

## *Survey of Recent Halakhic Periodical Literature*

### EXTENDING SABBATH INVITATIONS TO THE NON-OBSERVANT

One of the happier developments of recent decades is the return to religious observance on the part of countless individuals. Young people, perceiving a spiritual vacuum in their lives, have come to appreciate the purpose and richness of meaning to be found in a life devoted to *shmirat ha-mizvot*. Their quest has been guided by a cadre of teachers, and outreach professionals and a network of committed laymen drawn from all sectors of the Orthodox community. This phenomenon has spawned a plethora of publications designed to meet the thirst for knowledge manifested by the newly observant. This phenomenon is also reflected in problems addressed in contemporary halakhic literature.<sup>1</sup>

Congregational rabbis and Talmud Torah teachers have long found themselves in an uncomfortable position. On the one hand, it is often their professional duty to organize and to encourage attendance at Synagogue services as well as participation in educational and social events held on *Shabbat*. On the other hand, they are fully aware that many of the invitees will travel to and from these events by means of prohibited forms of transportation. In recent years, with the proliferation of organizations and programs devoted to introducing uncommitted and unobservant Jews to the richness of the Jewish heritage, the problem has become even more vexing. To a large extent, success of such programs, and with such success the hope of effecting a transformation in the lives of the persons reached in this manner, depends upon exposure to a *Shabbat* atmosphere. But again, for some individuals, encouragement to participate in such programs is tantamount to an invitation to engage in forbidden modes of travel.

The ramifications of the halakhic issues posed by this dilemma may well vary with the nuances of particular situations. Unfortunately, a comprehensive survey of the underlying halakhic considerations and their application in varying circumstances has, as yet, not been forthcoming. Nevertheless, a number of brief discussions of various scenarios as well as statements in the form of general guidelines have appeared.

An early discussion of one of the many guises of the problem is presented by R. Moshe Feinstein, *Iggerot Mosheh, Orah Hayyim*, I, no. 98. For pedagogic reasons, a synagogue apparently wished to institute a youth *minyan*. However, by virtue of the fact that the youngsters lived at some distance from the synagogue it was certain that they would travel by car. In a brief and somewhat cryptic statement Rabbi Feinstein declares that it is "obvious and clear" that institution of a youth *minyan* under such circumstances is forbidden. Presumably feeling that any further discussion would be superfluous, *Iggerot Mosheh* adds simply that "training" with regard to prayer assuredly does not take precedence over "training" with regard to Sabbath observance. The clear implication is that children should be taught to remain at home rather than to violate Sabbath prohibitions even for purpose of participating in synagogue services. Rabbi Feinstein adds that, in such cases, establishing a youth *minyan* would be tantamount to an overt directive to participate in syna-

gogue services even if such participation entails desecration of *Shabbat*. Hence the very establishment of a youth *minyán* under such circumstances seems to convey an incorrect lesson and to inculcate a false system of values. Rabbi Feinstein emphasizes that these considerations pertain even if the children are below the age of *bar mizvah*. Although it can hardly be anticipated that pre-*bar mizvah* children will themselves drive to the synagogue, the cogency of Rabbi Feinstein's comment is not diminished by its contextual superfluity.

Rabbi Feinstein does not at all enter into a discussion of whether anyone other than a father bears a formal responsibility for the "training" (*hinnukh*) of a child or whether there is an obligation to admonish a minor to desist from a prohibited activity. His response is simply that the innovation, albeit well-intentioned, is counterproductive. The inadvertent but inescapable effect of such activities is to confirm children in their non-observance of the Sabbath and to teach them that Sabbath observance is of lesser importance than communal prayer. That is a far more serious matter than responsibility for individual acts of omission or commission on the part of minors. Transmission of a false value system is assuredly prohibited to all.

In the immediately following responsum, *Iggerot Mosheh, Orah Hayyim*, I, no. 99, a responsum actually authored some two years prior to the preceding responsum, Rabbi Feinstein offers somewhat broader guidance. The question posed to him is whether it is permissible to invite people to attend synagogue services when it is known that they will travel by automobile in order to do so. He responds by ruling that it is forbidden to extend such invitations to people living at a distance from which it is impossible to come by foot on the grounds that the invitation constitutes a forbidden act of "placing a stumbling block before the blind" that is prohibited on the basis of Leviticus 19:14. He further advances a novel thesis in declaring that an invitation of such nature entails an additional transgression in the form of "enticement" (*meisit*). Deuteronomy 13:7-12 establishes successful enticement to commit an act of idolatry as a capital transgression. Citing the statement of the Gemara, *Sanhedrin* 29a, declaring the serpent that tempted Eve to partake of the fruit of the Tree of Knowledge as having had the status of an "enticer," Rabbi Feinstein argues that enticement to commit any infraction constitutes a distinct sin, although only enticement to idolatry constitutes a capital transgression.

*Iggerot Mosheh* further rules that the prohibition against "placing a stumbling block" applies even if travel by foot is not impossible but "it is known" that the invitees will nevertheless travel by automobile for the sake of convenience. However, he asserts that in such cases the prohibition against "enticement" is not applicable.

*Iggerot Mosheh* further discusses the even more usual situation in which explicit language of invitation is not employed but an announcement with regard to services is made for the benefit of those residing within walking distance although "it is known" that others who live beyond walking distance will also respond. Rabbi Feinstein declares that, in such circumstances, the prohibition against "enticement" does not apply but expresses doubt with regard to the applicability of the prohibition against "placing a stumbling block before the blind". Unfortunately, he does not spell out the reasons or considerations pro or con that give rise to his uncertainty. He further declares that, insofar as children and students who are offered inducements for attending services are concerned, it must be explicitly announced that prizes or rewards will be available only to those who come by foot.

The matter is revisited a third time by Rabbi Feinstein in *Iggerot Mosheh, Orah Hayyim*, IV, no. 71. In that responsum, Rabbi Feinstein writes that a teacher "did

well" in not encouraging students to attend synagogue services on *Shabbat* since "there is reason to suspect" that they would engage in prohibited travel on *Shabbat* in order to do so.

In the latter responsum, Rabbi Feinstein also addresses another related question. The teacher's duties included informing students of the date of a program or celebration to be held on *Shabbat* and to prepare them to take part in that program, i.e., to coach them in preparing parts for a play or the like. An obvious analogous problem arises with a much higher degree of frequency with regard to *bar mizvah* teachers who must determine the date of the *bar mizvah* and teach the student the *haftorah*.

Rabbi Feinstein responds by noting that, should the teacher decline to perform those duties, another instructor would surely be found for that purpose. That, he claims, removes the act from the ambit of the biblical prohibition against "placing a stumbling block before the blind." Nevertheless, a rabbinic prohibition remains in place even under such circumstances. However, concludes Rabbi Feinstein, since 1) the instruction does not take place immediately prior to the *Shabbat* on which the program is to be held and 2) it is not certain that the children will travel by automobile, "it is possible" that the teacher need not sacrifice his or her position by refusing to perform such duties.

Again, *Iggerot Mosheh* fails to cite precedents or to explain his reasoning. The distinction that *Iggerot Mosheh* draws in stating that no biblical prohibition against "placing a stumbling block" pertains in situations in which that act will readily be performed by another is a matter of significant controversy. As an example of "placing a stumbling block before the blind" the Gemara, *Avodah Zarah* 6a, offers the case of a person extending a cup of wine to a Nazirite and declares that a biblical transgression is incurred only if the Nazirite and the person extending the cup of wine to him are standing on opposite banks of a river, i.e., only if it would be impossible for the Nazirite to reach the wine without the assistance of the other person. If, however, both are on the same side of the river, no biblical transgression is incurred since the Nazirite, if he chose to do so, could reach the wine without assistance. But what of a case in which physical assistance *is* required but other individuals are available who are ready and willing to offer such assistance? *Tosafot*, *Haggigah* 13a, indicates that if a non-Jew is available to offer the necessary assistance in commission of a transgression, a Jew rendering the same assistance is not in violation of a biblical prohibition. *Mishneh le-Melekh*, *Hilkhot Malveh ve-Loveh* 4:2, distinguishes between situations in which a non-Jew, who bears no culpability for "placing a stumbling block" is available to render such assistance, and situations in which only a fellow Jew is available for such aid. *Mishneh le-Melekh* reasons that, in a situation in which the transgression can be performed only with the forbidden cooperation of a Jew, the individual who renders such assistance is culpable. Since all Jews are equally bound not to render assistance, no Jew can claim that the transgression would have been committed even in the absence of forbidden assistance. Accordingly, the person who provides such aid is guilty of "placing a stumbling block before the blind."

A number of authorities, including R. Abraham Samuel Benjamin Sofer, who authored a classic and comprehensive responsum devoted to the ramifications of this prohibition, *Teshuvot Ketav Sofer*, *Yoreh De'ah*, no. 83, take issue with *Mishneh le-Melekh*. Nevertheless, many writers, including *Sedei Hemed*, *Ma'arekhet ha-Vav*, *klal* 26, sec. 9, and R. Ya'akov Kanievski, *Kehilot Ya'akov*, *Likkutim*, II, no. 6, declare that the weight of authority supports the position of *Mishneh le-Melekh*.<sup>2</sup> Since in

the case discussed by *Iggerot Mosheh* it must be presumed that only Jewish teachers were available to provide the required services, those authorities would maintain that the availability of other teachers has no impact upon the applicability of the prohibition against “placing a stumbling block before the blind.”

Inviting or encouraging forbidden forms of travel constitutes “placing a stumbling block” even though such travel could readily have been undertaken without an express invitation. Causing a transgression by presenting a forbidden substance to a person who had no prior intention of committing a transgression although he was fully capable of doing so without assistance were he to have desired to do so, constitutes a violation of the biblical prohibition.<sup>3</sup> Moreover, it seems to this writer that the very act of extending an invitation whose acceptance entails commission of a sin constitutes “harmful advice” that is independently prohibited as a form of “placing a stumbling block before the blind.”

A quite similar question is frequently posed with regard to inviting guests to one’s home on *Shabbat*. Many individuals involved in outreach endeavors directed toward persons who have not had the benefit of a traditional Jewish upbringing and designed to motivate them to adopt a Jewish life-style have found that invitations to a *Shabbat* or *Yom Tov* meal often leave a profound impression and contribute greatly to developing an ongoing personal relationship. They have also found such invitations to be a most effective way of providing a meaningful experience in Jewish living. However, not infrequently, the invited guests choose to avail themselves of forbidden forms of transportation. R. Moshe Sternbuch, *Teshuvot ve-Hanhagot*, I, no. 358, reports that he was consulted by a newly-observant young man regarding the propriety of inviting his parents to *Shabbat* meals in the hopeful anticipation that their enjoyment of *Shabbat* would, over a period of time, lead them to become observant. His concern was that it might be improper for him to do so because of the fact that they customarily travel to and from his home by automobile.

Rabbi Sternbuch responded with a short but novel analysis of the prohibition “nor shall you place a stumbling block before the blind” (Leviticus 19:14). Rabbinic tradition as recorded in *Mekhilta, ad locum*, teaches that this verse serves as a prohibition against counseling a person in a manner that does not serve that individual’s best interests and, as stated by the Gemara, *Pesachim*, 22b, as a prohibition forbidding a person to assist another in the commission of a transgression. Rabbi Sternbuch asserts that this interpretation does not yield an absolute prohibition with regard to facilitating a transgression. In light of the phraseology employed in this verse, Rabbi Sternbuch argues that the prohibition applies only in situations in which an act is designed to cause damage or harm in the form of a transgression but that any act intended to yield an ultimate benefit is, by definition, not a “stumbling block”. The intention to benefit, argues Rabbi Sternbuch, is, in effect, exculpatory. Rabbi Sternbuch compares this prohibition to the prohibition against “wounding” which does not apply in the case of a physician who performs a surgical procedure designed to promote health and well-being. Accordingly, concludes Rabbi Sternbuch, an invitation designed to advance the spiritual well-being of the parents cannot be categorized as a “stumbling block” and hence is not forbidden.

Rabbi Sternbuch’s thesis is appealing but, at least as formulated by him, it is not supported by the sources that serve to define the prohibition. His comparison of “placing a stumbling block” in order to achieve a goal that is beneficial and laudatory to therapeutic “wounding” is entirely inapt. Causing a person to transgress is regarded by the *Mekhilta* as explicitly forbidden by this commandment; causing the trans-

gression is defined as a *malum per se*. Therapeutic “wounding” is permitted, not because of the benevolent intent of the physician, but because therapeutic wounding is, by definition, not a battery. Rambam, *Hilkhot Hovel u-Mazik* 5:1, carefully states that one who wounds “in the manner of an aggressor” (or, according to a variant reading, “in a humiliating manner”) is guilty of a biblical infraction. A surgeon performing his professional duties does not commit an act fitting that description.

There is, however, a long list of sources that discuss the question of whether it is permissible to cause a person to “stumble” and commit a comparatively minor transgression in order to preserve him from a more severe transgression as well as the related question of whether it is permissible to cause a person to commit a single transgression if doing so will effectively preclude him from committing a multiple number of transgressions. Those discussions focus upon the net effect of action over inaction rather than upon benevolent intent.

The *Shabbat* invitation question might be recast in precisely those terms: May a person be invited to desecrate the Sabbath in order to preserve him from multiple acts of desecration in the future? *Avnei Nezer, Yoreh De’ah*, no. 126, permits the sale of improperly slaughtered animals to a habitual sinner because the net effect is to prevent the more numerous transgressions incurred in eating meat of a nonkosher species. Similar reasoning is tentatively employed by R. Akiva Eger in a gloss on *Yoreh De’ah* 181:6 in resolving a related question and in contemporary times by R. Shlomo Zalman Auerbach, *Minhat Shlomoh*, no. 35, sec. 1, and is advanced as a consideration by R. Moshe Feinstein, *Iggerot Mosheh, Yoreh De’ah*, I, no. 72. *Tiferet Shmu’el*, in his commentary on Rosh, *Baba Mezi’a*, 5:3, comments that “perhaps” it is permitted for a borrower to accept funds under conditions in which payment of a premium for use of the funds is prohibited as usury by rabbinical decree if, in doing so, he denies the lender the opportunity to use the same funds for an interest-bearing loan that is biblically proscribed. A similar view is suggested by *Mahazit ha-Shekel, Orah Hayyim* 163:2.

On the other hand, R. Chaim Yosef David Azulai, *Birkei Yosef, Hoshen Mishpat* 9:3, rules that it is forbidden for a litigant to present a gift to a judge in order to dissuade him from unjustly favoring the opposing party. Acceptance of a bribe is forbidden even if the gift is designed to prevent a prohibited miscarriage of justice and its presentation even under such circumstances, rules *Birkei Yosef*, constitutes a forbidden form of “placing a stumbling block.” R. Eliezer Waldenberg, *Ziz Eli’ezer*, XV, no. 19, notes that R. Akiva Eger and *Mahazit ha-Shekel* make their points only tentatively and also cites equivocal language with regard to the applicability of the rabbinic prohibition against “assisting transgressors” even when the “assistance” is designed to prevent a biblical infraction.<sup>4</sup> It should also be noted that even the permissive views regard such acts as permissible only in situations in which it is a certainty, or a near certainty, that more serious transgressions will be avoided. That is assuredly not the case when invitations are extended as part of a process of encouraging adoption of an observant life-style but without any assurance of success.

Nevertheless, there are a number of other factors delineating the parameters of the prohibition concerning “placing a stumbling block” that impact upon each of the earlier posed questions:

1. *Sedei Hemed, Ma’arekhet ha-Vav, klal* 26, sec. 32, cites a number of authorities who declare that “placing a stumbling block” serves to prohibit only conduct requiring a physical act and, consequently, mere oral assistance or encouragement

to transgress is not included in the prohibition. *Mikhtam le-David, Yoreh De'ah*, no. 33, invokes the dictum excluding transgressors from agency, "The words of a master and the words of the teacher, whose words does one obey?" as establishing as well that there can be no culpability for verbal encouragement of transgression since the transgressor must always be presumed to be following his own inclination.

Nevertheless, Rambam, *Hilkhot Terumot* 6:3, declares that there is culpability in the eyes of heaven for causing or assisting in sin in any manner "even through mere speech." Similarly, Rambam, *Hilkhot Hovel u-Mazik* 5:13, followed by *Shulhan Arukh, Hoshen Mishpat* 380:2, states that a person who directs another to commit a tort "is an accomplice in the sin and is a wicked person for he caused a blind person to stumble and has strengthened the hands of evildoers." It cannot be maintained that, by definition, "placing a stumbling block" involves a physical act since the *Mekhilta, Kedoshim* 2:14, explicitly includes offering harmful advice as a biblical violation of the prohibition.<sup>5</sup> Indeed, as noted earlier, it would seem that encouraging or inviting a person to commit a transgression constitutes "placing a stumbling block" before the blind for two reasons: 1) it facilitates transgression; and 2) *ipso facto* it constitutes harmful advice.

2. In most of the cases in which these questions arise, the invitation to attend programs or synagogue services need not absolutely involve forbidden travel. Quite often, the destination is within walking distance even though the distance makes walking inconvenient; at times, if one wishes to do so, it is possible to secure accommodations for *Shabbat* within walking distance. May one create a situation in which it is not absolutely necessary for a person to transgress, although it is likely that he may do so? In effect, the question is, since the transgression can be avoided if desired, does such an invitation constitute a stumbling block?

The Mishnah, *Shevi'it* 5:6, enumerates specific agricultural implements which may not be sold during the course of the Sabbatical year but excludes a number of other implements and concludes with the explanatory statement: "This is the principle: everything whose use is designed for a transgression is forbidden; [everything whose use is designed] for a transgression and for a permitted activity is permitted." Similarly, a subsequent Mishnah, *Shevi'it* 5:8, records that Bet Hillel permits the sale of a plow animal to a person suspected of ongoing violations of the prohibitions concerning agricultural activity during the Sabbatical year "because he can slaughter it." Ritva, *Avodah Zara*, 15b, understands the Mishnah as positing the rule that even in situations involving a biblical transgression, i.e., the purchaser could not have committed the transgression but for the assistance of the seller, such sale is permitted because an object that can be used for a legitimate purpose is, by definition, not a stumbling block. If so, since the invitation to services and the like could be acted upon without transgression, extending an invitation under such circumstances would appear to be permissible according to Ritva.

There are, however, at least two authorities, *Tosafot Anshei Shem* and *Mishnah Rishonah*, who, in their respective commentaries on *Shevi'it*, interpret the permissive ruling of the Mishnah regarding the sale of utensils that can be used for both permissible and forbidden purposes as limited to situations in which such utensils are also available from other sources. Availability from other sources transforms the situation to one comparable to individuals standing "on the same bank of the river" in which the prohibition against abetting a transgressor is only rabbinic in nature. Nevertheless, a host of authorities including *Teshuvot Hatam Sofer, Yoreh De'ah*, no. 19;

*Teshuvot Pnei Yeshu'a, Yoreh De'ah*, no. 3; R. Yitzhak Elchanan Spektor, *Ein Yizhak*, I, *Orah Hayyim*, no. 13; as well as *Iggerot Mosheh, Yoreh De'ah*, I, no. 72 and *Orah Hayyim*, II, no. 62, in effect follow the position of Ritva in permitting assistance of a nature that can be utilized either in a legitimate or a forbidden manner.<sup>6</sup>

There is one other aspect of the ruling of the Mishnah in *Shevi'it* that is germane, viz., the definition of an implement "used for both permitted and forbidden purposes". Must the implement be used by the majority of people for permissible purposes, or is it sufficient if even a minority uses the implement for permitted purposes? With regard to the parallel rule governing the sale of a farm animal, Ramban, Ran and Rashbam, in their respective commentaries on *Baba Batra* 92b, appear to be of the opinion that there must be at least an equal chance that the purchaser will use the animal for a permissible purpose, i.e., he will slaughter it for meat rather than use it for plowing his fields. On the other hand, Rashi, *Avodah Zarah* 15a, and *Tosafot, Avodah Zarah* 15a and 15b, permit the sale of the animal even if the majority of customers purchase such animals for a forbidden purpose.

Among later authorities, R. Chaim Sofer, *Teshuvot Mahaneh Hayyim*, I, no. 47 and *Teshuvot Zivhei Zedek*, II, no. 18, rule that a sale of this nature is permissible only if the majority of purchasers utilize the object sold for permitted purposes.<sup>7</sup> However, it seems that *Taz, Yoreh De'ah* 151:1, permits such a sale even if only a minority of customers use the purchased object for a legitimate purpose.<sup>8</sup> This is also the position of *Teshuvot Imrei Yosher*, II, no. 115. R. Eliezer Waldenberg, *Ziz Eli'ezer*, IV, no. 5, chap. 4, citing *Teshuvot Hatam Sofer, Yoreh De'ah*, no. 19, rules that the sale is rendered permissible on the basis of the mere possibility that the object sold will be used for a legitimate purpose. This also seems to be the position of R. Yechiel Ya'akov Weinberg, *Seridei Esh*, II, no. 19.

It would appear, however, that none of these authorities would sanction the sale of an implement that can be used for a legitimate purpose if it is known with certainty that the purchaser will use it in a forbidden manner. R. Shlomo Kluger, *Tuv Ta'am va-Da'at, Mahadura Telita'a*, II, no. 50, forbids the sale of a razor to a person who is known to shave with a razor even though the implement can be used in a permissible manner to cut hair growing on the head since it is certain that he will also shave with it. A similar view is espoused by R. Moshe Mordecai Epstein, *Levushei Mordekhai, Mahadura Tinyana, Orah Hayyim*, no. 48.

Nevertheless, *Iggerot Moshe, Yoreh De'ah*, no. 72, finds grounds to permit the sale even under such circumstances. *Iggerot Moshe* argues that a person who violates agricultural proscriptions and who buys agricultural implements that can be used for permitted purposes will almost certainly use them for forbidden purposes as well. Yet, the Mishnah permits such sale. *Iggerot Mosheh* reasons that this is permitted since the sale is designed for a permitted purpose and hence does not constitute a "stumbling block;" any forbidden use is the result of the purchaser causing himself to stumble. *Iggerot Mosheh* points out that, if this line of reasoning is not accepted, it would be forbidden to sell pots and pans to Sabbath desecrators since they will certainly use those utensils for cooking on the Sabbath. This position is reiterated in *Iggerot Mosheh, Orah Hayyim*, II, no. 62, although in the latter responsum it is expressed with a measure of hesitation (*ein hetter zeh barur*). According to those authorities who understand the ruling enunciated by the Mishnah in *Shevi'it* as referring only to situations in which similar implements may be acquired from other sources, there is no basis for deducing such a principle with regard to the biblical prohibition. Moreover, the ruling of the Mishnah in *Shevi'it* may be limited to

situations in which it is possible that the implement may be utilized solely for a purpose that is entirely legitimate.<sup>9</sup>

3. It is also possible, and indeed likely, that even if acceptance of the invitation necessarily entails forbidden travel, the invitation will not be accepted, in which case no transgression of *Shabbat* prohibitions will occur. However, that contingency does not serve to render the invitation permissible since, as pointed out by *Teshuvot Mahaneh Hayyim*, 1, no. 46, the sale of implements designed solely for agricultural use is forbidden even though it is entirely possible that they will not be put to any use. Nevertheless, language employed by *Toldot Yizhak* in his commentary on the Palestinian Talmud, *Shevi'it* 5:3, indicates that "placing a stumbling block," by definition, is limited to situations in which the transgression is certain to occur because an act "can not be called placement of a stumbling block unless the unfortunate effect is known at the time that it is placed before him. But if it is doubtful whether [the victim] will perform the unfortunate act and it is within his power not to do so, this is not presenting him with a stumbling block; rather it is called causing himself to stumble." A similar view is expressed by R. Aharon Kotler, *Mishnat Rabbi Aharon*, 1, no. 3. Those authorities apparently understand that, in prohibiting the sale of agricultural implements to a person suspected of violating regulations pertaining to the Sabbatical year, the Mishnah is addressing situations in which actual prohibited use of those tools is virtually a foregone conclusion. According to those authorities, extending an invitation that, if accepted, is likely to result in forbidden travel would be permissible in situations in which it is not at all certain that the invitation will be accepted.

In a letter addressed to the administration of Yeshivat Ohr Sameach in Jerusalem R. Shlomo Zalman Auerbach writes:

It is permissible to invite even a person who lives at a distance from the place of prayer and to offer him a place to sleep close to that place in a manner such that he will not need to desecrate the Sabbath. Even if he does not accept the offer, there is no obligation to tell him to refrain from coming because of that, nor is it necessary to admonish him that it is forbidden to travel by automobile.<sup>10</sup>

Rabbi Auerbach presumably maintains that the offer of a place of lodging obviates the prohibition against "placing a stumbling block" even if there is little likelihood that it will be accepted and is in agreement with the authorities who maintain that the prohibition is limited to situations in which a transgression will necessarily result. According to Rabbi Auerbach, such an offer once made need not be withdrawn even if it becomes clear that it will indeed lead to transgression; since the offer does not constitute a stumbling block, it is the invitee who causes himself to stumble in insisting upon transgressing.

Withdrawing the offer or admonishing the invitee regarding the infraction might nevertheless be required as a form of *tokhahah* or admonition in fulfillment of the command "you shall admonish your fellow" (Leviticus 19:17). Rabbi Auerbach presumably maintains that, because of the prevalent lack of awareness of the nature and severity of the infraction, it is permitted and indeed preferable to refrain from admonishing the transgressor until such time as a receptive relationship is established. In that manner the prospects for success and acceptance of admonition and instruction will be enhanced.<sup>11</sup>



## MATERNAL IDENTITY REVISITED

The ongoing discussion of halakhic determination of maternal identity and its application in situations involving host mothers and donated ova has been broadened by Rabbi Ezra Bick's article titled "Ovum Donations: A Rabbinic Conceptual Model of Maternity" published in the preceding issue of *Tradition*, vol. 28, no. 1 (Fall, 1993). In the course of that discussion Rabbi Bick takes issue with a number of points made in my earlier article "In Vito Fertilization: Questions of Maternal Identity and Conversion" that appeared in *Tradition*, vol. 25, no. 4 (Summer, 1991) as well as in my "Survey of Recent Halakhic Periodical Literature" published in *Tradition*, vol. 19, no. 4 (Winter, 1981). I use the passive voice advisedly since, despite the impression made by Rabbi Bick's comments, the points that he questions have all been made by earlier writers and have been attributed to them.

Although it was candidly stated that certain statements to the contrary do exist, it is indeed my conclusion that "the preponderance of evidence adduced from rabbinic sources demonstrates that parturition, in and of itself, serves to establish a maternal relationship." That is the conclusion of a long list of contemporary rabbinic scholars cited in my article. Whether or not the donor of the ovum (a term that I regard as, halakhically speaking, more precise than "genetic mother") is also a mother is, as I have shown, an issue that is open to discussion.

1. The major source serving to establish parturition as a determinant of motherhood is the statement of the Gemara, *Yevamot* 97b, establishing that twins born to a woman who becomes a convert to Judaism during pregnancy are regarded for halakhic purposes as maternal siblings. Since familial relationships are nullified upon conversion, and since a fraternal relationship cannot exist without a concomitant filial relationship, it follows that the maternal relationship must have come into being subsequent to conversion.

Rabbi Bick raises a number of objections to this argument. Assuming for the purpose of his argument that a child can have but one mother, he contends that when motherhood is established at conception (or, it may be added, at an early stage of gestation), the existence of such a relationship serves to bar any second maternal relationship. Only in the case of a pregnant convert does parturition establish a maternal relationship since it has not been preempted by a previously existing relationship.

The response to that argument is quite simple. Having conceded that birth is, at least in some circumstances, a determinant of motherhood, it becomes necessary to prove: a) that a child cannot have two halakhic mothers; and b) that conception (or gestation) is indeed itself a determinant of maternity; and c) that it preempts any subsequent maternal relationship. *Yevamot* 97b establishes parturition as a determinant of maternal relationship. The contention that this relationship is established with the birth mother only if it is not preempted by a biological mother is an additional proposition. Methodologically, that proposition cannot be entertained unless supported by proof. Such proof is not adduced.

Rabbi Bick further argues that the maternal relationship may well be established at the *time* of birth, but only between the child and the woman who is the source of the ovum from which the child develops. I would rephrase that position in somewhat different terms and express it in the proposition that birth is the cause (*sibah*) of the maternal relationship but that the biological relationship is a condition precedent (*tenai*). The response to that argument is : 1) The burden of demonstrating the exis-

tence of such a condition has not been fulfilled, particularly if a baby may have two (or more) halakhic mothers. 2) Were it indeed the case that generation of the ovum is a condition of maternal identity, I fail to understand how birth can establish a maternal relationship between a mother and her proselyte child. It must be clearly recognized that Halakhah takes no direct cognizance of genetics as a significant factor in and of itself. There is no evidence that what Rabbi Bick calls "historical facts" are at all of halakhic relevance. There is no support of which I am aware for the notion that "genetic continuity" is, halakhically speaking, a *sina qua non* of parenthood. Consequently, since conversion nullifies any preexistent relationship, if it be insisted that continuity of identity between the donor (or gestational mother) and the birth mother is a necessary condition of halakhic motherhood, the inescapable conclusion would be that the child born to a pregnant convert has no (halakhic) mother.

The contention that the fetus of a pregnant proselyte undergoes conversion simultaneously with the mother is substantiated by the statement of the Gemara, *Yevamot* 78a, questioning the absence of a requirement for separate immersion of the child. The Gemara establishes that the mother's body does not constitute an interposition or barrier (*hazizah*) between the waters of the *mikveh* and the child because "that is its natural growth." This is the normative halakhic position as reflected in the comments of *Dagul me-Revavah*, *Yorah De'ah* 268:6, and is in no way contradicted by Rashi, *Yevamot* 97b. However, assuming, as cited in the name of *Zera Yizhak*, that "there is no such thing as conversion *in utero*" it then certainly follows that "A child born to a woman who converted during pregnancy is Jewish by virtue of birth." That position also yields the conclusion that parturition is a determinant of motherhood. Indeed, such an interpretation of *Yevamot* 97b understands birth as establishing a maternal relationship and *ipso facto* Jewish identity. The linchpin is parturition as the determinant of maternal identity.

[Despite the diligent efforts of the Gottesman Library's prodigious Rabbi Bernard Mandelbaum, the statement cited in the name of *Zera Yizhak* (4) (sic) eludes me. I suspect this is a typographical error and should read *Zekher Yizhak*, I, no. 4. However, *Zekher Yizhak* does not deny that a fetus undergoes conversion in utero. His statement reads, ". . . for whoever was a fetus in the innards of a proselyte who converted became sanctified with the sanctity of Israel." The sanctification to which reference is made is the sanctification of conversion undergone simultaneously with the fetus' mother. Moreover, *Zekher Yizhak* declares explicitly: "But that the child is a relative of the mother, this is not by virtue of [its] origin in intercourse, but rather by virtue of the fact that it was born from her." Thus, as accurately indicated in footnote 18 of my earlier article and explained in the accompanying text, *Zekher Yizhak* represents another prominent authority who unequivocally supports the thesis that the maternal relationship is established at the time of parturition.]

2. Both R. Joseph Engel and Maharal state that a pregnant woman cannot be termed a "mother" because the fetus is yet an integral part of the mother. Maharal explicitly states "and at the time that she became [Esther's] mother, at the time she was born (emphasis added), for at the time of conception she could not yet be termed a mother since the fetus did not separate [itself] from her." Those words are cited by R. Joseph Engel in declaring that his view is identical with that of Maharal. Contrary to Rabbi Bick's assertion, not only do these authorities declare that parturition is a determinant of motherhood, they also declare that any earlier maternal relationship is an impossibility. That declaration effectively precludes the possibility of a child having two halakhic mothers. Rabbi Bick seems to be saying that, according to

R. Joseph Engel, motherhood is established by donation of genoplasm in the ovum, then nullified by the fetus' integration in the body of the mother, only to be reestablished upon separation from the mother at birth. That takes us back to square one, i.e., the absence of any proof for a genetic theory of halakhic motherhood. Moreover, even if such support were available, any attempt to read that theory into the words of Maharal would be a bit strained, to say the least.

3. Rabbi Bick argues that the Gemara, *Hullin* 70a, explicitly denies that birth alone is the determinant of maternity. The Gemara queries:

What is the law [regarding the sanctity of a first-born animal] if the two wombs were affixed and [the fetus] went out of one and entered the other? Its own womb is exempted [from future status of a first-born, as this was its first-born], the one not its own is not exempted, or perhaps the one not its own is also exempted."

If any proof is to be brought from this text it must be in support of the proposition that maternal identity is established by birth. The issue left unresolved by the Gemara is then whether a fetus can be "born" twice by emerging from two different uteruses and thereby precluding any future first-born to the second mother as well. The phrase "its own womb," upon which Rabbi Bick dwells, connotes nothing more than the notion that parturition is a phenomenon of halakhic significance only as the culmination of gestation in utero.

This source is discussed in a somewhat peripheral vein by R. Zalman Nechemiah Goldberg in his contribution to *Tehumin*, vol. V. Rabbi Goldberg certainly does not find that it contradicts the thesis that motherhood is determined at parturition. In point of fact, no halakhic writer has cited this text as a source for the definition of maternal identity. They have not done so for the good and sufficient reason that status as a "*peter rehem*", i.e., a fetus that "opens a womb" has no bearing on maternal identity. No one has suggested that a neonate—even one which has no mother, if such is halakhically possible—subsequently inserted into the uterus of a woman acquires a mother simply by emerging from the birth canal of its host. One must assume that it is birth in the mode of disengagement from the physiological systems of the host, or at least as the result of labor, that is a determinant of a maternal identity. The question posed by the discussion in *Hullin* is whether "*peter rehem*" is to be defined in the same manner or whether mere opening of the womb by a fetus suffices to exempt future fruit of that womb from the status of a "*peter rehem*". The term "its own womb" employed by the Gemara and the transmuted term "its own child" found in Rambam connote nothing more than a gestational fact and have no import whatsoever for the determination of halakhic motherhood.

4. The conflicting halakhic inferences drawn by various writers from the aggadic statement to the effect that Dina was originally conceived by Rachel and subsequently transferred to the womb of Leah, including the comments of *Tur*, were cited and discussed in detail in this column in the Winter, 1981 issue of *Tradition*.

The statement that the aggadic source "was introduced into the literature concerning parenthood over thirty years ago by Rav Yisrael Zev Mintzberg and subsequently ignored" is factually incorrect. In actuality it was first cited by R. Menasheh Grossberg some seventy years ago in a contribution to *Sha'arei Torah, Sha'ar Menasheh*, XV (5684), no. 3, and subsequently discussed by R. Joshua Feigenbaum, *Sha'arei Torah*, XV, no. 4; R. Zevi Hirsch Friedling, *Ha-Be'er*, VI (5691), no. 3; and R. Betzalel Ze'ev Safran, as reported by his son in *Ha-Be'er*, VII (5692), no. 2. Nor has

it been ignored in more recent times. This source is cited and discussed by R. Moshe Hershler, *Halakhah u-Refu'ah*, I (Jerusalem, 5740), 319-320, by R. Abraham Isaac ha-Levi Kilav, *Tehumin*, V (5744), 267 and others.

I do not place any great weight upon this aggadic source because of the general inappropriateness of aggadic statements as a basis for halakhic inferences and also, as I have carefully shown in my earlier contribution to *Tradition*, because of the conflicting conclusions drawn from this source by earlier scholars. My own inclination lies with those who cite it coupled with the phrase "Dinah the daughter of Leah" in Genesis 34:1 as indicative of the fact that motherhood is governed by parturition because the Pentateuch is first and foremost a legal document and not given to surplusage. However, at best, the evidence is merely confirmatory.

5. Rabbi Bick dismisses proofs by analogy to vegetative relationships out of hand because of their "a priori inappropriateness" and describes such arguments as "desperate attempts" to "present a semblance of halakhic reasoning." In point of fact, those arguments were made by, and cited in the name of Professor Ze'ev Low, not by myself. Rabbi Bick seems to be concerned that, rather than consign that approach to the theater of the absurd, I dignify it by presenting an analysis and reasoned critique of those arguments.

Rules pertaining to plants and animals are not automatically analogous. But no serious and knowledgeable student of Halakhah should question "why there should be even a prima facie basis for imagining that the two concepts are analogous." Laws of *orlah* are predicated upon the identity of one living, growing organism, or of a part thereof, becoming submerged in an identify of another living, growing, organism. The primary question with regard to these problematic cases of *orlah* is not age, as Rabbi Bick seems to think; it is first and foremost identity. With regard to these problematic cases of *orlah*, age is directly contingent upon identity. Absent reasons to the contrary or overreaching in the construction of inappropriate analogies, such principles apply with regard to matters pertaining to animals and humans as well. The methodology is not really reasoning by analogy at all, but rather the identification of an operative principle equally applicable in non-agricultural situations. It is for that reason that as early as 1928, Rabbi Yekutiel Aryeh Kamelhar, *Ha-Talmud u-Mada'ei ha-Tevel*, pp. 44-45, cited regulations pertaining to *orlah* in writing that the recipient of a successful ovarian transplant must be regarded as the halakhic mother of any subsequent issue. Rabbi Bick himself enthusiastically embraces this principle with regard to organ transplants in which "the transplanted material loses its original identity and becomes part of the host." That principle is formulated and expressed with regard to agricultural laws.

6. Rabbi Bick asserts that the impossibility of dual motherhood is "eminently logical". Whether or not Halakhah recognizes dual motherhood is certainly a matter for detailed discussion as I have shown. There is, however, nothing "eminently logical" about either position. The discussion, it must be remembered, is not with regard to the empirical possibility of two biological or genetic mothers. Even with regard to that (at present) entirely theoretical question, *Tosafot*, *Sotah*, 42b, maintains that it is physically possible for two sperm to penetrate a single ovum. It would undoubtedly be technically much more difficult—but hardly logically or biologically impossible—for genetic material in the form of different chromosomes to be drawn from the ova of two different women. The result will be a child who draws maternal genes from two different women.

Our discussion, however, concerns halakhic rather than biological motherhood.

