



Shabbat Mishpatim – Feb. 18, 2023 (Repro Shabbat)

Pam Adelstein, Abby Gillman and Lisa Fishbayne Joffe

This was a joint d'var Torah from three Minyan members.

Pam Adelstein:

My name is Pam Adelstein

Today's parsha enumerates 53 ordinances, or mishpatim, which instruct the Jewish people how to conduct themselves and delineate consequences for breaking these laws.

In verse 24:7, Moses told the people about these ordinances, and the people answered in unison, "Naaseh v'nishmah!", "we will do it, we will obey it!" This response is admirable, but what will happen when these laws are applied to actual circumstances? Because life – unlike the laws in the Torah- is not black and white. Life comes in infinite shades of gray.

Laws concerning abortion are written by politicians who legislate in a black and white manner. Providers of abortion care work with real people and are uncertain about how to interpret these laws when confronted with real-life complex clinical situations.

In Judaism sometimes one interprets a law more narrowly for a gray situation, to err on the side of caution. For example: kitnyot. The "little things" that could be confused with chametz, even though they are NOT chametz, so best not to eat them during Pesach. Or chicken - which was designated as fleishig because it was eaten in a way that meat was eaten - despite that the idea of separating meat from dairy comes from the prohibition against boiling a kid in its mother's milk and, as we know, chickens do not lactate.

At medical school graduations, many physicians take the Hippocratic Oath, which often is summarized as "Do no harm," which is also black and white.

Abortion providers and pro-choice organizations have been reviewing new abortion laws put into place after the Dobbs decision and the repeal of Roe v. Wade. I will now discuss examples of how these laws have dire consequences for health care.

Example 1: The most recent set of abortion laws criminalize abortion and make it a felony. Abortion providers fear prosecution, losing their medical licenses, and prison sentences. Many providers are now waiting to provide abortions to pregnant people with serious medical illnesses until these folks are critically ill. Until they are septic. Or in heart failure. An example - practitioners were told by their organization's lawyers to withhold abortions until a patient's condition deteriorated and their life was at risk. An affected physician decried, "The idea of having to wait until [they] get sick is... counterintuitive to what we train to do as physicians," she said. "But that's what we're being told by these laws we must do." Remember the Hippocratic Oath to do no harm?

Example 2: Cancer diagnoses raise questions as well. Some cancers grow and spread faster because of the hormones of pregnancy. People may choose to end a pregnancy for this reason, or because the recommended treatment would be toxic or lethal to a developing fetus. If abortion is not an option in their state, then they must carry their pregnancy to term and delay treatment. The cancer may then be more serious and more widespread than earlier in the pregnancy.

Example 3: People with ectopic pregnancies, which have zero chance of developing into a healthy fetus, and huge likelihood of causing morbidity and mortality, are not being treated promptly because of anti-abortion laws. Several medical treatments for ectopic pregnancy are the same as those for medical abortions. Providers are scared that they will be falsely arrested and prosecuted for providing abortion in these situations.

Example 4. Jews were forced to grapple with abortion in part because of the high prevalence of the Tay-Sachs gene in Ashkenazi Jews. Tay-Sachs is 100% fatal. Most states do not have provisions for permitting abortion in case of fatal fetal anomalies. Imagine being forced to carry a pregnancy to term, knowing your baby will die soon after birth.

Example 5: Some states have "heartbeat laws" – abortion is prohibited if a heartbeat is detected in the embryo or fetus. In Missouri, hospital doctors told a

woman whose water broke at a pre-viable gestational age that "current Missouri law supersedes our medical judgment" and so she could not receive an abortion even though she was at risk of infection. That hospital is now under investigation for violating a federal law that requires doctors to treat and stabilize patients during a medical emergency.

We Jews have a long history of covert disobedience. Covert disobedience is privately resisting a law you believe is unjust because you do not believe disobeying it publicly will change it, AND there is an identified other in danger in front of you that you have the resources to help. Examples are the Underground Railroad and righteous Gentiles hiding Jews from the Nazis.

Many abortion providers are engaging in covert disobedience. They develop elaborate referral systems where they can send patients to get care. They mobilize resources in states where abortion remains legal. Doctors travel or relocate to practice in different states. In these ways, abortion providers are making sure their patients can still get care while trying to minimize losses to their livelihoods and personal freedom.

Abby Gillman:

Though this may be your first "repro Shabbat," one cannot deny that the topic of reproduction is hardly alien to our place of worship. The Torah has never shied away from portraying women's bodily and emotional experiences of reproduction. The first woman, Eve, is told she will have to suffer pain in childbirth, *betzv teldi banim*, but when Eve births Cain, she does not talk about pain, rather, she exclaims: "I have acquired a man with Adonai's help."

The Torah reports that Sarah had stopped menstruating: "chadal l'hiot l'sarah orach ca-nashim". Sarah also speaks of the pleasure she would have, "Edna," when she imagines making a baby with Abraham. Rebecca struggles with fertility and, as we know, with a difficult pregnancy of twins who "crush" her from within. As for Rachel and Leah, and Bilhah and Zilpah, we hear more than we want to know about their contest to produce children. But Rachel's pain resonates most deeply and loudly of all the foremothers', and though she loses her life giving birth to Benjamin, (or maybe because she does), she rises to the mythic status of the mother of exiles -- to use the phrase Emma Lazarus used in her sonnet describing the Statue of Liberty. Jeremiah writes, "Rachel m'avakah al

baneah, ki enenu”: we want her to plead our case, because she has God’s ear.

And since Purim is coming, we can look ahead to reading about the lack of sexual autonomy which Vashti, Esther, and so many other young women (na’arot betulot tovot mareh; how many were there?) suffered as they waited for their “turn” with the King. Moreover, each was given a six-month treatment with myrrh (shemen ha’mor) and six months with other oils, which I understand was a form of ancient contraception. Because they might have wanted to get pregnant, but it wouldn’t do to have so many Ahashverosh-juniors running around the palace.

Today, in Shmot chapter 21:22-24, we read verses which have been called the “foundational source of the Jewish approach to reproductive rights.”

[שמות כ"א:ב-ב"ה](#)

וְכִי־יִנְצוּ אֲנָשִׁים וְנִגְפוּ אִשָּׁה הָרָה וַיִּצְאוּ יְלָדֶיהָ וְלֹא יְהִי אָסוֹן עָנוּשׁ יַעֲנֹשׁ בְּאִשָּׁר יִשִּׁית עָלָיו (כב)
בְּעַל הָאִשָּׁה

וְנָתַן בְּפָלְלִים:

וְאִם־אָסוֹן יְהִי וְנִתְּנָה נַפְשׁ תַּחַת נַפְשׁ: (כג)

[Exodus 21:22-23 5](#)

(22) When men fight, and one of them pushes a pregnant woman, and a miscarriage results (“her children leave her body”), but no other damage ensues, the one responsible shall be fined according to what the woman’s husband may exact from him, the payment to be based on reckoning. (23) But if other damage ensues, the penalty shall be life for life...

It’s a difficult passage for a number of reasons, but the main idea is that if someone accidentally causes a miscarriage to take place, they are obligated to pay financial restitution. But if “other damage ensues,” “ason,” referring to harm to the mother, or the death of the mother, this would be considered manslaughter or murder, in ancient times punishable by the death penalty. From the structure of this verse, Jews deduce that causing the termination of a pregnancy is not considered murder. Nahum Sarna notes that all ancient near eastern societies had similar laws about financial restitution in this case.

Now I will discuss just a few Talmudic sources.

The first one establishes that the fetus in the mother's body belongs to the mother. From the verse cited above, where the woman is "pushed," you might think that the fetus "belongs" to the father since he is the one who determines the fine following the miscarriage. But Talmud Arakhin 7a refutes that reading. In this scenario: a pregnant woman is to be executed; does one wait for her to give birth before executing her? No, פשיטא גופה היא – After all, it is her body!

Other sources look more closely at the status of the fetus. In Yevamot 69b, it states that "until the fortieth day, it is mere fluid" – "maya b'alma hi." That is to say, the fetus has basically no status whatsoever for the forty days of pregnancy. It is like water--a thing of no legal significance. Was this because of the prevalence of miscarriages? Was it a larger philosophical claim? Regardless, this text is a clear assertion that life does not begin at conception.

In Gittin 23b, in the middle of a Talmudic debate about whether a fetus is considered separate from the pregnant person, we see a clear statement by Rabbi Yehuda HaNasi who, as redactor of the Mishnah, holds great authority. He states that the fetus is considered part of the women's body, here her "thigh":

עובר ירך אמו הוא

A fetus is not an independent being; it is part of the body of the person carrying it.

Also relevant is the category of the "rodef," the pursuer. Jews are not permitted to spare the life of a "rodef," one who is out to kill us. Rambam in his *Mishneh Torah* writes, "On this basis, our Sages ruled that when complications arise and a pregnant woman cannot give birth, it is permitted to abort the fetus in her womb, whether with a knife or with drugs. For the fetus is considered a rodef of its mother."

Rabbi Aharon Lichtenstein, an influential Orthodox rabbi writing in 1991, wrote that "saving a life is not the only sanction for permitting an abortion. It would seem to me that issues such as kavod ha'briyot (dignity of persons), shalom ha'bayit (domestic peace) and tza'ar (pain), which all carry significant [Jewish legal] weight in other contexts, should be considered in making these decisions."

Rabbi Pamela Barmash, a specialist in biblical law, co-chair of the Committee on Jewish Law and Standards of the Rabbinical Assembly, and member of the Joint Beit Din of the Conservative Movement, sums up our position:

Jewish tradition values life above almost all else, and this means that abortion, according to our ethical and religious principles, must be permitted. Even when abortion was, and is, greatly restricted [[if not completely forbidden in the US (and the Western world)]] rabbis across the Jewish denominations have upheld a lenient attitude toward abortion when the mother's life or her physical or mental health is at risk, when the pregnancy has resulted from rape, and when the child will suffer death soon after birth. Jewish law permits abortion to be done both surgically and through medication. That is the Jewish view on abortion.

Research on Jewish women in all denominations shows that women today make personal decisions in dialogue with both medical and religious authorities to find solutions that make sense for their lives.

An (excerpted) Prayer for Repro Shabbat (from NCJW)

God of our ancestors— Elohei Emoteinu v'Avoteinu –

We affirm that you have created each of us in Your sacred image, endowed with the inherent right to dignity and autonomy;

We ask that you guide us towards a caring and loving community and nation that reveres this dignity in each of us.

(...)

May our country become a place of liberty and justice for all, and may our care for one another include care and respect for each other's right to good and affordable healthcare, including abortion care, and right to live safely and securely. AMEN.

Sources

[משנה תורה, הלכות רוצח ושמירת נפש א':ט'](#)

אף כי מצינת לא תעשה שלא לחוס על נפש הרודף. לפיכך הורו חכמים שהעברה שהיא (ט) מקשה לילד מתר לחתך העבר במעיה בין בסם בין ביד מפני שהוא כרודף אחריה להרגה. ואם משהוציא ראשו אין נוגעין בו שאין דוחין נפש מפני נפש וזהו טבעו של עולם:

[Mishneh Torah, Murderer and the Preservation of Life 1:9](#)

(9) This, indeed, is one of the negative mitzvot - not to take pity on the life of a rodef. On this basis, our Sages ruled that when complications arise and a pregnant woman cannot give birth, it is permitted to abort the fetus in her womb, whether with a knife or with drugs. For the fetus is considered a rodef of its mother.

יבמות ס"ט ב

אי מיעברא עד ארבעים מיא בעלמא היא

Yevamot 69b

If she is found pregnant, until the fortieth day it is mere fluid.

גמ' פשיטא גופה היא איצטריך ס"ד אמינא הואיל וכתוב (שמות כא, כב) כאשר ישית עליו בעל האשה ממונא דבעל הוא ולא ליפסדיה מיניה קמ"ל

[Arakhin 7a:12](#)

GEMARA: Isn't it **obvious** that the court executes the pregnant woman rather than waiting? After all, **it is her body!** "Pshita- gufa hi."

Lisa Fishbayne Joffe:

In the aftermath of the *Dobbs* decision in June of 2022, states around the country enacted or began enforcing laws banning or restricting abortion. According to the 2014 Pew *Religious Landscapes* Study, 83% of American Jews believe abortion should be legal in most or all circumstances. There have, so far, been 30 lawsuits brought against states challenging the validity of these laws under the Constitution of the United States and under the constitutions of the individual states. Of these 30 cases, 5 have been brought by Jewish individuals and groups, arguing that restrictive abortion laws violate their freedom to follow the dictates of their religion and the constitutional prohibition the establishment of a state religion. I want to share some reflections on these cases.

Some of these cases are suits by individuals. Three Jewish women in Kentucky who must use in-vitro fertilization to have children – because of infertility, advanced maternal age or vulnerability to genetic diseases like Tay-Sachs – argue that the Kentucky state law, which makes destruction of an embryonic life from the moment of conception a crime, makes it impossible for them to risk even trying to get pregnant. They fear that simply engaging with these reproductive technologies creates a risk of creating embryos which will die or be destroyed, or

a risk that they will be forced to carry a child with a fatal disease to term. They argue under these laws they are being compelled to follow Christian religious beliefs about fetal life rather than their own Jewish faith. Jewish women in Indiana are suing because they fear that the Indiana's 20 week abortion ban would put their lives at risk if they developed pregnancy complications after that point. They argue that Indiana abortion ban prevents them from following Jewish law which might permit or require them to have an abortion under those circumstances.

Some cases have been brought by Jewish clergy and congregations, either on their own, as in Florida, or in conjunction with clergy of other faiths whose values permit abortion beyond the limits established in new state laws, like Missouri. These include:

Congregation Dor-le-Dor and several individual rabbis in Florida, joined by Arthur Waskow, argue that the 15 week ban in that state puts them at risk of criminal prosecution for doing their job as Jewish clergy. Their role, they say, is to teach and preach and counsel about what Jewish law has to say about abortion, which is that Jewish law and values acknowledge no such arbitrary limits on the choice of abortion.

These rabbis claim they are at risk of being criminally prosecuted for aiding and abetting or counselling someone to have an abortion if they simply explain to them what Jewish law is and counsel them about their options under Jewish law. (SB 8, the Texas "bounty" law which allows third parties to sue anyone who counsels or aids an abortion beyond the 6 week ban there, seeking damages of \$10,000 or more, has a similarly chilling effect on speaking about the contents of Jewish law. SB8 Copycat laws have been enacted in Idaho and Oklahoma).

Rabbis of all denominations have joined with Christian clergy to sue the state of Missouri arguing that it is violating the state constitution's guarantee of a separation between church and state. These rabbis attest to the complexity of Jewish approaches to abortion and its inconsistency with the Missouri law's emphasis on fetal personhood from conception. Rather, they say, Jewish law treats abortion as a complex moral matter, effected by halakha and Jewish values like *pikuah nefesh* and *bztelem Elohim*.

Turning the language of *Dobbs* on its head, in which Justice Alito found that abortion rights were not "deeply rooted in American history or tradition", Rabbi Jim Bennett stated in his affidavit that "giving priority to the life, safety and well-

being of the pregnant person is widely accepted in Reform Judaism and deeply rooted in Jewish scripture and tradition...”

All of these cases are at early stages, with most still preparing for an initial trial. However, In the Indiana case, officially called *Anonymous Plaintiff No 1 vs. Medical Licensing Board of Indiana*, (but I like to think of as the ***Hoosier Jews for Choice*** case), a judge granted a preliminary injunction against the state finding the plaintiffs had a good likelihood of success at trial with their claim that the law violated Indiana’s *Religious Freedom Restoration Act*. They had proven that the law unduly burdened their rights to practice Judaism by prohibiting them from following Jewish beliefs relating to abortion.

The result, however, may be less than satisfactory. The remedy for violations of RFRA (state and federal) is not striking down the law as invalid for everyone, but carving out an exemption from the law for those whose religious rights have been violated.

This is where it gets ethically and strategically complicated. If this reasoning prevails when the case is heard by a full court, it will chip away at the validity of state laws that limit abortion, as applied to Jewish people, but would leave the law intact for the vast majority of those affected by it. As many of the clergy who made statements in these cases make clear, this result does not comport with Jewish values, which want to see the dignity and personal autonomy of all pregnant people respected, not just those who are Jewish.