The Matrilineal Principle in Historical Perspective

SHAYE J. D. COHEN

ACCORDING TO RABBINIC LAW, FROM THE second century of our era to the present, the offspring of a gentile mother and a Jewish father is a gentile, while the offspring of a Jewish mother and a gentile father is a Jew. Each of these two rulings has its own history, but it is convenient to group them together under the general heading *the matrilineal principle*. What is their origin? This is an immensely difficult question which is further complicated by its contemporary relevance. The matrilineal principle is at the center of the perennial Israeli debate on the topic "Who is a Jew?" The Reform movement has recently decided to adopt a "non-lineal" principle, according to which a child of a non-Jewish mother would be considered a Jew if raised as a Jew. In spite of the relevance of the topic, this essay focuses on history, not Halaka. Whether or not the matrilineal principle should be retained I leave for others to determine; my goal here is to determine the origins of the law and to provide some historical background to the contemporary debate.[1]

The Mishnah

The central rabbinic text bearing on the matrilineal principle is Mishnah Qiddusin 3:12 (an explanation of all the technical terms in this Mishnah would swell this brief essay beyond reasonable length):

> (A) Wherever there is potential for a valid marriage and the marriage would not be sinful, the offspring follows the male. And what is this? This is the daughter of a priest, Levite, or Israelite who was married to a priest, Levite, or Israelite.
>
> (B) Wherever there is potential for a valid marriage but the marriage would be sinful, the offspring follows the parent of lower status. And what is this? This is a widow with a high priest, a divorcee or a 'released woman' (*halusa*, see Deut. 25:5-10) with a regular priest, a *mamzeret* or a *netina* (see Ezra 2:43-58, etc.) with an Israelite, an Israelite woman with a *mamzer* or a *natin*.
>
> (C) And any woman who does not have the potential for a valid marriage with this man but has the potential for a valid marriage with other men, the offspring is a *mamzer*. And what is this? This is he who has intercourse with any of the relations prohibited by the Torah.
>
> (D) And any woman who does not have the potential for a valid mar-

1. This essay is a capsule version of a long and detailed paper scheduled to appear in a forthcoming issue of the *Review* of the Association of Jewish Studies.

SHAYE J. D. COHEN *is associate professor of Jewish History and Jack and Miriam Shenkman associate professor of Post-Biblical Foundations of Western Civilization at the Jewish Theological Seminary.*

> riage either with this man or with other men, the offspring is like her. And what is this? This is the offspring of a slave woman or a gentile woman.

The Mishnah assumes that some marriages are valid and some invalid, and that the status of offspring is determined by the potential of the parents to contract a valid marriage with each other. Paragraph A treats unions which are permitted and potentially valid, B unions which are prohibited but potentially valid, and C and D unions which have no potential validity because they are prohibited. Legal paternity exists only if there exists the potential for a valid marriage between the father and mother. If the mother is legally incapable of contracting a valid marriage, her offspring lacks a legal father and follows its mother. Consequently, the offspring of a Jewish father and a Jewish mother follows the father (paragraph A, since legal paternity exists) while the offspring of a Jewish father and a slave or gentile mother follows the mother (paragraph D, since legal paternity does not exist). The logic of paragraphs B and C is somewhat different.

Mishnah Qiddusin 3:12 thus addresses one half of the matrilineal principle. In connection with a different issue, Mishnah Yebamot 7:5 addresses the other half of the matrilineal principle and assumes that the child of a Jewish mother and a gentile or slave father is a *mamzer*.[2] It is unclear whether this ruling is to be connected with paragraph D of Mishnah Qiddusin 3:12 (since the father lacks the capacity to contract a legal marriage, there is no paternity and the offspring follows the mother), paragraph C (since the mother is capable of contracting a valid marriage with other men but not with this man, the offspring is a *mamzer*), or with some other principle entirely. In any case, the Mishnah penalizes both a man and a woman for straying from the fold. A Jewish man who marries a gentile fathers a gentile; a Jewish woman who is married to a gentile bears a *mamzer*.

Both Mishnah Qiddusin 3:12 and Mishnah Yebamot 7:5 are anonymous, but their literary contexts suggest that each mishnah reflects the thought of the Yavnean period (circa 80-120 CE). The fact that the texts are anonymous implies that their editor, at least, regarded their rulings as beyond dispute. In the case of Mishnah Qiddusin 3:12 he was correct; no rabbi ever disputed the fact that the offspring of a gentile mother and a Jewish father follows the mother. In the case of Mishnah Yebamot 7:5 he was not correct. After a vigorous debate the Talmud reverses this Mishnah, insisting that the offspring of a Jewish mother and a gentile father is not a *mamzer* but a legitimate Jew. What motivated the Talmud to adopt this position is not known, but the Talmudic modification was

2. A *mamzer* is a male or female Jew (the feminine form of the noun is *mamzeret*) who is the offspring of a forbidden union (for example, adultery or incest) and is therefore prohibited from marrying a native born Jew; if he or she does, the children are *mamzerim*. Since the English terms "illegitimate" and "bastard" derive from a completely different legal system they do not accurately reflect the meaning of the Hebrew.

accepted by subsequent codifiers of Jewish law and remains in force to the present day. This dispute aside, both the Mishnah and the Talmud agree that the offspring is Jewish. Rabbinic literature preserves traces of non-matrilineal views, but the traces are few and insignificant.

Now we turn to the crucial questions: what are the origins of the matrilineal principle? Is it a rabbinic innovation of the first or second century, or was it already centuries old by the time it was codified in the Mishnah? With few exceptions, rabbinic family law is patrilineal. Status, kinship, and succession are determined through the father ("the family of the father is considered family, the family of the mother is not considered family"[3]). Why, then, did the rabbis adopt a matrilineal principle for the determination of the status of the offspring of mixed marriages?

It is not biblical

In biblical times the offspring of intermarriage was judged patrilineally. Numerous Israelite heroes and kings married foreign women; for example, Judah married a Canaanite, Joseph an Egyptian, Moses a Midianite and an Ethiopian, David a Philistine, and Solomon women of every description. By her marriage with an Israelite man a foreign woman joined the clan, people, and religion of her husband. It never occurred to anyone in pre-exilic times to argue that such marriages were null and void, that the foreign women must "convert" to Judaism,[4] or that the offspring of the marriage were not Israelite if the women did not convert. In some circumstances biblical law and society did pay attention to maternal identity — the children of concubines and female slaves sometimes rank lower than the children of wives — but it never occurred to anyone to impose any legal or social disabilities on the children of foreign women.

Similarly, if an Israelite woman was married to a non-Israelite husband, she thereby joined his family and his people and was lost to the people of Israel. The Bible pays scant attention to such marriages, since it pays scant attention to Israelite women generally, but clearly implies that the offspring of Israelite women and foreign men were judged matrilineally only if the marriage was matrilocal, that is, only if the foreign husband joined the wife's domicile or clan.[5] If the marriage was not matrilocal, that is, if the Israelite woman joined the house of her foreign husband, I assume that the fellow nationals of both the husband and the wife would have considered the children to be of the same nationality as their father.[6]

3. Babylonian Talmud *Baba Batra* 109b.

4. Conversion to Judaism did not yet exist; see Shaye J.D. Cohen, "Conversion to Judaism in Historical Perspective: From Biblical Israel to Post-Biblical Judaism," *Conservative Judaism* 36,4 (Summer 1983): 31-45.

5. See Lev. 24:10; 1 Chron. 2:17 (contrast 2 Sam. 17:25); and 1 Chron. 2:34-35.

6. 1 Kings 7:13-14, cf. 2 Chron. 2:12-13.

The Talmud, of course, is unaware of these developments, and attempts to find a basis in scripture for the rulings of the Mishnah. Deuteronomy 7:3-4 ("You shall not intermarry with them [the Canaanites]: do not give your daughter to his son or take his daughter for your son. For he will turn your son away from me to worship other gods.") serves as the scriptural "hook" upon which to hang the matrilineal principle ("Your son from an Israelite [woman] is called 'your son,' but your son from a gentile woman is not called 'your son' but her son"). How the Talmud derives the matrilineal principle from these verses is not entirely clear,[7] for the simple reason that the matrilineal principle is not to be found in these verses. It is not biblical.

It was not introduced by Ezra

After returning to Israel from Babylonia in 458 BCE (?), Ezra attempted to expel from the Jerusalem community approximately one hundred and thirteen foreign wives with their children (Ezra 9-10). Many scholars have argued that this episode proves that the matrilineal principle was introduced by Ezra. He attacked marriages between Israelite (at this period we can begin to say "Jewish") men and foreign women because their consequences were serious; like their mothers, the offspring are not Jewish. In contrast, he could ignore (at least temporarily) the marriages between Jewish women and foreign men because their consequences were relatively benign; like their mothers, the offspring are Jewish.

This view *may* be correct, but it is not necessarily so; other explanations are possible. Perhaps Ezra ignored the marriages between native women and foreign men because, as I have just mentioned, such marriages are generally ignored by biblical texts. Ezra's jurisdiction extended only to the members of his people, and he could do nothing to a foreign man who had married an Israelite woman. Even the attempted expulsion of the children of the foreign wives does not necessarily presume a matrilineal principle. Perhaps Ezra introduced a bi-lateral requirement for citizenship (Jewish identity requires two Jewish parents).

The likelihood that Ezra (or a contemporary) introduced the idea that the offspring of a Jewish father and a gentile mother is a gentile is further diminished by the fact that this half of the matrilineal principle is never attested explicitly, and is frequently contradicted implicitly, by the later literature of the second temple period. It is unknown to "the apocrypha," "the pseudepigrapha," the Qumran scrolls, Philo, Paul, Josephus, and the Acts of the Apostles. Some of these works are also unfamiliar with the other half of the matrilineal principle, the idea that the offspring of a Jewish mother and a gentile father is a Jew. Perhaps

7. See Rashi and Tosafot on Babylonian Talmud *Qiddusin* 68b; compare Palestinian Talmud *Qiddusin* 3:14 64d and Yebamot 2:6 4a.

later rabbis *deduced* the matrilineal principle from Ezra's actions, but that Ezra himself introduced the principle is unlikely.

It is not a relic of primitive times

Sixty years ago Victor Aptowitzer suggested that the matrilineal principle is a relic of primitive times when Israelite kinship was matrilineal and Israelite society was matriarchal. The thesis was supported by the discovery in both the Bible and the Talmud of numerous other such "relics" of primitive matriliny and matriarchy.[8]

This suggestion is not convincing because Aptowitzer confuses *matriliny* (determination of kinship through females) with *matriarchy* (rule by females), a social form which never existed. Whether ancient Israelite society was ever matrilineal, I leave for others to determine, but the alleged relics of that alleged society collected by Aptowitzer are, for the most part, trivial or debatable. Furthermore, relics which are nowhere attested in the Bible and post-Biblical Jewish literature but which surface miraculously in rabbinic texts a millenium or two after the period of their origins — these are remarkable relics indeed. Perhaps a methodologically sophisticated study of rabbinic family law and kinship patterns will reveal traces of a matrilineal society, but in the absence of such a study, Aptowitzer's suggestion is unconvincing.

Rape and intermarriage

It has been suggested that many Jewish women were raped by Roman soldiers during the wars of 66-70 and 132-135 C.E., and that the rabbis, out of pity for their plight, declared the resulting offspring to be Jewish, not gentile. The quality of this suggestion befits the obscurity of its origins, because, according to the Mishnah (see above), the offspring of a Jewish mother and a gentile father is a *mamzer*, and telling an unfortunate woman who has been raped that she is about to bear a *mamzer* is only slightly more consolatory than telling her that she is about to bear a gentile. In some respects it is less consolatory: a gentile, at least, can convert to Judaism, but a *mamzer* can never be legitimated.

Further, why declare the offspring of a Jewish father and a gentile mother to be a gentile? If the point of this half of the matrilineal principle was to discourage intermarriage by Jewish men, there seems to have been little need for such legislation. Perhaps in first-century Rome and Alexandria intermarriage between Jews and gentiles was not uncommon, but it certainly was uncommon in first century Judea and in rabbinic society generally throughout the following centuries. And if the primary motivation was to restrain intermarriage, the rabbis should have intro-

8. Victor Aptowitzer, "Spuren des Matriarchats im juedischen Schrifttum," *Hebrew Union College Annual* 4 (1925): 207-240 and 5 (1926): 261-297.

duced a bi-lateral requirement for citizenship, just as Ezra did (perhaps) in Jerusalem (see above).

The uncertainty of paternity and the intimacy of motherhood

Some have suggested that the principle is based on the old idea *mater certa, pater incertus*. The identity of a mother is always knowable, but the identity of a father is never knowable; if a woman is married, the law presumes that her husband is the father of her child, but this presumption always lacks certainty. Perhaps the rabbis, too, believed that paternity was always unknowable and felt that a child's identity should be determined in the first instance by its mother and not by its putative father. Hence the matrilineal principle. This suggestion fails for two reasons. First, as I remarked above, the rabbis restricted the matrilineal principle for cases of intermarriage, but paternity is no more uncertain in those marriages than it is in unions between Jews. Second, the rabbis did not always require marriage between the father and the mother for the offspring to inherit the father or receive his status. If an unmarried woman is pregnant and declares that the father of her child is a priest, R. Gamaliel and R. Eliezer say that she is to be believed; if a woman becomes pregnant as the result of rape, the offspring is presumed to have the same status as the majority of the people where the rape occurred (Mishnah Ketubot 1:9-10). In these cases paternity is very uncertain, but the rabbis did not judge the offspring matrilineally.

Instead of emphasizing the uncertainty of paternity, some have suggested that the matrilineal principle is the result of the natural closeness between mother and child. The offspring of a gentile mother and a Jewish father is a gentile because the intimate connection between a mother and her child makes it certain that she will influence him and instruct him in the ways of the gentiles. This suggestion, too, is unconvincing. The ancients, both Jewish and gentile, recognized the intimacy of motherhood, but they did not draw any legal inferences from this intimacy. Indeed, it was not until the nineteenth century that the legal systems of Europe began to recognize the legal rights of a mother to her children. According to rabbinic law a child must honor both his mother and his father, but only the father is legally responsible for raising the children. A mother's obligation to tend to her children is reckoned as one of her obligations to her husband, since it is he who is responsible for their care.

Two proposed solutions

Although I have failed to discover a definitive solution to our question, I offer two suggestions which are more plausible than those so far considered. These two suggestions share two assumptions. First, the matrilineal principle is a legal innovation of the first or second century of

our era, i.e., that the origins of the principle are to be sought in the period roughly contemporary with its earliest attestation. Second, the principle was introduced not in response to societal need but as a consequence of the influx of new ideas into rabbinic Judaism.

Roman law

According to Roman law, a child is the legal heir, and is in the custody, of his father only if his father and mother were joined in a legal marriage (*justum matrimonium*). The capacity to contract a legal marriage was called *conubium* (also spelled *connubium*), and was possessed almost exclusively by Roman citizens. Marriage between a person with *conubium* and a person without *conubium* was valid, but it was not a *justum matrimonium*; and without a *justum matrimonium*, the status of the child follows that of its mother. Consequently, if a Roman citizen marries a non-citizen woman, the children are non-citizens. If a Roman citizen has intercourse with a slave woman, the children are slaves. According to the legal theory, if a Roman matron marries a non-citizen, the children are citizens, except that the *Lex Minicia*, a law probably enacted during the first century BCE, declared that the children of such unions follow the parent with the lower status, that is, the children follow the father. Similarly, the children of a Roman matron by a slave ought to be, according to the theory, free citizens like their mother, except that a law, enacted under Claudius, declared that they are slaves.[9]

The conceptual similarity between the Roman and the rabbinic systems is striking. Marriages between citizens produce children whose status is determined patrilineally. Marriages between citizens and non-citizens produce children whose status, in theory at least, is determined matrilineally; but both legal systems tried to equalize the consequences for male and female citizens who stray from the fold. A Roman matron impregnated by a non-citizen or a slave bears a non-citizen or slave, not a citizen; a Jewish woman impregnated by a gentile or a slave bears a *mamzer*, a citizen of impaired status.

Although it is generally very difficult to prove the influence of one legal system upon another, here the evidence is rather strong. The Roman law, whose principles are clearly attested in republican times, antedates the earliest attestation of the rabbinic law. This suggestion accounts for the phraseology of the Mishnah as well as its dominant ideas. It takes seriously the Mishnah's explanation of itself, since the Mishnah's notion of "potential to contract a valid marriage" seems to reflect the Roman notion of *conubium*. It also is economical, since it accounts at once for both halves of the matrilineal principle. Perhaps, then, the matrilineal principle entered rabbinic Judaism from Roman law.[10]

9. For a readable introduction to the Roman legislation see John Crook, *Law and Life of Rome* (Ithaca: Cornell, 1967), pp. 36-68 ("The Law of Status"), esp. pp. 40-41.

A full assessment of this suggestion must await a detailed study of other possible influences of Roman ideas and institutions upon ancient Judaism. If the matrilineal principle can be shown to be but one of the many legacies of Rome to Jerusalem, the suggestion will gain force. This study will also have to address several difficult questions. How did the rabbis learn the principles of the Roman law of status? Surely not from the study of Roman law books. How, then? Why did they allow themselves to draw on Roman wisdom when hatred of Rome was so widespread in Judean society, even among those opposed to war with Rome? These questions are analogous to those which must be asked in any study of rabbinic "Hellenism" and the answers remain elusive.

Forbidden mixtures

My second suggestion sees the matrilineal principle not as the result of external influence but as an organic part of rabbinic thought. The Mishnah's treatment of the consequences of intermarriage should be juxtaposed to its discussion of the results of mixed breeding in the animal kingdom. Scripture prohibits the breeding of animals of different species (Leviticus 19:19), but if the prohibition is violated, what is the status of the resulting offspring? Does it belong to the species of the father or the species of the mother? Or is it a new species altogether? In the Tosepta the sages argue that a mule is neither a horse nor a donkey, but a new and distinct species. It makes no difference whether the mule's mother is a horse or a donkey; a mule is a mule.[11] The Mishnah, however, seems to ignore this opinion in favor of that of R. Judah who seems to say that a mule whose mother is a horse and whose father is a donkey is permitted to mate not only with other such mules but even with pure-bred horses, since a mule follows the status of its mother (Mishnah *Kilayim* 8:4). If this interpretation is correct, the offspring yielded by the mixed breeding both of animals and of humans is judged matrilineally. The offspring of a gentile mother and a Jewish father belongs to the species of its mother, just as a mule, in R. Judah's view, belongs to the species of its mother. The offspring of a Jewish mother and a gentile father is a Jew but (according to the Mishnah) a *mamzer*, just as a mule, in the sages' view, cannot mate with the kind of either its father or its mother. Even if we reject this interpretation of the debate between the sages and R. Judah,[12] the laws of *kilayim*, prohibited mixtures, provide an ideological context for the matrilineal principle. Jacob Neusner has well demonstrated the Mishnah's deep and abiding fascination with mixtures and with creatures which, like hermaphrodites, Samaritans, and the land of Syria, defy simple classifica-

10. This thesis was first proposed by Louis M. Epstein, *Marriage Laws in the Bible and the Talmud* (Cambridge: Harvard University, 1942), pp. 174 and 194-197.
11. *Tosepta Kilayim* 5:5, p. 222, ed. Lieberman.
12. It is rejected by the Babylonian Talmud *Hulin* 78b-79a.

tion.[13] The offspring of intermarriage was a conceptual problem which required a solution.

Conclusions

The transition from biblical patriliny to mishnaic matriliny cannot be dated before the period of the Mishnah itself. In all likelihood the transition was occasioned by the influx of Roman ideas and by the growth of the rabbinic interest in mixtures of all sorts. The transition was also facilitated by the emergence, in the first century BCE and the first century CE, of the idea that a gentile woman "converted" to Judaism not through marriage with a Jewish husband (as was the practice in biblical times) but through a separate ritual (immersion in water). The matrilineal principle presumes that the Jewishness of a woman born a gentile can be determined without reference to her Jewish husband. If she converts to Judaism, her children are Jewish; if she does not, they are gentiles. There is no evidence that the matrilineal principle was introduced in response to any particular social need.

Does this reconstruction have implications for contemporary practice? Does it strengthen the hand of those who wish to reject or reform the matrilineal principle of contemporary Halaka? I am not speaking to those fundamentalists who believe that all of rabbinic law was revealed to Moses at Mount Sinai, because they, in principle, oppose both historical scholarship and halakic reforms. I am speaking to those who accept, as I do, a modern, historical approach to Jewish tradition. Does my analysis have Halakic implications?

The answer is no. Jewish law, like other legal systems, is based on precedent, and what the historian can contribute to Halaka is the collection of precedents and the analysis of legal history. But history and Halaka are autonomous disciplines, each with its own methods, assumptions, and goals, and the historian cannot tell the jurist which precedent to follow or which decision to adopt. The modern jurist will, of course, consider the data provided by the historian, the sociologist, the economist, the politician, etc., but it is the jurist who makes the decision, and he makes his decision in accordance with his own legal philosophy. In its interpretation of the Constitution the Supreme Court considers, but is not bound by, the original meaning of the document in its 18th century context. The jurist seeks to determine the law, the historian seeks to determine the truth. The two need not coincide.

13. Jacob Neusner, *Judaism: the Evidence of the Mishnah* (Chicago: University of Chicago, 1981), pp. 256-270.