

## CENTER FOR MODERN TORAH LEADERSHIP

Center for Modern Torah Leadership



חרות ואחריות

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"Taking Responsibility for Torah"

## WHY DIDN'T THE RABBIS ELIMINATE MAMZERUT? PART 1

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Devarim 23:3 bans a *mamzer* and his or her descendants – even the 10<sup>th</sup> generation! - from marrying ordinary Jews. Mishnah Yebamot 4:13 records that Rabbi Akiva held that all Biblically forbidden relationships generate *mamzerut*; Shimon HaAmsuni held that *mamzerut* results only from relationships (other than *niddah*) punishable by  *karet* (excision) or worse; and Rabbi Yehoshua held only from those relationships punishable by execution. The law follows the middle position of Shimon HaAmsuni, with the result that *mamzerut* results only from cases of adultery and incest.

All these Rabbis were fully aware that the law of *mamzerut* unfairly punishes children for their parents' sins. Yet we find no record of a position declaring that "there never was and never will be a *mamzer*." Why not?

A moral critique of *mamzerut* is memorably articulated in Vayikra Rabbah (Emor 6) by Daniel the Tailor, who frames it as an interpretation of Kohelet 4:1

ושבתי אני ואראה את כל העשקים אשר נעשים תחת השמש  
והנה דמעת העשקים ואין להם מנחם  
ומיד עשקיהם כח ואין להם מנחם

*I turned, and saw all the oppressions that take place under the sun.*

*Behold - the tears of the oppressed! and they have no comforter.*

*Power flows from the hands of their oppressors, and they have no comforter.*

– ושבתי אני ואראה את כל העשקים . . . –

דניאל חייטא פתר קרייה בממזרים:

והנה דמעת העשקים –

אבותם של אלו עוברי עבירות, ואילין עלוביא, מה איכפת להון?

כך אביו של זה בא על הערוה:

זה מה חטא ומה איכפת לו?

ואין להם מנחם, אלא מיד עושקיהם כח –

מיד סנהדרי גדולה של ישראל שבאה עליהם מכחה של תורה

ומרחקתן על שום לא יבא ממזר בקהל ה'

ואין להם מנחם

אמר הקדוש ברוך הוא:

"עלי לנחמן,

לפי שבעוה"ז יש בהן פסולת,

אבל לע"ל אמר זכריה

"אנא חמיתיה אלו כורסוון כולו דהב נקי"

*I turned and saw all the oppressions . . ."*

*Daniel the Tailor interpreted this verse as referring to mamzerim -*

*Behold - the tears of the oppressed*

*Their fathers are transgressors, and they suffer: why is it their responsibility? !*

*So this one's father commits adultery:  
what sin has the son committed, and why is it his responsibility?!  
and they have no comforter, rather power flows from the  
hands of their oppressors -  
from the hands of the Great Sanhedrin that comes against them with the force  
of Torah  
and marginalizes them on the basis of the verse "a mamzeir may not enter the  
Congregation of Hasbem"  
and they have no comforter  
Said the Holy One Blessed Be He:  
"It is My responsibility to comfort them,"  
for in this world they have in them impurities,  
but in the Coming Future the prophet Zechariah said  
"I have seen those thrones all of pure gold."*

The Bar Ilan Responsa Project records only one other statement by Daniel the Tailor. In Bereishis Rabbah 64:7, he reads Bereishis 26:14 as teaching that "If a person does not make himself like a slave to his slave, he has not acquired him." One suspects that this principle was not enforced in rabbinic property courts. It seems safe to categorize Daniel the Tailor as a social critic of halakhah.

Rabbinic literature quotes Daniel's critiques (albeit not in the Talmuds), without any explicit reservation or controversy. Nevertheless, Professor David Halivni argues that his critique of *mamzerut* boomeranged. Daniel argued powerfully and memorably that *mamzerut* was an inherently immoral institution. He thus directly challenged the morality of the Torah. Any subsequent elimination of *mamzerut* in practice would therefore feel like a confession that the Torah was morally imperfect. That was religiously untenable. So *mamzerut* continued.

I contend that Professor Halivni overstates the case. It is true that the Talmud records Tannaitic positions that the Rebellious Son, Idolatrous City, and House With Tzora'at never were and never would be. But each of these positions is immediately countered by a statement of certainty (framed as eyewitness testimony) that it had been, and the law does not follow the positions that make these cases impossible. Moreover, the House With Tzora'at is not a moral issue, so it's not at all clear that those positions were generated by moral discomfort. So *mamzerut* would have continued anyway.

Moreover, Daniel the Tailor eventually has a profound influence on Halakhah. The sixteenth century Syrian Rabbi Yoshiyahu Pinto (Responsa Nivchar MiKessef 138) cites Daniel as his motivation for seeking to permit a specific mamzer, even while conceding that the mother had committed adultery and emphasizing the severity of that sin. More recently, Rav Ovadiah Yosef zt"l regularly cited Daniel in his responsa permitting alleged mamzerim and mamzerot to marry ordinary Jews (and also in his responsa permitting agunot, a topic requiring separate treatment).

The linchpin for Rav Ovadiah is that G-d says "It is My responsibility to comfort them" against those "that come against them with the force of Torah." Clearly it would be better not to come against them in the first place, and spare Him the need to comfort them.

The nineteenth century Rabbi Yosef Shaul Nathanson (Responsa Shoel uMeishiv 1:1:5) read Daniel very differently. He argued that because G-d promised to comfort the victims of His halakhah, we need not worry about creating them. Daniel was not seeking to overturn halakhah on moral grounds, but rather to reconcile halakhic decisors to the pain caused by their decisions.

Rabbi Nathanson's reading does not seem to fit well with Daniel's other preserved statement. Perhaps more importantly, Rabbi Nathanson offers his reading in the context of an argument against taking a lenient position in a specific case of adultery **before** the woman became pregnant. We don't know whether he would have maintained this attitude when addressing the reality of a potentially unmarriageable child.

I don't think Rabbi Nathanson would have lacked integrity if he had spent months laboring to permit that child. Because **everyone** in rabbinic tradition has always understood that mamzerut is morally troubling, because it punishes children for their parents' sins. Daniel the Tailor is just the best articulation of a universally acknowledged reality. The proper question is and was: Can the good of preventing adultery (or incest) justify that unfairness?

Let's approach this question via an apparently unrelated suggestion from my teacher Rabbi Aharon Soloveitchik zt"l. Rav Aharon argued that the death penalty in civil society, or Noahide Law, is justified only because it deters other acts of violence. Executions without deterrent impact are just murder. In the United States, he contended, there is no way to carry out the death penalty often enough to accomplish deterrence, without relaxing standards and procedures in ways that will lead to the unjustifiable execution of innocents. Therefore he opposed the death penalty in the U.S.

Rav Aharon's approach was in principle socially contingent. He did not challenge the morality of the Torah in permitting the death penalty, and he had no need to claim that the death penalty never had been and never would be carried out, or that all past judicial executions had actually been state-licensed murders. There may have been, and may yet be, societies where the proper balance of

deterrence and punctiliousness can be maintained. But, he held, the United States in the late twentieth century was not such a society.

One can disagree with Rav Aharon in at least three ways. One can argue that

- a. the death penalty has purposes other than deterrence (as Rav Aharon himself argued regarding the death penalty within Jewish society, that it grants the perpetrator atonement); or
- b. that it is an effective deterrent as-is, or
- c. that the relaxation of procedures necessary to allow it to be an effective deterrent would not make the execution of innocents more likely, or at least so much more likely as to outweigh the good of deterrence.

These grounds for disagreement likely reflect underlying different moral weightings of the different risks. But they enable dialogue and deliberation rather than dismissal or defenestration.

It seems likely that the closest we can come to justifying the status of mamzerut is the claim that it effectively deters adultery. (Granted this doesn't help us at all regarding mamzerut resulting from incestuous rape.) Otherwise, it is simple cruelty. It therefore becomes necessary to ask whether mamzerut is an effective deterrent in our time and place. I suspect reasonable people can differ about this question, and those differences may reflect the realities of different subcommunities.

What I think we can agree on is that mamzerut should be limited to the minimum number of cases necessary for effective deterrence. Very likely, precisely because mamzerut affects children rather than parents, effective deterrence requires only a barely plausible threat. We also must acknowledge that many American Jews are so far removed from halakhah that there is no possibility that any halakhic outcome could accomplish deterrence. Finally, the reality of effective birth control means that it is difficult for a potential effect on children to deter sexual behavior.

Since there are and probably always will be people who see marriage with factual mamzerim as a threat to the spiritual-genetic quality of the Jewish people, the risk that children will bear the consequences of parents' sins is always real, and those who can be deterred, will be. Humane poskim therefore can legitimately aim to resolve every case, so long as they can do so with integrity. This was plainly the approach of Rav Ovadiah, and is also the position of the Rav as conveyed to me by Rabbi Abraham Halbfinger of blessed memory.

The rub, of course, is what constitutes integrity. I plan to publish a follow-up essay soon reflecting on, illustrating, and hopefully illuminating that issue.