

Free Exercise of Religion for Everyone

Shabbat Mishpatim 5786

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When my second-born was on his way into the world, his mother's broke late at night on December 30, 2002. Driving to the hospital, Toni told me, "He will be born in 2002." I thought she was making some kind of hopeful prediction, that her labor wouldn't go too long. I was wrong. Being a physician, Toni explained to me that the doctors wouldn't let her labor continue more than twenty-four hours after her water broke but would resort to a caesarian section if it went that long, for fear of infection, even septic shock, which could be deadly. All went well. Daniel was born the natural way, a few hours short of the new year.

Emily Waldorf was not so fortunate. She was only "seventeen weeks pregnant with her second child in September of 2024 when her water broke. It was far too early for there to be any hope of the baby surviving, and she was at risk of sepsis. She spent five days in a Fayetteville hospital where she also worked, but was denied both antibiotics (to prevent a deadly infection) and an abortion to save her life... On her fifth day in the hospital, Emily [hired] a lawyer who sought to convince the hospital that an abortion was legal in her medical circumstances. But all the hospital would agree to do was to put her in an ambulance to Kansas. Emily was saddled with thousands of dollars in out-of-state medical bills along with trauma, and fear for future pregnancies."ⁱ

Emily Waldorf is now the lead plaintiff in a lawsuit, *Waldorf v. Arkansas*, challenging Arkansas's near-total abortion ban as overbroad and vague. Those legal issues are outside my expertise. Moreover, I have no knowledge of Ms. Waldorf's religion, if any. The same is true of the other named plaintiffs: Teresa Van was delighted to be pregnant with her second child. However, after an ultrasound, she "was told that she had no amniotic fluid and she would lose the pregnancy." Ms. Van could not afford to travel out of state for an abortion. Instead, she had to carry the pregnancy for nearly two months of "weekly appointments with her OB/GYN, followed immediately by another appointment with a psychiatrist." Arkansas's abortion ban meant that she could not terminate the pregnancy until the fetus's heart stopped. A third plaintiff, Allison Howland, a married woman with a son, was drugged and raped when traveling for work. Because Arkansas law makes no exception for rape, she had to travel for an abortion, but she wanted to do that in a way that would preserve DNA in the hope of identifying her rapist. Arkansas police "informed her they would not be able to travel to Illinois to 'maintain chain of custody' so 'she should not bother' collecting any evidence."ⁱⁱ

If Waldorf, Van, or Howland were Jewish, our tradition would permit them to secure abortions. In Waldorf’s case, abortion would be required, since her life was endangered by the risk of frequently fatal septic shock that could result from the continuation of a non-viable pregnancy after her water broke. The Mishnah, the first comprehensive code of Jewish law after the Torah, states very clearly that, if a woman’s life is threatened in pregnancy, even during childbirth—that is, if the fetus is viable—her life must be saved, even if that requires killing the fetus.ⁱⁱⁱ In Van’s and Holland’s cases, the psychological torture of being forced to carry a doomed fetus, in one case, or a fetus resulting from a rape, in the other, would be sufficient for most rabbinic scholars to determine that abortion is permitted to safeguard the pregnant person’s wellbeing.^{iv}

What if Ms. Waldorf, Ms. Van, Ms. Howland, or a physician treating any of them were Jewish? Would they have a claim that their First Amendment right to free exercise of religion ought to permit them to secure or provide abortion care?

My son Daniel—that is, the baby who was born before the new year twenty-three years ago—explored a related question in a 2022 law journal article about Arkansas’s ban on gender-affirming medical care for minors. He first established that a Jewish provider would have a religious obligation to provide that care, since evidence demonstrates the risk of suicide when the care is unavailable, and saving a life takes precedence over any other relevant consideration. Daniel argued that this provider should have the right to exercise their religion by providing the care. However, he also argued that such a claim is unwise, because it would “legitimize the religious claims made by fundamentalists looking to defy non-discrimination laws” and therefore do more harm than help to LGBTQ Americans.^v

Daniel was addressing a contemporary American problem. In recent years, those seeking a religious exemption to laws have typically been conservative religious people, demanding their freedom to discriminate on the basis of sexual orientation or gender identity or to decline to provide medical care their faith opposes. Think Hobby Lobby.

Rabbi David Segal, who is an attorney with the Baptist Joint Committee for Religious Liberty, wrote more recently about whether Jewish patients and providers have a First Amendment right to secure or provide abortion care, a right that would extend to adherents of other religions that countenance abortion rights. He noted: “Progressive religionists have hesitated to make religious liberty claims.” However, he also explained that “a handful of such claims have emerged in recent years. Examples include a person indicted for giving water to a migrant who crossed the border illegally, and a woman cited for giving food to unhoused people in a local park in violation of a city ordinance. Both claimed that religious

liberty protections for their religion entitled them to an exemption from criminal laws.” Rabbi Segal concludes: “Especially after a recent series of Supreme Court decisions siding with free exercise claimants, the door of free exercise seems open wider than ever.”^{vi} Daniel, too, acknowledges that the horse has now left the barn. Religious liberty exceptions are being freely granted to conservative religious folk, so the time has come for us to assert our own First Amendment rights.

National Council of Jewish Women has designated this Shabbat as “Repro Shabbat”—that is, a Shabbat on which we ought to consider Jewish teaching about reproductive justice. NCJW did not choose tonight and tomorrow randomly. This week’s portion, *Mishpatim*, includes the Torah’s only discussion of the status of a fetus. Specifically, it envisions two men fighting, one of them inadvertently knocking into a pregnant woman. If she miscarries as a result—that is, if the fetus dies—the wrongdoer is fined. If she is otherwise injured or dies, the penalty is infinitely more severe.^{vii} In short, Torah does not regard a fetus as a person. In Judaism, abortion is not murder. Admittedly, rabbinic scholars disagree about the cases in which abortion is permitted, some more restrictive than others. For none, though, is abortion murder.

Reform Judaism is very clear: The decision about whether to have an abortion ought to be left to the pregnant person and their health care provider, along with anybody else the pregnant person chooses to include in their decision-making process—a spouse or partner, a rabbi, or nobody else at all.^{viii} Conservative Judaism’s stance is quite similar, a position explicitly rooted in this week’s portion^{ix}

Reform and Conservative Jews, alongside religious Americans who adhere to other progressive traditions, deserve the same First Amendment rights as Americans whose religious outlook is different from our own. The First Amendment is not in the Constitution to protect only the free exercise of religion by the majority, but for us all. As the cases of Emily Waldorf, Teresa Van, and Allison Howland demonstrate, the lives and wellbeing of pregnant people depend on it.

Amen.

ⁱ Abortion in America’s Amplify Legal Digital Toolkit: *Waldorf v. Arkansas*.

ⁱⁱ *Ibid.*

ⁱⁱⁱ M. Ohalot 7:6.

^{iv} “When is Abortion Permitted,” *Contemporary American Reform Responsa* 23-27, citing traditional sources that permit abortion in circumstances that endanger the “mother’s psychological state, <https://www.ccarnet.org/ccar-responsa/carr-23-27/>.

^v Daniel Block, “The Halachic Mandate for Gender Affirming Care: Examining the Potential Efficacy of Religious Liberty Claims made by Jewish Health Care Providers,” *Brandeis University Law Journal*, Volume 10, Issue 1, Fall 2022, p. 136.

^{vi} David Segal, “A Religious Right to Choose? Prospects for Jewish Free Exercise Exemptions from Abortion Bans,” 61 *Hou.L.Rev.* (2024), <https://houstonlawreview.org/article/92817-a-religious-right-to-choose-prospects-for-jewish-free-exercise-exemptions-from-abortion-bans>.

^{vii} Exodus 21:22-25.

^{viii} “Central Conference of American Rabbis Statement on Reproductive Justice,” <https://www.ccarnet.org/statement-reproductive-justice-united-states/>.

^{ix} “Conservative Rabbis Strongly Condemn U.S. Supreme Court Decision to Overturn Abortion Rights,” The Rabbinical Assembly, May 2, 2022, <https://www.rabbinicalassembly.org/story/conservative-rabbis-strongly-condemn-us-supreme-court-decision-overturn-abortion-rights>.