Halakhic Possibilities for Patrilineal Descent

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For many progressive Jews whose practice is in dialogue with the halakhic tradition, there has been a tension between the commitment to matrilineal descent and a desire to positively recognize the Jewishness of our patrilineal fellows. In this brief article, I will propose one possibility for the development of a halakhic path toward the recognition of the status of patrilineal Jews. My hope is that this will spark a dialogue among progressive *posqim* on the feasibility of this approach and, if it is unable to be the basis of a possible resolution, that it may inspire the search for other pathways toward what I believe to be full recognition of the dignity of a marginalized segment of our community.

Metahalakhic Framework

Within the Conservative movement and progressive denominations generally there has been a long-held commitment to a wider and more expansive halakhic conversation than a narrow review of technical legal sources. Coming from this place, I feel it is important to begin with sources that speak to the ethical values of our tradition. These should be an integral element in wider halakhic discourse, as well as in the particular case with which this article is concerned—recognizing patrilineal descent. Rabbi Seymour Siegel said the following in an address to the Rabbinical Assembly Convention in 1971, which speaks to the ethos of this paper:

> It is possible to formulate the approach in terms of the relationship between the *aggadah* and the *halakhah*. If we loosely define the *aggadah* as the expression of the ethical and theological values of Judaism, and the *halakhah* as their embodiment, then our thesis is that the *aggadah* should control the *halakhah*—not vice versa…
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> For us, the *aggadah* is all important, for it is the expression of Jewish values and world-outlook. The *halakhah* is its

> embodiment. We do not intend, of course, to diminish the value of the *halakhah* in pressing this formulation. Indeed, it is our view that there is no better way to preserve the integrity and the authority of Jewish law than by revising it when it needs revision. Edmund Burke, perhaps the greatest of all conservative (politics, of course) thinkers, said: A state without the means of changing its laws is without the means of preserving its laws. Menachem Mendel of Kotzk put the idea in a striking saying: Do not make a *pesel* [an idol] of the *asher tsivkha hashem elokekha* [what God has commanded you].[1]

Other articulations of this call to appreciate the legal implications and force of aggadah can be found in the writings of Abraham Joshua Heschel, Neil Gillman, Gordon Tucker, and others. It is within this approach that I offer these first three sources as a metahalakhic framing for this paper. They represent what I believe are the values in our tradition that should be embodied in our halakhic rulings regarding this issue.

The first is taken from the Tur, *Orakh ḥayyim* 199:1:

> שמש שאכל כזית מזמנין עליו... תניא עם הארץ אין מזמנין עליו והאידנא אמר ר״י שמזמנין עם עם הארץ כדי שלא יהא כל אחד בונה במה לעצמו פי׳ אם היו פורשין מהם היו גם הם פורשין מן הציבור לגמרי וכ״כ ר״ח האידנא רגילין לזמן אפי׳ עם עם הארץ גמור:

> One who eats a *kezayit* of food that would make one obligated to say grace after meals should make a *zimmun*… [the] Mishnah teaches that an '*am ha'arets* does not count towards a *zimmun*. Now Rabbi Yitzhak said that you do form a *zimmun* with an '*am ha'arets* in order that one will not build a division between himself and there will be a separation from them so that they will be separated completely from the community. Rabbeinu Hananel has written that we are now accustomed to making a *zimmun* even with a complete '*am ha'arets*.

[1] Seymour Siegel, "Ethics and the Halakha," *Conservative Judaism* 25, no. 3 (1971): 36.

Here, out of an interest in not losing these marginal members of the community, the Tur codifies the *abrogation* of a mishnaic instruction that one does not include an *'am ha'arets* in the counting of a *zimmun*. How many Jews of patrilineal descent have felt a division built between them and the rest of the community by their exclusion from participation in the ritual life of our community? How many, feeling the doors to the synagogue closed to them, have decided to walk away from our communities because of this? This concern for the potential loss of members of our community is taken seriously enough that it is considered justification for the overturning of a mishnaic teaching.

Secondly, we find the following anecdote in b. Kiddushin 70a:

> וְכֹל הַפּוֹסֵל פָּסוּל וְאֵינוֹ מְדַבֵּר בִּשְׁבָחָא לְעוֹלָם וְאָמַר שְׁמוּאֵל בְּמוּמוֹ פּוֹסֵל

> He further said: And anyone who disqualifies others by stating that their lineage is flawed, that is a sign that he himself is of flawed lineage. Another indication that one's lineage is flawed is that he never speaks in praise of others. And Shmuel says: If one habitually claims that others are flawed, he disqualifies himself with his own flaw. The flaw he accuses them of having is in fact the one that he has.[2]

In this text we learn that we should avoid the impulse toward shutting others out based on questions of parentage and are exhorted against it with a *middah keneged middah* isolation of the one who does so. Our disposition in these matters should be toward searching out ways to include others rather than taking a defensive stance toward the status quo.

Lastly, in y. Yevamot 1:6:8 there is recorded the dispute between Beit Hillel and Beit Shammai regarding issues of marriage that could lead to serious transgressions in the area of status and permitted relationships:

> רִבִּי יוֹסֵי בֵּירִבִּי בוּן אָמַר. רַב וּשְׁמוּאֵל. חַד אָמַר. אֵילּוּ וְאֵילּוּ כַּהֲלָכָה הָיוּ עוֹשִׂין. וְחַד אָמַר. אֵילּוּ כְּהִילְכָתָן וְאֵילּוּ כְּהִילְכָתָן. מַמְזֶרֶת בֵּינְתַיִים וְאַתְּ אָמַר הָכֵין. הַמָּקוֹם מְשַׁמֵּר וְלֹא אוּרְעָ מַעֲשֶׂה מֵעוֹלָם.

> Rebbi Yose ben Rebbi Abun said, Rav and Samuel, one

[2] Adin Even-Israel Steinsaltz, ed., *The Koren Talmud Bavli Noé* (Jerusalem: Koren, 2016).

> said both acted according to valid practice; the other said, each party followed its own practice. Bastardy is between them and you say so? The Omnipresent watched and no case ever happened.[3]

Rather than allow for a deep division within the community to take place, they responded with a deus ex machina solution. Given the mutually exclusive approaches to marriage practices between these two segments of the community, it is impossible to conclude that by marrying with each other no such violations of their own norms took place. Yet the response was to say that God made sure no such violations occurred. When backed into a corner, they gave up legal resolutions and held tightly to the value of Jewish unity.

The Evolution of the Matrilineal Principle

To dive further into the particular question being investigated in this article, we will begin with a brief overview of the matrilineal principle. Works like Rabbi Dr. Shaye Cohen's "The Origins of the Matrilineal Principle in Rabbinic Law"[4] and Rabbi Ethan Tucker's series "Matrilineality and Patrilineality in Jewish Law and Community"[5] have already clearly established the long historical process involved in the development of this halakhic approach. Readers interested in the details of this should read these works which give in-depth analysis of the relevant texts.

In summary, the first attestation of any kind of matrilineal principle in Jewish text is found in Tannaitic material. There is no clear reference to any matrilineal principle in either the Tanakh or the literature of the Second Temple period. On the contrary, as most readers are probably aware, there is instead a clear patrilineal principle. In the Tannaitic period we encounter opinions that accept the status of a child from a Jewish mother and non-Jewish father as Jewish. However, at this earliest stage, the Mishnah accords them the status of a *mamzer*, and it is only in the Amoraic period that this status is overturned. Tucker, in his overview of the complex status of Jews

[3] Heinrich Guggenheimer, trans., *The Jerusalem Talmud* (Berlin: de Gruyter, 2005).
[4] Shaye J. D. Cohen, "The Origins of the Matrilineal Principle in Rabbinic Law" *AJS Review* 10, no. 1 (1985): 19–53.
[5] Ethan Tucker, "Matrilineality and Patrilineality in Jewish Law and Community," Hadar Institute (December 2015), https://www.hadar.org/torah-tefillah/resources/matrilineality-and-patrilineality-jewish-law-and-community-part-1.

of matrilineal descent and of patrilineal descent, points out that even some eighteenth- and nineteenth-century rabbinic authorities ruled that Jews of matrilineal descent required conversion. It is clear from the evidence that the matrilineal principle as we practice it today has been more fluid, even within the past two centuries, than is often assumed in popular discussion of the topic.

This is not to claim that these later texts are less authoritative or that the principle of matrilineal descent does not carry weight by virtue of being a later innovation, but simply to recognize the breadth of historical change that has taken place regarding this principle. The matrilineal principle of today is not the same as what is found in earlier literature. It raises the question, "If it has not always been this way in the past, then perhaps it may not always be this way in the future?" When tackling halakhic questions such as this one, which are often perceived as being almost untouchable, it may be helpful to keep in mind Rabbi Yoseph Hayim's description of the halakhic process, as summarized by Professor Zvi Zohar: "a rabbi who makes a halakhic decision is not bound by a majority of relevant precedents…if his own best understanding of the halakha leads him to formulate a decision completely without precedent, he may in good faith rule according to the halakhic truth as he sees it."[6]

The Status of Quasi-Jewish Groups in Rabbinic Texts

Professor Christine Hayes makes the following argument about rabbinic constructions of identity:

> Yet the rabbis resist simple dichotomies and locate many gentiles along a spectrum of proximity, as seen in rabbinic discussions of the righteous gentile, the venerator of heaven and the convert. Some others—non-rabbinic Jews of various types—are, by birth and culture, heirs to the text but have neglected, distorted, or abandoned it in some way.[7]

Identity creation and maintenance is a complex process; it is fluid and hard-

[6] Zvi Zohar, *Rabbinic Creativity in the Modern Middle East* (New York: Bloomsbury Academic, 2013), 68.

[7] Christine Hayes, "The Other in Rabbinic Literature," in *The Cambridge Companion to the Talmud and Rabbinic Literature*, ed. Charlotte Elisheva Fonrobert and Martin S. Jaffee (Cambridge: Cambridge University Press, 2007), 263.

ly a clear-cut matter. We can find the rabbis negotiating this "spectrum of proximity," as Hayes refers to it, in their opinions on the status of the Samaritans and later regarding the Karaites. Both communities have a claim to an identity as Israelite/Jewish, and the rabbis accept that claim at various points and to varying degrees. Further, this recognition of Jewish status carries over into areas of ritual practice and is not simply a validation of genealogy. The Samaritans and Karaites are communities that have a principle of patrilineal descent for determining group identity.[8] Recognizing and validating the status of Samaritans and Karaites implies acceptance of the validity of their practice of following the father's line in determining status.

Lawrence Schiffman wrote an in-depth review of the early rabbinic literature regarding the status of Samaritans, and he concludes:

> Up to a certain point the Samaritans were accepted as Jews. From that point on, the trend began to change, and this is reflected in both explicit statements and redactional tendencies which classify the Samaritans with non-Jews. This change of attitude can be traced even further, starting with the view of R. Judah the Prince that they are non-Jews, through the various negative statements of the Amoraim, and culminating in the ruling that the Samaritans are unquestionably considered as Gentiles.[9]

His review of the sources is compelling, and, while it may be that rabbinic tradition eventually develops in another direction, it is clear that, the Tannaim by and large accepted Samaritans as Jews.

There are a few sources from Tannaitic material that demonstrate this point. We find in m. Berakhot 7:1 that the *tanna' kama'* states: שלשה שאכלו כאחד, חיבין לזמן... והכותי, מזמנין עליהם, "When three persons eat together they are obligated in *zimmun*... [if there are two] and a Samaritan, then they make a *zimmun*." We also find the following disagreement in t. Terumot 4:13, והכותי כנכרי דברי ר׳ רשב״ג אומר כותי כישראל, "the Samaritan is like a

[8] On the Samaritans, see Monika Schreiber, *The Comfort of Kin: Samaritan Community, Kinship, and Marriage* (Leiden: Brill, 2009), 28–29, 149. On the Karaites, see Bernard Revel, "Inquiry into the Sources of Karaite Halakha," *Jewish Quarterly Review* 3, no. 3 (1913), 376–77 n. 100. See also "Marriage and the Laws of Matrimony," Universal Karaite Judaism, http://www.karaite.org.il/karaite/Nisuaim_veisut (Hebrew).

[9] L. H. Schiffman, "The Samaritans in Tannaitic Halakha," *Jewish Quarterly Review* 75, no. 4 (1985): 349.

non-Israelite. R′ Shimon ben Gamliel says, 'A Samaritan is like an Israelite.'" Finally, Rabbi Shimon ben Gamliel again takes the stance of upholding the status of Samaritans in t. Pesahim 2:2

> מצה של כותים מותרת ואדם יוצא בה ידי חובתו בפסח ורבי אליעזר אוסר לפי שאין בקיאין בדקדוקי מצוה רשב״ג אומר כל מצוה שהחזיקו בה [כותים] הרבה מדקדקין בה יותר מישראל.
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> Samaritan matzah is permitted and the one who [eats it] has fulfilled his obligation on Passover. Rabbi Eliezer rules it forbidden since [the Samaritans] are not exact in the laws [of matzah]. Rabbi Shimon ben Gamliel says, "any mitzvah which the Samaritans have taken on, they are more exacting in its observance than an Israelite."

It is the case, as noted in the quote from Schiffman above, that the rabbis eventually pushed the Samaritans further out on that "spectrum of proximity," culminating in their being treated as outsiders. Equally true is the reality that we have authoritative precedent within the halakhic tradition, represented in the sources above, for recognizing the status of groups practicing patrilineal descent.

The Karaite community has also had a history of acceptance, although contested, from rabbinic authorities down to the modern day. Documents from the Cairo Geniza testify to the practice of marriages between Karaites and rabbinic Jews, with marriage documents in some cases enshrining the Karaites' right to practice their own customs. While controversial to some, this practice was accepted by many rabbinic authorities in Egypt.[10] More recently than this medieval practice, the Committee on Jewish Law and Standards accepted a *teshuvah* in 1984 affirming the status of Karaites as Jews.[11] In this *teshuvah*, Rabbi David H. Lincoln provides a brief review of some relevant responsa, which he points out are primarily concerned with the question of marriage between the two groups. He explains that the major concern in these responsa is *safeq mamzerut*. This is the fear

[10] Ariel Stone, "Marriage with Sectarians: The Case of the Karaites," in *Marriage and Its Obstacles in Jewish Law: Essays and Responsa*, ed. Walter Jacob and Moshe Zemer (Pittsburgh: Rodef Shalom, 1999), 141–75. See also Zohar, *Rabbinic Creativity*, 319–51.

[11] David H. Lincoln, "Acceptisng Egyptian Karaites into Our Communities," in *Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement, 1980–1985*, ed. Rabbinical Assembly (New York: Rabbinical Assembly, 1988), 263–66.

that valid marriages may be taking place between Karaites but not valid divorce, leading to bastardy cases and therefore preventing the children of Karaite communities from marrying another Jew. The issue of marriage and potential *mamzerut* are not the primary issues for our question in this paper; rather, the crucial point is, as Lincoln says, "their 'Jewish descent' is not really in question (indeed, that is our problem)."[12] In other words, the foundational assumption of much of the halakhic literature surrounding Karaites is that they are, in fact, Jews. If this were not the case then there would be no concern of *safeq mamzerut*, the validity of their marriages, their ability to be valid witnesses, or other such issues.

The late chief Sephardic rabbi of Israel, Rabbi Ovadiah Yosef also permitted marriages between Karaites and rabbinic Jews, therefore recognizing the Jewish status of the Karaite community. His response on this issue can be found in *Yabiaʿ omer* EH 8:12. There he relies primarily on the rulings of Rabbis David ben Solomon ibn Abi Zimra (the Radbaz) and Yaakov de Castro, from the fifteenth and sixteenth centuries, who both held that it is permissible to intermarry with Karaites. In these sources the issue that is dealt with is *safeq mamzerut*, which, as already mentioned, is a relevant concern only in cases of marriage between Jews. The Radbaz makes this explicit in his writing on the issue of Karaites, intermarriage, and *safeq mamzerut* in Radbaz, *Teshuvot* 4:219, where he says: עוד יש טעם כללי לכלל הקראין שהרי ישראל הם, "Furthermore, there is a general argument concerning the Karaites as a whole, since they are Jews."

As with the case of the Samaritans, we have halakhic precedent that acknowledges the validity of the Karaite claim to Jewish status. As this group holds to a standard of patrilineal descent, it is difficult to argue that these rulings have not already granted a recognition of the Jewishness of individuals whose proximity to this identity is through their father's line. In our hands are sources both modern and ancient that provide at least the implicit recognition of this practice.

Conclusion

As progressive Jews we value a halakhic discourse that is not limited to legalistic sources. The metahalakhic framing offered above in sources that speak to our values of inclusion and unity, even in matters of lineage, should be considered in our discourse on par with *teshuvot* and legal codes. How-

[12] Lincoln, "Accepting," 264.

ever, we do not need to rely on this metahalakhic argumentation alone. The sources reviewed in this article contain halakhic precedent—both classical rabbinic sources and modern responsa literature—for accepting the status of communities en masse that hold to a principle of patrilineal descent. From here it appears that the same may be offered to individual Jews of patrilineal descent, since functionally this has already been done in the recognition of Samaritan and Karaite claims to Jewishness. It is my hope that this article can play some role in deepening and widening the conversation around this sensitive and pressing issue.

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