HALAKHIC DEFINITIONS OF CONFIDENTIALITY IN THE PSYCHOTHERAPEUTIC ENCOUNTER: THEORY AND PRACTICE

"For man sees the things that appear to the eye; but the Lord beholds the heart" (1 Sam. 16:7).

The psychotherapist’s role as bystander to the client’s innermost secrets and confidences devolves from the high degree of mutual trust each party must invest in the other so that their working alliance can operate effectively. At the same time, the right of privacy with regard to such confidences—which the patient maintains and the therapist protects—is a consequence of certain legal and moral commitments that are either implicit or explicit in the parties’ contractual relationship. No less than in medicine, where the physician commits himself to safeguard professional secrecy by taking the Hippocratic Oath, the mental health worker commits himself through his or her professional code of ethics (which does not necessarily contain an oath) to contain all information about the client, whether directly pertinent to the client’s problem or derived indirectly through the course of their relationship (for example, diagnostic tests, referring notes, and the like). There are occasions, however, when it is morally imperative that the professional disclose his confidential knowledge. Thus the conflict arises between professional confidentiality and prudent disclosures of confidential material. To resolve the conflict, the professional must apply his or her ethical principles to determine...
where his priorities lie and what posture is most appropriate to the given situation. As E. Promislo puts it, "The concept of privileged communication can never provide more than the finishing touches for a sound code of ethics." But this is clearly an unsatisfactory state of affairs given the number of very important challenges to confidentiality that arise in the daily practice of clinical, school, and consulting psychology and psychotherapy.

In this article I will compare the general ethical and the halakhic perspectives on the patient's right to privacy and the professional's obligations to maintain and sometimes divulge professional secrets. In the course of this analysis, I will explicate the general ethical and halakhic view of secrecy and confidence-bearing as a necessary good and right. Second, I will focus on the values of confidentiality with regard to numerous practical applications, such as consulting third parties, writing test reports, casework or diagnostic conferences, situations involving danger to the patient, therapist, or other parties, and problems involving professional testimony. This review will hopefully bring to light the basic halakhic values toward confidentiality and suggest avenues for further research on this topic.

CONFIDENTIALITY AS AN ETHICAL AND SOCIAL DESIDERATUM

The principle of professional secrecy is based on the notion that everything the patient says to the practitioner is actually the private property of the patient, which he or she shares with the practitioner for the express purpose of facilitating the achievement of certain goals, or which comes forward during the course of their relationship even when not specifically related to the achievement of such goals. The patient who elects to undergo psychological assessment, psychotherapy, or marriage counseling, and the like does not relinquish "ownership" of his private property, but instead allows the therapist to share this property, conditional upon the therapist's guarantee that no further sharing of this property will occur between any other persons with whom the patient has not struck a similar contract.

The privilege of confidentiality is closely related to the basic notion of secrecy. Implicit in the term "secret" (from the Latin secretum) is the connotation "something which is one's duty to set apart or conceal from the common knowledge of men." Objectively, then, a secret is a hidden thing; subjectively, it is the knowledge of something hidden with the obligation of not revealing it. The right
of privileged communication refers specifically to a legal right that protects the patient from having confidential information about him revealed in public, which includes his own family, or in court without his permission. This right is presumed to supersede (in general, though not always) all other obligations a therapist may have qua citizen to present testimony relevant to civil or criminal proceedings. At the same time, this notion of the secret as private property has a complementary aspect: should a patient forfeit his privacy—for example, by becoming a real or potential threat to others—the professional’s unique obligation to the patient becomes secondary to his obligation to the common social good and welfare. However, when therapists have taken oaths to confidentiality—for example, not to testify in court regarding patients without their consent—the issue of revealing necessary information becomes complicated by the need to balance the common weal against the sanctity of such oaths.

Finally, what is “private” about the therapeutic relationship is that it is a dialogue that transpires solely between the two participants (or more, if such is the contract, as in family therapy or marriage counseling). This notion of privacy also means that the patient will not discuss his relationship or the content of his therapeutic sessions with any other parties. In psychoanalysis, specifically, this dual direction of privacy is discussed at the outset of analysis so that subsequent breaches of this rule can be explored from the standpoint of “resistance,” “transference reactions,” and so forth in the effort to understand the dynamic motives for trespassing the privacy of the therapeutic relationship. We shall see in a later section that practitioners working within closely knit Jewish communities encounter particular difficulty safeguarding this commitment, where violations of confidentiality on the part of therapists, patients, and the general community are prompted by both neurotic motivations as well as by ethnic attitudes that in other circumstances would be halakhically praiseworthy, such as arevut or fellowship.

An additional moral principle underlying the preservation of confidentiality is that protecting a patient’s good name and reputation is an important control or motive for good living, and that, within limits, minimizing public attention to deviant behavior promotes social peace. Moreover, persons will not seek the assistance of others without the assurance that one will not be betrayed, and thus find one’s problematic condition made worse. Frustration of this willingness to seek help would lead to hopelessness, despondency, and would eventually disrupt social relations.
Thus, if the ultimate value of individual privacy derives from concern for social as well as individual peace, then an individual's right to a confidential relationship is subordinate to the rights of his fellows and of society in general. This is the basis for advocating the discreet revelation of professional secrets in the oft-cited example of the therapist or physician who discovers that his patient, who happens to be a school bus driver, is an epileptic or a poorly maintained borderline psychotic. In such cases, ethicists generally agree that it is wrong for the therapist to give the patient the choice of either informing the necessary authorities or terminating his relationship with the therapist; rather he or she must apprise both the client and the authorities as soon as possible.10

The theologian Vermeersch, echoing Aquinas, states the moral principles here as follows:11

Since both extremes must be avoided as sinful, namely, failure to tell the truth when it ought to be told and indiscreet revealing of the truth, the means of virtue is to be followed. This is obtained by observing the law of sincerity, which induces discreet manifestation of the truth and by the law of secrecy, which prohibits indiscreet manifestation of the truth.

This double-edged principle is the basis of the "holy" fiduciary responsibility to preserve professional confidentiality, as expressed in the Hippocratic oath,12 the professional codes of ethics of the American Medical Association, the American Psychological Association, and the National Association of Social Workers. Each code recognizes the right of the patient to privileged communication, but also, that this right cannot be absolute.13

To be more specific, each of the professional organizations mentioned above holds its diplomates or licensees to the following basic commitments:

1. The patient has the right to confidentiality;
2. This right extends beyond the period of professional services and even beyond the death of either party. This clause includes the careful disguise of all identifying characteristics of the patients during research or when using the patient's case material in public or professional reports, and so forth;
3. The professional must state and guarantee this right; and
4. However, if the patient's manifest or anticipated behavior may cause harm to individuals or society, the professional may be obligated to divulge the minimum information necessary to avert harm, and only to the least number of persons necessary for achieving this goal.
In explicating these guidelines, Moore-Kirkland and Irey suggest that the therapist's role be viewed as that of a mediator of knowledge and not merely as a protector of secrets.\textsuperscript{14} According to this perspective, both parties are cognizant that under certain conditions—not specified adequately by these authors—it will be incumbent upon the therapist to "mediate" certain knowledge gained from or about the patient to others outside of the therapeutic dyad. This perspective may have a certain appeal within the larger social work intervention model where the worker as broker is often expected to mediate otherwise confidential information among significant others such as agencies, relatives, support institutions, social service providers, and so forth. However, it does not really modify the dual obligations of the therapist: to preserve secrecy in the absence of mitigating circumstances or without the patient's consent to reveal confidential information to others, and to disclose confidential information in other circumstances when such disclosure is for the greater common good. More useful in this regard are Promislo's four conditions for determining whether the privilege of confidentiality can be guaranteed:\textsuperscript{15}

1. All communication begins with the patient's belief that it will not be disclosed;
2. Confidentiality promotes a full and satisfactory relationship between the therapist and patient;
3. Such relationships ought to be fostered, although this supposition would not be commonly accepted if it were learned that therapists generally hold back information bearing on public safety, and the like; and
4. The injury a therapeutic relationship would suffer by disclosure must be greater than the benefit such disclosure would produce for the protection of others or for the speedy disposal of litigation.

We shall see that many of these principles are implicit in the halakhic scheme.

Where civil law is concerned, most states—by statute—strictly subject the physician-patient relationship to a privilege of secrecy. These statutes specify, among other things, that the professional will not be compelled—and is not permitted (unless the patient waives his rights)—to testify in court regarding confidential knowledge.\textsuperscript{16} However, in the recent decision of Tarasoff v. Regents of the University of California, the Supreme Court of California ruled that
therapists who have determined that their clients pose a dangerous threat to the safety and welfare of others are obligated to protect the "intended victims" against such danger. In such instances, disclosure becomes essential to the public weal. In contrast with this ruling (which so far is law only in California) is Siegel's and Breggin's radical position that the psychotherapist should under no circumstance disclose confidential information, which, according to Breggin, includes even situations where the well-being of an innocent bystander is threatened. Breggin argues that such an absolute commitment is vital to the institution of therapeutic trust. On one hand, practical experience informs us that unqualified confidentiality is not as vital as Siegel, Breggin, and others sympathetic to this view suppose. Indeed, it may be critical to the therapist's ability to represent some sort of model of morality that he or she be able to convey to a patient that there are reality-imposed limitations to absolute secrecy in certain instances. Moreover, such absolute libertarianism runs the risk of endangering the welfare of other citizens, impinging on society's right to enjoy peace and safety from harm. Yet neither Tarasoff nor the A.P.A. or N.A.S.W. guidelines make adequately clear the conditions under which confidentiality or disclosure is the proper ethical response, and guidelines such as Promislo's have not been applied to specific, practical situations. The professional is thus no further along in resolving the ethical dilemma of "when to tell and when not to tell."

HALAKHIC CONCEPTIONS OF SECRECY AND THE VALUE OF CONFIDENTIALITY

In his most recent review of Jewish medical ethics, Chief Rabbi Immanuel Jakobovits briefly comments that in halakhic literature, "professional secrecy was never enjoined on physicians with the zeal with which it is now regarded by the medical profession because it was covered simply by the general injunction against talebearing." In fact, there are numerous references in the midrash, Talmud, and codes to the significance and parameters of confidentiality—though not always strictly related to the medical profession and certainly not the psychological profession. Rabbis J. David Bleich and Alfred S. Cohen, in fact, have recently reviewed some of the pertinent responsa regarding the disclosure of secrets in business and in medical practice. While some of their findings will be noted in the present
article, additional references are gathered here. Another contribution will be the specific focus on unexplored models applicable to problems that arise in clinical psychology and psychotherapy. A fully useful halakhic perspective needs to be organized from the existing rabbinic statements and from the ethical guidelines provided in scattered codes and responsa regarding the value of confidence-bearing and the destructiveness of talebearing. Finally, such guidelines will be most useful if related concretely to specific applications from the field of practice.

II

For Halakhah, the importance of confidentiality in the individual or professional encounter could be seen as devolving most basically from its social theory that the mitsvot, at root, are designed to promote individual and social welfare (le-tsaref bahan et ha-briot).22 Expanding this, confidentiality is not merely a specific contingency of a unique professional oath or contract, but must presume—and, as we shall see, sometimes grant priority to—the underwriting structure of kavod ha-briot.

The basic halakhic ethic is readily presented in the Bible: “He that goes about as a talebearer reveals secrets; but he that is faithful, conceals a matter.”23 More specifically, “Confidence in an unfaithful man in time of trouble is like a broken tooth, and a foot out of joint.”24 Simply put, an untrustworthy confidant actually becomes part of the patient’s problems, and a lack of trustworthy professionals increases society’s problems.

The Talmud expresses itself on this subject in characteristic fashion. “Seven things are hidden from man...what is in his fellow’s heart.”25 In other words, perhaps the greatest secrets—and deserving of being kept secret—are those matters that lie in the “heart” or personality, in that domain that represents man’s ultimate bastion of individuality. As R. Shlomo Edels interprets this aphorism, without discretion the concept of privacy would be defeated.26 That is, man is entitled to keep private his thoughts, feelings, and other knowledge about himself because this is an essential component of differentiating the self from others and for maintaining this distinction.27 Invasion of privacy is tantamount to the abolition of selfhood.

An even stronger statement of the value of secrecy is Hillel’s remonstration: “Do not tell a thing which should not be heard, for in the end it will be heard.”28 Hillel’s statement suggests that one’s
privacy is already compromised by the very fact that someone other than oneself is also privy to the secret. Of course, Hillel’s point must be taken as intentional hyperbole, since its literal interpretation would contradict the prevailing rabbinic attitude that there are times when a suffering person has no better recourse than to share his innermost problems and woes with a sympathetic listener—“Either companionship, or death.”29 R. Asi specifically teaches that confidential dialogue or counseling helps abate the destructive effects of woe or anxiety.30 Or, as a later ethicist, R. Hunin Ibn Ashik, would put it, “The preservation of a secret [in a confidential relationship] is the basis of love.”31

An excellent example of the extent of the fiduciary obligation in granting confidentiality is found in the following talmudic statement:32

From whence [does one derive] that one who has been told something by one’s friend is under ban to not [repeat what he has heard] until he is [expressly] instructed “tell”? The Writ says, “And God spoke to him from the Tent of Appointment saying” [that is, God’s instruction included the specific command to “tell”].

This statement harkens to the earlier mentioned ethic that in the initial sharing of “private property” in the confidential relationship the teller does not thereby relinquish his domain over such property. This view is actually carried over into daily halakhic living by Rabbi Abraham Gombiner (d. 1683) who rules, with reference to the above citation, “If one repeats something he heard without permission to do so, he violates an injunction.”33

Nonetheless, the rabbis strike a mean between absolute confidentiality and wanton indiscretion, as in the following interpretation of Solomon’s couplet, “A time to be silent and a time to talk”34—“There are times when one receives reward for keeping silent and times when one receives reward for talking.”35 This would seem to be the general attitude for the psychotherapist toward the material the patient shares with him, implying that there are exceptional situations where divulging secrets is justifiable within limits.

From the few references cited thus far it is quite clear the Halakhah considers maintaining general and certainly professional confidentiality to be more than a matter of prudence. Basic to these sources is the important ethical commitment to preserve kavod habriot, individual and social welfare and dignity.36 This commitment calls for an almost paradoxical promotion of interpersonal arevut.
(fellowship) precisely by maintaining a minimum of traffic regarding confidential matters among outsiders to the confidential relationship. It is in this sense that "the preservation of a secret is the basis of love."

The Talmud also relates confidentiality to the highly valued attribute of trustworthiness:

All who conduct themselves in trustworthiness merit to sit in the partition of God, as it is written, "Mine eyes are upon the faithful of the land, that they may dwell with me; He that walks in the way of integrity, he shall minister unto me."37

And elsewhere it is written:

All who conduct themselves in trustworthiness, are not given over to the "One who extracts" [a reference to God's oath to extract punishment from those who violate their vows].38

Strong censure of untrustworthiness if found in the talmudic account of a student of R. Ami who was expelled because he revealed what was actually a widely known matter that had been discussed in the academy 22 years earlier. R. Ami dubbed the student with the epithet: "the judge who reveals secrets."39

Later ethical tracts also emphasized the importance of securing, or being a trustworthy confidant. Shlomo Ibn Gabirol (d. 1069) records two stories:

They asked one scholar, "How do you conduct yourself regarding secrets?" He replied, "When someone reveals to me a secret, I dig a grave for it in my heart where it will lie buried forever." A story is related of another scholar who was entrusted with a secret by his fellow. His fellow then asked him, "Did you comprehend what I told you?" The scholar replied, "I have already forgotten what you told me."40

R. Issac Aboab (d. 1492) states, "One who reveals secrets that his friend entrusts with him is called a talebearer."41 R. Yonah ha-Hasid of Gerona (d. 1263), in his halakhico-ethical tract, supports the concept of confidentiality as an assurance and a motive for help-seeking when he rules, "One is obligated to conceal a secret that his fellow reveals to him in confidence... for in unwarranted disclosure of a secret there comes harm to its owner and may cause him to become distraught."42 In the ethical will of R. Eliezer the Great, one finds the instruction, "Be a trustworthy spirit to all men."43
HALAKHIC LEGISLATION REGARDING CONFIDENTIALITY

I have presented the basic Jewish perspective on the social desirability of general and professional secrecy. In fact, several fully biblical positive and negative obligations and injunctions also are involved that more clearly regulate the proper balance between indiscretion and confidentiality. From these sources, we distill specific halakhic procedures and policies regarding managing confidential material in psychological and psychotherapeutic practice.

On one hand, preserving secrecy devolves from the basic categorical imperative “Love thy neighbor” inasmuch as keeping secrets preserves the established social order, as explained above. More specifically—and as will be evident, more practically—professional secrecy stems from the prohibition against talebearing and slander, “You shall not go about as a talebearer among your people” (Lo telekh rakhil), echoed again in Proverbs by, “...reveal not the secrets of your neighbor,” as well as in R. Isaac Aboab’s and R. Yonah ha-Hasid’s rulings that one who reveals secrets is called a rakhil, or one who violates “Lo telekh rakhil.” Commenting on “He who goes about as a talebearer reveals secrets,” R. Elijah Gaon rules explicitly, “One who reveals confidences and one who bears tales, their transgression is the same.”

The halakhic codes further clarify that the injunction of “Lo telekh rakhil” subsumes a wide variety of indiscretions, including the revelation of any matter that would infringe upon another’s reputation or cause him embarrassment. The law precludes both men and women from either initiating or listening to defamatory tales and applies to tales about children and even the deceased. As elaborated in R. Moshe Sofer’s classic text, Mekor Hayyim: Shmirat ha-Lashon, the prohibition against talebearing is not lessened in general circumstances by the fact that the tale is common knowledge. That is, one is still forbidden to repeat or transmit such tales given the human propensity to embellish the tale or to inadvertently encourage further discussion of the matter in a manner which might eventually lead to character assassination or to embarrassment.

An additional parameter safeguarding secrecy will be mentioned briefly at this point since it will need to be qualified below: when one party vows either verbally or through written contract—and perhaps even by tacit commitment to a widely accepted professional code of ethics—to maintain confidentiality, then breach of such contract would also be forbidden by the laws of vows.
The above references establish the case for categorical confidentiality and say nothing specific about the possibility of or need for circumspect disclosure of secrets on certain occasions.

Of course, one need hardly marshall further sources to argue that the prohibitions against disclosing professional secrets and against breaching professional oaths to maintain absolute secrecy are waived in circumstances involving even the possibility of sakkanat nefashot (danger to life), as are all other obligations and prohibitions in such circumstances (with the exception of the three so-called cardinal sins). The principle that "danger to life is more stringent than prohibitions" (hamira sakkanta me-isura) is sufficient to waive the prima facie obligation to secrecy when danger warrants its application. Insofar as the patient who threatens to endanger others assumes the halakhic status of an aggressor (rodef), it would be incumbent upon the bystander—the therapist or his more perceptive supervisor—to do whatever is necessary, but no more than is necessary, to avert catastrophe. This is so, at least according to R. Elijah Gaon, even in the absence of demonstrable or conscious intent to cause harm. Note, however, that we are not here discussing alternatives to disclosure in cases of secrecy in the effort to avert harm; I am here only establishing the limits of that obligation.

In addition to allowing some disclosure in cases involving pikuah nefesh and rodef there are other principles requiring the disclosure of (or the preparedness to disclose) privileged information, such as when such disclosure will aid one's fellow in non-life-threatening monetary matters, or will prevent him from violating ritual prohibitions.

First, consider Rabbi N. Z. Y. Berlin's observation that the apparently unrelated clauses of the passage "You shall not go about as a talebearer among your people; do not stand idly by your brother's blood" indicate in fact that when "talebearing" will prevent calamity, hesitating to disclose is tantamount to bloodshed. This lends greater halakhic impact to the rabbinic interpretation of Solomon's couplet cited earlier. The Talmud and codes state in various locations that refraining from disclosing information as testimony that may spare one's fellow from trouble violates three separate biblical injunctions: (a) standing idly by one's brother's blood; (b) ignoring a call to bring forth material testimony (Im lo yagid...)—which includes according to some decisors not bringing forth relevant testimony even when not subpoenaed by the litigants or the rabbinic courts; and (c) being afraid to testify and concealing
material testimony (*lo taguru...*). Others add that inappropriate restraint regarding needed disclosure violates the biblical ""mi-devar sheker tirhak"" (stay far away from falsehood) and ""u'biarta ha-ra mi-kirbekha"" (chase out all evil from among you), although these passages serve primarily as supports (*asmakhtot*) rather than as full biblical injunctions. Finally, according to R. Yaakov Briesch, failure to disclose when appropriate violates ""not placing a stumbling block before the blind."" The obligation to disclose when necessary is, of course, also included in the philosophic notion of preserving social order.

Specific details of the above laws are relevant here. Note that Halakhah requires even a single witness, such as a therapist or psychological examiner privy to pertinent information, to testify in monetary matters or in matters of ritual prohibition (*issurin*)—unlike matters of nefashot—since in the former cases even a single witness has rabbinic efficacy. On the other hand, most codifiers add that even in these applications the single witness is not obligated to come to court unless he is actually summoned by either the court or the litigant. However, whenever two persons bearing material testimony are available, all agree that both parties must come forward even without being summoned. Second, the single witness is not obligated (if indeed not forbidden) to testify on matters of *issurin* when the ritual transgression or impropriety has already occurred and no further transgression is anticipated. Should he disclose his knowledge in such instances, he, too, violates the injunction against talebearing. A third relevant aspect of testimony is that while a witness in general is not allowed to present his inferences and assumptions as fact, he may present his inferences and assumptions *as such* and leave it to the court to decide how to deal with his disclosures.

**PROBLEMS OF DISCLOSURE AS TREATED IN SOME RESPONSA**

Some important aspects of the conflicting requirements to disclose or to maintain confidentiality emerge in detailed case analyses presented in select halakhic responsa. In the responsa to be discussed in this section, two important issues are addressed:

1. Does the underwriting principle in preserving secrets—*kavod habriot*—supersede ""lifne iver"" (not placing a stumbling block before the blind): for example, when keeping silent would
prevent a second party from taking appropriate action regarding a violation?

2. What is the halakhic status of professional oaths or tacit commitments to secrecy, and under what circumstances may such oaths be violated for the sake of some greater good?

The first issue is discussed in separate responsa by R. Ezekiel Landau and R. Chaim Halberstam. The presenting case involved the following peculiar circumstances: A young man had an adulterous relationship with the wife of a couple with whom he lived for several years. Subsequently, he recanted his sin and became a ba’al teshuvah. He then became engaged to the couple’s daughter. The specific questions addressed to Rabbi Landau, and also discussed by Rabbi Halberstam, were whether the young man is obligated to tell his future father-in-law of his sexual transgression since the husband is forbidden by Jewish law to continue to live with his adulterous wife, and whether bet din ought to be informed should the husband refuse to accept his unfortunate obligation?

In introducing his response, R. Landau rephrases the issue: may the young penitent maintain passive silence in order to preserve the integrity and honor of the apparently well-known husband? The supposition in ruling leniently would be that kavod ha-briot supersedes passive violations (shev ve-al ta’aseh), which would obtain in our case if the young man maintained his secret. The husband would then be erring unwittingly (be-shogeg) at worst. Rabbi Landau compares the case at hand to the law regarding one who notices his fellow wearing sha’atnez in public: Rambam, and Bet Yosef, rules that as long as the potential transgressor has a positive act to perform to prevent transgression (kum ve-aseh), others must inform him of the error immediately—even tear off the forbidden garments in public—since the offender’s embarrassment is secondary to the hilul ha-Shem that might otherwise occur. Rosh and R. Moshe Isserles rule that one does not have to take such radical action and may allow the offender to reach privacy where he can remove the garment without shame. Radical action, according to Rosh, is only required when oneself is the transgressor. After some discussion, R. Landau notes that the Rosh is lenient in the case of sha’atnez only because the offender was in transit and the error could be corrected momentarily, whereas in the present case, failure to inform the husband would result in continuous transgression. R. Landau accepts this as the definitive limitation to the kavod ha-briot argument. R. Landau thus concludes that the husband must be told (adding that this is necessary at very least so that the young man can
obtain forgiveness [mehilah] from the husband without which his teshuvah will never be complete). He also states, however, that bet din need not be informed in any case since appropriate testimony is lacking and the husband is, therefore, not technically obligated to believe the young man’s account.

Rabbi Halberstam reviews R. Landau’s analysis and argues that even Rambam’s stringency applies only to a fully specified biblical prohibition. He then attempts to show that the prohibition against retaining one’s adulterous wife is not a distinct biblical prohibition. R. Halberstam concludes that the husband need not be informed, viewing the young man’s passive silence as an appropriate application of the kavod ha-briot principle, and also the wife need not be instructed to confess to her husband since he is technically not obligated to accept her account.

The above two responsa make clear that serious consideration must be given to the potential cost and benefit of disclosing information when even serious violations may be averted. Rabbi Halberstam appears to allow a passive stance, and the maintenance of secrecy, in the case of less than fully biblical prohibitions when damage to kavod ha-briot will occur. Even according to Rabbi Halberstam, however, one cannot preclude the obligation to disclose information when this may avert a more serious catastrophe. According to R. Landau, even a single witness would be obligated to disclose pertinent information in a discreet way if this would prevent the persistence and certainly the initiation of issur (‘le-hafisho me-isura’).66 Despite the significance of their contribution, however, neither responsum deals with the issue of disclosing necessary information in the highly relevant case where the person harboring such information has taken an oath to not breach confidentiality—which generally includes a refusal to produce testimony regarding such matters in court—or belongs to a profession generally presumed to subscribe to such an ethic, even in the absence of a formal oath. One must examine other sources to clarify this problem.

Rabbi Eliezer Waldenberg discusses this topic and reaches the following conclusions (the sources for which have been discussed above): (1) One may not take an oath not to testify after one has already been called to court.67 (2) If one takes a prior general oath to preserve confidences absolutely, such an oath would be valid even though this oath would include not testifying in court.68 However, (a) such an oath still represents a nullification of the obligation to testify on one’s fellow’s behalf and thus one can presume that a halakhically
observant professional has also accepted a prior mental reservation not to include in such a vow material testimony that would be of value to avert calamity. In effect, professional vows of secrecy would not be originally intended to cancel one’s halakhic obligations. Rabbi Waldenberg then adds that (b) on the “slight chance” that one did intend such a vow to exempt one from testimony, one must nullify the vow before a bet din so that he be permitted to produce testimony when necessary.

Addressing the same problem, Rabbi Barukh Rakover submits the following practical conclusions:

1. A professional commitment without an oath to maintain absolute confidentiality is not deemed the equivalent of an oath. Although some may seem to require informed consent before such a “commitment” may be violated, most maintain that even a single witness enjoined against testifying merely by such commitment must testify when necessary without the consent of the other parties.

2. An oath to not testify after being called to court is generally invalid.

3. A single witness who takes such an oath even being subpoenaed need not testify (without first nullifying his oath) since his testimony is only rabbinically valid and thus his oath has not violated any biblical prohibition.

I have indicated above, however, that the obligation of a single witness to testify certainly supersedes oaths when sakkanah is involved. It would appear, then, that professionals who have not taken oaths of confidentiality—or have, but are presumed to have mentally qualified them, according to Rabbi Waldenberg—would be required to testify as per the demands of bet din.

A final consideration of this problem was reported by the Bet Din of Israel. The case involved a woman whose husband’s psychiatric illness was disrupting their marital and family life. She had requested pertinent information and records from the military psychologist, who refused on the grounds that a policy of revealing confidential matter could eventually threaten military security. The Bet Din ruled that the psychologist’s argument indeed waived his obligation to disclose the necessary information, but only because disclosure in this particular case could actually have far-reaching negative consequences such as threat to the security of the army and even to the state. In cases of lesser threat, one might infer that the
obligation to aid one’s fellow is sustained. However, Rabbi Alfred S. Cohen states that when disclosure threatens a professional psychologist with irreparable damage to reputation and possible financial ruin, disclosure would not be obligatory.\textsuperscript{72}

Rabbi Cohen forwards two arguments to support his conclusions. These merit examination. Rabbi Cohen first applies the principle that one is not required to spend more than one-fifth of one’s income in fulfillment of \textit{mitsvot}. While this principle generally applies to positive commandments, there is a question whether it also applies to negative commandments (that is, one may not violate a negative commandment no matter what the cost). Although R. Isserles sides with several \textit{rishonim} who rule that this principle does not apply to negative commandments, Rabbi Cohen adopts Hatam Sofer’s view that the above principle does apply to negative commandments, provided the person does no forbidden action, but merely failed to act to prevent violation (\textit{shev ve-al ta’aseh}).\textsuperscript{73} He notes that this qualification is apparently anticipated by R. Elijah Gaon and others.\textsuperscript{74} Rabbi Cohen then adds,

our research shows that the majority of halakhic authorities accept the position that a person whose livelihood depends upon maintaining the confidentiality of revelations made to him, need not jeopardize his position by telling these secrets, (p. 84)

since the professional is not violating the \textit{mitsvah} by \textit{doing} any action.

Rabbi Cohen does not reveal whom he consulted in adopting this conclusion, and one must consider some objections to his first argument. (1) I have cited several authorities who rule that when the therapist’s secrets bear on the ensnarement of a \textit{rodef}, the professional \textit{is} obligated to disclose his confidential information and thereby avert catastrophe. I believe it is presumed by these decisors that news of a therapist’s disclosure may have some discouraging impact on others, but that this impact is still deemed secondary to the obligation to aid one’s fellow. (2) While Rabbi Cohen is correct that the fulfillment of \textit{mitsvot} is generally limited to expenditures of up to one-fifth of one’s income (and up to one-third for \textit{hiddur mitsvah}), there are also numerous positive commandments that actually require any and every expense, such as purchasing wine for the \textit{seder}, \textit{Hanukkah} candles, \textit{pidyon ha-ben}, and others. Rabbi Cohen offers no evidence that aiding one’s fellow through disclosures of relevant secrets is not also one such \textit{mitsvah}. Second, the \textit{mitsvah} of \textit{pidyon shevuyim}, which is quite analogous to the case at hand, does require
expend much of one's total wealth.\textsuperscript{75} And finally, even if one were to correctly apply the one-fifth principle as Rabbi Cohen has presented it, one would be required to ascertain that disclosure would actually cost the professional one-fifth of his income and no less. Thus, appealing to the principle of one-fifth does not, it seems, adequately support Rabbi Cohen's conclusion. (3) When "failure to act" is itself the nature of violation, for example, not testifying or not coming to one's brother's aid, one cannot construe this as an instance of "shev ve-al ta'aseh" (note that the SMaK, no. 239 considers "ve-im lo yagid" a mitsvat lo ta'aseh, contrary to SMaG, nos. 108-109; Rambam, nos. 178-179; Hinukh, no. 122).

In fact, the principle one ought to directly evoke at this point is whether one is permitted to place oneself in jeopardy to aid one's fellow. While the Jerusalem Talmud indeed requires placing oneself into sakkanah (danger) if necessary in order to save one's fellow from sakkanah, the Babylonian Talmud rejects this view, and thus rule the codes and subsequent responsa.\textsuperscript{76} It is from this ruling that one might conclude that a therapist who clearly is threatened with ruin should he disclose confidences may indeed not be obligated to disclose.\textsuperscript{77} Where such a threat is not likely—as I submit is more generally the case since such disclosures are usually discrete and often readily understandable to the public mind—there would be little to justify a failure to come to the aid of one's fellow. Moreover, the Babylonian Talmud only forbids one to endanger one's physical existence to save another, but, as noted in (2) above, this prohibition does not include financial expenditures.

Rabbi Cohen's second argument posits that the public's "fear of exposure would preclude many persons from seeking help which they desperately need." This is probably an empirical issue, although I have shown above that Halakhah is sensitive to the need to guarantee society that privacy can be assured by certain professionals. On the other hand, it would be a definite detriment to society if persons believed that such privacy was generally deemed so absolute that they might conceivably carry out harmful intentions and escape justice under the protective cloak of a confidential relationship. It would appear far more important for citizens to understand that they can expect from their psychotherapists a generally completely confidential relationship so long as they remain committed to certain basic ethical constraints.

This understanding, I believe, has obtained since earliest times and has not resulted in adverse consequences to the public or dampened most persons' willingness to avail themselves of psychological services when needed.
Several practical applications with regard to a halakhic definition of confidentiality can be drawn from the preceding principles, codes, and responsa. Before adumbrating these, it is worthwhile to reiterate that from the standpoint of Halakhah, even if a therapist does not subscribe to a formal or written contract or code stipulating his obligations and the patient’s rights, all of the forthcoming obligations and rights are deemed in full force by virtue of a priori halakhic mandate.78

First, generally, the psychotherapist has a solemn halakhic obligation to maintain professional secrecy regarding his or her patients and their families. This obligation would obviously require keeping secret the very fact that a specific person has entered or even inquired about the possibility of psychological assessment or psychotherapy. It would also demand that psychotherapists procure appropriate work locations that guarantee privacy (that is, not their own homes unless extreme precautions are taken). This obligation extends beyond the termination of the professional relationship or event of the patient’s death. All of these obligations obtain whether or not the therapist has taken an oath to this effect.

Second, when a patient forfeits the right to confidentiality because he directly or indirectly poses a threat to the life or welfare of others or even to himself (for example, suicide), the therapist is halakhically obligated, first, to expeditiously explore alternatives to frank disclosure in the effort to prevent a calamity.79 Lane and Spruill, for one resource, discuss several alternatives to actual disclosure, yet fail to mention the most obvious: informing the patient cum rodef that he must choose between his “dangerous” wishes or intentions and his desire for a guaranteed confidential relationship.80 Should this tactic fail, the therapist must be prepared to initiate a series of graduated disclosures (for example, to the intended victim, his family, police, or other protective services). In such instances, one is still required to utilize prudence to ensure that such disclosure does not exceed necessity.

Third, the therapist cannot appeal to his prior commitments (sans oath) to professional secrecy when his knowledge is demanded by the court or by a litigant and when his disclosures will help prevent even less than life-threatening loss. However, with the exception of Rabbi Samson Raphael Hirsch, most authorities rule that a single witness is not required to come forward unless he is specifically
summoned (if the professional has taken a prior oath to privacy, see section 8 below). In legal proceedings involving matters of nefashot (capital law), the therapist as a single witness is in fact forbidden to disclose his knowledge since a single witness’ testimony is invalid in such proceedings. Indeed, his disclosure in such cases would itself be considered talebearing. However, when a supervisor or a co-therapist shares identical knowledge of the therapist’s secret (and does not merely know of such matters indirectly through supervision), the two become obligated by biblical mandate to come forward and disclose such material when relevant both in matters of lamamon as well as nefashot.

An example of weighing the merits of confidentiality versus disclosure would be the case of a marriage counselor whose former clients are currently entangled in “dirty” divorce proceedings in court or before a bet din. The therapist has learned that one of the mates is grossly misportraying and maligning the other, and the costs to the “victim” include financial loss and character defamation. It is obvious that the antagonistic mate will not wish to release the professional from his commitment to secrecy. Yet, it seems that the therapist is obligated to come forward for three reasons: (1) he cannot stand idly by as his fellow is “pursued” by another; (2) he cannot allow the “aggressing” party to utilize the therapist’s commitment to secrecy as a tool through which to cause harm to others; and (3) it may be a necessary deterrent to domestic disharmony for society to understand that the marriage counselor’s commitment to confidentiality under most circumstances will not prevent him or her from disclosing professional secrets in court if one of the partners acts unethically.81

Fourth, if the therapist becomes aware during his relationship with a patient, or while gathering data pertinent to the case, of the unwilling or willful transgression of biblical prohibitions (for example, incest, adultery, rape, and the like), the obligation to share such information depends upon (1) whom he wishes to inform (see R. Landau’s case); (2) whether the transgression threatens to continue or has already been committed, once and for all; and (3) whether the patient, desirous of effecting complete teshuvah regarding the transgression, is himself obligated to confess his sin or make recompense to any offended parties. Transgressions “between man and God” (bein adam la-Makom) must be kept private.

Fifth, in writing and presenting evaluational, diagnostic, and process reports, the writer must bear in mind that while the patient may have freely volunteered to be evaluated or tested, all inferences
and diagnostic hypotheses are in a sense extorted from the patient’s manifest behavior or verbalizations. For example, the patient’s “reasonable ego” does not initially wish to tell even his therapist that the patient is plagued by incestuous fantasies, and so forth, but a skilled clinician may infer from characteristic test responses that this is so. Such indirectly acquired, so-called natural secrets are also the property of the patient even though the patient does not know he has such property, and must be respected as such. Also, when diagnostic or prognostic inferences need to be disclosed as testimony, Halakhah demands that such data be presented as inference rather than as fact. The important principle here is that Halakhah cannot accept testimony based on presumption or inference (ein danin al ha-umdena).82

Sixth, the discussion of clinical material in a clinical team conference format or in the presence of students is appropriate because this is done for the ultimate benefit of the patient and is not designed for genut or character defamation, although the standard practice of disguising nonessential identificatory characteristics should be applied.83

Seventh, while Halakhah enjoins one to “stay away from falsehood,”84 professionals are often confronted with the dilemma of whether a lie is permissible to protect confidentiality when mere silence would be tantamount to disclosure (as the Talmud itself says, “Silence is as an admission”).85 Can one respond to unauthorized questions by stating, “I know nothing about the matter,” with the mental reservation, “to communicate to unauthorized persons?”86

Resolutions of this matter depends upon the legitimacy of the third party’s query. Sometimes such inquiry is wholly illegitimate, such as when a third party inquires whether Smith is in treatment, “so that we can lend him support...”, or when some inquisitive gadabout confronts the professional with, “I know you’re seeing Smith’s son—I referred him to you—I just hope you can cure him.” Do these questions merit false answers or denials when the usual “I don’t discuss my professional activities” will be taken by others as a confirmation of their suspicions?

In the case of Smith’s son, since both professional and third party already know that Smith’s son is in treatment, the therapist’s reluctance to confirm or deny reveals no new knowledge. In this case, it is sufficient for the therapist to merely reply that he does not discuss his professional activities. More generally, the professional is duty-bound to protect his patients from illegitimate or unlawful inquiry. When mere silence would violate this obligation,
modification of the truth may be the acceptable alternative. Halakhah specifically condones modification of truth in the interests of preserving peace or staving embarrassment—which, as we have shown, are ultimate goals of confidentiality. "Said R. Illai in the name of R. Eliezer, son of R. Simon, 'It is permissible to modify the truth for the sake of peace'... R. Natan said, 'It is an obligation.' "

This statement is further supported by the fact that Halakhah in some instances validates mental reservations made at the time of an oath, and does not consider such reservations a violation of the principle of staying clear of falsehood. Thus, it would surely seem permissible to mentally qualify one's much less sacrosanct, noncommittal responses to illegitimate inquiries in order to preserve peace.

At the risk of moralizing, I would add that the Jewish ethic of fellowship or arevut is not without its neurotic and self-serving determinants. The popular conception that intrusions and inquiries into others' welfare are permissible because of ahavat re'im—or a therapist's belief that "sharing" professional secrets with patients' relatives, rabbis, roshei yeshivah, and so forth is similarly justifiable—are fine examples of rationalizing a basic disregard for the selfhood of others or a therapist's unresolved need for the respect and love of his religious community. Such arevut is essentially annihilative, and is frequently bestowed upon incoming ba'alei teshuvah who in reaction feel virtually denuded by the oversolicitous advising, sharing, referring, monitoring, and counseling that often occurs "for their sake." All such tendencies merit careful self-examination or, at the very least, a second look at the excellent psychoanalytic primer, Shmirat ha-Lashon!

Eighth, the process of anamnesis or history taking often involves a patient's disclosure of information bearing on the actions and character of others, or the professional's solicitation of information from the patient's parents, teachers, and so forth. Such collection of confidential information does not violate the prohibitions against talebearing or listening to slander or "evil talk." (1) Many halakhists have stated that when previous errors or transgressions—or any other pertinent matter—are evoked in the effort to modify personal weaknesses, such endeavors in fact fulfill the biblical mandate to "remember the days of old." Thus, by analogy, history taking and evaluation function to eventually promote required remembrances designed to facilitate the eradication of disease or suffering. (2) One of the basic halakhic models supporting the healing endeavor is that the physician, or psychotherapist, functions by implicit commission
as an agent of *bet din*. Thus, the therapist’s professional endeavors are analogous to those of an “agent of *bet din*”—to guide, socialize, and correct. In addition to his role as defined in (1), the therapist, as an agent of *bet din*, is exempt from the prohibition against slander and talebearing, as is the law regarding *bet din* itself. Finally, (3) one is obliged to obtain, and if necessary provoke others to disclose information when this bears on one’s personal investment (*le-tovat atismo*) in establishing a viable and productive business or domestic relationship. It would again seem that the psychotherapist’s evaluations and so forth operate under the same intent in the establishment of an effective therapeutic relationship.

Note also that each of these three analogies dissolves the prohibition of “placing a stumbling block before the blind” that the professional would otherwise transgress in the process of involving other parties in the disclosure of confidential information.

Ninth, if the mental health worker actually took a halakhically valid oath or vow to categorical secrecy, this oath would not supersede *pikuah nefesh* where indicated. In other circumstances, a prior, general oath to categorical secrecy would be inviolable, although the therapist is urged, even obliged, to come forward and offer testimony where necessary by first obtaining absolution from such oaths so that he can fulfill his obligations.

Tenth, should the need or demand for testimony represent a clear and present threat to the therapist’s professional livelihood—all the above obligations withstanding—there is reason to believe that the therapist is still obligated to reveal professional secrets. However, this tentative conclusion needs further analysis. If, on the other hand, no such threat exists, despite the therapist’s concern in this regard, and the solicited disclosure would spare his fellow from clear and present danger, then the obligation to disclose remains incumbent according to some authorities. As the Arukh ha-Shulhan warns: although we maintain that one is not obligated to jeopardize his life for the sake of another’s, one should not be unjustly cautious in this domain.

Eleventh, in most jurisdictions, death terminates the privilege of confidentiality. Thus, psychologists may be called by courts to testify about their deceased patients in order, for example, to determine the mental capacity of a person at the time a will was executed, or to determine whether a death involved suicide, circumstances that may result in the nullification of insurance benefits or other compensations. While Halakah extends the privilege of confidentiality beyond death, it would defer in such cases to the *dina de-malkhuta* or the call of *bet din*. 

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Twelfth, while statutes have not been clearly worked out to address the unique confidentiality problems that arise in the practice of group or conjoint therapy, it would appear that when there are more than two parties in therapy—each must be seen as “an agent” of therapy (at least according to theory) and accordingly is obligated to preserve the type of relationship deemed elsewhere critical to therapeutic success. The fact that Halakhah sometimes considers statements made in the presence of three persons to no longer be subject to the laws of lashon ha-ra (since it is technically common knowledge), does not mean that a confidence entrusted as such to three or more persons is any less inviolable.

Thirteenth, suits to collect delinquent fees necessarily involve some disclosure about the patient by the therapist to the small claims court or a collection agency, but current statutes do not hold this to constitute an invasion of privacy. Halakhah would concur with this view, presuming ample warning had been made. However, some court cases have established that the psychotherapist is responsible if his collection agent makes unjustifiable disclosures (for example, calling up a patient’s employer in order to collect the debt). Here, too, Halakhah would presumably concur, although if the patient persisted in acting as a rasha, bet din could empower its agents to threaten to and, if necessary, actually shame the patient into resolving his financial problems. This would remain, however, a highly discretionary matter.

CONCLUSION

We have seen that from the perspective of Halakhah, the problem of striking a mean between professional discretion and disclosure is certainly not left to the intuitive judgment of the mental health professional nor merely to the professional’s application of the principle that his fiduciary obligation is contingent upon the patient’s desert of the right of secrecy. Rather, there are specific imperatives that on one hand demand professional secrecy as an individual and social good while also demanding disclosure in other circumstances. The professional will surely encounter circumstances that have not been addressed sufficiently by the above principles and conclusions, and, as in all cases, he will seek the opinions and recommendations of competent halakhic authorities. It is hoped, however, that one will find here the essential source material and some initial considerations that should sensitize the worker to the scope of his halakhic obligations and to the issues he will need to consider in evaluating his responsibilities.
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There is perhaps another valuable practical application for an exposition of the halakhic parameters of confidentiality aside from providing specific guidelines for the practicing mental health professional. This application involves educating the consumer of mental health services and the general public about the great sanctity with which mental health professionals regard the privacy of the psychotherapeutic alliance and, at the same time, fostering a more sophisticated understanding of the legal mandate involved in breaching confidentiality in certain circumstances. A very recent study suggests that a small but significant percentage of the consumer population (admittedly generalized from a small experimental group) has a rather insecure attitude about the degree to which professionals maintain confidentiality and, more important, would hesitate to avail themselves of mental health services because of this belief. The authors of this study state that they have not ascertained some of the relevant psychological characteristics of the group from which they drew this response (for example, did this population contain a large number of persons with paranoid tendencies?). Nonetheless, the possibility that even some persons would be reluctant to make use of necessary psychological services because of a rather realistic or unrealistic perception of professionals' trustworthiness demands that efforts be made to redress these perceptions.

I do not believe that the results of the aforementioned study seriously challenge my earlier argument contra Cohen to the effect that the institution of seeking and providing necessary psychological services has apparently survived the numerous legitimate (and even illegitimate) disclosures of privileged information over the decades. The above study notwithstanding, absolute privilege of confidentiality remains ethically and halakhically untenable. The options left include informing the public of guidelines, such as outlined in this article and others, and the utilization in public discussion as well as during the initial professional interviews of appropriate models that delineate the rights of and requirements for confidentiality and informed disclosure in specific types of clinical and experimental settings.

NOTES

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4. Secretum is derived from the verb secrenere: se, or “apart”, and cerere, or “to sift.” See also A. Vermecrsch, Theological Moralis: Principa, Responsa, Consilia (Bruges, 1924), vol. 2 No. 697.


7. Regan, pp. 18-20; see also the perspective expressed by the Sefer ha-Hinukh, nos. 236-240. See also Songs R. 1 and Sanhedrin 43b to the effect that God despises those who publicize defamatory accounts about Israel.


12. Constantine’s code also required physicians to keep secrets, as described in T. Moore, Principles of Ethics (Phila., 1935), p. 338. See also note 20.


16. The N. Y. Civil Practice Law & Rules, Section 352, and others cited in Regan, pp. 120-121.


19. See note 1 above.


22. Mid Ps. 18:25; Gen. R. 44:1; Tosefia Shab. 16; Hinukh, no. 545; Moreh 3:27; see also
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Abravanel and Ramban to Deut. 22:6.

23. Prov. 11:13; similar to Prov. 20:19 and Lev. 19:16; see also B.K. 99; Sanh. 31.

24. Prov. 25:19. For additional biblical sources see below.


26. Maharsha to Pes. 54b.

27. C. Schneider, Shame, Exposure, and Privacy (Boston, 1977).

28. Avot 2:5 and see the commentary of Rashi and R. Yonah, citing Eccl. R. 11:20; see also ARN 28. Similar thoughts are expressed by “Any secret you would hide from your enemy, hide also from your beloved” (Mishmar ha-Prinim 29, no.1) and “The wise person will not reveal his secrets and will not ask others to reveal their secrets” (S. D. Ibn Falaquera, Iggeret ha-Musar, p. 32.)

29. Ta'an 23a; B. B. 16b.

30. Yoma 75a; Sotah 42b; Sanh. 100b; see also R. Yonah ha-Hasid, Iggeret ha-Teshuvah, Yom 2, p. 195; also, Avot 2:13.


32. Yoma 4b; Pes. 42a; Tem. 7b; Sanh. 31a, 44b.

33. Magen Avraham to Sh. A., O. H. 156; SmaG, Neg. no. 8; see also Sefer Hasidim, no. 85.

34. Eccl. 3:7.

35. Zeb. 115b; see also Arkh. 15b.

36. Avot 4; Ber. 19b, 28b, 43b; B. M.; cf. Ket. 17a.

37. See Ta'an. 8a, citing Ps. 101:6; also Tamid 28a.

38. T. B. M. 12b; see also Tosefta B. M. 3:7.


40. Mishmar ha-Prinim: Sha'ar Hastarat ha-Yetser; see also Meiri to Prov. 11:13.

41. Menora ha-Ma'or, Ner 1:4, 2.


43. Tsava'at Geonei Yisrael (I. Abrahams, ed., J.P.S., 1937), vol. 1, p. 44.

44. Lev. 19:18 and see note 31 above; see also Lev Avraham (1976), vol. 2, p. 69-70.

45. Lev. 19:16.

46. Prov. 25:9, and see Sanh. 44b.

47. Commentary of the Gra to Prov. 11:13.

48. See Mekor Hayyim: Shmirat ha-Lashon, intro. and passim. It is also plausible to consider the obligation to preserve secrecy as falling under the category of protecting a pikadon entrusted in one’s care (Ex. 22:6; Sh. A., H. M. 291:26, 292:7), except that the laws of pikadon deal specifically with items of monetary value (B.M. 57b). However, I would innovate the idea that confidentiality is included as an instance of preserving pikadon to the degree that the revelation of many types of secrets (such as copyrights, patents, military secrets) has palpable monetary consequences. This idea can also be supported by another interpretation that broadens an apparent monetary obligation to include the appropriate disclosure of “secretly” obtained information. I refer the reader to R. Barukh Halevi Epstein (Torah Temimah: Deut. 22:2), commenting on the phrase “And you shall return it to him,” which the Talmud interprets to include “the loss of life,” who adds, “And included in this is if one heard that persons were plotting evil against another person—it is a mitzvah to inform him.” This would obligate a therapist to inform intended victims about harmful intentions expressed by or inferred from his patients when the therapist has cause to believe that he cannot prevent the patient from acting upon such intentions (see also Resp. Helkat Yaakov cited in note 58 below).


50. Mekor Hayyim 1-4.


52. Hull. 10a; Suk. 14b; Sh. A., O. H. 3:28, Y. D. 118; see also B. K. 23a, Tos., s.v., “u'rehayav” and B. K. 27b, Tos. s.v., “amen,” to the effect that one is even more obligated to protect others from harm than to protect himself or his professional reputation.


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55. *Ha'amek Davar*: Lev. 19:16 and see also *Torah Temimah*: Deut. 22:2 discussed in note 48 above.

56. B. K. 56a; see also *Torah Temimah*: Lev. 5:1, and see note 61 below.

57. Lev. 5:1; Deut. 1:17; B. K. 56b-56a; Sanh. 6b-7a; Shev. 31a; M. T., Hil. Shevuot 9:3, Hil. Sanhedrin 22:2, Hil. Eduot 1:1; SMaG, Pos. no. 108; Sh. A., H. M. 28:3, Y. D. 228:33; *Hinukh*, no. 237; also, see Rashi to Deut. 1:17 who translates "to tagenu" as "you shall not conceal," citing the usage in Prov. 10:5.

58. See *Torat Kohanim* 19; Sanh. 6b, 7a; Shev. 31a. Rabbi Aaron Soloveichik has pointed out to me in discussing this topic the view expressed by the Ba'alei Ha-Tosafot to Deut. 13:7-9 that even if one's friend confided his intentions to commit apostacy or idol worship, or tried in stealth to convince his friend to do so, he must not feel bound to "to telekh rakhit" and is obligated to disclose the matter. Rabbi Soloveichik wondered whether this view implies permission to disclose confidences only regarding threat of idolatry. However, it seems more likely that the Ba'alei Tosafot are merely innovating the idea that in such circumstances one should not regard the intimate conversation as a true confidence! In other cases, confidentiality may be broken in the presence of the types of considerations discussed in the text. Resp. *Helkat Yaakov*, vol. 3, no. 136, citing M. T., Hil. Rozeah 1:13 and Sh. A., H. M. 426:1, specifically opines that the law to disclose applies to one who is in a position to prevent any loss, and not merely to prevent idolatry. (On this, see *Arukh ha-Shulhan*: H. M. 426:1).


60. B. K. 55b-56a and see Meiri *ad loc* If a single witness refuses to testify, he is "guilty in the hands of heaven" but is not punishable by earthly courts; see also Tur Sh. A., H. M. 28:1, 2, 5; M. T., Hil. Eduot 1:1, 17:7; Sh. A. ha-Rav, Hil. Eduot 1; *Arukh ha-Shulhan*: H. M. 28:1 and also *Sedei Hemed*, vol. 4, pp. 420-421 for detailed discussion of the situations where the testimony of a single witness is accepted.

61. Rosh to B. K. 55b; *Kesei Mishneh* to Hil. Eduot 1: adds, "or if they are in court." See also *Hinukh*, no. 122, while S. R. Hirsch to Lev. 5:1 seems to hold that even a single witness is obligated to appear in court even without being summoned. On this point, see *TaZ* and *Aseti Levonah* to Sh. A., Y. D. 239:7 who reject a similar implication in a problematic comment of *Rama*.

62. Shev. 33b; Pes. 113b; Mar Shmuel in Kid. 66a; see also Resp. *Tsits Eliezer*, vol. 13, no. 104.


64. Resp. *Noda be-Yehudah* (Kama): O. H., no. 35.


66. See *Rama* to H. M. 28:1.


68. According to the *Maharam* (H. M., no. 5) cited by R. Waldenberg, such an oath is invalid even when taken by two witnesses who are biblically obligated to testify; see also Shev. 24a, Tos., s.v. ela hen.


70. *TaZ* to H. M. 28; the *Rama* implies that hatarah would be necessary, but see *Tumim ad loc*.

71. *Piskei Din Shel Beitei ha-Din ha-Rabaniyim be-Yisroel* 5:132-153, Case No. 5637-21, cited in *Sefer Assia* 4: p. 285. In the case of the military psychologist—and in other cases such as where a patient-defendant asks his psychotherapist to testify in court regarding his mental condition—the psychologist does have an alternative to disclosure; namely, to urge the court (or his patient) to appoint an independent examiner to make a professional assessment and judgment about the patient for courtroom use (see R. Slovenko, *Psychotherapy, Confidentiality, and Privileged Communication* [New York: 1966]).

72. Cohen, p. 82-84.

73. Citing Resp. *Hatam Sofer*: H. M., no. 177, in contrast to *Rama*, Sh. A., O. H. 656. It is not clear to me exactly why Rabbi Cohen decided to favor the ruling of *Hatam Sofer*.
rather than the opinion of the Rema when, indeed, a review of the relevant literature reveals a tendency toward the view that the principle of al yevazbez yoter mi-homesh does not apply to negative commandments, and also favors the view that one ought not to maintain a distinction with regard to negative commandments between passive and active compliance with such proscriptions; see, for example, Sedai Hemed, vol. 9, pp. 7, 64.

74. Citing Gra to Y. D. 157, no. 5 and Pithei Teshuvah: Y. D. 157(4); Hinukh, no. 588.

75. See Sh. A., Y. D. 252; Resp. Igrot Moshe: Y. D., vol. 1, no. 143, 145; Ahavat Hesed 20(2) citing B.M. 62a. Advocating a comparison between psychotherapy and pidyon shevuyim confronts the problem that such pidyon is generally limited to “kedai demeihem” or the worth of persons on the slave market or the standard ransom (see Resp. Maharam Lublin, no. 15; Resp. Radbaz haHadashot, no. 40). This would mean that even if the therapist’s anticipated heroism is an effort to “redeem” a patient “captivated” by external circumstances, he is only obligated (though not forbidden) to expend a set amount. Indeed, some argue that the rabbinic takanah limiting the ransom ceiling extends even when danger to life (sakanat nefesh) exists (see Pithei Teshuvah: YD. 252(4)). Let it be said in defense that many poskim have suggested that it is primarily the community that is protected by this all-inclusive takanah and that individuals may expend more than kedai demeihem when the captive is in danger (see Resp. Hatam Sofer: H.M., no. 177). Sedai Hemed, vol. 1, p. 47 leans in general to the view that sakanah would take precedence to this takanah, citing the ruling of Tosafot (s.v. “kol,” Git. 58a) as support. Medini also explains Rambam’s ruling (Hil. Matenot Aniyim 8:10, 12) in support of the apparent all-inclusiveness of the takanah to apply only when there is the assumption of danger (hezkat sakanah) and not when there is real or anticipated danger. Thus, the general pidyon shevuyim model—notwithstanding the problem of a contemporary definition of “kedai demeihem”—may apply in some practical dilemmas of confidentiality but not in others.

76. See Resp. Tsits Eliezer vol. 8, no. 15(10), vol. 9, no. 17(5); Resp. Radbaz, vol. 3, no. 627.


78. Ex. 21:6, 34:27; Kid. 1:2; JT Ned. 22b; Ned. 28a; JT Kid. 3:1; Deut. 29:11-13; JT Solah 2:5; Shev. 29a (kimu ve-kiblu); Meg. 7a; M. T., Hil. Yesodei Torah 9:3.

79. By analogy to rodef, one may not kill when maiming will accomplish the mitsvah and so one may not disclose liberally when this is uncalled for (M. T., Hil. Rotseah 1:13).

80. See Lane & Spruill, pp. 202-209.

81. Kid. 49b; JT Ta’an. 4:5; M. T. Hil. Sanhedrin 24:1-2; Sh. A., H. M. 15:5.

82. JT Ta’an. 4:5.

83. Mekor Hayyim 4:10, 8:2, 10:1, 4 and 9:3; B. M. 57b; Shitah Mekubetset: B. B. 39a. In this, the therapist’s report has the status of a judge’s pesak (Sh. A., H. M. 19:1). See also M. T., Hil. Teshuvah 7:8 who specifies “keday le-beisho,” which is essentially not the therapist’s motivation. Students would also be permitted to be privy to confidential information in the course of their learning experiences (Resp. Tsits Eliezer, vol. 13, no. 81[2]), e.g., observing therapeutic sessions through one-way mirrors, participating in diagnostic conferences, and so forth.

84. Ex. 23:7; B.M. 37b; Sanh. 92a, “kol ha-mahalif dibburo ke-itu oved avodah zarah.”

85. Yeb. 87b. Technically, should a professional appeal to silence in a bet din in response to questions which he is not yet sure he can or may answer, qua witness, his silence cannot be taken as an admission (Hidashei Ritva cited in Torah Teminah, Deut. 19:15).


87. Deut. R. 5; Lev. R. 9; Gen. R. 100:8; DEZ 11; JT Peah 1:1; Yeb. 65b; B. M. 23a, Tos., s.v. “be-ushpizyoh,” 87a; Suk. 53b; Ket. 16-17; Piskei ha-Rosh, Maharsha, Nimukei Yosef, Meiri, ad loc; Menorat ha-Ma’or, Vol. 2, 2(1); Resp. Petah Devir, vol. 1, No. 1; Hidashei ha-Ritva to Kid. 81a; TaZ and Magen Avraham to Sh. A., O. H. 565. Sefer Hasidim, No. 642 (citing Yeb. 65b), states that one may modify the truth to save another from bushah.

88. See note 96 below.

89. See also the story of R. Akiva in Kallah 2.


91. Deut. 32:7, and also Lev. 26:40; see also Deut. 24:9 and the role given it by Ramban in his *Ajin ha-Nosafim le-Sefer ha-Mitsvot*, no. 7. See also *Shmirat ha-Lashon*: *Sha‘ar ha-Teshuvah*, No. 12.

92. *Mak.* 8b.

93. M. K. 16a; Sefer Meirot Einayim 11; Be‘er Mayyim Hayyim to Mekor Hayyim 2, no. 2; *Shmirat ha-Lashon*: *Sha‘ar ha-teshuvah*, no. 5.


96. However, see the account related about R. Yohanan who swore to a matron not to reveal the secret of some medicinal procedure, and then revealed it (*Yoma* 84a; *A. Z.* 28a). The Talmud resolves the dilemma by saying that R. Yohanan originally intended to reveal the secret and had this in mind as he took his oath. The problematic implication is that without such qualification, R. Yohanan would not have revealed the confidential matter even though risk to life was involved in his case! In fact, the *JT* version of the story does not say the R. Yohanan took an oath but merely that he “said” that he would not reveal it. R. Hananel explains that the problem was not revealing confidences, but utilizing a cure based in idolatry (see also Maharsha to *A. Z.* 28a). Meiri (*A. Z.* 28b; *Hidushei ha-Meiri*: *Yoma* 84a) offers that R. Yohanan made his condition explicit, which presumably means that he explained to the matron that he would be obligated to reveal his secret knowledge in the event of an emergency.

