SEEKING HISTORICAL PRECEDENT FOR DETERMINING HALAKHIC MATERNITY WHEN A CHILD'S GENETIC MOTHER IS DIFFERENT THAN ITS BIRTH MOTHER

When listing Ya'akov's numerous descendants, one stands out as a seeming outlier: שאול בן הכנענית. Although he is listed among Shimon's children, the Torah seems to make clear that his mother was not Jewish. Rashi, quoting the Midrash, explains that Shaul's mother was actually Dinah, daughter of Yaakov. The Torah is alluding to the fact that she had been taken by Shekhem ben Chamor, a Kena'ani, and as such, she wasn't able to subsequently find a husband. Shimon, Ya'akov's second son, empathized with her plight and he married her.

Many commentators are seriously bothered by the permissibility of this union. Even among Bnei Noach, marriage between siblings is strictly forbidden. Various answers are offered:

Tur, in his commentary on the Torah, quotes a fascinating Midrash that describes that Leah was originally pregnant with Yosef and Rachel was pregnant with Dinah. Leah knew that Yaakov was destined to have 12 children and recognized that if she would have a seventh son, Rachel would only have one. She therefore davened to Hashem to help her sister and Hashem switched their fetuses. Accordingly, although both Shimon and Dinah were born from Leah, Dinah was conceived in Rachel and therefore, was not actually Shimon's full sister. Since the rules for Bnei Noach only prohibit the marriage of maternal siblings, Shimon and Dinah were free to marry each other.

While a peculiar take on a difficult problem, this argument is very relevant to modern question of determining maternity in case of egg donation. When an egg from one woman (egg donor) is fertilized through IVF and then implanted into a second woman (gestational carrier), whom does Halakhah consider to be the mother of the child?

Some have argued that the Tur would advocate for considering the genetic mother (egg donor) as the halakhic mother, just like Rachel was technically considered to be Dinah's mother, even though, practically speaking, Leah gave birth to Dinah. This has important ramifications for issues of status (Jew vs. non-Jew) as well as halakhic relationships.

One of the biggest challenges in confronting this issue from a halakhic perspective is the fact that the very notion of physically separating conception from birth was something completely inconceivable even just a century ago. That said, there is nonetheless a rich rabbinic tradition about the parallel notion of halakhically separating between conception and birth.

[**The following is not meant as a comprehensive review of the topic. It's an analysis of a single source within one side of the argument. Other approaches may follow in later weeks. ועוד חזון למועד.**]

The Gemara (Yevamot 78a) states that when a pregnant woman converts to Judaism, her eventual child does not require conversion (i.e., he is already considered to be Jewish). The

Gemara questions how the mother's tevilah in the mikvah can be effective for her as of yet unborn child, but ultimately concludes that it should indeed work. But why should the Gemara even care whether the mother's tevilah is effective for her child, since at the end of the day, this child was ultimately born from a Jewish mother! From the very fact that the Gemara provides an alternate explanation, it seems clear that being born to a Jewish woman is not sufficient reason to consider a child Jewish.

This Gemara seems to follow the logic of the Midrash—maternity is established at and by conception.

R. Yosef Engel (The Beit Ha-Otzar, vol. 1, ma'arekhet aleph-beit, klal 4) points to an otherwise innocuous comment of the Maharal that seemingly contradicts this approach. When Megilat Esther (2:7) describes Esther as an orphan, it mentions, כי אין לה אב ואם, ובמות אביה ואמה לקחה מרדכי לו לבת, twice highlighting the death of her parents. The Gemara (Megilah 13a) elaborates that Esther's father died just as she was conceived and her mother died at her birth. Rashi explains that Esther didn't even have a father or mother for even a single day. Maharal, in his Ohr Chadash explains that halakhic paternity devolves at the moment of conception, with Esther's father dying just prior. In a parallel manner, halakhic maternity is conferred at birth, with Esther's mother dying just as she was born, never having qualified as being Esther's halakhic mother.

A number of Poskim point to this Maharal as proof that halakhic maternity depends specifically on the moment of birth, rendering the birth mother as the child's halakhic mother.

The challenge is that the majority of modern Poskim endorse the position that the genetic (or conception) mother should be recognized as the halakhic mother as the majority of the sources support this approach. (Many will still advocate for גרות לחומרא when the genetic mother is Jewish but the birth mother is not out of an abundance of caution and desire that matters of Jewish identity be universally accepted.)

However, perhaps a closer look at Maharal's opinion may reveal a different approach.

According to Maharal's logic, halakhic maternity cannot set in so long as the mother is still pregnant. Since עובר ירך אמו, her fetus isn't considered to be a separate entity from the mom, but rather part of her very own body. It doesn't make sense, according to this logic, for a woman to be considered the mother of a part of her own body. It's only after birth, when the child becomes its own entity, that halakhic maternity can set in.

But while perhaps logically compelling, Klei Chemdah (Toledot) points out that this approach is somewhat self contradictory. If maternity cannot set in until after birth because עובר ירך אמו, then why should paternity set it immediately upon conception? If the fetus isn't considered its

own being until after it's born, then maternity and paternity should both set in simultaneously at birth.[1]

It may be tempting to suggest that conceptually, the fetus is indeed considered to be its own entity to everybody in the world, except its own mother. From everybody else's perspective, this fetus will [hopefully] develop into a fully functional person and the potential latent in the fetus even at this early stage is sufficient for him to be considered his own person. However, from his mother's perspective, עובר ירך אמו, and as Rashi writes (Gittin 23b), הוה ליה כחצי גופה. It's therefore possible for halakhic paternity to set in even while halakhic maternity is on hold until after birth.

But as R. Yehoshua Hartman points out, this explanation does not fit with Maharal's more general approach to pregnancy. R. Hartman demonstrates that in Maharal's thinking (Gevurot Hashem 3)ת a fetus is never considered to be an independent entity, from anybody's perspective—אין להם מציאות בפני עצמו. Rather, from Maharal's philosophical perspective, a fetus is only considered to be a potential person—כאשר האדם בא לעולם, ויוצא אל הפועל הלידה, (Be'er Ha-Golah, be'er 6). In several instances, Maharal employs this understanding of a fetus as merely potential without any independent status to explain various personal and national transition periods (Gevurot Hashem, ch. 52; Gur Aryeh, Shemot 12:34). If so, it's not only vis-a-vis its mother that the fetus isn't considered to be an independent entity, but rather more accurately describes the fetus's very essence.

Rabbi Hartman therefore suggests that the converse might actually be more correct.

From Maharal's perspective, a fetus doesn't yet have an independent status or existence. That said, there is a necessary exception to the rule—the fetus's father. The paternal relationship arises solely as a result of conception; it's only then that the father plays any role in the fetus's development. The fact that Maharal considers a fetus to not yet have its own independent status is largely irrelevant when it comes to paternity, as Rabbi Hartman explains, כי כל מהותו של האב היא הבכח של יצירת הולד ("the essence of paternity is the potential that the father imbues into the formation of the child").

But when it comes to maternity, Maharal seems to indicate that it completely depends upon birth. However, Chavatzelet Ha-Sharon (Va-Yigash, p. 658) suggests that that conclusion is somewhat less than clear: Does Maharal mean to argue that birth is the only halakhically

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[1] Klei Chemdah resolves this dilemma by adopting the Chavot Ya'ir's (31) approach to abortion, who believes that the prohibition is one of השחתת זרע. He combines this opinion with Tosafot's (Yevamot 12b) understanding that the prohibition of השחתת זרע only applies to men. Klei Chemdah therefore surmises that from the father's perspective, abortion is prohibited from the moment of conception, as a violation of השחתת זרע and as such, from his perspective, the child is already considered an entity to be reckoned with. However, since the mother isn't included in the prohibition of השחתת זרע, she had no reason to have to consider the fetus an independent entity until after birth.
This approach leaves many challenges and questions. Firstly, it assumes that abortion is permissible for women to perform. Secondly, השחתת זרע applies well before conception begins, but nobody would argue that halakhic paternity devolves from the moment that the זרע is produced, since that's the moment that the prohibition of השחתת זרע begins to apply!

relevant moment for determining maternity or is he instead suggesting that conception [or possibly gestation] is the real halakhic determinant of maternity, but so long as the woman is pregnant, the concept of עובר ירך אמו prevents halakhic maternity from devolving until birth?

R. Carlebach assumes that Maharal really intends the latter approach, essentially arguing that Maharal agrees that maternity, parallel to paternity, is determined at conception. The 'problem' is that so long as the woman is pregnant, the fetus is still considered ירך אמו, and as such, doesn't become an independent entity until after its birth. Since it's still considered to be 'part' of the mother herself, at least on some level, that woman cannot be considered yet to be its mother. The notion of maternity has already essentially set it, it's just that the current state of pregnancy prevents it from having any practical consequences.

What actually creates paternity and maternity? For paternity, it's clearly not just because a child resulted from an act of marital intimacy. Perhaps it's instead because the ensuing child has a direct physical connection to his father; the same is in fact true of its mother. The original sperm and egg are what eventually transform into a child and it's this physical continuation and contiguity of the child with the sperm and egg that establishes the parental relationship.

In other areas of Halakhah, a piece or substance that separates, exudes, or is secreted by a person or animal, maintains a similar status to the source from which it came. Although there is some distinction as to the severity of the prohibition, a דבר היוצא מן החי is similar to that living animal and consuming a דבר היוצא מן הטמא is prohibited, just as the source דבר טמא is prohibited. But even while the technical level of prohibition may differ (consuming the source animal itself may violate an איסור לאו while consuming the דבר היוצא may only incur an איסור עשה), the דבר היוצא is considered to be either an extension of the source or something secreted or exuded by the source.

However, as Rav Chaim Soloveitchik (Hilkhot Ma'akhalot Asurot 3:11), there is an additional type of an איסור יוצא, with the Gemara sometimes using the term יוצא to refer to offspring and children. In this instance, the child is most certainly an independent being, despite it being an actual physical product of its mother and father. Instead of simply being considered a byproduct or דבר היוצא from one or both of its parents and maintaining one or both of their identities, a child has its own identity and a filial relationship from the man and woman from whom he or she has physically derived. It's this physical continuity and contiguity that causes the parent-child relationship.[2]

If so, it only makes sense for the genetic mother, or more specifically, the egg-donor to be considered the halakhic mother. It's her egg—part of her body—that eventually forms the child and therefore what contributes to halakhic maternity. While it's also true that the gestational mother also has effects on the fetus within her womb, particularly with regards to

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[2] See Rabbi J. David Bleich's, *The Philosophical Quest*, p. 293 for a further discussion of "Identity as a Product of Spatio-Temporal Contiguity."

epigenetic changes, these can only affect the substance of the already existing embryo or fetus.[3]

This may then be the motivation to assume that this is what Maharal had in mind as well. Even though he lived well before the discovery of sperm and eggs, pre-modern medicine was aware that creating a child required the contribution of a physical substance by both father and mother. If so, it makes sense that maternity—at least in theory—should be determined at conception. The only 'problem' is that so long as the child is still in utero, it's considered to be ירך אמו, and if so, cannot assume an independent identity until after parturition. But keeping the above argument about the ultimate determinants of the child-parent relationship, this would mean that practically speaking, the 'mother' does not assume her identity as 'mother' until after birth, even while she is ultimately the woman from whom this child has the continuous-contiguous connection. Meaning that it's the very moment of conception that confers halakhic maternity upon the egg donor, but so long as the fetus is still considered ירך אמו, the practical חלות of halakhic maternity is held in abeyance until birth.

Chavatzelet Ha-Sharon suggests that this idea would also provide Maharal an answer to why it was permissible for Shimon to marry Dinah. He argues that while normally it is the moment of birth that determines maternity, it's only because the intervening pregnancy prevents halakhic maternity from setting in at conception. However, since, according to the Tur, Hashem switched the embryos of Yosef and Dinah, even though Dinah was conceived in Rachel, she was subsequently 'transferred' to Leah's womb. R. Carlebach argues that once she 'left' Rachel's womb, the notion of עובר ירך אמו was no longer applicable, and even though, for all practical purposes, Dinah was not yet 'born,' she had already left the womb in which she was conceived. Therefore, already at that moment, halakhic maternity as defined by the genetic / conception mother set in and Dinah was henceforth and forever considered to be the daughter of Rachel.

The challenge is that it's hard to read this into the words of the Maharal. But moreover, according to the argument above, the 'problem' preventing maternity from setting in at conception isn't because the fetus is specifically ירך אמו to the exclusion of all other women, but rather that he is the ירך of another person. Since, even according to this Midrash, the transfer of Dinah between Rachel and Leah's wombs was presumably instantaneous, she was considered the ירך of a woman from the moment of her conception until her birth. The fact that the woman whose ירך she was considered changed during her gestation is not relevant to the issue. The only relevant factor is that throughout her gestation, Dinah did not have an independent identity. If so, this would not help address the challenge of why Shimon was permitted to marry Dinah.

Most importantly, in commenting on this story in Bereishit, Maharal himself (Gur Aryeh) addresses the larger question of the permissibility of Shimon and Dinah's marriage, but does

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[3] For a further discussion of the role that epigenetics may play within a halakhic framework, see John Loike, Ira Bedzow, and Rabbi Moshe D. Tendler, "Epigenetics Revolution: The Power to Self-regulate and Control Human Behavior," in the most recent *Hakirah Journal*, vol. 27.

not offer this solution. He takes it as a given that both Shimon and Dinah are Leah's children. If in fact, Maharal believes that the birth mother is the only halakhically relevant player, then this makes a lot of sense. That said, Maharal doesn't even hint at the discussion of the potential for variability in halakhic maternity in quoting the Midrash that Shimon married Dinah. Instead, he claims that Ya'akov's children were Divinely instructed that they can marry among their own family members, so that they would not have to marry spouses from other nations.

However, it would seem inappropriate to draw any conclusions from his comments in Bereishit. There isn't any proof that Maharal was even aware of the Midrash quoted by the Tur. He was more likely familiar with Gemara Berakhot (60a) that states more simply that Leahs' fetus נהפכה לבת—transformed into a girl, instead of swapped places with Rachel's child. If so, Leah was both the genetic mother and birth mother of her child. While that child was originally destined to be a boy, Hashem changed the plan and transformed that very child into a girl—leaving this story irrelevant to the discussion of determining halakhic maternity.

That said, Maharal's comments in Ohr Chadash as explained above, would support the argument that the genetic mother should be considered the child's mother.