

Reproductive Justice – Rosh Hashana Morning Sermon
September 26, 2022 – 1 Tishrei 5783
Congregation Emanu-El of Westchester
Rabbi Howard J. Goldsmith

In 2006, my friends Rabbi David Young and Cantor Natalie Young were expecting their second child. At the last scheduled ultrasound before they planned to deliver a baby boy, the tech said, “uh oh.” They learned that the baby that Natalie hoped to deliver was brain dead and could not survive outside the womb. This left them with two impossible options: wait another month to give birth to a baby that could not live or go for a late-term abortion to one of the few doctors in the country who performed them. To get into the clinic in Wichita, Kansas, they needed to go past protestors who either did not understand or did not care or were too blind to the tragedy of their situation. Their physician assured them that it wasn’t their fault, that no one wanted to be there. Natalie described him as kind and compassionate and a man of faith. After the abortion David recalled, “While we both felt a sense of loss. We also felt a sense of gratitude that we could allow our son to rest in peace and not have to struggle.” Reflecting back on it later, David said, “There was nothing about this experience that would fit on a picket sign or a political campaign slogan. It’s way too complicated for that. And every single person has their own unique story just like ours.”¹ Three years later, their physician, Dr. George Tiller – a man so deeply needed by so many people in pain – was murdered at his church because of the important work that he did.

Abortion is a Jewish issue. It is a Jewish issue first and foremost because Jews get pregnant and need reproductive care. It is a Jewish issue because Jews get abortions. It is a Jewish issue because Jews have created ethical systems and legal structures concerning women and fetuses for thousands of years. And it is a Jewish issue because abortion intersects with dozens of other issues and ethical questions that are essential to who we are as Jews. Abortion care is about gender equity, agency, autonomy, family, healthcare, and religious values. Abortion is a Jewish issue because we Jews have diverse political interests and sometimes choose candidates whose interests align with ours on certain issues but not on abortion access. In other words, abortion is directly or tangentially related to vital questions that have ramifications for us as Americans and for us as Jews, issues that our tradition discusses and debates, issues that touch on values and perspectives passed to us from our parents and grandparents. So, I stand here not as a Democrat or a progressive or a reproductive rights activist, I stand here as a Jew.

Perhaps it goes without saying, but it is important to acknowledge, abortion is a fraught issue. In our country 35% of people think it should be legal in all circumstances; 13% think it should always be forbidden; and 50% think it should be legal in certain circumstances and the range of views within that group is vast.² Abortion is a fraught issue because while some people want to end pregnancies, many other people want desperately to become pregnant. Abortion is a fraught issue because any one of us who have been blessed with children know the hopes and dreams that we experience and foster during pregnancy, that we invest in that fetus. The Jewish community has always been pro-natalist, has always sought to encourage pregnancy and babies.

¹ <https://storycorps.org/stories/remembering-dr-tiller-10-years-after-his-murder-a-couple-reflects-on-his-abortion-care/>

² <https://news.gallup.com/poll/1576/abortion.aspx>

This would seem to run counter to a pro-choice perspective. All of these tensions are real and all of them make this fraught.

And still, the Jewish legal and ethical tradition is clear: people have the right to an abortion. It is important to understand the outlines of our laws and ethics around the issue. Not only can having that knowledge shore up our secular convictions, it also counters the dominant Christian anti-abortion rhetoric from a place of faith and religious conviction. We start in the book of Exodus, chapter 21:

When men fight, and one of them pushes a pregnant woman and a miscarriage results... the one responsible shall be fined... But if other damage ensues, the penalty should be life for life, eye for eye, tooth for tooth...³

The wording is confusing in English translation and even more vague in the original Hebrew. Specifically, is the “other damage” requiring life for life damage to the fetus or to the woman? Rashi explained that the fines were assessed for the miscarriage of the fetus.⁴ Any additional punishment was for injury or death caused to the mother.⁵ Here the Torah draws an important distinction, a distinction between the value of the fetus and the value of the mother. The fetus matters and has value as a potential person. But the fetus is not yet a person. The pregnant woman is a person and thus of greater, infinite value.

An important Talmudic text expands on and explain this position. It expands the principle from miscarriage to abortion by teaching that abortion is permissible even during labor if the labor is endangering the life of the mother. But, the text warns, if the majority of the baby has come out, we must allow the rest of the baby to be born even if it risks the life of the mother.⁶ The reason is that once half the baby is out it is considered a full person and the rabbis taught that we cannot sacrifice one person for the sake of another. So, according to Jewish tradition, not until we are out of the womb and in the world, do we become people. This lies at the heart of the difference between Judaism and classical Christianity which teaches that life begins at conception.⁷

The early church fathers seemingly derived this perspective from Plato who taught that the body was a mere vessel, and the essence of a human is the soul.⁸ If the soul is all that really matters, and if, as early Christian teaching insists, the soul is given at conception,⁹ then the fetus is a human in the most important and profound ways. Written at the same time, the Talmud teaches that the body and the soul are **both** integral to being human.¹⁰ The rabbis understood that one cannot be human without a body. So, no matter when the soul is given, the fetus is not a human until it exits the womb and lives on its own in the world.

³ Exodus 21:22-24

⁴ Rashi on 21:22 - ונתן THEN HE SHALL GIVE — i. e. the man that struck the woman shall give the value of the potential offspring.

⁵ Rashi on 21:23 ואם אסון יהיה AND IF THERE BE ANY FURTHER damage — in the case of the woman,

⁶ Mishna Oholot 7:6

⁷ Compare the 2nd century Onkelos Aramaic translation of Exodus 21 with the 3rd century Septuagint Greek translation.

⁸ Plato, *Laws*, trans. R. G. Bury, 1926, p. 545

⁹ Tertullian, *On the Soul*

¹⁰ Babylonian Talmud Niddah 31a

This leaves us two very different ideas, two very sincerely held religious perspectives, on when life begins. Hence, different views of abortion. For if life indeed begins with the gift of a soul at conception, then clearly abortion should not be permissible. If life begins at birth when we exist with both body and soul, then abortion can be permissible. These two perspectives, rooted in sincere and ancient theology and tradition, cannot be harmonized.

Later rabbinic works refined the Jewish approach to abortion. For example, one text discusses the changing status of the fetus over the course of the pregnancy.¹¹ Another speaks to the permissibility of abortion for serious birth defects or for pregnancies that threatened the physical or mental well-being of the mother.^{12 & 13} The large collection of legal rulings and their implications are very complicated.

And that is the key point: This is very complicated. So just what constitutes a permissible situation cannot be determined ahead of time. According to current rabbinic authorities, “The decision must be made on a case-by-case basis, in the context of each particular set of circumstances. And - here is where the line must be drawn – it cannot be fixed in advance by legal or religious authorities who do not know the woman in question and who are in no position to determine just what counts as her physical or emotional well-being. She is the only one in that position. Therefore, the decision for abortion can only be made by the woman herself.”¹⁴

And here we come to a major problem with the state of abortion law in this country. Here we come to a problem with the argument that we should just leave it to the voters or leave it to the states. The problem is not only one of individual autonomy and control of bodies – that is problem enough! The problem is also one of religious liberty. Jewish law does not forbid abortion. Jewish law requires abortion in cases where the mother’s life is in danger. Jewish law permits abortion for a wide range of reasons that can only be determined on a case-by-case basis. Any law restricting abortion therefore restricts our freedom to exercise our religion in the context of an intensely personal and intimate matter. The way that we practice our religion around abortion goes back through thousands – literally thousands – of years of serious theological and legal and ethical debate and reasoning. In the end, the Jewish position on abortion is rooted in the idea that people become people when they are born and, therefore, until that moment we preference the life and well-being of the mother over that of the fetus. This plainly contrasts the classical Christian understanding. And so, to impose their understanding on us profoundly burdens our ability to live according to our religion. And, if that does not violate the establishment and free exercise clauses of the constitution than I don’t know what does.

Several religious groups have already filed lawsuits against state-level anti-abortion measures on religious grounds.¹⁵ I really hope that at least one of these makes it to the Supreme Court and I cannot wait to see what happens. This newly constituted court seems to side with so-called

¹¹ Mishnah Niddah 3:7

¹² Mishneh Torah, Murderer and the Preservation of Life 1:9

¹³ Mishnah Arakhin 1:4 & later interpretations such as Peninei Halakhah, Simchat Habayit U’Virkhato 9:3:5 or Responsa Tzitz Eliezer 13:102

¹⁴ https://www.freehofinstitute.org/uploads/1/2/0/6/120631295/on_abortion.pdf

¹⁵ <https://www.politico.com/news/2022/08/02/florida-15-week-abortion-ban-faith-groups-00049241>

religious liberty every time: prayers at public school football games,¹⁶ funding for religious schools in Maine,¹⁷ and allowing a cake shop to refuse service to a gay couple,¹⁸ to name a few. The court claims that they have ruled for Christian practice over and over again because they truly believe in free exercise. Will they do the same when we get there with our claim? Will they rule for us when we explain a different theological understanding of personhood, an idea that cuts across Jewish denominations from humanist to Orthodox? Will they rule for us when the result of our sincerely held, well documented beliefs mean that Jews are allowed to have an abortion? I surely hope so! For anything else would establish Christian theology as the law of the land and lay bare a sickening hypocrisy while simultaneously allowing states to strip everyone who can get pregnant of their bodily autonomy. I'm skeptical.

Fear of hypocrisy at the Supreme Court is not the only hypocrisy that we will need to contend with now that Roe has fallen. Many of the people who advocated for the overturn of Roe, the people who successfully worked for a generation to change the court, the people who sanctimoniously preach about the value of life, promote other policies that will make life for all these new babies and their families much harder. Seventy-three percent of people who get an abortion do so because they say they cannot afford to raise a child.¹⁹ David Gushee, a prominent Pro-Life – Pro-Life – evangelical activist has noted this hypocrisy saying, "...a society that would roll back access to abortion [should] not be simultaneously weakening the social supports that would help make carrying a child thinkable."²⁰ Gushee then points to many services that pregnant people and new babies need in order to thrive: healthcare, nutrition, education, childcare, and in some cases supplemental income. Don't want to do it through government programs? Fine – fund it through private charity. We can argue that another time but in either case – resources will be needed to help with the forced pregnancies and the children resulting from forced pregnancies. And don't start with me about promiscuity. Don't tell me, "Well, she shouldn't have sex in the first place then she won't get pregnant." People who can get pregnant deserve bodily autonomy. Period. There are myriad ways to help people develop a moral, healthy, and safe sexuality. But, having states block abortion as a way to control sexuality denies bodily autonomy and the reality of our world today.

We can better engage with this important issue – we can engage with it more holistically – if we shift how we talk about abortion rights. Jewish tradition and American jurisprudence have always used a justification framework. A justification framework assumes that abortion is generally bad and only permissible if someone can provide an acceptable justification for terminating a pregnancy. If people cannot provide that justification, then they cannot get an abortion. And that means forced pregnancy. It also means that what society considers a valid justification can change at any time as we have seen in several states in the last few months. This does several things. It further disempowers people who can become pregnant by leaving their fate in the hands of lawmakers who cannot possibly know their unique circumstances or religious

¹⁶ <https://www.nytimes.com/2022/06/27/us/politics/supreme-court-coach-prayers.html>

¹⁷ <https://www.nytimes.com/2022/06/21/us/politics/supreme-court-maine-religious-schools.html>

¹⁸ <https://www.nytimes.com/2018/06/04/us/politics/supreme-court-sides-with-baker-who-turned-away-gay-couple.html>

¹⁹ <https://www.guttmacher.org/journals/psrh/2005/reasons-us-women-have-abortions-quantitative-and-qualitative-perspectives>

²⁰ <https://onbeing.org/programs/david-gushee-frances-kissling-pro-life-pro-choice-pro-dialogue-2/>

convictions. It also perpetuates a stigma around any abortion of any kind, including the kind that my dear friends had, no matter the reason for it.

On the other side of the same coin, when we advocate for access to abortion, we can find ourselves sounding like accidental eugenicists. For over a century, well meaning people with privilege have advocated for abortion rights by arguing that it needs to be available for people who “cannot afford” to raise children. This is often the reason people choose abortion. Yet history shows that advocacy for abortion access, especially in the early 20th century, was largely motivated by the desire to shape our country’s demographics. The upper crust of society often advocated for abortion access because they did not want more Italians or blacks or Irish or Jews from Eastern Europe. Too often, arguments in support of abortion today come perilously close to this – that a certain segment of the population is too poor, too uneducated, too new to America “to afford” to have large families – that is only up to the person in the situation and not the advocates for abortion rights. We need to make sure that our advocacy for abortion access focuses on individual bodily autonomy and religious freedom and does not come across as a desire to shape the look of our country.²¹

So how do we advocate for and argue for reproductive rights without sounding like eugenicists and without falling back on a justification framework? Dr. Michal Raucher, Undergraduate Director of Jewish Studies at Rutgers University, suggests that we expand the conversation, that we go beyond abortion to health care and then beyond health care to reproductive justice. Our tradition has always celebrated our children, we can also celebrate our families, families of every shape and size, families that we plan according to the endless variety of factors that make up a life. We can recognize, Raucher says that, “everybody has the right to have children, the right to not have children, and the right to raise their children in a healthy and safe environment... and may need support for raising them. And we need to be able to contain all of that”²² within our Jewish advocacy work for abortion access, for families, for anyone who can become pregnant and all of those who love them.

We have the chazak, the strength, to make this vision a reality. We have ethical and moral depth. We can navigate this complex issue in ways that hold those trying to conceive, those who are pregnant, those with newborns, and those who need to end a pregnancy. We can see and honor each person and each situation, the wondrous complexity and variety of human experience. We have the power to shape the politics in this country so that they allow everyone to live according to their own religious convictions and sincerely held beliefs. And we have a community to care for one another as we plan for families and honor each person’s choices. In this way, we will use our chazak, our strength and compassion and love to stand by those who can become pregnant and any choices that they make.

כן יהי רצון

May this be God’s will

²¹ See “Birth Control Battles: How Race and Class Divided American Religion” by Melissa Wilde

²² <https://www.hartman.org.il/no-75-how-jews-talk-about-abortion-transcript/>