

## 4

*“Technically Illegal”**Birth Control in Religious, Colonial,  
and State Legal Traditions*

An account by Mary G. Blacklock, who worked in the Liverpool School of Tropical Medicine and was “a member of the Women’s Medical Service for India, and later of the Colonial Medical Service in Africa,” is distinct among documents by colonial figures in mentioning both “Palestine” and “birth-control.” Blacklock had used a grant to take a “study tour” in the summer and autumn of 1935 “of the colonies of Hong Kong, Malaya, Ceylon and Palestine, and also to pay a short visit to China, Burma and India, to see something of the work which is being done there” (Blacklock 1936, 222). Blacklock wanted “to assess the welfare of women and children” (Manderson 1998, 42), rhetoric evoking familiar colonial feminist themes and concerns. In the resulting published article, “Certain Aspects of the Welfare of Women and Children in the Colonies,” Blacklock associates poverty, hunger, and lack of healthcare education for women and children in the colonies with high rates of maternal and infant death and even infanticide and calls for colonial investment, employment of British “medical women,” and training indigenous women as health workers and midwives. Illustrating the immanence of the racial-colonial calculus in relation to birth and death that I argue has not been addressed in scholarship on Mandate Palestine, she anticipates the resistance of those “in a few colonies” with a “tendency to decry welfare work for women and children” and who “in all seriousness” say such investment is a waste “until the economic and general health conditions of the country have improved; that the high infant mortality-rate strikes a balance between the population and the means of subsistence, and that it is better to let the children die if the world is not a fit place for them to live in” (Blacklock 1936, 224).

In her response to such British critics, Blacklock insists that “population and means of subsistence do not necessarily balance each other” and strategically (and not surprisingly) deploys a miserly pedagogical

approach to native health: “welfare clinics are meant primarily for the education of mothers and not for the treatment of sick children.” Her persuasion takes an explicitly eugenicist turn as she continues, while it was true that “many infants will die off” with no welfare work, “many of those who survive will grow up in a weak and sickly state” (224). She argues for “courageous thinking and planning for a policy of economic improvement and for the better equalization of wealth.” If such redistribution is “impossible,” an alternative is to “face the advocacy of birth-control; yet in a colonial empire of two million square miles with a population of only fifty millions, this seems not only a feeble but a dangerous policy to adopt” (261). Blacklock’s lack of enthusiasm for birth control was consistent with an imperial demographic agenda in many colonial sites that sought the reproduction and survival of enough laborers to serve extractive aims. Lenore Manderson argues that ultimately Blacklock’s welfare-of-women-and-children goals “reflected the thinking of other colonists concerned to dilute the exploitative costs of empire and justify continued control” (Manderson 1998, 42).

This chapter shifts the focus of the book to *nonreproductive desire* in Palestine by comparatively examining relevant legal genealogies and coexisting layers of law on birth control, especially abortion. The purpose is to undermine simplistic reliance on “religion” or “culture” to explain birth control ideologies, practices, and restrictions in historic Palestine. This and the following chapter show that contraceptive use was licit and available, and abortion, while often “technically illegal,” was always an important method of birth control for women in all communities. Most people made complex or simple anti-reproductive decisions best understood by accounting for personal situations and options, as well as material and structural conditions.

The first section offers an abridged comparative overview of Muslim, Jewish, and Christian religious legal traditions on contraception, abortion, and sex. The second examines late Ottoman laws, policies, and priorities as they interacted with birth control practices. The third summarizes British colonial law on birth control including in Mandate Palestine. The final section discusses Israeli, Jordanian, and Palestinian National Authority abortion laws and policies applicable since 1948. Modernity, which in this chapter I operationalize as the rise of state legal codification and policies in the nineteenth and twentieth centuries, reinforced male-dominated governmental and medical expertise over women’s reproductive and nonreproductive lives to

serve various demographic, professional, and geopolitical ends, even as improvements in scientific and medical knowledge increasingly provided additional birth control options.

### **Jewish, Muslim, and Christian Birth Control Traditions**

This section uses scholarly sources to summarize Jewish, Islamic, and Christian legal traditions on contraception and abortion in that order given the similarities between Jewish and Muslim traditions. Jewish, Muslim, and Christian legal traditions are all pronatalist within licit marital relations. Judaism and Islam are more similar than different in the importance assigned to sexual pleasure within marriage, as well as the noncontroversial nature of contraception. They are also more similar than different in their acceptance of abortion and understanding of the fetus as part of a woman's body rather than a separate being. All three traditions have dogmas as well as internal debates and disagreements about marriage, sex, reproduction, contraception, and abortion shaped by sacred texts, legal methods and codes, influential intellectual personalities, and the profane knowledges and priorities dominant in particular places and historical moments.

The Jewish Torah does not address contraception, and neither do the major Talmudic codes for the most part. Rulings on contraception come largely from Responsa, which like the Islamic fatwa tradition are “formal replies to legal queries addressed to scholars of all generations.” A response is often from one rabbi to another about a specific case. Responsa emerged from the multiple geographic locations of these experts and although addressing specific cases, they “become part of ‘case law’ and enter the legal mainstream as precedent” (Feldman 1968, 17–18).

Approaches to contraception are informed by the status of marriage within Jewish cosmology. Judaism considers marriage a religious duty for men linked to licit sexual pleasure, companionship, and love (21–22, 27, 36, 41). Jewish women may remain unmarried, although they are encouraged to allow men to fulfill their obligation to God (55). A Jewish man has a duty to initiate regular sex with his wife when she is not in her menstrual cycle and to give her pleasure, irrespective of the possibility of procreation (36, 41, 60–61, 64–65, 69, 71–72, 76–77, 79–80, 81–105, 152–153). While sex outside marriage is considered

sinful, Judaism does not traffic in the Christian belief in “original sin” linked to the story of Adam and Eve illicitly fulfilling their sexual desires; indeed, it discourages abstinence as a “hard blow to body and soul” (32, 78, 81–105).

The religious duty to follow God’s command to the sons of Noah to “be fruitful and multiply” is separate from his command to men to marry and their obligation to provide a wife with sexual pleasure. Jewish women are not required to procreate (28, 46, 50–51, 54, 124–125). Couples may use certain forms of contraception, especially in cases of “physical hazard” to themselves or the health of existing children, but “never” for reasons of “self-indulgence or convenience” (53). Using contraception is acceptable as long as the form does not block passage of the sperm to its destination and sexual gratification of men and women is not obstructed. Men may not improperly emit their semen or destroy it through onanism or coitus interruptus, although some exegetes argue they may do the latter to save the health of a pregnant wife (109–131, 155–156). At least by the late 1960s, condoms were rejected unless other forms of contraception were unsafe to the woman, while spermicide use was acceptable. Jewish religious scholars considered chemical oral contraceptive use by women the “least objectionable” (190, 229–233, 244–247). Even doubtful forms of contraception were acceptable to fulfill the command to marry and maintain the marital relationship (42).

Islamic approaches to birth control were shaped by the religion’s understanding of marriage: polygamy was accepted, concubinage coexisted with contractual marriage, and divorce was easy. Sex within marriage “needed no justification for procreative purpose.” Within this cosmology, “Contraception was permitted and abortion tolerated” (Musallam 1983, 11). The Quran makes no explicit mention (prohibitive or accepting) of contraception, so Muslim jurist rulings from the eleventh century CE onward relied on analysis of valid transmissions of the practices (sunna) and reported statements (hadith) of the Prophet Muhammad during his lifetime (Musallam 1981, 182). Given the dearth of material explicitly addressing birth control, Muslim jurists’ rulings on these matters were more likely to draw on “profane biology and economics than . . . strictly religious sources of law” (183).

The Muslim jurists were almost unanimous that coitus interruptus by men (*ʿazl*) was permitted provided “a free woman . . . gives

her permission" since she has the right to have children and "complete sexual fulfillment" (181). They used analogical reasoning and consensus to extend the permissibility of coitus interruptus to all forms of contraception. Women's use of contraception was particularly noncontroversial (Musallam 1981, 182; Musallam 1983, 120). Jurist rulings also articulated the right of fathers to control family size to enable them to materially support all their progeny (an obligation); recognized that women's frequent death in childbirth was a good reason for women to avoid pregnancy; understood that nursing infants whose mothers became pregnant frequently died of starvation; accepted that avoiding pregnancy "preserve[d] [a wife or concubine's] beauty"; and argued that settings of war and insecurity *required* Muslims to use birth control (including abortion) to avoid children being enslaved or converted (Musallam 1981, 189–190, 193–194; Giladi 2015, 35, 149–150).

In *Sex and Society in Islam: Birth Control before the Nineteenth Century*, Basim F. Musallam finds that "intra-vaginal suppositories and tampons [to impede sperm] were the mainstay of medieval Arabic contraceptive medicine" as reflected in the detailed medical text published in the mid-ninth century CE in Persia, which "became the standard reference work of Arabic medicine" for centuries and was even used in fourteenth-century CE Spain (1983, 61, 62, 63). The "physical clogging capacity" of "honey and oil" were widely recognized and used as were many other contraceptive and abortifacient methods (63, 77–82 [table 1], 83 [table 2], 84 [table 4], 85 [table 5], 86–87 [table 6], 87 [table 7]).

Islamic acceptance of birth control was shaped by a Hippocratic biological understanding that both men and women emit "seed" during sexual intercourse and each equally contributes to the creation of a child (Musallam 1981, 190–192). This contrasts with the Aristotelian privileging of semen as the sole source of human life and soul and by extension *`azl* as killing a person since it destroys semen (185–186, 188–189). While drawing on secular concerns and anatomical knowledge, Islamic rulings on birth control existed "in the context of [medieval Islamic jurists'] fundamental belief in God's infinite power" (188). Nevertheless, Muslim jurists recognized that abstaining from sex guaranteed non-conception and birth control limited the possibility of a woman becoming pregnant (188–189).

Christianity, in contrast to Judaism and Islam, has a strong ascetic tradition that associates sex with the original sin of Adam and Eve, inherited by man and not even “effaced by baptism,” an idea consolidated by the fifth century in the Catholic Church with the writings of St. Augustine (Noonan 1986, 37, 133–135). Christian sexual ethics came to consider celibacy and virginity as ideals and coitus as defiling, drawing from Greek Stoicism, which argued for the “rational use of sexual faculties” and challenged “bodily immoderation” (37, 46–47, 48, 49). The idealization of virginity in the Gospels meant that marriage had to “justify its existence” in Christianity and ultimately did so on the argument that “passion” could not be its sole basis (37–39, 41, 42, 46–49, 76). The Catholic Church eventually consecrated “sexuality in marriage” as “holy” when reproduction was possible. It rhetorically framed marital sex with reproductive potentiality against condemned sexual behavior such as oral sex, anal sex, and coitus interruptus (Breslow 1991, 55; Noonan 1986, 40, 53, 54, 76–77, 123, 126–127, 144; Feldman 1968, 145–148).

In establishing any form of birth control and non-procreative sex as a “sin against nature” that condemned one to “eternal damnation,” the Church drew on the theories of Jewish Alexandrian philosopher Philo and the Stoics, who denounced profane dependence, including on sexual urges (Breslow 1991, 55–56, 59; Noonan 1986, 49, 53–54, 74–75, 76–78). Church fathers considered birth control to interfere with the “natural and legitimate foundation for marriage,” which for St. Augustine was “the preservation of the race.” Only “delight of the mortal flesh” with the possibility of procreation within marriage was acceptable (Breslow 1991, 58; Noonan 1986, 46–49).<sup>1</sup>

Judaism considers independent life to begin at parturition. Before that, the embryo or fetus is not a person and is inseparable from the mother’s body (Feldman 1968, 253, 275). Judaism offers *no legal basis* for

<sup>1</sup> Lori Breslow argues that Christian norms on sexuality and reproduction were articulated in a period when the Catholic Church was consolidating itself as the center of true orthodoxy as it competed against challenges from two anti-natalist movements: the Gnostics included several trends ranging from advocates of complete celibacy to “complete sexual freedom,” but were “hostile to all procreation,” and the Manichees were pro-sex and anti-reproduction (Breslow 1991, 57, 58; Noonan 1986, 56–63). Protestantism was more accepting of marriage than the Catholic Church but not necessarily sex for pleasure, although by 1958 the Anglicans advocated for marriage on “relational” and “procreative” grounds (Feldman 1968, 25).

making abortion at any stage impermissible; only moral inhibitions have relevance (262–264, 267). Although the rabbinic tradition includes many debates and disagreements, “abortion is a noncapital crime at worst” (259). While Judaism condemns infanticide, a newborn is not considered “viable” until thirty days after birth (254–257). Within Jewish cosmology then, therapeutic abortion is generally noncontroversial and not even considered abortion in early gestational stages (275). A pregnant woman cannot be forced to give birth against her will since her desires are paramount (287, 292, 294). Judaism understands the “eternal soul” of a fetus to ascend to heaven if it is terminated given the religion has no theory of original sin (274). As a Jewish state very much committed to Jewish demographic expansion, the openness to abortion in Judaism has challenged Israel’s ability to restrict abortion in legal and practical terms, although the practice was illegal for a period.

Intentionally inducing abortion is not addressed in the Quran or “the Sunna (exemplary practice) of the prophet” (Katz 2003, 25). The Quran sternly and explicitly condemns infanticide (killing after parturition) for any reason and especially because of poverty or female gender. Muslim jurists were most likely to address loss of a fetus through accident. In comparison, their “Remarks relating to deliberate termination of pregnancy ... tended to be incidental and unsystematic,” possibly because induced abortion “generally remained within the purview of individual women and the midwives or other folk practitioners who assisted them” (25). Islamic jurisprudence and fatwa rulings on abortion were guided by the Quranic “theme” that fetal life developed gradually (Katz 2003, 26; Rogers 1999, 125–126). Thus, abortion’s level of wrongness and tort value depends on gestational stage (Katz 2003, 26; Musallam 1981, 183–185; Rogers 1999, esp. 123–125).

The unintentional death of a fetus in its early stages by the act of someone else was expected to be compensated in an amount analogous to damage done to a woman’s body part “such as fingers or teeth”; in later stages, penalties and compensation levels became progressively closer to requirements for the death or killing of a human being (Katz 2003, 28–29; Rogers 1999, 127–128). In the eleventh century Zahiri jurist Ibn Hazm used Quranic language that recognized the biologically developmental nature of fetal life to rule that “ensoulment” occurs from 120 days after conception, when “the fetus is indubitably alive,” whereas before that point “it is not a separate life at all” but

part of its mother and if recompense was demanded it went “exclusively” to her. Other jurists “retained [ambiguity] as a fruitful tension in their general understanding of fetal life” (Katz 2003, 29). None of these “tort debates” addressed “intentional abortion,” however. If intentional abortion cases came up, some rulings required a woman to compensate “the fetus’s remaining heirs or . . . the father of the child” and others ruled that if “a woman aborts with her husband’s permission” she owed no payment (29–30).

Using the point of ensoulment as a demarcation, “passing remarks” and “marginal commentaries” on other matters (e.g., burial rituals for a fetus, vengeance for the killing of a fetus, or inheritance rules in case of fetal death) in the four dominant Sunni schools of jurisprudence *generally* consider induced abortion to be “forbidden after ensoulment (literally ‘the inbreathing of the spirit’)” unless the wellbeing of the mother is endangered because her life supersedes the value of the potential life of a fetus at any stage. The jurists offered conflicting opinions within and across schools about the “permissibility” of abortion before 120 days (Katz 2003, 30–31, 34; Rogers 1999, 123). Most considered “a fetus before the gestational age of 120 days” as “not a Muslim or even a person, although the fetus is treated as a ‘potential’ person in some sense” (Rogers 1999, 122–123).

Marion Holmes Katz concludes, as do other scholars of Islamic jurisprudence, that “medieval Islamic discussions of abortion” were similar in recognizing the validity of different juridical opinions and having a “high level of tolerance for ambiguity and complexity, which avoids absolutist simplifications of the intricate moral issues raised by fetal life” (Katz 2003, 45). Moreover, no matter how “influential” the jurist criteria for establishing the humanity of the fetus on its own or in relation to the fully human mother, Katz argues that Islamic jurisprudence has never “represented the sole system of moral guidance for Muslims. Rather, legal texts are best understood within a larger religious world, one that includes mystical and philosophical discourses” (25).<sup>2</sup>

<sup>2</sup> Shi’a jurisprudence is distinguished from Sunni legal traditions by its reliance on the Quran *and* the legal reasoning of the twelve consecutive successors (Imams) of the Prophet, who are considered infallible, as well as the guidance of living Grand Ayatollahs (*maraji al-taqlid*) (Sekaleshfar 2008). Given lack of reference to abortion in the Quran and traditions of the Prophet, Shi’a “legal reasoning (*usul*) dictates the principle of ‘prevalence of liberty’” based on “rational and textual reasoning” (2). In response to questions from the faithful, the Imams

Abortion and its methods were familiar in the “Greco-Roman” times that overlapped with the development of Christianity (Noonan 1967, 86), but Christine Gudorf argues there was limited early church language on contraception and abortion because infanticide and abandonment were the “most common birth limitation practices” (Gudorf 2003, 59–60). Infanticide “was more effective than contraception, less dangerous to the mother than abortion, and it allowed for sex selection, which was the prime concern for premodern groups who generally wanted to maximize their males to increase production without either increasing community size beyond available resources or draining family resources to pay daughters’ dowries” (57). The Romans encouraged abandonment of newborns as more “civilized” than infanticide.<sup>3</sup> Between 600 and 1600 CE in Western Europe “abandonment seems to have outnumbered infanticide by a factor of several hundred to nearly a thousand” (58).

The fourth century CE Canons of St. Basil of Cappadocia, which remain influential in the Coptic and Eastern Orthodox rites, condemned “all women who commit abortion” at any stage of fetal development as well as the providers of abortifacient drugs (Noonan 1986, 88; Noonan 1967, 97). Roman Catholic traditions prohibit abortion at any stage of gestation for some of the same reasons that contraception is largely condemned, an approach that developed gradually in a context considered by early church leaders to be “indifferen[t] to fetal and early life” (Noonan 1967, 86–88). By the fifth century CE St. Augustine condemned contraception and destruction of a fetus without distinguishing between the two practices (Noonan 1967). Between 500 and 1100 CE, the period of Monk dominance in the Catholic Church, John T. Noonan argues, an even “more pessimistic and severe” approach to sexuality developed. Both contraception and abortion were condemned as associated with “magic” and paganism (Noonan 1986, 143–144).

Crucial to the abortion ban in Christianity is belief in original sin, which requires an embryo or fetus to be baptized for its soul to achieve salvation in the afterlife. Within this cosmology, inducing abortion is damning and even worse than murder because the aborting person

offered different positions on the permissibility of abortion and punishment for fetal death based on whether they considered the fetus ensouled (3–12).

<sup>3</sup> The Catholic Church condemned infanticide in the fourth century CE (Gudorf 2003, 57; Noonan 1967, 93–94).

condemns a soul to hell (Feldman 1968, 269–270). Following Greek Pythagorean teaching, early Christianity tentatively understood the soul to enter the body at conception, but this was distinct from considering the embryo a person. The Catholic Church came to accept St. Augustine's contention that a male embryo was a person forty days after conception and Leviticus's argument that a female embryo was a person after eighty days of gestation (Noonan 1986, 90, 122; Noonan 1967, 95; Feldman 1968, 268–269). The focus of the following section is Ottoman law, which was next in chronological relevance to contraception and abortion in Palestine, although it always overlapped with regional and community customs and religious legal traditions.

### **Abortion in Law and Practice in the Late Ottoman Empire**

Ottoman abortion-related policies and laws, the focus of this section, came to be embedded in one way or another in the criminal codes relevant to Palestine after the end of Ottoman rule. I found no scholarship and did not conduct archival research on contraception and abortion in Ottoman Palestine, when its five districts were part of the province of Greater Syria. We know from scholarship on other settings that Muslim Ottoman women widely used contraception, considered abortion a relatively noncontroversial method of birth control, and substantially relied on the method. Abortion was “seemingly free and unlimited,” according to the observations of European Christian foreigners in the eighteenth and early nineteenth centuries who accused residents of the empire of “lack of moral restraint” (Somel 2002, 340–341; Demirci and Somel 2008, 385).

During the nineteenth century, antiabortion policies and public discourse increased as pronatalism intensified among Ottoman elites for geopolitical reasons. Pronatalism manifested in law as early as January 1786, when “a non-Muslim pharmacist” was punished “for selling prohibited plants.” In May 1789 a different sultan issued a decree forbidding “physicians and pharmacists from selling drugs that induced abortion,” with an additional order to enforce it “in the provinces.” In March 1827 the government issued an order against two Jewish midwives in Constantinople “accused of providing abortifacients to pregnant women,” exiling them “to Thessalonica” (Somel

2002, 341; Demirci and Somel 2008, 386).<sup>4</sup> According to an antiabortion account published in 1872 by Ottoman journalist Basiretçi Ali (1845–1910), women seeking to abort “deliberately miscarry their infants immediately after they realize their pregnancy” (quoted in Demirci and Somel 2008, 411), indicating that abortion practices were guided by developmental gestational thinking.

In her doctoral dissertation on abortion in the empire from the 1840s until about the end of the century, Gülhan Balsoy finds elites were mainly worried about “depopulation,” since population numbers were understood as crucial to economic, military, and international vitality; they worried about not having enough laborers for agriculture and industry and soldiers to conscript (Balsoy 2009, 9, 10, 13, 19–20, 125). In addition to aiming to reduce the widespread practice of abortion, especially among Muslim women, nineteenth-century Ottoman pronatalist policies focused on lowering infant mortality rates and ameliorating epidemics and diseases by developing public health projects and by building medical institutions (2, 7, 25–29, 126–127).

Midwives were often blamed for infant mortality, especially by physicians, leading to a variety of policies, including disallowing midwives from using forceps or their hands to turn a fetus in a woman’s uterus early in the nineteenth century, establishing a midwifery curriculum within the medical school in 1842, and vigorous licensing and regulation policies (72–73, 86–87, 89–90, 220). In 1842 the Constantinople government required midwives, “whether Christian, Jewish, or Muslim,” to register for a midwifery course at the medical school. They were prohibited from using “a midwife chair” without a diploma from this course, which was taught by two midwives, one French and one Austrian, who were hired by the government (Demirci and Somel 2008, 394–395).

Midwives resisted these attempts to control them because “midwifery was one of the very few profitable career paths for Ottoman women, and entry into the profession was not controlled as in other trades, which were under the rigid control of either guilds or state

<sup>4</sup> Jewish midwives were popular with Ottoman women of all backgrounds because they were considered “modest and calm” in the dramatic setting of childbirth (Demirci 2008, 396 N60).

regulations” (395–396). By 1845 a mere thirty-six women had received the midwifery diploma, twenty-six of them Christian and the remaining Muslim; most of the certified midwives were “later employed at civil and military hospitals.” The overwhelming majority of working midwives “shunned this professional training” and continued to practice, even in Anatolia (396, 399).

The early nineteenth-century Ottoman Egyptian state under its independent-minded viceroy Mehmet Ali was similarly concerned with the abortion practices of independent midwives, so it invited French physician Antoine Clot (Clot Bey) to establish a medical school in 1832 to train women to become *hakimat* (health workers) and midwives. As occurred later with certified midwives in Constantinople, these women ultimately came to work directly for the state, for example conducting autopsies on women’s bodies (Hatem 1997, 70–71). State-employed Egyptian *hakimas* worked to control Egyptian women’s reproductive practices through “sanitary policing” that included registering births, verifying “causes of death among women,” and requiring a “death certificate by an agent of the state before burial” (67, 74). By the 1890s the Ottomans in Constantinople were appointing licensed and salaried (by “local budgets”) midwives in many major cities in the empire. Appointed midwives received pensions upon retiring and their children received death benefits (Balsoy 2009, 104–106). Balsoy mentions a Midwife Emetullah appointed to Jerusalem in 1898 (104n80).

The “major obstacle” to the Ottoman state agenda to “prevent abortion and promote maternity” was “Islamic law, which considered conjugal issues an inviolable realm, sheltered women from disciplinary interventions,” and considered women part of family units (Demirci and Somel 2008, 378). Long-standing societal and Islamic jurisprudential and medical respect for midwives – as well as gender segregation and bodily privacy norms that facilitated female spaces and socialities – posed considerable additional barriers to state interventions in reproduction. As Avner Giladi explains, Islamic scholars and jurists “in the central and western areas of the Islamic world” for centuries considered midwives trustworthy professionals “skilled in medicine” and especially knowledgeable about girls’ and women’s bodies and health. Islamic elites in law and medicine similarly recognized midwives as experts in gynecology and obstetrics and differentiated them from nonexpert but experienced birthing assistants. Usually referred to in

the Arabic singular as *qabila* (“receiver of the newborn”), “Midwives represent the epitome of the physical essence of femininity, with its periods of impurity – during menstruation and childbirth and after delivery; they are associated with its creative power and threatening mystery alike” (Giladi 2015, 56–58, 60–63, 66, 118).

Legal steps against the provision of abortion “remained piecemeal and ad hoc” in the empire until November 1838, when an imperial edict (*firman*) consolidated three proposals and reports issued in Constantinople by the “Council of Public Works, the Council of the Sublime Porte, and the Sublime Council for Judicial Ordinances” (Demirci and Somel 2008, 385, 386, 387; Reşit Paşa 1872, 750–757; also Balsoy 2009, 139–144).<sup>5</sup> The Council of Public Works report accused women in Constantinople especially of “habitually committing the shameful act of abortion which is against the will of God” (Somel 2002, 341–342; Reşit Paşa 1872, 750–752). Its authors argued that the two main causes of abortion were “hedonism and comfort” and “material difficulty to raise a child,” recommending “coercion” against the former and state support to address the latter if “a poor family has more than five children” (Somel 2002, 342). The document affirmed the sultan’s commitment to “realize the religious commands as well as prohibitions” in the “measures [that] will be taken to prevent abortion,” indicating recognition that Islamic jurisprudence was flexible on this matter. It called for the government’s chief physician to warn non-Muslim “midwives, physicians and druggists ... not to provide the population with abortifacient drugs” and to require them to “give oath to their religious leaders not to sell abortifacients,” and for Muslim midwives to do the same before an Islamic judge in Constantinople (342).

The Council of the Sublime Port then published its own memo warning that “many women already knew how to prepare” abortifacients and did not need the assistance of “physicians, druggists and midwives”; it also drew attention to “Jewish midwives in Istanbul,” recommending they be prohibited from abortion activities (342–343). The memo suggested punishment for residents who did not notify the government of abortion activities, and “the necessity” of

<sup>5</sup> Special thanks to Brooke Andrade at the National Humanities Center, who found a number of important Ottoman texts for me, and Günay Kayarlar, who was kind enough to skim ten pages in Ottoman Turkish to confirm their contents.

extending “the policy to all of the Ottoman provinces” (343). The two documents’ “considerations and . . . measures . . . were accepted by the Sublime Council for Judicial Ordinances,” which additionally *recommended* punishing pregnant women “willing to abort their foetus” and the consenting husband, and imposing this policy “throughout the Empire” (Somel 2002, 343; Demirci and Somel 2008, 393). The “propositions and measures” were “approved by [Sultan] Mahmud II” as a consolidated decree in 1838 (Somel 2002, 343).

The results were distributed as an announcement (in Turkish) that was word-for-word distributed “throughout Ottoman lands,” using the following language: “since the prosperity of a country was dependent upon the magnitude of its population, avoiding unwanted acts that would decrease the population was not only meritorious, but also a religious duty that was to be rewarded by God.” The announcement called abortion “against the will of God,” “homicide,” and a “grave sin” (Balsoy 2009, 143–144). However, not a single article from the 1838 decree was included in the 1840 Ottoman Penal Code or its comprehensive revision in 1851 (Demirci and Somel 2008, 391), both of which applied to the Palestinian districts of Greater Syria.

A legal turning point occurred in August 1858 when the Ottoman Penal Code punished providers of abortion services. Article 193 sentenced any person helping a woman commit abortion or providing her with methods to do so with “six months to two years of imprisonment.” If such assistance came from “a physician, surgeon, or pharmacist,” they would additionally “be sentenced to forced labor” (392). Coming as it did after a shift to a more Westernizing Ottoman leadership following the Crimean War (1853–1856), during which the Ottoman government sided with the British and French against the Russians, the 1858 Penal Code adapted aspects of the 1810 French Penal Code. Nevertheless, the articles related to abortion remained “in full harmony” with Islamic jurisprudence by not penalizing women who freely underwent an abortion (392–393).

Ottoman elite concerns with imperial population strength became more Muslim after the Russo-Ottoman War (1877–1878), when the empire’s borders shrank with the loss of the majority-Christian Balkans (402). Nevertheless, cases where Ottoman midwives and pharmacists were punished for facilitating or botching an abortion remained relatively rare in nineteenth-century records (Balsoy 2009, 144–146). After

the Ministry of the Interior appointed a commission to determine causes of abortion in 1892, the latter published an antiabortion pamphlet in Turkish that was translated into Arabic for distribution to the provinces. The pamphlet relied on public health rather than moralist rhetoric to discourage abortion. It condemned abortionists on "religious and humanitarian" grounds and advertised state policies that established mobile health units where needed and provided financial support to needy larger families (156–158, 161). Pronatalist efforts continued with a 1904 declaration "proposing additional material support" to parents of twins, triplets, and adoptees to encourage Muslims to have more children, and lawsuits against pharmacists who supplied drugs to pregnant women, for example in Ottoman Belgrade (Ertem 2011, 51). After five years trying to overcome "a long lasting resistance of [the] German embassy," in 1905 the Ottoman government expelled "a very famous German physician who practised abortion in Istanbul," Madame Zeibold (51).

Despite these efforts, no legal penalty existed for women who chose to abort a fetus until the Ottoman Parliament passed a revised Imperial Ottoman Penal Code on June 4, 1911 (Schull 2007, 85). Inspired by the Committee of Union and Progress (CUP),<sup>6</sup> the Young Turks/Unionist party that came to power in 1908 shifted the government from absolutist to constitutional rule. The 1911 code represented "the most extensive and sweeping reforms to the Imperial Ottoman Penal Code of 1858 (IOPC) that had ever been enacted" (85). It followed the French Penal Code (1810) in "its classifications and divisions," but expressed many differences in content (Bucknill and Utidjian 1913, xv).<sup>7</sup> The code served the government's goal of rationalizing, "centralizing and expanding the

<sup>6</sup> The CUP was a nationalist modernizing group that emerged in late nineteenth-century Constantinople and aligned with the Young Turks in the early twentieth century.

<sup>7</sup> I rely on the 1913 English version of the Ottoman Penal Code, translated and notated by John A. Strachey Bucknill, the attorney general of colonized Hong Kong and "King's Advocate of Cyprus (1907–1912)," and Haig Apisoghom S. Utidjian. Utidjian was an Armenian member of the colonial Cypriot Civil Service and official translator of Turkish documents for British authorities. Ottoman law remained applicable in Cyprus at this time although it was "applied by English judges, trained in the common law and following the English procedure that had already been introduced in 1882," after the Ottoman government ceded the island to Great Britain in 1878. Cyprus was annexed and came under direct British military occupation from 1914 to 1925 and was a British crown colony from 1925 to 1960 (Symeonides 2003, 447–448).

Ottoman bureaucracy's authority and power over the adjudication of criminal matters at the expense of Islamic law and courts" (Schull 2007, 85, 135). Consistent with this agenda, argues Kent Fielding Schull, the code increased "the state's ability to intervene in familial and personal matters," including substantially restricting abortion (85, 132–133, 135).

The 1911 code increased the penalties against providers and imposed penalties against women who aborted a pregnancy and their husbands. Article 192 of Part II ("The Punishment for Persons Causing Abortion, Selling Adulterated Drinks, or Poisons without Surety") stated: "The woman miscarrying her foetus by making use, or by giving her consent for the making use by another, of special means, is imprisoned for from six months to three years. The individual causing a woman to miscarry her foetus by preparing special means with her consent, is condemned to imprisonment for from one year to three years. If as the result of such miscarriage of foetus, or in consequence of the means made use of for miscarriage, destruction of person [pregnant woman] comes about, he is put in *kyurek* [hard labor] for from four years to seven years." According to the two clauses that followed: "If a person, without the consent of a woman whose pregnancy he is aware brings about miscarriage by making use of special means, or by beating, wounding, or committing other acts, he is condemned to *kyurek* for from three years to ten years." "If as a result of such miscarriage, or in consequence of the means made use of for miscarriage the woman dies, the punishment is *kyurek* for not less than fifteen years." If "these acts" were committed by "physicians, or health officers or persons practising under Government supervision such as midwives, the specified punishment is increased by one-sixth" (Bucknill and Utidjian 1913, 146, 147n5, 11). Article 193 penalized any person who with or without the consent of the pregnant woman provided "drugs" or instructions to undertake an abortion with six months to two years of imprisonment, with additional temporary *kyurek* if the person is "a physician, surgeon or druggist" (147n1). The less Islamic and more "modern" the Ottoman government became, the more it was able to impose restrictive laws against abortion to serve state biopolitical goals. The next section turns to legal developments related to abortion applicable in British-ruled Mandate Palestine (1918–1948) and considers them in light of Ottoman and other legal regimes.

## Abortion in British Colonial Law

Colonial authorities in Palestine largely relied on the 1913 Cyprus translation of the 1911 Ottoman Penal Code until the Palestine 1936 Criminal Code Ordinance was implemented in 1937.<sup>8</sup> This section compares British penal legislation on abortion during the Palestine Mandate to Ottoman, English, and other British colonial codes to situate abortion practices and colonial responses to them during the Mandate. Contraception was not mentioned and abortion was illegal in the applicable laws. However, the British government rarely criminally prosecuted cases of induced abortion, despite – or maybe because – it was a frequently used birth control method by Jewish settlers and Palestinians.

From the early nineteenth century, British state and colonial anti-abortion legislation drew on UK common law (court judgments) that deemed it “an offence to procure a miscarriage after the stage of ‘quickening,’ that is the stage at which movement of the foetus could be felt by the pregnant woman, marking the entry of the soul into the foetal body” (Milns and Thompson 1994). John Keown shows that the “quickening” gestational boundary was largely linked to a court’s ability to prosecute an abortion (Keown 1988, 3, 5). The general trend from 1803 to 1861 in English law was increasingly severe statutory punishment for attempted abortion and abortion (27). Antiabortion legislation in nineteenth-century England was propelled by three factors: protecting fetal life, protecting women from injury or death, and, most importantly, campaigns by physicians determined to limit competition from “irregulars” such as midwives and herbalists in the arena of childbirth (24, 27–33, 35–47).

The British Offences Against the Person Act 1861 (still in effect), revised by statutes in 1891, 1892, and 1893, reiterated the severe punishments in nineteenth-century English law for procuring and administering abortion. Section 58 provided that a woman “with

<sup>8</sup> I serendipitously borrowed a marked “personal copy” of the 1913 translation of the 1911 Ottoman code from a university library in New York previously owned by the British “Chief Justice” of Palestine, either Sir Thomas Wagstaffe Haycraft, chief justice from 1921 to 1927, or Sir Michael F. J. McDonnell, chief justice from 1927 to 1936. According to a commercial embossment on the front matter, the text was originally purchased at the Jerusalem branch of “Tarbuth Booksellers & Stationery’s,” which also had shops in Jaffa and Haifa (Bucknill and Utidjian 1913).

intent to procure her own miscarriage” using any method, and a person “with intent to procure the miscarriage of any woman, whether she be or be not with child,” who “unlawfully administer[s] to her or cause[s] to be taken by her any poison or other noxious thing . . . with the like intent, shall be guilty of felony and being convicted thereof shall be liable . . . to be kept in penal servitude” for at least three and at most five years. Section 59 created an additional offense by providing that any person who “unlawfully” supplies or procures methods “knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor and being convicted thereof shall be liable . . . to be kept in penal servitude” for “a minimum of three and a maximum of five years” (Sections 58 and 59, quoted in Keown 1988, Appendices, 167 with amendments in notes 1, 2, and 3).<sup>9</sup>

Section 312 of the 1860 (British colonial) Indian Penal Code (IPC), which was applicable beginning in 1862 and remains in effect with revisions, provides that whoever causes a pregnant woman to “miscarry,” including the woman herself, “if such a miscarriage be not caused in good faith for the purpose of saving the life of the woman,” would receive a prison penalty “for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment . . . for a term which may extend to seven years and shall also be liable to fine (Raghavan and Bakshi 2000, 222). Notably, the commentary defines “miscarriage” to occur only between “the fourth to seventh month of gestation” and states that “prevention of conception is not an offence” (223). The fourth month seems to be the definition of the “quickening” point, so induced abortion before that gestational stage was legal in British-colonized India but not in England as far as I can determine from the sources I examined. Section 314 of the IPC provides that a person intending to cause a miscarriage who also causes a woman’s death “shall be punished with imprisonment . . . for a term which may extend to ten years,

<sup>9</sup> The 1861 act was perceived not to cover “the period during which the child was being born, a time at which some women allegedly killed their babies.” As a result, the British Parliament passed the Infant Life (Preservation) Act of 1929, “which criminalised ‘child destruction’” of a life “capable of being born alive” but extended the period of viability from twenty-eight weeks to birth (Milns and Thompson 1994). Article 1.1 of the 1929 act, which may be found in *Blackstone’s Statutes: Medical Law*, provides an exception for saving the life of the pregnant woman (Morris and Jones 2007, 2).

and shall also be liable to fine” (224–225). Section 315 provides that a person acting to prevent a “child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment . . . for a term which may extend to ten years, or with fine, or with both” (226).

Mitra Sharafi finds that colonial authorities rarely enforced the anti-abortion provisions in the IPC, despite abortion being “very frequent” in India. The only cases that made it to court involved situations where a woman had died and even these rarely resulted in conviction, at least partly because Indian physicians were reluctant “to cooperate with the criminal justice system” (Sharafi 2020, 2–3, 19). British colonial officials “regarded abortion as an unfortunate corrective to an oppressive [Indian] norm” that expected widows to remain “chaste” in order to continue receiving financial support from the families of deceased husbands. They believed that in-laws falsely accused widows (understood as “victims”) of having had an abortion motivated by economic interest. Moreover, enforcing antiabortion provisions would have affected separated “imperial couples” engaged in “extramarital relationships” whose pregnancies required termination (3, 19, 25).

The Cyprus Criminal Code Order in Council 1928, which applied to the British colony of Cyprus, drew from Sections 58 and 59 of the Offences Against the Person Act 1861 (Dickens and Cook 1979, 427–429) rather than the IPC of 1860, although the abortion-related penalties were more severe in the Cyprus Criminal Code. In Chapter XVI, “Offences Against Morality,” Article 153 states that any person who intentionally procured a “miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony, and is liable to imprisonment for fourteen years” (Government of Cyprus 1928, 29). Article 154 provides that a woman who “with intent to procure her own miscarriage,” whether or not she is pregnant, “unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a felony, and is liable to imprisonment for seven years” (29). Article 155 states that any person who “unlawfully supplies to or procures for any person anything

whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman,” whether or not she is pregnant, “is guilty of a felony, and is liable to imprisonment for three years” (29).

*The Criminal Law of Palestine 1928*, “compiled by Norman Bentwich,” was described by him as “being the parts of the Ottoman Penal Code which are still in force and the principle [*sic*] ordinances of the Government of Palestine replacing parts of that code” (Bentwich 1928).<sup>10</sup> On abortion, the 1928 British Criminal Law followed the 1911 Ottoman penal law. Part II, titled “Procuring Abortion, Selling Adulterated Liquors or Poisons,” largely repeats the language and penalties in article 193 of the 1911 Ottoman Criminal Code without the legal nuances and notes (64–65).

Criminal Code Ordinance No. 74 of 1936 (Leon 1947), which came into force on January 1, 1937 (and remains in effect), in contrast represented a radical legal rupture whose *Palestinian social and political history* is yet to be written as far as I am aware. It replaced the Ottoman Penal Code of 1911, as Part I, Chapter I, Article No. 2 declares: “the Ottoman Penal Code shall cease to be in force in Palestine” (5). With respect to abortion, the code makes procuring, assisting, or using methods to induce abortion illegal, but in comparison to the 1911 Ottoman penal code the penalties for women who acquire an abortion and those who assist them are substantially higher (nos. 175–177 of chapter XVII). As with the Cyprus Criminal Code, abortion is addressed in a lengthy chapter (XVII) familiarly titled “Offences against Morality,” loaded Western colonial prose that contrasts with the descriptive title used in the 1911 Ottoman penal law.

<sup>10</sup> The British barrister and lifelong Zionist was the first attorney general in Mandate Palestine, serving between 1922 and 1931. British authorities in Palestine urgently sought to replace the 1911 Ottoman Penal Code to control Arab anti-colonial and anti-Zionist resistance, but faced fifteen years of obstacles, especially from Palestinians (Bentwich 1938, 71–72). Bentwich viewed “the serious rioting in Palestine of 1929” to require stronger punishment for homicide than allowed by Ottoman penal law. The Shaw Commission explicitly recommended such punishment after the 1929 riots (72). While he dismissed Palestinian criticisms of the draft penal law, the “disfavor of the Colonial Office” in London, which “desired a Code based primarily on English and not on French models,” was taken more seriously (72). It seems that the Indian Penal Code of 1860 was version 1 of British colonial penal law, followed by the “Australian Queensland Code” of 1899 (version 2), the “Codes of East Africa” (version 3), and the Cyprus Code of 1928, which became “the basis of the Colonial Office Code” (version 4) (Dickens and Cook 1979, 425–426).

Chapter XVII also discusses sodomy, underage sex, carnal knowledge of animals, indecent acts, marriage with underage persons, procuring prostitutes, and unlawful sexual intercourse (40–45).

Three articles address induced abortion in the 1936 law, Nos. 175, 176, and 177. The definition of crimes and the penalties are identical to those in the Cyprus Criminal Code of 1928. Article No. 175 (like Art. 153) states: “Any person who, with intent to procure miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony, and is liable to imprisonment for fourteen years” (45).<sup>11</sup> This penalty is substantially harsher than the relevant article in the 1911 Ottoman code and the language does not distinguish whether a woman was in fact pregnant or had sought assistance. Article No. 176 (like Art. 154) states: “Any person who, with intent to procure her own miscarriage, whether she is or is not with child, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a felony, and is liable to imprisonment for seven years” (45). In comparison, the 1911 Ottoman code does not categorize a woman who successfully acquires an abortion as a “felon” and the penalty for such a woman is less, imprisonment “for from six months to three years.” According to Article No. 177 (like Art. 155): “Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, is guilty of a misdemeanour” (45).<sup>12</sup> Article 193 of the 1911 Ottoman code is similar, providing for “six months to two years of imprisonment” for such accomplices and additional hard labor if they are medical practitioners (Bucknill and Utidjian 1913, 147n1).<sup>13</sup> The final section of this chapter brings the legal story of abortion in historic Palestine to the present.

<sup>11</sup> A “felony” is defined in the 1936 criminal code as “an offence which is punishable, without proof of previous conviction, with death, or with imprisonment for more than three years” (Leon 1947, 6).

<sup>12</sup> The 1936 criminal code defines a “misdemeanour” as “any offence which is not a felony or a contravention” (Leon 1947, 7).

<sup>13</sup> The 1936 criminal code includes no penalties for providers of abortion or its means where a woman dies as a result (Leon 1947, 45, 55–56).

## Post-1948 Legal Developments on Birth Control

This section provides a digest of Israeli, Jordanian, Egyptian, and Palestinian National Authority legal developments on abortion after 1948 since all of them were or remain sovereign in different parts of historic Palestine. While changes occurred over time in both restrictive and expansive directions, one continuity is the politically and socially situated nature of abortion laws and policies. Another is they are most relevant in how, whether, and when states enforce them, as well as how and when people violate or skirt them as they live their sexual and reproductive lives.

Pronatalism dominated in the Israeli state established in 1948, which was built on a Zionist logic of Jewish demographic dominance, with further preference for reproduction by and in-migration of Jews from better off “advanced” communities (Rouso-Schindler 2009; Kanaaneh 2002, 43–47). Contraceptives remained illegal in Israel until the late 1950s and even through the 1980s “were available primarily through private physicians and were not covered by insurance” (Kanaaneh 2002, 35, 37). Abortion was illegal by dint of incorporating the British 1936 Palestine Criminal Code (Basker 1980, 19).

However, the law against abortion was “virtually unenforced,” at least partly the result of a 1952 ruling in the District Court of Haifa regarding “a physician accused of performing an induced abortion.” The judgment argued that the term “unlawfully” in the 1936 code implied that “certain situations must exist in which abortion would indeed be ‘lawful.’” The judge further ruled that induced abortion was permissible on “medical grounds” (such as preserving the life and health of the mother) determined by a physician, if the procedure was conducted “in good faith and skillfully” in a recognized medical facility (Basker 1980, 20, 29; Steinfeld 2015, 5).

An account of the 1952 Haifa abortion trial published in a Hebrew-language newspaper associated with the Irgun movement shows, among other things, the influence of licensed physicians on abortion matters. Dr. Mosheh Horvitz, a German speaker, “was accused of murder by performing an abortion” on Tziporah Noyman. Horvitz testified that Noyman was referred to him in her “fifth month of pregnancy” by “Dr. Kraus” from the kibbutz of Hanitah. Horvitz learned from examining Noyman that she “suffered from chronic asthma,” had already delivered three babies, and had had “three

surgeries,” likely referring to medical abortions, which Horvitz argued justified the abortion he conducted. After the abortion, Noyman was transferred to a facility in the kibbutz to recover and “her condition was satisfactory.” When Horvitz visited to examine her at the request of Dr. Kraus, he reported he “found her playing with her son” with a normal temperature and pulse. After this, Noyman “suddenly and spontaneously began hemorrhaging and complained of lack of appetite.” The two physicians determined that Noyman was suffering from “an intestinal infection” and there was some discussion in court of the culpability of another physician at the kibbutz hospital, “Dr. Hefets,” who should have “performed a surgery immediately.”<sup>14</sup>

The attorney general of Israel followed the Haifa judgment with “directives to the police not to prosecute in cases of induced abortion unless” a woman died as a result, the woman had not consented to an abortion, the abortionist was not a licensed medical practitioner, or the abortion procedure was “conducted in a negligent manner” (Basker 1980, 20–21). While this directive was “officially abolished due to doubts about . . . legality” in 1963, no cases of induced abortion “per se” were discussed in Israeli courts after 1960 despite 20,000–30,000 pregnancy terminations annually, with “at least two-thirds” of them being “technically illegal” (Basker 1980, 21; also, Steinfeld 2015, 7). In 1966 Israel lifted any penalties against a woman undergoing an abortion procedure and reduced from fourteen to five years any sentence “against a procurer” (Steinfeld 2015, 7).

Coexisting with state law was the decision-making structure of Kupat Holim, the Sick Fund of the General Federation of Labor (Histadrut), estimated to include as members approximately 80 percent of Jewish Israelis in the 1970s. The organization established a “Committee on Matters of Pregnancy” or “Committee on Interruption of Pregnancy” at ten hospitals. Each committee included a gynecologist, “a specialist physician, and a psychiatrist,” as well as a nonvoting woman social worker (Basker 1980, 61). The committees used four criteria for abortion

<sup>14</sup> “Defense Testimony of Dr. Horvitz,” *Herut*, Wednesday, May 14, 1952 (page 4): <https://web.nli.org.il/sites/JPress/English/Pages/herut.aspx>. Also, “The Trial of Dr. Moshe Horvitz from Haifa, who is charged with causing the death by abortion of a woman from Hanitah, will take place in the Haifa District Court on May 5, [1952].” *HaBoker*, Monday April 21, 1952 (page 2), a newspaper associated with an older right-wing Zionist organization. I appreciate Duke librarian Rachel Ariel, who was kind and generous enough to find these accounts and translate them.

requests: “danger to the mother’s life,” “a defective fetus,” pregnancy resulting from “rape and/or incest,” or “psycho-social reasons” such as “social problems with severe mental ramifications” for the pregnant woman (29–30). To legally protect themselves, the committees “classified all approved applications under the first category of their operating instructions: danger to mother’s life or health.”<sup>15</sup> To avoid lawsuits they “required the husband’s written permission before granting abortion to a married woman.” In 1976 Kupa Holim committees approved an average of 89 percent of applications for 7,724 cases. Although the committees operated “extra-legal[ly],” the Histadrut was powerful and antiabortion penalties were not enforced (30–31).

In 1977 a “sparsely attended” Knesset meeting passed Penal Law 5737 (which came into effect on February 9, 1978), making abortion legal in Israel if the procedure was carried out in a medical institution registered with the Ministry of Health and if a committee of three people at that institution ruled it permissible (21, 23). The familiarly named Committee for Interruption of Pregnancies (CIP) at such medical institutions had to be composed of an obstetrician-gynecologist, a second medical practitioner (in ob-gyn, internal medicine, psychiatry, family medicine, or public health), and “a registered social worker” (Israel: Reproduction and Abortion: Law and Policy 2012, 13). With a woman’s informed consent, the law allowed five conditions for such a committee to permit pregnancy termination: if she was under seventeen years old or over forty years old; if the pregnancy occurred “from a relationship that is prohibited under the penal law, is incestuous, or is out of wedlock,” if the fetus is deemed to have “a physical or mental disability,” if the pregnancy endangers the woman’s physical life or causes her mental or physical harm, or if pregnancy continuation “might cause serious harm to the woman or her children,” the latter labeled “the economic clause” or “the social clause” (Basker 1980, 22; Israel: Reproduction and Abortion: Law and Policy 2012, 13).

The last condition was repealed in December 1979 as a result of strong opposition from rabbis and right-wing Zionist religious political parties given its demographic impact – most abortions were approved

<sup>15</sup> Eileen Basker found the Kupa Holim committees actively considered “psycho-social reasons” in their discussion of actual cases, however. Her dissertation offers fascinating discussion of the flexible bases of such reasoning (Basker 1980, 52–60).

on this basis (Steinfeld 2015, 10–12). Nevertheless, in 2008, CIPs approved 98 percent of all applications for an abortion in Israel (Israel: Reproduction and Abortion: Law and Policy 2012, 17). Since 2014 the Israeli government “pays for the legal abortions of many women, regardless of circumstance.” Lack of a gestational limit means that late-term abortion is relatively easy, if one is willing to subject themselves to the intrusive examinations of CIPs. Late-term abortion is especially easy in cases of fetal “defects,” given an “Israeli obsession with pre-natal testing, combined with a program of free services for the prevention of inborn abnormalities (started in 1978)” (Steinfeld 2015, 15–16).

The second set of relevant abortion laws in historic Palestine is Jordanian.<sup>16</sup> Technically, if not substantively, Jordan gained independence from the British in 1947. Its forces entered “the West Bank” including East Jerusalem in May 1948 and the Hashemite rulers expanded Jordan’s borders in 1949 by annexing the territory. Until promulgation of the Penal Code of Jordan 1951, a Jordanian military proclamation declared that “all laws and regulations in force in Palestine up to the termination of the Mandate should remain in force unless they were in contradiction to the Transjordan Defence Regulations” (Mogannam 1952, 195–196).

Jordan’s Penal Code (*qanun al-`uqubat*) No. 85 of (February 1) 1951 largely followed the Ottoman Penal Code of 1911 on abortion.<sup>17</sup> Chapter three (*al-fasil al-thalith*) dealt with abortion (termed *ijhadth*) in five articles. Article 315 punished a woman who aborted her own pregnancy or sought methods to do so with six months to three years of prison, exactly the same penalty as in Article 192 of the 1911 Penal Code. Article 316 punished any person who provided a *consenting* woman with an abortion or its means with one to three years of prison

<sup>16</sup> When Egypt had jurisdiction over the so-called Gaza Strip between 1949 and 1967, the British Palestine Criminal Code of 1936 remained in force, including its articles on abortion. We have no social or political history of whether or how the abortion articles of the 1936 penal code were relevant in Gaza during that period. Nor do we have studies of women’s reproductive and anti-reproductive situations or experiences.

<sup>17</sup> I am grateful to Lynn Welchman at SOAS and Sean Swanick and other staff at the Duke Library for assistance acquiring primary legal sources. Ultimately, ACOR librarians found the 1951 code by contacting librarian Nawal Raga Alageel at the National Library in Jordan, who kindly scanned the necessary pages of the Arabic law.

and no less than five years of hard labor if the result was the woman's death.<sup>18</sup> Article 317 punished the deliberate perpetrator of an *unconsented* abortion with no more and no less than ten years of hard labor if such an abortion led to the woman's death, whereas Article 192 of the 1911 Ottoman penal code punished such a perpetrator with three to ten years of hard labor and a minimum of fifteen years of hard labor if the woman died. Article 319 increased the punishment by one-third if the facilitator or provider of an abortion was a physician, surgeon, pharmacist, or midwife (*qabila*). Article 193 of the 1911 Ottoman Penal Code, by comparison, penalized with six months to two years of prison a person who provided a woman with means or instructions to self-abort, irrespective of her consent, and included "additional temporary" hard labor if such a facilitator was a physician, surgeon, or pharmacist.

Article 318 was the most innovative dimension of the 1951 Jordanian Penal Code, if we can use this negative term from Islamic jurisprudence to describe state law. The article provided mitigation for the woman who aborted her own pregnancy to protect her honor (*muhafatha `ala sharafha*) and similar mitigation for family members who facilitated a woman's abortion for honor reasons under Articles 316 and 317 if they were related to her up to the third degree (*hata al-daraja al-thalitha*). The article constituted and reified *honor* in legal discourse at the same time that it offered mitigation, which allowed for legal abortion in pregnancy resulting from, for example, nonmarital consensual sex, rape and incest. Notably, Article 318 also offered honor mitigation to perpetrators of an unconsented abortion or when a woman died from an unconsented abortion (Art. 317). Article 318 illustrates how postcolonial legal developments affecting gender and sexual relations are often more restrictive and stigmatizing in comparison to customary and religious jurisprudence and even to the relatively harsh "modernizing" Ottoman penal code of 1911, which did not use moralizing language or mention honor in discussion of abortion.

Chapter three (Articles 321–325) of Jordan Penal Code No. 16 of 1960 declares abortion illegal following the language of the 1951 code it replaced. Article 321 ("Self-Induced Abortion"), Article 322 ("Abortion with a Woman's Consent"), Article 323 ("Abortion

<sup>18</sup> Article 192 of the 1911 Ottoman code differs in punishing for a woman's resulting death with four to seven years of hard labor.

without a Woman’s Consent”), and Article 325 (“Aggravating Condition”), the latter addressing physicians, surgeons, pharmacists, and midwives, closely follow the language and punishments in Articles 315–319 in the 1951 Jordan Penal Code (DCAF 2012, 36). As in the 1951 code, the 1960 law includes Article 324 (“Honour-Related Abortion”), which states: “A woman who performs an abortion on herself to protect her honour, and a person who commits the crimes provided for in Articles 322 and 323 to protect the honour of a descendent, or a relative up to the third degree, shall benefit from a mitigating excuse” (DCAF 2012, 36).

Articles 59 to 62 of the 1960 Jordan Penal Code, in the chapter titled “Justifications” (*asbab al-tabriri*), are legally relevant to abortion because they allow general “exceptions from penalty and criminalization” in situations where a bad result was not intended, occurred by necessity (*durura*), or occurred while obeying the law. Article 62.2.c. is a justification specific to medical professionals: “a surgery or medical treatment is used according to the rules of the profession on condition it was carried out with the consent of the patient, their parents, or their legal representative in situations of urgency” (*halat al-durura al-masa*).<sup>19</sup>

I asked Dr. Niveen Jamil Faek Tutunji about contraception and abortion practices in Jordan in the 1950s and 1960s during an April 8, 2018, interview in Amman.<sup>20</sup> Tutunji and her older sister Nermeen were the first women from Transjordan to travel to the American University of Beirut for college and then medical school; they had studied at the CMS high school in Amman. In 1954 Niveen Tutunji returned to Amman from Beirut to run the maternity and surgery sections of the Red Crescent Hospital as a twenty-four-year-old. In 1955 she took over the Motherhood and Health Project of the Ministry of Health, which established a clinic focused on infant and maternal health and home birth training of young women who had graduated high school, in coordination with UNICEF and the World

<sup>19</sup> Jordanian Penal Code No. 16 of 1960 with Amendments. Arabic, my translation. Accessed January 15, 2020: <https://jordan-lawyer.com/2017/04/05/jordan-criminal-law/>.

<sup>20</sup> Tutunji’s father (a Syrian from Aleppo born in Ottoman Izmir) was the first minister of health in Jordan; he had been appointed in 1939 by King Abdullah to lead the Transjordan branch of the Palestine Department of Health and before that had been his personal physician.

Health Organization. As cohorts of these women graduated beginning in 1958, the Ministry of Health established additional clinics.

Tutunji explained that contraception was not controversial, although it “was not desired a lot” in the 1950s and 1960s. Women nursed babies to space children, couples used withdrawal, men wore condoms, and women who had just given birth had “caps” placed over their uterus or were implanted with a “loop” when they had a reason to avoid another pregnancy. The problem with the pill, she noted, was that it “stopped milk” for breastfeeding, so physicians usually waited at least a year after the birth of a child before prescribing it. When I prodded about abortion practices, Tutunji explained “they used to do curettage but it was illegal . . . It remained illegal but they did it in hospitals secretly. Or if the mother had a heart condition or kidney disease or something like that, they would do it.” Physicians also gave pregnant women an ergot drip, “which tightens the uterus,” when there was a reason to induce premature birth. Generally, however, the goal of state-sponsored medical professionals in the 1950s and 1960s was to improve rather than limit birth (*tahsin al-nasl mish tahdidub*) given the high rate of infant and child death.

After the Israeli invasion of the West Bank, Gaza, and the remainder of Jerusalem in June 1967, Israel annexed East Jerusalem and appended it to a “unified” city under Israeli jurisdiction (in violation of international law). In the West Bank and Gaza, existing systems of law, the 1936 British criminal code in Gaza and Jordanian laws in the West Bank, remained in effect. Israel amended or replaced them by military orders “mainly in the field of security” (Qafisheh 2012, 359).

Two additional sources of law became relevant in Jordan and the West Bank in relation to abortion, according to a legal PhD dissertation by Abdennaim M. A. Wandieen, but they developed after the expansion of the Israeli settler-colonial project over the remainder of historic Palestine. First, the Jordanian Medical Constitution of 1970, a document governing the practice of licensed physicians, made abortion legal “to save the life of a pregnant woman.” Such a decision requires the recommendation of two physicians and agreement by the woman or her husband. This was followed by state-level legislation giving a similar imprimatur with Article 62 of the Jordanian Law of Public Health of 1971, which allows an abortion to be performed “in a hospital or a licensed clinic” if it is necessary to save the life of a pregnant woman with her written approval or her husband’s written

approval if she is incapable of deciding. Again, "two registered medical practitioners must certify that the operation is necessary for the preservation of the life or the health of the pregnant woman" (Wanddeen 1987, 74–75). Wanddeen, a practicing lawyer in Jordan when he completed his dissertation in the late 1980s, disapprovingly indicates that the law was stretched to allow an abortion in Jordan "when it is certain that continuance of the pregnancy would cause serious damage to the *mental* or physical health of the woman" (my italics) (76).

The noncontiguous Israeli-Occupied West Bank and Gaza Strip came under the partial jurisdiction of the Palestinian National Authority (PNA) in 1994. The PNA is not the government of an independent or sovereign state with, for example, the right to control internationally recognized borders or issue currency. The PNA "retained the previously applicable law" and "started a process of unifying and harmonising the legislation of the West Bank with that of the Gaza Strip" (Qafisheh 2012, 359). Contraception is legal in the Occupied Palestinian Territories under the PNA and available without cost to married people at United Nations Relief and Works Agency (UNRWA), Palestine Red Crescent, and Makassed hospitals or clinics, as well as at Palestinian Association for Family Planning offices.

With respect to abortion, the combinations of Jordanian and PNA laws applicable in the West Bank "apply to all Palestinian institutions, including in Occupied East Jerusalem, as well as the Qalqilya Hospital," the only UNRWA hospital in the territory (Alrifai 2018, 385). The West Bank laws applicable to abortion include Articles 321 to 325 and Articles 59 to 62 of the 1960 Jordan Penal Code, and Clause 8 of Public Health Law (*Qanun al-Siha al-'Amma*) No. 20, which was passed by the Palestinian Legislative Council in 2004 and applies to all healthcare workers (Alrifai 2018, 385; Shahawy and Diamond 2018, 301). PNA Law No. 20 largely follows the 1971 Jordanian Public Health Law, although it seems to be stricter in its language. Article 8 of chapter two ("Mother and Child Health") "forbids" the aborting of a pregnant woman by any method except to save her life as documented by "two specialized physicians," one of them a gynecologist. Article 8 requires the advanced written consent of the pregnant woman or if this is not possible because of disability, of "her husband or her legal guardian," to perform an abortion; abortions must be "performed in a health institution," and the institution must keep a specific register with the woman's "name, date when the operation took place, the

abortion type, and its justification,” as well as all documentation, for “ten years at least.”<sup>21</sup> In practice in the West Bank, married women are reportedly required to bring to a physician “a medical report,” *as well as a fatwa (ruling) from a religious leader, to justify an abortion.*<sup>22</sup>



This chapter’s historical and comparative approach to law and jurisprudence in relation to contraception and abortion elucidates a number of points. First, Muslim and Jewish religious traditions are far more flexible and plural than Christian traditions on these matters. Second, it would be a mistake to understand the birth control positions and rationales of modern religious authorities, governments, and movements in Palestine and more widely, which are sometimes restrictive and conservative, as based in deeply rooted philosophies anchored in incontrovertible sacred truths. Third, all three religious traditions are guided as much by profane (social, philosophical, and political) as by sacred concerns in given historical contexts, even on the most seemingly fundamental or dogmatic questions. Fourth, Ottoman, British, Israeli, and Jordanian legal restrictions on birth control illustrate state interests to shape or direct to their ideological or material ends the reproductive and anti-reproductive practices of populations. Fifth, these efforts usually failed so they were often altered to some degree in text or application to meet actual sexual and reproductive needs and practices. The next chapter, which spans from the British Mandate to present-day historic Palestine, uses archival sources, interviews, and scholarship to explore the actual birth control practices of women who did not want to be pregnant as well as Palestinian experiences of child death.

<sup>21</sup> I translated the original Arabic from the *Palestine Official Gazette*, Issue 54, April 23, 2005, found on the Birzeit University electronic archive Muqtafi on January 15, 2020: <http://muqtafi.birzeit.edu/en/pg/getleg.asp?id=14778>.

<sup>22</sup> Email correspondence with Reem Al-Botmeh, January 14, 2020.