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RESOLVING THE CONFLICT BETWEEN THE ETHICAL VALUES OF CONFIDENTIALITY AND SAVING A LIFE: A JEWISH VIEW

*Arthur Gross Schaefer and Peter S. Levi**

I. INTRODUCTION

The scenario, as presented in this Symposium, pits in mortal combat the two ethical values of keeping a confidence and saving a life. The scales of justice must carefully weigh the competing considerations to determine which would tip the scale in favor of one option. It is as if a judge listed the positives and negatives of keeping a confidence versus saving a life and drew some utilitarian conclusion. However, this approach is one of conflict resolution which presupposes two commensurate and competing sides which must have a victor and a vanquished. The Jewish ethical tradition occupies a different vantage point based upon a clear principle that spiritual values will trump socially based rules.

While this Essay will include the manifestation of a number of concepts, the goal is to look for an understanding of the hierarchical ethical system embodied in the Jewish tradition. Generally speaking, social laws receive less priority than laws embodying spiritual truths. Jewish wisdom provides practical information and guidance for the maintenance of society in addition to spiritual truths to guide individuals toward a closer relationship with God. For example, social laws are needed so that people do not harm each other and so that property rights are protected. At the same time, legal structures express essential spiritual values. Of course, ritual law and social law are not mutually exclusive realms since social laws often contain spiritual value.

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Accordingly, it is important to recognize the danger of the overlapping nature of Jewish law and avoid the appeal to rigorous legal structures at the expense of the spiritual aspects. This risk is especially true when legal aspects are independent of spiritual aspects. In the modern age where reason is sublime, ethical theory has moved away from the spiritual realm to the exclusively rational. In this rational sphere, society often neglects the spiritual aspects of law at the expense of the social law—generally understood to be the proper subject of consequential or duty-based reasoning. Society uses such phrases as “it stands to reason” to explain the obvious need and correctness of such laws. For instance, these rules may be based on utilitarian considerations of procedures that will produce the greatest good or least harm for the community. This often reduces ethical decision making to a mere mechanical utilitarian analysis.

On the other hand, the spiritual aspects of guidelines have value by their own virtue, irrespective of their social utility or inherent logic. Generally, the legal structures developed for the maintenance of a civilized society are merely concrete statements of spiritually based laws mediated by a particular society in order to solidify spiritual truths. However, rabbis were often worried that the dogma of the legal rules may impede or even do violence to their spiritual considerations. If such a conflict arose, it would be critical to interpret the legal rules in order to leave the spiritual truths intact. In short, the goal was often not mediating between conflicting values but interpreting practical laws so that spiritual truths are followed. Clearly, the rabbis’ concerns were to narrowly view socially important laws as consistent with spiritual truths. Accordingly, when a spiritual value is at risk it is important to avoid the blind application of legalism.

The biblical story of Jephthah perhaps best illustrates this dichotomy.

Jephthah made the following vow to Adonai: “If Thou wilt indeed deliver the children of Ammon into my hand, then it shall be, that whatsoever cometh forth of the doors of my house to meet me, when I return in peace from the children of Ammon, it shall be the LORD’S and I will offer it up for a burnt-offering.”¹

1. *Judges* 11:30-31, in *THE PENTATEUCH AND HAFTORAHS* 667 (Dr. J. H. Hertz ed., 2d ed. 1960).

Upon returning home, his only child greets him at the door, and Jephthah mourns that he made the vow that he has no intention of breaking.² For Jephthah, the vow taken to God will take precedence over every other value in accordance with the law of *Numbers*: “When a man voweth a vow unto the LORD, or sweareth an oath to bind his soul with a bond, he shall not break his word; he shall do according to all that proceedeth out of his mouth.”³

One might believe that Jephthah would receive praise for his willingness to keep a promise to God even when it involved the sacrifice of his daughter. Nevertheless, the rabbis severely blame Jephthah for not annulling a vow that ultimately caused the death of an innocent person. Moreover, the tradition also heavily criticizes the High Priest—the acknowledged legal authority of the time—for not finding a legal way to circumvent the disastrous vow. The rabbinic authorities over the past 2000 years saw laws as important constructs to be manipulated in order to maintain the integrity of the more important spiritual value of saving a life.

II. THE IMPORTANCE OF SAVING A LIFE

Life is one of the highest values in the Jewish tradition, equated with the worth of an entire world.⁴ This concept is clearly articulated in the *Mishnah*—the first Jewish legal code codified around 200 C.E.—which provides:

For this reason was man created alone, to teach thee that whosoever destroys a single soul of Israel, scripture imputes [guilt] to him as though he had destroyed a complete world; and whosoever preserves a single soul of Israel, scripture ascribes [merit] to him as though he had preserved a complete world.⁵

The value of each individual life extends well beyond the parameters of that person’s physical existence to all future generations to come. This great value is expressed in the negative duty not to murder and the positive one to save a life.

The Jewish tradition, in contrast to the American legal system, confers both positive and negative duties upon individuals. The

2. *Id.*

3. *Numbers* 30:3, in THE PENTATEUCH AND HAFTORAHS, *supra* note 1, at 702.

4. THE BABYLONIAN TALMUD, 1 *Sanhedrin* 37a, *Seder Nezikin* 234 (Rabbi Dr. I. Epstein ed. & Jacob Shachter & H. Freedman trans., 1935).

5. *Id.*

Talmud teaches that: “[N]othing . . . stand[s] [as a more important conflicting duty] before [the duty of] saving life, with the exception of [the duties to refrain absolutely from] idolatry, incest and adultery, and [premeditated] murder [which are absolutely prohibited even if one must suffer death in order to avoid them].”⁶ Except for the three negative duties mentioned, all obligations are pushed aside in order to fulfill the commandment to save a life. The obligation to save a life is therefore unique because it may supersede all other commandments. This concept is called *pikuach nefesh*: saving a life. *Pikuach nefesh* commands one to preserve a life and thus provide that individual the opportunity to perform *mitzvot*—commandments—that would otherwise be lost. Unlike our American legal system which does not compel an affirmative action to save a life, biblical law demands that one must act to save a life unless one’s own life may be put at risk. The imperative is found in the phrase, “[N]either shalt thou stand idly by the blood of thy neighbour.”⁷

Moreover, life is seen as a gift from God that is so highly prized that suicide and active euthanasia are forbidden by Jewish law.⁸ This discussion points out the extremely fundamental value placed by Jewish tradition on life and the saving of life. While confidentiality is important, it clearly is not ranked as a fundamental spiritual value.

III. THE IMPORTANCE OF CONFIDENTIALITY

There is no doubt that confidentiality is a highly respected Jewish value. One is strictly forbidden to reveal a private conversation to another without expressed permission from the original speaker.⁹ And “[t]hou shalt not go up and down as a talebearer among thy

6. THE BABYLONIAN TALMUD, *Yoma* 82a, *Seder Mo'ed* 404 (Rabbi Dr. I. Epstein ed. & Leo Jung trans., 1938).

7. *Leviticus* 19:16, in THE PENTATEUCH AND HAFTORAHS, *supra* note 1, at 501.

8. The limited exceptions regarding suicide can be generally categorized as a situation involving an outside human being that would cause an individual to engage in activities that desecrate the divine name. See THE BABYLONIAN TALMUD, *Gittin* 47b, *Seder Nashim* 209-12 (Rabbi Dr. I. Epstein ed. & Jacob Shachter & H. Freedman trans., 1936); 1 *Samuel* 31:3-4, in SAMUEL I: A NEW ENGLISH TRANSLATION OF THE TEXT AND RASHI WITH A COMMENTARY DIGEST 246-47 (Rabbi A. J. Rosenberg ed. & trans., 1976). For a helpful discussion on the Jewish considerations when dealing with euthanasia, see BASIL F. HERRING, JEWISH ETHICS AND HALAKHAH FOR OUR TIME: SOURCES AND COMMENTARY 67-90 (1984).

9. THE BABYLONIAN TALMUD, *Yoma* 4b, *Seder Mo'ed* 13-17, *supra* note 6.

people.”¹⁰ An important consideration is the possibility of harm to the individual whose confidentiality is breached.

Maimonides, one of our greatest rabbis, in his twelfth-century codification of Jewish law,¹¹ elaborates on the concept of the talebearer from *Leviticus* 19:16: “Who is a tale-bearer? One who carries reports and goes from one person to another and says, ‘so-and-so said this’ or ‘such-and-such have I heard about so-and-so.’ Even if he tells the truth, [the tale-bearer] destroys the world.”¹² The implication is that it is wrong and harmful to tell falsehoods and slander, but it is also wrong and harmful even if it is the truth. In American law, the “truth” is an absolute defense against a charge of defamation. As seen above, Jewish law generally prohibits repeating even a truthful item.¹³

The law goes further and forbids breaching another’s confidentiality even if there is no harm. Based on the same verse in *Leviticus* 19:16, Rabbienu Gershom¹⁴ ruled that mail carriers were prohibited from reading other people’s mail without permission.¹⁵ Even if the mail carriers told no one that they read the mail and kept the information to themselves such that no harm could follow, it was still forbidden. Israel Meir Hacohen, the Chofetz Chayim, writes:

If someone tells you a secret, you are obligated to conceal it from others, since by repeating the secret information you could cause damage to the person who confided in you. In any event, even if no damage could possibly be caused, it is wrong to go against the other person’s wishes.¹⁶

With respect to confidentiality, that certain information is the truth or will not cause any harm to the individual does not provide a

10. *Leviticus* 19:16, in THE PENTATEUCH AND HAFTORAHS, *supra* note 1, at 501.

11. *Hilkhot De’ot* ch. 7:2, in THE BOOK OF KNOWLEDGE: FROM THE MISHNAH TORAH OF MAIMONIDES 14 (H.M. Russell & Rabbi J. Weinberg trans., 1981) [hereinafter BOOK OF KNOWLEDGE].

12. *Leviticus* 19:16, in THE PENTATEUCH AND HAFTORAHS, *supra* note 1, at 501.

13. The exception to the rule of keeping harmful information confidential is when the party or a third party may be forming a partnership or may cause harm to a third party ignorant of this information.

14. 965-1023 C.E.

15. 3 THE JEWISH LAW ANNUAL 128 (1980) (noting also that Gershom’s edict is cited in Be’er hagoleh, *Yoreh De’ah* 334:123). The prohibition against talebearing may be “equally applicable whether the bearing of tales is directed to another person or to oneself.” *Id.* (citing 1 SEFER HALEKET, no. 173).

16. RABBI ZELIG PLISKIN, GUARD YOUR TONGUE ch. 8:5, at 163 (1975) (*quoting* Israel Meir Hacohen).

reason to breach one's confidence. Confidentiality is an important value but we need to understand whether it warrants the same consideration as saving a life.¹⁷

IV. CONFIDENTIALITY AND SAVING A LIFE ARE NOT CONFLICTING SPIRITUAL VALUES

The classification of saving a life as a fundamental principle of Jewish law is not dependent upon a social rationale. In contrast, confidentiality may be justified on grounds of social utility, namely preventing harm to others. Certainly, such arguments can be and are made in the secular world, but these are not necessary from the Jewish perspective. Saving a life is an absolute spiritual value and when a fundamental value is at stake, socially useful doctrines are interpreted to sustain the fundamental principle. For example, the rule of not eating on Yom Kippur—a socially useful doctrine—is put aside when someone is significantly ill.

Strangely enough, the two values in question in our discussion—confidentiality and saving a life—are alluded to in the same verse of Scripture, *Leviticus* 19:16: "Thou shalt not go up and down as a talebearer among thy people; neither shalt thou stand idly by the blood of thy neighbour: I am the LORD."¹⁸ The juxtaposition of the two parts of this verse is not an accident. The latter half is brought to bear on the former. The first part of the verse provides that privacy and confidential information cannot generally be divulged.

17. With respect to the case under consideration, Jewish tradition does not include a sacramental, confessional tradition. This does not imply that confession has no role in a Jew's life. Confession, forgiveness, and changing one's behavior are considered essential parts of one's repentance. Despite our transgressions, we have the ability to change and become better people, and confession is a part of this process. Yet, this confession is often between the transgressor and the individual violated and between the transgressor and God. And like God, we are expected to be slow to anger and quick to forgive. But repentance is not complete until there is behavioral change. As such, confession need not be made to a rabbi. Jews do not confess to other human beings in the hopes of receiving absolution from them. As a result, the confidence between a rabbi and congregant is not any more privileged than the confidence between any two individuals. Yet, as leaders in a religious community, rabbis may be privileged by their congregants. Thus, many rabbis, when asked to keep a communication confidential, may reply that "if you trust me with important information, you must trust that I will act appropriately with the information." In fact, this view was posited by many of Dr. Gross Schaefer's rabbinical colleagues at the Union of American Hebrew Congregations National Convention in Atlanta, Ga. (Nov. 30, 1995). This statement clearly indicates to the other party the rabbi's unwillingness to be bound prior to knowing the extent and nature of the information.

18. *Leviticus* 19:16, in *THE PENTATEUCH AND HAFTORAHS*, *supra* note 1, at 501.

This prohibition is limited and modified by the latter phrase which is traditionally interpreted to mean that one should do everything possible to protect life and property from loss and injury, directly or indirectly, including providing information. For example, "if thy fellowman is accused of a crime, and evidence that would clear him of it is in thy possession, thou are not at liberty to keep silent."¹⁹ If revealing confidential information will result in preventing harm or protecting life, action must be taken immediately to avoid such harm or loss of life. Hence, saving a life takes precedence over preserving a confidential communication. The absolute spiritual value of life ranks higher in the hierarchy, thus precluding any possible need for a calculation weighing disparate values.

The spiritual value of life is incommensurate with all other values and thus supersedes them, except for the three cases mentioned in the first section. Yet, there is a human tendency to neglect spiritual value for practical or social value. This may result from comfort with the precision of legal details of the law or from emphasis on the rational at the expense of the spiritual. When social values conflict, a utilitarian calculation can settle the problem. Under Jewish tradition, however, decisions are not made using a utilitarian calculation in cases where the fundamental spiritual value of life is at stake. If a city is besieged by an enemy, and the enemy demands that the city's inhabitants sacrifice one person so that the rest will be let free, they are forbidden to give up an innocent life, even if it would save the entire community.²⁰ If only considering the utility values, the case would be decided differently. In light of the fundamental spiritual value of life, however, no utilitarian calculation is permitted.

While there is a positive commandment to save a life, the responsibility is limited when the rescuer's life may be put in danger. Accordingly, a person is not required to save a life if there is a threat to personal safety. When pirates would kidnap innocent people for ransom, the rabbis, in order to protect the community, ruled that *excessive* ransoms were not to be paid.²¹ Otherwise, this would inform the pirates that the Jewish community would pay the exorbitant amount and consequently, Jews would be at greater risk of

19. THE PENTATEUCH AND HAFTORAHS, *supra* note 1, at 501 (citing the *Sifra*).

20. See *Hilkhoh Yesodei ha-Torah* ch. 5:5, in THE BOOK OF KNOWLEDGE:, *supra* note 11, at 219 (based on Talmud Yerushalmi, Terumot, ch. 8).

21. THE BABYLONIAN TALMUD, *Gittin* 45a, *Seder Nezikin* 195-96 (Rabbi Dr. I. Epstein ed. & Maurice Simon trans., 1936).

kidnapping. While there may be a utility-maximizing justification for this outcome, in that a few individual Jews might suffer in order to protect the community, the reasoning is not based on a utilitarian calculation. Thus, the community is not required to redeem the captive if it will endanger itself in the process.

In terms of the case considered in this Symposium, an argument for weighing the benefit of keeping confidentiality against the harm of the innocent victim's death cannot even be made from the Jewish perspective. Such an argument completely neglects the absolute value of saving a life, a value that always supersedes an oath such as an oath of confidentiality. While the case of Jephthah is decisive, in that saving a life supersedes any oath, this general rule is emphasized when applied to the specific situation of an oath to keep a professional confidence.

Rabbi Joseph Colon was once asked for a legal opinion concerning how Jewish law would deal with persons who have information concerning the whereabouts of lost property but who do not want to reveal information received as a matter of professional confidence.²² Jewish law, which provides that lost property be returned to its rightful owner, also places value on not divulging information told in confidence. However, Colon's opinion not only requires the individual to give the information in order to affect the return of lost property; it also states that professionals who do not disclose the secret because it would betray a confidence should be dealt with more severely than a wanton perpetrator. These professionals are deceivers, perverting the letter of Jewish law to circumvent its spirit, namely, the return of lost property. One cannot take a particular oath—like an oath not to breach a confidence—that nullifies a divine commandment. The *Mishnah* declares that an oath not to testify in a given matter is an oath taken in vain.²³ A Jew is bound by a prior oath from the time of the revelation at Mount Sinai to fulfill the divine commandments. Therefore, the commandment to return lost property supersedes the keeping of a professional confidence. Confidentiality is not an absolute value like the spiritual value of fulfilling a divine commandment and so it must yield to the commandment.

22. Rabbi Joseph Colon, *Responsa 110*, in *JEWISH LAW AND JEWISH LIFE: SELECTED RABINICAL RESPONSA 29* (Stephen M. Passamaneck ed. & trans., 1977).

23. *THE BABYLONIAN TALMUD, Shevuot 29a, Seder Nezikin 158* (Rabbi Dr. I. Epstein ed. & Jacob Shachter & H. Freedman trans., 1935).

V. WHAT DOES THE RABBI DO IN THE SCENARIO OF THE SYMPOSIUM?

It is clear that under Jewish law, confidentiality must be breached when it comes up against an obligation to save a life. While the absolute spiritual value of life is sufficient for the rabbi to make this decision, it does not exhaust all the other considerations in this case. For example, if the rabbi keeps silent concerning someone's transgression when harm will follow, that silence is considered as complicity: "And if any one soul sins, in that he heareth the voice of adjuration, he being a witness, whether he hath seen or known, if he do not utter it, then he shall bear his iniquity."²⁴ If the rabbi keeps silent, the rabbi effectively becomes an accomplice to the sin by committing the sin of aiding sinners—*masayeh yedey ovrey avera*—or in modern terminology, compounding a felony.²⁵ And, as previously demonstrated, the rabbi would be considered more blameworthy than the one who confided in the rabbi since the rabbi deliberately perverted the Torah's command to save a life.

It may seem odd to ascribe sin to the unsuspecting rabbi who had no intention of participating in the confessor's sin. Once the rabbi has information, the rabbi is, however unwillingly, a participant in the affair. At least the rabbi is bound to convince the confessor to tell the truth. If the confessor refuses, then it is a sin for the rabbi to keep silent and refrain from telling the truth to the proper authorities.²⁶ The Torah teaches us: "Thou shalt not . . . put a stumbling block before the blind."²⁷ This is interpreted to mean that an individual may not give misleading advice, cause someone to commit

24. *Leviticus* 5:1, in THE PENTATEUCH AND HAFTORAHS, *supra* note 1, at 420.

25. Rabbi Isaac bar Sheshet Perfect offers the following teaching from the *Talmud*:

"On what Scriptural foundation do we base the obligation of a student, who is seated before his master, to speak up if he sees some argument for a poor man against a rich man, who are adversaries in a civil case?" The master, of course, has not thought of the argument or has ruled for the rich man.

Rabbi Isaac bar Sheshet Perfect, *Responsa* 234, in 1 JEWISH LAW AND JEWISH LIFE: SELECTED RABINNIC RESPONSA 42 (Stephen M. Passamanek ed. & trans., 1977) (quoting THE BABYLONIAN TALMUD, *Shevuot* 31a, *Seder Nezikin* 171 (Rabbi Dr. I. Epstein ed. & A.E. Silverstone trans., 1938)). "The Scripture asserts keep thee far from a false matter." *Id.* (quoting THE BABYLONIAN TALMUD, *Exodus* 23:7 (Rabbi Dr. I. Epstein ed. & A.E. Silverstone trans., 1938)). "If silence is tantamount to a lie in a civil matter, how much the more it is so in a criminal matter." *Id.*

26. SHULCHAN ARUCH, *Chosen Mishpot* 28:1.

27. *Leviticus* 19:14, in THE PENTATEUCH AND HAFTORAHS, *supra* note 1, at 500.

a sin, or place another in a position to suffer personal or financial loss.²⁸ Accordingly, the rabbi incurs two further obligations: (1) to prevent the state from sinning by killing an innocent person, and (2) to prevent others from being hurt now or in the future. By not telling the truth, the rabbi allows the state to act without all of the known information and to ultimately commit the grievous sin of executing an innocent person. Furthermore, by the rabbi's silence, a murderer is allowed to live, freely function, and potentially cause harm to others.

VI. CONCLUSION

One is certainly not permitted to keep a vow which leads to the death of an innocent victim. According to Jewish tradition the maintenance of civilized society requires that oaths to keep certain information confidential be superseded when revealing such information can prevent harm to self or others. To keep promises for their own sake is to neglect and violate the spiritual value of Jewish law. The letter of the law does not serve itself; it serves the spiritual value imbedded within it. An oath to keep strict confidentiality is an oath taken in vain since an individual is first required to fulfill the higher value of saving a life. For example, we teach our teenagers that secrets cannot be kept when they might entail harm. Specifically, if one is told in confidence by a friend that the friend is considering suicide, one is obligated to tell somebody and get the friend help. Accordingly, the value of saving a life supersedes the keeping of a confidence.

28. *Maimonides*, 9 MISHNEH TORAH, *The Book of Torts*, ch. 1.13, 12.4 (Julian Oberman ed. & Hymen Klein trans., 1954).