



## Parshat Mishpatim/ Repro Shabbat- Feb.10, 2024

By Pam Adelstein

My name is Pam Adelstein. Today is Reproductive Shabbat, an annual celebration started by the National Council of Jewish Women to honor the Jewish value of reproductive freedom. It takes place annually on *Parshat Mishpatim*, when we read the verses commonly referenced as the foundation of Judaism's approach to reproductive health, rights, and justice. Individuals and communities across the world gather to celebrate Repro Shabbat and the Jewish traditions it honors.

I give this dvar in memory of my father, Harvey Adelstein z"l, who raised me to speak up for what is right. His second yahrzeit was this week.

And I give this dvar in honor of those who have suffered due to restrictions on reproductive freedom, as well as those who have fought and continue to fight to secure reproductive justice for all.

Last year at Ma'or's first Repro Shabbat Abby Gillman, Lisa Fishbayn-Joffe and I delivered a joint dvar. Abby reviewed Jewish text and the halachic basis in support of prioritizing the life of a pregnant woman over the existence of a fetus. Lisa shared legal challenges by religious organizations to try to reverse the downstream effects of the Dobbs Supreme Court decision, which overturned *Roe v. Wade*. And I spoke of the ethical dilemmas raised for physicians by restrictive laws passed after Dobbs.

One year later, we continue to see legal challenges to Dobbs. Women's lives and families' well-being continue to be put at risk due to the lack of abortion access. And politics still hamper physicians' abilities to practice medicine in a way that centers the patient at the heart of healthcare.

Today we read Parshat Mishpatim. Fifty-three of the 613 mitzvot or laws in the Torah are found in this parsha. Thinking about Jewish law and reproductive health law made me curious about how these laws are created and reinterpreted with changing time and place. By understanding this, hopefully we can gain ideas about how we can secure reproductive rights.

The laws in Parshat Mishpatim were communicated to the Jewish people in a curious way - Moshe transmitted it verbally to the people, then wrote it down and then reiterated it.

Moshe "went and repeated to the people all G-d's commands and rules." Then, the people agreed to do G-d's commandments with the word *na-aseh* - we will do. After that, Moshe wrote down all G-d's commandments. And then, Moses read what he had written. The people once again promised to do G-d's commandments. *N'a-aseh*. But this time they added that they will also "hear" or "obey" or "understand" the commandments - *v'nishma*. After the Jewish people stated "*na-aseh v'nishma*" Moshe sealed the covenant between G-d and the people by sprinkling blood from the sacrifices.

Why do the people first say that they will do the commandments - and then later add that they will hear or understand or obey the commandments?

One interpretation from an essay on the RabbiSacks.org website, is even as we do the commandments - n'a-aseh, there is room after the doing for us to hear and understand them in our own way – v'nishma.

This appeals to me because it opens the door for future interpretation – and adaptation - of Jewish law.

How has Jewish law evolved and been re-interpreted?

(From Jewfaq website)

"Jewish Law," starts with "halakhah" - which can be translated as "the path that one walks" given its Hebrew root Hei-Lamed-Kaf (הלך), meaning to go, to walk or to travel.

Halakhah comes from three sources: first: mitzvot d'oraita (an Aramaic word meaning "from the Torah"), second: mitzvot d'rabbanan (Aramaic for "from the rabbis"), and third: from custom - minhag.

Mitzvot d'rabbanan- from the rabbis - are commonly divided into three categories: gezayrah, takkanah and minhag.

A gezayrah is a law instituted by the rabbis to prevent people from accidentally violating a Torah mitzvah. We commonly speak of a gezayrah as a "fence" around the Torah. For example, the Torah commands us not to work on Shabbat, but a gezayrah commands us not to even handle an implement that you would use to perform prohibited work (such as a pencil, money, a hammer), because someone holding the implement might forget that it was Shabbat and perform prohibited work. The word is derived from the root Gimel-Zayin-Reish (גזר), meaning to cut off or to separate. As a physician, I understand abortion providers fretting over vaguely worded laws that threaten fines, imprisonment, or loss of medical license and opting out of abortion care. Anti-choice activists have used vague laws as a gezayrah to reduce abortion access.

A takkanah is a rule unrelated to biblical laws that was created by the rabbis for the public welfare. For example, the "mitzvah" to light candles on Chanukah, a post-biblical holiday, is a takkanah. The word is derived from the Hebrew root Tav-Qof-Nun (תקן), meaning to fix, to remedy or to repair. It is the same root as in "tikkun olam," repairing the world, or making the world a better place, an important concept in all branches of Judaism. Physicians often use medications for off-label purposes. A medication may not have been expressly approved by the FDA for a certain medical indication, but user experience and international research has demonstrated safety and efficacy of the medication regimen for the public good - a takkanah. In reproductive health, we saw this in the expansion of medical abortion beyond the original restrictive gestational age approved by the FDA to that proved safe in Europe - and the availability of medical abortion pills by mail during the pandemic, rather than mandated unnecessary in-person visits, which were barriers to care.

Minhag is generally a custom that developed for worthy religious reasons and has continued long enough to become a binding religious practice. For example, the second, extra day of holidays was originally instituted as a gezayrah, so that people outside of Israel, not certain of the day of a holiday, would not accidentally violate the holiday's mitzvot. After the mathematical calendar was instituted and there was no doubt about the days, the added second day was not necessary. The rabbis considered ending the practice at that time but decided to continue it as a minhag: the practice of observing an

extra day had developed for worthy religious reasons and had become customary. The root of this word is from Nahog – to lead- nun hey gimel.

Perhaps support for abortion is minhag America. While there are sources in our tradition to support strict and lenient approaches, the fact that 80% of American Jews support reproductive choice is a rationale to align with the lenient position.

In Jewish law, we have the original text of the Torah. Then, rabbis further provided instruction on laws and their interpretation and application. Finally, customs surrounding the laws are deemed important enough to become law. Na'aseh v nishma. We do and we understand.

In the United States law is also influenced by several forces. First, the legislative branch of government is where laws are proposed, debated, and passed. Second, the president can use executive orders and administrative agencies, such as the EPA, can make rules to direct the government to act in ways that have the force of law. Na'aseh v nishma.

Perhaps the Torah and the legislators are analogous, and the rabbis and Minhag - and executive orders and administrative agencies - are analogous.

If rabbis shape halacha, can we citizens shape United States law?

Citizens who want to check representative government and wealthy special interest groups have historically turned to the initiative and popular referendum process, which are methods for amending state constitutions.

A **ballot initiative** is a citizen-initiated proposal of a statute or constitutional amendment that appears on a state or local ballot for voters to decide.

A **veto referendum** is a citizen-initiated ballot measure that asks voters whether to uphold or repeal an already enacted law.

In the fight for reproductive freedom, citizens have utilized veto referenda and ballot initiatives to fight attempts to interpret language in state constitutions to limit abortion care. Voters have rejected measures that would have made it more difficult to pass a constitutional amendment protecting abortion. Voters also passed amendments to state constitutions to actively protect abortion access. After decades of focus on the courts, it is exciting to see these new ways of shaping reproductive law. I can imagine these abortion rights activists proclaiming, "Na-aseh v'nismha!" as they use the ballot initiative and the voter referendum to create American minhag.

In 2022, following the Dobbs decision, there were six ballot measures addressing abortion — the most on record.

Voters in California, Michigan, and Vermont decided on ballot measures to establish state constitutional rights to abortion. In Vermont, voters approved a constitutional amendment to establish a right to *reproductive autonomy*.

In California, Proposition 1 was approved, providing that the state cannot "deny or interfere with an individual's reproductive freedom ...," including the decision to have an abortion.

In Michigan, voters approved a citizen-initiated measure to provide a state constitutional right to *reproductive freedom*, defined as "the right to make and effectuate decisions about all matters relating to pregnancy, including ... abortion care."

In 2023, voters in Ohio approved a citizen-initiated constitutional amendment to provide a state constitutional right to "make and carry out one's own reproductive decisions", including abortion.

So – I've spoken today about how laws of the Torah were transmitted to the Jewish people and how rabbinic authority and tradition shape halacha. I also spoke about how US law extends beyond the legislative and executive branches to include ballot initiatives and voter referenda.

How do we tie all this together?

Just as the Jewish people had the opportunity to accept G-d's laws as given through Moses – to decide whether to do the laws as well as to hear or obey or listen to the laws – we can use our collective voice to be part of the legal process.

Often it feels bleak when restrictive laws are proposed and passed. We may feel powerless against the system. And yet there are ways to make meaningful change as ordinary citizens. Learning about this gives me hope and inspires me to consider what I can do to play a part in ensuring reproductive rights. I hope I have done the same for you today.

Shabbat shalom.