/D6621BEC-0680-4F3F-8B32-4BEC1D90564D/0/022003.pdf.
47. Ibid.
48. Ibid., rules 11, 14, 17.
49. Ibid., rule 37.
50. Ibid., rule 35.
51. Zalman Quitner, Rabbinic Court's Administration Office, "Those Prevented from Marrying" (internal letter to Center for Women's Justice) [Hebrew], March 5, 2009.
52. Micha Lindenstraus, State Comptroller's Office and Omnubudsman, Report 63c 2012 [Hebrew], 248, www.mevaker.gov.il/he/Reports/Report_114/f1e98fb8-ad35-4ef4-8cc2-ffbd51567b58/7923.pdf.
53. All nine members of the committee were observant Jews and all were important civil servants. The committee included Chief Rabbi Shlomo Amar; Rabbis Shlomo Dichovsky, Avraham Sherman, and Chaim Izerer, rabbinic judges; Elyakim Rubenstein, Attorney General and later Supreme Court Justice; and Yaakov Shapira, advisor to Rubinstein; Rabbi Shimon Yaakobi, the legal advisor to the Office of the Rabbinic Courts; Eli Ben Dahan, secretary to Office of the Rabbinic Courts; and Eddie Weiss, the deputy legal advisor to the State Welfare Office.
54. Shlomo M. Amar and Elyakim Rubenstein, "Procedural Guidelines for those Ineligible for Marriage" [Hebrew] (Jerusalem: Justice Department, 2003), www.justice.gov.il/NR/rdonlyres/EC880D06-0620-44AC-0CC2-3A1ED52642F8/0/lineage.pdf.

55. Ibid., para. 1.
56. Ibid., paras. 2, 3.
57. Ibid., para. 9.
58. Ibid., para. 10.
59. Ibid., paras. 3–10, 14, 15.
60. Mary Douglas, *Purity and Danger: An Analysis of the Concept of Pollution and Taboo* (Routledge: 1966), 141–59.
61. Berger and Luckmann, *Social Construction*. In the following sections, I also draw upon cases published by the Israeli family and rabbinic courts.
62. See Glendon, *Transformation of Family Law*, 55–58 (distinguishing between prohibitions regarding marriage and taboos pertaining to mating, and describing how legal systems in the United States and Western Europe have gradually reduced marriage prohibition between distant relatives).
63. Deut. 25:5–10.
64. Lev. 18:18.
65. Lev. 18:16; compare with decision of J. Levine in FamCt 10779–02–10, *Doe v. Doe* (Beer Sheva, March 21, 2012) (rejecting motion to dismiss action against brother in law for paternity despite the mamzer threat).
66. See UN Convention on the Rights of the Child, article 3 (regarding best interest of child) and article 7 (stating that child has right to know who father is).
67. HCJ 143/62 *Funk-Schlesinger v. Minister of Interior.*
68. FamCt. 32690/09, *Plonit, et. al. v. Ploni et.al.*, 30–31.
69. FamCt File No. 13632/08, *Ploni v. Almonit* (Jerusalem), December 6, 2009.
70. File No. 24955–03–11, *M. v. H.* (Court of Appeals, Tel Aviv), August 28, 2012.
71. Ibid., 6.
72. HCJ 143/62, *Funk-Schlesinger v. Minister of Interior.*
73. Rivkah Lubitch, "Mamzeruth in Israel: Hardship and Solutions" (forthcoming).
74. 406 U.S. 164, 175, *Weber v. Aetna Cas. & Sur. Co.*, 1972 (striking down a Louisiana workman's compensation law that denied benefits to unacknowledged illegitimate children ("bastards"), stating: "[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth, and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent."
75. Countryman, *Dirt, Greed and Sex* (explaining that the Bible seems more intent on preventing one man from infringing on the property of another man—his wife—than on securing the fidelity and sanctity of marriage, and declaring that adultery in the Bible is about "dirt and greed"—i.e., purity and property—not about trust and fidelity.) Moreover, rabbinic courts are more vigilant in scrutinizing the extramarital sexual behavior of women, in general, than of men. This is because *din torah* prohibits an unfaithful wife from remarrying her ex-husband and lover, even if she has not had children with the lover. Israeli rabbinic courts feel compelled to indicate such prohibition in the act of court (מעשה בית דין) issued with the *get*. Such act of court applies to the status of the wife who is being set free and not the husband who is doing the freeing.
76. Ruth Halperin, "Adultery on the Part of the Husband as Grounds for Compelling Him to Divorce His Wife" [Hebrew], *Mehkarei Mishpat* 7 (1989): 297.
77. See also, RabCt. 041987009–24–1 C v. C, Law and its Decisor 9 (2005), no.6 (Haifa, November 25, 2002); RabCt. 027527164–21–1, Law and its Decisor 12 (2006), no. 4 (Tel

Aviv, November 21, 2005); RabCt. 9997–23–1 Ploni v. Plonit, Law and its Decisor 14 (2007), no. 7 (Tel Aviv, July 10, 2006); HRabCt. 8894–21–1 Plonit v. Ploni, *Da'at (Herzog Academy, Gush Ezion)*, www.daat.ac.il/daat/psk/psk.asp?id=258, Plonit v. Ploni PD 13 5(08) 2008 (Isr.) (Jerusalem, January 27, 2008).
78. HRabCt. 032675951–21–1, "*Ploni v. Plonit*," Law and Its Decisor 17, no. 8 (Jerusalem, January 15, 2008).
79. Atara Konigsberg, "in re: Declaring a Get Void after Delivery of Same" [Hebrew] (seminar paper, October 2004).
80. Susan Weiss, "The Three Methods of Jewish Divorce Resolutions: Fundamentalism, Extortion and Violence" [Hebrew], *Eretz Aheret* 13 (2002): 42.
81. HRabCt. 7041–21–1, *Plonit v. Ploni*, 16 (Jerusalem, March 11, 2008), *Da'at (Herzog Academy, Gush Ezion)*, www.daat.ac.il/daat/psk/psk.asp?id=252.
82. Dov Frimer, "Refusal to Give a Get: Tort Damages and the Recalcitrant Spouse in Contemporary Jewish Law," *Jewish Law Annual* 12 (2012): 39–52.
83. Michael R. Broyde, "An Unsuccessful Defense of the Beit Din of Rabbi Emanuel Rackman: The Tears of the Oppressed by Aviad Hacohen," *Edah* 4, no. 2 (2004): 2–28, esp. 4.
84. Lubitch, "Mamzeruth in Israel."
85. See argument that keeping women in their place is symbolic of the theological order God:man as man:woman; see Susan Weiss, "Not Just Words: The Tort of Get Refusal" (PhD diss., Tel Aviv University, December 2012), esp. chap. 7, 170–85.
86. 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).
87. Lon L. Fuller, "Legal Fictions," *Illinois Law Review* 25, no. 4 (1930–1931): 363–99, 513–46, 877–910 (explaining how persons who adopt legal fictions may be caught in an "existing conceptual apparatus" [513–46], adhering to rules that make their world seem "coherent" and "simple" [877–910]).
88. 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; see 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.
89. Douglas, *Purity and Danger.*
90. Maimonides, "Guide for the Perplexed," chap. 44, 377.
91. Rabbi Shlomo Amar (n.d.), "Greetings from the President," (Hebrew), [Israel] Rabbinic Courts [of Israel], accessed June 13, 2012, www.rbc.gov.il/president/index.asp (link has since expired); emphasis mine.
92. RabCt 027862614–21–1, *K. v. K.* (Tel Aviv), December 6, 2006 (unpublished, on record with author).
93. 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)*, www.daat.ac.il/daat/psk/psk.asp?id=521.
94. 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.

95. FamApp. 2374/11, *N. v. N.* (Israel Supreme Court), July 12, 2011, *Rulings, Interim Orders, And Protocols of State of Israel,* 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_d25352ic-78cc-6a3f-25cf-391db091df9e.
96. RabCt. 272088/6, *Ploni v. Plonit.*
97. Fuller, "Legal Fictions."
98. File No. 24955–03–11, *M. v. H.*
99. Rabbi Shlomo Aviner and Rabbi Mordechai Halperon. "Tissue Testing to Determine Paternity" [Hebrew], *Da'at* (Herzog Academy, Gush Ezion), www.daat.ac.il/daat/psk/psk.asp?id=388, www.daat.ac.il/daat/kitveyet/assia/kviat-4.htm.
100. See Yev. 47a; Maimonides, above section 2; Rabbi Elie Kaplan Spitz, "Mamzerut," *Responsa of the CLJS 1999–2000,* 559 (March 15, 2000): 572–73 (published by the Rabbinical Assembly), http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/1991-2000/spitz_mamzerut.pdf; Michael Wigoda, "Investigating Suspicions Regarding the Purity of Geneology in Rabbinic Courts" [Hebrew], *State of Israel, Justice Department, Mishpat Ivri* (2000), 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 Passamaneck, "Medieval Problems," 135–45) (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), 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).
101. Spitz, "Mamzerut," 586.
102. Lubitch, "Mamzeruth."
103. Avi Rosenthal, "We are All Mamzerim" [Hebrew], *VeTashar Devora,* May 12, 2013, http://vatashardevoraivrit.blogspot.co.il/2013/05/blog-post_12.html.
104. Lubitch, "Mamzeruth," 11n20.

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Backlash and Reaction