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THE JEWISH CRIMINAL LAWYER'S DILEMMA

Israel M. Greisman*

INTRODUCTION

When choosing a legal field in which to practice, a lawyer may try to reconcile his religious and professional obligations.¹ This Comment argues that being a criminal defense lawyer is an impractical option for a Jewish lawyer. Jewish Law² often conflicts with the obligations of a criminal defense lawyer. This renders the practice of criminal defense an impractical choice for Jewish lawyers.

A Jewish lawyer has obligations to God, to the Jewish people, to humanity, and to the legal profession. These obligations pull the lawyer in many different directions.³ One can only pray for the wisdom of Solomon when trying to reconcile these potentially conflicting obligations. This dilemma prompted Professor Sadiq Reza to comment, concerning religious public defenders, that a lawyer "must be 'schizophrenic,' separating his professional obligations

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1. Samuel J. Levine, *The Broad Life of the Jewish Lawyer: Integrating Spirituality, Scholarship and Profession*, 27 TEX. TECH L. REV. 1199, 1199 (1996) ("I seek a career in which I am able not only to reconcile my religious and professional duties, but to incorporate spirituality into my daily activities.")

2. In this Comment, Jewish Law refers to the Orthodox understanding of Jewish Law. Orthodox Jews believe in the written law, known as the Bible, and the oral law. ARYEH KAPLAN, MAIMONIDES' PRINCIPLES: THE FUNDAMENTALS OF JEWISH FAITH 69-70, reprinted in THE ARYEH KAPLAN ANTHOLOGY I, (discussing MAIMONIDES, PIRUSH HAMISHNAYOS SANHEDRIN 11 Yesod 8). The oral law is an explanation of the Bible given to Moses at Sinai. *Id.* The oral law was codified by Rebbi at the end of the second century, and elucidated in the Talmud. Orthodox Jews are bound by Halacha, which is the law that is derived from these sources. All the Halachik sources quoted in this Comment are traditional Orthodox sources. It is quite possible that other branches of Judaism will reach different results. See *infra* Part I for a more detailed description of Jewish Law.

3. See Russell G. Pearce, *To Save A Life: Why a Rabbi and a Jewish Lawyer Must Disclose a Client Confidence*, 29 LOY. L.A. L. REV. 1771, 1771-79 (1996) (describing a situation where a lawyer's professional and religious obligations were at odds).

from his religious commitments,"⁴ to ensure that the lawyer "remain[s] faithful to his client."⁵

Although many problems arise from being a Jewish lawyer, and specifically a Jewish criminal defense lawyer, this Comment argues that an attorney need not become "schizophrenic"⁶ to reconcile his obligations with the demands of his profession. Rather, a careful analysis must be made to determine whether the specific problems can be overcome.⁷ In the event that the problems facing the Jewish lawyer prove to be insurmountable, this Comment argues that the Jewish lawyer may not practice that field of law.

Part I of this Comment discusses the applicability of substantive Jewish Law outside of a Jewish court.⁸ Part II analyzes general issues of Jewish Law that conflict with the duties of a criminal defense lawyer. Part III examines some common settings in criminal defense work and their ramifications under Jewish Law, and argues that in many instances it is impossible to be a criminal defense lawyer, and at the same time obey Jewish Law.

I. IS JEWISH LAW APPLICABLE WHEN PRACTICING IN A SECULAR COURT?

The applicability of Jewish Law outside of a Jewish court⁹ is a threshold inquiry that must be addressed before examining substantive law. Judaism has its own judicial system and, naturally, the law applied in a Jewish court is Jewish Law. Jewish courts have jurisdiction over all cases in which the litigants are Jewish.¹⁰ How-

4. Sadiq Reza, *Religion and the Public Defender*, 26 FORDHAM URB. L.J. 1051, 1067 (1999) (arguing that a defense attorney must separate his professional and religious life).

5. *Id.*

6. Reza, *supra* note 4, at 1067.

7. There are many problems in Jewish Law with any type of legal practice. However, "the Jewish lawyer can – with study and diligence – steer clear of these snares and engage in a religiously proper, economically, intellectually, and socially rewarding practice of law." MICHAEL J. BROYDE, *THE PURSUIT OF JUSTICE AND JEWISH LAW* 137 (1996).

8. A Jewish Court, known as a "*Beis Din*," has jurisdiction in "almost every conceivable commercial matter that might be brought to [a Jewish Court] today." 1 EMANUEL QUINT, *A RESTATEMENT OF RABBINIC CIVIL LAW* 4 (1990).

9. A Jewish Court would certainly apply Jewish Law. The question this Comment addresses is whether Jewish Law is still applicable when one is not in a Jewish Court.

10. See RABBI YOSEF KARO, *SHULCHAN ARUCH CHOSHEN MISHPAT* 26. Indeed, it is prohibited for a Jew to sue another Jew in secular court. See BROYDE, *supra* note 7, at 41-48. However, due to the lack of proper ordination today, a *Beis Din* will only hear civil matters that occur frequently and entail a loss of money for the injured party. 1 QUINT, *supra* note 8, at 13 n.4.

ever, Jewish Law is also applicable outside of Jewish courts.¹¹ To properly illustrate this point, a brief description of Jewish Law is appropriate.

Judaism maintains that Jewish Law was given by God to Moses at Mount Sinai¹² and passed down from generation to generation.¹³ The laws were given in the form of the written law, known as the Torah,¹⁴ and the oral law,¹⁵ which was later codified in the Mishna¹⁶ and expounded upon in the Talmud.¹⁷ The purpose of the laws was to show to you the way that you should travel upon.¹⁸ Jewish Law is typically referred to as "Halacha," which literally translated means "the way on which one goes."¹⁹ The laws are binding upon every Jew and may only be violated in exigent circumstances, such as when a life is in danger.²⁰

The areas covered by Jewish Law are very broad. Besides the substantive law governing the resolution of disputes between two or more parties, such as contracts, torts and property,²¹ Judaism also has numerous laws that deal with one's service to God.²² There are dietary laws that restrict what a Jew can eat,²³ Sabbath and holiday laws that restrict when a Jew can work,²⁴ and modesty laws that restrict how a Jew can dress.²⁵ There are laws that dictate how a Jew should get dressed in the morning,²⁶ and there is even a

11. See *infra* notes 12–30 and accompanying text.

12. See MISHNA PIRKEI AVOT 1:1 ("Moshe received the Torah from Sinai and handed it down to Yehoshua; Yehoshua to the Elders; the Elders to the Prophets; the Prophets handed it down to the Men of the Great Assembly.").

13. *Id.*; see also MAIMONIDIES, INTRODUCTION TO MISHNA TORAH.

14. See KAPLAN, *supra* note 2, at 68–69 (discussing MAIMONIDIES, PIRUSH HAMISHNAYOS SANHEDRIN 11 Yesod 8).

15. *Id.*

16. See Chad Baruch & Karsten Lokken, *Research of Jewish Law Issues: A Basic Guide and Bibliography for Students and Practitioners*, 77 U. DET. MERCY L. REV. 303, 307 (2000).

17. *Id.* at 306.

18. *Id.*

19. *Id.*

20. See, e.g., TALMUD BAVLI YOMA 83a (discussing the intricacies of violating the Sabbath to save a life).

21. See generally RABBI YOSEF KARO, SHULCHAN ARUCH CHOSHEN MISHPAT.

22. See generally RABBI YOSEF KARO, SHULCHAN ARUCH EVEN HA'EZER.

23. See *Leviticus* 11:1–32 (discussing which animals and fish are kosher).

24. See generally RABBI YOSEF KARO, SHULCHAN ARUCH ORACH CHAYIM 242–365 (discussing the laws of Sabbath); *id.* at 495–529 (discussing the laws of holidays).

25. See generally RABBI PESACH ELIYAHU FALK, OZ VEHADAR LEVUSHAH, MODESTY – AN ADORNMENT FOR LIFE (1998).

26. See generally RABBI YOSEF KARO, SHULCHAN ARUCH ORACH CHAYIM 2.

law mandating which shoelace to tie first.²⁷ The result of all these laws is, arguably, that no matter what a Jew does or where a Jew is, he or she is before God. A Jew is a Jew, and must act like one, twenty-four hours a day, seven days a week.²⁸

While one may be accurate in claiming that American law²⁹ is practiced mainly in American courts, the same claim could not be made about Jewish Law. Jewish Law is binding wherever God is found, in other words – everywhere.³⁰ Therefore, even if something would be permitted under American law, a prohibition under Jewish Law would still be binding.³¹

Some commentators, notably Rabbi Alfred S. Cohen, have argued that even some Jewish Laws may not be binding in certain circumstances if American law is to the contrary.³² For example, Cohen argues that the duty of confidentiality³³ may trump the Jew-

27. *Id.* at 2:4.

28. Indeed, the reason Jews wear yarmulkes is to constantly remind them that there is a God above them. TALMUD BAVLI SHABBOS 156b (explaining the commandment to wear a yarmulke); *see also* RABBI YOSEF KARO, SHULCHAN ARUCH ORACH CHAYIM 2:6.

29. In this Comment, American law and secular law are used interchangeably. These terms refer to all non-Jewish Law.

30. There are, of course, procedural laws that would not be appropriate anywhere but in a Jewish Court. *See, e.g.*, RABBI YOSEF KARO, SHULCHAN ARUCH CHOSHEN MISHPAT 11 (discussing service of summons to a Jewish Court). However, the majority of Jewish Laws, and certainly all laws that pertain to service of God, would apply in all circumstances.

31. A simple example of this is the Jewish Law prohibition of working on the Sabbath. *See generally* RABBI YOSEF KARO, SHULCHAN ARUCH ORACH CHAYIM 242–365. Though under American law there is no prohibition against working on the Sabbath, it is prohibited under Jewish Law. Likewise, there is no prohibition under American law to lend money with interest. Under Jewish Law, however, there is an absolute ban on lending money with interest. *See* MAIMONIDIES, MISHNA TORAH HILCHOT MALVEH VE'LOVEH 6:1. Interestingly, the Roman Catholic Church has recently decreed that Roman Catholic lawyers must refuse to take divorce cases. *See* Melinda Henneberger, *John Paul Says Catholic Bar Must Refuse Divorce Cases*, N.Y. TIMES, Jan. 29, 2002, at A4 (noting the Church's position that a divorce lawyer would be at odds with Catholicism's goal of reconciliation).

32. Rabbi Alfred S. Cohen, *On Maintaining a Professional Confidence*, 7 J. HALACHA & CONTEMP. SOC'Y, 73, 77–80 (1984).

33. Generally, a lawyer or a doctor is not permitted to reveal confidences of his client. This came to play in the area of medical confidences in the famous case of *Tarasoff v. Regents of Uni. of Cal.*, 551 P.2d 334 (Cal. 1976), where a psychologist was told by his client that he planned to kill a girl. *Id.* The psychiatrist informed the police, but did not inform the victim, and was found liable for not telling the victim, which would have been breaking his patient's confidence. *Id.* Regarding lawyers, the American Bar Association Model Rules of Professional Conduct state that a lawyer *may* (not *must*) only divulge a confidence to prevent the client from committing a criminal act that would cause imminent death or substantial bodily harm. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1).

ish Law prohibition against standing idly by while your neighbor is being harmed.³⁴ Cohen argues that societal considerations may weigh in favor of maintaining confidences, even in violation of religious prohibitions.³⁵ Regarding doctor-patient confidentiality, he argues that the proper question should be, "What would be the net result to *society* if troubled persons no longer had someone to help them cope with personal problems?"³⁶ Because medical confidentiality serves a great societal need, a doctor may be obligated to keep a confidence even if doing so would violate the Jewish Law prohibition of standing idly by while another is being harmed.³⁷

Cohen cites as a support to his position the famous case of Rabbi Meir of Rothenberg, who was captured in 1293 and refused to allow his community to ransom him³⁸ because allowing them to do so would only encourage future kidnappings.³⁹ This was true even though there is a biblical commandment to redeem captives.⁴⁰ Cohen concludes, "There are times when individual rights must be forfeited for the greater benefit of the community."⁴¹

Similarly, Professor Monroe Freedman has argued that in the American adversarial judicial system, two lawyers are required to advocate the positions of their client to the best of their abilities.⁴² Accordingly, an individual lawyer's personal religious obligations

34. Cohen, *supra* note 32, at 84. Cohen argues that if a student told a school psychologist he was taking drugs, the psychologist would have to keep the students confidence, in compliance with American law, and not tell the parents about the students drug habit. *Id.* This should be so even though not telling the parents would violate the prohibition of standing idly by while another is being harmed. *Id.*

35. *Id.* Cohen does not go so far as to say that it is permissible for a doctor to break the confidence of the patient, rather he says that in each case the doctor should seek competent rabbinical advisement. *Id.* It may be that the needs of confidentiality outweigh the prohibition of standing idly by, or it may be "that it is more important for the doctor to reveal the confidential material, even if will cause him enormous personal damage." *Id.*

36. *Id.* at 78.

37. For a more thorough discussion of the prohibition of standing idly by while another is being harmed, see BROYDE, *supra* note 7, at 25-30.

38. Cohen, *supra* note 32, at 80.

39. *Id.* at 80 n.10 (comparing this to the State of Israel's policy of not negotiating with terrorists, because negotiating with them would only cause more terrorism).

40. See TALMUD BAVLI BABA BASRA 8a; MAIMONIDIES, MISHNA TORAH HILCHOT MATNAS ANIYIM 8:10. ("There is no commandment bigger than the commandment to redeem captives.").

41. Cohen, *supra* note 32, at 80.

42. See MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 108-43 (1990).

should be forfeited for this greater societal benefit.⁴³ A lawyer should adhere to the secular laws of the legal profession, even those in violation of Jewish Law, to benefit all of society.⁴⁴

Such a broad proposition, however, has no precedent in Jewish Law. Cohen himself admits that under Jewish Law there is no bright line rule that societal needs trump individual obligations.⁴⁵ Cohen even concedes that there is precedent supporting the proposition that a Jew may not violate Jewish Law even if there is a societal need. He quotes Maimonides,⁴⁶ who ruled that if a town is besieged by an army that demands that one person be handed over to be killed in exchange for sparing the rest, it is impermissible to hand over the person, even though not doing so will result in the entire town being killed.⁴⁷ Thus the great societal gain derived from giving over one person is not a justification to violate the Jewish Law prohibition of handing someone over to be killed.⁴⁸

Therefore, there is no rule under Jewish Law that societal needs trump individual religious obligations. Even Cohen gives consideration only to those demands of the profession that are "absolutely integral to the proper function of that profession."⁴⁹ Additionally, Cohen considers the possibility that a practitioner may violate Jewish Law only where the profession is essential to the welfare of society.⁵⁰ Even under such circumstances, there is no "hard-and-fast rule"⁵¹ that Jewish Law may be violated.⁵²

43. See Monroe H. Freedman, *The Legal Ethics Perspective: Religion is Not Totally Irrelevant to Legal Ethics*, 66 *FORDHAM L. REV.* 1299, 1300 (1988) (arguing that there would be no ethical problem with a lawyer presenting perjured testimony).

44. See *id.*

45. Cohen, *supra* note 32, at 84.

46. Rabbi Moshe Ben Maimon ("Rambam") was born in Cardova around the year 1135. Maimonides' most well known publication is *Mishna Torah* in which he codified and analyzed all areas of Jewish Law. BEREL WEIN, *HERALD OF DESTINY* 115-28 (1993).

47. Cohen, *supra* note 32, at 80 n.13 (quoting MAIMONIDES, *MISHNA TORAH HILCHOT YESODEI HATORAH* 5:5).

48. MAIMONIDES, *MISHNA TORAH HILCHOT YESODEI HATORAH* 5:5.

49. Cohen, *supra* note 32, at 84.

50. *Id.*

51. *Id.*

52. *Id.* It is not clear that the confidentiality rule is absolutely integral for a functioning judicial system, even an adversarial one. Additionally, if collecting fees and defending yourself from suit are important enough interests to justify breaking a client's confidence, certainly a commandment from God should also be a justification. See Pearce, *supra* note 3, at 1779 (concluding that a lawyer would have to disclose a client's confidence to fulfill the obligation of saving another person's life).

Moreover, Cohen does not distinguish between *active*⁵³ and *passive*⁵⁴ violations of a commandment. Rather, Cohen relies solely upon cases resulting in a passive violation of a commandment,⁵⁵ which come from a person's nonfeasance.⁵⁶ Maimonides, however, illustrates an active violation of a commandment,⁵⁷ and ruled that societal needs did *not* trump individual religious obligations.⁵⁸

Because strict laws govern active violations of religious commandments,⁵⁹ there is no precedent for Cohen and Freedman's argument that societal needs should justify actively violating a commandment. Even in a situation where a societal need exists, one may not actively violate a commandment absent exigent circumstances.⁶⁰

In conclusion, Jewish Law is binding upon a Jewish lawyer even if secular law is different. A Jew is prohibited from actively violating Jewish Law even when this would result in a societal benefit.

II. CAN A JEW BE A CRIMINAL DEFENSE LAWYER?

Many people view the role of a public defender as the noblest role in the legal profession.⁶¹ Indeed, although Judaism's view may be skeptical of the role of an advocate,⁶² the Jewish concepts of equal justice for the poor,⁶³ and love for a neighbor⁶⁴ would cer-

53. An example of an active violation would be Maimonides's case. *See supra* notes 47-48 and accompanying text. There, an active act, handing over a person to be killed, is prohibited.

54. An example of a passive violation is the case of Rabbi Meir of Rothenberg. *See supra* notes 38-39 and accompanying text. There the violation, not ransoming a captive, was done passively – by doing nothing.

55. Cohen, *supra* note 32, at 80-84.

56. For example, the violation in the case of Rabbi Meir of Rothenberg was that the community was not fulfilling its commandment to redeem prisoners. *See supra* notes 32-33 and accompanying text. This, however, is merely nonfeasance (*She'ev V'al Ta'aseh*), which is occasionally permitted under Jewish Law. *See, e.g.,* RABBI YOSEF KARO, SHULCHAN ARUCH, CHOSHEN MISHPAT 588:5 (ruling that one should refrain from blowing the *shofer* on Rosh Hashonah if it falls out on the Sabbath).

57. *Supra* notes 46-47 and accompanying text.

58. MAIMONIDES, *supra* note 47, at 5:5.

59. Indeed, one is obligated to give up all his money, rather than violate a negative commandment. RAMA, ORACH CHAYIM 656.

60. *See, e.g.,* TALMUD BAVLI YOMA, 83a (ruling that you may violate the Sabbath to save a life); *see also* Pearce, *supra* note 3, at 1779.

61. *See* Reza, *supra* note 4, at 1053-56.

62. *See* MISHNA PIRKEI AVOS 1:8 ("Yehuda ben Tabbai says: Do not act as a lawyer; while the litigants stand before you, consider them both as guilty; but when they are dismissed from you, consider them both as innocent, provided they have accepted judgment.").

63. *See* Leviticus 19:15; Deuteronomy 16:18.

64. *See* Leviticus 19:18.

tainly find such a role meritorious. However, being a defense attorney presents a number of challenges that must be addressed from the standpoint of Jewish Law.

Defense attorneys rely on numerous tactics in defending their clients. This includes attempting to suppress all evidence that could be harmful to their client, impeaching the credibility of witnesses whose testimony may be harmful to their client, and trying to establish reasonable doubt by demonstrating that someone else could have committed the crime. All this is done under the rubric of zealously defending their clients to the best of their ability.⁶⁵

The morality of this conduct is, however, questionable. One persuasive argument is that the needs of an adversarial system necessitate the defendant to have an adequate defense to ensure that the prosecution meets its burden of proof.⁶⁶ Thus, the availability of an adequate defense is an essential component in the judicial system.

This argument, however, is inadequate to justify violating Jewish Law. For example, one can make a similar argument that it is essential under our adversarial system for each side to have adequate representation in a corporate or civil litigation matter. Nevertheless, even if it were in the best interest of the client for the lawyer to work all weekend in representing the client, it would undoubtedly be improper for a Jewish lawyer to work on the Sabbath⁶⁷ or a holiday.⁶⁸ Just because the requirements of the judicial system require certain behavior is not in and of itself reason to violate Jewish Law.

Accordingly, we must ascertain whether the tactics commonly used by defense attorneys violate Jewish Law. This Comment will discuss entering a not guilty plea for a client who has committed the crime, defending a client who is admittedly guilty, and discrediting a truthful witness.

65. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-19 (2001).

66. See RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER* 36-37 (1999).

67. RABBI ISAAC JACOB WEISS, *MINCHAT YITZCHOK* 9:21 (holding that it is forbidden for a Jewish lawyer to delegate to others, even non-Jews, work that must be done on the Sabbath).

68. *Id.* at 9:21. Sandy Koufax, the Hall of Fame pitcher for the Los Angeles Dodgers, refused to pitch in a World Series game because the game was taking place on Yom Kippur. See Mark Hermann, *Koufax Emerges From His Cocoon*, *NEWSDAY*, Oct. 25, 1999, at A54.

A. Entering a Not Guilty Plea for a Client Who Has Committed the Crime

One issue that constantly arises in criminal defense practice is the prohibition of lying under Jewish Law. Indeed, the Bible instructs Jews not only to refrain from technical lying, but also to distance themselves from falsehood.⁶⁹ However, the prohibition on lying is not a problem for a Jewish defense attorney, because it is prohibited not only by Jewish Law, but by secular law as well.

Because of the Jewish Law prohibition on lying, a Jewish lawyer is not allowed to say that his client is innocent when he knows him to be guilty. Similarly, a Jewish lawyer is not allowed to claim someone else committed the crime, when he knows his client did so, as this too would be a lie. It therefore logically appears to follow that it would be prohibited for a Jewish lawyer to enter a plea of not guilty when he knows his client is in fact guilty, because, again, this would be a lie. This analysis, however, is a technical one based on a very narrow understanding of what a plea actually is.

Some commentators argue that a plea of not guilty is not a statement of innocence per se, but rather a statement that the defendant will hold the government to its burden of proving its case beyond a reasonable doubt.⁷⁰ This is illustrated by the dichotomy of a defendant having a right against self-incrimination,⁷¹ and yet, at the same time, having an obligation to plead guilty or not guilty.⁷² Therefore, a plea is not an affirmative statement by the defendant claiming his innocence or guilt.⁷³ Rather, a guilty plea is a statement by the defendant agreeing to the government's unproved assertions that he has committed a crime, and thus absolving the government of its burden to prove guilt beyond a reasonable doubt. Conversely, a not guilty plea is a statement by the defendant that he will hold the government to its burden.⁷⁴ Rabbi Michael J. Broyde in his book, *The Pursuit of Justice and Jewish Law*, cites as proof to this argument the fact that one can

69. *Exodus* 23:7. See also BROYDE, *supra* note 7, at 78 (noting that discrediting a truthful witness, which is not technically lying, would be a violation of the Jewish Law commandment to distance oneself from falsehood).

70. See BROYDE, *supra* note 7, at 89-90.

71. U.S. CONST. amend. V.

72. FED. R. CRIM. PROC. 11 ("A defendant may plead guilty, not guilty, or nolo contendere. If a defendant refuses to plead, or if a defendant organization, as defined in 18 U.S.C. § 18, fails to appear, the court shall enter a plea of not guilty.")

73. BROYDE, *supra* note 7, at 90 (noting that there would be no prohibition under Jewish Law for a defendant, who knows that he is in fact guilty, to plead "not guilty").

74. *Id.*

not be prosecuted for perjury when he enters a plea of not guilty, but can be prosecuted for perjury if he testifies to his innocence and is then proven guilty.⁷⁵

Accordingly, if a plea of not guilty is not equivalent to a statement of "I did not do it," then a defendant is not, in fact, lying by entering a plea of not guilty, even if he committed the crime. Accordingly, some authorities in Jewish Law have concluded that it is not a lie under Jewish Law to enter a plea of not guilty even if one is indeed guilty.⁷⁶

This analysis, however, is limited to pleas, which are not actual claims of innocence. The reasoning would not cover any other statement of innocence, such as statements during testimony or the lawyer's arguments, as these would be affirmative statements claiming, "I did not do it".⁷⁷ Thus, although it would be permissible under Jewish Law for a lawyer to enter a plea of not guilty for a client who he knew was guilty, it would be impermissible for the lawyer to actually claim his client was innocent, because this would be an affirmative lie.

The same result is reached under the Model Code of Professional Responsibility.⁷⁸ A lawyer is obligated to zealously defend the position of his client, but only within the boundaries of the law.⁷⁹ He cannot say his client did not commit the crime when he knows his client did, as this would be lying and outside the boundaries of the law.⁸⁰ On the other hand, he may plead not guilty and claim that the government has not met its burden of proof.⁸¹ Be-

75. *Id.* at 90 n.5 ("Proof to this can be derived from the American law rule that a person who testifies that he is innocent when he is not actually innocent, can be prosecuted for perjury, but merely pleading not guilty when one is actually guilty is not grounds for a perjury charge as no testimony has occurred."); *see also* United States v. Endo, 635 F.2d 321, 322 (4th Cir. 1980) (holding that a person's guilty plea could not form the basis of a perjury charge, "To be false, the statement must be with respect to a fact or facts and the statement must be such that the truth or falsity of it is susceptible of proof.").

76. *See* BROYDE, *supra* note 7, at 90 (citing RABBI DOVID COHEN & RABBI YAAKOV EMDEN, SHE'ELAT YA'AVETZ 2:9).

77. Indeed, one could be prosecuted for perjury for claiming during the trial that he did not commit a crime, when he in fact did. *See* BROYDE, *supra* note 7, at 90.

78. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-19 (2001).

79. *Id.*

80. *See id.*

81. *See supra* notes 70-78 and accompanying text. It should be noted, however, that implying a falsehood is also a violation of the prohibition to distance oneself from falsehood. Therefore, though a lawyer may defend a client he knows to be guilty, he must be very careful to not say, or imply, that his client did not commit the crime. For example, the lawyer could not argue that his client did not commit the crime, but he could argue that the government has not met its burden of proof. BROYDE, *supra*

cause the same result is reached under both Jewish Law and secular law, it appears that these situations do not pose a problem for a Jewish defense attorney.

B. Defending a Guilty Client

Some have argued that defending criminals to help them avoid punishment is not in accord with Jewish Law.⁸² The Torah commands Jews to “destroy the evil from your midst.”⁸³ Based on this commandment, Rabbi Herschal Schachter ruled that it is impermissible for a lawyer to help a criminal client escape the consequences of his actions.⁸⁴ This analysis, however, applies only to cases where Jewish Law prohibits the criminal conduct at issue.⁸⁵ If the conduct is criminal under American law, but permissible under Jewish Law, then the lawyer would not violate the commandment to “destroy the evil from your midst”⁸⁶ by defending his client.⁸⁷

Another potential problem with being a defense attorney is the commandment to pursue justice.⁸⁸ It may seem that working to get an acquittal for an admittedly guilty client is not “pursuing justice” and should therefore be prohibited by Jewish Law. There are two possible responses to this argument. First, one can argue that protecting the client’s constitutional rights is indeed pursuing justice, even though the end result is that a guilty client will not be punished for his crimes. Second, though the verse of “justice, justice thou shall pursue”⁸⁹ seems to be commanding an objective principle of the pursuit of justice, the verse is interpreted within the context of procedural law in civil disputes between two parties.⁹⁰ It

note 7, at 90. *Contra* ZITRIN & LANGFORD, *supra* note 66, at 43-44, 47 (“Sanitized cross-examinations and reasonable doubt arguments *don’t* work; they point the arrow of guilt directly at the defendant.”).

82. Michael J. Broyde, *Practicing Criminal Law: A Jewish Law Analysis of Being a Prosecutor or Defense Attorney*, 66 FORDHAM L. REV. 1141, 1148 (1998) (citing Rabbi Hershel Schachter, *Dina DeMalchusa Dina: Secular Law As a Religious Obligation*, 1 J. HALACHA & CONTEMP. SOC’Y 3, 121-22 (1981)).

83. *Deuteronomy* 17:7.

84. *See* Broyde, *supra* note 82, at 1148 (citing Schachter, *supra* note 82, at 121-22.).

85. *Id.* at 1143 n.9.

86. *Deuteronomy* 17:7.

87. *See* Broyde, *supra* note 82, at 1148 (citing Schachter, *supra* note 82, at 121-22.).

88. This is learned from the verse, “justice, justice thou shall pursue.” *Deuteronomy* 16:20.

89. *Id.*

90. *See* RASHI DEUTERONOMY 16:20; OHR HACHAIM DEUTERONOMY 16:20; S’FORNO DEUTERONOMY 16:20; (interpreting the verse as a directive about how to choose judges). *See also* TALMUD BAVLI SANHEDRIN 32b (holding that the verse is a

therefore appears that a Jewish lawyer can practice criminal defense without violating the biblical obligation to pursue justice.⁹¹

C. Discrediting a Truthful Witness

1. *Discrediting a Truthful Witness Under Secular Law*

The question of whether a defense attorney should discredit a truthful witness is unsettled in the academic field.⁹² Supreme Court Justice Byron White believed that a defense attorney should, “confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive.”⁹³ He reasoned that it is the defendant’s prerogative to hold the government to its burden of proof and discrediting a truthful witness is merely one method of doing so.⁹⁴ Such a defense is clearly in the best interests of the client, and, “[u]nder our Constitution and our system of justice, [the client should] be entitled to nothing less.”⁹⁵

To the contrary, Professor Harry Subin argues that it is unethical to discredit a truthful witness.⁹⁶ Though such practice is not prohibited under the current ethics codes, he sees no social value in allowing a lawyer to defend his client in such a fashion.⁹⁷ Subin argues that there is no difference, “between deliberately offering perjured testimony and deliberately attempting to create false ‘proof’ by offering truthful but misleading evidence.”⁹⁸

Professor Monroe Freedman agrees with Subin, in theory, that there is no difference between testifying falsely and discrediting a truthful witness through cross-examination.⁹⁹ However, Freedman

directive to judges to ask many questions of a litigant whom they know to be a liar); TALMUD YERUSHALMI SANHEDRIN 5:2 (holding that the verse is a commandment to judges to try to find mitigating factors where the defendant is accused of a capital crime). This is not to say that the objective principle is to be disregarded. Rather one can argue, as most criminal lawyers do, that upholding prophylactic rules, such as suppression of evidence when there was an illegal search, is pursuing justice as it is protecting a defendant’s Fourth Amendment rights.

91. There are other problems with making a motion to suppress that are discussed *infra* Part III.

92. See ZITRIN & LANGFORD, *supra* note 66, at 38-45 (noting differing opinions on the issue of discrediting a truthful witness).

93. *United States v. Wade*, 388 U.S. 218, 257 (1967) (White, J., dissenting in part, concurring in part).

94. *Id.* at 257-58 (White, J., dissenting in part, concurring in part).

95. See ZITRIN & LANGFORD, *supra* note 66, at 48.

96. See generally Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right To Present a False Defense*, 1 GEO. J. LEGAL ETHICS 689 (1988).

97. ZITRIN & LANGFORD, *supra* note 66, at 41.

98. *Id.* at 42.

99. *Id.*

rejects Subin's disapproval of the practice of cross-examining truthful witnesses.¹⁰⁰ He predicts that the foreseeable result of forbidding cross-examination of a truthful witness would not be more justice by reducing falsehood, but rather that clients and lawyers who would avoid these ethical problems by not communicating freely.¹⁰¹ Because the Constitution mandates that a client be able to discuss his case fully with his lawyer,¹⁰² such a result is unacceptable. Therefore, even though Freedman agrees in principle with Subin that such conduct is morally wrong, he would allow a lawyer to cross-examine a truthful witness in order to discredit him.¹⁰³

2. *Discrediting a Truthful Witness Under Jewish Law*

Jewish Law prohibits discrediting a truthful witness.¹⁰⁴ Jews are commanded to "distance [themselves] from falsehood."¹⁰⁵ Beyond this catch-all prohibition that covers all forms of dishonesty, there are other more specific prohibitions as well.¹⁰⁶ Cross-examining a truthful witness and implying that the witness might be lying, which is itself a lie, would be a clear violation of these prohibitions.¹⁰⁷

Additionally, besides the prohibition against lying, it is also possible that the lawyer will violate the prohibition of, "A man shall not insult his fellow."¹⁰⁸ For example, in the course of the cross-examination, the lawyer may embarrass the witness, which is prohibited if the witness is truthful.¹⁰⁹ Moreover, the entire tactic of trying to make a truthful witness appear less credible will no doubt embarrass the witness, and therefore violate this commandment.

100. *Id.*

101. *Id.*

102. See C.B. MUELLER & L.C. KIRKPATRICK, EVIDENCE 361 (1995) ("The defendant's right to counsel in criminal cases, guaranteed by the Sixth Amendment and most state constitutions, would appear to require some degree of confidentiality for communications between a defendant and his attorney.").

103. ZITRIN & LANGFORD, *supra* note 66, at 42.

104. BROYDE, *supra* note 7, at 78 ("It is prohibited for a lawyer to undermine the credibility of a witness whom the lawyer knows is telling the truth.").

105. *Exodus* 23:7.

106. See *Exodus* 23:1 ("Do not cause to be heard a false report."); *Leviticus* 19:16 ("Do not go as a talebearer among your people.").

107. BROYDE, *supra* note 7, at 78.

108. *Leviticus* 25:17.

109. See BROYDE, *supra* note 7, at 78. If the witness has indeed perjured himself, Rabbi Cohen holds that a lawyer may bring this out in cross-examination even if this will embarrass the witness. See Mordechai Biser, *Can an Observant Jew Practice Law? A Look at Some Halakhic Problems*, 11 JEWISH L. ANN. 117.

The fact that obeying this commandment would damage the lawyer's ability to defend the client's case is immaterial.¹¹⁰ As Rabbi Feivel Cohen stated, "[J]ust as Tamar was ready to be burned alive rather than embarrass *Yehudah* in public,¹¹¹ so a lawyer should be prepared to lose a case rather than commit this serious *halakhic* transgression."¹¹²

III. CAN A JEWISH DEFENSE LAWYER REALLY DEFEND A CLIENT?

Though a religious lawyer could abide by the ethical rules of the legal profession and still carry out his duties to his client insofar as cross-examination¹¹³ and pleadings¹¹⁴ go, there are various scenarios that face a criminal defense lawyer that may conflict with Jewish Law. The following three situations will be discussed: (1) the client maintains his innocence; (2) the client admits that he is guilty; and (3) the client admits that he is guilty, but the police used physical violence to obtain the confession from him.

A. The Client Claims That He Is Innocent

The most problem-free scenario under Jewish Law is when the client maintains his innocence. A lawyer is obligated under Jewish Law to give a client the benefit of the doubt, absent proof to the contrary.¹¹⁵ Thus, the lawyer, who believes in his client's innocence, or at least has no proof to the contrary, would not be lying by claiming his client did not commit the crime. Similarly, the lawyer could advise his client to take the stand and testify that he did not commit the crime.

This analysis applies to all defenses recognized under Jewish Law, such as the claims of innocence and self-defense. There are, however, criminal law defenses that are based on concepts that are not recognized under Jewish Law. For example, there is no concept in Jewish Law of a motion to suppress evidence due to an illegal search, or a quantum of proof called "reasonable doubt."

110. Biser, *supra* note 109, at 117.

111. *Genesis* 38:24.

112. See Biser, *supra* note 109, at 117 (quoting Rabbi Feivel Cohen, Address at the Agudath Conference).

113. See *supra* notes 105-112 and accompanying text.

114. See *supra* notes 69-81 and accompanying text.

115. See BROYDE, *supra* note 7, at 92 n.12 (citing KITZUR PISKEI HAROSH NIDDAH 9:5).

The question then arises, whether a lawyer is "pursing justice"¹¹⁶ by getting a client acquitted by using these defenses.¹¹⁷

Rabbi Yaakov Ettinger¹¹⁸ ruled that a Jewish lawyer can further any arguments recognized by the adjudicating court, even though they are not recognized by a Jewish court.¹¹⁹ Though there is a story recounted in the Talmud¹²⁰ in which Rabbi Tarfon refused to aid someone who was accused of murder, the reasons given therein for doing so are inappropriate in this situation. Tosafot explains that the accused murderer was a fugitive, and Rabbi Tarfon was afraid that the ruling government would punish him for aiding the accused murderer.¹²¹ This rationale obviously does not apply to a defense attorney who has a legal obligation to represent his client. Thus, if the Jewish lawyer believes his client is innocent, he may advance all defenses recognized by the adjudicating court.¹²²

B. The Client Admits That He Is Guilty

A more troublesome situation is when the client admits to the lawyer that he has committed the alleged crime. As noted above, the prohibition on lying would limit the defenses that the lawyer may advance, as well as the tactics he can employ.¹²³ It is also possible that Jewish Law would prohibit the lawyer from employing other legal tactics.

For example, consider a case where an acquittal can be achieved through technical defenses not going to the guilt or innocence of

116. *Deuteronomy* 16:20.

117. It could be that there was no place for such rules in Jewish Law. Under Jewish Law, circumstantial evidence and confessions were not admissible in criminal court. Thus, there was no place for a motion to suppress, and the fact that it did not exist is not a clear proof that Jewish Law would prohibit such a motion in a situation where circumstantial evidence is admissible. See AARON KIRSCHENBAUM, *SELF-INCRIMINATION IN JEWISH LAW* 17-21 (1990) (discussing the inadmissibility of confessions under Jewish Law).

118. Best known for his famous Talmudic work, entitled *Aruch LaNer*, Rabbi Ettinger lived from 1798-1871 in Altona. See BEREL WEIN, *TRIUMPH OF SURVIVAL* 57 n.1 (1990).

119. RABBI YAAKOV ETtinger, *ARUKH LANER NIDDAH* 61a. For others who are of the same opinion, see BROYDE, *supra* note 7, at 94 n.16 (citing this as the opinion of RABBI YAAKOV EMDEN, *SHE'ELAT YA'AVETZ* 2:9; RABBI MOSHE SCHREIBER, *CHASAM SOFER* 6:14; RABBI YAAKOV BREISH, *CHELKAT YAAKOV* 4:23).

120. *TALMUD BAVLI NIDDAH* 61a.

121. *TOSAFOT NIDDAH* 61a.

122. Broyde cites two different views about defending criminals. BROYDE, *supra* note 7, at 91-96. According to both views if the lawyer believes his client is innocent he may advance all defenses, even those not recognized by Jewish Law, in defending his client. *Id.*

123. See *supra* notes 69-75 and accompanying text.

the client, such as with a motion to suppress evidence as the fruit of an illegal search. In other words, the client admits his guilt, but the defense is premised on the inadmissibility of the evidence.

Under the Model Code of Professional Responsibility, the lawyer would be obligated to make such a motion upon his client's request, because the Code requires lawyers to advocate the position of their clients.¹²⁴ Moreover, a person has a constitutionally protected right to be free from unreasonable searches and seizures.¹²⁵ By making a motion to suppress illegally seized evidence, a lawyer is protecting that societal right.¹²⁶ A lawyer would therefore be obligated to make such a motion on behalf of his client under American law.

However, we must also look to Jewish Law, even though the issue is before a secular court, for guidance on resolving this complicated issue.¹²⁷ There are several areas of Jewish Law that must be analyzed to decide whether the lawyer may make the motion to suppress. The areas we will discuss are the law of the pursuer (*Rodeif*) and the prohibition of standing idly by while your neighbor is being harmed (*Lo Ta'amod Al Da'am Re'echah*.)

1. *The Law of Rodeif (Pursuer)*

Under Jewish Law, there is an obligation to save another person's life if it is in danger.¹²⁸ There is also, however, a prohibition against killing.¹²⁹ In the *Rodeif* (pursuer) situation, the two commandments are in direct conflict.¹³⁰ In the typical *Rodeif* situation Person *A*, the pursuer, is trying to kill Person *B*, the victim.¹³¹ Person *C*, a bystander, has an obligation to save Person *B*.¹³² But what if the only way Person *C* could save Person *B* is by killing Person *A*? Under normal circumstances killing another person is prohibited as murder.¹³³ Under the law of *Rodeif*, however, one is obligated to save another person's life, even if it means killing the

124. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-19 (1981).

125. U.S. CONST. amend. V.

126. *United States v. Calandra*, 414 U.S. 338, 348 (1974) (noting that suppressing illegal evidence protects Fourth Amendment rights).

127. *See supra* notes 9-31 and accompanying text.

128. *See* MAIMONIDES, MISHNA TORAH HILCHOT ROTZEIACH 1:10.

129. *Exodus* 20:13 ("Thou shall not murder.").

130. *See* RABBI YOSEF KARO, SHULCHAN ARUCH CHOSHEN MISHPAT 425:1 (describing the *Rodeif* laws.).

131. *See id.*

132. *See id.*

133. *Exodus* 20:13 ("Thou shall not murder.").

pursuer.¹³⁴ Thus, in the above scenario, Person C, a passerby, is obligated to save Person B, even if it entails killing Person A.¹³⁵

Rashba¹³⁶ and Rivash¹³⁷ disagree as to whether the obligation to save the victim by killing the pursuer applies to only active murder or to passive murder as well.¹³⁸ Generally, under Jewish Law, one is not liable for murder for passively killing another.¹³⁹ For example, if a person places another in front of a lion he would not be liable for murder.¹⁴⁰ Accordingly, Rashbah opines that because the killer is not a murderer in the legal sense of the word,¹⁴¹ the law of *Rodeif* is inapplicable and the pursuer may not be killed to save the victim.¹⁴² Rivash, on the other hand, believes that the law of *Rodeif* applies even to a passive killer.¹⁴³ Thus, if the pursuer places a victim in front of a lion, a passerby would still be obligated to kill the pursuer to save the victim, even though the pursuer would not have been a murderer in the legal sense of the word.¹⁴⁴

134. RABBI YOSEF KARO, SHULCHAN ARUCH CHOSHEN MISHPAT 425:1.

135. *Id.* There is actually a prohibition to have mercy upon the pursuer. See *Deuteronomy* 25:12; MAIMONIDIES, MISHNA TORAH HILCHOS ROTZEIACH 1:8.

136. Rabbi Shlomo ben Aderes (Rashba) lived in Barcelona from 1235 to 1310. BEREL WEIN, *HERALD OF DESTINY* 182-83 (1993). He served as rabbi of Barcelona for over forty years and was the effective leader of Spanish Jewry. *Id.* Thousands of his responsa have been preserved, and his commentary on the Talmud is still one of the basic texts of Talmud study. *Id.*

137. Rabbi Yitzchok ben Sheshes Perfet (Rivash) lived from 1326 to 1407. WEIN, *supra* note 136, at 195. He was a great rabbinical judge and the Halachik authority of his time. *Id.* Rivash led a yeshiva in Valencia, until he was forced to flee because of the pogroms of 1391. *Id.* He then became rabbi of the Jewish community in Algiers. *Id.* Many of his responsa have survived and are still used today. *Id.*

138. RABBI SHLOMO BEN ADERES, HIDDUSHEI HARASHBA BABBA KAMA 22b (holding that the pursuer laws do not apply to passive murder); RABBI YITZCHOK BEN SHESHES PERFET, RIVASH § 238 (holding that the pursuer laws do apply to passive murder). Stabbing someone would be an example of active murder, whereas placing the victim in front of a lion would be an example of passive murder. See Irene Merker Rosenberg et al., *Murder By Gruma: Causation in Homicide Cases Under Jewish Law*, 80 B.U. L. REV. 1017, 1037-39 (2000) (discussing the status of passive murder under Jewish Law).

139. TALMUD BAVLI SANHEDRIN 77a; see also Rosenberg, *supra* note 138, at 1017.

140. TALMUD BAVLI SANHEDRIN 77a.

141. This is to say that under Jewish Law, *Beis Din* (the Jewish Court) would not be able to execute a murderer who had passively killed someone. *Id.*

142. ADERES, *supra* note 138, at 22a. For a brief biography of Rabbi Shlomo Ben Aderes, see *supra* note 136.

143. PERFET, *supra* note 138, at § 238. For a brief biography of Rabbi Yitzchok ben Sheshes Perfet, see *supra* note 137.

144. PERFET, *supra* note 138, at § 238.

There is a principle, promulgated by Rabbi Tzvi Hirsch Chajes,¹⁴⁵ that one who significantly violates the law is subject to the *Rodeif* laws because the violation of laws will surely lead to anarchy.¹⁴⁶ Additionally, even if you do not go as far as Rabbi Chajes, who believes that all criminals are pursuers,¹⁴⁷ certainly if a person has attempted to murder someone, and, if let free, he would try to murder the person again, the law of the pursuer would apply. Additionally, some Rabbinical authorities opine that a person selling drugs has the status of a pursuer¹⁴⁸ and is subject to the laws of *Rodeif*.¹⁴⁹

But even if a person is considered a pursuer, and a passerby has an obligation to save the victim, there are restrictions on what the passerby may do to the pursuer. The general rule is that a passerby must use the least severe means possible to save the victim.¹⁵⁰ If a passerby can save the victim by merely maiming the pursuer, he may not kill the pursuer.¹⁵¹ Accordingly, even if a person was considered a pursuer for committing a crime, a passerby must employ the least severe means available to ensure that he will save the victim from harm, and if there are such means available, he may not kill the pursuer.¹⁵²

145. Rabbi Chajes, a famous Hungarian Rabbi who lived from 1805 to 1855, is known by the name of his commentary on the Talmud, "*Maharetz Chayis*."

146. RABBI TZVI HIRSCH CHAJES, MAHARATZ CHAYES TORAT NEVI'IM 7, cited in BROYDE, *supra* note 7, at 86. It is important to fully understand how the pursuer laws, whose goal is to save the victim, can be applicable to a criminal, whose conduct is in the past. The criminal is considered a pursuer not because of what he has done, but rather because of what Jewish Law is afraid he will do in the future. *Id.* For example, if a person has attempted to murder someone, he is not a pursuer because of his past criminal conduct. He is a pursuer because Jewish Law is afraid he will attempt to murder again in the future. *Id.* Thus, he is considered to be pursuing his future victim and is subject to the pursuer laws. *Id.*

147. *Id.*

148. This line of reasoning would appear to follow only the opinion of Rivash, PERFET, *supra* note 138, at §238, that the law of *Rodeif* applies to passive murder as well, as none of these cases are situations where the person is actively trying to kill another.

149. This is said in the name of Rabbi Moshe Feinstein, a leading rabbinical authority.

150. TALMUD BAVLI SANDEDRIN 49a.

151. *Id.* (holding that if a passerby kills a pursuer when he could have saved the victim by merely maiming the pursuer, he is liable for murder); MAIMONIDIES, MISHNA TORAH HILCHOS ROTZEIACH 1:7, 1:13 (ruling that you can only kill a pursuer when you can not save the victim with less severe means).

152. MAIMONIDIES, MISHNA TORAH HILCHOS ROTZEIACH 1:7, 1:13.

There are many instances where a criminal defendant would be considered a pursuer.¹⁵³ Thus, a defense attorney may be obligated under Jewish Law to save potential victims by ensuring that his client does not have an opportunity to commit future crimes.¹⁵⁴ Surely, under the pursuer laws, the lawyer may not help put his client in a position where the client will be able to commit further crimes. Thus, it appears that it is impermissible for a lawyer to work on obtaining an acquittal for a client who has the status of a pursuer.

However, the conclusion that a person who commits a crime is a pursuer depends largely on the crime committed. The purpose of the pursuer laws is to save the victim.¹⁵⁵ If there is no hope of saving the victim, the law of the pursuer does not apply.¹⁵⁶ Therefore, the only crimes that, if committed, subject the defendant to the laws of the pursuer, are those where the potential victim would be safe from harm if the defendant was incarcerated. If, however, stopping the pursuer would not save the victim, the law of the pursuer does not apply. If the crime was an attempted murder, for example, and the lawyer knew that the client would again attempt murder, stopping the client would save the victim, and the law of the pursuer would apply. In such a case, the lawyer would be prohibited from representing the client. Conversely, if the crime was serving alcohol to minors, where the lawyer's action could not save the victim, as the minors would surely obtain alcohol from other sources, the laws of the pursuer would not apply and the lawyer could represent the client.¹⁵⁷

153. See *supra* notes 146-149 and accompanying text. For an explanation of how a criminal defendant is considered a pursuer for a future crime, see *supra* note 146.

154. See *supra* notes 146-149 and accompanying text.

155. MAIMONIDES, MISHNA TORAH HILCHOS ROTZEIACH 1:8 ("A person is obligated to save the victim from the pursuer."); SEFER HACHINUCH, § 600.

156. MAIMONIDES, MISHNA TORAH HILCHOS ROTZEIACH, 1:5, 6. This is why a person may only kill the pursuer while he is pursuing. Once the pursuit is over, the person may not harm the pursuer because he is not acting to save the victim anymore. *Id.*

157. This seems contrary to the ruling of Rabbi Feinstein that one selling drugs has the status of a pursuer, *supra* note 149 and accompanying text, because even if you do incarcerate this dealer, the "victims," those buying the drugs, will simply buy the drugs from another dealer. It is possible Rabbi Feinstein was in accord with the opinion of the Maharatz Chayis, see *supra* notes 145-146 and accompanying text, that anyone who regularly commits crimes is a pursuer because such conduct will surely lead to anarchy and chaos. *Supra* note 146.

2. *The Laws of Lo Ta'amod Al Da'am Reiacha*¹⁵⁸

There is a prohibition to stand idly by while a neighbor's blood is being spilled ("*Lo Ta'amod Al Da'am Reiacha*").¹⁵⁹ This prohibition is not limited to cases of actual bloodshed, but also to cases of monetary harm.¹⁶⁰ At the same time, there is a prohibition against slandering your neighbor.¹⁶¹ It is possible that these two laws could conflict, such as in a case where the only way to save your neighbor from harm is to inform the authorities about the person trying to harm him. The rule in such cases is that the obligation to save your neighbor trumps the prohibition to slander.¹⁶² Accordingly, Maimonides ruled that one who is in a position to save another by reporting on a wrongdoer, and refrains from doing so, has violated the prohibition of standing idly by.¹⁶³

Based on this reasoning, Rabbi Ovadia Yossef¹⁶⁴ has ruled that one who knows that another person suffering from an illness that can render him incapable of driving has applied for a drivers license, is obligated to inform the Department of Transportation of the person's condition.¹⁶⁵ Failure to do so would be a violation of *Lo Ta'amod*, because a person with such a condition who is allowed to drive is a danger to society.¹⁶⁶ Rabbi Yossef further ruled that even a doctor, who is bound by the ethical duty of doctor-patient confidentiality, has an obligation to divulge confidences in order to avoid danger to the public.¹⁶⁷ It is for this reason, said Rabbi Yossef, that the verse, "[T]here shall not go a talebearer in your midst,"¹⁶⁸ is juxtaposed next to the commandment to "not

158. *Leviticus* 19:16 ("[Y]ou shall not stand aside while your fellow's blood is shed.").

159. *Id.*

160. See Aaron Kirschenbaum, *The Bystander's Duty To Rescue in Jewish Law*, J. RELIGIOUS ETHICS 8, 204-26.

161. *Leviticus* 19:16 ("There shall not go a talebearer in your midst."). ABA Model Rule 8.3(a), which requires a lawyer to report another lawyer he knows is acting unethically, presents particular problems in this area. MODEL RULES OF PROF'L CONDUCT R. 8.3(a).

162. MAIMONIDES, MISHNA TORAH HILCHOS ROTZEIACH 1:14.

163. *Id.*

164. Rabbi Ovadia Yossef, born in 1920 in Baghdad, was named head of the rabbinic court and Chief Rabbi of Cairo at the age of twenty-seven. *Bar Ilan CD*, Version 7.0. He later moved to Israel where he served as the Rabbi of Tel-Aviv, and later as the Sephardic Chief Rabbi of Israel. *Id.* Renowned for his breadth of knowledge and total recall, Rabbi Yossef's responsa is endowed with an encyclopedic quality. *Id.*

165. RABBI OVADIA YOSSEF, YECHAVA DAAS 4:60.

166. *Id.*

167. *Id.*

168. *Leviticus* 19:16.

stand idly by while your friends blood is being spilled."¹⁶⁹ The implication is that you should always keep confidences, but only to the extent that such will not present a danger to others.¹⁷⁰

Accordingly, a lawyer has an obligation under Jewish Law to prevent a client who is a danger to society from going free.¹⁷¹ Furthermore, according to Rabbi Yoseff's reasoning, the lawyer may even have an obligation to break client confidentiality and inform the authorities of the client's confession.¹⁷² Surely then the lawyer should be prohibited from helping the client go free.

Thus, in many circumstances, it appears that when the lawyer knows his client is guilty he is prohibited from employing technical defenses on the client's behalf.

3. *Client Admits He Is Guilty But the Police Used Physical Violence To Obtain His Confession*

There is yet a third scenario that must also be explored. Suppose your client confessed to selling drugs, but only after the police had beaten him to obtain the confession. Professor Broyde claims that such evidence, "may be suppressed as the evidence's validity may be reasonably doubted."¹⁷³ However, Broyde's assertion is too broad; it depends on the specific facts of each case. If the client protests his innocence to the lawyer, Broyde would undoubtedly be correct because the lawyer would be obligated to believe his client¹⁷⁴ as it is possible that the confession was not sincere, and was made by the client only to stop the beatings. If, however, the client admits to the lawyer that he was indeed selling the drugs, then the client may be subject to the laws of the pursuer,¹⁷⁵ and the lawyer may be subject to the prohibition of *Lo Ta'amod*.¹⁷⁶ If this were the case, the same conclusion reached above, that it would be impermissible in certain cases to make such a motion to suppress,

169. *Id.*

170. YOSSEF, *supra* note 165, at 4:60. This appears to support Professor Russell Pearce's conclusion that the obligation to save a life supersedes the obligation of client confidentiality. Pearce, *supra* note 3, at 1771-79.

171. YOSSEF, *supra* note 165, at 4:60.

172. *See supra* notes 164-170 and accompanying text.

173. BROYDE, *supra* note 7, at 93 (expounding upon RABBI HERSHEL SCHACHTER, DINA DI'MALCHUSA: SECULAR LAW AS A RELIGIOUS OBLIGATION at 121-22).

174. MISHNA PIRKEI AVOT 1:6 (instructing Jews to judge another favorably and to give them the benefit of the doubt); *see* KITZUR PISKEI HAROSH NIDDAH 9:5, *cited in* BROYDE, *supra* note 7, at 92 n.12.

175. *See* discussion *supra* notes 128-157 and accompanying text.

176. *See* discussion *supra* notes 158-172 and accompanying text.

would be reached here.¹⁷⁷ In sum, unless it is clear that the client's confession to the police was sincere, the lawyer would be obligated to believe the client's innocence, and would be allowed to defend the client by moving to suppress the confession. However, if it is clear that the confession was sincere, the lawyer would be prohibited from making a motion to suppress if the motion would lead to the client getting off.

CONCLUSION

The Mishna instructs parents to teach their children a trade that is "clean and easy."¹⁷⁸ Rabbi Menashe Klein interprets this to mean a trade that is easy to practice in accord with Jewish Law.¹⁷⁹ The practice of criminal defense undoubtedly fails that test. Even those who permit religious Jews to practice law admit that, "there are . . . limitations upon what a religious Jew may do."¹⁸⁰ It seems that the inherent problems in the practice of criminal defense are insurmountable in many instances. A Jew who wishes to practice law within the boundaries of Jewish Law should choose another area of law in which to specialize.

177. This is an irrelevant point under American law where a lawyer is obligated to zealously defend his client, even by using defenses that do not pertain to guilt or innocence. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-19 (1981).

178. MISHNA KIDDUSHIN 4:14.

179. See Steven H. Resnicoff, *Lawyering Ethics*, 15 *TOURO L. REV.* 73, 103 (1998) (discussing Jewish Law issues that arise when practicing law) (quoting MENASHE KLEIN, MISHNA HALAKHOT 7:255).

180. BROYDE, *supra* note 7, at 137.