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To Save a Life: Why a Rabbi and a Jewish Lawyer Must Disclose a Client Confidence

Russell G. Pearce

TO SAVE A LIFE: WHY A RABBI AND A JEWISH LAWYER MUST DISCLOSE A CLIENT CONFIDENCE

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I. INTRODUCTION

The buzz of the intercom startled Rabbi Paula Samuels[1] as she prepared to leave the synagogue to go to Loyola Public Defender Services. Ever since her graduation from law school the year before, she had been volunteering one night each week for the public defender. Upon retiring from the pulpit next June, she planned to volunteer for the public defender two or three days a week.

She had asked the receptionist to hold all calls. Why was the intercom buzzing? Reuven, the receptionist, informed her that Ben Jones was here to see her and that Ben looked pretty distraught. She remembered Ben. She had officiated at Ben's bar mitzvah twenty years ago. Ben had been a bit of a wise guy, but a decent kid. After the bar mitzvah, Ben and his family had left the synagogue. She remembered hearing that he had developed a drug problem and had been in and out of trouble with the law for the past twenty years. Oh, well, . . . she still had fifteen minutes before she had to leave.

"Send him in."

Although Ben was now in his midthirties, she could still see traces of the smiling thirteen-year-old boy he had been.

"Welcome, Ben. What can I do for you?"

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1. The *Loyola of Los Angeles Law Review*'s hypothetical for this Symposium provided the Rabbi's name, as well as the names Frank Smith and Ben Jones. I use Paula Samuels, rather than Paul, to challenge the assumption that all rabbis are men and to reflect the reality that many rabbis are women.

"Thank you for seeing me, rabbi. I heard you were working with the PD. I need some advice and I thought that as a lawyer and rabbi you'd be the right person to help me."

Ben began to cry. He explained that seven years ago he had killed a police officer during an attempted bank robbery. Frank Smith, who had nothing to do with the robbery or murder, was to be executed for the crime in a few days. Ben did not want to see Frank Smith die, but he also did not want to die himself or face a life in prison.

Rabbi Samuels paused. This was not quite what she expected. She excused herself to call the public defender and explain that she would be at least an hour late. When she returned, she began talking with Ben about how he felt, what he wanted, and what he could do to prevent Frank Smith's death. After a lengthy discussion Ben concluded, "I know what the right thing to do is, rabbi, but I just can't do it. I can't face the risk to myself." He got up and ran out of the office before Rabbi Samuels could say anything else.

Now Rabbi Samuels had a dilemma. She believed Jones's confession. She had information indicating that an innocent man was about to die. As a rabbi, did she have any obligation to keep that information confidential? Did it matter that she was also a lawyer?

She was aware that in contrast to a Catholic priest, Jewish tradition provided no duty of confidentiality for a rabbi different from that of other Jews. From a Catholic perspective, the priest cannot disclose confessional communications because he learns them acting as God or God's representative.[2] In contrast, the rabbi is a teacher and does not stand in a special relationship to God.[3]

II. ARGUMENTS FOR CONFIDENTIALITY

Nevertheless, Rabbi Samuels thought of at least four arguments for preserving confidentiality. One applied to all Jews. The other three derived from the religious implications of secular constructions of the role of lawyer or rabbi.

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2. *See* Dexter S. Brewer, *The Right of a Penitent to Release the Confessor from the Seal: Considerations in Canon Law and American Law*, 54 JURIST 424, 429-30 (1994); *see also* Anthony Cardinal Bevilacqua, *Confidentiality Obligation of the Clergy from the Perspective of Roman Catholic Priests*, 29 LOY. L.A. L. REV. 1733, 1734 n.5 (1996) (noting that the sacramental seal of confession was divinely instituted by Jesus Christ); Teresa Stanton Collett, *Sacred Secrets or Sanctimonious Silence*, 29 LOY. L.A. L. REV 1747, 1755 (1996) (noting the seal of confession derives from Christ's commandment).

3. *See* THE ENCYCLOPEDIA OF JUDAISM 579-80 (Geoffrey Wigoder ed., 1989).

The first and foremost argument involved the traditional Jewish requirement that all Jews, regardless of occupation, preserve confidences. Jewish tradition generally forbids the disclosure of confidential information as "a terrible invasion of another person's privacy."[4] This interdiction, rooted in the Torah's prohibition on talebearing,[5] applies even when the information disclosed is true.[6] The great medieval commentator, Maimonides, observed that gossip "ruins the world."[7] He further reproached "the evil tongue of the slander-monger who speaks disparagingly of one's fellow, even if the truth is told."[8]

Accordingly, the Jewish tradition developed the general rule that information must be kept confidential absent an express waiver of confidentiality. In the Talmud, Rabbah stated that "if a man had said something to his neighbour the latter must not spread the news without the informant's telling him 'Go and say it.'"[9] As Rabbi Alfred S. Cohen observes, Jewish tradition teaches that "*anything* at all which someone tells you must be treated with strict confidentiality, unless or until he gives you permission to repeat it."[10] This rule suggested that Jones's refusal to permit disclosure would bar Samuels's disclosure.

A second argument for confidentiality arose under the principle *dina de-malkhuta dina*, "the law of the land is the law."[11] This doctrine does not mean that secular law substitutes for Jewish law in all respects. Rather, it requires obedience to secular law insofar as it is not unfairly applied[12] and is not inconsistent with provisions of

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4. Alfred S. Cohen, *Privacy: A Jewish Perspective*, J. HALACHA & CONTEMP. SOC'Y 53, 73 (1981); *see also* Norman Lamm, *The Fourth Amendment and Its Equivalent in the 4.fel6*
Halachah, 16 JUDAISM 300, 305 (1967) (noting that disclosure constitutes a privacy violation).

5. *Leviticus* 19:16 (Jewish Publication Society).

6. Janise Poticha, *When the Physician is Sero-H.I.V. Positive*, *in* REFORM JEWISH ETHICS AND THE HALAKHAH: AN EXPERIMENT IN DECISION MAKING 163, 166 (Eugene B. Borowitz ed., 1994).

7. *Id.* (quoting Maimonides).

8. *Id.* (quoting Maimonides).

9. YOMA § 4b (I. Epstein & Leo Jung trans., The Soncino Press 1960).

10. Cohen, *supra* note 4, at 81 (discussing privacy).

11. 6 ENCYCLOPEDIA JUDAICA 51 (3d ed. 1974).

12. *Id.* at 53.

"fundamental importance" to Jewish law,[13] including but not limited to, "religious or ritual observances."[14]

Here, two parallel secular legal rules could be read to require nondisclosure. Jones confessed confidential information to Rabbi Samuels. Although neither of them clarified the situation, Jones stated that he came to talk to her because she was a rabbi and because she was a lawyer. Assuming that the confidential communication was made to her in both of these capacities, relevant law could be read to require confidentiality.

As adopted by courts and legislatures, lawyer's ethical codes have the force of law.[15] They require a lawyer to keep information confidential unless the lawyer knows the client will commit a future crime.[16]

The harm to Smith would not come from any crime on the part of Jones. Indeed, the crime to which Jones confessed is a crime which occurred in the past. Accordingly, without parsing the complexities of the duty of confidentiality,[17] for purposes of this analysis, one could assume that confidentiality as a lawyer is required.

The situation with regard to clergy is similar, but less clear. State legislation creates a congregant-clergy privilege which protects confidential communications from a congregant to a clergy from disclosure in court.[18] As a general rule the congregant, and not the clergy person, owns the privilege and has the authority to decide whether to waive it.[19] This would bar Rabbi Samuels from testifying in court or submitting an affidavit regarding Jones's confession. It

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13. Aaron Kirschenbaum & Jon Trafimow, *The Sovereign Power of the State: A Proposed Theory of Accommodation in Jewish Law*, 12 CARDOZO L. REV. 925, 926 (1991).

14. 6 ENCYCLOPEDIA JUDAICA, *supra* note 11, at 53. *Dina de-malkhuta dina* "is an extraordinarily difficult and complicated subject." Kirschenbaum & Trafimow, *supra* note 13, at 940. This Essay does not purport to offer a complete theory of its contours.

15. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 206 (2d ed. 1990 & Supp. 1993) [hereinafter HAZARD, LAW OF LAWYERING]; CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.1, at 51-52 (1986).

16. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1995); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980).

17. For a more complete discussion of these rules, see 1 HAZARD, LAW OF LAWYERING, *supra* note 15, § 1.6:100.

18. *See, e.g.*, CAL. EVID. CODE § 1033 (West 1995) (granting privilege to the penitent to refuse to disclose or prevent another from disclosing penitential communications); CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 76.2 (John William Strong ed., 4th ed. 1992) (noting that all states have adopted a privilege protecting communication between clergy and penitents).

19. *See, e.g.*, CAL. EVID. CODE § 1033.

could arguably be read to imply the establishment of a duty of confidentiality with regard to public disclosure as well.

Perhaps as a rabbi, and certainly as a lawyer, Samuels's duty under secular law gives rise to an obligation of confidentiality under *dina de-malkhuta dina.*

A third, and related, consideration arose from the policies underlying the legal duties of confidentiality. Jewish tradition recognizes that sometimes the interests of the individual must be sacrificed for the good of the community.[20] Could the harm of disclosure to society outweigh the benefit of potentially saving Smith's life?

Rabbi Alfred S. Cohen makes such an argument.[21] He objects to the *Tarasoff v. Regents of the University of California*[22] decision which held a psychiatrist liable for failing to disclose his client's intent to commit a murder.[23] Rabbi Cohen asserts that permitting disclosure will harm society by discouraging individuals from seeking the professional assistance they need and, if they seek assistance, from making the full disclosure necessary to obtain the benefit of professional advice.[24] The same arguments have been made for protecting lawyer's confidences and one could therefore extend Cohen's analysis of *Tarasoff* to argue for nondisclosure of Jones's confidence. One could also argue that a policy of encouraging consultation with rabbis similarly favors nondisclosure.

Rabbi Cohen further offered a fourth argument for nondisclosure. He argues that under Jewish law "a person whose livelihood depends upon maintaining the confidentiality of revelations made to him, need not jeopardize his position by telling those secrets."[25] Rabbi Samuels could conceive that disclosure would imperil her legal career. It might result in termination of her work with the public defender's office and might make it impossible for her to practice criminal defense. Her intuition was different with regard to her rabbinical career. Although some congregants might object to her

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20. *See* Alfred S. Cohen, *On Maintaining a Professional Confidence*, 7 J. HALACHA & CONTEMP. SOC'Y 73, 84 (1984).

21. *Id.* at 80.

22. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

23. Cohen, *supra* note 20, at 82-83. While criticizing *Tarasoff*, Cohen does not offer any particular rule of his own. Rather, he advises a professional facing such a dilemma to seek the advice of competent halakhic authority. *Id.* at 84-85.

24. *Id.* at 82-83.

25. *Id.* at 83-84.

revealing Jones's confidence, she doubted that the disclosure would result in discharge before her retirement or in an insurmountable barrier to seeking another pulpit, should she decide to end her retirement.

III. WHY THE RABBI AND LAWYER SHOULD DISCLOSE

As she considered these powerful arguments for confidentiality, Rabbi Samuels reflected on two related duties which she thought might provide more powerful arguments for disclosure.

The first was the duty not to "stand idly by the blood of thy neighbor,"[26] which applied quite literally to the impending death of Frank Smith. Indeed, the duty not to stand idly by has been construed expressly to require producing evidence that "favors the accused" in a criminal case.[27]

A second, related duty of *pikuach nefesh*, or preserving life, strengthened the obligation not to stand idly by as applied to Smith's execution. The Torah instructs us to "choose life."[28] The Talmud teaches that God first created one human being "to teach you that if anyone destroys a single human being, the Torah considers that person to have destroyed the whole world; and whoever rescues a single human being, the Torah credits that person with having rescued the whole world."[29] To save a life, one may violate all of Jewish law, except idolatry, incest and adultery, and murder.[30]

Accordingly, in this case, the combined duties "not to stand idly by" and "to preserve life" outweighed the Jewish legal obligations of confidentiality and *dina de-malkhuta dina*.[31] But before she could

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26. *Leviticus* 19:16 (Jewish Publication Society 1955).

27. W. GUNTHER PLAUT & BERNARD J. BRAMBERGER, THE TORAH: A MODERN COMMENTARY 901 (W. Gunther Plaut ed., 1981) (summarizing commentary of Sifra and Targum Pseudo-Jonathan); *cf. Leviticus* 5:1 ("And if anyone sin, in that he heareth the voice of adjuration, he being a witness, whether he hath seen or known, if he do not utter it, he shall bear his iniquity.")

28. *Deuteronomy* 30:19 (Jewish Publication Society 1955).

29. BARRY A. CYTRON & EARL SWARTZ, WHEN LIFE IS IN THE BALANCE: LIFE AND DEATH DECISIONS IN LIGHT OF THE JEWISH TRADITION 73 (1986) (quoting SANHEDRIN 4:5). *See also* YOMA, *supra* note 9, § 85b (citing *Leviticus* 18:5 to the effect that you should live by the commandments and not die by them).

30. SANHEDRIN 74a (The Soncino Press 1969).

31. For commentators who have reached a similar result, see MICHAEL J. BROYDE, THE PURSUIT OF JUSTICE IN JEWISH LAW: HALAKHIC PERSPECTIVES ON THE LEGAL PROFESSION 25-29 (1995) (arguing that Jewish law requires disclosure of a client's intent to physically harm another); Gordon Tucker, *The Confidentiality Rule: A Philosophical Perspective with Reference to Jewish Law and Ethics*, 13 FORDHAM URB. L.J. 99, 104-07

finally determine that these duties required disclosure, Samuels had to figure out whether she could save Smith's life without disclosure, whether disclosure would indeed save Smith's life, and whether the harm of disclosure would outweigh the harm of silence.[32]

She could think of no alternative to disclosure which would help Smith. Jones had stormed out of her office and she knew of no way to contact him to try again to persuade him to come forward. She knew of no other way to demonstrate Smith's innocence. Smith's execution was imminent and delay in disclosure could cost his attorney precious time.

On the other hand, it was not clear that if she disclosed Jones's confession, she would save Smith's life. Courts might exclude her testimony on grounds of privilege. Even if her testimony were admissible, courts would look skeptically on the last minute introduction of a confession to save the life of a person on death row, especially where the confession included no details which would lend it credence.

Where Jones's confession would be admissible would be in the political process—the battle to obtain clemency from the governor and gain the support of the public. Again, the lack of details would limit its effectiveness but Samuels thought that if a rabbi or lawyer risked her reputation to reveal the confession of a congregant or client, the politicians and the public might very well give credence to the confession.

To have an obligation to disclose, Samuels did not have to decide that she would definitely prevent Smith's wrongful execution, only that she possibly could. As Maimonides observed, even the possibility of saving a life is sufficient to justify violating other Jewish laws.[33] Here, Samuels faced that possibility.

Samuels's last consideration addressed the potential harms of disclosure to Jones, to herself, and to society. Her disclosure would turn the prosecution's attention toward Jones and an investigation

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(1985) (arguing that Jewish tradition requires a lawyer to disclose confidential information to prevent physical or financial harm); *cf.* J. David Bleich, *Professional Secrecy*, *in* 2 CONTEMPORARY HALAKHIC PROBLEMS 74-80 (1979) (noting a doctor's "[r]espect for privacy and the inviolability of the professional relationship certainly do not take precedence over protection of the lives and safety of others").

32. Cohen, *supra* note 4, at 76-78 (discussing the Chofetz Chaim's guidelines for disclosure of a confidence).

33. MOSES MAIMONIDES, THE CODE OF MAIMONIDES, MISHNEH TORAH, LAWS OF SHABBAT ch. 2, law 1 (Philip Birnbaum trans., 1974)

could possibly lead to his conviction and execution. If Jones were guilty, his execution might accord with Jewish law,[34] and even if it did not, it would be a lesser evil than the death of the innocent Smith. Rabbi Hershel Schachter notes that where the Jewish offender has violated a Torah law, such as murder, "[t]here is no problem . . . in informing the [secular] government of a Jewish criminal, even if they penalize the criminal with a punishment more severe than the Torah requires."[35]

Moreover, if Jones were innocent notwithstanding his confession, the same factors which limited the value of disclosure to Smith also limited their harm to Jones. Jones could use the privilege to block Samuels's testimony and the prosecutor's use of the fruits of Samuels's disclosure. Even if the police and prosecution were somehow able to use the information, it would be of little value because it lacked specificity.

The enormity of the potential harm to Jones made Samuels uneasy about considering harm to herself. She needed to respond to Rabbi Cohen's suggestion that a professional need not risk one's livelihood to disclose a confidence. While the Jewish tradition is clear that one need not risk one's own life to save a life, "[h]ardship, suffering and great inconvenience . . . cannot serve as bases of exemption."[36] Despite this teaching, Cohen asserts that the command "not to stand idly by" should be treated as a positive—as opposed to a negative—command because it requires action and "a Jew is not required to spend more than 1/5 of his income in the fulfillment of a" positive commandment.[37]

Samuels found more persuasive a contrary perspective grounded in Maimonides's commentary. In a manner similar to Cohen, Maimonides distinguished the two types of negative commandments. Violations of negative commandments breached by action resulted in punishment by lashes while negative commandments violated passively, like "do not stand idly by," did not receive such a punish-

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34. *See, e.g.*, J. David Bleich, *Capital Punishment in the Noachide Code*, *in* 2 CONTEMPORARY HALACHIC PROBLEMS 341 (1983) (discussing whether, and under what circumstances, Jewish law would accept the imposition of capital punishment by secular courts).

35. Hershel Schachter, *"Dina De'Malchusa Dina": Secular Law as a Religious Obligation*, 1 J. HALACHA & CONTEMP. SOC'Y 103, 118 (1981).

36. Aaron Kirschenbaum, *The Bystander's Duty to Rescue in Jewish Law*, 8 J. RELIGIOUS ETHICS 204, 213 (1980).

37. Cohen, *supra* note 4, at 83.

ment. Maimonides, however, went on to assert that even though violation of the duty "not to stand idly by thy neighbor's blood" was not punishable by lashes, it was equally serious because of the traditional emphasis on saving a life.[38] Samuels agreed. Where the nonclient would die, the principle of *pikuach nefesh* had to override considerations of livelihood.

Last, she turned to Rabbi Cohen's argument that the importance of confidentiality to society was more important than harm to an individual. Cohen's assertion of the necessity for absolute confidentiality[39] accorded with the traditional arguments for lawyer confidentiality and made sense intuitively. Recently, some commentators have questioned whether a guarantee of absolute confidentiality is necessary to encourage clients to confide in lawyers.[40] Indeed, the ethical rules themselves have long had exceptions for lawyers to exercise their discretion to disclose confidential information to defend themselves and collect fees, as well as to disclose certain crimes.[41]

But even assuming that Cohen's assertions were correct, Samuels had to disagree. At this moment, she did not have to determine all the exceptions to confidentiality Jewish tradition would require. She had one issue before her: a matter of life or death. She would follow the teaching that if you save one life, it is as if you have saved the entire world. The balance of harms had already been recognized by tradition. Only the three extraordinary commandments regarding murder, idolatry, and adultery could not be violated to save a life. Even if some harm would come to society from her disclosure, she must do it.

IV. CONCLUSION

Samuels reached for the phone to call Smith's attorney. She was unhappy. She would be betraying someone who had confided in her as a rabbi and a lawyer. She would be throwing her rabbinate into turmoil and jeopardizing her career as a lawyer. But she had to do whatever she could to try to save a life.

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38. MOSES MAIMONIDES, THE CODE OF MAIMONIDES, MISHNEH TORAH, *Book 11, The Book of Torts* ch. 1, para. 16 (Hyman Klein trans., 1954).

39. *See* Cohen, *supra* note 4, at 87.

40. *See, e.g.*, Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 380-83 (1989).

41. *See supra* note 16.