

Chapter 3



ASSISTING THE GUILTY

Halakhic Considerations

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As a modern American rabbi serving in a suburban metropolitan congregation,¹ I have been routinely exposed to the delicate problems of individuals, some of which involve criminal behavior. Specifically, my experience as a congregational rabbi and advisor to colleagues has brought to me the following personal crises of people whom we have served in the past.² One individual revealed and confessed criminal complicity in a scheme to harbor an illegal alien and thereby to defraud federal and state authorities, participating in a criminal scheme of misrepresentation; another individual sought spiritual guidance during the course of which he revealed his own criminal culpability in a complicated enterprise of bank fraud involving real estate sales to middle income households; and, in perhaps the most difficult case, I was faced with the evident confession by a father to the routine physical abuse of his children.

In this paper, I propose to address the halakhic considerations involving an appropriate professional response to these

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real crises.³ Specifically, I will discuss problems involved in (a) defending one accused of a crime, (b) informing secular authorities of criminal behavior which is known to you, and (c) protecting confidential information which has come to you as a result of your professional clergy status.

A brief discussion of the resolution of the three cases will conclude the presentation.

Defending One Accused of a Crime

There is little question under Jewish law that a person is not required to plead guilty even if he actually is. This is because in so doing he would waive his right to a trial and such would essentially be the equivalent of requiring him to confess under any and all circumstances. Accordingly, a Jew may (or perhaps even *must*) plead "not guilty" in order to compel the civil authority (Jewish or secular) to prove its case according to the law.⁴

The halakhic scope of a professional's (particularly an attorney's) role in aiding a criminal defendant is established by the Talmudic discussion at *Niddah* 61a which states:

Raba said: Regarding slander, even though one should not accept its truth, one should nevertheless take note of it. There was a rumor about certain Galileans that they had murdered a person. They came to Rabbi Tarfon and pleaded with him: "Will the Master hide us?" He said to them "But how should I act? If I do not hide you, you will be seen [and summarily executed by the blood avengers.] [On the other hand] if I do hide you the Sages [e.g., Raba, *supra*] have said 'Regarding slander, even though one should not accept its truth, one should nevertheless take note of it [and I would be acting contrary to that ruling].' Go and hide yourselves."

The justification for Rabbi Tarfon's refusal to aid the Galileans remains in dispute among Jewish authorities, which dispute is essential to our understanding of the limitations, if any, upon professional assistance to the guilty.

Rashi flatly states that the reason that Rabbi Tarfon would not help the Galileans was because if they were indeed guilty of murder, his assistance would be prohibited—implying that Jewish law prohibits aiding defendants who might be guilty. But *Tosafot* and Rabbenu Asher (*Rosh*)⁵ both disagree, and insist to the

contrary that the justification for Rabbi Tarfon's refusal to help the Galileans was his fear that the blood avengers would punish *him* for assisting in the escape of criminals. Thus his *self-interest* in personal security justified his refusal to aid the fleeing Galileans. But *Tosafot* and the *Rosh* both insist that helping them would otherwise be permitted under Jewish law.

The issue for Rashi was Rabbi Tarfon's doubt as to whether or not the Galileans were actually guilty. This has led one modern authority to insist that the decision to aid one who is guilty of a crime depends upon the *actual knowledge of guilt* on the part of the one whose assistance is requested: "If a lawyer *knows* that his client has committed a crime, it is forbidden for him to help the criminal escape the consequences of his act, by relying on some technical legal points or other devices. The lawyer, just as any Jew, is directed by the Torah to eradicate the evil from our midst, and may not actively assist someone to avoid his punishment."⁶

Of course, the practical implications are such that the difference between Rashi and *Tosafot* may not be so great. Criminal defense attorneys rarely, if ever, *know* their client is guilty because the establishment of guilt is a legal, and not a factual, conclusion. A determination of guilt in modern systems of criminal justice involves the variables of testimony, witnesses, police misconduct and clearly established criminal intent. We may assume then that criminal guilt is never really *known* by a professional providing assistance to an accused defendant.

An interpretation is possible which reconciles Rashi, *Tosafot* and the *Rosh* and makes no distinction between known guilt and mere rumors of guilt. This is suggested by understanding Rabbi Tarfon's hesitation to be essentially out of fear of violating *the secular law* and being punished for said violation. Thus, the sole limitation on assisting one accused of a crime would be the *danger to one's self*, i.e., will *the secular authorities* chase and apprehend you for your assistance?⁷

Modern criminal justice systems not only permit but require professional assistance to criminal defendants, which is accordingly justified, as well, by Jewish law. If this is correct, then any form of assistance legally permitted by the secular society and authority would be permitted under Jewish law.

Particularly in light of current American law⁸ this position appears both logical and sensible: namely that a professional's assistance simply insures that the secular society is satisfying its

general obligation "to remove evil from its midst," but in the manner in which it has determined is appropriate and just.

Informing the Authorities of Criminal Behavior

A closely connected question to that of defending one accused of a crime is that involving the so-called duty to inform. Again, a classic Talmudic text introduces the problem, from *Baba Metzia* 83b-84a, as follows:

Rabbi Eleazar, son of Rabbi Simeon, met a police officer, who was arresting thieves. Rabbi Eleazar said to him [the police officer]: "How are you able [to detect] the thieves ... ? Perhaps you take the righteous innocent and leave behind the guilty!" The police officer replied: "But what can I do? It is an order of the [secular] King." [Rabbi Eleazar then attempted to instruct the policeman as to how to determine who was a thief and who was not].... The matter was heard in the House of the King. They said: "Let the one who reads the letter be the messenger." Rabbi Eleazar, son of Rabbi Simeon, was then brought to the court and he proceeded to arrest thieves. Rabbi Joshua ben Korchah sent [this message] to him: "Vinegar, son of wine! [You defamer of your father's good name!] How long will you deliver the people of our God for slaughter?" Rabbi Eleazar sent [back] to him: "I am destroying thorns from the vineyard." Rabbi Joshua responded: "Let the owner of the vineyard come and destroy his thorns." ... And also [a similar circumstance to this occurred] to Rabbi Ishmael, the son of Rabbi Jose. The prophet Elijah met him [and] said to him: "How long will you hand over the people of our God for execution?" Rabbi Ishmael responded: "What can I do? It is an order of the King." Elijah retorted: "Your father fled to Asia; you can flee to Laodicea."⁹

So *Baba Metzia* records that two sages of the Gemara were rebuked—one by Rabbi Yehoshua and the other by the prophet Elijah—for assisting the secular government in the prosecution of criminals, suggesting clearly that this conduct is not proper. This position seems clearly to be codified in halakha by *Shulkhan Arukh*, *Hoshen Mishpat* 488:9, which states: "It is forbidden to denounce a Jew before the gentile authorities, even if he is wicked and a sinner. Anybody who so denounces his fellow Jew forfeits his place in the world to come." But the full and literal import of this clear provision has been nullified, essentially, by its routine interpretation as applying only to turning over a per-

son or his property to the custody of an "oppressor," who inflicts bodily or financial harm in a manner that is malevolent or entirely extra-legal.¹⁰

One line of explanation for Rabbi Joshua's rebuke of Rabbi Eleazar is that though this conduct (of helping the secular authorities) was generally permitted, it was deemed inappropriate for the pious and religious leaders of the community. This understanding is generally based on an inference from the Jerusalem Talmud, *Terumot* 8:4 as well as the expansion of this principle by Joseph Karo in *Beit Yosef, Hoshen Mishpat* 388. According to this analysis, it is only the pious of the community who are to avoid assisting the secular police and prosecution authorities, inasmuch as it is undignified and unseemly for this class to hold themselves out as "assistant policemen"—*though it is permissible for others to do so*. Following this line of reasoning, Rabbi Hershel Schachter says: "There is no problem of "*mesirah*" [informing] the government of the Jewish criminal, even if they penalize the criminal with a punishment more severely than the Torah requires, because even a non-Jewish government is authorized to punish and penalize above and beyond the [Jewish] law ... for the purpose of maintaining law and order. However, this only applies in the situation where the Jewish offender or criminal has violated some Torah law."¹¹ A fascinating application—and apparent contradiction—of this principle occurred in a case involving Rabbi Dr. Moses Tendler, a distinguished professor of Jewish Law at Yeshiva University as well as the son-in-law of the late revered halakhic authority Rabbi Moshe Feinstein.

In this case, a convicted murderer appealed his trial conviction on the grounds that his confession of "the brutal stabbing murder of his twenty-three-year-old pregnant wife" to his regular *shul* rabbi, the esteemed Dr. Tendler, should not have been admitted at trial. Rabbi Tendler testified against the defendant at the trial and fully revealed the confession, which resulted in his conviction. The court determined that "the defendant's communications to Rabbi Tendler were made for the secular purpose of seeking assistance in the retention of counsel, and in negotiating with the prosecutor's office and securing other assistance in connection with the preparation of his defense to the charges, and were not made by the defendant in confidence to Rabbi Tendler 'in his professional character as spiritual advisor.' Accordingly, the communications were not privileged."¹²

Rabbi Tendler's actions may seem to be in violation of halakhah if the unenhanced, simple and literal reading of *Shulkhan Arukh, Hoshen Mishpat* 488:9 is used as the standard, and if Rabbi Yehoshua's reprimand of Rabbi Eleazar is understood as restricting the behavior of pious scholars (of whom Rabbi Dr. Moses Tendler would certainly be one). But there is another approach to the text in *Baba Metzia* 83b-84a. This second interpretation rejects the opinion of Rabbi Eleazar and elevates that of Rabbi Joshua to the normative Jewish standard¹³—an opinion which initially prohibits informing the authorities of criminal behavior. If Rabbi Joshua's opinion is normative, then it would be permitted to assist the gentile secular government and its criminal prosecutions only when the person poses a threat to others or to the community through his conduct. These situations are based upon the Jewish law of a *rodef*, a pursuer. The law of the *rodef* "not merely permits, but mandates that a bystander come to the rescue of a putative victim whose life is threatened and [even] that, if there is no other way of preserving the life of the intended victim, rescue be effected by taking the life of the aggressor."¹⁴ Under this reading the dispute between Rabbi Eleazar and Rabbi Joshua takes on a different character.

Rabbi Eleazar can be seen as having come upon an official of the secular authority, the King who is apprehending individuals and delivering them for execution without at all endeavoring to distinguish between the innocent and the guilty. The police officer clearly recognized that his actions were unjust, but pleaded in his defense the doctrine of *force majeure* ("What shall I do? It is the command of the King!"). In all probability, the King in the Talmudic tale was well aware of the fact that arrests were being made indiscriminately, but pursued such a policy because of a desire to instill fear in the hearts of thieves in an effort to cause them to desist from their nefarious conduct. Execution of the innocent was designed either (a) to intimidate those who were indeed criminals or (b) to secure the cooperation of the citizenry, who would themselves bring pressure to bear upon the thieves to desist from their criminal activities. Either way, *de facto*, innocent persons were being put to death because of the activities of thieves. Thus, thieves were "pursuers" of the innocent. Since the thieves refused to abandon their criminal activities they were branded as "pursuers" by Rabbi Eleazar who declared that "I am eradicating thorns from the vineyard." The import of that state-

ment may be taken to mean that the criminals were a threat to the innocent just as thorns are a threat to the grapes that would otherwise flourish in the vineyard.

This possibility means that the controversy between Rabbi Eleazar and Rabbi Joshua may well reflect disagreement regarding the level of certainty of impending loss of life that is required to trigger the law of the pursuer—the *rodef*.¹⁵ As is well known, in Jewish law, one who poses a threat to the life of others must be prevented from accomplishing the intended harm. Force—even deadly force—may be used in such a case without the need for a court hearing. And *this threat need not be limited to the possibility that the criminal will actually harm another*, but includes such factors as the possibility that in response to a Jew being apprehended for committing a crime, other Jews will be injured or anti-Semitism will be promoted.¹⁶

Indeed Rashi argues elsewhere that Jewish law recognizes that a secular government may properly enforce any law validly promulgated under the rule “the law of the land is the law” (*dina de-malkhuta dina*), even against Jews.¹⁷ The policy value of the application of this principle is “maintaining law and order”¹⁸ or “the prevention of the world’s destruction.”¹⁹ And it was pursuant to such an argument that Rabbi Moshe Feinstein allowed a Jew to serve as a tax auditor for the United States Government, in a situation wherein the audit might result in the criminal prosecution of Jews for evading taxes.²⁰

The dispute in *Baba Metzia* 83b-84a may thus be summarized: many authorities rule that only those viewed as of exemplary piety must avoid assisting in the prosecution of Jewish criminals providing that the criminal prosecution is for conduct that violates Jewish law but otherwise there are no obstacles to others assisting in criminal prosecutions. Others disagree and follow Rabbi Joshua holding that it is prohibited to assist the secular government in criminal prosecutions unless the criminal poses a general danger to society (the *rodef*). In practical application, the result may indeed be the same.

Professional Confidence

There can be no question that though Judaism places strong and severe restrictions upon disclosure of confidential information,²¹

Jewish law also requires one to inform a Jew of harm that might befall him and which could be avoided.²² This tension reflects the conflict inherent in Leviticus 19:16, between its two provisions (a) "thou shall not go about as a bearer of tales among your people"²³ and (b) "do not stand by while your brother's blood is being shed." Though the stricture against disclosure of confidential information results in a moral code "even more restricted in some respects than presently accepted canons of professional confidentiality,"²⁴ the countervailing obligation to help others and divulge secrets for that purpose applies not only to saving lives but also to preventing monetary loss.²⁵ It is understood by contemporary halakhic authorities that no person has the right to divulge information of a personal nature concerning a fellow man or woman simply to satisfy the curiosity of a third party. The crucial consideration is thus the "need to know" in the sense of avoiding potential harm.²⁶ Respect for privacy and the inviolability of the professional relationship certainly do not take precedence over the protection of the lives and safety of others. This latter consideration is of sufficient weight to oblige a physician, attorney or member of the clergy to take whatever measures may be necessary to eliminate the danger. If, however, no danger exists or *if the danger can be averted by other means*, he may not violate the confidence. The desire to see an evil doer brought to justice and punished for his crime is not, in itself, sufficient reason to justify a breach of confidence.²⁷ It is clear that a cloak of strict confidentiality ordinarily obtains in any discussion that a rabbi has with a member of his or her congregation. Its breach can only be justified, according to Jewish law, in circumstances in which lives or money will be saved and "the prevention of the destruction of the world"²⁸ will be advanced.

Conclusion

Modern rabbis face a delicate dilemma in circumstances in which criminal behavior is disclosed to them during the course of their professional responsibilities. In addition to the presumption of confidentiality regarding any communication given to a rabbi, there is the question of the rabbi's a priori relationship to secular authority. In no instance does Jewish law suggest that a rabbi is an agent or assistant to the police or prosecuting authorities. Such

assistance (as in the case of Rabbi Eleazar in *Baba Metzia* 83b-84a), must find specific justification from among a system of values which places life and the maintenance of law and order at its apex. Such justification depends upon the relative weights which the rabbinic personality places on these various policy considerations.

In the cases outlined at the beginning of this paper, no reference to secular authority was made by the rabbi. Following pastoral counseling, the scheme to harbor an illegal alien was voluntarily terminated. The real estate and bank fraud was the subject of an indictment and plea of guilty, and the abusive parent was convinced to obtain counseling and treatment which resulted in the end of misbehavior a restored standard of appropriate conduct.

In assessing the degree to which we should hasten to assist the guilty or "turn them in," an obvious and central philosophical question for the modern rabbi concerns the appropriate and justified degree of confidence in secular authority. Classical rabbinic Judaism exhibited a strong distrust of secular authority. Though we surely live in a different world, "calling the police" may nevertheless best remain a last and desperate resort.

Notes

1. Temple Sinai of Sharon is a 550 family congregation in Sharon, Massachusetts, a south suburb of Boston.
2. For obvious reasons the names of the individuals involved will not be used nor divulged. In addition, the relevant statutes of limitations applicable for the commission of the crimes to which reference is herein made have all run, thus vitiating the criminal culpability and legal vulnerability which may have otherwise obtained.
3. The actual resolution of the three cases will be addressed at the end of the paper.
4. Maimonides, *Sanhedrin* 18:6; see generally J. David Bleich, *Contemporary Halakhic Problems II* (New York: 1983), pp. 349-357 and Norman Lamm, *Faith and Doubt* (New York: 1986), pp. 78-92.
5. *Tosafot*, *Niddah* 61a (s.v. "atmarinkhu") and Rabbenu Asher, *Tosafot Harosh* on *Niddah* 61a (s.v. "atmarinkhu").
6. Hershel Schachter, "Dina Di'Malchusa Dina: Secular Law as a Religious Obligation," *Journal of Halacha and Contemporary Society* 103, 121-22 (Spring

- 1981), citing Rabbi Shelomo Luria, *Hokhmat Shelomo*, commenting on Niddah 61a; and Rabbi Akiva Eiger on Niddah 61a [emphasis mine].
7. This is advanced by Michael J. Broyde, *The Pursuit of Justice and Jewish Law* (New York: 1996) p. 94, citing Rabbi Yaakov Ettlinger, *Arukh Laner*, commenting on Niddah 61a, Rabbi Yaakov Emden, *She'elat Ya'avetz* 2:9, and Rabbi Moshe Shreiber, *Hatam Sofer* 6:14.
 8. See, e.g., *Nix v. Whiteside*, 475 U.S. 157 (1986) (a United States Supreme Court decision ruling that though a lawyer may, as most states require that he must, inform the court of perjury by his client there are circumstances in which one has the "right" to present a false case in order to compel the government to prove its accusations beyond a reasonable doubt).
 9. The Gemara's reference is to the Roman province of Asia, *Asia Proconsularis*, to which Jews fled in order to avoid public appointment under the authority of the Roman Empire. Elijah's statement thus seems to suggest a rebuke along the lines of: "Your father had the courage to resist the pressure of secular authority; if you were a worthy son, you would show the same character."
 10. David J. Bleich, "Jewish Law and the State's Authority to Punish Crime," 12 *Cardozo Law Review*, 829, 830 (1991).
 11. Hershel Schachter "Dina Di'Malchusa Dina: Secular Law as a Religious Obligation," pp. 103, 118.
 12. *People v. Drelich*, 506 N.Y.S. 2d 746, 124 A.D. 2d 441 (2d App. Div. 1986).
 13. There are a number of authorities whose inferences suggest such an approach: Maimonides, *Hilchot Rotzeah* 2:4; *Tosafot* to *Sanhedrin* 20b; see generally David J. Bleich, "Jewish Law and the State's Authority to Punish Crime," 12 *Cardozo Law Review* 829, 840-44 (1991).
 14. J. David Bleich, "Jewish Law and the State's Authority to Punish Crime," 12 *Cardozo Law Review* 829, 849 (1991).
 15. *Ibid.*, 849-50.
 16. These principles are applied in a famous commentary of Rabbi Moses Isserles (the *Rama*) which rules that a Jew who engages in counterfeiting or the like may be turned over to civil authorities for punishment. *Rama* commenting on *Shulkhan Arukh*, *Hoshen Mishpat* 388:12, 425:1.
 17. *Rashi* commenting on *Gittin* 9b (s.v. *dinim*).
 18. Michael J. Broyde, *The Pursuit of Justice and Jewish Law* (New York: 1996), p. 87.
 19. Maimonides, *Hilchot Melachim* 10:11 (*shelo yishacheit ha-olam*) suggests a natural law theory of Jewish obligation to the secular world which would justify a very expansive reading of the otherwise routinely constricted understanding of *dina de-malkhuta dina* in Jewish law. The full quote from Maimonides' *Mishneh Torah* is as follows: "The *Beit Din* of Israel is obligated to establish judges for these resident aliens to judge them in accordance with these laws in order that the world not be destroyed. If the *Beit Din* sees fit to appoint judges from among them, they may do so; and if they see fit to appoint Jewish judges for them, they may do so." [emphasis mine]

See generally Gil Graff, "Separation of Church and State: *Dina de'Malchuta Dina*," *Jewish Law, 1750-1848* (University, Alabama: 1985). The standard Talmudic references to *dina demalchuta dina* are found in *Gittin* 10b; *Baba Kamma* 113a; *Baba Batra* 54b; and *Nedarim* 28a.

The argument advanced, has been that state statutes which mandate clergy disclosure and breach of confidentiality in cases of child abuse should

be honored and observed under the rubric of *dina d'malchuta dina*. I do not agree. If child abuse is observed or suspected from information obtained outside the bounds of a confidential rabbi/congregant relationship, then such information may and should be reported to secular and civil authorities pursuant to general principles of Jewish law apart from any applicable state statute. If, however, the knowledge is obtained in the context of a confidential relationship, its confidential character and the constraints placed by Jewish law upon its breach mandate, in my opinion, its protection and the rabbi's refusal to disclose. Even in cases of extreme urgency, circumstances in which direct observation of a putative victim is possible by a rabbi or other synagogue professional, confidentiality is preferred not the breach of professional clergy confidentiality. *Dina d'malchuta dina* is not understood by Jewish tradition to be an all-emcompassing and ever-elastic standard which incorporates any block of secular law as binding and valid. When it conflicts directly with standards of Jewish law (as, I argue, here) its value must be weighed against the value of the countervailing principles of Jewish law then in contention.

20. Moshe Feinstein, *Iggerot Mosheh, Hoshen Mishpat* 1:92.
21. Maimonides, *Hilkhot De'ot* 7:2; *Yoma* 4b.
22. Michael J. Broyde, *The Pursuit of Justice and Jewish Law* (New York: 1996) p. 25.
23. Other halakhic concerns involve the avoidance of the negative mitzvot of *lashon hara* and *lo tailaich rachil*. See Cohen, Rabbi Alfred S., "On Maintaining A Professional Confidence," 7 *Journal of Halacha and Contemporary Society* 73,77 (1984); Cohen, Rabbi Alfred S., "Privacy: A Jewish Perspective," *Journal of Halacha and Contemporary Society* 53, 82-87 (1981) and authorities cited therein.
24. J. David Bleich, *Contemporary Halakhic Problems II* (New York: 1983) p. 75. For an excellent and continuously updated summary of the state of American law regarding professional clergy confidentiality, see *Annot.*, Matters to Which the Privilege Covering Communication to Clergymen or Spiritual Advisors Extends, 71 ALR3d 794 (1976).
25. Hofetz Hayim, *Be'er Mayim Hayim, Hilkhot Issurei Rekhilut* 9:1. See Aaron Kirschenbaum, "The Bystander's Duty to Rescue in Jewish Law," 8 *Journal of Religious Ethics* 204-226 (1980).
26. J. David Bleich, *Contemporary Halakhic Problems II* (New York: 1983), p. 76.
27. *Ibid.*, p. 78.
28. See footnote 19, *supra*.