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THE POLICING OF RELIGIOUS MARRIAGE PROHIBITIONS IN ISRAEL: RELIGION, STATE, AND INFORMATION TECHNOLOGY

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ABSTRACT

The State of Israel applies religious law in all matters of marriage and divorce. For the Jewish population of Israel, the law of marriage includes religious prohibitions on certain kinds of marriages, most notably the prohibition against intermarriage and the prohibition against marrying a *mamzer*. Over the years, Israel's state-religious authorities have adopted a variety of methods and practices for policing these prohibitions. These include stringent procedures for premarital registration inquiries; use of databases for collecting information on prohibited persons; recording the possibility of mamzer status of newborn children; special *Beit Din* proceedings for handling cases of possible marriage prohibitions; *Beit Din*-initiated investigations of possible prohibited persons, including minors; and special "Jewishness investigations" for people of questionable Jewish ancestry. This article surveys the law and practice of these policing methods, as well as the acute social problems and injustices they cause. Lastly, this article discusses ways in which these methods change traditional Jewish marriage norms of information dissemination.

INTRODUCTION

To a reader familiar only with modern Western legal systems, the notion that the state administration of marriage and divorce should follow religious law and be administered exclusively through state-employed religious clerics and tribunals is so foreign that it almost defies understanding. This sense of strangeness is especially acute with respect to the Jewish laws that prohibit the marriage of certain kinds of individuals or couples, which may appear arcane and cruel.

Yet these prohibitions are part of marriage law of the State of Isra-

el, and in order to enforce them, the rabbinical institutions of the modern State have adopted a policing mentality, and use information technologies and coercive powers to prevent transgressions. This system of enforcement affects the lives of many Israeli citizens who are denied their right to marry, and as we shall see, these enforcement methods radically alter the norms surrounding Jewish marriage.

MARRIAGE LAW IN ISRAEL: A BRIEF BACKGROUND

Under the Ottoman Empire, and later under the British Mandate government over Palestine, marriage and divorce law was subject to the religious laws of the recognized religious denominations and administered by their clerics, in what was known as the *Millet* system.¹ When the State of Israel was founded in 1948, the existing order remained in place.² Shortly thereafter, the Chief Rabbinate was consolidated as an organ of the nascent state under the new Ministry of Religions. In 1953, a law granted exclusive jurisdiction to the rabbinical courts, or *Batei Din*, over all matters of marriage and divorce of Jews in Israel.³

To this day, state-appointed clerics for each of the Jewish, Muslim, and Druze religions serve as marriage registrars for their respective populations and their religious courts adjudicate matters of marriage and divorce. Ecclesiastical courts and church institutions of state-recognized Christian denominations perform the same services for their communities, but they are not appointed by the state.⁴

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1. Palestine Order in Counsel § 51 (1922-1947) (Isr.).
2. Law and Administration Ordinance, 5708-1948, 2 OFFICIAL GAZETTE 1 (Isr.).
3. The core provisions of the act are as follows:

Article 1: Matters pertaining to the marriage and divorce of Jews in Israel, both citizens and residents, shall be under the exclusive jurisdiction of Rabbinical Courts [Batei Din].

Article 2: Marriages and divorces of Jews shall be conducted in Israel under Jewish law [Din Torah].

Article 3: In the event that a claim for divorce among Jews has been submitted to a Rabbinical Court, either by the woman or the man, the Rabbinical Court shall have exclusive jurisdiction over all matters bound up with [karuch] the claim for divorce, including support payments for the woman and the children of the couple.

The Adjudication of Rabbinical Courts (Marriage and Divorce) Act, 5173-1953, 7 LSI 139 (1953) (Isr.). In 2005, the law was amended to extend the *Beit Din's* jurisdiction over a greater scope of cases where one or both spouses' domicile is outside of Israel. *Id.*

4. See Palestine Order in Counsel § 54 (1922-1947) 3 Laws of Palestine 2569 (Isr.); see also, SHIRIN BATSHON, ECCLESIASTICAL COURTS IN ISRAEL: A GENDER RESPONSIVE REPORT (2012) available at

The religious laws preclude any possibility of inter-faith marriages and same-sex marriages. There is also no marriage option for those who do not belong to any recognized religion or denomination in Israel, such as members of non-monotheistic religions, or atheists.⁵ This paper however, only addresses the *Jewish* marriage law system of Israel,⁶ but it is important to note that similar problems affect the other religious communities as well.

As a matter of policy, one not enshrined in any law or regulation, only an Orthodox Jewish rabbi is appointed as a Jewish marriage registrar (a *Roshem Nisuin*), or a *Dayan* (judge) of a *Beit Din* (pl. *Batei Din*). All of these positions are, *ipso facto*, held by men. Other streams of Judaism, namely the reform and conservative movements have been excluded from these positions, and the Israeli Supreme Court has upheld this exclusion.⁷

THE BUREAUCRATIZATION OF MARRIAGE - WHY DOES THE STATE NEED TO CONTROL RELIGIOUS MARRIAGE IN ISRAEL?

That the recording of marriages is among the proper functions of a modern state hardly attracts a second thought anymore. Yet that has not been the case for much of history, and the story of how an essentially religious rite became a function of the secular state throughout the Western World, mostly in the last two hundred years, is too complex to recount here.⁸ In Israel, unlike the Western World, marriage remains the domain of religious law,⁹ but like the rest of the world, the Israeli

http://www.jadaliyya.com/pages/index/12559/ecclesiastical-courts-in-israel_a-gender-responsiv.

5. However, in 2010, the Knesset passed the Law of Civil Unions for People without a Religion, SH No. 2235 p. 428 (2010) (Isr.). This law provides for registration of civil unions, explicitly not called 'marriage', only so long as both parties do not belong to any of the State's official religions (Judaism, Islam, the Druze faith, or a Christian denomination). *Id.* Perplexingly, an application to form a civil union is subject to the approval or disapproval of each of the religious courts, which can prevent such a civil union on the grounds that one of the parties is a member of their religion and subject to their law. *Id.*

6. Furthermore, this article does not deal with the Ethiopian Jewish community in Israel, whose unique history has led to the establishment of a separate system of state-appointed marriage registrars and *Dayanim* from those of the general Jewish population. Its system of control is every bit as strict, and often stricter, than that of the general Jewish population.

7. HCJ 47/82 The Isr. Movement for Reform and Progressive Judaism et al. v. Minister of Religions et al. 43(2) PD 661 [1989] (Isr.).

8. See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989).

9. Only a few laws, most notably the Law of Equality of Women, have sought to deliberately derogate from some of the property rules of Jewish law and impose a state law over the religious law. The applicability of this law in the religious courts was upheld.

State confers secular legal significance to the religious status of marriage. However, the particular features of the Jewish laws of marriage has shaped the way that marriage has become institutionalized in Israel.

A Jewish wedding is a ceremony rich with layers of *halacha* and spiritual meanings and traditions.¹⁰ At the core of traditional Jewish marriage is the constitutive act of a marital relationship – the *Maase Kinyan* (literally “Act of Purchase”): The man gives the woman a wedding ring and says to his bride in front of two witnesses, “Behold, you are consecrated unto me by this ring, according to the law of Moses and Israel.” The marriage is thus constituted by the woman’s willing acceptance of the ring. Similarly, a divorce is concluded by the willing transmission of a *Get* (deed of divorce) by the husband to his wife and her willing acceptance of the *Get*.¹¹

The validity of a marriage or a divorce depends entirely on the joint voluntary actions of the man and the woman. For this reason, the *Batei Din* adjudicates the validity of a marriages and divorces as questions of fact, but they cannot dissolve a marriage through an act of the court. Even in situations where a couple is under obligation to divorce because of some fault of one of the partners, all a *Beit Din* can do is order the husband to divorce his wife and impose sanctions on a party that refuses to cooperate. This is an important factor in the problem of the *Agunah* – a wife who is “chained” to a husband who refuses to give her a divorce, even against the order of a *Beit Din*.¹²

Because a Jewish marriage is constituted solely by the acts of the parties, its validity does not depend on any official act of registration by a state authority. It is possible for a couple to be married in the eyes of religious authorities (and therefore the law) without this fact appearing in any official documents. This poses a challenge to the State’s regulation of marriages and divorces, because the integrity of public records demands that all valid marriages and divorces be officially recorded. The concern is that so-called “private” marriages or divorces, not recorded by the state, may lead to the proliferation of cases of dubious personal status—people who appear as single in public records but are

HCJ 1000/92 Bavli v. The Supreme Rabbinical Court et al. 48(2) PD 221 [1994] (Isr.).

10. On Jewish marriage in general, see ENCYC. JUDAICA, MARRIAGE 1026-52 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007).

11. This is, of course, a highly simplified account of the constitutive acts of marriage and divorce, meant to introduce some of its most salient features only. Jewish law contains a complex set of rules and jurisprudence governing every aspect of marriage and divorce, which the narrow scope of this article cannot fully explore.

12. This paper does not deal with the problem of the *Agunah*. For a good discussion of the problems of *Agunot*, see SUSAN M. WEISS & NETTY C. GROSS-HOROWITZ, MARRIAGE AND DIVORCE IN THE JEWISH STATE: ISRAEL’S CIVIL WAR (2012).

married in the eyes of religious law, or people who are still married in the eyes of the law but are holding themselves out as divorced.

THE PROHIBITION ON “PRIVATE” MARRIAGES

In the interest of public order, in 1950, a convocation of rabbis under the auspices of the Chief Rabbinate of Israel issued the ‘Jerusalem Prohibition’ or *Herem Yerushalayim*, a set of rules designed to assert the authority of the Chief Rabbinate over all matters of marriage in the State of Israel. The most important among these provisions was a ban on performing “private” marriage ceremonies, without the prior written consent of the Chief Rabbinate.¹³ Though, criminal sanctions for unrecorded “private” marriages have been on the books since the beginning of the British Mandate period,¹⁴ they have seldom if ever been applied.¹⁵ However, in 2013, the criminal penalty for failing to register a marriage was amended to two years imprisonment.¹⁶

The *Herem Yerushalayim* has not done away with “private” marriages. Today, a growing number of couples choose to marry in “private” marriages without the intermediation of the state, often as a deliberate act of defiance against the religious establishment.¹⁷ An organization called “Havaya” performs unregistered wedding ceremonies by lay officiants or rabbis, and such marriages may still be *halachically* valid, depending on the circumstances. While the true scope of this trend is unknown, a 2012 State Comptroller’s report noted that in recent years the Chief Rabbinate has reprimanded some 400 rabbis for performing “private” unregistered marriages.¹⁸ As a policy, the State refuses to register “private” weddings *post facto*, and insists that all marriages be performed exclusively through the official marriage registrars. In a number of cases, couples that married privately, some even in violation of religious prohibitions, later sought official state recognition of their mar-

13. See Zerah Verhaftig, *Takanot Harabnut Harashit*, in CHIEF RABBINATE OF ISRAEL: SEVENTY YEARS TO THE FOUNDING 85, available at <http://www.daat.ac.il/daat/EZRACHUT/harabanut2-2.htm> and <http://www.daat.ac.il/daat/EZRACHUT/harabanut2a-2.htm> (last visited Sept. 16, 2014).

14. Marriage and Divorce (Registration) Ordinance, 2 LAWS OF PALESTINE 903, ch. 88, No. 39 § 7 (1919).

15. A search of the Nevo legal database under the relevant statute found no criminal convictions for performing a “private” marriage.

16. Law to amend the Marriage and Divorce (Registration) Ordinance (No. 2), 5774-2013, SH No. 2410 p. 29 (Isr.).

17. See Amanda Borschel-Dan, *Orthodox couples opt for illegal halachic weddings*, TIMES OF ISR. (Feb. 16, 2014, 11:33 AM), <http://www.timesofisrael.com/israeli-orthodox-couples-opt-for-illegal-halachic-weddings/>.

18. OFFICE OF THE STATE COMPTROLLER OF ISR., ANNUAL REPORT NO. 63(3), 232 (2012).

riage through the courts. Almost invariably, the Israeli Supreme Court denied these petitions.¹⁹

RELIGIOUSLY PROHIBITED MARRIAGES

The need to maintain centralized state control over marriages in Israel is motivated by another important interest – the enforcement of the *halachaic* prohibitions on marriage.

Nearly all countries have some kinds of restrictions on certain marriages, such as the marriage of a minor or polygamy. These restrictions were adopted by the Jewish sages, and were reiterated in the Jerusalem Prohibition of 1950.²⁰ But Jewish law also contains numerous other marriage prohibitions, derived from the written laws of the Torah and expanded over the generations in the jurisprudence of the sages.²¹ Most notable among these prohibitions are the prohibitions of: a *Cohen*, a male member of the ancient priestly class, to marry a divorcee; the law that an adulterous wife must divorce her husband but may not marry her lover, *Asura Le-Ba'ala U'Le-Bo'ala*; and, crucially, the prohibition against the marriage of a *mamzer*, the child of extra-marital sexual relations.

The salient feature of these religious prohibitions is that a transgression does not, in itself, invalidate the marriage. However, the transgressor who marries in violation of these prohibitions has committed a sin, but the marriage itself is not void *ab initio*. In the case of such a prohibited marriage, the couple is obligated to divorce, but they must do so themselves; a *Beit Din*, as noted, cannot void a marriage. By contrast, incestuous marriage and the intermarriage of a Jew to a non-Jew are also prohibited, and such marriages are considered null and void *ab initio*.²²

The prohibition of the marriage of a *mamzer* has special importance to the policing of marriages in Israel. A *mamzer* is a child of extra-marital sexual contact between a married woman and man other than her husband, or the child of an incestuous relationship. A Jew from birth may not marry a *mamzer* and this prohibition applies equally to male and female *mamzerim* (however, a convert to Judaism may

19. See, e.g., HCJ 130/66 Segev v. Rabbinical Court 21(2) PD 541 [1967] (Isr.); CA 32/81 Tsonen v. Shetel 37(2) PD 761 [1983] (Isr.); CA 238/51 Cohen v. Att'y Gen. of the State of Isr. 8 PD 4 [1954] (Isr.); HCJ 80/63 Gurfinkel v. The Minister of the Interior 17(3) PD 2048 [1963] (Isr.); HCJ 51/69 Rodnitzky v. Supreme Rabbinical Court of Appeals 24(1) PD 704 [1969] (Isr.).

20. Verhaftig, *supra* note 13.

21. On Jewish marriage prohibitions in general, see ENCYC. JUDAICA, MARRIAGE, PROHIBITED 1051-1054 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007).

22. *Id.*

marry a *mamzer* under certain circumstances). The prohibition against marrying a *mamzer* passes also to all the offspring of the *mamzer* down through the generations. A Jewish person may not even marry a person who is merely suspected as a *mamzer* so long as there is serious doubt about his or her status, however, confirmed *mamzerim* may marry each other.²³

A *mamzer* can be born as a result of deliberate infidelity on the part of its mother, but a *mamzer* can also be born inadvertently. For example, consider the case of a woman whose divorce from her first husband is not properly concluded before she has children by her second husband, but she wrongly believes that she is divorced from her first husband. In this case, her second marriage is null and void, because a woman cannot be married to two men. Consequently, the woman is considered still married to the first husband, and therefore her children by the second are *mamzerim*.

The prohibition against marrying a *mamzer* is particularly outrageous to moral sensibilities because it punishes a person for the sins of their parents or ancestors. Because the prohibition of the *mamzer* is absolute and has the potential of exponentially increasing the number of *mamzerim* in Jewish society, preventing the birth of inadvertent *mamzerim* is one of the strongest motivations for maintaining strict control and proper records of marriages and divorces. The *Dayanim* and marriage registrars consider it their duty as community delegates (*shlichei tsibur*) to prevent the illicit marriages of a *mamzer* or a marriage that might inadvertently give birth to a *mamzer*.²⁴

THE SYSTEM OF CONTROL: POLICING RELIGIOUS MARRIAGE PROHIBITIONS

The system of religious control over prohibited marriages has three main components: (1) The marriage registration process, (2) the newborn registration process, and (3) the rabbinical courts system. Here we will examine each in turn.

THE MARRIAGE REGISTRATION PROCESS

Nearly all countries keep records of marriages and divorces in order to prevent polygamy and underage marriage, and maintain the accura-

23. The main laws pertaining to a *mamzer* are found in the *Shulhan Aruch, Even Haezer*, § 4.

24. The *Beit Din* explicitly refers to the implicit authority of the Beit Din to adjudicate the status of minors based on their position as *shlichei tsibur*. See, e.g., File No. 5684-63-1 Beit Din (Haifa), (Aug. 11, 2005), Nevo Database (by subscription) (Isr.) (no case name provided in court decision).

cy of public records. Many countries' marriage registration offices inspect the couple's identifying documents, take sworn declarations, and require evidentiary proof of divorce or widowhood if necessary before granting a marriage license or certificate. Many countries also have mandated waiting periods between marriage registration and solemnization, and publicize planned marriages in advance, in order to allow the couple a period of serious reflection before getting married and also in order to give members of the public ample time to come forth with any possible information impeding the marriage. Some countries have added other pre-marital requirements, such as medical tests or compulsory marriage counseling.²⁵

In much of the Western World today, the strict pre-marital bureaucratic controls have been reduced to simple and perfunctory steps designed primarily to prevent polygamy and underage marriages. In Israel, by contrast, pre-marriage registration remains an arduous ordeal, and is the main bureaucratic stopgap against violations of religious marriage prohibitions. The pre-marital registration process is standardized in a set of Marriage Registration Procedures issued by the Chief Rabbinate.²⁶ According to the Procedures, the marriage registrar must check the couple's national identification documents (or passports, if one of them is a non-citizen) to insure the accuracy of the registration form. The spouses' names are also checked against the national population registry to confirm their accuracy. The registrar must thoroughly question the couple to ensure that their statements on the registration form are correct, and warn them of the penalties under law for making a false statement. The registrar must also thoroughly question each of the intended wedding witnesses separately to verify the absence of any marriage prohibitions pertaining to the couple. Whenever possible, the couple must present their parents' *ktuba* (marriage contract), as well as other relevant documents when necessary (divorce certificate, a spouse's death certificate, etc.). The marriage registrar must thoroughly examine all the documents presented to him to make sure they are not forgeries. Special rules apply to converts, immigrants, adopted persons, and certain other categories. Also, prospective marriages must be publicized in a daily newspaper.

In case the marriage registrar has any doubt whether the couple may marry according to *halacha* or not, he must (after allowing the couple to make their case) report them to Ministry of Religious Services, and instruct the couple to obtain a ruling from a *Beit Din* permitting them to marry.

25. GLENDON, *supra* note 8, at 59-66.

26. STATE OF ISR. MINISTRY OF RELIGIOUS AFFAIRS, CIRCULAR 5763/1: GUIDELINES FOR MARRIAGE REGISTRATION PROCEDURES 31 (2003).

Marriages are registered in 133 local Religious Councils and religious-affairs departments in cities and towns across the country. Yet the state monopoly over Jewish marriage is not complete. There are three independent (i.e. non-state operated) Jewish marriage registering bodies belonging to the ultra-orthodox communities in Jerusalem, Bnei Brak, and Shoham, whose marriages are nonetheless recognized by the state although they are not subject to state oversight.²⁷ These independent registering bodies have operated for decades (one has existed before the founding of the state), but their existence is an example of the privileges that are sometimes accorded to Orthodox groups but are never accorded to other Jewish denominations like the reform and conservative movements.

The marriage ceremony itself is not performed by the marriage registrar, but by a marriage officiant (*mesader kiddushin / orech chupah v'kiddushin*) who is licensed to perform the wedding ceremony. Officially, marriage officiants must receive a permanent or one-time license to perform marriages from a committee of the Chief Rabbinate, which ensures that all officiants follow orthodox practice. However, in 2012 the State Comptroller noted that rules for licensing marriage officiants are frequently flouted, and marriage registrars, and even the Chief Rabbis, sometimes gave individuals permission to perform marriages in circumvention of the procedures under circumstances that smell of discrimination and nepotism. Violations of the rules prohibiting marriage officiants to advertise their services and charge extra fees frequently go unpunished as well.²⁸

To be sure, the pre-marriage Procedures all have their roots, in letter or in spirit, in Jewish traditions that predate the modern state of Israel. However, in Jewish communities outside of Israel, the exact details of the pre-marriage process are largely left to the individual structure, and judgment of the rabbi performing the marriage; the decision to marry in a Jewish ceremony and the choice of rabbi who performs the ceremony, is left up to the couple. *Betei Din* outside of Israel are community institutions, not government bodies, and the decision whether to seek a *Beit Din's* opinion in case of religious uncertainty is entirely the voluntary choice of the affected couple.

Although marriage registrars in Israel are all Rabbis with expert knowledge of the *halachic* laws of marriage, they are required to follow standardized procedures that allow them only narrow discretion in the interpretation of Jewish law and do not allow for divergence of practice and opinion among its marriage registrars and officiants. All cases of uncertainty are funneled into just twelve *Batei Din*.

27. OFFICE OF THE STATE COMPTROLLER OF ISR., *supra* note 19, NO. 63(3), at 247-53.

28. *Id.* at 226.

Considering the rigid bureaucratization of a function that traditionally belonged among the personal services that a rabbi performed for his congregants, it is not surprising, perhaps, that marriage registrars frequently ignore the Marriage Registration Procedures and follow their own understanding when performing pre-marital registration.²⁹ In cases where the permissibility of a marriage is doubtful, it is often easier to discretely approach a marriage registrar with a reputation as a “problem solver” rather than seek a formal *Beit Din* decision. This is not to suggest that marriage registrars are corrupt and violate *halacha*, but merely that some take more lenient views and attitudes and are willing to bend the rules when their judgment and conscience allows it.

Databases

Central to the policing of prohibited marriages during pre-marriage registration is the reliance on vast computerized databases to verify marriageability status. The reliance on databases sets the pre-marriage process in Israel apart from the way all other Jewish communities in the world perform pre-marriage checks.

The National Population Registry and Adoption Registry

As noted previously, during the marriage registration process, the marriage registrars are required to check the details of all couples against the national population registry.³⁰ The marriage registrars have access to the full registry, including records of the couples’ parents and grandparents, and including any record changes.³¹ The information in the national population registry is a vital resource for policing marriage prohibitions; it can show if an applicant is already married or divorced, whether her parents were married or divorced at the time of her birth, whether the applicants or her parents immigrated to Israel or were born in the country, and if any of them had converted to Judaism. Although the population registry information is not conclusive evidence about a person’s ancestry and status, it can help the marriage registrar identify circumstances that raise suspicion that a person is not eligible to marry because of some prohibition. By knowing the couple’s background, the registrar can direct his questions accordingly and demand the appropriate documentation to support the marriage application.

The marriage registrars also have direct access to the adoption registry,³² which can be used to uncover the identity of an adopted person’s

29. *Id.* at 206-16.

30. STATE OF ISR. MINISTRY OF RELIGIOUS AFFAIRS, *supra* note 26, at 11.

31. Population Registry Law, 5725-1965, 19 LSI 288 § 31(6) (1965) (Isr.).

32. Child Adoption Law, 5741-1981, 35 LSI 360 § 30(2) (1981) (Isr.).

birth parents and help identify individuals who are not Jewish by birth or whose birth raises suspicion of being a *mamzer*.

The Prohibited Marriages Database

Perhaps the most powerful policing tool is the Prohibited Marriages List (*Reshimat Meukavei Nissuin*), which contains the names of all individuals known to be subject to a marriage prohibition. Of course, maintaining a computerized list of all known prohibited persons was not commanded to Moses upon Sinai, but is a practice that evolved in the modern State of Israel.

One of the Chief Rabbinate first actions, in 1951, was to gather and circulate lists of known *mamzerim* and other people prohibited from being married. Rabbis were instructed to notify the Chief Rabbinate and the Ministry of Religions of anyone they knew to be subject to a religious marriage prohibition. By 1967, the Ministry of Religions circulated a consolidated list of all known prohibited persons that contained 2,218 names, a large number considering that the entire Jewish population of Israel at that time numbered fewer than 2.5 million people.³³

The circulated lists suffered from habitually bad record keeping. People who have been cleared from doubt about their status were not promptly removed from the lists and the terminology used in the lists was often confusing and did not always clearly state the reason for the prohibition. Names were included primarily based on the reports of marriage registrars who refused cases of prohibited marriages during the pre-marriage registration process and from the *Batei Din*, which encountered cases of prohibited marriages referred by the marriage registrars.

Batei Din also included individuals whose marriage prohibition came to light during unrelated judicial proceedings. For example, a child could be placed on the Prohibited Marriages List under suspicion as a *mamzer* if statements made during her parents' divorce proceeding raised allegations of the mother's infidelity. Occasionally, marriage registrars would receive tips about a person subject to a marriage prohibition from third parties who volunteered this information to prevent a marriage. Tips about prohibited persons also came from the Foreign Ministry and the Jewish Agency, two official bodies involved in the immigration of Jews to Israel, whose agents occasionally reported to the

33. The early history of the List is detailed in the Attorney General's Guidelines on the List of Prohibited Marriages, which are still in force. STATE OF ISR. MINISTRY OF JUSTICE, ATTORNEY GENERAL'S GUIDELINES ON THE LIST OF PROHIBITED MARRIAGES, GUIDELINE NO. 6.4501 (1976) [hereinafter: ATTORNEY GENERAL'S GUIDELINES], available at <http://www.justice.gov.il/NR/rdonlyres/3020BA04-6498-4172-9BC2-FA7722E088A5/0/64501.pdf>.

Chief Rabbinate the names of immigrants who were not Jewish according to *halacha* but were seeking Israeli citizenship. In these ways, some people were included in the lists without ever having registered to be married, based on dubious informants acting without any clear authority.

By 1976, the circulation of prohibited marriage lists had caused a public stir that prompted then Attorney General Aharon Barak to issue his Guidelines for operating the List. Barak's Guidelines rested on a legal conclusion that a centralized record of prohibited marriages was within the powers of the Ministry of Religions to ensure that all marriages conformed to Jewish law. As an exercise of lawful authority, any decision to include a person in the prohibited marriages list had to adhere to two principles: first, it had to follow "natural justice" (due process) and; secondly, the Ministry of Religions had to protect the privacy of the individuals on the List. Following this reasoning, Barak instructed the Ministry of Religions to ensure that all decisions on marriage prohibitions: were based on credible information; provide affected persons an opportunity for a fair hearing; protect the privacy of those included; rely solely on the decisions of the marriage registrars and *Batei Din*; and follow publically promulgated rules.³⁴

In 1979, the Prohibited Marriages List was computerized, and at some point in the 1990s, the administration of the List was transferred from the Ministry of Religions to the Rabbinical Courts Administration, a unit within the Ministry of Justice.³⁵ Computerization, however, did

34. *Id.*

35. There is little publically available material on the way the List is managed. However, a glimpse at the internal workings of the Rabbinical Courts Administration's handling of the Prohibited Marriages List came to light in a public committee set up by the Knesset in order to make recommendations on the issue of human egg cell donations, which has implication for the marriage status of the children born to egg donors. Among the speakers before the panel was Rabbi Eliahu Ben Dahan, then Chief Administrator of the Religious Courts and currently Deputy Minister of Religious Affairs. Rabbi Eliahu Ben Dahan, Chief Adm'r of Religious Courts, Statement at Pub. Prof'l's Comm. to Examine Question of Egg Cell Donations (June 7, 2000). According to Rabbi Ben Dahan's statement, the List is held in a single location in the Rabbinical Courts Administration. *Id.* The List is divided according to the various categories of prohibitions. *Beit Din* rulings stating that a certain person is prohibited from marrying another are passed along to the Rabbinical Courts Administration, and the General Manager is the only person authorized to include or remove a name from the List. *Id.* The queries are only done on an individual name basis, and nobody outside the Rabbinical Courts Administration, including the marriage registrars, has access to the entire List. *Id.* According to Rabbi Ben Dahan, the Rabbinical Courts Administration regularly updates the List to remove any obsolete listings.

The protocol of the meeting of the Public Professional Committee to Examine the Question of Egg Cell Donations, June 7, 2000, can be found at: STATE OF ISR. MINISTRY OF HEALTH, PUB. PROF'L COMM. TO EXAMINE THE QUESTION OF EGG CELL DONATIONS (2000), available at www.old.health.gov.il/Download/pages/egg_5.doc (last visited Sept. 13, 2014).

little to fix the haphazard way data was stored in the Prohibited List. In 1989 and again in 2012, State Comptroller's annual reports contained scathing criticisms of the way the Prohibited Marriages List was managed. *Beit Din* decisions that lifted individuals' prohibitions were not always updated in time. In some cases, *Batei Din* even failed to inform the Rabbinical Courts Administration of decisions to prohibit an individuals' marriage. Converts who completed their conversion process were not immediately removed from the List and neither were names of deceased persons.³⁶

Crucially, to this day, the Prohibited Marriages List includes names of people who never registered to be married and never participated in the *Beit Din*'s judicial proceedings, in particular children and other relatives of persons placed on the List. This can happen, for example, when one of the parties in a divorce proceeding alleges that a child was born of extramarital relations by the mother, making that child a *mamzer*. In such a case, the child's name is registered in the Prohibited Marriages List, even though the child was not heard in the judicial proceedings and there could be no question of the child marrying anytime soon. Placing a child in the List under this kind of scenario clearly violates due process rights and the Attorney General's guidelines.³⁷

The practice of placing children on the Prohibited Marriages List without a hearing means that a person can be on the list and never know it. In one such case, a woman in her late twenties discovered that she was on the Prohibited Marriages List when she came with her fiancée to register before their wedding and was told by the marriage registrar that she couldn't marry. It turned out that the woman's name was placed on the List as an infant. When she was initially placed on the prohibited persons list she was an infant whose mother spoke practically no Hebrew. When her mother was asked by the *Beit Din* who the girl's father was, she was unable to answer. All of this occurred without representation or knowledge of what impact the proceedings would have.³⁸

In further violation of the Attorney General's guidelines, no internal rules or guidelines for administering the Prohibited Marriage List were ever issued. The lack of publicly promulgated rules is a large part

36. OFFICE OF THE STATE COMPTROLLER OF ISR., *supra* note 19, No. 63(3), at 247-53; OFFICE OF THE STATE COMPTROLLER OF ISR., ANNUAL REPORT NO. 40, 283-90 (1990).

37. OFFICE OF THE STATE COMPTROLLER OF ISR., *supra* note 19, No. 63(3), at 247-53; OFFICE OF THE STATE COMPTROLLER OF ISR., *supra* note 37, No. 40, at 283-90.

38. This story, and all the personal stories mentioned in this article were told to me anonymously by Rabbinical Pleader Rivkah Lubitch. They belong to women who sought advice and help about their situation directly from Lubitch or who came to her attention through her work with various women's organizations.

of the problem. In the absence of written law and guidelines, the public's understanding of the treatment of potentially prohibited persons is fueled by rumors and guesswork. As Rivkah Lubitch of the Center for Women's Justice noted, many of the women³⁹ who seek the center's assistance are misinformed about the way their name or their children's names may be included in the List. With proper representation and expert advice from lawyers and rabbinical pleaders, it is sometimes possible to resolve issues of marriage prohibition through the *Beit Din*. However, because information is seldom readily available, many women choose to avoid any contact with the *Beit Din* system rather than to try and resolve their own or their children's marriage status.

Names on the list are continually being added and removed as some cases are resolved through *Beit Din* decisions and new ones arise. However, the ballooning number of names on the List is a cause for concern. In 1989, there were 8,379 names on the list, an exceedingly high number.⁴⁰ In 1995, Minister of Religions Professor Shimon Shetreet, initiated a case-by-case review of all the names on the list, which numbered at that time 5,200. At the review's conclusion, the List was reduced to just 200 names.⁴¹

By November 2012, however, the Prohibited Marriages List had again grown to include 5,397 names. According to the Rabbinical Courts Administration, the names on the List fall into 11 categories of marriage prohibition, which include *mamzerim*, non-Jews, individuals known to be married in "private" marriages, but still not registered as married in the population registry, and other religious prohibitions. Of the total number of people on the list, about half are Jews subject to a variety of marriage prohibitions, while the other half, approximately 2,400 names, are included for being non-Jewish or of questionable ancestry.⁴² 258 names on the Prohibited Marriages List, 4.8% of the total, belong to *mamzerim* or suspected *mamzerim*.⁴³

Here too, the marriage registrars do not always check the Prohibited Marriages List as required. As of 2012, many marriage registrars occasionally failed to check some couples, and a number of registrars ad-

39. Although the prohibitions affect both men and women, experience shows that it is usually pregnant women and young mothers who mostly suffer the hardships caused by marriage prohibitions.

40. OFFICE OF THE STATE COMPTROLLER OF ISR., *supra* note 37, No. 40, at 283-90.

41. See SHIMON SHETREET, *THE GOOD LAND: BETWEEN POWER AND RELIGION* 205 (1998).

42. As we shall discuss below, these are typically individuals who are undergoing conversions, suffered a revocation of their conversion, or who tried to marry as Jews but refused and referred to the Rabbinical Courts because they could not prove they were Jewish.

43. OFFICE OF THE STATE COMPTROLLER OF ISR., *supra* note 19, NO. 63(3), at 248.

mitted they had ignored the Prohibited Marriages List entirely.⁴⁴

The existence of a secret Prohibited Marriages List that governs who may marry and who may not is a troubling example of the policing mentality surrounding marriage prohibitions in Israel. The Prohibited Marriages List enables the Chief Rabbinate to block known prohibited individuals from marrying anywhere in Israel. The requirement to check every couple against the List is another measure that limits the discretion of marriage registrars to reach their own conclusions, and forces them to defer to the opinion of the *Beit Din* or registrar that originally put that person on the List.

POLICING *MAMZERIM* FROM BIRTH

The System of Newborn Registration

The second component of control over prohibited marriages starts at birth. Because the national population registry is a vital link for detecting marriage prohibitions, rules have been put in place to help identify *mamzerim* as soon as they are born. The Population Registry Law⁴⁵ does not permit registration of the child's biological father in the National Population Registry when the child is born under circumstances that would make her a *mamzer*. Instead, by default, the name of a woman's husband (or recent ex-husband, where divorce took place within 300 days of the birth) are registered as the father of a newborn child on the form for registering a child in the National Population Registry. In a situation where the mother claims that the husband (or recent ex-husband) is not the child's biological father, the name of the father on the form must remain blank; the biological father can only be registered as the newborn child's father by order of a *Beit Din* or civil court.⁴⁶

This rule was enacted with the best intentions. It is meant to prevent the creation of an official record that would mark a newborn child as a *mamzer*. However, leaving the name of the father blank in official documents provides a signal to a future marriage registrar that the identity of the child's father might be an obstacle to her marriage.⁴⁷ By creating deliberate ambiguity about the identity of a child's father, therefore, the law simultaneously "protects" the child against being

44. *Id.* at 211-13.

45. Population Registry Law, 5725-1965, 19 LSI 288 § 22 (1965) (Isr.).

46. See POPULATION IMMIGR. AND BORDER AUTH., STATE OF ISR. MINISTRY OF THE INTERIOR, PROC. 2.2.0008 (2006), available at <http://www.piba.gov.il/Regulations/6.pdf>.

47. The names of a person's mother and father appear in every citizen's national Identification Document (*Teudat Zehut*). As noted above, the Identification Document is checked at registration for marriage, and the marriage registrars also have access to the national population registry.

branded as a *mamzer* while at the same time makes it easier to identify her as a possible *mamzer* in the future.

Preventing Proof of Biological Parenthood

The policy of deliberate ambiguity regarding *mamzerim* is enforced in yet another way. Even if a mother wishes to register the true biological father on the child's birth certificate, she may not be able to prove he is the father. The 2008 amendment to the Genetic Information Law⁴⁸ prevents both civil and religious courts from ordering paternity tests under circumstances that would confirm that a child is a *mamzer*. Thus, even if a mother wishes to acknowledge the identity of her child's biological father, or if the biological father wants to assert his rights, they may be prevented from doing so in the name of the dubious "benefit" to the child by leaving their status as a *mamzer* ambiguous.

Following the Law on Genetic Information, the Family Courts in Israel, which belong to the civil court system, not the rabbinical courts, have developed a jurisprudence that excludes even circumstantial evidence of paternity in cases that might condemn a child as a *mamzer*, with very narrow exceptions. Under the Family Courts' current practice, a *mamzer* cannot prove the identity of her biological father, even if this means losing her right to child support payments; likewise, a father of a *mamzer* cannot assert his paternity even if it means losing his paternal rights. The Family Courts operate under the reasoning that the primary interest of the child is to avoid conclusive evidence of being a *mamzer*, and that this interest necessarily trumps other important interest such as maintaining a connection with a birth father and receiving parental financial support.⁴⁹

As a consequence of the newborn registration rules, a mother facing circumstances that may make her child a *mamzer* must choose between several bad options: she can leave the father's name blank on the birth documents, she can falsely register the child as the offspring of her husband or ex-husband who is not the biological father, or she can go through the arduous and uncertain process of trying to obtain a court order to register the biological father on the birth certificate. Each of these choices comes at immense personal costs.⁵⁰

48. Genetic Information Law, 5761-2000, §§ 28D, 28E (2000) (Isr.).

49. See File No. 32690/09 Family Court (Kfar Saba), Anonymous v. Anonymous et al., (July 16, 2012), PsakDin Database (by subscription) (Isr.); File No. 31880/07 Family Court (Haifa), A.G.Z and T.Z. v. A.Z. et al., (Nov. 5, 2013) PsakDin Database (by subscription) (Isr.); File No. 7038/12 Family Supreme Court, Anonymous v. Anonymous et al., (Oct. 16, 2012), PsakDin Database (by subscription) (Isr.).

50. This story, and all the personal stories mentioned in this article were told to me anonymously by Rabbinical Pleader Rivkah Lubitch. They belong to women who sought

Mothers who leave the name of the biological father blank in the registration documents often prevent any contact between the child and the biological father in order to hide the truth from the child and avoid social stigma. A number of women reported that they avoid interacting with authorities in situations where the consent of both parents is required—such as registering them for school or seeking certain medical treatment for them—for fear that when these authorities see their child’s fatherless identification documents the secret will be revealed and the child will not be able to marry in the future. This course of action also means that a mother cannot obtain child support payments from the child’s biological father. It may also prevent the child from inheriting the estate of her biological father when he passes. Consequently, for many mothers, having a *mamzer* sentences both child and mother to poverty.

Mothers who allow possibly illegitimate children to be registered as the offspring of the non-father husband or ex-husband also pay a price. Like leaving the father’s name blank, this course of action prevents the child from knowing who her biological father is. Allowing an outright lie to be created in official documents may be impossible to correct later, *inter alia* because performing a genetic test may be impossible. Perpetuating such a falsehood inside the family also binds mother and child to the non-parent husband or ex-husband. This may cause serious trouble. In one such case, a woman lived in constant fear that her husband might decide to expose the truth about his *mamzer* stepchild out of spite. In another case, a woman’s ex-husband, a dangerous convicted felon, was registered as the child’s father in the National Population Registry without his knowledge; the woman now lives in fear that the ex-husband might hurt her or the child if he finds out the truth.

The third choice – to initiate proceedings before the *Beit Din*, while the child is small, in order to obtain a ruling that the child is not a *mamzer* is not always the best choice. Taking the case before a *Beit Din* means breaking secrecy and undergoing a long, expensive, and uncertain process. Therefore, it is not surprising that many women prefer to avoid dealing with the problem and leave the child’s status unresolved.

The social stigmatization of *mamzerim* is sometimes so great that at least two women reported that they had had abortions after being told they were carrying a *mamzer*, a decision they both deeply regretted later.

The laws, regulations, and jurisprudence on newborn registration and genetic testing are further manifestations of the policing mentality regarding marriage prohibition. The policy of deliberately leaving the

advice and help about their situation directly from Lubitch or who came to her attention through her work with various women’s organizations.

identity of the father ambiguous in official documents and judicial decisions can seem confusing until one realizes that the purpose is to funnel all cases of dubious parenthood into the *Batei Din* for future adjudication. In appropriate circumstances, deliberate ambiguity makes it easier for *Batei Din* to rule that no prohibition should be imposed. However, for all cases of doubtful *mamzer* childbirth, the policy of leaving the name of the father blank in official documents singles out children of questionable parentage for future scrutiny by the marriage registrar if they should ever try to marry in Israel.

A mother's decision as to whether to allow a relationship between an illegitimate child and her biological father, sometimes at the cost of admitting the child is a *mamzer*, is never easy. However, the law in Israel usurps the natural prerogative of the mother to make this decision under the assumption that the preeminent interest is always to avoid evidence of a *mamzer*, no matter what the cost to the child. The bitter irony is that the law does not ensure that the child will be able to marry in the future, all it does is condemn the child to a *Beit Din* trial where the deliberate ambiguity about their paternity works against him or her.

RABBINICAL ADJUDICATION OF MARRIAGE PROHIBITIONS

The third component of the control of prohibited marriages is the rabbinical adjudication system. This system operates unlike any western court, and its unique method of adjudication serves to exacerbate the problem of prohibited marriages in Israel.

The twelve regional *Batei Din* have exclusive jurisdiction over all questions of marriage law pertaining to Jews in Israel, including marriage eligibility and prohibitions.⁵¹ The decisions of the regional *Batei Din* may be appealed to the Supreme Rabbinical Court (*Beit HaDin Harabani Hagadol*) in Jerusalem.⁵² Rabbinical decisions cannot normally be challenged before the Israeli Supreme Court, except under extraordinarily narrow circumstances.⁵³

The *Batei Din*, as mentioned, apply *halachic* law. They follow their own rules of procedure,⁵⁴ issued by the Chief Rabbis in 1993, which are

51. See The Adjudication of Rabbinical Courts (Marriage and Divorce) Act, 5173-1953, 7 LSI 139 (1953) (Isr.); Regulations of Procedure in Rabbinical Courts, 5753-1993, 4102 YP 2299 (1993) (Isr.).

52. Regulations of Procedure in Rabbinical Courts, 4102 YP 2299.

53. Generally, under the Basic Law, the Supreme Court may only review a decision by a *Beit Din* that was given *ultra vires*, and only if the challenge to the *Beit Din*'s authority was raised at the first opportunity. Basic Law: Adjudication, SH No. 1110 p. 78 § 15(d)(4) (Isr.).

54. Regulations of Procedure in Rabbinical Courts, 4102 YP 2299.

based upon traditional *halachic* practice and differ markedly from those of the civil courts. The process tends to be inquisitorial, with the *Dayanim* actively questioning the parties. The deliberations of the *Batei Din* take place behind closed doors; only a small number of *Beit Din* decisions are published and made available through legal databases. In many cases, there is not even a complete record of the *Beit Din* hearing, only a summary of the proceedings.

The Consequences of Doubt

An important factor that exacerbates the problem of marriage prohibitions is the consequence of factual doubt in the jurisprudence of the *Batei Din*. As far back as the Torah, the laws of family purity (*Taharat Hamishpacha*) are among the most severely punished prohibitions in Jewish law. Rabbinical jurisprudence has generally held that a *Dayan* must tilt the scales towards the side of greater restrictions and caution when deciding matters of family purity. Any non-trivial doubt about the permissibility of a marriage is sufficient for the *Batei Din* to prevent the marriage as long as the doubt is not dispelled. To emphasize this point – whereas a civil court can only render an adverse judgment against a defendant if the preponderance of evidence supports such a ruling – in proceedings before a *Beit Din*, the defendant suspected of a marriage prohibition is treated as “guilty until proven innocent” and does not enjoy the benefit of the doubt. However, *Batei Din* do not employ *res judicata* and a case may be brought multiple times before the same *Beit Din* if it needs to re-examine its prior decisions based on new evidence, circumstances, or a previous error.⁵⁵

Because of the strict treatment of doubt and the non-finality of judgments, the *Batei Din* and Rabbinical Courts Administration commonly use the phrase “requiring further inquiry” when placing individuals on the Prohibited Marriages List, instead of finding a definitive cause for a prohibition. This is another manifestation of the policy of deliberate ambiguity, which assumes that wording a decision as a doubt that can be dispelled in the future is preferable to an affirmative prohibition, which would be more difficult to overturn. However, wording decisions in this manner can be vexing to litigants who desire certainty in their status and do not understand the reasoning behind an indefinite and inconclusive *Beit Din* decisions.

Guilty until proven Innocent: Rabbinical Procedures pertaining to Minors

Another important distinction between rabbinical and civil adjudi-

55. Regulations of Procedure in Rabbinical Courts, 4102 YP 2299.

cation, is that *Batei Din* issue binding decisions on marriage eligibility even when those decisions pertain to third parties who were not parties to the disputes. A *Beit Din* can even rule on a person's marriage eligibility as an incidental matter tangential to the original question.. one result is that, *Batei Din* sometimes rules on the marriage eligibility of children. If at any time during the parents' divorce proceedings, information identifying a child as a *mamzer* or as non-Jewish comes to light, a child's marriage eligibility might be jeopardized, even though they would not be party to the original dispute.

Acknowledging that decisions affecting unrepresented third parties, especially minors, are a clear violation of natural justice and due process. In 2004, Attorney General Elyakim Rubinstein, and Chief Rabbi Shlomo Moshe Amar issued procedures for handling possible marriage prohibitions on minors.⁵⁶ Under the 2004 procedures, when a *Beit Din* has reason to believe that a minor may be subject to marriage prohibition, it must refer the matter to a special panel of the *Beit Din* as a new case. The Rabbinical Courts Administration serves as petitioner while the minor in question is the respondent and is represented by counsel from the Attorney General's office.⁵⁷

But there is a catch. In the interim, before the independent judicial proceeding can take place, the child is placed on the Prohibited Marriages List because of the unresolved doubt about his or her status. As noted, the child is "guilty until proven innocent," and bears the burden of participating in the special *Beit Din*-initiated proceeding and producing sufficient evidence to clear their name of the marriage prohibition. In at least one case concerning a minor suspected as a *mamzer*, the *Dayanim* ruled that the minor's name should remain on the Prohibited Marriages List as long as his parents refused to take part in the proceedings.⁵⁸ In essence, placing minors on the Prohibited Marriages List as "requiring further inquiry," serves as a tool to compel participation in such proceedings, now or in the future. Therefore, the 2004 Procedures do not provide a real safeguard against determinations of minors' marriage eligibility without due process. As long as refusing to participate in a *Beit Din*'s proceedings leads to indefinite inclusion in the Prohibit-

56. Rules of Procedure for Adjudicating Fitness to Marry, 5764-2004 (Isr.). These rules were not publically promulgated, but were merely circulated among the *Batei Din*. (a copy is on file with author).

57. Representation of minors by a state-appointed counsel is done in similar situations in the civil courts in which the rights of a minor could be affected by legal proceedings such as guardianship, trust, or estate cases, *See* Law on Legal Competency and Guardianship, 5722-1962, SH No. 380 p. 120 § 69 (Isr.).

58. In this case, the minor was represented by the Attorney General's office, but refused to take direct part in the proceedings. File No. 5684-63-1 Beit Din (Haifa), (Aug. 11, 2005), Nevo Database (by subscription) (Isr.) (no case name provided in court decision).

ed Marriages List, referral of the case to separate *Beit Din* proceeding is tantamount to imposing a marriage prohibition without a trial. This clearly strays from the spirit of the 1976 Attorney General's Guidelines, which forbid any determinations against minors whose marriage is not currently at issue.

The 2004 procedures give the *Beit Din* a power unknown in any western legal system – the ability to initiate legal proceedings against an individual *sua sponte*, of its own initiative. This unprecedented power radically expands the authority given to the *Beit Din* under law to adjudicated matters of “marriage and divorce”⁵⁹ far beyond the cases of people actually seeking to marry or divorce, and gives the *Beit Din* the authority to initiate proceedings against any citizen at any time. Initiating legal proceedings by the *Beit Din* transforms the *Beit Din* from an impartial arbiter of legal rights into an enforcer of religious prohibitions; it turns every proceeding between litigants into an opportunity to investigate the marriage eligibility of their children and other third-party relations.

To be sure, the authors of the 2004 Procedures recognized the need to offer procedural safeguards against judicial decisions that would impact unrepresented minors. The procedures explain that the 2004 Procedures were issued based on the experience of the *Dayanim* and that doubts and uncertainties about a child's marriage eligibility are easier to resolve closer to the child's birth, when evidence clearing the child of doubt is easier to find, rather than later in life. The authors of the Procedures took it for granted that the best interest of a child is to obtain a judicial decision about her marriage eligibility while young, whatever the outcome. They did not entertain the possibility that leaving no record at all of the child's status until he or she comes of age might be preferable for the child, or that the child's parents are best suited to choose whether to seek a *Beit Din* decision or not.

Policing Converts' Piety

In recent years, the *Batei Din* have become increasingly preoccupied with policing the piety of converts to Judaism. In the past, the official certificates of conversion granted through recognized conversion organizations were treated as a final seal of a convert's Jewishness. Recently, however, there has been a growing trend of casting doubt on the conversion certificates of converts and their revocation whenever the *Dayanim* are unconvinced of a convert's sincerity.

This trend has been given support by a controversial landmark de-

59. The Adjudication of Rabbinical Courts (Marriage and Divorce) Act, 5173-1953, 7 LSI 139 (1953) (Isr.).

cision by the Supreme Rabbinical Court in 2008.⁶⁰ The Israeli Supreme Court later overturned the case amid scathing criticism of the Supreme Rabbinical Court.⁶¹ However, because *Batei Din* are not bound by the principles of *stare decisis*⁶² they continue to routinely scrutinize and revoke conversions.⁶³

Typically, the revocation of a conversion occurs when a marriage registrar or a *Dayan* suspects, for whatever reason, that the convert has not been sincere in their conversion and is not Jewish according to *halacha*. Revoking a conversion means, in essence, declaring that the person was never truly Jewish to begin with, and cannot be married to a Jew. If a conversion is called into question during a divorce between a convert and a Jew from birth, this can significantly alter their respective rights during the divorce. Calling the Jewishness of a woman into question affects the marriage eligibility of her children as well, since under Jewish law the religion of the child follows that of the mother. As a result, all converts in Israel today face the possibility that their sincerity will be challenged and their conversions revoked. In practice, placing converts on the Prohibited Marriages List has become a *de facto* method for policing their religious piety, and even their children's and grandchildren's piety, and the threat of inclusion in the list makes many converts feel that their religious lives are under a microscope.

This cruel reality is demonstrated by the case of a young woman who lived her whole life as an Orthodox Jew but was not allowed to marry in Israel. Members of *Yad L'Achim*, an organization devoted to fighting Christian "missionary" activity, had accused her parents of being false converts, even though they had lived as Orthodox Jews for over thirty years. The rumors spread by *Yad L'Achim* resulted in the ostracism of the family from their community. Worse, the rumors reached the marriage registrar, and the woman's wedding was not allowed to take place. After a brief session before the *Beit Din*, in which the woman's parents were not given a chance to answer the allegations against them, the *Beit Din* ruled that entire family was not Jewish and was placed on the Prohibited Marriages List. The woman eventually married in a "private" Orthodox ceremony in Israel and a civil marriage

60. File No. 5481-64-1 Supreme Rabbinical Court, Anonymous et al. v. The Rabbinical Court (Feb. 10, 2008), PsakDin Database (by subscription) (Isr.).

61. HCJ 5079/08/HCJ 2448/09 Anonymous v. Dayan Rabbi Avraham Sherman et al. [2012] PsakDin Database (by subscription) (Isr.).

62. *Batei Din* are not included in Section 20 of the Basic Law: Adjudication, which establishes the rule of *stare decisis* for the civil court system. See Basic Law: Adjudication, SH No. 1110 p. 78 § 20 (Isr.).

63. See, e.g., File No. 886121/1 Beit Din (Netanya), Anonymous v. Netanyah Rabbinical Court (May 14, 2012), PsakDin Database (by subscription) (Isr.).

in the United States.⁶⁴

Since 2008, all Orthodox conversions in Israel are administered through a state body within the Prime Minister's Office. Although converts are required to show conversion certificates when they register to marry, there is no direct link between the conversion database and the marriage registration process.⁶⁵ In matters of conversion too, marriage registrars do not always comply with the rules. But unlike the lax treatment of Jews by birth, some marriage registrars treat converts with excessive suspicion, refusing to allow them to marry even when they hold official conversion certificates.⁶⁶

The *ex post facto* revocation of conversions at the initiative of the *Beit Din* is one of the most outrageous aspects of Israel's rabbinical courts system. It is emblematic of how the *Batei Din* exceed their role as adjudicators and take upon themselves the role of a police over the Jewishness, and hence the marriageability, of the entire population.

Policing Jewish Ancestry - the "Jewishness Investigators"

Policing the prohibition against intermarriage affects not only converts to Judaism but also individuals whose identity as Jews by birth. This has become an acute problem since the massive immigrations of Soviet Jews to Israel in the early 1990s. Soviet Jews tended to lead secular lives and many were the offspring of intermarried parents. Moreover, many Jews in the Former Soviet Union only married in civil ceremonies. This reality makes it difficult to know with certainty who is Jewish by birth according to *halacha* and who is not.

For this reason, in the mid-1990's the Marriage Registration Procedures were amended to require that all immigrants to Israel after 1990 underwent a "Jewishness Investigation" before they are allowed to marry. In addition, a marriage registrar may instruct any couple to undergo a Jewishness Investigations if he is uncertain that an individual is Jewish. A "Jewishness Investigation" or *Berur Yahadut*, is a judicial proceeding conducted by the *Betei Din* with the assistance of four *Mevarer Yahadut* – rabbis whom the Rabbinical Courts Administration recognized as experts in investigating Jewish ancestry. The role of the Jewishness Investigators is to interrogate the person in question and examine the available evidence about her ancestry in order to provide an opinion to the *Beit Din* on her Jewishness. Although the final decision

64. This case belongs to a woman I know personally. A similar case revoking the conversion of a woman and her children at the instigation of *Yad L'Achim*, is found at File No. 139466/1 Beit Din (Beersheba), Head of Jewishness Investigations Department v. Anonymous (Jan. 18, 2009), PsakDin Database (by subscription) (Isr.).

65. OFFICE OF THE STATE COMPTROLLER OF ISR., *supra* note 19, NO. 63(3), at 252.

66. *Id.*

rests with the *Beit Din*, in 99% of cases the *Batei Din* accept the Jewishness Investigator's opinion with little or no discussion. Often, *Beit Din* decisions do not state the evidence that formed the basis for the Jewishness Investigator's opinion or even the Investigator's name.⁶⁷

At first, the four Jewishness Investigators were independent of the Rabbinical Court administration, and were chosen without any clear appointment process or definition of the necessary qualifications needed to become an Investigator. In 2010, following the public outcry over the conversion revocation cases, Chief Rabbis Amar and Metzger issued new guidelines for conducting Jewishness Investigations.⁶⁸ The new guidelines officially integrate the Jewishness Investigators as employees of the Rabbinical Court System under the authority of a Chief Officer of Jewishness Investigations. Instead of targeting only recent immigrants, the 2010 Guidelines mandate that a Jewishness Investigator must be consulted in *all* cases of marriages or divorces, *unless* the couple can prove that their parents or siblings were married in Israel or married abroad by a rabbi trusted by the chief rabbinate.⁶⁹ Crucially, according to the 2010 Guidelines, the Chief Officer of Jewishness Investigations, any Jewishness Investigator, and any marriage registrar are authorized to participate in any judicial proceedings and even to initiate investigations of anyone's Jewishness, whether or not that person is currently seeking a marriage or divorce.⁷⁰ Although, the Jewishness Investigators are now state employees, *Batei Din* are still allowed to consult with approved outside Jewishness Investigators in cases of "special need."

Currently, the same four Jewishness Investigators continue to hold their positions. The criteria for appointing new Jewishness Investigators has not yet been promulgated.

Yet here too, the Chief Rabbinate's monopoly is not strictly upheld. In 2011, the State Comptroller found that around 17% of marriage registrars do not always refer their couples to the *Batei Din* and instead rely on the opinions of outside Investigators. Most of these opinions come from a single source – a private organization for conducting Jewishness Investigations headed by a former employee of the Religious

67. See RABBI ISRAEL ROSEN, RAPPAPORT CENTER FOR ASSIMILATION RESEARCH AND STRENGTHENING JEWISH VITALITY, BAR ILAN UNIVERSITY, JUDAISM INVESTIGATIONS IN THE RABBINICAL COURTS — A SURVEY STUDY OF YEARS 2003-2007 (2007).

68. STATE OF ISR. MINISTRY OF RELIGIOUS AFFAIRS, CIRCULAR 72/1: GUIDELINES FOR JEWISHNESS INVESTIGATIONS 33 (2011).

69. On the recognition of rabbis in communities outside of Israel, *see infra* p. 38.

70. This authority is exercised in practice in the cases of challenged conversions. *See, e.g.*, File No. 139466/1 Beit Din (Beersheba), Head of Jewishness Investigations Department v. Anonymous (Jan. 18, 2009), Rabbinical Courts Administration Database (Isr.).

Courts Administration.⁷¹

The Jewishness Investigators use software called “*Maayanot*” (“Wellsprings”) that aggregates data pertaining to related family members into single family tree.⁷² Little is publically known about this software; however, one of its developers, Jewishness Investigator Rabbi Alexander Dan describes it as follows:

It is a very sophisticated program that is impossible to beat. We enter into it every piece of information we have, and when the time comes and we want to investigate a certain individual, it returns a flood of information....

People are often astonished at the sophistication of the program. Its purpose is to discover tricks and forgeries that we, being human, find it difficult to uncover. It fills in all the ‘gaps’ in an investigation. Just like the police must cross-check information, we too usually rely on the aid of a computer.⁷³

The comparison between Jewishness Investigations and police investigations is no coincidence. In the interview, Rabbi Dan also mentioned that the Jewishness Investigators receive help from the Israel Police’s forensic science labs to examine suspected forged documents, and exchange information with confidential informants in Jewish communities abroad regarding the subjects of their investigations.⁷⁴ Because the *Batei Din* usually accepts the Jewishness Investigators’ opinion without discussion, it is unclear what *halachic* rules, methods, and expert knowledge they apply in making determinations of Jewishness. Since the basis of the Investigator’s opinion rarely appears in *Beit Din* decisions, determinations of Non-Jewishness (or inability to prove Jewishness) are difficult to challenge, and there is little emerging body of “common law” that would allow lawyers and rabbinical pleaders to help their clients navigate the process.⁷⁵

The system of Jewishness Investigations exacerbates the difficul-

71. The name of the private Jewishness Investigator’s organization is not mentioned in the report. OFFICE OF THE STATE COMPTROLLER OF ISR., *supra* note 19, NO. 63(3), at 217-20.

72. The use of this software is mandated in the 2010 Guidelines. STATE OF ISR. MINISTRY OF RELIGIOUS AFFAIRS, *supra* note 69, at 5.

73. Mendy Reisel, *The Hassid from Russia who combats the forgeries of the non-Jewish wins Religious Courts Administration Award*, CHABAD ON-LINE (Dec. 20, 2009), http://www.col.org.il/תהדוּש_הבד.

74. *Id.* Examples of the use of the police forensics lab to check the authenticity of documents can be found in File No. 886121/1 Beit Din (Netanya), Anonymous v. Netanyah Rabbinical Court (May 14, 2012), PsakDin Database (by subscription) (Isr.); File No. 818546/1 Beit Din (Haifa), Petitioner [Anonymous] v. Respondent [Anonymous] (Jan. 11, 2011), PsakDin Database (by subscription) (Isr.).

75. ROSEN, *supra* note 68, at 16.

ties of converts and people of questionable Jewish. In the past, people who declared themselves Jewish by birth or who underwent conversion were rarely challenged. Today, by contrast, marriage registrars and *Be-tei Din* are instructed to challenge and investigate the Jewishness of a large segment of the population based on a rough profiling of their geographic origin or if they are converts, and have little individual discretion in the matter.

The growing emphasis on preventing the marriage of non-Jews can be seen in the numbers. In 1989, there were about 50 people on the Prohibited Marriages List for doubts about their Jewish ancestry and none for revoked conversions.⁷⁶ As of 2011, almost half of the Prohibited Marriages List, around 2,400 names, belong to converts and other people whose Jewishness was called into question. It is likely that those numbers have increased considerably since 2011 because of the new guidelines.

The pre-marriage Jewishness Investigators treat couples as untrustworthy suspects. Couples report feeling that the marriage registrar's decision to investigate their Jewishness and the proofs they are asked to provide feel entirely arbitrary. In some cases, even third- and fourth-generation Israeli Jews have had their Jewishness called into question over trivial inconsistencies in their statements. In quite a few cases, individuals whose pre-marriage applications raise questions are instructed to submit their elderly grandparents to humiliating interrogations in order to prove their Jewishness.⁷⁷

In response to the growing scrutiny of the Jewish origins of Soviet immigrants to Israel, the Tzohar organization of rabbis established a service call "*Shorashim*" ("Roots")⁷⁸ to assist immigrants to prove their Jewishness, often by tracking down old documents in obscure archives or photographing gravestones in the Former Soviet Union. This service faces the dilemma of many legal aid organizations – should one work within a broken system and try to alleviate the plight of those caught up in it, or advocate change to the system itself?

Shorashim goes to extraordinary lengths to help thousands of individuals marry as Jews within the current system. However, by success-

76. See OFFICE OF THE STATE COMPTROLLER OF ISR., *supra* note 37, NO. 40, at 283-90.

77. Naomi Darom, *So You Think you are Jewish enough for an Israeli wedding? Prove it*, HAARETZ (July 11, 2013), <http://www.haaretz.com/weekend/magazine/premium-1.556772>; For examples of cases where elderly grandparents were interrogated, see Reisel, *supra* note 74.

78. Jeremy Sharon, *Religious Affairs: a Crisis of Identity*, JERUSELEM POST (Sept. 20, 2012), <http://www.jpost.com/LandedPages/PrintArticle.aspx?id=285743>; Liron Nagler-Cohen, *Rabbis Work to Verify Jewish Status*, YNETNEWS.COM (Jan. 2, 2012), <http://www.ynetnews.com/articles/0,7340,L-4183849,00.html>.

fully solving some people's difficulties proving their Jewishness, *Shorashim* allows the Rabbinat to raise the standard of proof that all other Jews from the Former Soviet Union are required to meet. Thus, *Shorashim* helps perpetuate a system that insists on exacting levels of evidence and severe interrogations as a condition for Jewish marriage. By doing so, it helps create a semblance of adequacy to a system that is oppressive, arbitrary, and unfair.

The numbers of Jewishness Investigations suggest an escalating social problem. During the period between January 2010 and September 2011, there were 2,907 Jewishness Investigations.⁷⁹ However, in 2012 alone some 4,500 people underwent a Jewishness Investigation.⁸⁰ These figures indicate a steep increase in the number of Jewishness Investigations performed, or at least that more of them are done through the Chief Rabbinat's formal channels.

The inflation of Jewishness Investigations is hardly evidence of growing numbers of non-Jews seeking a Jewish marriage, 98% of investigations in 2012 ended with permission to marry. This number suggests that a vast majority of investigations are initiated based on rough profiling rather than a concrete and well-founded suspicion that the person in question is not Jewish. The overwhelming "pass-rate" for investigations indicates a serious problem of false flagging – far too many marriages are unnecessarily delayed or prevented by *Beit Din* procedures and Jewishness Investigations.

Because of the increased use of Jewishness Investigations, there is a growing population of immigrants, converts, and persons of doubtful parentage living in fear that they might be put on the Prohibited Marriages List if they try to register for marriage. Undoubtedly, many couples who might be *halachically* eligible to marry choose not to take their case to the *Beit Din* after an initial rejection of their pre-marriage application because of the time, expense, and uncertainty of the Jewishness Investigations process, or they might simply avoid the official marriage system altogether.

The creation of professional state-run Jewishness Investigators is a frightening symbol of how the State's rabbinical system uses policing techniques and technologies against segments of society they view as inherently suspect. The mandatory process of Jewishness Investigations concentrates immense power to define who is Jewish in the State of Israel in the hands of just four investigators, with almost no measures of public transparency or accountability. By fostering fear among immigrants and converts, the policing mentality is likely pushing many eligible couples away from officially recognized Orthodox

79. OFFICE OF THE STATE COMPTROLLER OF ISR., *supra* note 19, No. 63(3), at 217.

80. Darom, *supra* note 78.

marriage in Israel.

Exporting the Policing System Abroad – the List of Trusted Foreign Rabbis

The impact of Israel’s policing Jewish marriage prohibitions ripples beyond its borders and effects Jewish communities throughout the world. When a Jew from another country seeks to marry in Israel, the marriage registrar requires that person to obtain a letter from a community rabbi that affirms his or her Jewishness. Not all rabbis’ letters are accepted for this purpose, and the Chief Rabbinate maintains a list of rabbis in Jewish communities throughout the world whose endorsement it recognized. It almost goes without saying that only Orthodox rabbis are recognized; however, this list is kept secret, and the Israeli Chief Rabbinate follows no clear criteria defining which foreign rabbis it trusts and which it does not. Astonishingly, the decision of which rabbis’ letters to accept is made by a single mid-level bureaucrat at the Chief Rabbinate, who reaches his decisions by making private inquiries with a network of unnamed contacts.⁸¹

The list of trusted rabbis became the focus of controversy in 2013, when a letter by liberal American Rabbi Avi Weiss attesting the Jewishness of his congregant was rejected in Israel. This event demonstrated how the Israeli Chief Rabbinate’s power to withhold permission to marry from nearly half of the world’s Jews enables it to foster compliance and complicity abroad with its marriage practices. This power has a chilling effect on the willingness of rabbis outside of Israel to speak on controversial religious issues, since any dissenting rabbi risks losing his ability to serve his congregants by vouching for their Jewishness if they should choose to marry in Israel.

CHANGING INFORMATION NORMS IN JEWISH RELIGIOUS MARRIAGE: THE RULE OF MISHPACHA SH’NITMEA

Collecting vast amounts of data on prohibited marriages into the Prohibited Marriages List and *Maayanot* database radically alters the established norms of Jewish law concerning the transmission of information on prohibited persons. Shifting away from long-established norms aggravates the problem of marriage prohibitions rather than reducing it. This will be demonstrated by discussing the *halachic* rule of the “intermixed family” (“*mishpacha sh’nitmea*”).

The rabbinical tradition was sensitive to the patent injustice done

81. Ben Sales, *Israeli Bureaucrat Decides Who Can Marry in the Jewish State*, TIMES ISR. (Jan. 8, 2014, 3:43 AM), <http://www.timesofisrael.com/israeli-bureaucrat-decides-who-can-marry-in-the-jewish-state/>.

to *mamzerim*, who suffer for the sins of their parents.⁸² Expressing concern for the plight of the *mamzer*, the Talmudic sages adopted a principle that one should not inquire into the genealogy of a family suspected of being “tainted” by a *mamzer* among its ancestors. If descendants of a suspected *mamzer* have already married into the community by mistake, the family is considered as an intermixed part of the community and is not subsequently banned from marriage anymore.⁸³

In expounding the principle of the intermixed family, later sages explored the tension between the need to transmit information about a “tainted” family, that is the descendants of a *mamzer*, to the community at large in order to protect the public from marrying against the prohibition, and the equally compelling need to keep information about a person’s ancestry secret, thereby allowing such a person to again rejoin the community in marriage under the “intermixed family” rule.

Rabbi Moses Ben Maimon (“Maimonides”), renowned scholar of Jewish law of the 12th Century, stated that it is permissible to reveal the genealogical blemish of an individual only when there are two reliable witnesses that can testify to their prohibited status.⁸⁴ Rabbi Nissim Ben Rabbi Reuven (known as *Ha’Ran*), an important commentator on the Talmud from the 14th Century, held that information on *mamzerim* should not be disclosed in hindsight after they had already married into the community at large; however, information on *mamzerim* could be revealed in confidence to discreet individuals.⁸⁵ Rabbi Joseph Karo, the 16th Century author of the *Shulhan Aruch*, an important compendium of Jewish law, qualifies the rule set out by Rabbi Nisim, and explains that the requirement not to reveal information about a family descended from a *mamzer* only pertains to a family already mixed through marriage into the community. The *Shulhan Aruch* goes on to explain:

... But this rule [that a person may not marry a mamzer or other categories of prohibitions] applies only to someone who knows about such a prohibition. But if a family is tainted [i.e. has a mamzer among its ancestors], and this fact is not known to the public, since it has mixed—it is mixed and anyone who knows its blemish may not reveal

82. To cite an example, a famous passage in *Vaikra Rabba* interprets the reference to the “tears of the oppressed” in the book of Kohelet (Ecclesiastes) as a sympathetic allusion to the plight of the *mamzer* and a condemnation of the injustice of children who are punished for the sins of their parents by the hands of the Jewish tribunal of the *Sanhedrin*. Vayikrah Rabbah, Commentary, *A Collection of Commentaries on the Book of Leviticus 32:5*, available at http://he.wikisource.org/wiki/ת_לב_רבה_ויקרא.

83. *Babylonian Talmud, Kiddushin* 71a, available at http://he.wikisource.org/wiki/ע_א_קידושין.

84. Maimonides, *Mishneh Torah, Hilchot Issurei Biah*, ch. 19, halacha 18, available at http://www.chabad.org/library/article_cdo/aid/960667/jewish/Issurei-Biah-Chapter-Nineteen.htm.

85. Ha’Ran, Commentary, *The Alfasi (Ha’Rif)* 30a-b (on file with author).

it, but will let it remain under the presumption of fitness to marry. However, it can be revealed to discreet people...

...but this only applies to a family that has mixed and intermingled [through marriage] into the community, but as long as it has not intermingled into the community, the tainted ones must be revealed and declared, so that the fit ones may keep away from them....⁸⁶

Rabbi Moshe Ben Rabbi Yitzchak Yehuda Lima, an important 17th Century commentator on the *Shulchan Aruch*, followed Maimonides' view that the duty to publically disclose information about *mamzerim* is limited only to cases where the information was credible and supported by two witnesses. However, in cases of mere rumors about a person about to marry, there is a duty to keep silent and not disclose such rumors casting suspicion of a person as a *mamzer*, except to discreet and trusted persons.⁸⁷

The foregoing offers a glimpse into the traditional *halachic* debate, which counterbalanced the duty to help the devout avoid marrying a *mamzer* with a collective forgetting of the genealogical past in order to avoid an obsessive preoccupation with the ancestry of potential marriage partners.

The tension between these principles persists to this day. Decisions of *Batei Din* occasionally invoke the *halachic* duty to announce prohibited persons for the protection of the community as the basis for the modern Prohibited Marriages List. In these decisions, *Batei Din* adopt a narrow interpretation of the 'inter-mixed family' rule, and exclude its application where a minor who is not yet married is suspected as a *mamzer*.⁸⁸

On the other side of the argument, the modern reliance on the duty to disclose prohibited persons as a basis for initiating independent judicial proceedings concerning minors is sometimes contested. For example, in one publicized case, Dr. Michael Vigoda, head of the Jewish law department at the Ministry of Justice, contested a decision to include a minor suspected as a *mamzer* in the Prohibited Marriages List, arguing that the *Beit Din* was wrong to raise the issue of her status in the first place and was under no duty to do so.⁸⁹

86. *Shulchan Aruch, Even Haezer*, § 2, Art. 5, available at http://he.wikisource.org/wiki/שולחן_ארuch_אבן_ערוך_2 (paraphrasing from Hebrew is my own).

87. Rabbi Moshe Bar Yitzchak Yehuda Lima, Commentary, *Helkat Mehokek* (on file with author).

88. See, e.g., File No. 5684-63-1 Beit Din (Haifa), (Aug. 11, 2005), Nevo Database (by subscription) (Isr.) (no case name provided in court decision).

89. Dr. Michal Vigoda, Commentary, *Opinion Concerning Investigations of Suspicions on Fitness to Marry, Submitted to the Supreme Rabbinical Court in Connection with Appeal 621/5760, Case No. 1/99009*, available at <http://index.justice.gov.il/Units/MishpatIvri/HavatDaatNew/39berureimamzerut.doc>.

Yet there can be no doubt that the technological and administrative means available to the marriage registrars in Israel radically alter the delicate balance of Jewish law. The traditional duty to disclose information about prohibited families came into being at a time when there was no technological ability or institutional capacity to record and disseminate information throughout a large portion of Jewish society.⁹⁰ It was generally understood that the *halacha* did not require every suspicion to be recorded and investigated, and the *halachic* requirement to have two credible witnesses, the prohibition on disclosing a *mamzer* on mere rumors, and the law of the “intermixed family” served to further mitigate the harshness of marriage prohibitions. Moreover, throughout much of Jewish history, the decision whether to permit the marriage of a couple was a matter for the personal discretion and conscience of the individual rabbi who officiated the ceremony. This rabbi would base his opinion on a personal acquaintance with the couple and witnesses as well as his understanding of the *halacha*. As a consequence, many different rabbis representing diverse *halachic* viewpoints participated in building a broad communal consensus over the norms of marriage. Thus, the potential harshness of *halachic* marriage prohibitions was balanced by the natural limitations on information gathering throughout the entire Jewish people.

In contemporary Israel, by stark contrast, officiating rabbis have limited discretion and are held to a uniformly strict and exacting standard procedure of pre-marriage investigations. All marriages go through a small number of marriage registrars and the ultimate decisions over *halachic* marriage prohibitions are brought before an even smaller number of *Batei Din*. Determinations of Jewishness are made by just four Jewishness Investigators—all of whom adhere to a uniformly hard-line interpretation of *halacha*. The Chief Rabbinate provides its marriage registrars with access to vast information about couples under conditions that are largely hidden from the public. The resulting system ensures that any information about a person’s eligibility to marry, remote and questionable as it may be, is available to all marriage registrars through the Prohibited Marriages List and *Maayanot* database and cannot forget nor be ignored. Consequently, a growing population, now in the thousands, is under marriage prohibition as suspected *mamzerim*, for being of questionable Jewishness or convert, or other mar-

90. See *Babylonian Talmud, Kiddushin 71a*, available at [http://he.wikisource.org/wiki/קידושין_ע"א_א](http://he.wikisource.org/wiki/קידושין_ע). The Talmud provides an example of the way information about prohibited people was disseminated in that time: According to some traditions mentioned in the Talmud, the Sages would orally convey the names of families they knew to be descendent of *mamzerim* to their sons and students only once or twice every seven years, but would not publically reveal the information about those families. *Babylonian Talmud, Kiddushin 71a*, available at [http://he.wikisource.org/wiki/קידושין_ע"א_א](http://he.wikisource.org/wiki/קידושין_ע).

riage prohibitions.

CONCLUDING THOUGHTS

The law of marriage and divorce in Israel is an ongoing battleground between a vision of Israel as a secular and democratic state of the Jewish people versus a vision of Israel as a state living by the Jewish religion. The policing mentality towards marriage prohibitions represents the latter's vision, which strives to eliminate religious freedom and impose a uniform Orthodox practice on the entire Jewish population in Israel, at least in the area of marriage.

But the battle is not simply one of Orthodoxy against secularism or pluralism. Rather, it is a conflict between those who view Judaism as a broad constituency of rabbis and communities sharing a common understanding and devotion, and those who view Judaism as a hierarchy that places the authority of a select few rabbis over the entire population. The policing mentality over marriage prohibitions reflects the latter's desire to administer a single Orthodox *halacha* through a small number of marriage registrars, *Batei Din*, and Jewishness Investigators and eliminate diversity of Jewish opinion and practice.

A frequently voiced argument in justification of Israel's system of marriage is that a uniform application of *halachic* marriage law prevents the Jewish people from tearing apart into two groups: Those of unquestionable Jewish marriage status who will only marry someone of similarly impeccable pedigree in a proper Jewish wedding, and to those who abandon the strict purity of marriage. The fear is that intermarriage, questionable marriages, and improperly concluded divorces, will proliferate the number of people in Jewish society whose *mamzer* or non-Jewish descendants will be forever cut off from marrying within the Jewish faith. Failure to strictly uphold the Jewish marriage laws, so it is argued, will irreversibly diminish those who maintain *halachic* family purity and increase those of corrupt ancestry down the generations. In fact, this reason was alluded to in the famous letter sent by David Ben Gurion to the Agudath Israel World Organization in 1947, which set out the general parameters of the *status quo* on religious affairs in the Jewish state to this day.⁹¹

This argument is disingenuous and unfair. It is disingenuous, because it uses the cause of national unity to an extreme in order to justify the imposition of a single system of religious authority over the entire population for the sake of including the most zealous. It is unfair, because the convenience and peace of mind of the strictest interpreters of

91. The text of the famous "Status Quo" letter can be found at: *Status Quo*, WIKISOURCE, http://he.wikisource.org/wiki/קוון_הסטטוס_מכתב, (last visited June 22, 2014).

Jewish law is achieved at the cost of incalculable hardship to those whose pedigree or piety do not meet to the exacting demands of the hard-liners.

There will always be those Jews whose insistence on absolute certainty about their potential partner's ancestry will lead them to avoid any hint of marriage impropriety. But a just system of marriage law cannot serve them alone, and must accept boundaries on its power to gather information and coerce compliance placed upon it by legal authority, due process, and protected rights. Placing limitations on religious authority means that some decisions on marriage eligibility, especially those requiring fuzzy and ambiguous determinations of fact and law, will inevitably be taken under a certain degree of uncertainty. This is not unusual, but was in fact a basic premise of the *halachic* tradition as it evolved over the centuries. It is rather the demand for absolute certainty at all costs that is an innovation of recent decades. Those who take upon themselves a higher standard of certainty might have to forego certain weddings; however, in all likelihood, a majority of the Jewish people will accept a *halachic* observance of marriage law, in line with the broader Jewish world, which does not resort to secret databases and investigations in order to achieve *halchically kosher* marriages.

Ultimately, the policing of marriage prohibitions in modern Israel marks a departure from tradition, not an adherence to it. These practices represent an unparalleled zealotry to discover and disseminate information about persons prohibited from marriage. The policing of marriage prohibitions in Israel comes at the cost of terrible suffering and injustice to thousands of families, and casts a dark shadow over a much larger portion of the population. It is tearing apart the Jewish world instead of uniting it.

