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### WHY DIDN'T THE RABBIS ELIMINATE MAMZERUT? PART 2

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Rabbinic law often seems radically more humane than the text of the Written Torah. This discrepancy leads some to conclude that the Rabbis of the Mishnah and Talmud consciously and deliberately overturned Biblical law when they found it morally disagreeable. This conclusion leads to a question/critique: Why don't contemporary rabbis do the same thing?

In Part 1, I briefly discussed cases where (some) Rabbis explicitly declared that a Biblical law "never was and never will be," and why no such statement appears regarding mamzerut. I wrote that nonetheless "Humane poskim can . . . aim to resolve every case of mamzerut, so long as they can do so with integrity." In other words, it is possible and legitimate for a contemporary halakhist to aim for the laws of mamzerut to never apply in practice, even though factually many pregnancies result from adultery or incest.

How can this be done with integrity? In what way is this different than eliminating a Biblical law on the basis of our own morality?

Mamzerut actually seems to be a more extreme case of elimination than the Rebellious Son, Idolatrous City, or House with Tzora'at. It's not just that the Rabbis didn't formally eliminate mamzerut; they actually extended it to new cases. Most dramatically, the Biblical prohibition, as understood by the Rabbis (Kiddushin 73a), applies only to a mamzer *vadai*/definite, but the Rabbis extended it to cases of *safek*/doubt! Contemporary halakhists who seek to resolve every case of mamzerut therefore seem to be diverging from the Rabbis as well as from the Torah.

This extreme version of halakhic authority is disturbing for another reason. We might cheer poskim when they undo stringencies that cause pain, but by doing so, are we also granting them the authority to undo leniencies? If the Torah does not constrain rabbis from imposing their morality on halakhah, why should we have more confidence in their morality than in the Torah?

Let's approach this issue through the specific lens of **Igrot Moshe**, the collected responsa of the great 20th century posek Rav Moshe Feinstein zt"l. I want to concede upfront that the synthetic position I develop below is not explicit in Rav Moshe's works, and some of the details are also derived or extrapolated. Nonetheless, I believe that it is a fair and accurate portrayal.

Mishnah Kiddushin Chapter 4 lists three groups of people with halakhic marriage-barriers that derive from *safek* rather than certainty: "*sbtuki*, *asufi*, and *kuti*." A *sbtuki* is someone whose

mother is known, but she refuses to name the father; an *asufi* is a foundling. (The *kuti* is unrelated to mamzerut issues.)

Rava (Kiddushin 73a) states that a *sbtuki* and *asufi* are each Biblically permitted, but Rabbinically forbidden. Why would the Rabbis have created such a cruel prohibition? Since the Torah permits a *safek mamzer*, Rava reasons, the Rabbis cannot have been concerned for the minority possibility that these children are *mamzerim*. Rather, they must have been concerned that these children with unknown parents would **contract** an incestuous marriage, and thus give birth to *mamzerim*.

However, the Talmud (or Rava himself) rejects this explanation as far-fetched. It concludes instead that the reason must be **מעלה מיעושי ביוחסין**, literally "they created a higher standard in genealogical matters."

This conclusion seems to abandon, without justification, the opening assumption that the Rabbis would not contradict the Torah's decision not to be concerned for the minority possibility of *mamzerut*. How can this be?

Rav Moshe notes that the Talmud explicitly includes only the *sbtuki* and the *asufi* in the new Rabbinic prohibition. Perhaps all other *safek mamzers* remain permitted! This possibility appeals to him, but it runs aground on Mishneh Torah, Laws of Sexual Prohibitions 15:21.

דין תורה שספק ממזר מותר לבוא בקהל  
– שנאמר לא יבא ממזר בקהל ה'  
ממזר ודאי אסור לבוא בקהל, ולא ספק,  
אבל חכמים עשו מעלה ביוחסין,  
ואסרו גם הספיקות לבוא בקהל.

*The law of the Torah is that a safek mamzer is permitted to marry into the Jewish community*

*because Scripture says: A mamzer must not enter the community of Hashem,*

*a definite mamzer is prohibited to enter the community, but not a safek.*

*But the Sages instituted a higher standard in genealogical matters, and forbade even the safeks from entering the community.*

This undisputed ruling of Maimonides makes it clear that the *sbtuki* and *asufi* are only examples, and the Rabbis forbade all *safek mamzers*.

But, Rav Moshe notes, Maimonides also makes clear that the prohibition is the same for all *safek mamzers*. This means that the reason for the prohibition can never be a genuine concern that the

child is a “biological” *mamzer*, but rather – as Maimonides states – that some form of higher standard is imposed here. But what is the difference between a “higher standard” and a “genuine concern?”

Igrot Moshe EH 1:11 has one answer to that question. A genuine concern, analogous to all other cases of *safek*, would apply for all halakhic matters. A “higher standard” would apply only to matters that affect a holiness status conferred by genealogy. It therefore does not apply to the marriage prohibitions for biological kohanim that do not have the holiness status of *kobanim*, such as a *petzua daka*.

EH 1:24 points toward a different answer. Please bear with the unavoidable technicalities, and the necessarily clinical discussion of a tragic case of rape.

Mishnah Ketubot 1:10 reports that an unmarried young woman was raped when she went to draw water from her city’s well, and subsequently gave birth to a daughter. Talmud Ketubot 15a asks: Is the daughter eligible to marry a kohen? That depends on whether the rapist/presumed father was a man whose daughters are eligible (i.e. not a *mamzer* or *netin* or *chalah*), or not. The Talmud concludes that the daughter is eligible (according to the positions that matter for our discussion) if

1. most of the men in the city were “eligible,” and
2. there was a caravan of travelers near the city, and most of the men in the caravan were “eligible.”

The need for the presence of a caravan, and for the majority of the caravan to be eligible, is that a “higher standard” was implemented for genealogical matters – we require “two majorities,” not just one. Since a majority of the potential “city fathers” were eligible, and also a majority of the “caravan fathers,” this higher standard is met.

The obvious problem is that this “higher standard” does not affect the statistical likelihood of the daughter’s eligibility. If 90% of the men in the city were eligible, and 60% of the men in the caravan, then including the caravan makes things worse statistically than if there were no caravan! Regardless, the actual likelihood is a single percentage, drawn from the overall population of potential fathers/rapists. So in what sense is this “two majorities?”

It must be that the “higher standard” for marrying a *kohen* is not statistical, but rather formal. Rav Moshe contends that this is the nature of “higher standards.” It follows that in *mamzerut* cases as well, on a statistical basis one needs only to demonstrate that the person is a *safek*. This removes the Biblical prohibition, and leaves one only needing to meet the “higher standard.” To meet the “higher standard,” one needs only a second formal argument that generates a *safek*, even if that formal argument does not affect the overall odds.

In EH 4:17, Rav Moshe presents a third way in which *mamzerut* differs from ordinary halakhot (at least according to Rambam). In other areas, where there is no specific Biblical leniency for cases of *safek*, any probability greater than 50% generates a prohibition. However, regarding *mamzerut*, the Biblical leniency applies to any case where the probability is less than 100%.

Formal rules of halakhah turn majorities into certainties, and so formal rules can create Biblical *mamzerut*. However, in Rav Moshe’s view, informal/circumstantial evidence and judgments about reality can just about never create a Biblical prohibition. In practice, evidence for *mamzerut* is generally circumstantial, (e.g. fertilization cannot be witnessed, but only inferred). Therefore, even if we make the Biblical standard “certainty beyond a reasonable doubt,” rather than absolute certainty, Biblical *mamzerut* will be extremely rare. Rabbinic *mamzerut* will be much more common – but it can be overcome by a formally distinct second argument that generates some degree of doubt, **even if that argument doesn’t change the overall odds.**

If we now put it all together, Rav Moshe understands the Talmud to be saying that the Torah is not concerned about children born from adultery or incest marrying in the community; even children who most likely were born from such relationships are perfectly marriageable. The rabbis imposed a higher standard – but that higher standard creates a formal requirement, not a higher statistical bar.

The formal requirement means that every public case of suspected *mamzerut* requires a formal rabbinic permission. For the process to be taken seriously, both the public and the rabbis must acknowledge that it is possible that no grounds will be found for permission. But every rabbi involved must also understand that in any specific case, not finding such a permission is their failure; there is nothing in the Torah that requires this child to suffer for their parent or parents’ sins.

The result is that Rav Moshe, and any posek following his approach, can with full integrity, and full belief in the Torah as interpreted by the Talmud, seek to resolve every potential case of *mamzerut* in the direction of leniency. This despite the fact that no one in halakhah has ever suggested that cases of *mamzerut* never have been and never will be.

Seeking to resolve every case does not mean that one will always succeed. Poskim adopting this approach will properly be held accountable by poskim who adopt other approaches, including those who believe that the goal of halakhah is to prevent people who are factually children of adultery or incest from marry within the community. Leniencies developed without the greatest attention to intellectual rigor will fail in practice.

It should also be clear that Rav Moshe’s position about *mamzerut* has no necessary implications for any other area of halakhah. What drives Rav Moshe is the conviction that the Torah specifically permits any potential *mamzer* about whose status there is any doubt at all, and that the Rabbis had no intention or interest in practically expanding the category (at least when doing so would have no significant deterrent effect on adultery – see Part 1). Rav Moshe’s interpretations and rulings result from belief rather than critique.

In Part 3 (LOOK FOR OUR YAMIM NORAIM READER!), I plan to step back from the specific issue of *mamzerut* and revisit the general question of whether interpretations that make a halakhah wholly impractical are necessarily the result of moral or ethical discomfort.