

## Abortion in Torah and in Arkansas

*Shabbat Mishpatim 5784*

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My students can tell you the danger of answering a question I ask in class. I am known for trick questions, such as, “Tell me about a wedding in the Torah” or “Where is a conversion ceremony in Tanach?” The answer in both cases is that there isn’t one. And an abortion in the Torah? There isn’t one.

This week, though, we read about a physical altercation that ends in unintentional assault of a pregnant person. That assault is a crime. If a miscarriage results, the offense is more severe. What comes next, though, makes the essential point: If the pregnant person were killed in that fight, the penalty would be infinitely harsher.<sup>i</sup> Killing a fetus is not homicide.

When our sages began to codify Jewish law in the Mishnah, published around 200 C.E., they taught that, if carrying the fetus endangers the pregnant person’s life, the fetus **must** be destroyed, right up to the moment of birth.<sup>ii</sup>

Arkansas lawmakers are apparently less concerned than the sages were about pregnant people’s welfare. Yes, Arkansas law permits abortion to save the pregnant person’s life, but only in a medical emergency. Arkansas law puts pregnant people at risk.

The matter is not theoretical. For example, a person with cancer can become pregnant, and a pregnant person can be diagnosed with cancer. Many forms of cancer treatment endanger the welfare of a fetus. Physicians will not prescribe those treatments to pregnant patients, which would be malpractice. The patient’s life is in danger, which would be exacerbated by delaying treatment. In a state with compassionate abortion laws, the pregnant person could choose: Endanger their health to sustain the fetus or terminate the pregnancy to pursue prompt cancer treatment. Absent a medical **emergency**, though, Arkansas law does not permit the pregnancy to be terminated. A doctor who performs that procedure could be imprisoned. A Jewish doctor who declined to perform the abortion—you know, to stay out of prison—would be violating the **Jewish** law that requires terminating a pregnancy that threatens the pregnant person’s life.

In 2023, in the first session of the Arkansas General Assembly after the Supreme Court’s *Dobbs* ruling, overthrowing *Roe v. Wade* and permitting states to limit or prohibit abortion in ways they could not for a half-century, Arkansas lawmakers had an opportunity to consider exceptions to the state’s near-total abortion ban. However, they rejected a proposal that would have permitted

terminating a pregnancy conceived through incest and another that would have empowered parents to end a pregnancy after the diagnosis of a fatal fetal anomaly.<sup>iii</sup> These concerns, too, are not merely theoretical.

*USA Today* reports that, before *Dobbs*, approximately one percent of American abortions were for pregnancies conceived through rape, whereas one-half of one percent were to terminate pregnancies conceived through incest.<sup>iv</sup> Those are small percentages but they represent significant human suffering. The same newspaper reported the findings of a highly esteemed medical journal that “there may have been more than 64,500 pregnancies resulting from rape in the 14 states that have enacted near-total abortion bans since *Roe v. Wade* was overturned in 2022.”<sup>v</sup>

Meanwhile, a study published in the *American Journal of Obstetrics and Gynecology* indicated that diagnosis of a fatal fetal anomaly is accurate more than ninety-nine percent of the time and that some two-thirds of people pregnant with these fetuses chose to terminate their pregnancies, mindful that the fetus was destined to die in utero or within the first four weeks after birth.<sup>vi</sup>

Different rabbinic authorities, studying the same sources, have come to different conclusions about the conditions under which Jewish law permits abortion. All agree, though, that the welfare of the pregnant person is the determining factor. A person who has been sexually abused should not be forced to carry their abuser’s crime with them for a lifetime. After receiving the diagnosis that a lovingly planned pregnancy has resulted in a fatal fetal anomaly, Arkansas law would compel the pregnant person to carry the pregnancy to term and then watch the baby die days later. Many would call that torture.

To be clear, pregnant people in a wide variety of circumstances—not all of them as horrifying as rape, incest, or a fatal fetal anomaly—need abortion care. Even though Jewish law permits only some abortions, American Jews do not expect that our religious requirements should be codified as laws of the United States or any state. With the First Amendment, we also oppose the imposition of abortion bans driven by other religious traditions, as is indisputably the case in Arkansas. Abortion bans are, quite literally, against our religion.

Now, Arkansans have the opportunity to sign petitions to place the Arkansas Abortion Amendment on the November ballot. That amendment would not reimpose *Roe v. Wade* on Arkansas in its purest form. It would “only” forbid the General Assembly from enacting **any** restriction on abortion in the first eighteen weeks of pregnancy and would require the state to permit later abortions in cases of threat to the pregnant person’s life, even absent an emergency, and also in cases

of threat their physical health or subsequent to the diagnosis of a fatal fetal anomaly.

Arkansans for Limited Government, which has organized this effort, points to polling indicating that fifty-one percent of Arkansans support this return of limited abortion rights in Arkansas. The campaign will be hard-fought. Polling also indicated that an attempt to do even more would have little chance at success.

The Trustees of Congregation B'nai Israel have endorsed the Arkansas Abortion Amendment. Our congregation will be supporting this effort with petition drives and get-out-the-vote efforts. Tonight, we have distributed information about the campaign. I urge you to use these handbills to let Arkansans for Limited Government know that you would like to get involved. If you want to be engaged in the Temple effort, please tell Annabelle or me.

We will not be alone. In my decades of advocacy for reproductive healthcare, I have learned that clergy and congregations can change the conversation from one in which religious groups uniformly oppose abortion to one that more accurately demonstrates that religious people are divided on the issue. To that end, I have invited local clergy to a meeting here on Tuesday, to begin organizing a faith effort in support of the ballot initiative. The response is almost overwhelming, so many Presbyterian, Episcopal, Methodist, Lutheran, and Unitarian ministers are eager to be included.

The Arkansas Abortion Amendment would legalize some ninety-nine percent of the abortions that were taking place in Arkansas before the *Dobbs* ruling. Moreover, the amendment would expand abortion access for people in parts of all six states that border Arkansas. Some say that it's not enough. We will have to make a lot of compromises in this campaign.

And, we must acknowledge, we will engage in this sacred endeavor to save lives and protect people's dignity with the full knowledge that we may not win. Our rabbis teach: *Lo alecha ham'lacha ligmor*. We cannot be required to complete the task, *v'lo atah l'hibateil mimeina*, but that is no excuse to desist from it. We must not be lazy. God is knocking at our doors, urging us to act,<sup>vii</sup> for the welfare of every pregnant person who desperately needs abortion care in Arkansas.

Amen.

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<sup>i</sup> Exodus 21:22-23.

<sup>ii</sup> Mishnah Ohalot 7.6.

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<sup>iii</sup> Tess Verbin, “Lawmakers reject two proposed exceptions to Arkansas’ abortion ban,” *Arkansas Advocate*, March 30, 2023, <https://arkansasadvocate.com/2023/03/30/lawmakers-reject-two-proposed-exceptions-to-arkansas-abortion-ban/>.

<sup>iv</sup> Alia E. Dastagir, “Rape and incest account for hardly any abortions. So why are they now a focus?” *USA Today*, May 24, 2019, <https://www.usatoday.com/story/news/nation/2019/05/24/rape-and-incest-account-few-abortions-so-why-all-attention/1211175001/>.

<sup>v</sup> N’dea Yancey-Bragg, “Tens of thousands of rape victims became pregnant in states with abortion bans, study estimates,” *USA Today*, January 29, 2024, <https://www.usatoday.com/story/news/nation/2024/01/29/rape-pregnancy-statistics-abortion-ban-state/72366953007/>,

<sup>vi</sup> [https://www.ajog.org/article/S0002-9378\(19\)32220-3/fulltext](https://www.ajog.org/article/S0002-9378(19)32220-3/fulltext).

<sup>vii</sup> Mishnah Avot 2.16.