

## COMMUNICATIONS

### MENTAL DEFECTIVES IN HALAKHAH

TO THE EDITOR OF *TRADITION*:

In the Fall 1966 issue of *TRADITION* Professor Rosenfeld cites the *Minchat Chinukh* (*Mitzvah* 32) as quoting the opinion of the *Halakhot Ketanot* that the Sabbath may not be violated for mental defectives of the category of *cheresh* and *shoteh* and that killing a *cheresh* and *shoteh* does not entail the death penalty, without giving any indication of disapproval. While it is true that in *Mitzvah* 32 he voices no disapproval regarding the opinion of the *Halakhot Ketanot* on the subject of Sabbath violation, he does in *Mitzvah* 34 strongly disapprove of the opinion rejecting the death penalty for killing the *cheresh* and *shoteh* (needless to say, the question is only about the death penalty by a human court, and has no reference to punishment by the divine court, about which there can be no doubt). He quite clearly states that the opinion of the *Halakhot Ketanot* is utterly ground-

less and the *cheresh* and *shoteh* are no different in this respect from other Israelites. Why the *Minchat Chinukh* makes no comment in *Mitzvah* 34 is somewhat perplexing. It is well to remember, however, that the *Minchat Chinukh* is not a definitive work, that it was printed only at the persistence of the admirers of the author without being completely ready for publication, and so suffers from many lacunae. The omission of the criticism of the view of the *Halakhot Ketanot* in *Mitzvah* 32 may be an oversight. The author probably expressed his complete view on this matter in *Mitzvah* 34. That one is to differentiate between the death penalty, on the one hand, for killing the *cheresh* and *shoteh*, and violating the Sabbath for him, on the other hand, does not appear warranted, and Jewish practice militates against any such distinction, as is evident from Dr. Rosenfeld's quotation from the *Mishnah Berurah* (p. 21 of article). It might also be pointed out that there are many discussions in *Halakhot Ketanot* which were of a purely theoretical and pilpulistic

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nature and were never intended to serve as true norms of Halakhah. See author's introductions, as well as the "Haskamah" of R. Chayim Halevi Horwitz. Cf. also the modern editions of the *Halakhot Ketanot* which contain references to other works which discuss the opinion of the *Halakhot Ketanot* (cited within the Responsa, as well as at the end of the volume, p. 88, where a disagreement with the author by the *Shaar Ha-Zekenim* is cited).

On the subject of a *golem* created by human beings who would be on so high a spiritual level as to be endowed with intelligence and speech (this, of course, could be achieved only by supreme saints, Sanhedrin 65b), it is the opinion of R. Gershon Henoch in his *Sidrei Taharah* (quoted in *Taharat Yom Tov*, Vol. XV, p. 360) that it could be regarded as truly human in every respect.

In the interesting article by Dr. Spector on the *Talmud and the Search for Security*, p. 44, there is a quotation from the Talmud (Megillah 13a) to the effect that a woman is jealous only of a neighbor's children. This interpretation is not borne out by the original text.

(Rabbi) David S. Shapiro  
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### POPULATION CONTROL

TO THE EDITOR OF *TRADITION*:

One welcomes the article of Moses Tendler [*TRADITION*, "Population Control — The Jewish

View," Fall 1966] and concurs heartily with its general sentiments and conclusions about population and birth control. However, as a "cry of protest against those who took unto themselves the mantle of spokesman for the Jewish people on this complex and delicate issue," the article succeeds only in subverting its stated purpose. Certainly it cannot pretend to be based, as its author claims, on "the words of the Talmud and its commentaries."

The "Talmud and its commentaries" would not support, for example, his declaration that "Onanism . . . is clearly a Biblical prohibition." If by Onanism, he means the "Act of Er and Onan," the *dash mibifnim v'zoreh mibachutz* of the Midrash and the *shello k'darkah* of the Talmud, then how does he explain the Halakhah's theoretic permission of *shello k'darkah* and its simultaneous prohibition of *zoreh mibachutz* — both independent of the Onan narrative? What can he mean by "prohibition" when the Talmudic commentaries point out that the contraceptive act of Onan is inextricable from its special context; that the same act under other circumstances would not be prohibited? And if "prohibition" indeed, what does he mean by "Biblical"? Does he, writing the "Jewish view," mean *d'oraita*? If so, he dismisses the commentaries and *poskim* who conclude that even *hash-hatat zera* is not derivable from Onan — because Onan was still a Noahide (which accounts for the form of the codified law of *Rambam, Tur* and *Shulhan Arukh*) or for other such reasons — but is

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instead to be derived from (the obverse of) *p'ru u'r'vu* or from *dor hamabul* or from *lo tin'af* — and yet regard even these as *remez* or *asmakhta*. The author of *Sefer HaBrit* (Part I, Chapter 16), for example, would have liked to state that *hash-hatat zera* is either derivable from Onan or is *d'oraita*, but was careful to allow himself only:

Since this evil is so great and since many do yield to the temptation, the Torah therefore did not forbid it explicitly in keeping with (the Talmudic principle) “better that they sin unwittingly rather than knowingly.” But yet the Torah let us know through a narrative, such as that of Er and Onan, that *the practice is objectionable*.

If Dr. Tendler is in possession of some information that would overrule all of the above, he still cannot speak of it as “clearly a Biblical prohibition” — not, that is, in terms of the Talmud and commentaries.

Even more astonishing is Dr. Tendler's next sentence: “Many *halakhic* authorities classify the diaphragm method as ‘casting the seed on wood and stones’ and prohibit its use even if life-threatening medical consideration demands contraception.” For the “many *halakhic* authorities,” the relevant footnote offers only the Responsum of R. Akiva Eiger (No. 71). But even this sole citation is indefensible. Firstly, R. Akiva Eiger is manifestly speaking of a tampon, not a diaphragm. The distinction is made eminently clear by *Maharsham* (Responsa, Volume I, No. 58), to whom a diaphragm, which “covers the uteral os,” imitates the condi-

tion of “pregnancy when, too, the mouth of the uterus is, as it were, closed.” This ruling was widely accepted by successive *T'shuvot* which dealt with similar questions. (E.g.: *Emek Halakhah*, No. 66, in which Rabbi Joshua Baund writes: “I do not know why we even need enter into the *Mahloket ha pos'kim* (concerning *mokh*) since a new method has become available, in which a rubber covering is placed on the mouth of the uterus — which is certainly permissible (as a method).” But even prior to *Maharsham*, and probably before the diaphragm was available or popular, Responsa of undisputed authority made a similar distinction in theory between the *mokh* of the Talmud — which is what R. Akiva Eiger says he is talking about and which, these authorities point out *on the basis of Rashi to Niddah 3a*, must be tampon-like — and the wholly distinct principle of the diaphragm. The difference is both obvious and logical.

*Secondly*, even if the above were not so, the Responsum of Akiva Eiger is inadmissible here. For, Akiva Eiger is — contrary to the common assumption, even of *Pit'hei T'shuvah*, Jakobovits and others — *not* dealing here with “life-threatening medical considerations.” This point is established by *Igg'rot Mosheh* (*E.H.*, No. 63, *Anaf* 5); but, independently of R. Mosheh Feinstein, the same conclusion is affirmed by the *Hazon Ish* (*E.H.* 37, 5). And, if R. Akiva Eiger — speaking neither of diaphragm nor of *sakkanat nefesh* — cannot be cited as authority for Dr. Tendler's judgment in this case,

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is there even one, let alone "many," who could?

Proceeding now to his next sentence, we find Dr. Tendler erring dangerously, on the side, this time, of leniency: "The use of non-mechanical barriers to conception such as chemical spermicides or hormonal repression of ovulation present us with the least objectionable methodology for contraception." In connection with the first-half of this sentence, Dr. Tendler is evidently unaware of some pertinent *realia*, and the following might be called to his attention: Chemical spermicides often contain an agent that throws up an occlusive sponge, rendering them, for our purposes, tampon-like. They seem to be spermicides but are actually, or additionally, occlusive barriers. Furthermore, they immobilize the sperm at an earlier point in its course than a diaphragm would; as the spokesman for a leading contraceptive pharmaceutical corporation wrote me: 'to the best of our knowledge, there are none of the first type you mention, i.e., those that would deprive the sperm of its generative capacity without immobilizing it.'

The "hormonal repression of ovulation" in the second-half of that sentence is qualified by a footnote (#9) to a previous paragraph that such activity may indeed be "abortifacient." Dr. Tendler makes this point at some length with regard to the IUCD'S, as well. The whole tenor of his discussion, in fact, is in the nature of warning that what we may naively take as contraceptive is actually abortive. But, I humbly submit that in this

case, too, Dr. Tendler is — like those before him whom he has come to correct — thinking in other-than-*halakhic* categories. To "the Talmud and its commentaries," illicit contraception is, he must admit, a more serious transgression than technical abortion — unless we confuse the picture with that of *Bnai Noah*. This is so intrinsically; the Talmud, not to speak of Commentaries, Zohar, Codes and Responsa, treats *hash-hatat zera* differently from from the law of *ubarin*. Extrinsically, too, the situations differ in the Responsa: therapeutic abortion is a mitzvah when there is no alternative; illicit contraception, when medically necessitated, usually has the alternative of a licit method; etc., etc.

Lapses such as these — and others, too — mar an otherwise fine article and compromise its important message. In undiminished respect for Dr. Tendler's learning and achievements, I offer at least the above for his and your readers' consideration.

Rabbi David M. Feldman  
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TO THE EDITOR OF *TRADITION*:

With all due respect I find that Dr. Tendler in his article on "Population Control" makes some very questionable assertions. Admittedly, "the management of the world's population is relegated to God" but so is the key to the rain. Indeed He determines everything in this world. All is in the hands of God save the fear of heaven and

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catching cold. But that does not forbid us to cloudseed or avoid the birth of monstrosities or does it? Is Dr. Tendler asserting that we adopt the attitude of the Moslem fatalists? Since when is a Ben Noach commanded to procreate and therefore forbidden to use methods of birth control. I find that the halacha regards a non-Jew as free from the duty of procreation, at least since *matan Torah*, though there is an individual opinion that strives to find otherwise. He is also permitted to waste seed and sterilize himself (See Talmudic Encyclopedia under *Ben Noach*). A Jew is most certainly not forbidden to exercise moral restraint provided he has fulfilled the commandment to procreate by bringing at least one son and one daughter into the world. The duty of *ona* is one he has to discharge at the insistence of his spouse, who herself is not commanded to procreate. She may forego her right to *ona*. Dr. Tendler's treatment of the prohibition of cohabitation in time of famine or disaster is also an oversimplification. Some authorities exempt the *tevilah* night and, to say the least, the subsequent softening of the originally absolute prohibition caused a great deal of heartsearching amongs the codifiers (see Sharei Teshuva, *Orach Haim* 574). In the light of the exceptions made by the authorities on the grounds of the satisfaction of the sexual urge of either partner, it would be difficult today to lay down dogmatically the relevance of either

pleasure or propagation to this particular ruling.

Whilst Dr. Tendler rightly maintains he is not speaking in the language of *psak din*, the Jewish view on any subject must reflect the Halakha. Naturally it behooves man *ab initio* to utilize technological advance to increase the food supply rather than inhibit birth. But this does not preclude the control of birth as envisaged and implemented by world and national authorities today as a *short term policy* to combat an existing emergency. It is not our duty to invent or exaggerate halakhic prohibitions in this context. And as far as the Jewish people alone is concerned, the Halakha has set down its own norms within which there is room for moral restraint, and a limited use of those birth-control methods that do not violate them. Science would seem to be providing such methods, that have, of course, to be carefully examined before a final ruling is established. Very often this decision will depend on the individual case and circumstance. But we must clearly distinguish between *midat hassidut* (which can work both ways—in the direction of either celibacy or propagation), the halakha and ad hoc enactments. In conclusion, without derogating from the importance of Dr. Tendler's effort, his presentation, in my opinion, steers dangerously nearer the Catholic and Moslem rather than Jewish view.

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### DR TENDLER REPLIES:

The dangers of writing on halakhic issues in a publication available to the Jewish laity are increased by the institution of the Letters-to-the-Editor column. Editorial policy that permits publication of comments by individuals, who need not subject themselves to editorial scrutiny of their professional competence or the accuracy of their comments, is particularly unsuited for the proper dissemination of halakhic information. The pages of TRADITION should not serve as a definitive guide to religious practice. Indeed, I essayed most religiously to prevent any misreading of the lines I wrote. I hope that the readers of TRADITION will not be misled by the fundamentally erroneous comments of questioner David Feldman, nor by the inaccuracies of Mr. Newman's comments. Lest their comments be given undue consideration, I will specifically detail my responses to their questions.

(a) Questioner David Feldman cites the *Sefer Habrit* with wrong reference (16:3 not 16:4) and erroneous English translation so as to support the "liberal" view that he obviously represents.

"L'maan daat ki zeh hadavar ra b'einei Hashem m'od" does not convey the tone of his translation, "... the practice is objectionable." Likewise, the status of this *sefer*, as a source of *psak halakhah* rather than of a biological *mussar sefer*, is new to me.

(b) The request for information in my possession that onanism is a biblical prohibition indicates that

the questioner didn't even see his prime reference, the *Maharsham*, nor any of the sources I quote. For the benefit of my colleagues, I cite thirteen references which include the clearly stated position of the *Shulchan Arukh* (Reference Materials Section I).

Concerning "the many halakhic authorities prohibiting diaphragm" to whom I make reference and to which Rabbi Feldman takes exception without the courtesy of even a perfunctory glance at the *Tshuvot Rav Akiva Eiger*, I cite 19 references which include the *Maharsham* who permits diaphragm only in cases of *pikuach nefesh* (see Reference Section II). The *Tshuvot Rav Akiva Eiger* cites six Rishonim who concur.

His distinction between tampon and diaphragm, for which he quotes again the *Maharsham* (who prohibits the use of diaphragm) as well as a recent writer, the *Emek Halakhah* is also a result of his failure to read his sources. The *Maharsham* clearly transliterates the word "pessary," which took many forms — some similar to our modern I.U.C.D. The *Emek Halakhah* speaks of *mokh*, but clearly defines this, in transliteration, as "condom" — obviously not relevant to our discussion. The lack of distinction between tampon and diaphragm is further attested to by another of his sources, the *teshuvah* of my father-in-law, *shelita*, in *Igrot Moshe* #63 where he states (I quote in *verbatim* translation):

"The rubber that a woman places in her uterus clearly has the halakhic status of *mokh*."

The comments of the *Minchot*

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*Yitzchak* I:115 on the attempt of the *Maharsham* to differentiate between pessary and *mokh* should also be noted.

Especially objectionable is the questioning that Rabbi Akiva Eiger's responsum refers to a life-threatening situation when the text clearly states: "V'tamid he beklal sakana." The *Igrot Moshe* #63 clearly assumes this, as do the other *gedolei haposkin*. For the erudition of my colleagues, I cite ten reputable halakhic authorities who prohibit *mokh lifnei tashmish* even *bmakom sakana* — (see References Section III).

With reference to my comments on chemical spermicidals, let me assure the questioner that my "awareness of the pertinent *realia*" can be ascertained by his attendance at my *Hilkhos Nida* seminars. The letter from the pharmaceutical company refers to "immobilization" of the sperm. This term refers to cessation of sperm motility and is not synonymous with "mechanical barrier or blockage." Lest my passing reference to this method of contraception be understood as a failure to review the key halakhic sources, I cite 12 halakhic references that consider chemical spermicidals as halakhically more acceptable than diaphragm. (Reference Section IV.) . . .

The questions posed by Mr. Newman, whose journalistic prowess I have often admired, reveal a basic lack of familiarity with the topic.

a) Re: procreation of *Ben Noach* — see *Sheilto's* 165: *Sanhedrin* 59 for "individual" opinions that *Ben Noach* has the mitzvah of *p'ru urevu*. It is, however, the *con-*

*sensus* of opinion that he has the duty to procreate under the more general mitzva of *Lo Tohu Braah*.

b) Re: sterilization of *Ben Noach* — See *Sanhedrin* 56 for the opinion that this prohibition, *Serus*, is to be counted in the seven Noahic laws. However, *all* authorities agree that the prohibition against self-mutilation is clear. (See *Encyclopedia Talmudis*, *Ben Noah*, page 355. Has this questioner also an aversion to checking his own references?)

c) Mr. Newman errs for want of opening up the *Shulchan Arukh*. If he did so and referred to: *Even Haezer* 1, 3, and 8, he would realize that a Jew may not refrain from having more children than the minimum requirement of one son and one daughter unless there are the mitigating circumstances which I referred to in my article.

d) I haven't the slightest idea what his confusion is concerning *mitzvat Ona*.

e) The interpretation of the Talmud in *Ta'anit* 11 which I gave in my article is the interpretation used by practically every Halakhic authority, as can be seen by the treatment of this Talmudic reference by all the commentaries on the *Orach Chayim* 574:5.

f) Mr. Newman leaves the realm of questioner and enters the realm of impudent *posek* when he states that there is some special permissibility "in a short-term policy to combat an existing emergency." His fanciful interpretations of the halakhic references lead him to conclude that the interpretation of these references in my presentation is *midat hassidut*. As one who is

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fully governed by the dictum *koach d'heteira adif*, I respectfully advise him that the interpretations are *pshat*, confirmed by the halakhic tradition that is perpetuated by the great *poskim* of our generation. Regrettably, his alternate interpretations, which lead him to confuse the great ultimate truths of our Torah with values promulgated by other societies, bear the blemish of his attempt at secular researching of a serious halakhic problem.

g) His reference to "birth of monstrosities," and the concurrence of "world and national authorities" in recommending birth control methods appear to put our Halakhah on the moral defensive. Demographic and medical research, governed by halakhic principles, would have avoided both the thalidomide "monstrosities" and the causes that perpetrate world-wide

famine. The response of Halakhah to the present "short" or long-term situation is accurately reflected in my discussion.

h) Since six of the *rishonim* and more than 30 of the greatest halakhic authorities of the last two centuries refuse to recognize any halakhic permissibility of contraceptive techniques in cases other than life-endangering medical considerations, it behooves me to formally rebuke Mr. Newman for equating these views with those of Catholicism and Mohammedanism. The inference of the questioner that Judaism can join the clamor for widespread use of surgical or mechanical means of reducing world population is indeed a reflection of the impact of alien religions even on his fine personality.

Rabbi Moses D. Tendler, Ph.D.

## REFERENCES

### SECTION I

#### ONANISM AS A BIBLICAL PROHIBITION

1. שו"ע אבן העזר כ"ג, א': אסור להוציא ש"ז לבטלה ועון זה חמור מכל עבירות שבתורה. לפיכך לא יהיה אדם דש מבפנים וזורה מבחוץ.
2. מגיד משנה פ' כ"א איסור ביאה.
3. לבוש סימן א'.
4. קרית ספר להמבי"ט — פ' כ"א מאיסורי ביאה — מביא הפסוק, "וירע בעיני ד' . . . ואחר כך הוא מוסיף, "זוהו הוי דאורייתא".
5. תוכחת חיים פרק י"ב — טו: מביא דברי תוס' דף נט: בסנהדרין ד"ה והא פו"ר — ואומר, "דהוא איסור תורה".
6. המג"א באו"ח ס' ג' ס"ק י"ד.
7. הפרי מגדים שם באשל אברתם, "שהוא אסור מן התורה".
8. משבצות זהב ס"ק י"ב, "הוצאת ז"ל הוי איסור תורה וספיקו לחומרא".
9. חיים ושלום ח"ב ס' י"ח, "איסור הוצאת זרע לבטלה הוי מדין תורה ולא מדרבנן.
10. מנחת יחיאל ח"ב ס' כ"ב — הוצאת ז"ל אסור מדאורייתא.



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11. ערוך לנר מס' נדה דף י"ג: וכן בספרו בנין לציון ס' קל"ז — "אולי האזהרה דהשחתת זרע הוא "מלא תשחית" או שהלכה למשה מסיני היא".
12. שו"ת מהר"ש ענגיל ח' ו' סי' י"ח — "ספק השח"ז הוי מן התורה לחזקתא" אפילו לשיטת הרמב"ם דס"ל דספק לקולא שאני הכא דהאיסור היה נוהג אפי' קודם מתן תורה.
13. סמ"ק מצוה רצ"ב — מונה איסור השחתת זרע במנין המצות.

### SECTION II

Those who prohibit use of a diaphragm when there is no significant medical justification:

1. רדב"ז ח' ג' א' כ"ב.
2. דברי מלכיאל ח' א' ס' ע'.
3. אבני נזר ס' פ"א, יוד.
4. יד יצחק ח' ב' קס"ב.
5. ישרש יעקב יבמות י"ב.
6. דבר אליה' סימן ס"ה.
7. אגרות משה ס' ס"ד.
8. מהרש"ם ס' ס"ח: "כדאי לסמוך . . . [על המקילים] במקום שנוגע לפקוח נפש".
9. מנחת יצחק ח' ג' כ"ו, ג'.
10. בנין ציון ס' קל"ז.
11. צור יעקב קס"ז.
12. מהר"ם בריסק ח' א' ס' צ"ו.
13. יתם סופר יו"ד ס' קע"ב.
14. ישמח לב יו"ד ס' ה'.
15. אמרי אש יו"ד ס' ס"ח.
16. מנחת אליה' ס' ב' דף ה', ג'.
17. אבני נזר ס' פ"א.
18. בינת אדם אות ל"ו (בשער בית הנשים)
19. תשובות ר' עקיבא איגר סי' ע"א — כדי להסיר כל מכוכה אני מביא לשונו הקדוש וז"ל: "ע"ד אשר דן מעכ"ת באשה קשת רוח שבכל לידה מקשת לילד ובצער גדול — ותמיד היא בכלל סכנה להתיר לה לשמש במוך ליתן מוך באותו מקום קודם תשמיש . . . לענ"ד לא נראה להתיר כי לא מצינו מאן דמתיר במפורש . . . והוי כמשמש על עצים ואבנים והבעל עביד איסורא כמו שכתבו תוספות יבמות וכתובות . . . וכיון דהרמב"ן, והרא"ה, והריטב"א, והרשב"א, והג"י, כוליהו ס"ל כן וכן בשטה מקובצת בכתובות דף ע"ב. בשם הדיב"ש דאיכא איסורא בדבר . . . ומי ירים ראש להקל", עכ"ל.

### SECTION III

Authorities who prohibit use of diaphragm method even when pregnancy can be a life-threatening situation:

1. תשובות ר' עקיבא איגר סימן ע"א.
2. בנין ציון סי' קל"ז.
4. מהר"ם בריסק ח' א' ס' צ"ו.

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3. צור יעקב ס' קס"ז.
5. חתם סופר יו"ד ס' קע"ב.
6. ישמח לב יו"ד ס' ה'.
7. אמרי אש יו"ד ס' ס"ח.
8. מנחת אלי' ס' ב'; ה', ג'.
9. אבני נזר ס' פ"א.
10. בינת אדם אות ל"ו (בשער בית הנשים).

## SECTION IV

Concerning the preference of spermicidals over mechanical means of contraception:

1. אמרי יושר ח' א' ס' קל"א — „דקיל טובא ממוך“.
2. מערכי לב ס' פ"ו.
3. חיי נפש דף ק'.
4. פקודת אלעזר ס' ק'.
5. מנחת יצחק ח' א' ס' קט"ו.
6. תשופת ש"י ס' ס"ב — „שבשעת תשמיש תשים באותו מקום משחה הנמסת ברחם שמונע ההריון“.
7. עצי חיים ס' ל"ו.
8. חבצלת השרון — השמטה לח' א' אה"ע — „עתה שיש סם המסויים שמשוימים באותו מקום שמפסיד הזרע שלא תהא ראויה להוליד בודאי אין זה דומה למשמש במוך ודומה לעקרה וזקנה שמותר לכו"ע, וא"כ זה סניף גדול להתיר“.
9. בנין דוד ס' ס"ח — „קיל טובא ממוך“.
10. חלקת יעקב ח"ב סוף ס' י"ג — „ליתן כדורים או משחה לפני תשמיש עפ"י פקודת הרופאים יכול לסמוך ולהתיר“.
11. פרי השדה ח"ד ס' י"ד — „ליתן אבקה באותו מקום בשעת תשמיש נראה דכו"ע מודי דשרי... אך אינה ממלאת הרחם באותו אבקה רק מפזר בשטח בשר הרחם“.
12. אגרות משה ס' ס"ב — „לענין המשחה בסם... שנומל כח ההולדה שיש בזרע ומסתבר שאינו אלא ככוס של עיקרין“.

## CORRECTION

The Winter 1967 issue was incorrectly numbered, Volume 9 No. 4. It was in fact, Volume 8 No. 4.