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Practicing Criminal Law: A Jewish Law Analysis of Being a Prosecutor or Defense Attorney

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PRACTICING CRIMINAL LAW: A JEWISH LAW ANALYSIS OF BEING A PROSECUTOR OR DEFENSE ATTORNEY

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INTRODUCTION

OUR secular society cycles as to whether it glorifies defense attorneys or prosecutors. Sometimes, we adore defense attorneys—they are the lawyers who ensure that innocents are not punished, "L.A. Law" is the show to watch, and the attorneys to imitate. Other times, we revere prosecutors—they are the lawyers who punish evildoers, "Law and Order" is the show to watch, and the attorneys to imitate. Jewish tradition recognizes the inherent ethical difficulties with the conduct of both types of attorneys.

Jewish law recognizes that the societal imposition of the criminal justice system on citizens, who otherwise function in accordance with their own communal norms, is a significant burden on the community, both to prosecute criminals and to defend them. Thus, while Jewish tradition unanimously recognizes the central duty to participate in the common commercial practices and financial laws of the host country through the principle of the "law of the land is the law,"[1] participation in the criminal law process—either to prosecute criminals or to defend them—is much more problematic. The dilemma is simple: the prosecution of Jews for "crimes" where the punishment seems vastly different than that mandated by Jewish law, or even where the criminalized conduct is permitted by Jewish law, seems contrary to Jewish tradition. On the other hand, defending guilty people from punishment does not exactly seem in the spirit of Jewish law.

Three distinct issues are involved in a Jewish law discussion of an attorney practicing criminal law: 1) When is it permissible to inform upon a person for committing a crime and to serve as a witness at the trial? 2) May one prosecute criminals? 3) May one represent a person who has been accused of a crime, and what types of defenses can one present? Each of these issues will be explored at some length.

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1. For more on this principle, see Shmuel Shilo, *Dina De-Malkhuta Dina* (1974).

I. Being a Witness or Prosecutor

A. *Introduction: The Story of Rabbis Joshua and Eleazar*

Two distinctly different approaches have been taken by Jewish authorities on the permissibility of a Jew aiding the secular government in punishing Jews for criminal offenses.[2] The dispute revolves around the proper understanding of a Talmudic text. The Talmud states:

> Rabbi Eleazar son of Rabbi Simeon met a police officer who had been sent to arrest thieves. Rabbi Eleazar said to him, "How can you detect the thieves . . . ? Perhaps you take the innocent and leave behind the guilty." The officer replied, "What shall I do? It is the King's command." [Rabbi Eleazar then advised the officer how to determine who was a thief and who was not] . . . A report [of this conversation] was heard in the royal court. They said, "Let the reader of the letter become the messenger" (i.e., let Rabbi Eleazar work as a police officer). Rabbi Eleazar son of Rabbi Simeon was brought to the court and he proceeded to apprehend the thieves. Rabbi Joshua son of Karchah, sent word to him, "Vinegar, son of wine! [i.e., inferior son of a superior father] How long will you deliver up the people of our God for slaughter?" Rabbi Eleazar sent the reply, "I eradicate thorns from the vineyard." Rabbi Joshua responded, "Let the owner of the vineyard come and eradicate his thorns." . . . A similar incident befell Rabbi Yishmael the son of Rabbi Yosi. The prophet Elijah appeared to him and rebuked him. . . . "What can I do—it is the royal decree," responded Rabbi Yishmael. Elijah retorted "Your father fled to Asia, you flee to Laodicea.[3]

Thus, the Talmud records that two sages were rebuked for assisting the government in the prosecution of criminals, indicating that this conduct was not proper, or, at least, was conduct objected to by Rabbi Joshua.[4]

B. *One Explanation of Rabbi Joshua's Conduct*

A number of commentaries advance an explanation which changes the focus of this reprimand. It has been suggested that Rabbi Yom

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2. Throughout these chapters the term "criminal law" will be used to denote those areas of secular law where the government seeks to physically punish (through jail or other corporeal punishment) violators of the law. *See* David ben Samuel Halevi, *Turei Zahav*; Shulhan Arukh, *Yoreh Deah* 157:8 [hereinafter *Taz*]. When the government uses the criminal justice system to seek only monetary fines (even punitive damages), Jewish law does not classify that as criminal litigation; that is more properly categorized as civil litigation.

3. *Babylonian Talmud, Bava Metzia* 83b-84a [hereinafter *Bava Metzia*]. For an excellent analysis of the issues raised by secular enforcement of criminal law, see J. David Bleich, *Jewish Law and the State's Authority to Punish Crime*, 12 Cardozo L. Rev. 829 (1991).

4. For a discussion of the balancing problems involved in informing from a modern American law perspective, see Jack B. Weinstein, *The Informer: Hero or Villain?—Ethical and Legal Problems*, N.Y. L.J., Nov. 8, 1982, at 1.

Tov Ishbili[5] ("Ritva") argues that even Rabbi Joshua—who rebuked Rabbi Eleazar for working as a police officer—admits that it is only scholars and rabbis of the caliber of Rabbi Eleazar and Rabbi Yishmael who should not assist the government as prosecutors or police officers—and even for these individuals such conduct was not prohibited, but only frowned upon.[6] Many authorities state that it is permissible for an individual to assist the government in appehending criminals.[7] According to this analysis, it is only the pious who should not engage in this type of activity as it is undignified for scholars to act as government agents in these circumstances—but all others may.[8]

Based upon this mode of analysis, Rabbi Hershel Schachter argues:

> One critical point should however be added: There is no problem in informing the government of a Jewish criminal, even if they penalize the criminal with a punishment more severe than the Torah requires, because even a non-Jewish government is authorized to punish and penalize above and beyond the [Jewish] law . . . for the purpose of maintaining law and order. However, this only applies in the situation where the Jewish offender or criminal has at least violated *some* Torah law.[9]

According to this opinion, it is permissible to be a witness or prosecutor against individuals who have committed actions which violate both Jewish and secular law.[10]

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5. *See Yom Tov Ishbili, Ritva* commenting on *Bava Metzia* 83b as quoted in Betzalel Ashkenazi, *Shittah Mekubetzet* (noting that if the king is authorized to punish criminals, an agent is permitted to assist); *see also* Bleich, *supra* note 3, at 840-44.

6. Moshe Schick, *Teshuvot Maharam Schick, Hoshen Mishpat,* Responsum no. 50, at 21 (noting that Rabbinal authorities should not engage in such activity). This understanding might be based on an inference from the Jerusalem Talmud. *See Jerusalem Talmud, Terumot* 8:4, at 32b-33a (indicating that this conduct is only prohibited to the pious).

7. *See* Yosef Karo, *Beit Yosef, Shulhan Arukh, Hoshen Mishpat* 388 [hereinafter *Hoshen Mishpat*]; *Taz, supra* note 2, at 157:7-8; Tzvi Hirsch Shapira, *Darkei Teshuvah, Yoreh Deah* 157:1; Meir Simhah of Dvinsk, *Or Sameah, Melakhim* 3:10.

8. The prohibition of testifying against another Jew found in *Hoshen Mishpat, supra* note 7, at 28:3-4, is inapplicable when the legal advice or testimony is both true and subpoenaed and withholding it would cause a desecration of God's name.

9. Hershel Schachter, Dina DeMalchusa Dina: *Secular Law As a Religious Obligation,* 1 J. Halacha & Contemp. Soc'y 03, 118 (1981). The person must have violated a provision of Jewish law in order to be punishable, according to Rabbi Schachter, as the secular government is only authorized to punish in manners different from Jewish law, and not to criminalize conduct permitted by Jewish law.

10. *See* People v. Drelich, 506 N.Y.S.2d 746 (1986). In this case, a person appealed his murder conviction on the grounds that his confession of the "brutal stabbing murder of his 23-year-old pregnant wife" to his communal rabbi, Rabbi Dr. Moses Tendler, dean and professor at Yeshiva University (as well as Rabbi Moshe Feinstein's son-in-law), ought not to have been admitted at trial. Rabbi Tendler testified against the defendant and recounted the confession, which resulted in his conviction. The court determined that no rabbi-penitent privilege attached as "[t]he defendant's communications to Tendler were made for the secular purpose of seeking assistance in the retention of counsel, and in negotiating with the prosecutor's office and securing other assistance in connection with the preparation of his defense to the charges." *Id.*

C. *A Second Explanation of Rabbi Joshua's Conduct*

The second approach rejects the opinion of Rabbi Eleazar, and states that Rabbi Joshua, who rebuked Rabbi Eleazar, represents the normative opinion which prohibits this conduct.[11] If Rabbi Joshua's opinion is normative, then the only time it would be permitted to assist the secular government in criminal prosecutions is where a criminal poses a threat to the community through his conduct.[12] Both of these situations are based upon the rules of a pursuer (*rodef*). Indeed, in Jewish law, one who poses a threat to the life of others must be prevented from accomplishing the intended harm; force—even deadly force—may be used in such a case without the need for a court hearing. The requirement of a threat does not mean only that the criminal may actually harm another, but includes such threats as the possibility that in response to a Jew being apprehended for committing a crime, other Jews will be injured or anti-Semitism will be promoted.[13]

According to this approach, it is only when there is a possibility that the lack of punishment of this criminal will lead to other crimes that the secular authorities should be informed. Indeed, one authority has argued that on a functional level there is no difference between the two approaches because disobedience of the law generally will certainly lead to anarchy and crime, and thus all significant violations of the law can be punished under the pursuer rationale.[14]

In addition, Rabbi Shlomo Yitzhaki (*Rashi*), commenting on the Talmud, seems to argue that Jewish law recognizes that the secular government may properly enforce any law validly promulgated under the rule "the law of the land is the law" (*dina de-malkhuta dina*), even against Jews.[15] Maintaining law and order is unquestionably one such function. A proof for this proposition may perhaps be found in Rabbi Moshe Feinstein's decision permitting one to serve as a tax auditor for the government in a situation where the audit might result in the criminal prosecution of Jews for evading taxes.[16]

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at 748. Rabbi Menashe Klein appears to prohibit this type of conduct. *See* Menashe Klein, *Mishneh Halakhot* 7:285. For a response, see Samuel Turk, *Peri Malka* 76:2.

11. Such an approach can be implied from *Maimonides*, Murder 2:4. *See* Bleich, *supra* note 3, at 840-44 (discussing the two alternative views of the Talmudic incident).

12. Shmuel di-Medina, *Maharashdam*, *Hoshen Mishpat* 55; Moshe Sternbuch, *Teshuvot ve-Hanhagot* 1:850 (stating that the authorities may be apprised of one who drives recklessly or without a license); *see also* Moshe Isserles, *Rema*, *Hoshen Mishpat* 388:12 [hereinafter *Rema*] (addressing communal dangers).

13. *See Rema*, *supra* note 12, *Shulhan Arukh*, *Hoshen Mishpat* 388:12, 425:1 (discussing one who counterfeits coins). For a complete analysis of the various permutations of this rule, see Yaakov Blau, *Pithei Hoshen, Hilchot Nezikin* 4:7, at 144.

14. Zvi Hirsch Chajes, *Maharatz Chayes*, *Torat Nevi'im* Ch. 7.

15. *Rashi*, *Gittin* 9b; Bleich, *supra* note 3, at 852-57.

16. Moshe Feinstein, *Iggerot Moshe*, *Hoshen Mishpat* 1:92. It is incorrect to maintain that Rabbi Feinstein refers to a tax auditor who can only recommend civil and not criminal penalties, as no such position exists. Rabbi Feinstein's rationale hinges

It is important to distinguish between private and public causes of action. Jewish law does not permit one Jew to bring a lawsuit against another Jew in secular court alleging a violation of Jewish law, even if the secular government recognizes that violation of Jewish law as an impropriety. Thus, for example, Rabbi Feinstein maintains it is prohibited to sue a person in secular court for *kashrut* (dietary laws) fraud if that person will go to a Jewish court to resolve this claim.[17] Such a case, however, involves two private parties suing each other and thus is readily distinguishable from Rabbi Feinstein's responsum permitting one to be a tax auditor, which dealt with the interactions between the government and a private citizen.

D. *Summary*

There is a fundamental dispute concerning being a witness or prosecutor of Jewish criminals.[18] Many authorities rule that only those viewed as of exemplary piety must avoid this activity. Provided that the criminal prosecution is for conduct which violates Jewish law, there are no obstacles according to Jewish law (except for the rule forbidding unseemly actions as violating the "conduct of the pious") in assisting in criminal prosecutions. Others disagree and rule that it is prohibited to assist the secular government in criminal prosecutions unless the criminal poses a danger to society.[19]

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on the legitimacy of the government's collection of taxes and the fact that others will collect the taxes anyway, and not on the penalties available to the government.

17. Feinstein, *supra note* 16, at 1:8.

18. Jewish law recognizes, without any doubt, the validity of secular law and its criminal justice system in the prosecution of gentiles for violation of secular law. The crucial question addressed in this section is one of jurisdiction. Does Jewish law recognize that the secular system has jurisdiction to criminally punish those who are duty-bound to have fidelity to Jewish law, or not.

19. For a general survey of the issues raised in this chapter within the context of the extradition of a Jewish defendant from Israel to France, see H.C. 852/86, 869/86, *Aloni v. Minister of Justice*, 41(2) P.D. 1, where Justice Menachem Elon discusses at great length Jewish law's approach to assisting in the criminal prosecution of Jews. Commenting on this case, Elon stated:

> [S]ome scholars saw in an unfavorable light Jewish assistance in the discovery and extradition to the secular authorities of Jewish criminals, as they felt it preferable that "the owner of the vineyard—the Lord—should come and destroy the thorns from the vineyard" rather than deliver these "thorns" to the judicial authority of rulers who have no mercy for the people and property of Jews. Other Sages disagreed and gave assistance, both in theory and in practice, to the secular authorities in order "to remove the thorns from the vineyard" . . . . One should, however, take care not to act in this way from the outset for it is not "the teaching of the pious."
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> In time, even those who had reservations agreed that one should hand over *ab initio* Jewish transgressors whose acts could endanger the [Jewish] public since these people were considered pursuers. . . . Other Sages considered the extradition of Jewish criminals to the general authorities as a necessity in order to uphold order and public welfare based upon the validity of the "law of the land is law" which could not be condemned.

II. Defending One Accused of a Crime

A. *Introduction*

Having addressed the question of when it is permissible to assist in the prosecution of criminals, it is now necessary to determine if one can aid accused criminals in their defense, and if so, what type of asssitance is permitted.[20] Within the American adversarial system of justice, while a lawyer may not lie on behalf of his client, he must defend his client zealously, even if he knows the case against his client is factually correct.[21] This is especially true, and of constitutional magnitude, in a criminal case where the government bears the burden of proving guilt beyond a reasonable doubt.

An initial question must be addressed. May a defendant, according to Jewish law, plead "not guilty" in secular court to a crime that he knows he has committed but which the government cannot prove, or must a Jew plead guilty when charged, if actually guilty? It would appear that one may plead "not guilty" even if one knows that he is factually guilty. According to Jewish law, a confession is not admitted in court, and in fact, does not prove guilt.[22] Requiring a person to plead guilty if he actually is, and, thus, waive his right to a trial, is tantamount to requiring a person to confess to his crime. A Jew thus may plead "not guilty" so as to force the government to prove its case according to the law.[23]

While it might appear to some that a defendant is lying when he pleads "not guilty" if he knows he is factually guilty, such is a misunderstanding of the secular law involved. A defendant need not plead to any offense in American law. In the absence of any plea, a plea of

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Menachem Elon, *Extradition*, *in* Tehumin 8:263, 277-78 (1988). For two detailed criticisms of Justice Elon's opinion in *Nakash*, both of which assert that Elon is relying on Jewish law material inserted for the benefit of the censor, and is not indigenous to Jewish law, see J. David Bleich, Extradition, *supra*, at 8:297, and Shaul Yisraeli, *supra*, at 8:287.

20. Certainly one may represent a defendant who wishes to plead guilty and only desires a reduced sentence. Such negotiations are the end result of more than 98 percent of the criminal indictments issued in the United States. *See* Donald Newman, *Reshape the Deal*, Trial May/June 1973, at 11 ("[T]he frequency of convictions by plea approaches 98% of all those charged.").

21. *See, e.g.*, District of Columbia Rules of Professional Conduct, Rule 1.3(a) (1997) ("A lawyer shall represent a client zealously and diligently within the bounds of the law."); Model Code of Professional Responsibility Canon 7 (1969) (stating that a lawyer should "represent [a] client zealously within the bounds of the law"). *But see* Model Rules of Professional Conduct Rule 1.3 (1993) which does not mention the word "zeal" in any form.

22. Maimonides, *Laws of Sanhedrin* 18:6; Norman Lamm, *Self Incrimination in Law and Psychology: The Fifth Amendment and the Halakhah*, *in* Norman Lamm, Faith and Doubt (1986).

23. *See* Yaakov Emden, *She'elat Ya'avetz* 2:9; J. David Bleich, Contemporary Halakhic Problems II 349-57 (1979). Rabbi David Cohen (of *Gvul Yavetz*) notes in a letter dated 17 Av 5754/July 23, 1994 to this author, that it is obvious that a person need not plead guilty to a crime, even if he is guilty.

"not guilty" is entered (in harmony with the American rule of innocent until proven guilty). Thus, by entering a plea of "not guilty," a defendant does not assert that he is actually innocent—he can only do that through testimony—but only that he wishes to be tried in a court of law.[24]

So too, when the government has not proven its case, a defense lawyer may advise the jury to acquit his client simply because the evidence has not proven "beyond a reasonable doubt" that his client is guilty. This is true even if the client has told the lawyer that he is factually and legally guilty. In the American legal system, as in Jewish law, the government bears the burden of proving each element of a criminal charge, and in any situation in which the government has not done so, the defendant is legally entitled to an acquittal. Any other rule is tantamount to requiring a Jew who is actually guilty of a crime to plead guilty, even if the government cannot prove its case. A Jew, like all other citizens, is entitled to a trial in which the government meets its burden of proving guilt.[25]

B. *Assisting the Guilty*

Given the fact that a defendant may take steps to ensure that he is given a fair trial, one might argue that a lawyer representing a defendant could take any action on his client's behalf. This is not so. The scope of a lawyer's role in aiding a criminal defendant is directly connected to a discussion in the Talmud which states:

> It was rumored about certain Galileans that they killed a person. They came to Rabbi Tarfon and said to him, "hide us." Rabbi Tarfon replied, "What shall I do? If I do not hide you, you will be seen. Should I hide you? The Sages have said that rumors, even though they may not be accepted, nevertheless, should not be dismissed. Go and hide yourselves."[26]

The reason Rabbi Tarfon declined to aid is in dispute, and this dispute is critical to understanding the status of criminal defense work according to Jewish law.

Rashi states that the reason Rabbi Tarfon would not help these people was because if they were guilty, helping them would be prohibited.[27] This would imply that Jewish law prohibits aiding defendants who might be guilty. *Tosafot* and Rabbenu Asher (*Rosh*) disagree and

24. This principle can be derived from the American law 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.

25. That Rabbi Tarfon did not advise the Galileans who came to him that if they are guilty they should turn themselves in to the authorities, indicates that a defendant can plead innocent when charged, as both fleeing and pleading innocent are a form of resisting imprisonment.

26. *Babylonian Talmud, Niddah* 61a.

27. *Rashi, Niddah* 61a.

argue that the reason Rabbi Tarfon would not help them was because he was afraid that the government would punish him for helping criminals escape, but that helping them is *halakhically* (in accordance with Jewish law) permitted.[28] Most early authorities accept the reasoning of *Tosafot* and Rabbenu Asher.[29] According to their explanation, any help which the government allows one to provide would be permitted, since it poses no danger to the provider (e.g., being a defense attorney).

Rabbi Shlomo Luria argues that this ruling of *Tosafot* and Rabbenu Asher only applies in cases where, in the aider's mind, the guilt of the defendant is in doubt, as it was in the Talmud.[30] In the case of *known guilt*, no help is permitted. Basing his opinion on this ruling, Rabbi Hershel Schachter states:

> [I]f a lawyer knows that his client has committed a crime, it is *forbidden* for him to help the criminal escape the consequences of his act, by relying on some technical legal points or other devices. The lawyer, just as any Jew, is directed by the Torah to "eradicate the evil from our midst," and may not actively assist someone to avoid his punishment.[31]

Thus, according to Rabbi Schachter, a lawyer may not advance "technical legal points or other devices" when the client is known to be guilty in fact. On the other hand, it is apparent that the defendant must be presumed innocent by the lawyer.[32]

In addition, it is also important to distinguish between those situations in which the lawyer advances a defense of "technical legal points" for a client he knows to be guilty, and those situations in which the lawyer advances defenses that are true, that mitigate the seriousness of the crime, or that cast doubts on the validity of the government's case. For example, under Rabbi Schachter's ruling, it would seem that while a lawyer cannot advance at trial a defense of "my client did not commit the crime" when the client has informed his lawyer to the contrary,[33] a lawyer may advance numerous defenses

28. *Tosafot*, *Niddah* 61a and Rabbenu Asher, both quoting Rabbeinu Aha, *She'iltot*, Numbers, ch. 129.

29. *See* Rabbeinu Menachem ben Shlomo, Meiri, *Niddah* 61a.

30. Shlomo Luria, *Hokhmat Shlomo*, *Niddah* 61a; Akiva Eiger, *Niddah* 61a.

31. Schachter, *supra* note 9, at 121-22.

32. *See Kitzur Piskei ha-Rosh*, *Niddah* 9:5. One could argue that all defendants who have not told their lawyers that they are factually guilty, have the status of "in doubt" until conviction at trial. The overwhelming majority of defendants are in this category. It is clear that this type of reasoning does have some outer limit. For example, Rabbi Oshry concludes that Jewish law would prevent a Jewish lawyer from defending a Nazi war criminal, and discusses his response in a case when a lawyer wished to do so. Ephraim Oshry, *Responsa from the Holocaust* 104 (1983).

33. This also violates many professional ethics rules. Obviously a lawyer may not use techniques at trial whose sole purpose is to confuse the finder of fact or to produce error and a reversal on appeal. Both of these tactics are unethical in American law.

which indicate that a guilty verdict is inappropriate. Thus, he may advance an insanity defense, or defenses of necessity, duress, or inadvertence, provided that the client has told him that these mitigating factors are present, or that the lawyer reasonably believes them to be present. So too, any rule of evidence or law whose goal is one of "truth-seeking," and whose violation by the prosecution casts doubt on the credibility of the evidence, may be invoked by a lawyer to the benefit of a client, since such rules promote justice by the court. Thus, for example, both hearsay evidence and a confession given after torture may be suppressed as the evidence's validity may be reasonably doubted.

The status of the prophylactic rules occasionally promulgated by the Supreme Court in the field of criminal procedure could be debated.[34] While these rules were not authorized in order to ensure justice in a particular case, they are part of the government's program to reduce violations of law by governmental officials and to promote justice in society at large. While the efficacy of such a policy could be, and is, debated by lawyers, there is little doubt that the goals these policies seek to advance are ones which Jewish law respects, and also are a fulfillment of the obligation to eradicate injustice from society.

In the more typical case where the client does not tell the lawyer he is guilty and instead protests his innocence (notwithstanding the evidence to the contrary), it would seem that a complete defense would be permitted according to Rabbenu Asher and *Tosafot*.[35] In such a case, a lawyer may advance all defenses which are tenable and which the client represents as correct.

Obviously, a lawyer may also advance a defense that the facts, as stated by the government, do not constitute a crime under the relevant statute, and thus the client ought to be acquitted. For example, in a prosecution for criminal tax fraud, the defense frequently argues that not only was no crime committed, but that the tax return of the defendant was properly filed, and the IRS is misinterpreting the relevant tax law.[36]

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34. *See e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961). A "prophylactic rule" corresponds to the rabbinic concept of a "fence around the Torah" (*seyag latorah*) and refers to those rules designed to remove the temptation to violate the law. *Mapp*, for example, ruled that illegally seized evidence will not be admitted into court. This rule created a "fence" around the Fourth Amendment's prohibition of illegal searches and seizures by reducing the incentives on a police officer to violate the law, as the products of such searches may not be used in court.

35. *See supra* note 27 and accompanying text.

36. It is permissible under Jewish law to challenge the IRS's understanding (called Regulations) of the Internal Revenue Code, as the executive branch of the federal government is not constitutionally given the power to interpret laws in a manner that binds citizens. That task is left to the judiciary, whose interpretation binds the other two branches, as well as the citizenry. Thus, in America, *dina de-malkhuta dina* only applies to laws that the judiciary sanctions as valid.

C. *Assisting the Guilty: A Second Approach*

An understanding of Rabbi Tarfon's dilemma, different from that advocated by Rabbi Luria, is possible and better explains the position of *She'iltot*, *Tosafot*, and Rabbeinu Asher. The *She'iltot*, *Tosafot*, and *Rosh*, might in fact make no distinction between known guilt and mere rumors of guilt. Rather, Rabbi Tarfon might have hesitated to act solely out of fear of violating the secular law (and being punished for that violation). Under this explanation, the sole limitation upon aiding a person accused of a crime would be the danger to the aider. All aid permitted by the government, and hence without any danger to the provider, would thus be permitted. Rabbi Yaakov Ettlinger advances exactly such an explanation. He denies that there is any intrinsic halakhic obstacle to aiding criminals who seek help—and he asserts this as *Rashi*'s opinion, as well as that of *Tosafot* and Rabbenu Asher. He states:

> In my opinion one could state that *Rashi* does not disagree with *She'iltot*. When *Rashi* states that it is prohibited to save the murderers, he does not mean that it is prohibited according to Jewish law to save them, *but rather that secular law prohibits that conduct.* Once secular law prohibits this conduct, Jewish law does also, since saving these individuals would involve great risk.[37]

A contemporary rabbi, Menashe Klein, questions whether *dina de-malkhuta dina* applies in the United States. He states:

> [The applicability of the principle of] *dina de-malkhuta dina* in our times, when there is no king but rather what is called democracy needs further clarification. As I already explained the position cited in the name of Rivash quoting Rashba, one does not accept *dina de-malkhuta dina* except where the law originates with the king. But in a case where the law originates with the king. But in a case where the law originates in courts, and the judges have discretion to rule as they think proper, or to invent new laws as they see proper, there is no *dina de-malkhuta dina,* as there is no law of the king .... Indeed, even the government sometimes creates law and the Supreme Court contradicts it. Certainly in such a system there is no *dina de-malkhuta dina* according to Rivash and Rashba.

37. Despite Klein's views, it is important to note that most authorities have held that *dina de-malkhuta dina* applies within the United States and have found any problems caused by the democratic form of government, the judiciary, the jury system, or the possibility of judicial review. This was the approach of Moshe Feinstein. *See* Moshe Feinstein, *Iggerot Moshe, Hoshen Mishpat* 2:62; Yosef Eliyahu Henkin, *Teshuvot Ibra* 2:176; *see also* Shmuel Shilo, Dina De'malkhuta Dina 157 (1974).

Indeed, once one acknowledges that *dina de-malkhuta dina* applies to non-monarchical governments, it is unclear why other factors would, as a general matter, be problematic as a matter of Jewish law. There is no apparent Jewish law deficiency in the secular system for interpreting the law. Even if a king were to promulgate written laws, he would undoubtedly delegate the daily responsibility of judging cases to others, and such judges would have to interpret the law. A secular sytsem must delegate the interpretative function to someone and it is not fatal under Jewish law even if the secular system were to delegate some aspect of this function to judges, rather than legislators. Judges are required to determine whether legislative acts are consistent with legally superceding documents—such as treaties, constitutions, or even certain

If this approach is correct, and it certainly best reflects the formulation of *Tosafot* and Rabbenu Asher, any form of aid legally permitted by the secular society (e.g., being a defense attorney) would be halakhically permitted, as it is only because of the danger to the aider that one may not help a criminal.[38] According to Rabbi Ettlinger, the only type of aid prohibited is that which the secular government does not allow.[39]

Particularly in light of American law, Rabbi Ettlinger's position appears logical. Since the secular government not only allows, but actually requires that a criminal be represented by a competent lawyer at trial (a conviction is invalid without this representation), a lawyer's participation as a defense attorney simply ensures that society fulfills its obligation to remove evil from its midst—but only in the manner that society has designated as just.[40]

According to both approaches, a lawyer may not assist a client in the creation of a false defense—i.e., allowing his client or any other witness to commit what the lawyer knows to be perjury. Needless to say, such conduct is prohibited under relevant American law as well.[41]

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other legislative acts. There is no reason why a secular legal system division of power between legislative and judicial branches should impair *dina de-malkhuta dina.*

In any event, even if there were some irregularity in the secular procedure for applying the law, and even if this would deny Jewish law validity to the *outcome* of a secular case, it would not prevent *dina de-malkhuta dina* from rendering the substantive rules of secular law valid as a matter of Jewish law. For example, disputes between Jews, even when *dina de-malkhuta dina* applies, are supposed to be litigated in Jewish courts who would decide the dispute in accordance with secular law rules. In such instances, the Jewish courts themselves would serve as the fact-finders. For more on this issue, see Michael J. Broyde and Steven Resnicoff, *Jewish Law and Modern Business Structures: The Corporation Paradigm,* 43 Wayne L. Rev. (forthcoming 1998). *See also* Yaakov Ettlinger, *Arukh la-Ner, Niddah* 61a (emphasis added); *see also* Yaakov Emden, *She'elat Ya'avetz* 2:9 (explaining *Niddah* 61a in a similar manner); Moshe Schreiber, *Hatam Sofer* 6:14 (same); Yaakov Breish, *Helkat Yaakov* 4:23 (same); *Asefat Zekenim, Niddah* 61a (same); Yosef Shapira, *Hiddushei Mahari Shapira, Niddah* 61a (same).

38. *Rashi* could be arguing that secular law can halakhically prohibit this activity. *See Rashi, Gittin* 9b. *Tosafot* and Rabbeinu Asher reject this rule. *See Tosafot, Gittin* 9b; Rabbeinu Asher, *Gittin* 9b; *see also* Bleich, supra note 3, at 852-57 (discussing the principle of *dina de-malkhuta dina*).

39. On a practical level, there is nearly no distinction between the positions taken by Rabbi Luria (*Hokhmat Shlomo*) and Rabbi Yaakov Ettlinger (*Arukh la-Ner*). The sole point in contention would be whether a lawyer could advance defenses at trial not on the issue of the person's guilt but on procedural issues for a person who has acknowledged to the lawyer his factual guilt.

40. Such a conclusion was reached (albeit with somewhat different reasons) by Rabbi David Cohen (of *Gvul Yavetz*) in a letter to this author dated 17 Av 5754/July 23, 1994 (on file with author).

41. *See* Nix v. Whiteside, 475 U.S. 157 (1986) (holding that a lawyer may, and most states require that he must, inform the court of perjury by his client); *see also* Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case,* 1 Geo. J. Legal Ethics 125 (1987) (stating that false defenses are improper and ethical lawyers do not use them).

D. *Summary*

Numerous individuals, whose guilt was never doubted when their trial began, have shown themselves through able defenses, to have been factually innocent of the charges brought. Regrettably enough, history is also full of innocent people who were punished because of unavailable or incompetent defense attorneys. That is not to say that all defense strategies are permissible—many are not—but rather, the zealous advocacy of truthful defenses enhances, rather than detracts from, justice in society. To the extent a lawyer helps his client to benefit from legal rules designed to ensure justice, such conduct is permitted, and perhaps even mandated, according to Jewish law.[42]

CONCLUSION

Jewish law is of two minds on both of the topics we have addressed. On the question of prosecuting criminals, one view accepts that such conduct is truly proper conduct, and that Jewish law and ethics view the intrusion of secular society into Jewish society to punish those who violate the law as basically proper. The second approach views such intrusions as less than ideal, to be limited to cases of profound danger to health and welfare, and certainly not to be encouraged. On the question of defending criminals, the same two views can be encountered, in the reverse. One view essentially says guilty people ought to be punished by society, and it violates Jewish law to defend them. Another view avers that a spirited defense is proper for all, and the Jewish tradition allows for every defense technique permitted by the criminal justice system.

42. One final note is needed. It is important to distinguish between the role of a lawyer in defending a particular client, and the role of a lawyer, as an informed citizen, in shaping public policy. Merely because Jewish law permits—in the opinion of some authorities—one to offer a full zealous defense for a specific client in a criminal case does not mean that lawyers should not seek reform of the criminal justice system, even if that reform reduces either the rights of those accused of crimes or the role of attorneys in trials. These broader public policy issues, however, are of no relevance when a lawyer defends a specific person charged of a specific crime. The lawyer's goal in such a case should be to provide the best defense of that client permitted by Jewish and American law.