BIRTH CONTROL NARRATIVES: Jewish Women and the Law of Reproduction

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Abstract

Jewish law has sustained a distinctive jurisprudence on reproduction and birth control throughout its history. Even when Jews lived as minorities within a Christian majority which prohibited birth control, Jewish authorities continued to advocate for its use to protect the lives of mothers and children, and to promote the cohesion of families. In Europe and the United States, Jews were pioneers in controlling births, and were ardent and outspoken adopters of new contraceptive methods.

In light of this history, the childbearing patterns of American Orthodox Jews are a conundrum. In the first half of the twentieth century, Orthodox Jewish birthrates were low, but in the second half of the twentieth century, as American birthrates declined, Orthodox Jewish birthrates increased to double the American average. In this Article, I analyze the childbearing narratives of Orthodox Jewish women, focusing on their attitudes to the Jewish law on reproduction and birth control, asking how these attitudes influence their childbearing choices.

I propose that the recent increase in Orthodox Jewish birth rates and concurrent interpretation of Jewish law on reproduction are responding to the same stimulus: catastrophic loss of Jewish life. Further, the flexible interpretation of Jewish law on reproduction has been central to the survival of Jews over their long history as minorities in unpredictable conditions. Jewish law had the flexibility to encourage high birthrates during times of plenty. In conditions of scarcity or threat, it could be interpreted to increase use of birth control and decrease birthrates.

This Article contributes to feminist legal scholarship in several ways. It recognizes that women are essential informants on the ways in which law written by men becomes embedded in women's bodies and narratives. Women's voices have rarely been recorded in legal history; they may have been subjects of the law, but were not

named as authors. This paper intends to redress the imbalance in one instance—the Jewish law of reproduction and birth control—in which the women who are governed by laws developed by and for men, take the law into their own hands.

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INTRODUCTION

Jewish law has sustained a distinctive view on birth control throughout its history.[1] Even when their Christian neighbors forbade the practice, associating it with prostitution and illicit sex,[2] Jewish authorities advocated for the use of birth control to protect the lives of mothers and children, and to promote cohesion of families. In Europe[3] and the United States,[4] Jews were pioneers in controlling reproduction, and were early and ardent adopters of new contraceptive methods.[5] In light of this history, the childbearing patterns of American Orthodox Jews are a conundrum. In 1970, American Orthodox Jews had smaller families than other American

1. TOSEFTA, Niddah 2:4 (a second century CE Jewish text provides: "[T]hree women use a *mokh* (tampon-like birth control): a minor, a pregnant woman and a nursing woman."). For comprehensive discussions of Jewish reproductive law, *see generally* DAVID M. FELDMAN, BIRTH CONTROL IN JEWISH LAW: MARITAL RELATIONS, CONTRACEPTION, AND ABORTION AS SET FORTH IN THE CLASSIC TEXTS OF JEWISH LAW (1968); RONIT IRSHAI, FERTILITY AND JEWISH LAW: FEMINIST PERSPECTIVES ON ORTHODOX RESPONSA LITERATURE (2012).

2. Etienne Van de Walle, *'Marvellous Secrets': Birth Control in European Short Fiction, 1150–1650*, 54 POPULATION STUD. 321, 322 (2000); *Id.* at 326.

3. Massimo Livi-Bacci, *Social-Group Forerunners of Fertility Control in Europe*, *in* THE DECLINE OF FERTILITY IN EUROPE, 182, 189–95 (Susan C. Watkins & Ansley J. Coale eds., 1986).

4. The earliest study to show Jewish birthrates were lower than non-Jews was John S. Billings, *Vital Statistics of the Jews in the United States*, 19 CENSUS BULL. 3, 9 (1890). For other early studies, *see generally* Calvin Goldscheider, *Fertility of the Jews*, 4 DEMOGRAPHY 196 (1967).

5. *See generally* Calvin Goldscheider, *Contraceptive Use Among American Jewish Families*, *in* PAPERS IN JEWISH DEMOGRAPHY, 1981: PROC. OF THE DEMOGRAPHIC SESS. HELD AT THE 8TH WORLD CONGRESS OF JEWISH STUD., JERUSALEM, AUG. 1981 (Sergio Della Pergola, Paul Glikson & Usiel O. Schmelz eds., 1983).

Jews and Americans in general.[6] Since then, Orthodox birthrates have almost doubled, even as birthrates in America and throughout the world have fallen.[7] Orthodox Jews today have more than twice as many children as other American Jews and Americans in general.[8] The high fertility rate of Orthodox Jews is contrary to global trends, American trends, and the practice of Orthodox Jews in the past.

In this Article, I ask whether Orthodox women's attitudes toward the Jewish law of reproduction and birth control contribute to their childbearing choices. I answer the question by examining the childbearing narratives of Orthodox mothers of large families discussing the Jewish law of birth control. These women do not have direct knowledge of the law, nor do they seek to learn it, but they bring themselves under its jurisdiction as they build families.

Paying close attention to the women's narratives reveals that the high Orthodox Jewish birth rate and the prevailing interpretation of Jewish law work together to bring the Jewish community to equilibrium after catastrophic loss. I propose that Jewish law and Jewish women's attitudes toward reproduction developed together, ensuring Jewish survival in unstable conditions as minorities in the diaspora.

This Article contributes to feminist legal scholarship by focusing on women as informants of the law and shows how laws are embodied in women's narratives. In the past, women's voices were rarely recorded in legal literature. Women may have been subjects of the law, but they were not named as authors. If women engaged in legal interpretation in the past, there is little evidence of their methods. This Article redresses the imbalance in one instance—the

6. Rena Cheskis, *The Impact of Jewish Identification on the Fertility of American Jews* 257, *in* Papers in Jewish Demography, 1981: Proc. of the Demographic Sess. Held at the 8th World Congress of Jewish Stud., Jerusalem, Aug. 1981 (Sergio Della Pergola, Paul Glikson, & Usiel O. Schmelz eds., 1983).

7. The increasing fertility of Orthodox Jews holds true even for groups where the level of religiosity is stable. For example, fertility data were collected in a study of rabbis affiliated with the centrist Rabbinical Council of America (RCA). In comparing rabbis in each age cohort, the study shows that the younger rabbis have a greater number of children than their older colleagues. Moshe Aharon Bleich, Attitudes of Jewish Clergy Toward Adoption Issues 119–20 (2003).

8. *A Portrait of American Orthodox Jews*, Pew Research Center's Religion & Public Life Project. Pew Res. Ctr. (Aug. 26, 2015), https://www.pewresearch.org/religion/2015/08/26/a-portrait-of-american-orthodox-jews [https://perma.cc/F97D-JCJX] ("On average, the Orthodox get married younger and bear at least twice as many children as other Jews (4.1 vs. 1.7 children ever born to adults ages 40–59).").

Jewish law of reproduction and birth control—in which women who are governed by laws developed by and for men, take the law into their own hands.

Part I contains a review of the Jewish law of reproduction and birth control. Parts II and III provide context for the women's narratives. Beginning with a history of Jewish fertility and global fertility, these sections describe the recent fall in human birth rates, and highlight how exceptional are contemporary Orthodox birthrates. Parts IV and V contain transcribed interviews of nine Orthodox mothers navigating the Jewish law of birth control, including a description of the methods used in conducting the interviews. Part VI analyzes the women's narratives. The Article concludes with a possible connection between the growth of Orthodox birth rates in the last fifty years and the promulgation of the Jewish law of reproduction during that time.

I. Jewish Law Around Reproduction and Birth Control[9]

Jewish legal sources discuss the use of barrier methods, oral contraceptives, abstinence, and abortion to protect the lives and health of mothers and to promote the cohesion of families. In this Part, I provide a survey of the sources. However, the women whose interviews are the focus of this paper did not quote any of the written law outlined here, even though it is readily available. They have their own understanding of the law, not necessarily consistent with the written evidence, as will be discussed.

The Jewish law of reproduction has three components. The first is the male obligation to "be fruitful and multiply."[10] The second is the prohibition of wasting male seed.[11] And the third is reverence for the married union, supporting a couple's sexual relationship and the lives and health of each living member of the family.[12] Existing lives and potential new lives all have value in Jewish law, which must be weighed together when introducing new life into a family.

The biblical requirement to "be fruitful and multiply" is interpreted to mean that a Jewish man must marry and have a girl and a boy.[13] A woman, in contrast, is required neither to marry nor to

9. For authoritative discussion, *see generally* Feldman, *supra* note 1.

10. *Genesis* 1:28; *Genesis* 9:1; *Genesis* 35:11; Shulhan Arukh, Even Haezer 1:5.

11. Babylonian Talmud, Niddah 13a–b.

12. See discussion of *shalom bayit* in Shlomo Aviner, *Tichnun Mishpacha Uminiyat* H*erayon (Family Planning and Contraception)*, 3 Assia 167 (1983).

13. Babylonian Talmud, Yevamot 61a where the Mishna records a dispute between the Schools of Hillel and Shamai: Hillel requires a man to

have children.[14] The authoritative *Shulhan Arukh* (translated colloquially as the Code of Jewish Law) requires a man to have a girl and boy, each of which is capable of having children.[15] Some sources require a man to keep having children even after the births of a girl and a boy,[16] citing the biblical verse "in the evening do not rest your hand."[17] Others believe this verse introduces a desirable, not obligatory, enhancement to "be fruitful and multiply."[18] The obligation to be fruitful is among the most important in Jewish law. For instance, it is usually impermissible to sell a Torah scroll, but such a sale is permitted if it enables a couple to marry and have children.[19]

A man's seed may not be wasted under Jewish law,[20] although the meaning of "waste" is unclear. Some consider it to be a prohibition on practicing withdrawal, or *coitus interruptus;* others permit *coitus interruptus* if there is no intent to destroy seed,[21] or even recommend it to prevent conception by a nursing mother.[22] Some sources prohibit both men and women to waste male seed (however that term is interpreted); others provide that the prohibition only applies to men, because only those who are obligated to procreate are forbidden to waste seed. As women are not obliged to procreate, so they cannot be prohibited from "wasting" seed.[23]

Reproduction is also governed by more general Jewish legal principles. Jews may not put their lives or health at serious risk; the definition of risk depends on the individual, the state of medical science, and the degree of generally accepted risk in a community.[24] For example, a woman would be obligated to avoid pregnancy if it creates or exacerbates risk to her life or health. Immediately giving

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have one of each gender while Shamai requires two boys. Shulhan Arukh, Even Haezer 1:5 follows the School of Hillel.

14. Shulhan Arukh, Even Haezer 1:13. Rema there quotes opinions that a woman should marry to avoid suspicion. There are minority opinions that impose some reproductive obligation on women. These have not been accepted.

15. Shulhan Arukh, Even Haezer 1:5–6.

16. Babylonian Talmud, Yevamot 62b (statement of R. Yohoshua) ("If a man has children in his youth, let him also have children in his old age.").

17. *Ecclesiastes* 11:6.

18. Yehiel Michel Epstein, Arukh Hashulhan, Even Haezer 1:8.

19. Babylonian Talmud, Megillah 27a; Shulhan Arukh, Even Haezer 1:2.

20. Babylonian Talmud, Niddah 13a–b.

21. Tosafot on Babylonian Talmud, Yevamot 34b, *shelo kedarko*.

22. So the mother can continue to nurse and not put her living child's life or health at risk. Babylonian Talmud, Yevamot 34b (opinion of R. Eliezer).

23. Rabbeinu Tam on Babylonian Talmud, Yevamot 12b.

24. *See* Aviner, *supra* note 12.

birth, a woman has the status of an ill person.[25] Becoming pregnant again while still recovering from a birth might be considered a health risk and to be avoided.

Jewish law also requires protection of already-born children. If a nursing mother would stop breastfeeding upon becoming pregnant, an early Talmudic source provides that contraception either may or must be used,[26] because premature weaning could result in illness or death of the infant.[27] Finally, Jewish law places high value on harmony within a family, including encouraging a pleasurable sexual relationship between a couple, and a peaceful life for the couple and their children.[28]

In summary, the minimum Jewish law of reproduction requires that a man has a girl and a boy, which might take more than two births to achieve. Some authorities take an expansive view of other sources, such as "in the evening do not rest your hand" and "wasting" seed, resulting in less use of birth control and more births. Under crisis conditions, one Talmudic source appears to abrogate marriages and conceptions or forbid having more than a girl and a boy.[29] By making birth control a matter of Jewish law, a community-wide vision of reproduction becomes part of the decision making of individual couples who bring themselves under the jurisdiction of the law.

In the post-World War II period, Jewish legal authorities in America threw a shroud of secrecy and mystery around the law of birth control, even though prior Jewish writings on the subject were published without discomfort or disguise. Indeed, some recent sources forbid writing for the public about this area of law at all, which they claim falls under the prohibition against *arayot* "nakedness."[30] This change of policy appears in popular Jewish writings

25. Shulhan Arukh, Orah Hayim 330.

26. Babylonian Talmud, Yevamot 34b; Rashi (permits) Rabbenu Tam (requires); also Babylonian Talmud, Yevamot 12b, Ketubot 39a.

27. *Id.*

28. *See* Aviner, *supra* note 12.

29. Babylonian Talmud, Bava Batra 60b. This passage in the Talmud may be a polemic, not intended as practical instruction. Tosafot's commentary assumed the Talmud did not abrogate the obligation to be fruitful and interpreted the prohibition on marriage and procreation to apply only to men who already had a girl and a boy. "We should decree upon ourselves not to marry a woman?! It is a wonder, as it is written, 'be fruitful and multiply.' And perhaps it is only referring to those who already fulfilled 'be fruitful and multiply' [by having a son and a daughter]."

30. Moshe Feinstein, Sefer Igrot Moshe, Even Haezer 1:163, cited in Herschel Schachter, *Halakhic Aspects of Family Planning*, 4 J. Halacha & Contemp. Soc'y 5, 6 (1982). After citing the prohibition, Schachter offers just such a prohibited discussion, because "[s]everal Gedolim [leading rabbis] felt

from the 1950s onwards,[31] speaking about the "indoctrination of the public" on "the acute problem of overpopulation and its attendant consequences."[32] Popular Orthodox writers believed that such concerns had no place in the Jewish scale of values: "Throughout our history, the genuinely Jewish attitude has been that many children are to be considered a blessing from heaven."[33] The association of birth control with extraneous values—despite the long history of Jewish sources the subject—informs the Orthodox debate in the second half of the twentieth century. Rabbinic writings and speeches about birth control became increasingly strident as the practice became widespread in America, as discussed below.

Moses Tendler, a professor of both biology and Jewish law at Yeshiva University, was an Orthodox leader and mentor-teacher to several generations of young men in college and *yeshiva*.[34] In 1959, he wrote that "[m]odification of the marital act to preclude the possibility of conception is the basis of family planning . . . [A]uthorities in Halochah [*sic*] unanimously agree that family planning in this sense, in the absence of significant medical consideration, is a violation of the spirit of our Torah."[35] Tendler stated that birth control is "solely within the jurisdiction of the orthodox community rabbi. There are so many variables . . . that only the rabbi who is fully familiar with the individuals involved, their motives and aspirations, can properly evaluate these variables that in total determine the *Halakhic* position."[36]

Immanuel Jakobovits, a rabbi at Fifth Avenue Synagogue in New York, Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, and pioneering medical ethicist, made the issue of family size and birth control a crusade. In a 1966 speech in Manhattan, he said "that he could solve the perplexing question of the increased birth rate of . . . China and India, but that China and India had not asked him to do so . . . therefore . . . he

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that a new halakhic paper on this subject in English would be appropriate . . . " Although Jewish authorities in the past have written openly about the Jewish law of reproduction, rabbis in the United States after World War II have deliberately fostered a sense of mystery about Jewish law around birth control. Zev Eleff, *Piety and the Pill: American Orthodox Judaism and the Contraception Debate in the Postwar Era*, 104 Am. Jewish Hist. 533, 535–6 (2020).

31. For an excellent review of the popular literature, *see generally id.*

32. Willy Hofmann, *Birth Control and the Right to Life*, 19 Jewish Life 6, 6 (1952).

33. *Id.* at 7.

34. Institute of higher Jewish learning.

35. Moses Tendler, *The Jewish Attitude Toward Family Planning*, 26 Jewish Life 6, 6–7 (1959).

36. *Id.* at 10.

was limiting himself to the 'Vanishing Jew.'"[37] In an article of the same year, Jakobovits calls on Jews in the 1960s to engage in a new kind of "martyrdom,"[38] namely "some economic martyrdom. This concerns the Jewish birth-rate . . . because it is today the most crucial factor in our physical survival . . ."[39] In the flagship modern Orthodox journal *Tradition*, Jakobovits concludes an incomplete review of the Jewish law around birth control with the warning, "the problems involved are so intimately personal, sacred, and grave—affecting, as they do, capital issues of life and death—that each question should always be submitted to a competent rabbi for judgment on the basis of the individual merits . . . "[40]

The inconsistency between the late twentieth century American Jewish legal writings and the legal writings that developed over more than a thousand years previously is remarkable. The ways in which the legal theory and policy discussed above expressed itself in the lives of individual Jewish women is explored in the following Parts.

II. Jewish Fertility History

Jews have been living as widely dispersed minorities in many countries for more than two thousand years.[41] In settlements around the world, Jews have often maintained family patterns distinct from their neighbors. In certain Italian communities, Jews deliberately limited childbearing many years before their Christian counterparts d*id*. Massimo Livi Bacci coined the term "fertility forerunners" to describe their novel behavior.[42] In some German villages, Jews limited their fertility before Christians did, and Jews in Germany led the way in fertility control right up to the eve of World War II, when Jewish childbearing virtually ceased.[43] In England, living in poverty and harsh conditions, Jews had lower fertility and lower child mortality than the Christian majority.[44] Low Jewish fertility rates were

37. Emanuel Wiedberg, *A Notable Event*, 3 Lincoln Square Synagogue Bull. 5, 5 (1966).

38. Immanuel Jakobovits, *The Cost of Jewish Survival*, 15 Judaism 426, 426 (1966).

39. *Id.* at 427.

40. Immanuel Jakobovits, *Review of Recent Halakhic Periodical Literature*, 3 Tradition: A Journal of Orthodox Jewish Thought 217, 226 (1961).

41. *See generally* Paul Johnson, A History of the Jews (1988).

42. Livi-Bacci, *supra* note 3.

43. *See generally* Arthur J. Knodel, The Decline of Fertility in Germany, 1871–1939 (1974).

44. See, e.g., Barry A. Kosmin, Nuptiality and Fertility Patterns of British Jews 1850–1980: an Immigrant Transition? (1982); Lara V. Marks,

not universal, however. Eastern European Jews had higher fertility (and much lower mortality[45]) rates relative to the Christian majority, even late in the nineteenth century, and experienced significant population growth.[46]

Jews were forerunners in fertility control in the United States from the late nineteenth century onwards. "Family limitation [was] so acutely desired by many [Jews] that dangerous expedients have been employed," said an observer of the Chicago Jewish community. "Women . . . [would] do most anything. They [would] jump from chairs . . . They [would] take quinine pills, they [would] take hot applications, hot mustard baths . . . "[47] Jews were also among the first and most ardent patrons of Margaret Sanger's birth control clinic in Brownsville, Brooklyn,[48] and devoured Yiddish translations of her writing. For entertainment, they attended plays such as "Birth Control or Race Suicide" in New York, and "A Woman's Duty in Birth Control" in Chicago.[49] In her drive to legalize birth control in the United States, Margaret Sanger chose a working-class Jewish mother as key witness in the hearing before Congress. Rose Halpern, the witness, testified: "I would not live in constant fear of bringing another child into the world, which meant death for me."[50]

Model mothers: Jewish mothers and maternity provision in East London, 1870–1939 (1994).

45. Maristella Botticini, Zvi Eckstein & Anat Vaturi, *Child Care and Human Development: Insights From Jewish History in Central and Eastern Europe, 1500–1930*, 129 The Econ. J. 2637, 2638 (2019).

46. *See generally* Barbara A. Anderson, Erna Härm & Ansley J. Coale, Human fertility in Russia Since the Nineteenth Century (2015) (the combination of high fertility and low infant mortality resulted in large population growth for Jews in Eastern and Central Europe in the nineteenth century).

47. H.L. Lurie, *Sex Hygiene of Family Life*, 3 Jewish Soc. Serv. Q. 19, 66 (1926).

48. They were also major patrons of subsequent clinics. In one 1935 study, of the women coming to the Birth Control Clinical Research Bureau in New York City, two-thirds of the women were Jewish and one-sixth were Catholic, while only one-tenth were Protestant. These proportions were far from representational of the city's residents, where Jews were always minorities. Regine K. Stix & Frank W. Notestein, *Effectiveness of Birth Control: A Study of Contraceptive Practice in a Selected Group of New York Women*, 12 The Milbank Memorial Fund Q. 57, 58 (1934).

49. Jenna Weissman Joselit, The Wonders of America: Reinventing Jewish culture, 1880–1950, 64–68 (1994).

50. *Birth Control: Hearings Before a Subcomm. of the S. Comm. on the Judiciary, U.S. Senate, 73rd Cong.* 65 (1934) (statement of Rose Halpern, New York City), *cited in* Melissa R. Klapper, Babies, and Banners of Peace: American Jewish Women's Activism, 1890–1940, 68 (2013).

In every American survey that includes data on Jews, a higher proportion of Jews than non-Jews have been found to use birth control, use birth control earlier, use more efficient forms of birth control, and generally more effectively plan pregnancies.[51] In a large survey from the 1930s, "[t]he most striking and significant result . . . [was] the much higher proportion of contraceptive effort among the Jews than among the women of any other religious class . . . the Jewish women far outranked all other classes in the proportion of contraceptors . . . "[52] In the 1950s, scholars used even more superlative language: "[t]he degree to which Jewish couples use more effective contraception than either Protestants or Catholics . . . strains credulity. Not only do the Jewish couples . . . rely more exclusively on the most effective methods, but they apparently manage these methods with unusual efficiency."[53]

As a group, American Jews may have lower fertility rates than the American average, but when the Jewish data are broken down by denomination,[54] a more complex picture emerges. Before 1980, Orthodox fertility was neither consistently above nor below Jewish fertility generally.[55] But in surveys since 1990, the number of children born to Orthodox women has been at least double the number born to the non-Orthodox women, which has significantly impacted the composition of the Jewish community. In comparing the 1990 National Jewish Population Survey[56] and the 2013 Pew Portrait of Jewish Americans,[57] the number of adult congregants who identify

51. The earliest study to find that Jewish birthrates were lower than that of the general population was Billings, *supra* note 4. For other early studies, *see* Goldscheider, *supra* note 4.

52. Raymond Pearl, The Natural History of Population, 1939 *in* Calvin Goldscheider, *Contraceptive Use Among American Jewish Families*, *in* Papers in Jewish Demography, 1981: Proc. of the Demographic Sess. Held at the 8th World Congress of Jewish Stud., Jerusalem, Aug. 1981, 239, 240 (Sergio Della Pergola, Paul S. Glikson & Usiel O. Schmelz eds., 1983).

53. Charles F. Westoff, Robert G. Potter, Philip C. Sagi, & Elliot G. Mishler, Family Growth in Metropolitan America (1961), *in* Calvin Goldscheider, *Contraceptive Use Among American Jewish Families*, *in* Papers in Jewish Demography, 1981: Proc. of the Demographic Sess. Held at the 8th World Congress of Jewish Stud., Jerusalem, Aug. 1981, 239, 241 (Sergio Della Pergola, Paul S. Glikson & Usiel O. Schmelz eds., 1983).

54. The denominations are usually Orthodox, Conservative, Reform, and other.

55. Goldscheider, *supra* note 4 (citing the Providence case, in which foreign-born Orthodox women had earlier marriages and higher fertility than non-Orthodox women, and American-born Orthodox women had lower fertility than non-Orthodox women).

56. Sidney Goldstein, *Profile of American Jewry: Insights from the 1990 National Jewish Population Survey*, 90 Am. Jewish Y.B. 77, 170 (1992).

57. *A Portrait of Jewish Americans: Findings from a Pew Research Center*

as Orthodox has doubled, and the number of Orthodox children has quadrupled.[58] In the 2013 Pew study, the number of children in Orthodox households was more than double the number of those in non-Orthodox households.[59] This finding is corroborated by surveys of children in Jewish schools.[60] As Orthodox fertility has increased, the fertility of Jews in general, of Americans, and indeed of humans globally has declined. These general declines in fertility are discussed in the following Part.

III. Global Fertility History[61]

Before 1750, every human community for which we have records had high rates of both birth and death. The number of children born varied, with averages falling between five and eight births per woman.[62] Most babies that were born alive died before reaching adulthood.[63] Before the modern era, humans could not effectively manage mortality, but they had some control over reproduction, even before the dissemination of reliable contraception. Access to

Survey of U.S. Jews. Pew Res. Ctr. (Oct. 1, 2013), https://www.pewresearch.org/religion/2013/10/01/jewish-american-beliefs-attitudes-culture-survey [https://perma.cc/QZ9R-C6XB].

58. *See* Steven M. Cohen, *Lessons Learned From Orthodoxy's Dramatic Growth*, The Jewish Week (Dec. 9, 2015, 12:00AM), https://www.jta.org/2015/12/09/ny/lessons-learned-from-orthodoxys-dramatic-growth-2 [https://perma.cc/7MZU-WXC2]; Michael Lewyn, *Bringing Judaism Downtown: A Smart Growth Policy for Orthodox Jews*, 51 U. Balt. L. Rev. 37 (2021); Viva Hammer, *Blessed with Children*, JEWISH ACTION, https://jewishaction.com/jewish-world/blessed-with-children [https://perma.cc/8A8U-M3EH] (last visited July 8, 2024).

59. "On average, Orthodox Jews are much younger and tend to have much higher fertility than the overall Jewish population – an average of 4.1 children among Orthodox Jews in the survey ages 40–59, compared with 1.9 children per Jewish adult overall." Alan Cooperman & Gregory A. Smith, *Eight Facts about Orthodox Jews from the Pew Research Survey Pew Research Center*, Pew Res. Ctr. (Oct. 17, 2013), https://www.pewresearch.org/fact-tank/2013/10/17/eight-facts-about-orthodox-jews-from-the-pew-research-survey [https://perma.cc/3ZZC-9BET].

60. Marvin Schick, A Census of Jewish Day Schools in the United States 2013–2014, 1 (2014) (finding that the number of children enrolled in Orthodox schools has increased from 147,436 to 220,914 between 1998 and 2013).

61. This Part is based on Massimo Livi-Bacci, A Concise History of World Population (2017).

62. These are averages for groups and include women who never marry or marry and don't have children. Within every group, there are women who have numbers of children that are far from the average.

63. Tommy Bengtsson, Cameron Campbell, & James Z. Lee, Life Under Pressure: Mortality And Living Standards in Europe and Asia, 1700–1900, 363–5 (2004).

sex (usually through marriage), abstinence, breastfeeding, abortion, infanticide, and neglect were used to manage the production of new life in changing conditions.[64]

Until the modern era, the human population grew exceedingly slowly.[65] After exceptional events such as war and famine, populations recovered from losses and returned to equilibrium by adjusting the regular population control mechanisms such as access to marriage, breastfeeding, abstinence, etc. For example, if in equilibrium conditions, 20 percent of the women in a population never married and never had children, after the losses of war, the number of unmarried women may have been reduced to 10 percent and childbearing thereby increased. These adjustments to normal population control mechanisms did not result in rapid population recovery; on the contrary, adjustments after external shocks were generally weak in the short term. However, "as long as there is any trace at all" of the tendency to equilibrium, "no matter how weak, this tug, by its systematic persistence, comes to dominate human population dynamics over the long run, if not the short . . . "[66] Over human history, the size of the human population had a strong tendency to stability, neither growing nor shrinking.

In the last two hundred and fifty years, this stability in the size of the human population was disrupted.[67] A persistent decline in mortality resulted in a persistent increase in population.[68] Further, in French villages during the late eighteenth century—which were rural, illiterate and unindustrialized—birth patterns began to change.[69] Women had many children, but demographers hypothesize that couples began to *deliberately* stop having children when their families reached a certain size.[70] We do not know how or why these couples achieved fertility control, long before the advent of reliable contraceptives. Between 1880 and 1920, one hundred years after France, almost all of Western Europe experienced a drop in birthrates. As the world economy collapsed in the 1930s, birth rates in Europe fell further, even as marriage rates increased.[71] For two decades after World War II, the United States

64. *See generally* The Decline of Fertility in Europe (Susan C. Watkins & Ansley J. Coale, eds., 1986).

65. *Id.*

66. Ronald D. Lee, *Population Dynamics of Humans and Other Animals*, 24 Demography 443, 443 (1987).

67. *See generally* The Decline of Fertility in Europe, *supra* note 64.

68. Bacci, *supra* note 61 at 63.

69. *See* The Decline of Fertility in Europe, *supra* note 64, at 234–260.

70. *Id.* at 261–292.

71. Bacci, *supra* note 61 at 120.

experienced an increase in births, but it was short lived: in the 1970s, births declined in the United States, increased briefly, and declined again to around 1.7 children per woman after 2009. The birth rate in the United States continues to decline to this day.[72] Global birth rates have halved since the mid twentieth century.[73] However, death rates have declined faster than birth rates. Over the period in which global fertility has halved, the global population has tripled.[74]

The "demographic transition" is the process by which societies begin with high mortality and high fertility, and end with low mortality and low fertility.[75] Fertility has remained consistently above replacement level in only one developed country throughout the twenty-first century,[76] and most developed countries have recorded fertility rates below replacement levels for some time.[77]

Although it is universally observed that birth rates decline as populations modernize, there is no accepted explanation as to why this happens. Birth rates have declined under diverse conditions, and the decline is not necessarily correlated to education, urbanization, mortality, or the dissemination of reliable birth control. Evolutionary theory would predict an increase in childbearing

72. Melissa S. Kearney, Phillip B. Levine & Luke Pardue, *The Puzzle of Falling U.S. Birth Rates Since the Great Recession*, 36 J. Econ. Persp. 151, 151 (2022).

73. As of the time of writing, the global average is about 2.5 children per woman, and is expected to continue to decline. United Nations, World Population Prospects: The 2017 Revision: Key Findings and Advance Tables (2017), https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/files/documents/2020/Jan/un_2017_world_population_prospects-2017_revision_databooklet.pdf [https://perma.cc/Q2LW-288K].

74. *What Do Declining Global Fertility Rates Really Mean?*, Population Matters (Nov. 11, 2018), https://populationmatters.org/news/2018/11/what-do-declining-global-fertility-rates-really-mean [https://perma.cc/R99Q-3PSC].

75. The Decline of Fertility in Europe, *supra* note 64, at 201.

76. Defined as a total fertility rate of 2.1 children per childbearing-aged woman.

77. *See* Sergio Della Pergola, *View from a Different Planet: Fertility Attitudes, Performances, and Policies among Jewish Israelis*, *in* Love, Marriage, and Jewish families: Paradoxes of a Social Revolution 123, 123 (Sylvia B. Fishman ed., 2015) (" . . . in 2012 Israel – a country ranked sixteenth out of 186 by the Index of Human Development – with 3.1 children currently born per family had the highest Total Fertility Rate (TFR) among the world's 94 more developed countries"). For more recent data, *see* Total Fertility Rate 2024, World Population Rev. (2024) https://worldpopulationreview.com/country-rankings/total-fertility-rate [https://perma.cc/P7HU-R78N]. *See also* Viva Hammer, *Failure to Thrive*, Commonweal Mag. (Oct. 22, 2022) [https://perma.cc/3DDB-8FUL].

as resources become increasingly available, but in fact the more resources humans have, the fewer children they have.[78] The ubiquity of declining family size amid plenty is an unsolved problem in every field of scholarship that attempts to explain it.[79] Orthodox Jews are an exception to the global trend to smaller families. In the same period that the United States experienced a baby boom, Orthodox families were small; as American fertility has declined, Orthodox family sizes have grown. This Article begins the analysis by examining the more general relationship between religiosity and fertility.

IV. Religiosity and Fertility

Calvin Goldscheider laid the foundations for examining the near-universal finding of high fertility in groups with higher levels of religiosity,[80] and his work has been elaborated on by Kevin McQuillan.[81] Goldscheider suggested initially that the high fertility among religious groups might not arise because of an aspect of religion itself, but rather because of other characteristics of religious groups, such as their relative income, education, and urbanization, as compared to the general population.[82] Even after these characteristics were accounted for in the data, however, disparities in fertility persisted between the religious and less religious. In response to the data confounding his theory, Goldscheider proposed instead that religious people have more children because of the "particularized theology" of religion, expressed primarily through "broadly based norms of family control and gender relationships,"[83] and secondarily

78. Anna Goodman, Ilona Koupil, & David W. Lawson, *Low Fertility Increases Descendant Socioeconomic Position but Reduces Long-Term Fitness in a Modern Post-Industrial Society*, 279 Proceedings of the Royal Society B: Biological Sciences 4342, 4342 (2012).

79. For reviews of the literature, *see generally* John Cleland & Christopher Wilson, *Demand Theories of the Fertility Transition: An Iconoclastic View*, 41 Population Stud. 5 (1987); Mary K. Shenk, Mary C. Towner, Howard C. Kress & Nurul Alam, *A Model Comparison Approach Shows Stronger Support for Economic Models of Fertility Decline*, 110 Proc. of the Nat'l Acad. of Scie. 8045 (2013); Sarah E. Hill & H. Kerm Reeve, *Low Fertility in Humans as the Evolutionary Outcome of Snowballing Resource Games*, 16 Behav. Ecology 398 (2004).

80. Calvin Goldscheider, Population, Modernization and Social Structure (1971).

81. Kevin McQuillan, *When Does Religion Influence Fertility?*, 30 Population & Dev. Rev. 25 (2004).

82. Calvin Goldscheider & Peter R. Uhlenberg, *Minority Group Status and Fertility*, 74 Am. J. Socio. 361, 361 (1969).

83. Calvin Goldscheider, *Religious Values, Dependencies, and Fertility: Evidence and Implications from Israel*, *in* Dynamics of Values in Fertility

through "religious theology emphasizing large families and/or discouraging the use of contraceptives and birth control . . . "[84] Kevin McQuillan expands on this theory, suggesting that religion influences fertility through a distinctive framework of values, including pronatalist "'official' positions" that influence fertility, such as rules regarding contraceptives and abortion, and attitudes toward sex, marriage, divorce, cohabitation, abstinence, breastfeeding, family roles, education, and women's paid work.[85]

Goldscheider asks *whether* and *how* religion influences fertility; McQuillan asks *under what circumstances* and *by what methods* religion influences fertility. McQuillan theorizes that "[r]eligious values are most likely to matter when religious institutions have the means to communicate values to their members and institute mechanisms to promote compliance and punish nonconformity. The institutional influence of religion can be felt at three levels: "in the larger society, in the community, and in the life of the individual."[86] He illustrates his theory with examples from the institutional frameworks of the Catholic Church in Quebec and Ireland in the nineteenth century. McQuillan proposes that it was the power of the Catholic Church in both places that delayed the Catholics' demographic transition relative to their Protestant neighbors.

The factors McQuillan ascribes as sources of power for Catholics in Quebec and Ireland have parallels in the conditions observed during the strengthening of Jewish Orthodoxy in America and elsewhere during the past half century. These conditions include the growth in attendance at Orthodox day schools,[87] increased post-high school study in Israel,[88] the nature of and attendance at

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Change 310, 312 (Richard Leete ed., 1999).

84. Calvin Goldscheider, *Religion, Family, and Fertility: What Do We Know Historically and Comparatively?*, *in* Religion and the Decline of Fertility in the Western World 41, 42 (Renzo Derosas & Frans van Poppel eds., 2006).

85. McQuillan, *supra* note 81, at 25.

86. *Id.* at 32.

87. Schick, *supra* note 60 at 1. Steven M. Cohen finds that "Orthodox day schools seem to produce the most marked net increase in Jewish involvement of any form of Jewish education." Steven M. Cohen, *The Impact of Varieties of Jewish Education upon Jewish Identity: An Inter-Generational Perspective*, 16 Contemp. Jewry 68, 92 (1995).

88. *See generally* Shalom Z. Berger, Daniel Jacobson & Chaim I. Waxman, Flipping out? Myth or Fact: The Impact of the "Year in Israel" (2007).

men's *yeshivas*,[89] attendance at premarital classes,[90] synagogues with congregants living in close proximity led by rabbis whose primary training is in Jewish law,[91] the growth of the religious Jewish publishing industry,[92] and the evolution of norms in matchmaking for marriage.[93] Even in free and open societies, these factors encourage Jewish interaction, communication and mutual observation. Jewish leaders who wish to propagate religious messages can, through these institutions, reach Orthodox Jews *en masse*. Nonconformity can be penalized through shunning and exclusion, leading to loss of family, community, and livelihood.

Considering these theories, this Article asks several questions. What role do Orthodox women ascribe to the Jewish law of birth control in their reproductive decisions—what Goldscheider calls the "religious theology?" How do Orthodox women encounter the Jewish law of birth control? Who articulates and controls the law? And how does the encounter between the women and the law shape the law?

V. Orthodox Women's Narratives: Methods

This study focuses on nine interviews with Orthodox mothers of or from large families.[94] The value of small qualitative studies has

89. Term used loosely for many kinds of Jewish educational institutions, from elementary school to adult education; in this context, referring to institutions of higher Jewish learning for men, compared (inexactly) to seminaries or divinity schools. In *Yeshiva*, men devote long hours to the study of Talmud, without any particular goal such as an academic degree or ordination. *Yeshivas* provide intense socialization into Jewish values and Jewish law and attendance at *Yeshiva* among American Orthodox Jews has grown significantly since World War II, and with it, familiarity with Jewish law. *See generally* Yoel Finkelman, *Haredi Isolation in Changing Environments: A Case Study in Yeshiva Immigration*, 22 Mod. Judaism 61 (2002); William B. Helmreich, The World of the Yeshiva: An Intimate Portrait of Orthodox Jewry (2000).

90. *See generally* Chana Maybruch, Steven Pirutinsky & David Pelcovitz, *Religious Premarital Education and Marital Quality Within the Orthodox Jewish Community*, 13 J. Couple & Relationship Therapy 365 (2014).

91. *See generally* Daniel J. Elazar & Rela Geffen Monson, *The Evolving Roles of American Congregational Rabbis*, 2 Mod. Judaism 73 (1982).

92. *See generally* Jeremy Stolow, Orthodox by Design: Judaism, Print Politics, and the Art Scroll Revolution (2010); Jeremy Stolow, *Communicating Authority, Consuming Tradition: Jewish Orthodox Outreach Literature and Its Reading Public*, *in* Religion, Media, and the Public Sphere 73 (Birgit Meyer & Annelies Moors eds., 2006).

93. *See generally* Hannah Rockman, *Matchmaker Matchmaker Make Me a Match: The Art and Conventions of Jewish Arranged Marriages*, 9 Sexual & Marital Therapy 277 (1994).

94. The interviews were conducted in-person and over the phone and are

been recognized by scholars as having the potential to provide more nuanced insight into human fertility.[95] The discipline of demography, which measures fertility levels, typically focuses on large surveys with "a small number of common dependent variables," allowing for comparison of "demographic behavior anywhere in the world."[96] The drawback of mass-collected data is that they measure behavior, but cannot explain it. A small number of detailed observations can reveal diversity in human behavior and uncover new relationships between variables. The potential disadvantages of the small study are its lack of representativeness, the difficulty in measuring outcomes, and possible ambiguity of results. Because every form of study has drawbacks, we need many approaches to understanding human processes; the more views there are, the richer our overall picture.

The form of study I have chosen here is a series of unstructured dialogues with Orthodox Jewish mothers, collecting narratives of family formation and reproduction. I sought a "non-hierarchical, non-authoritarian, non-manipulative, humble relation to the 'subject.'"[97] My method of presentation, in which I offer the reader the whole narrative, has been called experiential analysis, or portraits.[98] This method seems most suitable because I want to introduce the women in a way that enables the reader to hear them directly. Although I offer my interpretation of the narratives, I do so as one investigator and not as final arbiter of meaning. These stories offer

a subset of interviews conducted with Orthodox mothers (and a small number of fathers) of or from large families. The interviews in this paper were chosen based on their extensive discussion of birth control. All interviews were open-ended and did not follow a prescribed set of questions; they were conducted and transcribed by the author. The women's names and identifying details have been changed to protect their privacy.

95. *See, e.g.*, Tom Fricke, *The Uses of Culture in Demographic Research: A Continuing Place for Community Studies*, 23 Population & Dev. Rev. 825 (1997); William G. Axinn, Thomas E. Fricke & Arland Thornton, *The Microdemographic Community-Study Approach: Improving Survey Data by Integrating the Ethnographic Method*, 20 Soc. Methods & Rsch. 187 (1991).

96. David I. Kertzer & Tom Fricke, *Toward an Anthropological Demography*, *in* Anthropological Demography: Toward a New Synthesis 1, 2 (David I. Kertzer & Tom Fricke eds., 1997).

97. Shulamit Reinharz, *Experiential Analysis: A Contribution to Feminist Research*, *in* Theories of Women's Stud. 162, 181 (Gloria Bowles & Renate Duelli Klein eds., 1983).

98. *See, e.g.*, Sara Lawrence-Lightfoot & Jessica Hoffmann Davis, The Art and Science of Portraiture (1997); James Agee & Walker Evans, Let Us Now Praise Famous Men: Three Tenant Families (2d ed. 1960); Svetlana Aleksievich, Secondhand Time: The Last of the Soviets (Bela Shayevich trans., 2017); Amia Lieblich, Kibbutz Makom: Report from an Israeli Kibbutz (1982).

one lens through which to approach the question of why Orthodox Jews have more children than most modern women today.

VI. Orthodox Women's Narratives

The extracts below are from transcribed interviews with Orthodox Jewish mothers of large families. With one exception (Kim) the women were all born in the United States and bore and raised their children in various parts of the United States. English is their native tongue. Some were raised Orthodox, some came to Orthodoxy on their own, before they married. All were born Jewish from Ashkenazi European backgrounds. They have between 4 and 11 children. These women's narratives were chosen for this Article because of their particularly rich and detailed discussions on Jewish law and how they incorporate it into their lives. The women's names and some identifying details have been changed to protect their privacy. Because this is a unique collection of women's narratives, the women's language has been preserved as much as possible in its original form, which may include words in Hebrew or Yiddish (translated in footnotes) and may include the idiosyncrasies of the spoken word.

A. *Carol*

Born mid 1940s; married at age 20; 2 siblings; 6 children; bachelor's degree.

If you asked me as a kid how many kids I was going to have, I don't know if I had an answer. I never thought about it one way or the other . . . But my husband was very, very goal oriented about everything, and he had a very fixed idea about having a large family. It was one of the first things he told me when I met him: he wanted eight. I was very clever and said to him, "Maybe you'll settle for six." He was the innovator, not me, for sure.

To tell you the truth, I didn't think we'd have the large family. We had these children one at a time. As time went on, I wanted to please him, and I was good at small babies. I had one, then I had a second, a third; it got easier. I would have had even more children. Then I had some difficulties when my fourth was born and I didn't conceive. I didn't space those children; after the fourth that wasn't [spaced], that's what I got. I even went and was checked out, because once my father died, I was anxious to have a boy.

When I was having kids, four was a big family. Six became your idea of a possibility. There are many more families of six today . . . The more into religious circles I have become, the more I realize that six is not such a large group . . . When I grew up, honey,

I didn't know of a family of six, period. The largest family I knew was five and I thought that was *enormous*. I went to a Jewish school; I don't think there was anyone in the school who was part of such a big family. I knew big Catholic families but not Jewish families. Jews didn't do that.

My children are choosing to have larger families. Jews always [choose], in my opinion; as soon as they figured out birth control, they used it. My kids act like . . . Catholics [in not using birth control]; it drives me nuts, but that's also a choice, a true choice.

I did space, but only to get on my feet . . . look, I have 18 months, two years, and two and a half years between the first three; each time I took a little more time. There were more children, there was more to do! My husband had this idea, he gave me the task and I went with it. It was a standing goal. And he was very supportive, but it really was my choice. If I would have said to him, "I can't do this again," he would have said, "Fine." Whatever he got would have been fine.

We were part of a trend, but I don't think we knew it. When I look back, I realize we were part of this drift to the right, and part of that is these larger families, but our circumstances were *our* circumstances. [My husband] wanted to have a big family, [and] I went along with it. It was easy; I had easy, good children. It became my life, with these children; that's what I did, I brought up these children.

And we were surrounded by people who wanted to have as many as they could. I think that was part of the religious ethic: to replace the victims of the Holocaust. It was the environment, but I can't tell you that [I ever] heard anybody say *it's your duty to have as many as you can* or *replace the ones that were lost*, and I didn't get that in my family. My father lost a brother at Auschwitz, both my parents had families in Europe that were wiped out, but I don't *think* I got it at home. It must have been a subliminal message in my generation.

It seemed people were stretching: if two would have been easy, you tried for the third, because it's your duty to have more to replace the ones that were lost. I looked around and it seemed most people had as many as they could, not just as many as they'd like. You had more than was comfortable, you pushed to have that extra child. The ethic was that it's a good thing to have as many as you can. And I think that's the message that's gone down to the next generation: *you're under an obligation; you shouldn't have two, you should stop and have another one; if you possibly can, you should make that sacrifice, etc.*

You know, honey, I went to a middle-of-the-road Jewish high school; I don't remember being told *you should go home and have as many children as you can*, and that's clearly the message now. I feel from my children that you don't ask a rabbi to use birth control [until] you're desperate.

One of my sons calls me up and tells me, "Ma, you're going to love this story." He went to his rabbi and says, "My youngest child is now two but the oldest is having a very big problem and we're struggling." And the rabbi answers him, "What, are you crazy? What are you coming to me for? You don't need to ask this question." He tells me this story because in the middle while he's telling it I said, "What, are you crazy?" He said, "Ma you're going to like this; the rabbi said exactly that." I said, "What did you have to ask for?" He said, "Because you're supposed to ask." I said, "But you don't need to ask, you *knooow* the answer." He said, "You're supposed to ask, get another opinion."

The point is, you see, you need to justify not having more children.

They won't test, nobody in my family will test [for genetic defects while pregnant]. With my daughter, they tested after she miscarried and because they told her the baby had a genetic defect, she decided that was the end of the road, she wasn't going to take a chance because she wouldn't test and she wouldn't abort, so she didn't have another one. A wise decision in my opinion, but it was her decision. I would have aborted a child with a defect.

In my last pregnancy, I had set up the test before I missed, I mean whatever God would send, He would send, but that was one thing that He sent the test to do, in my opinion. Whoever *paskened* all these *shailos*,[99] they don't raise the [children]: things happen.

B. *Sara*

Born early 1940s; married at age 19; 3 siblings; 9 children; several graduate degrees.

I have to attribute my thoughts on my educational background. My oldest sister . . . never went to *yeshiva*[100] elementary school . . . so her *hinukh*[101] really started in high school. My other sister started in the middle of elementary school, and I started in first

99. Answered the Jewish legal questions.

100. Used loosely for many kinds of Jewish educational institutions, from elementary school to adult education; particularly used for exclusively male higher institutes of learning.

101. Jewish education.

grade, and I'm sure that had tremendous *hashpa'a*[102] on me, because I loved, loved *limudai kodesh*,[103] I was always learning Torah . . .

I started Yeshiva University Central High School[104] and by eleventh grade the girls in my class started *frumming*[105] out together. This was in 1959–60. There was a woman that had tremendous influence on me, her name was Dr. Jaffin. She had a Ph.D. and she taught at City University. I was in awe of her because she was cool, she was with it, but she was *frum*[106] and she married a *kollel*[107] boy. And she was the first woman I saw that covered her hair.

At that point I grew up in a *sviva*[108] where people would even have social dancing . . . and about 15, 16 [years] our teachers impressed the importance of - you shouldn't have *negia*,[109] you shouldn't be touching a boy . . . I can't say how many were being influenced in this way, but my *hevra*[110] was . . . And I just had this feeling, we just have to do . . . we were put . . . maybe it was . . . I don't remember being taught this way, maybe we were the generation after the Holocaust and we kind of had to start a trend, of understanding the importance of what *Hashem*[111] wants of us . . .

I think it had a lot to do with my father-in-law, who had a large family and I saw the importance of it. Religiously I used to think of myself - how can I please *Hashem*? If I thought of the end of days my *din v'heshbon*[112] . . . what does *Hashem* really want from me? And I thought I would like to raise nice *frum*[113] people to do *avodat Hashem*[114] . . . what would give me the most *sipuk*,[115] in terms of what he wants from me, how is He most satisfied, is to bring as many Jewish children that I can into this world to do *mitzvot*.[116]

I don't remember asking about using birth control in the first few years, maybe if a doctor would say to me, "I don't think you

102. Influence.

103. Jewish religious studies.

104. Modern Orthodox girls' school.

105. Becoming religious.

106. Religious.

107. Higher institute of Jewish learning for men generally attended by married (rather than single) men.

108. Community, surroundings.

109. Physically touching a member of the opposite sex, normally prohibited outside the family.

110. Crowd, social group.

111. God.

112. Final judgment.

113. *frum; frumkeit; frumming out* – religious, pious; religiosity, piety; becoming religious.

114. Service of God.

115. Satisfaction.

116. Religious obligation, *also*, good deed.

should have children for a year," if a doctor said so, then . . . but I think, no, I don't know if I went to ask a *shaila*[117] afterwards (says in a wondrous tone, trying to recall, surprised), it wasn't . . . the idea of asking a *shaila* . . . I did it with my later children, it came later on. I became more educated in terms of the availability of a *rov* to ask a *shaila*. I don't think my parents asked *shailos*, I don't remember it being a discussion like, "I'm going to ask a *rov* . . . " It's not that they disregarded *halakha*, they weren't trained like that.

My husband went to Yeshiva University; it was very *halakhic*.[118] That made me realize you ask questions. A lot of [times] I would ask my husband and he would look it up [in a written code of law], not that people don't do that today . . . I remember at the beginning asking *kashrus*[119] questions, probably a *taharas hamishpoho*[120] question if I saw a [menstrual] stain or something, but much more so when I was midway into my thirties. It just evolved that you go to classes and the *rav* (rabbi) says, "Somebody called me up with a *shaila*," I said, *OHHH you can ask!* I look at my children, I think it's wonderful, everything is a *shaila*, it's part of education. I was part of the first generation - we weren't in the [ultra-Orthodox girls' school] *Bais Yaakov*, we were in [modern Orthodox girls' school] Central Yeshiva. My kids are aware that I used to go to a *rov* for *shailos* . . . I would certainly make them aware that we ask a *shaila*.

I remember once calling Rav Dovid Feinstein (or maybe it was Rav Luz) asking if I could use birth control, and I remember he said to me, "Well if you knew you were pregnant now - would you be climbing the walls?" And I said, "Well, no . . . " I wanted to space at that time, I was already up to my seventh, maybe my sixth, I felt maybe I should wait, and he said, "What would you do?" and I said, "I wouldn't be climbing the walls." He said, "Look, if you really feel you would be emotionally drained and it would be too difficult for you, you could do something," and in all honesty I didn't feel that was the situation with me.

I think he felt if it would be emotionally difficult, then you could use something, but if not, be honest with yourself that you should have more [children], that's what he was telling me, and . . . whenever I had a baby, I always wanted one more. Once I

117. *Shaila*, plural *shailos*—formal question addressed to a rabbi on any topic.

118. Focused on Jewish law.

119. Jewish dietary law.

120. Jewish law around sexual relations between a couple, especially the abstinence rules connected with menstruation and childbirth and the woman's going to the mikva, the ritual bath, as described in Hammer, *supra* note 77.

had my baby, I never said, "Oh, I want five children, eight children." I had a baby, I wanted to have another one.

I became a volunteer at *Nitza*,[121] for women who have postpartum depression [in Israel]. It's hard for a lot of girls . . . financially and emotionally, to take care of everybody. The very *frum* Israeli girls don't think about birth control, they don't have that as an option. A more educated person knows there's an option, knows to ask; to look it up. For a lot of *baalei teshuva*[122] there are not grey areas, everything is black and white. Some people don't even realize [birth control] is an option. It's difficult, very difficult.

I think the rabbis see a lot of people who aren't managing, I think they're more careful, very sensitive to it. They say, *how will they manage*? I think *esrim vearba hodesh*—24 months—is almost a given. I think it's based on the Torah, the weaning of Isaac, and *Rashi*[123] says they had this party. I think rabbis are giving more *heterim*[124] than they used to. They want people to ask more. I don't think they want family planning, but I think they want to give women a break that's *halakhically* val*id.*

C. *Leah*

Born mid 1950s; married age 24; 4 siblings; 11 children; bachelor's degree.

And so the answer to that question, why I wanted to have a large family: it really fit into my choice to live a Torah life, to live as an Orthodox Jewish woman and for me having a large family whether I wanted one or not—it came with the territory. If this was something that psychologically and physically would have been too much for me, I would have turned to my rabbi for guidance, but once I made the decision to be a Torah Jew, then that was one of the things I expected. Any challenges that I had were growing in that way—it's like my daughters come home from school and I'm exposed to a lot of discussion about what *tsnius*[125] is. They say, "Ma, can you pin the back of my collar?" Generally, I think of myself as a *tsnius* woman, and when I'm exposed to new laws, I say, "OK, this is difficult for me; I need to synthesize this into my personality and be careful about my collar line, to follow what I've learned the law

121. The Nitza Ctr. for Maternal Health, https://nitza.org [https://perma.cc/R9XD-7MHQ] (last visited May 24, 2024).

122. People who become religiously Jewish after being non-observant.

123. Preeminent biblical commentator.

124. *Heter*, plural *heterim* – permission from a rabbi to use birth control (in other contexts, it might be permission to do something else that would normally be prohibited in Jewish law).

125. Modesty/modest.

to be." Having a large family was part of that. Even when things were hard and I wasn't sure if I was ready to have another child, I made a decision that if I could, I would.

In my parents' generation, just like other parts of Jewish law, they weren't aware of this law surrounding birth control. In my generation, we were more knowledgeable about Jewish law and followed it more carefully and avoided birth control. My husband and I are idealistic and did not look for avoidance, for *heterim*. We did it with joy and are very happy with our decision.

Why did God not want me to use birth control? Because there's something holy in a life; life is precious. We were sharing in creation. I'm not the norm in the health profession when I advocate with a soft voice and say, *Life is precious even if a person is being fed by tube and nonresponsive and lying there*. It's holy and something I don't have control over, and not only do I not take it away because it's a waste of resources, but I'm going to advocate to prolong that life. My ideal is very radical in America; you have to whisper that life is holy. It's counter-intuitive: this is life and eleven children is copeable and you can give each love and attention as you would for an only child, that's the Torah life. One of the things I'm enjoying about having a large family is that people know it was a choice and that I did it anyway; this is a value of mine.

There were periods when I thought, *I can't cope*, so three times in my life I called a rabbi and he said, "Do this [contraception] for six months and call me back."

Six months is the rabbi's common sense; those first few months are the hardest time, before the baby sleeps through the night. I had babies two years apart, 14 months [apart], 18 months [apart], and I think when they are two years apart, it's *much* easier.

I didn't call [the rabbi] back [after six months]. I said [to myself], "I think things are OK," but I don't think they were. I know [now] I was depressed and at the time I didn't know I was depressed. I thought, "If only I try harder, I'll be OK."

At one time I had a more in-depth conversation with the *rov*.[126] He told me to use foam [contraceptive]. When I told him it wasn't very effective, he said, "If you use the pill, there's breakthrough bleeding." One time I had a *heter* to use a diaphragm. One time I called the *rov* and asked to use the IUD. I said, "It's back! And my friend from Israel is using it!" He said it was problematic under Jewish law and gave me blessings and encouragement. I thought I would react by saying, "You don't know what you're talking about; I need to use birth control!" Instead, I felt, "Sure, I can do this!"

126. Rabbi.

At the time that I was going through it, there were many times where I wished I wasn't pregnant again and then I remember thinking—which kid was it I wished wasn't born? I truly believe that this was part of God's plan and I am very grateful for what I went through.

I have a sister who does labor support and Lamaze classes and she's very involved with rabbis. I got the feeling from her that women are advised to wait [between births] also by the rabbis. Unlike years ago, today many rabbis are more aware of problems of abuse and when a woman says, "My husband's hitting me," he doesn't say, "Go home and cook him a chicken soup." They are aware of problems of postpartum depression and dysfunctional families, so that when a woman says, "Rabbi, I'm afraid to get pregnant," the rabbi doesn't say, "It will be fine, *Hashem* will give strength." He says, "Take something for a year," as opposed to six months. I spoke to someone in Israel too; I heard there's more birth control being used.

I know for my son . . . when he got married and he didn't have a job and [his wife] didn't have a job and we said to them, "How are you going to do it?" And he said, "I think it's dumb to have kids right away. We're going to enjoy our early marriage and I'm not going to have to worry about money." [My husband] spoke to my son's *rov* and he said, "Yes, this is very much in keeping with the advice we're giving them; to postpone having babies in the beginning." We were relieved because we thought the marriage was shaky . . . so the fact that the *rov* told them "Don't have children right away,"—whatever birth control they were using—good for them!

D. *Vicky*

Born late 1950s; married at age 25; 3 siblings; 4 children; bachelor's degree.

My first was a colicky baby; it was really awful because all he did was scream for 7 months and I couldn't figure out why women liked babies, if this was "babies." I was overwhelmed, we were moving, I was packing, I was juggling a screaming baby, my Hebrew was still semi-biblical, navigating was just a nightmare.

We went to the rabbi from the synagogue [in Israel]. He was just wonderful, in his fifties, really nice. He was *Aguda* black hat, deep dark black hat [i.e., ultra-Orthodox]. And we went to him, and I said, "I'm overwhelmed with this kid and my husband is going to start a residency [in the United States] and we're still going to be living a couple thousand miles away from our parents in a community where we know nobody and I'm going to be working and I just

don't think I can juggle it all!" And my husband is going on and on about how it's imperative, an obligation, to have zillions of children, blah blah blah.

And the rabbi turned to my husband and said, "Your wife is young, she'll have more children!" The rabbi said I could have a year.

He wasn't specific [about which birth control I should use]. I wasn't going to take the birth control pill, that was for sure. I still won't; I won't mess with my body that way. There was way too much male hormone in the pill and I'd seen a lot of women who had stroked out and I wasn't going to risk the pill. It's men, it's men; men are developing these medications so that they don't have to worry about getting the girl pregnant.

I wouldn't use the pill, but I also know that was one [form of birth control] the rabbis would let you use. But obviously I also knew that I had to use the birth control and not my husband and barrier methods were generally acceptable. So I just used a diaphragm.

I went to [ultra-Orthodox girls' school] *Bais Yakov*, I knew I had to get a *heter* . . . I knew, my husband knew, my husband went to *Yeshiva*, we all knew, there was never a question that we would ask for a *heter*. And I got pregnant on birth control.

After my second [child], I asked again. I got the second *heter* in the U.S. from a Young Israel black hat [rabbi]. It was about a week before I would go to the *mikva*. So I said, "Well, okay I'm not doing this [childbearing] again any time soon. We're packing it up and going to the rabbi." The rabbi's wife was playing with my first child in the other room. The baby is sitting in the pumpkin seat at our feet sleeping, God bless her. We're in the office and I'm explaining to the rabbi my issues. And at that point he really didn't want to hear from my husband. He said [to my husband], "This isn't your issue at all. You have your boy and your girl. You're done. You're done. Now it's just the woman here." So we talked for a while and he nailed it. He said, "You just don't do change well." And I said, "No, I don't, I like things controlled and moving is very uncontrolled, getting used to a new place is very uncontrolled, it's unpredictable." And he asked me, "What would you do if I said *no, you can't use birth control*?" . . . I just looked at him, I said, "I'm supposed to go to the *mikva* next month." I said, "I won't go." I said, "The only way to keep my husband away from me is not to go to the *mikva*," I said, "He can't divorce me for a year. I get a year off! All I want is a year!" I can petition for a divorce after 3 months, but he can't divorce me for a year. And so the Rabbi said to me, "Let's discuss the types of birth control that are permitted." I think he was surprised . . .

[It depends on] how you ask. My sister-in-law . . . called me up, she said, "How do you get a *heter*?" I said to her, "Cry." And she didn't have kids for three years so, after having Irish twins again and again. I knew that would work for her.

The rabbi said to me, "You have a *heter* for a year if you need it." And about three months after we moved, four to five months into the *heter*, my husband starts bothering me again about stopping using birth control. He was afraid if I stopped having children, I wouldn't have any more. And I told him, "I have a *heter* for a year." He said, "If you need it." It's interesting what each person grabs onto. And I think once we had the boy and the girl, he was really afraid because I had fulfilled my duty.[127]

So he got angry; he called the rabbi, he said, "She won't go off birth control; she says she has a year. But we've moved already, we're unpacked, she's got a job." And the rabbi said, "Is she settled in her job? Does she have friends? Does she know where to shop?" And he said "No, she's not really settled in her job; she's still figuring out the neighborhood."

So the rabbi said, "I gave her the *heter* because she doesn't do change well. She's still not settled, so give it a year." So I waited a year, and then I got pregnant, miscarried and then we did it again. At that point I figured if we're doing this third kid let's get it over with.

[After the third child,] I didn't ask; I stopped asking. I'd had 3 kids; we'd had the boy and the girl, I told my husband, "I know which birth control I'm allowed to use. I'm completely overwhelmed, and we don't need a rabbi to confirm that." That was that. At that point I felt that we'd asked enough times that we knew what the parameters were.

E. *Libby*

Born late 1960s; married at age 29; no siblings; 5 children; graduate degree.

My mother's father didn't trust anyone on religious matters, [he] was very *frum*, very strict, very careful it should be so and so. He served his *Hasidic rebbe*, was never the earner. My grandmother sewed for a living, working and taking care of everybody.

So my mother associated *frumkeit* with negative things: women work hard, they suffer, they don't get to learn, they don't know what's going on, and are not afforded respect. And the men come off with rules that you have to follow; religion in my house

127. As described above in Part I, under Jewish law, a man is required to have a girl and a boy to fulfill the obligation to "be fruitful and multiply."

was about a lot [of] rules. But my *mother* is rule oriented! Her *own* set of rules . . .

Seminary was transforming: on my own for a whole year, taking care of myself; it was mind boggling. I learned that there was so much to know. I've always been the kind of person who needed something to follow: some kind of map, guideline. I was never daring enough to figure things out on my own, [to] do what I felt like doing. I was always looking to see how other people were doing it. There was a Seminary rabbi who gave me clear guidelines [on] what to do, how to be good, to be a different person when I came back.

I went back to live with my parents and go to college nearby . . . I was trying to incorporate into my life what I'd learned in Seminary and my parents felt threatened; I wasn't very nice about it, there was a lot of conflict, stress. I tried to do something different but was afraid of being too different; it was safe to challenge my parents.

I considered my religiosity to be different from their religiosity, yes, and I did things with more conscious choice than they d*id.* My parents were religious because they were supposed to [be], for social reasons, for other reasons. I wanted to be honestly religious and understand what I was doing, idealistically, for the *right* reasons. I was very proud of my self-awareness, thinking about what my job in life is, what *Hashem* wanted from me. I felt like a *baalas teshuva* in a lot of ways, despite coming from a *frum* home; I rediscovered things and even now I'm still figuring things out.

From the time I came back from Seminary, I studied more, read books to figure out what to do with this aspect of my life and become more perfect. I would get together with a network of friends and learn, and that kept things exciting: becoming a better person, figuring out what kind of life I wanted to lead.

I've always been a perfectionist, trying to get better and be satisfied with myself, do the right thing to the utmost.

I got married, wanted to feel part of things—and a lot of figuring how many children to have is about *what do people do?* My husband and I talk about it often between ourselves, trying to figure out what's going on behind the scenes, what other people have and what seems to work. Taking our little poll of what's going on around. People don't talk about fertility issues; they don't talk about birth control; they don't talk about it to me.

But in our community, I feel you're supposed to want as many children as you can physically bear: the more the better. People don't speak about . . . "I'm ready to stop now." You're not done

until *Hashem* says you're done, decided by God. I'm sure people are getting *heterim*, I'm sure things are going on. Honestly in terms of us, the thought of looking for a *heter* is more scary than having another child. I don't know how other people deal with it. Nursing is a good spacing, but there are no guarantees.

Once we had a boy and a girl, maybe that rang a bell in our heads that maybe now we have a choice. I don't feel we had a choice. My husband also doesn't feel like we had a choice and his understanding was that you have children as long as you can have children. That's the understanding in the community, that's the *yeshivish* way.[128] My husband said [rabbi] Shlomo Zalman gave a *psak*[129] that if the parents had a girl and a boy already and the woman is over 40, then she can take birth control.

I think he heard this from somebody else, he didn't read this in a *teshuva*[130] or whatever it is, but the implication is that unless you're in that situation you can't. So we didn't even bother asking, the concept of having a child as a life decision, as life choice, one of these decisions you make like where you're going to live, where you send your children to school, and how many children you have: that doesn't feel very Jewish, feels like a kind of secular thing to me, and I think that I'm taking that from my understanding of the community.

Having children feels like a very Jewish thing, a very appreciated thing in Judaism. It's the *chius*: when we talk about how the Jewish people survived and everything. What's *chius*? The life, the way we stayed *alive* all this time. My understanding was that the more children we bring into the world the more we keep alive the Torah and the more we're able to continue this way. Everyone talks about intermarriage and the fact that we're dwindling and I feel like the *frum* community feels this great obligation to continue and to have more and more to make *up* for that almost, to make *sure* that we're still *around.*

At this point because it's more complicated, we don't have a connection to a *rav* (rabbi), to a real guide to tell us *halakhically* you are allowed to, you're not allowed to. I personally—I have an aversion to the concept of taking birth control, I don't like the idea of tampering with my body, I feel if I don't have to, I'd really rather not.

I kind of feel a lot of things in life; I cover my eyes and walk forward, in terms of risk taking, you want to say risk taking? That's the way I take risks, I don't jump into the pool, but I know that life

128. Proper behavior of a *yeshiva* graduate.
129. Expert response to specific Jewish legal question.
130. Expert response to Jewish legal question.

is full of risks, and some places I just don't pay attention and hope that *Hashem* will guide in the right way.

F. *Kim*

Born early 1970s; married at age 21; 1 sibling; 5 children; bachelor's degree.

When we got married, I was 21 and had a year left to finish my degree and we went to our rabbi to discuss birth control. The rabbi was relaxed in some ways. He said, "You don't want to have a kid while you're in the middle of finals, that's understandable." But on the other hand, he said, "You haven't had any kids yet", and so he gave us a *heter* to use birth control for three months, which would allow me to finish my degree before giving birth.

But what in fact happened was that I got married in September, used birth control for three months, got pregnant in December, finished my degree in July, and gave birth in September. But it was very difficult to be pregnant so quickly into a marriage. I was not feeling brilliant the whole pregnancy, and then having finals and giving birth so quickly after that. And that has long-term implications. That carries with you even after 15 years.

We didn't have the wherewithal, experience, education, or know-how to negotiate with the rabbis about these things. We were young and naive, and we thought everything will be fine, ho hum. Now, had we pushed it and said, "Look, I have a whole year of study, I'd rather not get married and wait," then I'm sure he would have said, "Fine, wait a year before you get pregnant."

I wouldn't say those decisions were the wrong decisions, that's just a life lived, a natural process, but if you're asking me how I made those decisions then, I definitely made them in a more vague, naïve, twenty-ish-year-old person way, which is what I was.

I can't say, "I learned it here or there," but birth control was an issue that both my husband and I thought to be of *halakhic* relevance. We didn't discuss it together formally, we definitely thought that issues of birth control would be a part of a rabbinic discussion. We wouldn't have made those decisions on our own.

It's interesting how we knew to ask a rabbi about birth control and it's also interesting at what point we stopped asking the questions.

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I was really low after giving birth. "I'm not doing this again for a while," I sa*id.* We went back to the rabbi and I explained how I was feeling, emotionally and health wise. He said, "This is fine,

this is what you need to do, don't worry about it," and he gave me a *heter* for birth control again, for a longer time.

Once you've had a kid everything changes: the rabbis' approach is relaxed. Everybody knows you're into this family thing, so it's fine to use birth control for a longer period. I think individual assessment and negotiation is important; for some young married couples giving them a year, a year and a half, with no pregnancy or children is an important part of establishing a relationship.

[I think rabbis are resistant to letting newly married couples use birth control because] they think, "How long will this go on?" And I understand that, but you have to be realistic about the background of people with whom you're making these negotiations. If you're a woman who comes from eight kids and wants to finish her degree after having two kids, maybe that will work, but if you're from a nonreligious background like myself, from a family of only two kids, having a child is a very different experience . . . You don't know how you're going to be affected by having children.

Anyway, when we had our second child, we were in Israel already. There are two years and two months between the first two . . . I was using birth control between them, but . . . I changed the form of birth control I used before our first child was born because it made me feel ill and I used a form that's less protective. But if I got pregnant it wouldn't be the end of the world, it wouldn't be exactly as planned, but I was happier to lose a little bit of control in order to feel like a healthier human being.

So the third child was born two years four months after the second, also in Israel.

And I'm trying to recall at this point what kind of *heter* we had between numbers 2 and 3, and I think we just got a blanket comfortable *heter*: well you've had two, you're on your way . . .

After the birth of the second child, we would discuss birth control with young couples we were friendly with in the rabbinic community [in Israel], mostly Americans. Not in *halakhic* discourse, much more practical, "Are you using this, are you using that?"

I had number 4 when I was 29 and there was procrastination. [My husband] thought four was a lot and possibly enough. Certainly, according to the *halakhic* opinions that we considered relevant to our lifestyle, a boy and a girl is required and any more is, "Lovely! Well done!" But we'd fulfilled that, and my husband's attitude was, "Well, that's good, that's done." We considered that that would be it, but I think I just really, I don't know why, I wanted another one, I can't explain it by any thought-out process.

I pushed for another one. It took [my husband] a little while; number 5 is almost three years younger than number 4, which is our biggest gap.

We did use birth control, the same birth control we used between the others, the non-sure, noninvasive one[131]—given it had not proven risky the other times. [My husband] is incredibly sensitive to what the more secure birth control did to my body even though in some ways we had decided not to have more children. I wasn't prepared to use more invasive form of birth control and he was OK about that, which is important in the relationship. If he was really opposed to having more children, perhaps he would have said, "Look, perhaps it's time to use something more protective."

But I just didn't want to be a body that couldn't have another child.

Eventually I did persuade him and we had another one . . . Also, we had had 3 boys and 1 girl so I thought, *either we're going to have one girl three boy scenario, where it will be a boy family, or we're going to have another girl and that will kind of balance things out a little bit*. When I say this, I feel like a lunatic to some extent.

I mean you can't make these decisions in this mad way . . . I just thought, I just felt, I had the feeling, that five was what I wanted to do, that's the truth. I also did have a strong feeling that once I'd done what felt comfortable, or able to manage, or whole in some way that I would *feel* it, I would say *I feel OK*. And I remember thinking after number 3, *no, I do want more children*, reasonably soon after giving birth; and the same was true of number 4, but not true of [my husband] so much, but once I had number 5, I said *OK*, I said *OK* . . .

Within the religious community I don't think it's so much a pressure as just a social norm. I never felt massive pressure to have loads of kids for religious reasons. I had such an eclectic group of friends, some had two or three, some had none and one friend who [had] 10, so there was definitely scope for me to find a place where I felt comfortable.

I feel now I'm at capacity in what I personally want to give to my children; this is what I can manage. I have certain expectations,

131. Kim distinguishes between different types of birth control for their effect on her body and their efficacy. She posits an inverse relationship between the "invasiveness" of the birth control and its efficacy, so that she had to choose between having her body "invaded" by a secure form of birth control, or not having her body invaded which came with a higher risk of getting pregnant. These decisions are true of other women interviewed too, having to choose between comfort and surety.

like I want them to do after-school activities, I want them to have time with me, I want to be able to speak to them individually, and this is what I can manage with this amount of children . . .

How are those decisions actually made? Some were made in a less precise way than others in terms of really thinking about it, and others were more active decisions—I might feel *right now is a good time to try for another one* . . . Who can be aware how autonomous we are, what fuels those decisions? We're in different relationships, within religious structures, within different cultural expectations and everything plays a part; but I always wanted a family that felt large-ish, always—even as a child and I wasn't *frum* then . . . I was very close to my grandmother who had five children; I always loved that there were so many brothers and sisters, the cousins. We were brought up with our cousins, very jolly, in and out of each other's houses; I really wanted that for my children.

I think that it's also an eldest child thing: I have to be responsible, because . . . God I sound so judgmental! I feel propelled to maintain, to continue, Jewish heritage and passing on; we're the *only* family with Jewish children.

It doesn't mean I have to have loads and loads and loads of kids, but it means that bringing up a solidly-identifying Jewish family is really important to me. It's not a quantity issue at all, my children are all very different people, and I'd want them to maintain their individuality. It doesn't mean cutting themselves off or being ultra anything; I hope they'll all feel [like] valuable, purposeful members of whatever society they choose to live in. Nevertheless, it would be lovely if they enjoyed the lifestyle in which they were brought up and wanted to have Shabbat and the other stuff; to continue some kind of Jewish, really positive identity.

It's constantly there when I think of my grandparents and who are their grandchildren; and they're all beautiful grandchildren, don't misunderstand me, but in terms of Jewish heritage, I kind of feel propelled, and responsibility: straight, plodding along, just keeping on going, keeping on.

G. *Ora*

Born early 1970s; married at 18 years; 2 siblings; 9 children; high school graduate.

My first four were born in Israel. I didn't ask for a *heter*. I struggled with it, never asked [to use birth control] till after my sixth. If I'd asked, very likely it would have been *yes*, but I felt the stigma: *what kind of a person asks that kind of heter, to grovel that my life is falling apart?* That's the perspective I had from living in

a very *shtark haredi*[132] community. When everyone's in *kollel* and everyone tries to be as *mahmir*[133] as possible, in a good way, trying to be the best they can be, it's hard to know when you're getting to the gray part.

The first time my doctor asked me if I wanted birth control I was in Israel after my third. I was horrified! *What an outlandish question! Where does he practice?* I thought.

It was expected that any woman physically and emotionally capable would have kids as many as God sent them, without any artificial efforts at spacing. I struggled: why should I go to a rabbi about something so personal? It's important to know your rabbi and they should know you. My first rabbi was so rigid, nice, but so rigid; I was very upset. I had a six-months *heter* and that wasn't relevant, I never got pregnant that fast anyway; I never went back. We had a lot of stress in our life; it would have been emotionally very difficult [to have another child]. The next time I spoke to the rabbi's wife, I asked, "How can I reconcile myself with the fact that my husband doesn't want kids and I do; what's the Jewish law about that?"

Now I have another rabbi; he has much more experience. We didn't speak to him about this issue. In the end, I said I didn't need to ask; I did it myself. I don't want six months; I want a *carte blanche*. Then I had kids two and a half years apart and that was much more relaxed. I was ready for it, instead of usually, *Oh no! It's too soon!* I needed to feel I had the choice, that's why I needed that *heter*.

Having more children is not in any way connected to this issue for me any longer. I basically have been told by my rabbi that there's no reason I should have more kids if my husband and/or I don't feel good about it. So the decision to have more kids is not a religious one at all. Up to six kids it was a religious issue: I was a pretty together person, what was my excuse to use birth control? My house runs well, why would I ask?

I didn't want a big family, couldn't imagine having more than five at the *very* most. I didn't want to be pregnant right away and wasn't happy a bit to find out I was pregnant a few months after my wedding. The process of enjoying and appreciating each of my kids as a unique blessing grew with time, and my views evolved to the point that I now would love to have a bigger family. I really think that every child is a special gift, and I would be crazy to turn down such a precious present.

I love, love, love my family size, and would never want to change it (except to expand it!) It just gets better all the time—I

132. Black hat, strict Ultra-Orthodox.
133. Strict interpretation of Jewish law.

enjoy all my kids so much, and it is a privilege to watch them grow up into such great people. I think it gets better because my attitude about mothering as an important job has developed enormously, my home management has gotten better, and my belief in myself as a good mother has gotten stronger. When my family was smaller, I didn't feel I could be competent enough to do a good job as a mother to even more kids, but as the family has grown, I have seen that a person's capacities do expand, especially when effort is made to learn better parenting/homemaking strategies.

I don't see having kids as a way to replace what was lost in the Holocaust, or anything like that. My only ulterior motive is that I enjoy them and really believe that more kids are a true blessing, not an obligation. Also, we never decided we had an ideal picture of how many kids we want, and to keep going until then. We take it one at a time, assessing where we are at, honestly - can we be good parents to all of our kids? Will having another child negatively impact the family? I am open to having more kids but [I] am not *trying* to bulk up the world's population!

I don't feel I am sacrificing to have a family this size; when the stress is on sacrifice, it brings to mind images of how hard it is. I don't see raising my kids as hard, but as rather meaningful and worthwhile. I can't think of anything that takes more skill, grace, and commitment than raising kids.

H. *Fruma*

Born early 1970s; married at age 25; 6 siblings; 5 children; graduate degree.

Bigger families are a Jewish tradition. In this community there's a lot of rhetoric; a speaker will come for inspiration and describe the fundamental approach: that every Jewish child born is a precious soul and step towards redemption and *Hashem* only gives you what you can handle.

These girls I talk to are confused as to why I have children and throw my energy into them. "Why don't you want to have your nails done and have time for yourself?" They thought I'd be a high-power banker in tight suits, independent. They thought my education was a ticket out. But staying home is the right decision for me right now. Children are a blessing, and I just don't toss it out. I'm lucky I'm financially able, but I still would like to go shopping more!

I don't see that working is connected with having children. People don't work to get time for themselves, they work because they have to. If you're leaving things in the hands of God, whatever happens, happens. Work's a decision you make based on sitting

down and calculating your income; family size is something not in our hands.

Then they say, "I can't have kids, I'm so overwhelmed, I'm going to ask a *rav* (rabbi), he's going to say, 'OK, you need your sanity.'" I hear it, but whoever taught me, treated the subject as sacred, you don't tamper with the possibility of a soul coming down. I wouldn't get into a car on *Shabbos*,[134] I wouldn't tamper with God's plan to increase the Jewish people. There [are] ways to use common sense, you could wait a couple of nights[135] but it's getting out of hand, people are saying they need peace of mind, I think they should *duven*[136] to *Hashem* and *Hashem* will give them peace of mind.

The whole world of *heterim* is unknown to me, I had no reason to go to a *rav* (rabbi), thank God. I knew a girl, she suffered from depression, she was on Prozac, she had a *heter* for the first six months, just to see out the beginning of the marriage. She was very young, she was shaky, she had serious mental problems. I didn't have anything I couldn't handle. I see a *heter* is something you go to when you really have a problem, not a way out or free ticket out of the obligation or burden [of having children]. I want to be able to have the financial ability to get help, so I can focus on my kids.

I. *Tali and Daniel*

Both born mid-1980s; married at ages 21 and 22; she has 12 siblings, he has 7; they have 2 children; Tali has bachelor's degree, Daniel has graduate degree.

Daniel: The first time and only time I asked a *shaila* was after the first child, I realized it's just this mushy thing.

Tali: All [rabbis] said six to nine months after the baby you don't have to ask. [The rabbi] said, "That's a given, we don't even need to discuss it."

D: Yeah, and he said two years is like . . .

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134. Sabbath.

135. "Wait a couple of nights" means waiting before going to the *mikva*, the ritual bath. After giving birth or during menstrual bleeding, a woman has the status of a *nidda* which requires sexual abstinence until the woman ceases bleeding and immerses in a *mikva*, a ritual bath. After immersion, the couple may resume sexual relations. When a woman has a regular ovulation cycle, the time for going to the *mikva* is in the middle of the cycle. Immersing in the *mikva* and resuming sexual relations normally coincides with peak fertility and high likelihood of conceiving. If the woman "waits a couple of nights" before going to the *mikva*, she might resume sexual relations so long after ovulation that she is able to avoid pregnancy. "Waiting a couple of nights" is a form of rhythm method for avoiding conception. *See* Hammer, *supra* note 77.

136. Pray.

T: Standard.

D: Standard.

Interviewer: Did he tell you what birth control you could use?

D: No.

T: No, he didn't have to because my doctor who was Jewish but not observant dealt with the *frum* community she told me! She went through all the birth controls and told me what's rabbinically OK . . . just sharing with me her wisdom.

D: The more I talked to people, the more I found out it was a sort of mushy thing where the rabbi does his psychological analysis, like "How does your wife feel?" What other area of Jewish law do they ask, "How does your wife feel, and how are your kids, and would it help if you got a cleaning lady?"

What?! [What if I had asked] "Is this kosher?" [and the Rabbi had answered] "Well, would it help if you got a cleaning lady?" Come on! If the rabbi is asking you if getting a cleaning lady will help, clearly it's a very, very mushy area of *halakha*. I remember asking my rabbi this, "What other area of Jewish law do you find 'What if you sent your kids to nursery?'" He said, "No, I can't think of any other area of Jewish law." I didn't say it [to make] fun. What other area of law is so subjective that you're asking these questions?

T: That sounds more like guidance than law to me.

VII. Analysis

The women interviewed have an unusually large number of children relative to the American and western majority and each one describes personal reasons for her childbearing decisions. However, they are also aware that they are part of a trend toward larger Orthodox family sizes in an era of a general decline in fertility; they know what they are doing is countercultural. The question this Article asks is what role Orthodox women's attitudes to the Jewish law of reproduction and birth control might play in the growth of Orthodox birth rates.

I begin by focusing on the concept of "Jewish law": the women do not use that term; they use the term, "*halakha*." *Halakha* is used dynamically by the women in these narratives, to mean law and lore and a *way of life*. Each woman discovers before marriage that *halakha* governs questions of reproduction, but they do not know the content of that *halakha*. Most of the women interviewed believe birth control is not used unless the woman passes a *threshold of adversity*, and a rabbi allows her to use it. Each woman has a different assumption about how high the threshold of adversity must be, but none believes using birth control is a matter of whim or

convenience. After asking rabbis about birth control and learning the principles of *halakha* by way of the rabbis' answers, the women stop asking questions and take the law into their own hands; they have learned to decide the *halakha* of birth control for themselves.

In this Part, I show how the women's attitude to the *halakha* of birth control progresses through a sequence composed of several stages. As the women's attitude to *halakha* changes, so does their use of birth control and their childbearing patterns. The interviews reveal that the law pertaining to birth control is not the sole cause of the women's high birth rates, but rather that the women and their rabbis have other, shared reasons for bringing forth large numbers of children, namely the replacement of losses of Jewish life.

A. *Evolution of Women's Attitudes to Jewish Law*

In this Part, I describe the evolution in women's attitudes to *halakha* over their lifetimes and over generations, and how those changing attitudes influence their use of birth control.

In the first stage of the evolution in the women's attitudes, *halakha* is composed of Jewish communal and family practice, carried from one member of the community to another, and one generation to the next, by observing and mimicking. Women in this stage treat birth control as outside the purview of *halakha* and have small families.

In the second stage, *halakha* is transformed into a divinely ordained, written code of law that governs a broader range of matters than could be observed and mimicked from Jewish practice. Women in this second stage treat birth control as within the jurisdiction of *halakha* and believe it may be used only if permission is obtained from legal experts: rabbis. In this stage, family sizes are large. From the rabbis' responses to their questions, the women in the second stage develop an understanding of *halakha* around birth control.

In the third stage, women engage with *halakha* around birth control as knowledgeable agents. They cease consulting rabbis and take the law into their own hands. In both the first and the third stages, women use birth control without asking rabbis' permission. Unlike the women in the first stage, women in the third stage know that *halakha* has jurisdiction over birth control. But by the third stage they have acquired expertise from the answers they receive to the legal questions they ask of rabbis and can apply what they learn in the context of their lives. It has yet to be seen whether family sizes will fall as more women move into this stage.

In proposing this schema, I do not consider *halakha* an independent institution that the women encounter and subject

themselves to. On the contrary, there is an interdependence between the women's childbearing decisions and *halakha* around birth control. The women and the rabbis are acting together in a period of history in which Jews have experienced large losses. I propose that the historical moment has a simultaneous effect on the desire of Orthodox women to bear children and the interpretation of *halakha* regarding birth control. Acting together, they may help explain high Orthodox fertility.

1. First Stage in the Evolution of Women's Attitudes Toward Jewish Law

In the first stage in the development of the women's attitudes to Jewish law, *halakha* is a way of life lived by religious Jews, learned by observing and mimicking the actions of others, particularly the previous generation.[137] Sara describes starting out in life observing *halakha* in this way, and then evolving to a different understanding of *halakha*.

> When I got married, I knew I was going to cover my hair because I had learned that already . . . But it was different in those years.[138] [My teacher's] husband learned in *kollel*, but I remember she wore a beret with a lot of pretty hair coming out. When I first got married, I used to have a long pony-tail coming out because [my teacher] had hair coming out. It was a process. And when did I start covering more of my hair? When my daughters came home from high school and said to me, "*Mommy*! You're only allowed to have a certain amount uncovered!"
>
> And I remember going to the rabbi of my community and he took a *Gemara*[139] and he really taught me the *halakhot* and then I started covering more hair, I was the kind of person pretty much if someone told me a *halakha* and I spoke to a *rav* [rabbi] about it and it was confirmed, it was important to me. I felt I was here to really do what *Hashem* wanted me to do . . . once I learned that my hair had to be covered, it had to

137. Note Haym Soloveitchik's description: "*Halakhah* is a sweepingly comprehensive regula of daily life—covering not only prayer and divine service, but equally food, drink, dress, sexual relations between man and wife, the rhythms of work and patterns of rest—it constitutes a way of life. And a way of life is not learned but rather absorbed. Its transmission is mimetic, imbibed from parents and friends, and patterned on conduct regularly observed in home and street, synagogue and school." Haym Soloveitchik, *Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy*, 28 TRADITION: A J. OF ORTHODOX JEWISH THOUGHT 64, 66 (1994).

138. Sara is describing her high school years, which were in the late 1950s and early 1960s.

139. Part of the TALMUD.

> be covered, once I learned that my sleeves . . . [My teacher] didn't talk about sleeves; I used to wear short sleeves . . . it sounds strange, because . . . for my daughters, it's not a question, but in my days, it was a process. My mother wore short sleeves, and my mother didn't cover her hair, and I thought what she did was always right, until I learned that the *halakha* was otherwise . . . it wasn't in the end that I was a goody-goody but . . . intellectually I had to be satisfied . . . I wasn't the kind who just said *oh yeah [sleeves] down to here and here* . . . If my *rav* said that was *halakha*, then I would basically accept it . . . I usually liked to get it from a source.

Initially, Sara learned Jewish practice by *watching* both her mother and teacher and copying them, because "what [her mother] did was always right." She notes that her parents' approach to the Jewish way of living was not guided by asking questions of rabbis: "I don't think my parents asked *shailos*, I don't remember it being a discussion like, 'I'm going to ask a *rav* . . .' It's not that they disregarded *halakha*, they weren't trained like that." In describing her parents' lifestyle, Sara uses the word *halakha* as a practice learned by observing and mimicking, and she contrasts that with her *training* in which she discovers that *halakha* means something else, a rule written down and shown to her by a rabbi. When there is a conflict between a rabbi's written rule, and a practice observed at home or school, Sara chooses the written rule. Moreover, it becomes a positive value for her to ask questions of rabbis who know how to look up texts, wherever possible, rather than rely on what she observes.

Leah similarly contrasts her approach to *halakha* and that of her parents: "In my parents' generation, just like other parts of Jewish law, they weren't aware of this law surrounding birth control. In my generation, we were more knowledgeable about Jewish law and followed it more carefully and avoided birth control."

Libby also describes her attitude to *halakha* in contrast to her parents' attitude: "I considered my religiosity to be different from their religiosity . . . and I did things with more conscious choice than they did. My parents were religious because they were supposed to [be], for social reasons [and] for other reasons. I wanted to be honestly religious and understand what I was doing, idealistically, for the *right* reasons." Libby considers the "*right* reasons" to be the "conscious choice" to follow the Seminary rabbi's guidelines rather than her parents' practice.

In this first stage, proper Jewish behavior is learned by observation, but the use or nonuse of birth control is unlikely to be observable. Any woman's births are a result of many factors, chosen and unchosen; if a woman does not disclose her attitude to

reproduction, an observer cannot determine her attitude to birth control merely by observing her. Unlike the laws regarding the Sabbath or kosher diet, which can be observed in action the home and on the street, women learning about *halakha* by observing their mothers and teachers are less likely to learn that birth control is under the jurisdiction of *halakha*, and therefore they can treat it as a personal preference. Especially in the United States, where observable Jewish (including Orthodox) practice has been to limit family size, women following their mothers and teachers would choose to use birth control and have small families. I therefore link this first stage in the sequence to a period immediately before and after World War II, in which Orthodox Jews "weren't aware of this law surrounding birth control," in Leah's words, and Orthodox fertility was not higher than the fertility of other Jews or other Americans.

2. Second Stage in the Evolution of Women's Attitudes to Jewish Law

In the first stage, the women understand *halakha* to be a set of activities and prohibitions whose authority derives from communal and family practice. In the second stage, *halakha* is transformed into a divinely-ordained legal system found in written texts. The women explain their relationship to *halakha* using the language of law, of judgment, and of God's authority, invoking words such as: *mitsvot* (legal obligations), *avodat Hashem* (divine service), *din v'heshbon* (final judgment) *shaila* (Jewish legal question), *heter* (permission or dispensation under the law), *psak* (Jewish legal ruling), and *teshuva* (Jewish legal responsum).[140]

Sara gives the strongest account of the change in understanding of "*halakha*." She discovers by *listening* to her daughters that

140. Sara: If I thought of the end of days my *din v'heshbon* . . . what does *Hashem* really want from me?
Leah: In my generation, we were more knowledgeable about Jewish law and followed it more carefully and avoided birth control . . .
Libby: I was very proud of my self-awareness, thinking about what my job in life is, what *Hashem* wanted from me . . . In our community, I feel you're supposed to want as many children as you can physically bear: the more the better . . . You're not done until *Hashem* says you're done, decided by God.
Ora: When everyone's in *kollel* and everyone tries to be as *mahmir* as possible, in a good way, trying to be the best they can be, it's hard to know when you're getting to the gray part . . . It was expected that any woman physically and emotionally capable would have kids as many as God sent them, without any artificial efforts at spacing.
Fruma: If you're leaving things in the hands of God, whatever happens, happens . . . whoever taught me, treated the subject as sacred, you don't tamper with the possibility of a soul coming down. I wouldn't get into a car on *Shabbos*, I wouldn't tamper with God's plan to increase the Jewish people.

"the *halakha* was otherwise" than what she observed from her mother and high school teacher. She goes to a rabbi to decide between the conflicting sources, and she chooses to follow what her daughters and rabbi tell her. Sara does not explain why her daughters' and rabbi's views prevail over her mother's and teacher's view, but she calls the process of elevating the written authority over the observed one "*frumming* out." By using this term, Sara implies that, in following her rabbi and his written sources, she considers herself to be living in a more religious, pious manner than she did when she mimicked her mother's and teacher's Jewish practice. She doesn't explain why she believes one form of religious observance is superior to the other. Perhaps it is the written form of law that appears more authentic to Sara than the passing on of tradition from mother to daughter.

Libby corroborates Sara, noting that the *halakha* written in texts and decided by rabbis is superior to the *halakha* observed from her parents: "My parents were religious because they were supposed to [be], for social reasons [and] for other reasons. I wanted to be honestly religious and understand what I was doing, idealistically, for the *right* reasons."

One possible reason why the women allow text-based *halakha* to supersede observation-based *halakha* may be the formal Jewish education that the interviewed women received, but that their mothers did not. In Sara's words, "I have to attribute my thoughts on [*sic*] my educational background. My oldest sister . . . never went to *yeshiva* elementary school . . . so her *hinukh* really started in high school. My other sister started in the middle of elementary school, and I started in first grade, and I'm sure that had tremendous *hashpa'a* on me, because I loved, loved *limudai kodesh*, I was always learning Torah . . . I started Yeshiva University Central High School[141] and by eleventh grade the girls in my class started *frumming* out together."

Women in the second stage have been taught that birth control is governed by *halakha*. But unlike the dietary or Sabbath laws, which must be taught in enough detail so that they can be observed, the law regarding birth control is not actually taught to these women. Nor did the women interviewed seek to educate themselves by reading about the law, even though there are texts readily available in their original form and in English translation.[142] The women of the second stage, who consider *halakha* a binding code of law, enter marriage having received messages prohibiting

141. Modern Orthodox girls' school.

142. For example, *see* texts cited in note 2.

birth control without a rabbi's permission, even if they cannot pinpoint their origins.[143]

a. Women Asking About Birth Control: The Threshold of Adversity

Every woman in this study except Carol enters marriage believing she needs to go to a rabbi before using birth control, but each woman does so at a different stage of marriage, after reaching a certain "threshold of adversity." Sara reaches that threshold after having six or seven children, because "maybe" she wants to wait before having another child. Ora asks after she has had six children, because another child would have been "emotionally difficult." Leah asks three times in her life when she feels that she "can't cope." Kim asks before marriage because she wants to finish her studies. Vicky asks when she is "overwhelmed with this kid and my husband is going to start a residency [in the United States] and we're still going to be living a couple thousand miles away from our parents in a community where we know nobody and I'm going to be working and I just don't think I can juggle it all!"

In contrast, Libby and Fruma never overcome what they believe is the *halakhic* presumption against birth control, nor do the *Nitza* mothers Sara volunteers with, who "don't think about birth control, they don't have that as an option." Sara believes they do not know *halakha* permits birth control and comments that a "more educated person knows there's an option, knows to ask; to look it up . . . " The *Nitza* mothers, however, may not be ignorant about the *halakhic* options. Instead, they may believe as Fruma does, that "you don't tamper with the possibility of a soul coming down. I wouldn't get into a car on *Shabbos*, I wouldn't tamper with

143. Leah: In my generation, we were more knowledgeable about Jewish law and followed it more carefully and avoided birth control.
Vicky: I went to Bais Yakov, I knew I had to get a *heter* . . . I knew, my husband knew, my husband went to *Yeshiva*, we all knew, there was never a question that we would ask for a *heter*.
Kim: I can't say, "I learned it here or there", but birth control was an issue that both my husband and I thought to be of *halakhic* relevance. We didn't discuss it together formally, we definitely thought that issues of birth control would be a part of a rabbinic discussion. We wouldn't have made those decisions on our own.
Ora: My first four were born in Israel. I didn't ask for a *heter*. I struggled with it, never asked till after my sixth. If I'd asked, very likely it would have been *yes*, but I felt the stigma: *what kind of a person asks that kind of heter, to grovel that my life is falling apart?*
Fruma: I didn't have anything I couldn't handle; I see a *heter* is something you go to when you really have a problem, not a way out or free ticket out of the obligation or burden.

God's plan to increase the Jewish people." Alternatively, the *Nitza* mothers may not want to be branded with "the stigma" that Ora articulates so forcefully, hearing the voice of the community going through her mind: "*what kind of a person asks that kind of* heter [permission to use birth control]*, to grovel that my life is falling apart?*" Ora believes early in her marriage that to even go to a rabbi to ask about birth control, her life had to be "falling apart," although she learns later that this is a misconception.

For Libby, Fruma, and the *Nitza* mothers, the threshold of adversity a woman must reach to use birth control is so high that they never reach the threshold. They believe that asking a rabbi to use birth control is a confession of failure as mothers and as religious women. Just as a religious Jew can use a car on the Sabbath only in extreme circumstances, when a life is at stake or in the event of serious illness, so the women believe birth control is allowed only in extreme circumstances. Sara, Vicky, and Kim understand *halakha* otherwise. Although they too believe *halakha* does not permit birth control without asking, they do believe *halakha* permits birth control before a woman is "falling apart."

b. When Women Ask About Birth Control, What Do They Ask, And How?

What the women ask their rabbis, and how they ask, changes as they acquire acumen on Jewish law. Kim wants to complete her studies before having a child, but she asks her rabbi to use birth control without the "wherewithal, experience, education or know-how to negotiate with the rabbis about these things." In arguing her case to the rabbi, Kim did not know what relevant facts to bring to the rabbi that he could use in interpreting the law. Her rabbi gives her permission to use birth control for only three months; she becomes pregnant immediately on ceasing to use it and has a child within a year of getting married. At the time of the interview, almost twenty years after marriage, she knows that "had we pushed it and said, 'Look, I have a whole year of study, I'd rather not get married and wait,' then I'm sure he would have said, 'Fine, wait a year before you get pregnant.'"

Kim's ignorance of her rabbi's calculus works against what would have been her best interests. She says she was content with the rabbi's answer at the time, but now that she is older and better educated—no longer "young and naïve"—she believes that the rabbi should have conducted his premarital meeting with her differently. He should have redressed the imbalance of power between himself and the young couple, the power he possessed through his knowledge of *halakha* and their ignorance of it. Kim implies that

her rabbi gave her an inappropriate ruling on birth control because he failed to probe her circumstances and account for them in his response. She can make this judgment because she has gained expertise through subsequent meetings with rabbis who, in answering her questions, have built her understanding of the *halakha* around birth control.

Vicky comes into marriage with some knowledge of *halakha* gained in high school. Her education gives her confidence with the rabbis; she knows what and how to ask, and she pushes back against her husband, who always wants her to have another child before she is ready. The rabbi that Vicky visits after arriving in the United States is her ally against her husband and an advocate for the stability of their marital union. In contrast to Kim's rabbi's lack of interest in Kim's circumstances, Vicky's rabbi inquires about the cause of Vicky's stress. Kim's rabbi answers her with little understanding of her emotional state, but Vicky's rabbi digs deeper to respond with sensitivity not only in discussing birth control, but also by confronting Vicky's husband so that Vicky feels supported and validated.

Some women share with each other their findings about the *halakha* regarding birth control,[144] but mostly the women gain expertise from their own interactions with rabbis. Kim changes her method of asking the rabbi once she becomes pregnant too soon in her marriage; after her first pregnancy, she presses him harder the second time she meets him. As her family grows, Kim gets a "blanket comfortable" permission to use birth control and then stops asking for permission altogether, as do Vicky and Ora. Tali and Daniel decide after their first meeting with a rabbi that *halakha's* "mushy" calculus regarding birth control means that this is not a question they need a rabbi to answer. Only Carol's son continues to ask a rabbi's permission to use birth control, even when the rabbi indicates that asking is unnecessary. The rabbi expects Carol's son to have learned from earlier discussions and his own learning how the law applies to him in his circumstances. The rabbi may also have wanted the couple to take responsibility for their family-building decisions at some point in their married life.

144. Vicky tells a cousin with Irish twins to "cry" when going to the rabbi to ask for birth control. Leah brings news from Israel of the IUD, "I said [to the rabbi], 'It's back! And my friend from Israel is using it!'" Kim's religious community in Israel discuss among themselves the types of birth control they are using.

c. The Answers: The Threshold of Adversity

The women reach a threshold of adversity before asking rabbis to use birth control, and rabbis have their own threshold of adversity—invariably different from the women's—that they expect the women to reach before they give permission to use birth control. Sara's rabbi asks her, "'Well, if you knew you were pregnant now, would you be climbing the walls?' . . . He said, 'Look, if you really feel you would be emotionally drained and it would be too difficult for you, you could do something.'" In determining whether to give permission to use birth control, the rabbi considers whether the woman is *climbing the walls*, whether she would be *emotionally drained*, and whether it would be *too difficult to have another pregnancy*. These are low thresholds of adversity. Almost any woman after giving birth and for substantial time afterward would be able to meet Sara's rabbi's standards.

Leah's threshold of not being able to cope is sufficient for her rabbi to give her six months on birth control. However, when she asks for a more secure form of protection than foam, which she found ineffective, her rabbi talks her out of using *any* form of contraception and instead offers "blessings and encouragement." Even though now she looks back and recognizes that she was depressed at the time, her rabbi's "blessings and encouragement" were enough for her to be enthusiastic about his refusal to let her use birth control.

Kim's rabbi recognizes that having "a kid while you're in the middle of finals" is adverse enough to allow her to use birth control exactly long enough so she gives birth immediately after finals, even though that meant Kim would be pregnant during the entire last year of her degree. Before she has her first child, Kim's rabbi only recognizes childbirth, and not pregnancy, as sufficient adversity. However, once Kim has her first child, the rabbi's threshold of adversity is reduced. The rabbi "knows you're into this family thing, so it's fine to use birth control for a longer period."

The rabbis' rulings are diverse, and their standards change as the women's family sizes grow. All of them (except Leah's rabbi) conclude that if a woman says she needs birth control, she should be able to use it. Eventually, Kim's rabbi gives a "comfortable, blanket *heter*"—permission to use birth control—and Ora's rabbi tells her she does not need to have any more children if she or her husband do not want to. At some point in a woman's childbearing life, the rabbis' threshold of adversity that must be met before birth control is allowed falls to zero. If a woman wants to stop having children, or space them, all the rabbis (except Leah's) allow them to do so.

d. Types of Birth Control

The women interviewed use many types of birth control; most rabbis do not specify a type that they must use. Vicky's first rabbi talks about a specific time frame, not type of birth control. She has her own calculus on what type to use based on her understanding of medicine and *halakha*, although the method she chooses ultimately fails and she gets pregnant. In an interesting reversal of roles, Tali's rabbi does not tell her which method to use: instead, her doctor "went through all the birth controls and told [her] what's rabbinically OK."; the doctor becomes the *halakhic* expert on Jewish law of birth control. Kim changes from a more "secure" form of birth control to a less secure one for reasons of personal comfort, unconnected to Jewish law.

Only Leah's rabbi has an opinion about the type of birth control she should use. When she asks for an IUD, he tells her that they create problems under Jewish law; rather than suggesting something else, he encourages her to continue living without any form of protection, which she does.

e. Time Limits

When the women interviewed receive permission to use birth control, the rabbis provide a time limit in almost all cases. The shortest period is three months, granted at the beginning of Kim's marriage. Kim believes the time was so short because she had not had a child, and the rabbis want to ensure that the use of birth control not extend indefinitely. In Kim's words, "They think, 'How long will this go on?'" But Kim believes that even so early in the marriage (immediately after the wedding), if she had asked the rabbi in a different way, he would have given her more time on birth control.

In contrast, Leah's son uses birth control for more than three months at the beginning of his marriage at his rabbi's suggestion. His mother reports that the rabbi understood that his "marriage was shaky." The rabbi explains, "Yes, this is very much in keeping with the advice we're giving them: to postpone having babies in the beginning." Similarly, Fruma reports about "a girl [who] suffered from depression . . . She had a *heter* for the first six months, just to see out the beginning of the marriage. She was very young, she was shaky, [and] she had serious mental problems."

Rabbis frequently permit birth control for six months in these interviews. Ora rejects this amount of time as not being "relevant," although Leah accepts it, taking whatever break she can get. Leah suggests that six months is "common sense" because that gives the mother enough time until the "baby sleeps through the night" before getting pregnant again. But Leah reports that at the time of

the interview, rabbis were giving permission for a year of birth control because they are "aware of problems of postpartum depression and dysfunctional families." A year is also the time that both of Vicky's rabbis give her.

Sara reports that rabbis give permission for twenty-four months, although it is not clear whether this means twenty-four months of birth control or twenty-four months between births. She postulates a biblical origin for this time frame. Libby reports unsubstantiated hearsay that birth control is only permitted after a woman reaches forty years of age.

The length of time that rabbis give for birth control changes depending on the age of the women asking and the numbers of times they have given birth. After giving birth many times, both Ora and Kim are given indefinite use of birth control by their rabbis.

Third Stage in Evolution of Women's Attitudes Toward Jewish Law

In the second stage, the women learn the rabbis' calculus in answering birth control questions, take control over their reproductive decisions, and usher in the third stage. The progression from the second to the third stage is expressed most forcefully by Tali and Daniel, who, after asking a rabbi to use birth control, discover that the rabbi's principles in answering their question are "mushy."

Daniel: The more I talked to people, the more I found out it was a sort of mushy thing where the rabbi does his psychological analysis, like 'How does your wife feel?' What other area of Jewish law do they ask, 'How does your wife feel, and how are your kids, and would it help if you got a cleaning lady?' . . . What other area of law is so subjective that you're asking these questions?

Tali: That sounds more like guidance than law to me.

This couple decides that the subjectivity of the law, which requires a rabbi to probe into the couple's psychological state, makes the question unworthy of a legal opinion. They imply that if there were an objective answer to the question of birth control, it would be a matter suitable for a legal opinion. When the expert's answer depends on eliciting subjective emotional states, it looks like what Tali calls "guidance," for which this couple does not need a rabbi.

Tali and Daniel suggest that a decision from a rabbi based too much on subjective factors may not rest on a rule of law at all. The couple expects their rabbi to be an expert in objective laws of universal application; that was the only reason they sought out his opinion. When he answers their question based on "mushy" factors, it makes his opinion irrelevant for them. But why does a subjective, fact-intensive ruling breach their sense of the suitability

of the matter for a legal opinion? One possible explanation of their view on the rule of law is as follows: "[w]hen an appellate judge comes up with nothing better than a totality of the circumstances test to explain his decision, he is not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact-finding . . . which means . . . there is no single 'right' answer. It could go either way."[145] Tali and Daniel expect a legal decision from a rabbi based on Aristotelian principles: "Rightly constituted laws should be the final sovereign; and personal rule . . . should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement."[146] Tali and Daniel are not interested in a "personal rule" from their rabbi, a rule that could go either way. If the rabbi knows the general rule, they want him to pronounce it and apply it to their case. A personal rule is not *halakha* as they understand it, it is *guidance*, and for that Tali and Daniel do not need an expert opinion.

Ora, in contrast, wants a *more* personal rule from her rabbi when asking him about birth control; "I struggled: why should I go to a rabbi about something so personal? It's important to know your rabbi and they should know you. My first rabbi was . . . nice, but so rigid; I was very upset. I had a six-month *heter* and that wasn't relevant [since] I never got pregnant that fast anyway; I never went back." Ora believes that in a matter so "personal" as birth control, a connection between the rabbi and the woman is essential in validating the rabbi's response. Ora recognizes that the *halakha* of birth control is subjective, and an appropriate answer requires a relationship with the rabbi, rather than his legal expertise. And because Ora's rabbi does not know her circumstances, she does not trust his response to her, nor does she return to ask him again. She wants "a *carte blanche*" and "choice" regarding birth control, neither of which he gives her.

When Ora asks a rabbi to use birth control and receives an answer that is not "relevant," she reaches a turning point in her attitude toward *halakha* and toward bearing children. She had her first six children for religious reasons, she says, because she didn't ask for permission to use birth control. She *chose* to have each of the children born after the sixth child individually. Her new rabbi tells her that "there's no reason [she] should have more kids if [her]

145. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 Univ. Chi. L. Rev. 1175, 1180–1 (1989).

146. Ernest Barker, The Politics of Aristotle, Bk. III, 127 (1946), *quoted in* Scalia, *supra* note 145, at 1176.

husband and/or [she did not] feel good about it," but she does not need this rabbi's approval. She has taken the matter of birth control into her own hands.

Kim, like Ora, believes a rabbi should not aim to be objective and indifferent to a woman's circumstances; on the contrary, she believes that "you have to be realistic about the background of people with whom you're making these negotiations . . . If you're from a nonreligious background like [she is], from a family of only two kids, having a child is a very different experience . . . You don't know how you're going to be affected by having children." For Kim, a critical role of the rabbi is having experience with young couples embarking on the journey of parenting and taking a proactive role in forming their expectations of early marriage.

Vicky and Kim begin their married lives by asking permission to use birth control but at some point stop asking. Kim finds that the role of rabbis in her life changes as she progresses from a young newlywed to an experienced mother: "It's interesting how we knew to ask a rabbi about birth control, and it's also interesting at what point we stopped asking the questions." Vicky reaches the point of *halakhic* self-sufficiency after the third child, when she had "stopped asking." She explains, "I'd had three kids; we'd had the boy and the girl, I told my husband, 'I know which birth control I'm allowed to use. I'm completely overwhelmed and we don't need a rabbi to confirm that.' That was that. At that point, I felt that we'd asked enough times that we knew what the parameters were."

Unlike the women and couples who move from the second stage of rabbinic dependence to the third stage of independence, Carol's son never makes the transition. He asks his rabbi about using birth control when his oldest child is having trouble, and the rabbi says, "What, are you crazy? What are you coming to me for? You don't need to ask this question." But Carol's son has his own principles, different from the rabbi's or his mother's: "You're supposed to ask, get another opinion." He doesn't *ever* feel it is proper to be answering his own birth control questions. This attitude is like Sara's, who teaches her children that asking a *halakhic* opinion is an act of submission to the system, even if the outcome of the question is known and the rabbis instruct you to stop asking.

Carol is an outlier among the women interviewed here, in practice and attitude to *halakha*. She does not report asking for permission to space her children, and she is displeased when her son continually does so. She considers birth control a "true choice," even when the choice is handed to the rabbis. "My children are choosing to have larger families. Jews always chose, in my opinion;

as soon as they figured out birth control, they used it. My kids act like . . . Catholics; it drives me nuts, but that's also a choice, a true choice." She contrasts her understanding of the Catholic approach, as an example of a system that forbids birth control entirely, and the approach of her children, who choose not to use birth control but who are not *required* to make that choice. Jewish law gives them the option to use birth control, and her children may the choice not to use it.

Abortion as a form of birth control is mentioned only by Carol. She is emphatic that she would have aborted a child with a "defect" irrespective of the rabbis' views. Her reasoning is as follows: "I mean whatever God would send, He would send, but that was one thing that He sent the test to do, in my opinion. Whoever *paskened* all these *shailos*,[147] they don't raise the [children]: things happen . . . " She uses the expression "whatever God would send, He would send." She repurposes the phrase, commonly used to justify refusing prenatal testing and abortion, to mean precisely the opposite. She says that God "sends" prenatal tests to give women the chance to terminate a pregnancy and concludes with a legal principle of her own devising: a male rabbi expert in *halakha* around birth control who does not live with the consequences of his decisions, *has no jurisdiction* to decide for the woman who will be forced to live with the consequences of his decision.

3. Replacement of Losses

Human birth rates are the product of both culture and biology. The cultural tools used to limit births (such as breastfeeding and abstinence) are themselves dependent on the survival of the group, because a culture survives only if the group that carries it also survives. The aspect of culture that controls the reproduction of its people also determines the reproduction of the culture itself. At one extreme, a culture that prohibits childbearing will die out because the people who carry the anti-natalist value will die out. At the other extreme, a culture that promotes childbearing even if there are not enough resources to raise children to adulthood also imperils the community carrying that culture. A group that develops optimal flexibility in its reproductive strategy will be successful and spread throughout the earth, as humans have done.[148] Peter Richerson and Robert Boyd propose that it is humans' unique capacity to learn and teach culture that has enabled them to spread

147. Answered the *halakhic* questions.

148. On the foundational expression of the idea of culture and community co-evolving, *see generally* Peter J. Richerson & Robert Boyd, Not by Genes Alone: How Culture Transformed Human Evolution (2006).

so widely. The ability to accumulate learning over a long period of time meant that humans thrived in rapidly changing environments more effectively than biological evolution would have predicted.

This Article asks what role Orthodox women's attitudes to the Jewish law of birth control—a crucial aspect of the community's culture of reproduction—has had on the growth of Orthodox fertility in the last fifty years. I conclude that women's attitudes to Jewish law do have a role in the growth of family size, as part of the larger response of Orthodoxy to the Jewish experience during and after World War II. The Orthodox community in America was poorer than other denominations immediately before and after World War II and it was predicted to disappear, but instead it has flourished, with increasing visibility, self-conscious pride, and economic and political acumen.[149] One emblem of its success is the large number of Orthodox children. Indeed, there is a positive relationship between different Orthodox Jewish communities' intensity of observance and their average family size.[150]

With the exception of Vicky, all the women interviewed here wanted many children. If Ora had known that Jewish law is as permissive as she discovers later, she may have spaced her children earlier in her marriage. But even *after* she learns that the law does not require her to have additional children, she has several more. Kim's young life is hampered by her rabbi's ruling, which limited the use of birth control early in marriage, yet she continues to have children even after learning she has birthed as many children as was required of her. Libby and Fruma never use birth control, believing in the sanctity of their mothering role in bringing forth life. Sara and Carol take opposite views of Jewish law—one being submissive and the other being independent—but both give birth throughout the fertile periods of their lives. The *halakha* of birth control is in the background of these women's lives. In the foreground is the drive to build Jewish families and community, which shapes and is shaped by *halakha*, the Jewish way of life.

What is the link between the large Orthodox family and the intensification of Orthodox and *halakhic* life? This Article argues that it is connected to the urge—conscious and unconscious, biological and cultural—to bring Orthodox life back to equilibrium after cataclysmic loss. The equilibrium theory of human populations is

149. Jack Wertheimer, *The Orthodox Moment*, Commentary 18 (1999). On the development of American Orthodoxy, *see generally* Zev Eleff, Authentically Orthodox: A Tradition-Bound Faith in American Life (2020).

150. United Jewish Cmtys., The National Jewish Population Survey 2000–01, 3–4 (2003); Goldstein, *supra* note 56. *See also* Schick, *supra* note 60.

well established, with the incontrovertible evidence that from the beginning of human history until the modern era, the population of humans grew exceedingly slowly.[151] While the equilibrating forces have always been weak, Ronald Lee finds that "as long as there is any trace at all" of the tendency to equilibrium, "no matter how weak, this tug, by its systematic persistence, comes to dominate human population dynamics over the long run, if not the short . . . "[152]

Observing how a community rebuilds after rupture has been flagged as "among the most important of challenges for anthropology and social science generally."[153] A community losing significant numbers cannot survive unless it recovers those losses—either through births or absorbing other groups, by migration (nations) or conversion (religions). The Jewish community has endured repeated, massive depletions and yet has endured ethnically and culturally. This historical experience is embedded in the genetic record of Ashkenazi Jews. Geneticists find that the concentration of Ashkenazi genes is the result of a series of bottlenecks: heavy loss followed by a rebound.[154] David Reich suggests that Ashkenazi Jewish genetics are "the legacy of a small town that had a tradition of very large families . . . Bottlenecks are often thought of as a crisis, but sometimes it's a group that's been incredibly successful."[155]

In explaining the high fertility of Orthodox Jews in her generation, Carol uses the language of replacement. "We were part of a trend," Carol says, "And we were surrounded by people who wanted to have as many as they could. I think that was part of the religious ethic: to replace the victims of the Holocaust . . . It must have been a subliminal message in my generation . . . I looked around and it seemed most people had as many as they could, not just as many as they'd like. You had more than was comfortable . . ." Carol links this subliminal trend of replacing the losses of the Holocaust to the attitude towards birth control. "I don't remember being told *you should go home and have as many children as you can*, and that's clearly the message now. I feel from my children, that you don't ask a rabbi to use birth control till you're desperate."

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151. *See generally* THE DECLINE OF FERTILITY IN EUROPE, *supra* note 64.

152. Lee, *supra* note 66, at 452.

153. Michael Fischer, *Emergent Forms of Life: Anthropologies of Late or Postmodernities*, 28 ANN. REV. OF ANTHROPOLOGY 455, 471–2 (1999).

154. Shamam Waldman et al., *Genome-wide Data from Medieval German Jews Show that the Ashkenazi Founder Event Pre-dated the 14th Century*, 185 CELL 4703, 4703 (2022).

155. Andrew Curry, *Meeting the Ancestors*, 378 SCI. 940, 943 (2022).

Sara's assessment is similar: "maybe we were the generation after the Holocaust and we kind of had to start a trend, of understanding the importance of what *Hashem* wants of us . . . I think religiously I used to think [to] myself - how can I please *Hashem*? . . . And I thought I would like to raise nice *frum* people to do *avodat Hashem* . . . to bring as many Jewish children that I can into this world to do *mitsvot*." Carol and Sara started families in the 1960s. In the generations before, Orthodox women were not having large families. It was only in the 1960s, after the American baby boom was over, that an Orthodox baby boom began. Perhaps it was, as Carol and Sara suggest, to replace the losses of the Holocaust. At the same time, a religious norm was developing to limit the use of birth control: the "particularized theology" that Goldscheider and McQuillan theorized as the cause of high religious birthrates. Each woman interviewed expresses personal reasons for her childbearing decisions, knowing that she is bringing children into a community that blesses and encourages her decision. The *halakha* around birth control works together with the communal urge to bear children, bringing the Jewish population to equilibrium in response to war and assimilation. For Kim, it is not the loss of war that drives her childbearing decisions, but rather that her children are the only Jewish children in her wider family. Kim's motivation is quite different from the genocide that Carol and Sara are responding to. Living in an open society with opportunities for assimilation, Kim finds she is the only member of her extended family to bear Jewish children. Because of this, raising a large number of Jewish children is particularly meaningful to her, replacing the losses of those absorbed into the larger society.

Throughout their mothering lives, the women interviewed transform the abstract commitment to having large families into the day-to-day of childrearing. Libby says that the enormous, unremitting daily work of mothering is supported by the "common understanding" of the women in her community. They do not necessarily share mothering in a practical or physical sense, but in a common understanding of the value of the enterprise; that Orthodox women are in it together, even if they do not know one another or know those whose losses they are replacing. Trent MacNamara considers a "community vision" essential in implementing a pronatalist policy:

> Childrearing is not easily reconciled with a postmodern vision of the good life centered on minimizing binding commitments and deconstructing shared moral systems. As a means of transcendence, childrearing is more demanding and less

> reversible than, say, work, art, companionship, experience, or ritual. Unless credible community norms make childrearing seem worth the additional commitment and price, less imposing forms of transcendent experience will remain more attractive.[156]

A "common understanding" between members of the Orthodox Jewish community as to the value of having and raising children is met by the "common understanding" of the rabbis as to the interpretation of the law of birth control, coming together to support the replacement of losses. The abstract commitment to the joint Jewish enterprise buoys Orthodox mothers through their childbearing and childrearing, investing in large families even as the surrounding culture increasingly turns from this way of spending time and resources.

Conclusion

The Jewish law of reproduction and birth control and the desire to replace Jewish losses have co-evolved in the last half century. Jewish law, or *halakha*, is part of Jewish culture that was lost in the Holocaust and continues to be lost through assimilation. *Halakha* is being recreated by Orthodox Jews and it has a role to play in rebuilding Jewish life after rupture. *Halakha* has a flexible view on reproduction, as observed in the range of responses the rabbis give to the women interviewed on the question of birth control. This flexibility allows the community to remain lean in crisis and to expand in times of surfeit. I argue that it is the flexibility of *halakha* around reproduction that allows both the *halakha* and the people who abide by it to survive. As a living cultural organism, *halakha* ensures that the people who adhere to it can adapt to changing circumstances.

156. Trent MacNamara, Birth Control and American Modernity: A History of Popular Ideas 180 (2018); for explicit Jewish legal authorities providing for change in long standing *halakhic* practice as a result of persecution of Jews, their decline in numbers, and therefore opportunities for family formation, *see* Tosafot on Babylonian Talmud, Kiddushin 41a; Kol Bo, opinion of Peretz of Corbeil No. 76; Mordecai Yaffe, Levush HaButz v'HaArgaman 37:8.