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MEDICAL CONFIDENTIALITY IN ISRAELI LAW

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INTRODUCTION

In the course of medical treatment, doctors become aware of information concerning their patients. The source of this information is either the doctor's diagnosis and observation or the patient's own admission. Ordinarily, this information assists the doctor in his treatment of the patient and is not divulged to anyone else. Thus, in effect, all such information is confidential.

The problem arises when information gained in the course of medical treatment is useful to others. In such circumstances, two questions arise. First, is the doctor permitted to disclose the information? If so, then the disclosure of information gained through the medical treatment is optional. Second, is the disclosure obligatory or required by law?¹

Revelation of medical information is relevant in a number of contexts. For example, law enforcement authorities usually want to know of every case where a doctor treats a victim of a gun-shot wound. Health authorities want to be cognizant of all HIV positive carriers.² A husband wants to be informed if his wife is pregnant

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1. The issue of medical confidentiality has been examined in numerous jurisdictions outside the United States. See generally James A. Thomson, *Records, Research and Access: What Interests Should Outweigh Privacy and Confidentiality? Some Australian Answers*, 1 J.L. & MED. 95 (1993); Bartha Knoppers, *Confidentiality and Accessibility of Medical Information: A Comparative Analysis*, 12 REVUE DE DROIT UNIVERSITE DE SHERBROOKE 395 (1982); Howard S. Ginsberg, *Insurer's Right of Access to Insured's Medical Records*, 73 CANADIAN B. REV. 77 (1994). The only consideration of Israeli law can be found in a book written in Hebrew almost 20 years ago on the general subject of medicine and the law. See generally AMNON CARMİ, *THE DOCTOR THE PATIENT AND THE LAW* (1977).

2. The advent of the AIDS crisis has generated a great deal of literature on the competing interests of disclosure and confidentiality. See, e.g., Bernard Friedland, *HIV Confidentiality and the Right to Warn - the Health Care Provider's Dilemma* 80 MASS. L. REV. 3, 4 (1995) (stating that caregivers' membership in the medical profession imposes a duty of confidentiality, but ethical considerations force these same caregivers to warn third persons where their patients pose a danger to others); Sev Fluss & Dineke Zeegers, *Symposium on*

and intends to abort the pregnancy.

There is no doubt that individuals are entitled to their privacy and secrecy.³ There is also no doubt that police need to know about shootings, health officials need to find out about infectious diseases, and spouses want to know about imminent loss of a fetus.⁴ The problem is balancing the rights of these competing interests. Are they compatible? Are they mutually exclusive? Must society's interests always triumph over the individual's or vice versa?

In most countries, a person is entitled to certain fundamental rights, one of which is his or her privacy.⁵ Consequently, the law circumscribes phone tapping and eavesdropping. Also, the government cannot search individuals or their effects without a warrant.⁶ Similarly, confidentiality of medical records is a recognition of the individual's right to privacy, and thus, reflects a respect for the person.

Not only do individuals benefit from the law protecting their medical confidentiality, but society benefits as well. The only way to foster efficient medical treatment is for the doctor to have the maximum available amount of relevant information concerning his or her patient. In many circumstances, the patient will be forthcoming with this information only if he or she believes that it will be kept in confidence. The benefit to society of having an open exchange of information between doctor and patient may be the reason that historically, since the Hippocratic Oath,⁷ doctors have pledged to protect the secrecy of their patients and their records. Although Israeli and American courts have only recognized the "right of privacy" in law since the twentieth century, the patient's right of privacy, or, alternatively the doctor's duty to maintain confidentiality, has existed for at least 2400 years.

AIDS and the Rights and Obligations of Health Care Workers—Aids, HIV, and Health Care Workers: Some International Legislative Perspectives, 48 MD. L. REV. 77, 90 (1989) (commenting on the recommendation of the Committee of Ministers of the Council of Europe that AIDS and seropositivity cases require confidentiality, but that this confidentiality can be waived under certain circumstances).

3. See generally FERDINAND DAVID SCHOEMAN, *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY I* (1984).

4. But see *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992) (invalidating a section of a Pennsylvania statute, which required married women seeking an abortion to notify their spouses).

5. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that there is a fundamental right to privacy derived from several express constitutional guarantees).

6. See, e.g., *Katz v. United States*, 389 U.S. 347, 356 (1967) (stating that warrantless searches are per se unreasonable, unless subject to "a few specifically established and well-delineated exceptions").

7. See HIPPOCRATIC OATH, reprinted in, GLENN C. GRABER ET AL., *ETHICAL ANALYSIS OF CLINICAL MEDICINE: A GUIDE TO SELF-EVALUATION* 77 (1985).

In the area of medical confidentiality there is an inherent conflict between individuals and society. Nevertheless, respect for privacy and the inviolability of the doctor-patient relationship does not supersede the safety of others and the protection of their lives.⁸

I. PRIVACY AND ISRAELI LAW

Israeli law recognizes the individual's right to confidentiality.⁹ "No person shall infringe the privacy of another without his consent."¹⁰ The Privacy Protection Law specifies examples of intrusions that appear to encompass the doctor-patient relationship. For example, the statute prohibits "infringing [upon] a duty of secrecy laid down by express or implicit agreement in respect of a person's private affairs."¹¹ Certainly, implicit in the doctor-patient relationship is the expectation and, therefore, the understanding that privacy will be maintained. In the United States, courts have ruled that even in the absence of a specific statute creating a duty of confidentiality for physicians, a duty exists by virtue of the contractual or fiduciary nature of the relationship.¹² By comparison, the Israeli privacy statute is even more focused, prohibiting "the disclosure of information pertaining to discrete personal matters of the individual or his medical situation."¹³ Also, the Protection of Privacy Law specifically provides that the release of medical information kept in centralized storage can only be obtained through a physician, who can withhold the release for medical reasons.¹⁴ Notably, the statute precludes not only doctors from disclosing information gained in the course of medical treatment, but it also prohibits anyone who happens to come into possession of medical or private information of another from disclosing that information, even if the information was not originally revealed in the context of medical treatment.¹⁵ Therefore, the rationale of this statute is not to place restrictions on doctors, but to ensure the privacy rights of patients. The gravity and seriousness of a breach of confiden-

8. This seems to be the approach of Israel and the United States. *But see* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22-28 (1978) (arguing that when policy concerns conflict with principles in fundamental rights cases, the principles should be vindicated).

9. As early as 1955 there was a statute relating solely to disclosure of psychological information. *See* Law of the Treatment of the Mentally Ill, § 12 (1955) (amended 1991). *See generally* Steven R. Smith, *Medical and Psychotherapy Privileges and Confidentiality*, 75 KY. L.J. 473 (1986) (discussing the confidentiality privileges afforded by law and the exemptions to those privileges).

10. Protection of Privacy Law, 1981, § 1, 35 L.S.I. 136.

11. *Id.* § 2 (8).

12. *MacDonald v. Clinger*, 446 N.Y.S.2d 801, 805 (N.Y. App. Div. 1982).

13. Protection of Privacy Law, 1981, § 2 (11), 35 L.S.I. 136.

14. *Id.*

15. *Id.*

tiality is reflected by the fact that the Protection of Privacy Law imposes a criminal penalty of one year imprisonment for any violation.¹⁶

Despite the fact that Israeli law protects medical confidentiality, the protection is not absolute. There are numerous exceptions scattered throughout the Israeli statutes that not only permit, but require the disclosure of information. These exceptions include the following:

(1) a doctor must report a person with a communicable disease to a governmental physician within twelve hours of gaining this knowledge;¹⁷

(2) a doctor must report a person over sixteen years of age, whose medical condition, such as epilepsy, would make him or her a dangerous driver, to the authority appointed by the Health Minister.¹⁸ Similarly, a doctor must report such a person to the appropriate authority if his or her condition would interfere with his or her ability to pilot an aircraft;¹⁹

(3) a doctor must report a person whose medical or psychological condition would make his or her possession of a weapon a danger to society to the Health Department.²⁰ The Health Department can then disclose this information upon request to the gun licensing department if the individual makes a gun application;²¹

(4) if requested by the appropriate military authority, a doctor or a medical institution must reveal any detail of a person's medical and psychological records, where the person's general ability and condition is being assessed for service or a particular job in the defense forces;²²

(5) the head of a hospital must notify the police of the circumstances surrounding a person who arrives at the hospital injured, unconscious or dead, and there is reason to assume that he or she was involved in an act of violence;²³

(6) a doctor or nurse must notify the designated authorities of a situation where a child has been abused and there is reason to assume this abuse was caused by the child's guardian or that the

16. *Id.* § 5.

17. National Health Ordinance, 1940, § 12.

18. Traffic Ordinance (new version), 1961, § 12.

19. Law of Pilots (amended 1992), 1927, § 12(a).

20. The Firearms Law (amendment No. 4), 1971, § 11(a), 25 L.S.I. 163.

21. *Id.* § 12(c).

22. Law of the Security Service (combined version), 1959, § 44; Security Service Regulations, 1967, § 4(c).

23. National Health Ordinance, 1940, § 29(c); National Health Regulations (Notification of Suspected Violence), 1975.

guardian cannot care for or control the child;²⁴

(7) police investigating a crime involving the patient of a doctor are entitled to access of that patient's medical records;²⁵

(8) a doctor must notify police when a patient reveals to the doctor that the patient intends to commit a criminal act if such notification is necessary to prevent the person from committing the crime;²⁶

(9) tax authorities are entitled to access doctors' medical records, including names of patients, for the purpose of levying income tax;²⁷

(10) hospitals and doctors must supply information requested by the Central Statistics Office, which is empowered to collect information on the health of Israeli citizens.²⁸

These ten exceptions represent the interests of society taking precedence over the privacy interests of individuals. In other words, the patient's right of privacy, or the doctor's duty of secrecy, is limited by countervailing public interests. As the California Supreme Court stated, the privilege of confidentiality ends "where the public peril begins."²⁹

Israeli law on medical confidentiality developed from a series of unrelated legal acts. Because no single document encompassed all the various aspects of Israeli law on medical confidentiality, doctors were forced to consult a series of different sources to determine their responsibilities.

On April 15, 1996, the Director-General of the Israeli Ministry of Health issued guidelines concerning medical confidentiality.³⁰ These guidelines were distributed to Israeli doctors and represented the first time that such instructions were amalgamated in one document. Although this document has no formal legal significance, it accurately includes much of the above mentioned laws. Moreover, the Director-General's guidelines included two additions. First, a doctor must report all cases of cancer to the regional physician.³¹ Second, a doctor must inform the Minister of Health when infants are born with certain physical or mental ab-

24. Youth Care and Supervision Law (Amendment No. 5), 1974, § 2(a), 28 L.S.I. 89.

25. CARMi, *supra* note 1, at 135.

26. This is implied in the Penal Law Revision (State Security), 1957, § 5(a), 7 L.S.I. 186. See also CARMi, *supra* note 1, at 138.

27. Israel Supreme Court, 447/72 - Yesimhovitz v. Baruch and Bros., vol. 27, (2) 253.

28. Statistic Ordinance (New Version), 1972, §§.10-15, 2 L.S.I. 283-84.

29. Tarassoff v. Regents of the Univ. of Cal., 551 P.2d 334, 347 (Cal. 1976).

30. Dr. Meyer Oren, Director-General of the Ministry of Health: Press release issued on April 15, 1996 by Yifat Ben-Hai, Ministry Spokesperson.

31. NATIONAL HEALTH ENACTMENTS (Report and Special Information on Cancer), (1982).

normalities.³² In closing, the Director-General stated that "confidentiality is not from the patient - it is of the patient, for the patient."³³

Since medical confidentiality seeks to protect the patient's rights, the patient can waive this right and authorize disclosure. The main rationale behind medical confidentiality is to encourage a patient's candor and, thus, to assist the doctor in providing the best possible treatment. Accordingly, there is no duty of confidentiality when a person discloses to a doctor medical information for an illicit purpose, such as illegal abortion or illegal acquisition of drugs.³⁴

Furthermore, a doctor may assert the privilege of doctor-patient confidentiality in a court of law.³⁵ However, if the demands of justice outweigh the need for secrecy, a court can compel a doctor to disclose information acquired from a patient in the course of medical treatment.³⁶

II. MEDICAL CONFIDENTIALITY IN AMERICAN LAW

Anglo-American common law did not recognize an explicit obligation of doctors to maintain patient confidentiality.³⁷ All fifty states, however, have enacted legislation creating a duty of confidentiality for doctors.³⁸ Courts have found a duty of medical confidentiality, notwithstanding state statutes based on the following theories: breach of contract;³⁹ breach of fiduciary relationship;⁴⁰ breach of implied promise of confidentiality;⁴¹ licensing statutes

32. *Id.* These enactments specify that Down's Syndrome, defects to the central nervous system and missing or deformed limbs are considered medical or physical abnormalities. *Id.*

33. Oren, *supra* note 30.

34. Israel Supreme Court, 447/72 - Yesimhovitz v. Baruch and Bros., vol. 27, (2) 253.

35. Evidence Ordinance (New Version), 1971, § 49, 2 L.S.I. 209.

36. *Id.* Courts review the facts on a case-by-case to determine whether to compel disclosure of confidential information.

37. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2380 (1961). See generally Daniel W. Shuman, *The Origins of the Physician - Patient Privilege and Professional Secret*, 39 SW. L.J. 661 (1985).

38. See, e.g., CAL. CIV. CODE § 56.10 (West Supp. 1997); 735 ILCS 5/8-802 (1994); UTAH CODE ANN. § 78-24-8 (Michie 1953 & Supp. 1996).

39. See, e.g., *Doe v. Roe*, 400 N.Y.S.2d 668, 674 (N.Y. Sup. Ct. 1977) (holding that a physician who enters into an agreement to provide medical treatment for a patient, impliedly agrees to keep confidential all disclosures made during the course of that treatment).

40. See, e.g., *MacDonald v. Clinger*, 446 N.Y.S.2d 801, 805 (N.Y. App. Div. 1982) (finding that a doctor's disclosure of confidential information was a breach of his fiduciary responsibility to the patient).

41. See, e.g., *Hammonds v. Aetna Casulty & Sur. Co.*, 243 F. Supp. 793, 799 (N.D. Ohio 1965) (stating that a doctors must obey his or her implied promise to a patient to keep confidential information secret).

and testimonial privilege that reflect a policy basis for secrecy;⁴² and, the inherent right of privacy.⁴³

Whether the duty of medical confidentiality is based on of the doctor-patient relationship,⁴⁴ the professional obligations of the doctor as a physician, the privacy rights of the patient or the statutes, the scope of this duty of confidentiality is not unlimited. Some of the limitations are specified by statute, while others have been inferred by the courts.

The most commonly invoked exception is the common law duty of doctors to warn persons foreseeably endangered by their patients.⁴⁵ If a doctor fails to warn a person who might be endangered by his or her patient through the spread of disease, the doctor will be guilty of negligence. At a minimum, doctors must "exercise reasonable care to advise members of the family and others, who are liable to be exposed thereto, of the nature of the disease and the danger of exposure."⁴⁶ Notably, this obligation does not extend to unforeseeable victims or the general public. A doctor has no duty to warn persons at large when his or her patient is potentially dangerous to a large segment of the community.⁴⁷ There must be a specific victim or a readily identifiable limited class of victims.⁴⁸ However, all states have enacted statutes that require doctors to report certain communicable diseases or infections to public health agencies.⁴⁹

In addition, doctors must also report cases of child abuse,⁵⁰ dangerous patients,⁵¹ gun or knife wounds that appear to have been intentionally inflicted,⁵² and occupational diseases or injuries.⁵³ Increasingly, a number of states require doctors to report information relating to certain prescription drugs, abortions, can-

42. See, e.g., *Simonsen v. Swenson*, 177 N.W. 831, 832-33 (Neb. 1920) (holding that a doctor's license to practice medicine could be revoked for disclosing confidential information concerning his or her patient).

43. See, e.g., *Mikel v. Abrams* 541 F. Supp. 591, 597 (W.D. Mo. 1982) (concluding that the right to privacy does include the right to have information given to or gained by a physician during treatment kept secret).

44. In Jewish ecclesiastical law (halachah) the theory of "lashon hara," the prohibition against speaking evil, would also apply. Another theory would be that oaths (including Hippocratic Oath) have the force of law, and not merely an ethical component.

45. RESTATEMENT (SECOND) OF TORTS §§ 314-315 (1965).

46. *Davis v. Rodman* 227 S.W. 612, 614 (Ark. 1921).

47. *Gammill v. United States*, 727 F.2d 950, 954 (10th Cir. 1984).

48. *Id.*

49. Bernard M. Dickens, *Legal Limits of AIDS Confidentiality*, 259 J. AM. MED. ASS'N 3449 (1988).

50. See N.H. REV. STAT. ANN. § 169-B:43 (1955 & Supp. 1994)

51. See OKLA. STAT. ANN. tit.63 §1-503 (West 1996).

52. See N.Y. PENAL LAW § 265.25 (McKinney 1989).

53. See generally NATIONAL COMMISSION ON CONFIDENTIALITY OF HEALTH RECORDS, HEALTH RECORDS CONFIDENTIALITY LAW IN THE STATES (1979).

cer and battered adults.⁵⁴

Although most states recognize a doctor-patient testimonial privilege, this privilege is more limited than it appears.⁵⁵ In some states, the privilege does not apply in criminal proceedings⁵⁶ and when the patient puts his or her condition at issue.⁵⁷ The doctor-patient privilege and its exceptions apply only to court proceedings. Outside the courtroom milieu, in addition to the compulsory reporting requirements, there are other exceptions to confidentiality. These exceptions include medical emergencies, adjuration of health insurance claims, professional peer review, access by researchers and auditors.

III. COMPARATIVE ANALYSIS

On a thematic basis, both Israeli and American law on medical confidentiality are identical. Patients have a right to medical confidentiality, while doctors have a duty to preserve that right, but society's interests sometimes supersede the patient's rights and imposes a duty on the doctor to disclose. There are, however, numerous differences between Israeli and American law on medical confidentiality.

First, unlike the United States which provides relatively few exceptions to the duty of medical confidentiality, Israeli law provides more situations where medical secrecy can be breached. For example, Israeli armed forces have access to private medical records.⁵⁸ The rationale behind this exception may lie in the fact that in Israel there is compulsory service for all, whereas in the United States the armed forces are composed solely of volunteers. However, as a pre-condition for military service, the United States armed forces can stipulate that the potential soldier waive his or her right to confidentiality. Also, in Israel, doctors must report to the police information regarding victims of violent acts, whereas in the United States, doctors only need to report victims wounded by knives or guns.⁵⁹ Perhaps in a country with nearly 300 million people, the police must limit their priorities to extreme acts of violence involving guns and knives, and therefore, the doctors' reporting requirements are confined to such instances. Furthermore, in Israel, doctors are required to report information relating to any person whose medical condition would make his or her possession

54. *Id.*

55. Wigmore, *supra* note 37, § 2380-91. A doctor cannot testify about confidential communications with his or her patient made in the course of treatment unless the patient waives the privilege. *Id.*

56. See CAL. EVID. CODE § 998 (West 1995).

57. See LA. REV. STAT. ANN. § 13:3734 (c)(3)(West 1991).

58. See *supra* note 22 and accompanying text.

59. See text accompanying *supra* note 52.

of a weapon dangerous.⁶⁰ By contrast, most state statutes do not impose such a requirement.⁶¹ One possible explanation for this distinction may be the fact that given the precarious political and civil situation in Israel, a greater percentage of citizens apply for gun permits. Moreover, most gun permits in the United States, when granted, only allow the licensee to possess a gun and do not allow the licensee to actually carry the gun on the streets. Israeli gun licensing laws, however, allow gun owners to carry their personal firearms, which causes the streets of Israel to resemble, at times, the "wild west." Hence, there is greater emphasis on doctors to disclose information pertaining to possible violent acts in Israel.

Notably, the differences between Israel and the United States regarding the disclosure of medical information relating to possible violent acts do not necessarily reflect a greater respect for medical secrecy in the United States. Rather, Israel's more expansive exceptions can be attributed to cultural and societal differences between the two countries, which are unrelated to the doctor-patient relationship. Indeed, it is difficult to compare a society of five million people with a compulsory army and large portions of civilians carrying weapons, with a society with almost 300 million people with a voluntary army and more unlicensed guns than licensed guns.

Second, in the United States, the obligation of a doctor to maintain secrecy usually occurs only if he or she was the attending physician. Similarly, the doctor-patient testimonial privilege is limited to communications during the course of treatment. Conversely, in Israel, the law precludes disclosure of medical records or information by anyone who obtains them, regardless of the source. Apparently, Israeli law is result-oriented and seeks to ensure that private medical records are kept private. The damage and harm to the patient by such disclosure is the same whether leaked by the doctor or a third party. Arguably, this attitude is also accepted in the United States. The problem in the United States is that most states have passed statutes concerned only with doctors or other health care providers.⁶² These statutes focus on the doctor's duties with respect to the patient, including the duty of confidentiality. The underlying theories behind this duty⁶³

60. See text accompanying *supra* note 20.

61. See, e.g., TENN. CODE ANN. § 19-17-1301-1318 (West 1996) (imposing no licensing requirement on the purchase of weapons, hence, no medical report is required); N.Y. PENAL LAW § 265, 400 (McKinney 1989) (imposing no medical background check requirement for prospective licensees).

62. See, e.g., CAL. CIV. CODE § 56.10(a) (West Supp. 1997) (stating that "[n]o health care provider shall disclose medical information . . ."); 735 ILCS § 5/8-802 (1994) (restricting disclosure by health care practitioner).

63. The basis for this duty lies in the contractual or fiduciary relationship between doctor and patient. See, e.g., *Doe v. Roe*, 400 N.Y.S.2d 668, 674-75

all relate to confidences communicated during the course of treatment. Thus, in the United States the duty was circumscribed. In Israel, a statute enacted in 1981 addresses the issue of privacy in its broadened form as it relates to newspapers, eavesdropping, picture-taking, medical information and profiting off individuals without their consent.⁶⁴ Therefore, Israel is not as hampered as the United States and seeks to deal with the issue by emphasizing the privacy of the individual, as opposed to the duties of the doctor.⁶⁵

Third, in Israel, a doctor must notify specified governmental officers of cases involving infectious diseases and dangerous patients. After the doctor notifies these officials, the doctor is relieved of any further obligations, except those obligations arising out of treating the patient. The burden to protect society from this patient thus is transferred from the doctor to the government. Conversely, in the United States, doctors not only have a statutory duty to report instances of infectious diseases and dangerous patients to the government, they also have a common law obligation to initiate whatever precautions are reasonably necessary to protect potential victims of the patient. A doctor may be found liable for failing to warn a patient's family, medical personnel, or other persons likely to be exposed to the patient, of the nature of the disease and the dangers of exposure. This distinction between Israel and the United States is most likely due to the litigious attitude in the United States. The philosophy of tort law in the United States is more expansive than that of any country in the world. Arguably, multi-million dollar jury verdicts are more a function of this philosophy than of a greater prevalence of negligence in America.

IV. AREAS REQUIRING CHANGE

There are a number of shortcomings regarding the law of medical confidentiality in both Israel and the United States. Given the rationale and purposes of the duties imposed on doctors and the exceptions, this Article proposes some changes which should be considered.

(N.Y. Sup. Ct. 1977); *MacDonald v. Clinger*, 446 N.Y.S.2d 801, 805 (N.Y. App. Div. 1982).

64. See text accompanying *supra* note 7. Both the oath of Asaf HaRofo, which states that a person shall "not to reveal a person's secret who trusted in [that person]" and the oath that a modern Israeli doctor pronounces, "to preserve the trust of one who trusted in you" limit the duty of secrecy by a doctor to his patient. The Hippocratic Oath is much broader and states "whatever I shall see or hear in the course of my profession, as well as outside my profession in my intercourse with man." Thus, not only information disclosed in a doctor-patient capacity shall be kept secret.

65. There are, however, many statutes protecting an individual's privacy. See, e.g., 18 U.S.C. §1702 (1994) (prohibiting the taking of letters from the mail to "pry into the business or secrets of another").

First, neither country deals with the issue concerning notification of the patient when the doctor discloses information pursuant to the law. In some instances, notifying the patient is counter-productive and vitiates the purpose of the reporting.⁶⁶ Similarly, when tax authorities investigate potential fraud, they do not want people prematurely alerted. In other situations, however, the principles of justice and fairness support notifying the patient of the disclosure. For example, an epileptic should know that traffic authorities are aware of his or her condition and that such a condition cannot be concealed. Furthermore, a patient who is not informed by the doctor and finds himself or herself approached by a governmental health official will feel betrayed by his or her doctor. Therefore, the laws of Israel and the United States should address this situation.

In addition, neither country addresses the issue of notification of next of kin or spouses.⁶⁷ All of the reporting statutes relate to notification of governmental authorities. Even in the United States, the obligation of the doctor to notify others is only required to prevent them from being harmed. But should a doctor only inform a wife when her husband is dying from a contagious disease and not when the diagnosis is "only" cancer? Should doctors not inform parents if their twenty-year-old child living at home is a drug addict? On the other hand, maybe the privilege is so personal to the patient that only he or she should be allowed to waive it. Cancer patients and drug addicts might be discouraged from obtaining diagnosis or treatment if they know that their spouses or parents will be informed.

At times, the laws of both Israel and the United States are not broad enough to affect their purpose. For example, in Israel, when medical information militates against granting a gun license, the doctor must report this to the Health Department. The Health Department, however, needs to report to the gun licensing department only if requested. Yet, why risk bureaucratic blunder? The Health Department should automatically report every case where a patient's condition would interfere with his or her ability to handle a gun in a safe manner. Also, why is the doctor required to report only those patients who are not suited to drive a car or a plane? What of a boat? More importantly, why is it solely the doctor's requirement to report this information? What if a lawyer, a

66. For example, informing a guilty criminal with a gunshot wound that the police are being notified would be counter-productive, since he or she will no doubt seek to elude capture.

67. On July 10, 1994, the Israeli ministerial committee on legislation introduced a bill which removes the need for parental consent for a minor's AIDS test. The parents will be notified, however, should the test prove positive. *Aids Test won't Require Parental Knowledge*, JERUSALEM POST, July 12 1994, at 12.

teacher or even a neighbor has information about the person's physical or mental limitations? Although doctors are, usually, more privy to such information, why should there not be an affirmative obligation on others? Indeed, are firemen the only persons who must report fires? Similarly, the duty to disclose instances of suspected child abuse should rest on anyone with such knowledge. On the other hand, a system in which every citizen is required to be a "yenta," "shtinker" or tattle-tale might be unwieldy.⁶⁸

Yet, the laws are occasionally too broad. In Israel, the military exception is too over-reaching. The medical information becomes part of the soldier's record, and thus, may be misinterpreted by laymen. Perhaps only military doctors and psychologists should be afforded access to these files. Alternatively, the military can perform *all the tests they want* on a soldier in order to determine his or her medical and psychological fitness, without resorting to the soldier's medical history. The issue is not "what are you afraid of, if you have nothing to hide?" Rather, it is an issue of privacy. Maybe a female soldier does not want the army to know whether she once had an abortion. In addition, in situations involving possible tax fraud, tax authorities should utilize their access to information held by the central statistics office before resorting to an intrusion on the privacy by probing through medical records, especially when it is not the patient who is suspected of tax fraud.⁶⁹

CONCLUSION

The issue of medical confidentiality is a central part of any doctor's practice in the United States, Israel and the world over. Confidentiality is not just a responsibility of the doctor, but also a right of the patient. Thus, it is the patient, and not the doctor, who may choose to waive this right. Certain exceptions apply where the doctor is not only allowed, but required, to offer confidential medical information for the sake of the greater good. Unlike in the United States, where many of the exceptions to medical confidentiality are based on common law, in Israel, the legislature has codified these exceptions.

68. Notably, Israeli law places certain obligation on all citizens vis à vis reporting. For example, it is a criminal offense for a person to know that someone intends to commit a crime and for that person to fail to act to prevent it. Criminal Law Ordinance, 1936, § 44. Similarly, knowledge of certain heinous crimes which have been committed must be reported by anyone with knowledge Penal Law Revision (State Security), 1957, § 5(a), 7 L.S.I. 186.

69. The tax authorities and the Histadrut (Labor Union) of Doctors have voluntarily entered into agreements which reduce the disclosure e.g. doctors treating patients with sexual diseases need only list names by initials CARM, *supra* note 1, at 139. This, of course, is an insufficient piece-meal approach which is only voluntary. It needs to be expanded and be statutorily mandated.

In Israel the patient's right to privacy is specified in an explicit legal statute, while in the United States it is frequently implied from common law theories including contract, fiduciary relationship, implied promise, public policy and the general right of privacy. As mentioned earlier, the central idea behind medical confidentiality is a free exchange of information between doctor and patient, so that a fully informed doctor will provide the best possible treatment. If a patient believes that the information will not be passed on to third parties, the patient is likely to be more candid in his or her disclosure to the doctor. Accordingly, in both Israel and the United States, a doctor is not permitted to reveal the medical secrets of his or her patient except in criminal proceedings or where the patient puts his or her condition in issue. In Israel, when the court decides that the need for revelation of the information is so overpowering that it negates the patient's right of confidentiality, the legal proceedings are continued behind closed doors to minimize the damage to the patient.

Although the laws in Israel and the United States have many similarities respecting medical confidentiality, there are three significant differences between the two systems. First, Israel provides for a greater number of exceptions to the rule of medical confidentiality; this can be explained by differences in the two cultures and societies. Second, the United States requires only the attending physician to maintain the confidentiality of his or her patient's secrets, while Israel extends this requirement to all informed parties. This emphasizes Israel's preoccupation with protecting the patient's right of privacy. Third, Israel requires that the doctor notify only specified governmental agencies, whereas the common law of the United States imposes an obligation upon the doctor to warn all potential victims of the patient. This distinction may be explained by the litigious attitude in the United States.

Neither Israel nor the United States deal with the issue of whether the doctor should warn the patient that he or she is informing a third party of the confidential information. There are positive and negative aspects of their silence with respect to this issue. By not requiring the doctor to notify the patient when the doctor reveals confidential information, it benefits law enforcement or other authorities that wish to maintain the "element of surprise." Yet, the absence of this requirement may lead the patient to feel betrayed by the doctor when a licensing or other authority confronts the patient with the information. This article has mentioned the bureaucratic shortcomings of the Israeli licensing requirements pertaining to the exposure of medical information, as well as the broadness of the Israeli exceptions. While many loopholes and irregularities do exist in medical confidentiality law, this author trusts that, in time, both Israel and the United

States will perfect their respective systems. In perfecting this area of their respective laws, Israel and the United States should give maximum benefit to medical diagnosis and treatment within the legitimate rights of law enforcement personnel and the safety of the general public.