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THE CONFIDENTIALITY RULE: A PHILOSOPHICAL PERSPECTIVE WITH REFERENCE TO JEWISH LAW AND ETHICS

Gordon Tucker*

I. Introduction

The Model Rules of Professional Conduct for lawyers (Rules) were adopted in 1983 by the American Bar Association (ABA).¹ Rule 1.6, one of the more controversial components of the Rules, treats the subject of confidentiality between a client and his attorney.² The controversy over Rule 1.6 centers on its failure to resolve the conflict among the competing values of the individual's right to counsel, the interest of society in a fair and accessible system of justice and the need to preserve social order and citizen security. When competing values represent important social and individual interests, as in the case of Rule 1.6, a solution is particularly difficult to achieve.

Evaluating Rule 1.6 from the perspective of Jewish law can help clarify these conflicts. Jewish law has different values from those of our American system of law. An examination of the interaction of these values provides guidance for evaluation of Rule 1.6 problems. Jewish legal literature offers wisdom and experience gained through its legal and ethical tradition.

In this Essay, Rule 1.6 is examined from a philosophical perspective. First, the Essay discusses the premises underlying the Rule. Second, it evaluates the Rule according to the ethical standards of our society and our legal system. The focus will be on Rule 1.6 as it relates not only to the standards of contemporary American culture but also to the standards set by Jewish law and ethics.

This Essay also examines whether there is any philosophical jus-

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1. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter cited as RULES].

2. See *supra* General Introduction to this series of Articles, note 1; see also discussions of Rule 1.6 in the accompanying Articles within this book: C. Kelbley, *Legal Ethics: Discretion and Utility in Model Rule 1.6*; A. Abramovsky, *A Case for Increased Confidentiality*; D. Abramovsky, *A Case for Increased Disclosure*.

tification for the principle of confidentiality in our legal system; whether limits ought to be placed on application of that principle; whether a balance can be reached between confidentiality and other imperatives such as protecting innocent people from harm; whether the distinction between "murder and mayhem" and other crimes is relevant; and whether discretion can be left to lawyers when significant competing values are involved.

In conclusion, this Essay proposes that, when faced with prospective crimes that are likely to seriously injure life, limb, or property, a lawyer should disclose information that he has reason to believe may prevent the injury. In all other cases, particularly in cases of victimless crimes, disclosure of privileged information should be prohibited. Conversely, Rule 1.6 never obligates the lawyer to disclose information and only permits disclosure in certain circumstances.

II. The Principle of Confidentiality

To define the limits of confidentiality, it is essential to understand the principle's foundations. Attorney-client confidentiality is an integral part of the American legal system. However, while some of its sources are within that system, others lie beyond it in general ethical principles. Sources for the principle of confidentiality relevant to this Essay are general ethical principles of the attorney-client relationship, implications derived from the attorney-client contract, and certain fundamental guarantees of the United States Constitution arising under the fifth and sixth amendments.

A. The Attorney's Obligation to Protect the Client's Rights

Generally, one who is dependent on another can claim protection from that person,³ provided that other obligations will not be grossly violated by such protection. As physicians have a responsibility to preserve the lives of their patients, so too attorneys have a responsibility to protect the rights of their clients. The attorney's responsibilities include the obligation to protect the client from self-incrimination.⁴

However, preservation of confidentiality is not absolute. An obligation to protect a dependent cannot override the general moral obligation to protect innocent human life. Similarly, if the lawyer's

3. The discussion in this section relies on observations made in S. BOK, LYING 158-64 (1978), to which the reader is referred for more detail.

4. U.S. CONST. amend. V, cl. 3.

responsibility to the client is partially derived from the client's right not to incriminate himself, the lawyer's ethical obligation should be no more absolute than the client's fifth amendment right. The client's right to refuse to testify against himself cannot be invoked ethically if it would place an innocent person in mortal danger. Rule 1.6 is consistent with this reasoning since it does not provide clients with an absolute right to confidentiality where the client's own actions would place other persons in mortal danger.

B. The Attorney-Client Contract

Another basis for the confidentiality principle focuses on unique aspects of the attorney-client relationship. The confidentiality principle may be seen to flow from a promise, explicit or implicit, made by the attorney in his agreement to represent the client. According to this theory, the lawyer is not merely obligated to defend the client from harm but also is required to honor his client's confidences.

According to this view there are limitations on the lawyer's contractual obligations of confidentiality. An individual cannot legitimately promise to do something which he is otherwise prohibited from doing. A lawyer's promise to represent his client aggressively cannot, for example, be construed as a promise to use falsified evidence; to do so would violate his obligations as an officer of the court. Similarly, despite the attorney's agreement to preserve his client's confidences, ethical considerations preclude him from concealing certain imminent crimes from the authorities. Therefore, if an attorney's promise to keep a client's confidence results in concealment of an impending crime, such promise cannot be construed as valid and binding.

C. Confidentiality as a Safeguard of Fifth and Sixth Amendment Rights

Another approach views the principle of confidentiality as a fundamental safeguard of the fifth amendment right to due process and the sixth amendment right to counsel.⁵ Given the adversary nature of the American legal system, certain rights which are critical to the system's fair operation must be afforded extraordinary protection. For example, the right to competent counsel would be meaningless without a guarantee that confidential disclosures will not be produced by the lawyer in court. The right to confidentiality between the

5. U.S. CONST. amends. V and VI.

attorney and client, therefore, is inherent in the sixth amendment.

The significance of the sixth amendment right to competent counsel and confidentiality should not be underestimated. For example, a lawyer may be the only individual possessing information which could be used to convict his client of a crime. The lawyer, as an officer of the court, may be obliged to promote justice by aiding the conviction of that criminal. Clearly, however, acquitting the client or dismissing the charges against him for lack of evidence is deemed preferable to infringing on the attorney-client privilege. The decision is utilitarian: the damage done by failure to convict and punish the criminal is considered less serious than that done to the entire legal system by undermining the attorney-client relationship.

The rule of confidentiality, while safeguarding rights highly valued by society, may threaten other valuable rights. This rule must not ignore political, social, and moral realities which determine the nature of our constitutional system. Therefore, the rules regarding the attorney-client relationship should be consistent with such fundamentals of our system.

III. Jewish Law—Some Basic Considerations

A. Halakhah

Halakhah, Jewish law, is a system of codes and court decisions which has developed over two thousand years. It is a legal system, based on religion, which has been influenced by Jewish cultures throughout the world. The emphasis of *halakhah* is on obedience to the will of God,⁶ as opposed to American law which emphasizes compliance with a constitution. Since "the will of God" is difficult to verify, there is no single way to validate the elements of Jewish law. Some Jewish jurists use external standards, such as conformity with antecedent moral convictions, to determine legal validity. Other legal scholars have "periodized" Jewish legal history by according greater weight to legislation and legislative history compiled before certain pivotal dates such as the redaction of the Babylonian Talmud.

Like other legal systems, *halakhah* is an autonomous creation of a particular society. It should be studied with many of the same tools used to study other legal systems. However, the meaning of *halakhah* is not always clear because there have been as many

6. For a discussion of how this emphasis in *halakhah* developed, including case materials, see S. PRESSER & J. ZAINALDIN, LAW AND AMERICAN HISTORY: CASES AND MATERIALS 31-138 (1980).

halakhot⁷ as there have been Jewish communities. Consequently, a problem arises when the posture of Jewish law is sought on a given issue. Nevertheless, there are instances in which the sources of Jewish law provide a reliable expression of Jewish tradition on a given matter.⁸

B. Sources of Jewish Law

The predominant source of Jewish law is the *Pentateuch*, or *Torah*, which comprises the first five books of the Hebrew Bible.⁹ In addition to narrative, these books set forth codes of law.¹⁰ Some of the statutes in the *Torah* are based on sparse text which has prevented it from being considered a self-sufficient source of law. The *Torah* is dependent on interpretation, or exegesis, to translate its economical, often hortatory, style into law. Much of that task is accomplished by Rabbinic literature which focuses on the *Mishnah*, a comprehensive, topically arranged code of law¹¹ compiled in Palestine at the end of the second century A.D.

The *Mishnah* provides detailed laws and regulations concerning agriculture, the calendar, family law, all aspects of commercial and criminal law, the structure of the judiciary, religious rites at the temple and the synagogue, and the maintenance of ritual purity.

7. Plural for *halakhah*.

8. A further complication concerning Jewish law arose nearly 200 years ago, when Jewish people all over Europe began to be recognized by the modern nation-states as full citizens. This process, referred to as the "Emancipation" by Jewish historians, ended the centuries-old autonomy in civil, and sometimes criminal, law which European Jewish communities had enjoyed in both law and fact. Now unenforceable for all practical purposes, Jewish law has assumed a voluntary nature, serving to highlight its religious aspect and eclipse its legal character. For one thing, in the absence of agencies of enforcement (Jewish family law in the State of Israel is a notable exception), the impetus for development and refinement has waned. This is a fine example of how voluntary, as opposed to mandatory law can suppress the development of a legal system. It is also an ironic outcome of the "Emancipation," which was to some the ticket to the normalization of the Jews. Of course, it did normalize Jews as citizens, but it simultaneously excluded Jewish civilization. For a further discussion of the development and history of Jewish law, see L. FINKELSTEIN, *JEWISH SELF-GOVERNMENT IN THE MIDDLE AGES* (1924); M. KAPLAN, *JUDAISM AS A CIVILIZATION 467-71* (1934); Baron, *The Modern Age*, in *GREAT AGES AND IDEAS OF THE JEWISH PEOPLE* (L. Schwartz ed. 1956).

9. See Rosenberg, *Biblical Narrative*, in *BACK TO THE SOURCES: READING THE CLASSIC JEWISH TEXTS 31-33* (B. Holtz, ed. 1984) [hereinafter cited as *BACK TO THE SOURCES*]. For a more complete discussion of sources of Jewish law, see Faur, *The Fundamental Principles of Jewish Jurisprudence*, 12 N.Y.U. J. INT'L LAW & POLITICS 225, 225-35 (1979).

10. See Greenstein, *Biblical Law*, in *BACK TO THE SOURCES*, *supra* note 9, at 83-104.

11. See Goldenberg, *Talmud*, in *BACK TO THE SOURCES*, *supra* note 9, at 131-34.

Particularly significant are those laws which were not rendered moot by the Roman destruction of the temple and of Jewish political autonomy. The *Mishnah* became the basis for the more meaningful and diverse legislation and juridical discussion found in the Talmuds of fourth century Palestine and sixth century Babylon, as well as later codes and case law up to the present day.¹²

The *Torah* states that “[h]e who fatally strikes a man shall be put to death.”¹³ The only procedure prescribed, however, is the requirement that two witnesses are necessary to establish a case.¹⁴ Conversely, extensive description of criminal procedure detailed in the *Mishnah* clearly provides that there shall be no state prosecutors but only justices and witnesses.¹⁵ Indeed, the *Mishnah* does not provide for defense attorneys. That *sanegor*, the only word for defense counsel in Rabbinic literature, is a word of Greek origin indicates that the roots of this function are non-Jewish.¹⁶

This lack of defense counsel does not mean that a criminal defendant is bereft of special protections. Rather, Jewish law provides numerous protections for criminal defendants, including the abolition of capital punishment for murder and other serious crimes despite the clear biblical mandate for allowing it.¹⁷ The *Mishnah* records the following colloquy among early second century rabbis:

A court which executes someone once in seven years is called “destructive.” Rabbi Elazar ben Azaria said: “Once in 70 years.” Rabbis Tarfon and Akiva said: “Had we been on the court, no one would ever have been executed.” Rabbi Simeon ben Gamliel said: “They [Tarfon and Akiva] would have encouraged murder in Israel.”¹⁸

12. The Rabbinic sources of Jewish law are described in Townsend, *Rabbinic Sources*, in *THE STUDY OF JUDAISM: BIBLIOGRAPHICAL ESSAYS* 35-80 (1972). In particular, Townsend directs the reader to English translations of Rabbinic literature such as the *Mishnah*. *Id.* For a discussion of Rabbinic literature, see also *BACK TO THE SOURCES*, *supra* note 9.

13. *Exodus* 21:12.

14. *Deuteronomy* 19:15.

15. *Mishnah, Tractate Sanhedrin* ch. 4, 5.

16. In fact, nearly all the uses of *Sanegor* in Rabbinic literature are metaphorical. A right to counsel, as we know it, is not part of Jewish jurisprudence. This distinction is consistent with the differences between the American and Jewish systems. The former is based on rights inherent in the formation of society, while the latter is based on a common subjection to the divine will. This makes objective truth, rather than protection of rights, the primary goal of Jewish law. Lawyers, and the relationships they generate, tend to complicate that quest.

17. See *supra* note 13 and accompanying text. Some of the procedures which accomplished this *de facto* abolition are described in the *Mishnah, Tractate Sanhedrin* ch. 4, 5.

18. *Mishnah, Tractate Makkot* 1:10.

This exchange demonstrates the tension between the desire to protect the accused and society's right to security. The choice of Rabbinic Judaism was to err on the side of preventing executions of innocent persons. Undoubtedly, that choice was made because the threat involved in freeing possible criminals was, though real, still intangible and provided only a potential for harm. By contrast, an unjust execution was immediate and irreversible.¹⁹

The simplicity of the criminal procedure mandated by *halakhah* underscores a basic feature of Jewish criminal law, the emphasis on the individual. It is an individual's guilt or innocence that is on trial. In a capital case, his life hangs in the balance. General procedural rights tend to lose importance when confronted with the specific facts and interests involved.²⁰

The focus of Jewish law on the individual rather than the system led to the creation of certain extraordinary procedures for safeguarding a defendant's life. This aspect of Jewish law was partially inspired by the sobering observation that each unjust death destroys an infinity of innocent generations; in the Rabbinic idiom, "one life is equivalent to an entire universe."²¹ However, juxtaposed with this concern for protecting the individual is the special concern for potential victims of a crime. The very ideology which led to the Rabbinic abolition of capital punishment necessarily leads to the conclusion that innocent life must be protected. Concern for the potential victim overrides other more general and less immediate considerations in the same way that concern for a particular defendant outweighs general apprehension about the security of society.

C. Application of Principles of Jewish Law to Rule 1.6

The logic of Jewish law indicates that testimony which could save an innocent victim should be compelled. Since biblical times, Jewish law has insisted that everyone has a religious duty to testify as to matters about which they have knowledge.²² Since the goal of Jewish

19. Jewish law may also have been stimulated to make this choice by the notion that divine justice could be relied upon to protect society by overtaking and supervising a freed criminal.

20. The Rabbinic emphasis on the individual went far beyond the Bible in this respect, but it was not without important biblical antecedents. For a compelling treatment of the premises underlying the criminal law in the Bible, see Greenberg, *Some Postulates of Biblical Criminal Law*, in *THE JEWISH EXPRESSION* (J. Goldin ed. 1970).

21. *Mishnah, Tractate Sanhedrin* 4:5.

22. This principle is stated in the Bible at *Leviticus* 5:1, and recurs throughout Rabbinic literature until finally codified by Moses Maimonides, a great Jewish philosopher and jurist of the 13th century, in his code entitled *Mishnah Torah*,

law is to determine truth and to punish guilt, failure to disclose information is sinful. It would be particularly heinous if failure to disclose resulted in the death of an innocent person.²³

The values and ethics underlying Jewish criminal law indicate that a person possessing information about the imminent victimization of another person must disclose that information if disclosure might prevent or ameliorate the anticipated harm.²⁴ Jewish law would mandate disclosure even in the case of a lawyer and his client. This conclusion is in accord with the three basic sources of the confidentiality principle.²⁵ First, while the dependency inherent in the lawyer-client relationship may be a valid basis for the confidentiality principle, it is clearly insufficient to outweigh the rights of potential victims.²⁶ Certainly, Jewish law would concur.

The second source of the confidentiality principle is the notion that an implied promise to keep the client's confidences stems from the lawyer-client contract. Although some ethical contexts might allow the implied promise of confidentiality to survive the conflict between sanctity of the attorney-client relationship and the rights of potential victims,²⁷ Jewish law probably would not. Since Jewish law is grounded

Laws Concerning Testimony 1:1. An English translation is available entitled MAIMONIDES MISHNEH TORAH (P. Birnbaum ed. 1967) (Hebrew Publishing Co., New York). See Goldenberg, *Talmud*, in BACK TO THE SOURCES, *supra* note 9, at 161-72, 273.

23. *Leviticus* 19:16 states: "Do not stand by the blood of your neighbor." This has traditionally been understood to mean that one is forbidden to allow an innocent person to be harmed if the harm can be prevented.

24. "Jewish ethics" is the subject of some lively discussion. Some commentators claim that Jewish scripture contains an extralegal, supererogatory set of behavioral norms, which are properly called "Jewish ethics." Others maintain that all such norms are automatically subsumed by the *halakhah*, via an "umbrella obligation" such as "going beyond the letter of the law." The paradox inherent in the latter position is obvious and noteworthy. Still other commentators assert that *halakhah*, like everything else, must answer to an independent set of ethical criteria. This issue is discussed in Lichtenstein, *Does Jewish Tradition Recognize an Ethic Independent of Halakha?*, in MODERN JEWISH ETHICS 62-88 (M. Fox ed. 1975). For our purposes here, there is no problem with the ambiguity surrounding the term "Jewish ethics."

25. See *supra* Section II.

26. Looking at the dependency relationship between client and lawyer as the sole basis of the confidentiality principle, the importance of victims' rights versus the client-lawyer dependency is evident. The victim also depends on the lawyer, since the lawyer has information which would enable him to prevent the crime. Because both the client and the victim depend on the lawyer, and it is the client himself who threatens the victim, the lawyer's duty to the victim should predominate in this oversimplified scheme. Of course, where other bases of the confidentiality principle are considered as well, the balancing of duties becomes more complicated and a proper outcome is less clear.

27. A Kantian analysis, as well as some rule-utilitarian approaches, would fit

in concepts which transcend the will of the people, it would not allow a promise between two persons to override a universal obligation to protect innocent lives. Indeed, it is an unambiguous principle of Jewish law that one cannot obligate oneself to do something which the *Torah* forbids, or to refrain from doing something which the *Torah* mandates.²⁸ Thus, the universal obligation to protect individual life, which lies at the heart of the Jewish legal system, supersedes a lawyer's promise of secrecy. The promise of confidentiality would therefore be suspended in the circumstances under which Rule 1.6 becomes operative.

The third source of the confidentiality principle is the constitutional guarantee of due process and counsel. Since this source is uniquely American, it does not create any special relationships or obligations cognizable under Jewish law. Nonetheless, certain conclusions may be drawn from this consideration of the confidentiality principle from the standpoint of Jewish law. First, the ethical questions raised when a lawyer knows there is a potential victim of a deadly crime must be evaluated along with the rights of the client. Second, promises of confidentiality must yield when they conflict with fundamental ethical obligations. Finally, the advocacy system is not the only possible framework within which justice can be achieved. Since this system is a means toward justice and not an end, the principle of confidentiality, which is designed to facilitate the functioning of the system, cannot be made the ultimate goal. The principle must yield to other important principles such as protection of innocent lives which all systems of law, including advocacy, must uphold.

IV. Problems With Rule 1.6

The problems with Rule 1.6 as it is currently written include its undervaluation of victims' rights, failure to distinguish adequately between past and future crimes, arbitrary distinctions between forbidden and permitted disclosures, and failure to recognize that life and limb are more important than the right to counsel.

into this category. Any good introduction to ethics will explain such approaches in further detail. See, e.g., G. HARMAN, *THE NATURE OF MORALITY: AN INTRODUCTION TO ETHICS* 65-77 (Kant), 152-63 (Utilitarianism) (1977).

28. This principle is articulated on many occasions in Rabbinic literature. One such statement can be found in the *Babylonian Talmud, Tractate Qiddushin* 19b (English translation, Soncino Press). It is also found in the medieval codes, for example, in Maimonides, *Mishnah Torah, Laws Concerning Marriage*, 6:9. See *supra* note 22. The principle is sometimes stated as follows: One is already foresworn from Mount Sinai (the scene of the ratification of biblical law)—and therefore, one cannot contradict that obligation by a later promise or oath.

A. Rule 1.6 Undervalues Victims' Rights

Application of Rule 1.6 gives rise to a number of problems. Consider two hypothetical cases. In the first case, a client tells his lawyer, after consultation, that he is so upset about his legal difficulties that he intends to have a few drinks at the corner tavern before driving home. The lawyer cannot dissuade him from committing the crime of driving while intoxicated. In the second case, a lawyer learns that his client is about to defraud an elderly couple of their entire life savings. In such a case, the existence of potential victims conflicts with the principle of confidentiality and indicates that the lawyer's responsibilities may change in response to consideration of the victims' rights. The case of the elderly couple is more disturbing because it presents actual victims, as opposed to the unidentified potential victims of the drunk driving hypothetical.²⁹ Rule 1.6 only permits disclosure in situations where the lawyer reasonably believes his client will cause substantial bodily harm. The Rule does not permit disclosure where the client only intends to inflict financial injury or property damage. It is, therefore, problematic that Rule 1.6 would allow disclosure in the drunk driving instance because it could potentially result in "substantial bodily harm," but would forbid such preventive action in the case of the elderly couple. The failure of Rule 1.6 to protect innocent persons indicates that the rights of victims are being undervalued and that the permissive disclosure rule should be made less protective of confidential information.

B. Rule 1.6 and the Distinction Between Past and Future Crimes

By forbidding disclosure of information concerning crimes that will seriously injure property or economic interests, Rule 1.6 fails to distinguish adequately between the role of confidentiality as applied to past and prospective crimes. With respect to past crimes, there is no dispute that a lawyer's responsibility is to protect client confidences. Under the exclusionary rule, for example, clearly probative and incriminating evidence is excluded where it was obtained through intentional violations of the fourth amendment.³⁰ Often, the injustices

29. This viewpoint does not deny that the victims on the road are actual, but rather it asserts that there is some moral difference between cases where the victims can be identified in advance, and those cases where they cannot.

30. Recently, the United States Supreme Court has made inroads into the exclusionary rule by declaring that there is a "good faith" exception to the rule where police violate fourth amendment rights in good faith, believing they have a valid search warrant. This eliminates the purpose of the exclusionary rule which

which result from application of the exclusionary rule, including freeing a dangerous criminal, are striking. However, the utilitarian conclusion is that the long-term injustices resulting from infringements of privacy rights far outweigh the immediate ill effects of the exclusionary rule.

In the case of the exclusionary rule, a crime has already been committed and the victims have been harmed. To support the constitutional right to privacy, we choose to sacrifice the opportunity to punish the criminal instead of preventing the crime. Although releasing a violent criminal may result in future crimes, the risk is only an undetermined, possible future event.

On the other hand, Rule 1.6 deals with actual victims whom the lawyer can probably identify as those who will lose life or limb at the hands of his client. However, toleration of an occasional failure to punish criminals and of a risk of potential crimes does not mean that the client's right to confidentiality should prevail in the face of serious future crimes. Indeed, the idea that confidentiality as to future crimes is inherent in the right to counsel is itself implausible.

The client's right to invoke the confidentiality principle exists to ensure adequate legal representation with respect to alleged past crimes. It is easier, morally, to deal with past crimes since it is no longer possible to protect the victims. By holding a lawyer to secrecy regarding an intended crime, the client is not exercising his right to counsel but rather is abusing it.

C. Rule 1.6 Arbitrarily Distinguishes Between Forbidden and Permitted Disclosures

Rule 1.6 draws the line between forbidden and permitted disclosures at murder and mayhem but does not provide any compelling rationale for doing so. If the ultimate purpose of Rule 1.6 is to uphold a right to counsel through the confidentiality principle, why should disclosure be permitted to prevent murder and mayhem but not to prevent a poor couple from being defrauded of their life savings? If murder and mayhem are treated differently because the duty to protect innocent life and limb is more fundamental than the right to counsel, why is there not also a higher duty to protect property? Indeed, if the confidentiality principle cannot be construed to apply to future crimes, then there is no rationale for drawing a line to

is to deter police misconduct. *See* *United States v. Leon*, 104 S. Ct. 3405 (1984); *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984); *Supreme Ct. Rept.*, 70 A.B.A. J. 110 (1984).

prevent disclosure of any category of crime. Why should knowledge of a major drug deal likely to victimize thousands of people be considered privileged information? Once the right to effective counsel is called into question for prospective crimes, any substantial infringement of third party rights, particularly those which are fundamental, should mandate disclosure.

D. Rule 1.6 Fails to Recognize that Life and Limb are More Important than the Right to Counsel

Rule 1.6 gives the lawyer discretion to disclose information concerning imminent murder or mayhem, but does not require disclosure. "A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule."³¹ This position is untenable. The criminal justice system, which is created to protect life, limb, and property, should require its officers to disclose potential criminal homicide or mayhem. If, as Rule 1.6 suggests, the duty to protect innocent life and limb outweighs the constitutional right to effective counsel, Rule 1.6 should not be permissive but should require the attorney to carry out that duty. If the victims' claims are sufficiently serious enough to override confidentiality, they must also override lawyers' discretion to decide whether to disclose confidential information.

Morally, Rule 1.6 fails to recognize that the sanctity of life and limb is more important than the right to counsel. It is possible to imagine a system of justice which is neither an advocacy nor a constitutional system, and which, therefore, does not provide the kinds of rights guaranteed by the sixth amendment, but which is morally sound. Rabbinic criminal law is one example. However, it is difficult, if not impossible, to imagine a morally commendable system which does not contemplate the protection of innocent life and limb as a premise.³² In fact, political considerations also demand that the sanctity of life and limb take precedence over the right to counsel. The Constitution guarantees the right to counsel. However, the Constitution was designed to create a society in which people would not be deprived unjustly of life, liberty, and property. Thus,

31. RULES, *supra* note 1, Rule 1.6 comment (Disclosure Adverse to Client).

32. The two most familiar paradigms of ethical theories today are those of John Rawls, on the one hand, and Robert Nozick on the other. See J. RAWLS, A THEORY OF JUSTICE (1971); R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974). Despite the vast differences between these two approaches, both the "equality" and "difference" principles of Rawls, and Nozick's minimal state agree on the duty to protect innocent life and limb.

in the political as well as the moral sense, the right to counsel cannot outweigh the duty to protect life and limb. With respect to the lawyer's implicit promise of confidentiality, it can be argued that, because of the moral and political priority of the duty to protect life and limb, the lawyer has no right to promise, implicitly or explicitly, to ignore this duty.³³

V. Proposed Revision of the Rule

The serious flaws in Rule 1.6 indicate that there is an urgent need for revision. Considerations of Jewish law³⁴ and American law underscore the need for changes in Rule 1.6 so that:

(1) Serious victimization of innocent individuals is the dividing line between disclosure and non-disclosure. Only such a distinction respects the compelling moral rights of individual victims, which are basic to both American and Jewish law;³⁵

(2) A lawyer may not avoid his responsibilities as a lawyer and as a citizen. If a moral claim is sufficient to override his professional responsibilities to a client, the lawyer should not be given discretion to respond to that moral claim. An alleged promise to maintain confidentiality should not, as Rabbinic law explains, be construed as a valid promise where it conflicts with superior moral claims.

As illustrated by Rule 1.6, a rule may reach its final wording

33. Failure to recognize the priority of the duty to protect innocent life can lead to disturbing results. Several years ago, for example, in a New Jersey case, a journalist had received information from sources to whom he had explicitly promised confidentiality. See Wallwork, *Government vs. the Public's Right to Know*, N.Y. Times, Jan. 7, 1979, § 11, at 22, col. 3. Defense attorneys in a murder trial believed this information was vital to their client's defense. In order to protect his sources, the journalist elected to go to jail rather than comply with a subpoena for their identity. His rationale was that the freedom of the press guaranteed by the first amendment would be hollow if the press could be hampered in its ability to develop sources of information. See *id.* This rationale conflicts with the sixth amendment right to compel favorable testimony. Even if courts would refuse to convict a person who had been deprived of his sixth amendment rights, there still remains the following troubling question: should a journalist reveal the information on his own initiative in order to prevent the unjust imprisonment of an innocent person, even where the defense does not suspect its existence? Given the vehemence and absolutism with which the press argued that case, it is plausible to assume that many in the press would deny that the journalist has that responsibility. Given their arguments, there is no reason to suspect that their answer would be different if the possible execution of an innocent person was at issue.

34. See *supra* Section III.

35. This argument, obviously, would not apply to application of the confidentiality principle to victimless crimes, even if they had not yet been committed. Nothing in the proposal that concludes this section affects the principle in such cases.

through a process of political compromise, resulting in a product which confounds attempts to find consistency. Though the process of compromise is natural and unavoidable, philosophical analysis must look beyond that process to the moral and logical justification of the rule, particularly when its application affects basic rights. Accordingly, paragraph (b)(1) of Rule 1.6 should be revised to read:

A lawyer must reveal information to the extent the lawyer reasonably believes it necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death, substantial bodily harm, or significant infringement of property or privacy rights of a third person.³⁶

36. This mandatory provision is similar to the new Confidentiality of Information Rule adopted by New Jersey which reads:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

(c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or

(3) to comply with other law.

(d) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b) or (c).

N.J. RULES OF PROFESSIONAL CONDUCT RPC 1.6.