Washington University Law Review

Volume 79 | Issue 4

January 2001

What Would Have Seinfeld Done Had He Lived in a Jewish State? Comparing the Halakhic and Statutory Duties to Aid

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WHAT WOULD HAVE SEINFELD DONE HAD HE LIVED IN A JEWISH STATE? COMPARING THE *HALAKHIC* AND STATUTORY DUTIES TO AID

I. INTRODUCTION

In the series finale of the hit television comedy, *Seinfeld*, the show's four main characters, Jerry, Elaine, George, and Kramer, stand idly as they watch an assailant attack and rob another pedestrian.[1] The four are subsequently arrested and placed in jail for violating an actual Massachusetts law that requires persons who witness certain crimes to report them to law-enforcement officials.[2] Although the incident is portrayed in a humorous fashion on television, it points to one of the more interesting and controversial debates in American law: Should the law impose on a person the obligation to come to the aid of a stranger who is in danger?[3] Or, in the terms in which the question has been traditionally analyzed, ought the law impose a "general duty to aid"?[4]

Although several legal systems, both past and present, have imposed a duty to aid,[5] the long established answer in the Anglo-American legal

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1. *Seinfeld* (NBC television broadcast, May 14, 1998).

2. MASS. GEN. LAWS ANN. ch. 268, § 40 (2000).

3. *See, e.g.*, PROSSER, HANDBOOK OF THE LAW OF TORTS § 56, at 375 (5th ed. 1984); Melody J. Stewart, *How Making the Failure To Assist Illegal Fails To Assist: An Observation of Expanding Criminal Omission Liability*, 25 AM. J. CRIM. L. 385, 385-89 (1998); John T. Pardun, Comment, *Good Samaritan Laws: A Global Perspective*, 20 LOY. L.A. INT'L & COMP. L.J. 591, 591 (1998) ("In the wake of Princess Diana's death, the 'Good Samaritan' parable of Biblical yore is reiterated in the backdrop of the twentieth century as the world focuses again on the duty to assist.").

Stewart observes:

> Whether individuals should be legally obligated to act or render assistance to anyone and everyone in peril has been and remains a controversial and an emotional issue. It is a subject that has been commented on in this county for at least ninety years. Arguments for and against a general legal duty to assist have been the topic of many academic writings from both criminal law and civil law perspectives.

Stewart, *supra*, at 386 (citations omitted).

4. This duty is sometimes also referred to as the "general duty to assist" or "the general duty to rescue." For the most part, all of these terms refer to the same legal concept. Additionally, the term "general" is used because, as will be discussed below, courts have recognized exceptions to the general rule. *See infra* note 114 and accompanying text. However, for the sake of convenience, the remainder of this Note will omit the term "general."

5. *See* Stewart, *supra* note 3, at 392 n.25; Pardun, *supra* note 3, at 594-603. Specifically, Australia, Portugal, France, Russia, Germany, Greece, Switzerland, and Spain, and several other European states currently recognize a duty to aid. *See id*. Moreover, as Part II of this Note will explore in great detail, traditional Jewish law, or *Halakha*, has recognized a duty to aid for more than 3,000 years. *See infra* Part II.

tradition has been that the law should *not* impose such a duty.[6] Under the common-law "no-duty" rule, which remains the predominant rule in this country, a person has no legal duty to aid another person in peril "even if the other is in danger of losing his or her life"[7] and "the aid can be rendered without danger or inconvenience to the one who could undertake the rescue."[8]

Many commentators have noted the "shocking" results that the no-duty rule often produces.[9] For example, in *Osterlind v. Hill*, the defendant was in the business of renting boats to patrons for use on Lake Quannopowitt.[10] The defendant rented a canoe to the plaintiff, even though the defendant knew that the plaintiff was heavily intoxicated.[11] The plaintiff's canoe overturned and, "after hanging to it for approximately one-half hour, and making loud calls for assistance, which calls the defendant heard, and utterly ignored," the plaintiff drowned in the lake.[12] Applying the common-law rule, the court held that the defendant was under no duty to either refrain from renting a canoe to the plaintiff or to rescue the plaintiff from drowning.[13]

Although the no-duty rule remains the established rule in this country,[14] its scope has eroded considerably during the past century.[15] This erosion began as courts developed a number of judicial exceptions to the general rule, the most important of which has been the "special relationship"

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6. *See* PROSSER, *supra* note 3, at 375 ("[T]he law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger, even if the other is in danger of losing his life.").

7. People v. Oliver, 258 Cal. Rptr. 138, 142 (Cal. Ct. App. 1989).

8. WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., CRIMINAL LAW § 3.3, at 203 (2d ed. 1986). *See also* Jackson v. City of Joliet, 715 F.2d 1200, 1202 (7th Cir. 1983).

9. PROSSER, *supra* note 3, § 56, at 375. For other outrageous cases decided under the no-duty rule, see *Allen v. Hixon*, 36 S.E. 810 (Ga. 1900) (Defendant failed to help plaintiff, who was his employee, after her hand had become crushed in a machine used at the place of employment.); *Handiboe v. McCarthy*, 151 S.E.2d 905 (Ga. Ct. App. 1966) (Defendant failed to rescue child from drowning in a swimming pool.); *Hurley v. Eddingfield*, 59 N.E. 1058 (Ind. 1901) (Defendant, who was a doctor, refused, "[w]ithout any reason whatever," to render aid to the decedent, even though he knew the patient was dangerously ill.); *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959) (Defendant incited plaintiff, who was a business visitor, to jump into the water and let him drown.). *See also* Louisville & Nashville R.R. Co. v. Scruggs & Echols, 49 So. 399 (Ala. 1909); Chastain v. Fugua Indus., 156 S.E.2d 679 (Ga. Ct. App. 719); O'Keefe v. William J. Barry Co., 42 N.E.2d 267 (Mass. 1942); Buch v. Amory Mfg., 44 A. 809 (N.H. 1898); Sidwell v. McVay, 282 P.2d 756 (Okla. 1955); Riley v. Gulf, Colo. & Santa Fe Ry. Co., 160 S.W. 595 (Tex. Civ. App. 1913).

10. 160 N.E. 301, 302 (Mass. 1928).

11. *Id.*

12. *Id.*

13. *Id.*

14. For a statement and discussion of the no-duty rule, see *supra* notes 6-8 and accompanying text.

15. For discussion of the erosion of the no-duty rule, see *infra* notes 16-20 and accompanying text.

exception.[16] Additionally, in the last thirty years, eight states have circumscribed the no-duty rule even further by passing limited duty-to-aid statutes.[17] An example of a limited duty-to-aid statute is the Massachusetts statute referred to above.[18] Massachusetts requires an individual to render aid to a stranger but only to the extent of reporting certain crimes to law-enforcement officials.[19] However, four states have gone so far as to turn the no-duty rule on its head by statutorily creating a *general* duty to aid.[20] These four statutes, at least in theory, supplant the no-duty rule by imposing a legal obligation on individuals to assist others who are in danger, irrespective of their relationship.[21] The emergence of these statutes, coupled with the earlier judicial exceptions, suggests that the duty to aid is gaining increasing acceptance in this country.[22]

This Note explores one legal system that has adopted an extremely expansive version of the duty to aid, the system of practical Jewish law, or *Halakha*.[23] As this Note discusses in great detail, the *Halakhic* duty to aid

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16. These six exceptions, particularly the special relationship exception, are discussed in greater detail in Part II.B of this Note. *See infra* note 114 and accompanying text.

17. The following states have enacted or are currently considering limited duty-to-aid statutes:

(1) Three states require reporting criminal acts: Colorado, Hawaii, Nevada, and Ohio. *See* COLO. REV. STAT. ANN. § 18-8-115 (West 1999); HAW. REV. STAT. § 663-1.6 (1985); OHIO REV. CODE. ANN. § 2921.22 (West 2000).

(2) The following five states require reporting only of specifically enumerated acts: Florida, Massachusetts, Nevada, Rhode Island, and Washington. *See* FLA. STAT. ANN. § 794.027 (West 2000); MASS GEN. LAWS. ANN. ch. 268, § 40 (West 2000); NEV. REV. STAT. 202.882 (1999); R.I. GEN. LAWS § 11-1-5.1 (1999) and R.I. GEN. LAWS § 11-37-3.1 (1999); WASH. REV. CODE. ANN. § 9.69.100 (West 1998).

(3) The following five states are currently considering duty-to-aid statutes of one kind or another: California, New Jersey, Michigan, Mississippi, and Washington. *See* Marcia M. Ziegler, Comment, *Nonfeasance and the Duty to Assist: The American Seinfeld Syndrome*, 104 DICK. L. REV. 525, 527 (2000). In addition, Congress is currently considering a bill that would make it a federal crime to fail to report incidents of child sexual abuse. *See id.* at 527-28.

18. *See supra* note 2 and accompanying text..

19. *See supra* note 2 and accompanying text.

20. Minnesota, Rhode Island, Vermont, and Wisconsin enacted this statutory general duty to aid, requiring aid in *all* cases in which another is in serious danger. *See* MINN. STAT. ANN. § 604A.01 (West 2000); R.I. GEN. LAWS § 11-56-1 (1956); VT. STAT. ANN. tit. 12, § 519 (1973); WIS. STAT. ANN. § 940.34 (West 1998). For the text of these statutes, see *infra* notes 132, 135, 131, and 134, respectively.

21. *See infra* notes 131, 132, 134, 135.

22. *See* Part III.B *Principle #2: Love vs. Autonomy*. As noted above, courts have created six exceptions to the common-law no-duty rule. Eight states have enacted a limited duty to aid; four states have enacted a general duty to aid; and five states and Congress are currently considering a statutory duty to aid. *See supra* notes 16, 17, 20 and accompanying text. Moreover, almost every jurisdiction in the country has enacted "Good Samaritan" statutes, which grant various degrees of immunity to rescuers who voluntarily render aid to others in danger. *See infra* note 30. Arguably, these developments comprise sufficient evidence to demonstrate that America, as a whole, is moving closer to adopting a general duty-to-aid rule.

23. In its most general sense, *Halakha* consists of the 613 Divine commandments contained in

requires an individual to provide assistance to another who is in danger, even if the aid cannot be rendered without danger or inconvenience to the rescuer.[24]

Halakha has its origins in the so-called Written and Oral *Torah*[25] that G-d[26] revealed to Moses more than 3,300 years ago at Mount Sinai.[27] On one hand, *Halakha* is like any other legal system insofar as it sets forth countless rules to govern the myriad of questions and disputes that naturally arise wherever human beings interact and form societies.[28] On the other hand, *Halakha* is unlike other legal systems because its rules are believed to embody absolute Divine commandments that provide clear and specific instruction on how individuals and societies ought to conduct themselves, as well as how they are to find their ultimate purpose and meaning in life.[29] Therefore, *Halakha* is a legal system, but is also much more.

This Note compares and contrasts the *Halakhic* duty to aid with the American statutory duty to aid.[30] A comparison of these duties and the values

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the *Torah*, together with the many ordinances and decrees issued by the *Halakhic* authorities over the generations. *See generally* ARNOLD COHEN, AN INTRODUCTION TO JEWISH CIVIL LAW 1-90 (1991). For a discussion of the term, *Torah*, see *infra* note 25. For a more detailed discussion of the history and larger significance of *Halakha*, see *infra* notes 25-29 and accompanying text. The term *Halakha* is a derivative of the word *halak*, which means to walk. Therefore, when one follows the rules established by *Halakha*, one walks, so to speak, along the proper path.

24. *See infra* Part II.A.

25. *Torah* is the all-inclusive Hebrew term that refers to the entire body of Jewish writing and thought. *Torah* includes the Five Books of Moses, Prophets, and Writings, which together make up the Written *Torah*, as well as such works as the *Mishnah* and *Talmud*, which are written codifications of the Oral *Torah*. For a description of the *Mishnah* and *Talmud*, see *infra* note 43. The term also includes more contemporary *Halakhic* commentaries, codes, and rabbinic decisions. *Torah* comes from the root *hora'ah*, which means to teach. *See generally* RABBI MORDECHAI KATZ, UNDERSTANDING JUDAISM 65-69, 327-66 (2000); RABBI ADIN STEINSALTZ, THE TALMUD: THE STEINSALTZ EDITION, Reference Guide 1-88 (1989).

26. *Halakha* requires that one respect the name of G-d, both when spoken and written. Therefore, because the author cannot ensure that this Note will be treated respectfully—e.g., it may be thrown in the trash—the author has intentionally misspelled the word to ensure that the name of G-d will not be desecrated.

27. *See* MISHNAH, *Avos* 1:1. *See generally* COHEN, *supra* note 23, at 10; KATZ, *supra* note 25, at 57-61.

28. *See* COHEN, *supra* note 23, at 8-10; KATZ, *supra* note 25, at 62-63.

29. *See generally* RABBI SHNEUR ZALMAN OF LIADI, TANYA; STEINSALTZ, *supra* note 25, at 1-10.

30. That is, the Note does *not* cover the eight limited duty-to-aid statutes discussed above. *See infra* note 17. The Note also does not discuss in great detail the common-law duty-to-aid rules. Additionally, the Note does not cover the Good Samaritan statutes, passed in almost every jurisdiction, which grant various degrees of immunity to rescuers who voluntarily render aid to others in danger. *See generally* Danny R. Veilleux, Annotation, *Construction and Application of "Good Samaritan" Statutes*, 68 A.L.R.4th 294 (1989); Robert A. Mason, Comment, *Good Samaritan Laws—Legal Disarray: An Update*, 38 MERCER L. REV. 1439 (1987). Instead, this Note focuses on the four *general* duty-to-aid statutes. *See supra* note 20.

underlying them sheds light on why America has been so slow to adopt the duty to aid, and why, even today, it continues to face opposition. This comparison provides insight into whether it is reasonable to expect more states to enact duty-to-aid statutes in the future.

Part II of this Note analyzes the specific elements of the *Halakhic* and statutory duties to aid and highlights the significant differences between them. Part III explains how these differences reflect the various values, or fundamental principles, which generally underlie the two traditions. In short, these differences are: (1) *Halakha* understands freedom primarily in terms of one's capacity to seek a higher purpose in life, whereas American law understands freedom primarily in terms of one's capacity to live free of unwanted intrusions;[31] (2) *Halakha* places the value of loving one's fellow man as oneself before the value of individual autonomy, whereas American law reverses the importance of these values;[32] (3) *Halakha* takes a "good man" view of law, whereas American law takes a "bad man" view,[33] and related to this, *Halakha* presupposes the existence of a Divine judge, whereas American law does not.[34]

Part IV addresses two of the primary objections leveled against the duty to aid and considers how *Halakha* might respond to these objections.[35] One of the arguments is more theoretical in nature,[36] the other, practical.[37] In short, the theoretical argument is that a duty to aid infringes upon one's individual autonomy.[38] The practical argument is simply that a duty to aid is

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31. *See infra* Part III.A *Principle #1: Different Notions of Freedom.*

32. *See infra* Part III.B *Principle #2: Love vs. Autonomy.*

33. The expression "bad man view of the law" was first coined by Oliver Wendell Holmes. *See supra* note 270 and accompanying text.

34. *See infra* Part III.C *Principle #3: "Good Man" vs. "Bad Man" View of Law.*

35. For a list of the other arguments against the duty to aid, see *infra* notes 36, 37 and accompanying text.

36. For a discussion of some of the other theoretical arguments against the duty to aid, see Andrew D. Kaplan, Comment, *Cash-ing Out: Regulating Omissions, Analysis of the Sherrice Iverson Act*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 67, 70-71 (2000) [hereinafter Kaplan, *Iverson Act*] (arguing that individuals consensually delegate to government, e.g., police, fire, medical personnel, the power and responsibility of conferring benefits to others); Ziegler, *supra* note 17, at 528-37 (arguing that omissions cannot give rise to liability because they do not cause harm).

37. For a discussion of some of the other practical arguments against the duty to aid, see Alison M. Arcuri, Comment, *Sherrice Iverson Act: Duty to Report Child Abuse and Neglect*, 20 PACE L. REV. 471, 480-81 (2000) (arguing that the duty to aid would lead to selective and arbitrary prosecution); Jessica R. Givelber, Note, *Imposing Duties on Witnesses to Child Sexual Abuse: A Futile Response to Bystander Indifference*, 67 FORDHAM L. REV. 3169, 3199-3200 (1999) (arguing that rescuers free-ride on each other); Kaplan, *Iverson Act*, *supra* note 36, at 89-90 (arguing that numerous practical and cultural factors contribute to bystander inaction).

38. Stewart, *supra* note 3, at 431-32 (noting that empirical evidence suggests that in a wide variety of circumstances and settings, the presence of others inhibits rescue); A.D. Woozley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273, 1293-99 (1983) (exploring the

impossible to enforce.[39]

Part IV argues that *Halakha* can muster a strong defense against these arguments, but that its defense relies upon the three fundamental principles enumerated above that are not, or not yet, accepted by American law. Therefore, this Note concludes that, although the gap between the *Halakhic* and statutory duty to aid has narrowed considerably, the remaining differences between the two duties will persist to the extent that America continues to reject the fundamental principles on which the *Halakhic* duty is based.[40]

II. OVERVIEW OF THE *HALAKHIC* AND STATUTORY DUTIES TO AID

This Part is divided into three sections. The first two discuss the origins of the *Halakhic* and statutory duties to aid, respectively. The third section compares and contrasts the *Halakhic* and statutory duties to aid with respect to six elements of analysis: (1) the conditions triggering the duty; (2) the nature of the aid required by the duty, once triggered; (3) the conditions that can limit and absolve this duty; (4) the duty's immunity provision; (5) the duty's compensation provision; and (6) the consequences of noncompliance with the duty.

A. Origins of the Halakhic Duty to Aid

The first explicit articulation of the *Halakhic* duty to aid appeared almost 2,000 years ago in an early rabbinic work called the *Baraisos*:[41] "From where do we know that if a man sees his fellow drowning, mauled by beasts, or

philosophical arguments against imposing a duty to aid); Arcuri, *supra* note 37, at 476 ("In a democratic society, the basic and most obvious argument against forcing people to help others is that such a law will interfere with an individual's freedom and privacy."); Sungeeta Jain, Notes and Comments, *How Many People Does It Take To Save a Drowning Baby?: A Good Samaritan Statute in Washington State*, 74 WASH. L. REV. 1181, 1198-1200 (1999) (reviewing the argument that the no-duty rule allows for greater individual liberty).

39. Givelber, *supra* note 37, at 3196 n.214 (arguing that it is difficult if not impossible for prosecutors to prove their case because they cannot show that rescuers knew that they were legally required to intervene); Pardun, *supra* note 3, at 605 (arguing that enforcement of these statutes would require extensive investigation and adjudication, which would be costly and time-consuming).

40. *Cf.* Rabbi Omar Furmansky, Patterns of Existence, (Sept. 2000) (unpublished manuscript, on file with the Geulus Yisrael University Library) (explaining how *Halakhic* principles can and should be applied to social, economic, and legal systems in other countries).

41. The *Baraisos*, compiled approximately in the 200 C.E., provide one of the earliest written accounts of *Halakha*. *See* RABBI ADIN STEINSALTZ, THE ESSENTIAL TALMUD 41 (1976). Prior to the writing of the *Baraisos*, *Halakha* had largely been transmitted orally, which according to Jewish law and tradition began at Mount Sinai when G-d revealed the *Torah* to Moses. *See supra* note 27 and accompanying text.

attacked by robbers, he is bound to save him? From the verse [in *Leviticus* 19:16]: 'One should not stand over the blood of his fellow.' "[42]

However, rabbis in later generations, writing in the *Talmud*,[43] determined that the *Halakhic* duty to aid could also be derived from a second passage in the *Torah* found in *Deuteronomy*:[44]

> You shall not see the ox of your brother or his lamb cast off, and hide yourself from them; *you shall surely return them to your brother*. If your brother is not near you and you do not know him, then you shall bring it inside your house, and it shall remain with you until your brother's inquiring about it, *and you shall return it to him*. So shall you do for his donkey, and so shall you do for his garment, and so shall you do for any lost article of your brother that may become lost from him and you find it; you cannot hide yourself.[45]

In interpreting this passage, the rabbis were bothered by the latter phrase, "and you shall return it to him," because it appears to repeat what has already been stated in the first phrase, "you shall surely return them to your brother."[46] This apparent redundancy is problematic because a fundamental principle of *Halakhic* reasoning is that no word, let alone a whole set of words, can be superfluous.[47] This principle must be true if one believes that the words of *Torah* are the words of G-d.[48] A perfect being must use perfect speech.[49] No breath can be wasted.[50]

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42. BABYLONIAN TALMUD, *Sanhendrin* 73a. Unless otherwise noted, the translations are the author's own.

43. These "rabbis of later generations" refer to the rabbis who lived in the era of the *Talmud*, which was compiled approximately 300 years after the *Baraisos*, circa 500 C.E. The *Talmud* discusses and analyzes the rules in the *Baraisos* and the other early writings in the Rabbinic tradition, most notably the *Mishnah*.

The *Mishnah*, compiled approximately during the same period as the *Baraisos*, or 200 C.E., is written in an extremely concise and terse Hebrew style. The rules in the *Mishnah* generally do not cover every possible case, and therefore, rabbis in subsequent generations debated the many problems and questions whose solution cannot be found in the plain language of the *Mishnah* alone. These debates, which lasted for approximately the next 300 years, make up the *Talmud*. In the Eleventh Century, the French rabbi, Shlomo Yitzchoki, otherwise referred to by acronym as Rashi, composed what is universally acknowledged as the greatest commentary on the *Talmud*. *Tosafos* refers to commentary composed by Rashi's disciples. See *generally* KATZ, *supra* note 25, at 65-69, 327-366; STEINSALTZ, *supra* note 25, at 1-88.

44. *Deuteronomy* is the fifth book in the Five Books of Moses. The first four, in order, are *Genesis*, *Exodus*, *Leviticus*, and *Numbers*.

45. *Deuteronomy* 22:1-3 (emphasis added).

46. BABYLONIAN TALMUD, *Sanhendrin* 73a.

47. *See* RABBI ISHMAEL, SIFRA, *Introduction*. Rabbi Ishmael sets forth the thirteen fundamental rules by which the *Torah* is expounded.

48. *See id.*

49. *See id.*

To resolve this difficulty, the rabbis interpreted the latter phrase, "and you shall return *it* to him," to mean "and you shall return *himself* to him."[51] In Hebrew, there are no neuter pronouns and therefore the word "it" may also mean "himself." On this reading, the first phrase simply teaches that if another person's property is in danger, one must intervene and rescue it.[52] The second phrase then teaches a new point that if another person's life is in danger, then one *should return himself to him*, that is, rescue the person.[53] Therefore, although on the surface the passage refers only to one's duty in returning lost property, a deeper reading, informed by fundamental principles of *Halakhic* construction, demonstrates that this duty extends to aiding another's life as well.[54]

The resolution of this passage, however, created another difficulty for the rabbis. According to this interpretation, the rabbis now had two sources for the *Halakhic* duty to aid: (1) the verse in *Leviticus*: "one should not stand over the blood of his fellow";[55] and (2) the verse in *Deuteronomy*: "you shall return *it* [i.e., himself] to him."[56] This presented a problem because two verses should not be needed to teach one law. No words or verses can be superfluous, as noted above.[57]

The rabbis resolved this difficulty by determining that both verses are in fact necessary because they teach two different things about the duty to aid.[58] The verse in *Deuteronomy* is the source for the duty to aid in general, while the verse in *Leviticus* teaches the exact nature and extent of aid that is required by that duty.[59] If the *Torah* only provided the verse in *Deuteronomy* and not the verse in *Leviticus*, then one would mistakenly think, for reasons

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50. *See id.*

51. *See* BABYLONIAN TALMUD, *Sanhendrin* 73a. *See also* RABBI MEIR HALEVI ABULAFIA, YAD RAMAH, *Sanhendrin* 73a.

52. Hence, this first phrase, "and you surely return them to your brother," is the source of the *Halakhic* duty to return lost property.

53. *See* BABYLONIAN TALMUD, *Sanhendrin* 73a. For further elaboration on this point, see also ABULAFIA, *supra* note 51; RASHI, COMMENTARY ON THE BABYLONIAN TALMUD, *Sanhendrin* 73a; TOSAFOS, COMMENTARY ON THE BABYLONIAN TALMUD, *Sanhendrin* 73a.

54. It is interesting to note, then, that according to *Halakha*, the duty to aid is an extension of the duty to return lost property.

55. *Leviticus* 19:16. *See supra* text accompanying note 42.

56. *Deuteronomy* 22:2. *See supra* notes 51 and 53 and accompanying text.

57. *See supra* note 47 and accompanying text.

58. *See* BABYLONIAN TALMUD, *Sanhendrin* 73a.

59. *See* BABYLONIAN TALMUD, *Sanhendrin* 73a. The verse in *Deuteronomy*, which provides basis for the duty to aid in general, appears in the *Torah* after the verse in *Leviticus* that discusses the exact nature and extent of the aid. This strange ordering is based on another principle that the events and statements recorded in the *Torah* do not necessarily appear in chronological order. *See* RASHI, *Commentary on Exodus* 18:13 and 31:18; MECHILTA, *Commentary on Exodus* 18:13; BABYLONIAN TALMUD, *Zevachim* 116a; BABYLONIAN TALMUD, *Pesachim* 6b.

that will be discussed momentarily, that the *Halakhic* duty to aid is limited to the personal ability of the rescuer.[60] However, this conclusion would be incorrect because, as discussed later, the duty also requires the rescuer to solicit and even hire the assistance of other people if necessary.[61]

There are two reasons why, without the verse in *Leviticus*, one would mistakenly think that the duty is limited to the personal ability of the rescuer. First, the verse in *Deuteronomy* only says "*you* shall return it [i.e., himself] to him."[62] Therefore, this verse, by itself, only teaches that one has a *personal* obligation to render aid to another in danger.[63] It does not teach that a person might also have an obligation to solicit and hire others to render the necessary aid.[64] Second, the reader will recall that, in interpreting the passage in *Deuteronomy*, the rabbis determined that the duty to aid is an extension of the duty to return lost property.[65] From other sources, the rabbis knew that the duty to return lost property is indeed limited to the personal ability of the finder.[66] Therefore, inasmuch as the duty to aid is an extension of the duty to return lost property, one might mistakenly conclude that duty to aid is likewise limited to the personal ability of the rescuer.[67]

As noted above,[68] the rabbis determined that the verse in *Leviticus*, "one should not stand over the blood of his fellow," is the source for the exact nature and extent of assistance required by the *Halakhic* duty to aid.[69] "One *should not stand* over the blood of his fellow" means that if a person is, herself, unable to save her fellow, she *should not stand* and act passively.[70] On the contrary, she must stop standing, and instead, seek out and solicit or

60. *See* BABYLONIAN TALMUD, *Sanhendrin* 73a. For a discussion of reasons for this mistaken interpretation, see *infra* note 62-67.

61. For discussion of the requirement to hire assistance, see *infra* note 71 and accompanying text. *See also infra* Part II.C.2 *Element #2: Nature of Aid Required by Duty*.

62. *Deuteronomy* 22:2 (emphasis added).

63. *See* BABYLONIAN TALMUD, *Sanhendrin* 73a.

64. In the words of the *Talmud*: if one would derive the duty to aid only from the verse in *Deuteronomy*, 'you should return it to him,' "I would have said that this [duty] applies only when [a person] himself [has the opportunity to rescue another's life]. But [with regard to] bothering to hire a rescuer, I would say [one is] not [required to do so]. [Therefore,] the verse ['one should not stand over the blood of his fellow'] teaches us [that he is required even to hire someone to provide the necessary aid]." BABYLONIAN TALMUD, *Sanhendrin* 73a.

65. *See supra* note 54 and accompanying text.

66. *See* Rabbi Aaron Kirschenbaum, *The Good Samaritan: Monetary Aspects*, 17 J. OF HALACHA & CONTEMP. SOC'Y 83, 84 (1989).

67. *See id*.

68. *See supra* note 59 and accompanying text.

69. *See* BABYLONIAN TALMUD, *Sanhendrin* 73a.

70. RASHI, COMMENTARY ON BABYLONIAN TALMUD, *Sanhendrin* 73a (emphasis added). "'One should not stand' means that one should not hinder himself. Rather [one] must go to any extent necessary in order to save the life of one's fellow." *Id*. For a discussion of this point in English, see Kirschenbaum, *supra* note 66, at 85.

even hire the assistance of another person who can render the necessary aid.[71] For example, if the foursome in the Seinfeld incident had concluded that they, themselves, were unable to help the person being robbed, then the *Halakhic* duty to aid would have obligated them to find or hire assistance from someone who could provide the necessary aid.[72] Therefore, the verse in *Leviticus* teaches that the *Halakhic* duty to aid is an all-encompassing duty including not only "one's person but also one's purse."[73]

Under this expansive duty, the rabbis also developed special rules for situations in which a rescuer would be coming to the aid of someone who was being assaulted.[74] The first explicit articulation of these rules appeared in the *Mishnah*,[75] an early rabbinic work: "These are who we save at the cost of their lives: one who pursues his fellow to kill him, or [one who runs] after a male [to sodomize him], or [one who runs] after a betrothed maiden [to violate her]."[76]

In later generations, rabbis observed that the *Mishnah* does not explicitly state *who* the rescuer saves as a result of her intervention. The *Mishnah* merely says, "[T]hese are who we save," but it is unclear who "these" are. Some rabbis interpreted the *Mishnah* to be saying that, in killing the pursuer, the rescuer saves the *victim*.[77] However, others held that the rescuer is actually saving the *pursuer*,[78] on the belief that the rescuer prevents the pursuer from committing a capital crime[79] and thereby "saves" the pursuer from committing a severe sin that ultimately would be punishable by death in any event.[80]

The latter group of rabbis made two principal arguments in support of their interpretation. First, the very next sentence of the *Mishnah* states: "But

71. *See* ABULAFIA, *supra* NOTE 51. For further elaboration on the requirement to seek out actively the assistance of another, see the commentary on *Sanhendrin* 73a in the CHIDUSHEI HARAN. For a discussion of this requirement in English, see Anne Cucchiara Besser & Kalman J. Kaplan, *The Good Samaritan: Jewish and American Legal Perspectives*, 10 J.L. & RELIGION 193, 211 (1993); Kirschenbaum, *supra* note 66, at 84-85.

72. *See generally* Kirschenbaum, *supra* note 66, at 84-85.

73. *See id*. at 84.

74. The details of these rules are discussed *infra* Part II.C.2 *Element #2: Nature of Aid Required by the Duty*.

75. For a brief explanation of the *Mishnah*, see *supra* note 43.

76. MISHNAH, *Sanhendrin* 73a.

77. *See* TOSAFOS, COMMENTARY ON THE BABYLONIAN TALMUD, *Sanhendrin* 73a; RABBI MOSES MAIMONIDES, COMMENTARY TO THE MISHNAH; ABULAFIA, *supra* note 51; RABBI MENACHEM HIMEIRI, BET HEBECHIRAH, *Sanhendrin* 73a. *See also* RABBI YOSEF KARO, SHULCAN ARUCH, *Hoshen Mishpat* § 60.

78. *See* RASHI, COMMENTARY ON THE MISHNAH, *Sanhendrin* 73a.

79. A "capital crime" in *Halakha* basically refers to murder or a severe sexual crime, such as rape. *See* BABYLONIAN TALMUD, *Sanhendrin* 73a (Artscroll ed.) 21-22 n.2-3.

80. *See infra* notes 83-86 and accompanying text.

when one pursues a beast, or one [is about] to desecrate the Sabbath, or one [is about] to engage in idol worship, we may not save these at the cost of their lives."[81] Obviously, the cases in this second sentence do not involve victims. Based on the principle that two adjoining sentences should parallel one another, these rabbis concluded that, if the second sentence does not speak in terms of victims, then neither does the first.[82]

Second, the passage quoted above is found in the context of a larger discussion of cases in which it is sometimes permissible to kill individuals who are in the process of committing certain crimes.[83] In these situations, a person is justified in killing the perpetrator on the principle that, by virtue of her wicked nature, the perpetrator is destined to receive capital punishment in any event.[84] In fact, the rabbis held that it is better for the perpetrator to die prematurely before having time to commit crimes that are even more severe in nature.[85] Therefore, the killing "saves" the perpetrator from committing these graver transgressions.[86]

As noted, other rabbis disagreed and held that the *Mishnah* does in fact refer to saving the victim as opposed to the pursuer.[87] First, they pointed to a subsequent passage in the *Talmud* that suggests that the *Mishnah* is referring

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81. MISHNAH, *Sanhendrin* 73a.

82. *See* RASHI, COMMENTARY ON THE MISHNAH, *Sanhendrin* 73a.

83. *See* BABYLONIAN TALMUD, *Sanhendrin, Chapter 8: Ben Sorer U'Moreh*. One example of an individual who may be killed before he has committed a capital crime is a *"ben sorer u'moreh."* A *ben sorer u'moreh* is a boy who commits certain sins associated with theft and gluttony. *Id*. If his parents admonish him and he ignores their warnings, he is flogged in court. *Id.* If he still persists in his behavior, he is put to death, provided numerous criteria are satisfied. *Id*. Another individual, discussed in *Sanhendrin Chapter 8*, who may be killed before committing a capital crime is a thief who is caught tunneling into someone's home. The *Talmud* says that because it is obvious that a homeowner will fight to protect her property, it may be assumed that the thief has resolved to overpower and kill the owner, if need be. Consequently, the homeowner is permitted to kill the thief in self-defense. *See* RASHI, COMMENTARY TO THE BABYLONIAN TALMUD, *Sanhendrin* 72a. A verse in *Exodus* says that when the homeowner kills the thief, "there is no blood-guilt." *Exodus* 22:2. That is, like the *ben sorer u'moreh*, the thief has already forfeited life and may be justifiably killed. *See also infra* note 84 and accompanying text.

84. *See* BABYLONIAN TALMUD, *Sanhendrin* 68b, which states:

> But is a ben sorer u'moreh executed for a sin of his [that he has already committed]? [No, rather] he is executed on account of the eventual [outcome] of his [current behavior.] And since he is executed on account of the eventual [outcome] of his [behavior, we punish him now] even as a minor.

85. *See infra* note 86.

86. See BABYLONIAN TALMUD, *Sanhendrin* 72a, which states:

> The *Torah* foresaw the outcome of a ben sorer u'moreh's attitude, that he will eventually exhaust his father's property [through continued acts of theft,] and he will [then] seek to maintain his habit, but he will not find [it possible to do so.] He will [therefore] go out to the crossroads and rob people, [and possibly kill anyone who resists. Because of this condition,] the *Torah* stated: Let him die [while he is still] innocent, and let him not die guilty [of a capital crime.]

87. *See supra* note 77 and accompanying text.

to the victim.[88] Second, they referred to another passage found earlier in the *Talmud*, which states that in cases in which a minor is trying to kill another person, a rescuer may kill the minor.[89] According to *Halakha*, a minor cannot be convicted and punished for committing a crime.[90] If a minor cannot be made liable for a crime, then it is of course not necessary to save *him* from committing one. That the rescuer is nevertheless given permission to kill the minor demonstrates, therefore, that the rescuer must instead be saving the victim.[91]

Finally, in accordance with a fundamental principle in *Halakha* that no criminal punishment is assigned to violations of positive duties to act,[92] the rabbis held that a court cannot sanction a would-be rescuer who breaches the *Halakhic* duty to aid.[93] However, the rabbis nevertheless considered a violation of this duty to be a most serious offense, in part, because of their belief that "if one destroys [a single life], he is regarded as if he destroyed the whole world, and if one preserves [a single life], it is as if he has preserved the entire world."[94]

Moreover, the rabbis held that the *Halakhic* duty to aid, like all positive duties, is ultimately enforced through a Divine judge, G-d, even if it is not enforced through a human court.[95] Therefore, although there are no human-imposed penalties for noncompliance, the *Halakhic* duty is nevertheless enforced and enforceable because of the belief in Divine sanction.[96] Describing this idea of a Divine judge, one contemporary legal scholar has written: "This notion depends on the fundamental belief that human punishment and divine retribution function as equal components of a single scheme. [*Halakha*] makes no textual distinction on which to base

88. *See* TOSAFOS, COMMENTARY ON THE BABYLONIAN TALMUD, *Sanhendrin* 73a (noting that a subsequent passage in the *Talmud* says that, in the case involving the betrothed maiden, the rescuer "saves her").

89. *See* BABYLONIAN TALMUD, *Sanhendrin* 72b.

90. *See* BABYLONIAN TALMUD, *Shabbat* 89b; MIZRACHI; RASHI, *Commentary on Exodus* 21:12.

91. *See* RASHI, COMMENTARY ON THE BABYLONIAN TALMUD, *Sanhendrin* 72b; ABULAFIA, *supra* note 51.

92. *See* Besser & Kaplan, *supra* note 71, at 217 n.121-22 (citing RABBI MOSES MAIMONIDES, MISHNAH TORAH; COMMENTARY TO THE MISHNAH, *Makkos* 3:1).

93. *See* Ben Zion Eliash, *To Leave or Not To Leave: The Good Samaritan in Jewish Law*, 38 ST. LOUIS U. L.J. 619, 623 (1994).

94. *See* MISHNAH, *Sanhendrin* 4:5.

95. For a discussion of reward and punishment in Jewish thought, see generally RABBI ARYEH KAPLAN, HANDBOOK OF JEWISH THOUGHT 263-85 (1992) [hereinafter KAPLAN, HANDBOOK].

96. *See generally* RABBI MOSES MAIMONIDES, THIRTEEN PRINCIPLES OF FAITH; RABBI MOSES MAIMONIDES, MISHNAH TORAH, *Laws of Teshuvah* 9:1. G-d may punish people, not only in Heaven, but also on Earth. BABYLONIAN TALMUD, *Kiddushin* 40a; MIDRASH, *Shemos Rabbah* 30:1; MIDRASH, *Vayikra Rabbah* 24:1. For examples of applications of this principle, see Rashi's commentary on *Exodus* 20:1, 21:13, 21:29, 23:7, 28:35, 28:43.

enforcement and non-enforcement or between those which are humanly enforced and divinely enforced."[97] Or, in the words of the *Talmud*, a person who causes damage to another "is exempt according to the laws of man but liable according to the law of Heaven."[98] Indeed, this system of Divine retribution led one rabbi to conclude that, when one fulfills the *Halakhic* duty to aid, one is saving not the victim or the pursuer but oneself![99]

In conclusion, the author wants to underscore the fact that, at least in the rabbis' estimation, the *Halakhic* duty to aid, besides being a mere legal obligation, is also a Divine commandment.[100] This fact explains why the rabbis based the *Halakhic* duty to aid on verses in the *Torah* as opposed to human reason and understanding.[101] Although the rabbis would certainly have agreed that human intellect is able to grasp and even defend the *Halakhic* duty without referring to Divine instruction,[102] they nevertheless concluded that its justification must rest on the *Torah*.[103] Human intellect can understand and rationally accept the *Halakhic* duty to aid, but in the rabbis' eyes, intellect cannot justify its ultimate truth.[104]

B. Origins of the Statutory Duty to Aid

As noted in the Introduction, under the common-law no-duty rule, which remains the predominant rule in this country, a person has no legal duty to aid another person who is in peril even if the aid can be rendered without

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97. Besser & Kaplan, *supra* note 71, at 197.

98. *Id*. (quoting TOSEFTA, *Bava Kama* 55b).

99. *See* Kirschenbaum, *supra* note 66, at 92.

> The reason [that the bystander] is going to such lengths, even to the extent of incurring monetary losses, is not that he is doing so in behalf of his fellow [who is in peril] exclusively, but rather he is also doing so in his own behalf, to save himself—to discharge the obligation placed upon him by [the Holy One], may He be blessed. Moreover, his [heavenly] reward is a very great one indeed.

Id. (quoting RESPONSA MAHARSHDAM, Y.D. resp. 204) (alterations in original).

100. *See, e.g.*, KARO, *supra* note 77, § 426 (listing the duty to save one's fellow as one of the 613 divine commandments contained in the *Torah*). *See also supra* notes 23, 29 and accompanying text.

101. See RABBI MENACHEM MENDEL SCHNEERSON, TORAH STUDIES 117-18 (Rabbi Jonathan Sacks trans., rev. ed. 1996). Scheerson taught:

> Why is human reason not sufficient in itself? Firstly, because it has no absolute commitment: "Today it (one's evil inclination) says to him, Do this; tomorrow it tells him, Do that; until it bids him, Go and serve idols." . . . Secondly, because even though it might lead a man to obey judgments, it would not bring him to closeness with G-d. This is the difference between an act which is reasonable and an act which is a Mitzvah (Divine Commandment). "Mitzvah" means "connection": It is the link between man and G-d.

Id. (quoting BABYLONIAN TALMUD, *Shabbat* 105b.)

102. *Cf.* BABYLONIAN TALMUD, *Eruvin* 100b ("If the *Torah* had not been given, we would have learned modesty from the cat and honesty from the ant . . . .").

103. *See* COHEN, *supra* note 24, at 8-10.

104. *See generally* SCHNEERSON, TORAH STUDIES, *supra* note 101, at 112-18.

danger or inconvenience to the would-be rescuer, and the victim may die in the absence of assistance.[105]

The no-duty rule arose in part as a result of the sharp distinction that the common law drew between "misfeasance" (active misconduct) and "nonfeasance" (passive inaction).[106] For liability to be imposed, common-law courts required misfeasance rather than mere nonfeasance on the theory that active misconduct directly causes harm, whereas passive inaction does no more than allow already existing harm to materialize.[107] Therefore, in the duty to aid context, an innocent bystander who fails to render aid does not make a victim's situation any worse, as the danger existed irrespective of the bystander's action or inaction. It would be unfair, so the courts held, to impose liability on the would-be rescuer simply for being unfortunate enough to stumble across a victim who was already in harm's way.[108]

Additionally, courts were concerned about interfering with personal autonomy.[109] Courts have consistently held that the decision to come to the aid of a stranger is a matter of individual choice.[110] Subjecting persons to liability for choosing not to render aid would amount to the imposition of a state-morality.[111] As such, a duty-to-aid rule would be "unduly coercive and

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105. *See supra* notes 6-8 and accompanying text. Note that early common law did recognize a modified duty to aid in the "misprision of felony." *See* Arcuri, *supra* note 37, at 474. Under the misprision of felony, it was a crime if one did not "raise the hue and cry and report felonies to authorities." *Id*. at 475 (citation omitted).

106. PROSSER, *supra* note 3, at 373-75; Givelber, *supra* note 37, at 3173 ("[T]he government may put you in jail for hurting someone, but not for declining to help someone.") (quoting Steve Chapman, *Should Doing Nothing About a Crime Be a Crime?*, LAW VEGAS REV. J., Aug. 31, 1998, at 78.); Peter M. Agulnick & Heidi V. Rivkin, Notes and Comments, *Criminal Liability for Failure to Rescue: A Brief Survey of French and American Law*, 8 TOURO INT'L L. REV., 93, 95-96 (1998); Kaplan, *Iverson Act*, *supra* note 36, at 71-73.

107. Ziegler, *supra* note 17, at 528-37.

108. *Id.*

109. Jain presents the historical context of this argument:

> Legal historians trace the origin of the no-duty-to-rescue rule to the Western value of individual autonomy. The early common law was largely individualistic; people feared that judicial intervention in social and economic affairs would drain them of their self-reliance and infringe upon their individual freedom.

Jain, *supra* note 38, at 1184-85 (citing Leslie Bender, *An Overview of Feminist Tort Scholarship*, 78 CORNELL L. REV. 575, 580 (1993); Jay Silver, The Duty to Rescue: A Reexamination and Proposal, 26 WM. & MARY L. REV. 423, 424 (1985); Robert Justin Lipkin, Comment, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue*, 31 UCLA L. REV. 252, 276 (1983)).

As courts no longer draw a sharp distinction between nonfeasance and misfeasance, this concern for personal autonomy is probably the most important rationale used by modern courts to justify the no-duty rule. See generally Jain, *supra* note 38, at 1198-1200.

110. *See* Kaplan, *Iverson Act*, *supra* note 36, at 68-70.

111. *See* Jain, *supra* note 38, at 1198-1200.

> The individualist objection to a duty to rescue is that such a duty deprives people of their freedom

beyond the legitimate scope of government."[112]

However, in response to some of the outrageous results that the no-duty rule often produced,[113] courts slowly began to develop a number of exceptions to the general rule, the most important of which has been the special relationship exception.[114] According to this exception, a person does have a duty to aid another where one party is dependent on another, or there is a mutual interdependence between them.[115] Initially, courts were reluctant to expand this exception beyond traditional relationships of dependence and interdependence, for example, parent-child, spouse-spouse, and employer-employee.[116] In more recent times, however, courts have expanded the special relationship exception to include many more kinds of relationships, so much that "[o]f the various exceptions to the common-law no-duty rule, the special status relationship has undergone the widest judicial expansion."[117] The exception now includes relationships between carrier and passenger,[118] innkeeper and guests,[119] land possessor and invitees,[120] storeowner and patron,[121] host and social guest,[122] prison employees and inmates,[123] and even girlfriend and boyfriend.[124]

> to choose whether or not to rescue victims. Individualists believe that requiring the performance of affirmative acts is unduly coercive and beyond the legitimate scope of government. If people choose not to aid victims, society may label them "moral monsters," but under an individualist system, that is solely their concern.

Id. at 1198 (citations omitted).

112. Silver, *supra* note 109, at 429 (citing Robert L. Hale, *Prima Facie Torts, Combination, and Non-feasance*, 46 COLUM. L. REV. 196, 214 (1946)). This respect for individual autonomy has manifested itself recently in the "right to be left alone" and "right of privacy." *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) ("[T]his case is about the most comprehensive of rights and the right most valued by civilized men, namely, the right to be left alone."); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Palko v. Connecticut, 302 U.S. 319 (1937); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

113. For specific examples of outrageous cases under the no-duty rule, see *supra* note 9.

114. *See* Jain, *supra* note 38, at 1185-89. Today, there are six generally recognized judicial exceptions to the no-duty rule. The common denominator between them is that there is a significant relationship between the victim and the rescuer. The exception can be caused by (1) special relationship, (2) contract, (3) creation of risk, (4) voluntary assumption of care, (5) control over conduct of others, and (6) ownership of land. *See id*.

115. Stewart, *supra* note 3, at 395, 397-401.

116. *See* Stewart, *supra* note 3, at 395, 397.

117. *See* Stewart, *supra* note 3, at 395.

118. RESTATEMENT (SECOND) OF TORTS § 314A(1) (1965).

119. RESTATEMENT (SECOND) OF TORTS § 314A(2) (1965).

120. RESTATEMENT (SECOND) OF TORTS § 314A(3) (1965).

121. *See* Southland Corp. v. Griffith, 633 A.2d 84, 91 (Md. 1993).

122. *See* Lindsey v. Miami Dev. Corp., 689 S.W.2d 856, 860 (Tenn. 1985).

123. *See* Brownelli v. McCaughtry, 514 N.W.2d 48, 50 (Wis. Ct. App. 1994).

124. *See* People v. Oliver, 258 Cal. Rptr. 138 (Cal. Ct. App. 1989) (holding that a special relationship existed between a woman and a man who had just recently met, thereby imposing upon

Despite the growth of the special relationship exception, courts remained unwilling to go so far as to impose a general duty to aid, sparking the ire of many who thought that the law should recognize such a duty.[125] This debate came into the national spotlight in 1964 when a woman named Catherine ("Kitty") Genovese was stabbed to death in the lobby of her apartment building in Queens, New York, while thirty-eight of her neighbors watched passively.[126] The attack lasted for more than thirty minutes. Moreover, at one point the murderer even left the scene.[127] Yet, no one tried to help Genovese nor even report the crime to the police.[128] Under New York law, a common-law state, the neighbors had committed no legal wrong.[129]

The Genovese incident produced a national uproar, and the public demanded that legislatures respond with duty-to-aid laws.[130] In 1965, Vermont became the first state to pass a duty-to-aid statute.[131] In 1983, Minnesota enacted the country's second duty-to-aid statute[132] after another

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her a duty to assist him after he took an overdose of drugs in her bathroom).

125. *See* Silver, *supra* note 109.

126. *See* Martin Ginsberg, *37 Who Saw Murder Didn't Call the Police*, N.Y. TIMES, Mar. 27, 1964, at A1.

127. *See id*.

128. *See id*.

129. *See id*.

130. *See* Stewart, *supra* note 3, at 388 ("In 1964, media accounts of public reaction to the would-be rescuers of Catherine Genovese thrust to the fore the issue of whether there should exists a general legal duty to exist, and triggered an examination of the common law no-duty-to-act rule." (citations omitted)).

131. VT. STAT. ANN. tit. 12, § 519 (2000). The statute provides:

> (a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.
>
> (b) A person who provides reasonable assistance in compliance with subsection (a) of this section shall not be liable in civil damages unless his acts constitute gross negligence or unless he will receive or expects to receive remuneration. Nothing contained in the subsection shall alter existing law with respect to tort liability of a practitioner of the healing arts for acts committed in the ordinary course of his practice.
>
> (c) A person who willfully violates subsection (a) of this section shall be fined not more than $100.00.

For a discussion of the statute's historical background, see also Marc A. Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51 (1972).

132. MINN. STAT. ANN. § 604A.01 (West 2000). The statute provides, in part:

> Subdivision 1. Duty to assist. A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement officials or medical personnel. A person who violates this subdivision is guilty of a petty misdemeanor.
>
> Subdivision 2. General immunity from liability. (a) A person who, without compensation or the

tragic incident involving the brutal rape of a woman in a Massachusetts bar in which a room of would-be rescuers passively watched and in some instances even cheered the rapists.[133] Shortly thereafter, Wisconsin[134] and Rhode Island[135] passed duty-to-aid statutes as well. As of the writing of this Note, these are the only four states that have passed general duty-to-aid statutes.[136]

Although these four statutes have been in effect for more than twenty years, prosecutors have tried to enforce them in remarkably few instances.[137]

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expectation of compensation, renders emergency care, advice, or assistance at the scene of emergency or during transit to a location where professional medical care can be rendered, is not liable for any civil damages as a result of acts or omissions by that person in rendering the emergency care, advice, or assistance, unless the person acts in a willful and wanton or reckless manner in providing emergency care, advice, or assistance. This subdivision does not apply to a person rendering emergency care, advice, or assistance during the course of regular employment, and receiving compensation or expecting to receive compensation for rendering care, advice, or assistance.

133. *See The Tavern Rape: Cheers and No Help*, NEWSWEEK, Mar. 21, 1983, at 25. In New Bedford, Massachusetts, the victim was dragged, kicking and screaming, to a pool table where four men swung her on top of the pool table and proceeded to rape her for more than an hour. *Id*. Even though the victim frequently cried out for help, neither the bartender nor any of the other fifteen customers in the bar rendered any assistance whatsoever. *Id*. Some of the customers even cheered the rapists on. *Id*. Eventually, the woman managed to flee from the bar. *Id*. This tragedy later became the story for the movie, *The Accused* (Paramount Pictures 1988).

134. WIS. STAT. ANN. § 940.34 (West 2000).

(1)(a) Whoever violated sub. (2)(a) is guilty of a Class C misdemeanor . . . .

(2)(a) Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim . . . .

(2)(d) A person need not comply with this subsection if any of the following apply:

1. Compliance would place him or her in danger.

2. Compliance would interfere with duties the person owes to others.

3. In circumstances described under par. (a) assistance is being summoned or provided by others . . . .

(3) If a person renders emergency care for a victim, S. 895.48(1) applies. Any person who provides other reasonable assistance under this section is immune from civil liability for his or her acts or omissions in providing the assistance. This immunity does not apply if the person receives or expects to receive compensation for providing the assistance.

Id.

135. R.I. GEN. LAWS § 11-56-1 (1956).

Duty to assist. Any person at the scene of an emergency who knows that another person is exposed to, or has suffered, grave physical harm shall, to the extent that he or she can do so without danger or peril to himself or herself or to others, give reasonable assistance to the exposed person. Any person violating the provisions of this section is guilty of a petty misdemeanor and shall be subject to imprisonment for not more than six months or by a fine of not more than five hundred dollars ($500), or both.

Id.

136. However, as noted above, several state legislatures, as well Congress, are in the midst of considering duty-to-aid statutes. See *supra* note 17 for a listing of these legislatures.

137. Givelber, *supra* note 37, at 3195. *See also* Stewart, *supra* note 3, at 424. Stewart summarizes

Courts have interpreted these statutes in even fewer cases.[138] Accordingly, at this point, the true scope of these statutes remains highly ambiguous.[139]

In *State v. LaPlante*, the Court of Appeals of Wisconsin upheld the first and only reported conviction in this country under a duty-to-aid statute.[140] In *LaPlante*, the defendant hosted a party at her home.[141] At one point during the evening, some of her guests told LaPlante that they planned to physically assault another guest at the party.[142] Later in the evening, they carried out their intentions and brutally beat the victim, while LaPlante and others passively watched.[143] The court ruled that the defendant had violated her duty under the statute to provide aid or summon assistance.[144]

In summary, largely due to concerns with interfering with individual autonomy,[145] the common-law no-duty rule remains the predominant rule in this country.[146] However, in response to a number of shocking cases, the American legal system has narrowed the scope of this rule, as courts have created various judicial exceptions,[147] and most recently, as four states have

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research related to enforcement:

> A 1991 survey conducted of prosecutors in jurisdictions with duty-to-report crime laws sheds light on some enforcement issues. Three hundred and eighty-seven prosecutors practicing in duty-to-report jurisdictions were presented with the facts of the New Bedford [, Massachusetts] rape. This survey was conducted in an effort to determine whether the lack of litigation via the legislative responses to the public rape was due to any prosecutorial reluctance to invoke the laws. Of the 387 prosecutors surveyed, 157 responded, revealing *inter alia* that "an inability to identify perpetrators . . . as well as the problematic nature of coercing testimony from crucial witnesses . . . account [] for the dearth of precedent on point." None of the prosecutors who responded to the survey could recall filing a complaint under the respective statutes.

Id. (alterations in original) (citations omitted).

138. *See id*. at 3195 ("In each state that imposes a duty to rescue or to report, the statutes have produced virtually no case law.").

139. *See generally* Givelber, *supra* note 37, at 3196-98.

140. 521 N.W.2d 448 (Wis. Ct. App. 1994).

141. *See id*. at 449.

142. *See id*.

143. *See id*.

144. *See id*. at 452. Even though LaPlante was charged and convicted of violating the statute, some have argued that the conviction was not necessarily based on the statute but on tort case law. *See* Givelber, *supra* note 37, at 3199.

> Instead, the conviction may have rested on the court's belief that a party host who creates a risk to her guests owes those guests a duty. In other words, the nature of the special relationship (as recognized by tort law) between the rescuer . . . and the victim (her guest) may have warranted the imposition of a duty.

Id. This argument explains, for example, why the state only prosecuted the host and not all of the bystanders who stood idly by and watched the beating.

145. For examples of individualistic concerns, see *supra* notes 109-12 and accompanying text.

146. For a discussion of the common law rule, see *supra* notes 6-8 and accompanying text.

147. For a discussion of judicial exceptions, see *supra* notes 114-24 and accompanying text.

enacted general duty-to-aid statutes.[148] But even though these statutes have been in effect for more than twenty years, enforcement has been rare.[149]

C. Comparing and Contrasting the Halakhic *and Statutory Duties to Aid*

Having established the origins of the *Halakhic* and statutory duties to aid, the current section compares and contrasts these duties with respect to the six elements of analysis enumerated above.[150] This section will show that, with respect to nearly every element, the *Halakhic* duty to aid is more expansive than the statutory duty to aid.

1. Element #1: Conditions Triggering the Duty

The *Halakhic* duty to aid is triggered irrespective of whether the victim's peril is caused by criminal acts or acts of G-d.[151] Under the statutory duty to aid, three of the four states have established this same rule.[152] Only the Wisconsin statute is limited to criminal acts.[153]

Furthermore, the *Halakhic* duty to aid is triggered whether the rescuer sees or merely knows that another is in danger.[154] Under the statutory duty to aid, the states are evenly split. Vermont and Wisconsin, like the *Halakhic* duty to aid, require the rescuer to assist the victim whether the rescuer sees that the victim is in danger or merely knows this to be so.[155] The statutes in Minnesota and Rhode Island, however, only require the rescuer to render aid when she actually sees that the victim is in danger.[156] If a would-be rescuer only knows that another is in danger—say, Seinfeld is merely told that the

148. For a discussion of the four duty-to-aid statutes, including statutory language, see *supra* notes 131-36 and accompanying text.

149. For a discussion of enforcement issues, see *supra* notes 137-39 and accompanying text.

150. *See supra* Part II.A-B.

151. The rabbis reached this conclusion simply by generalizing from the three specific cases mentioned in the *Baraisa* quoted in Part II.A: "From where do we know that if a man sees his fellow drowning, mauled by beasts, or attacked by robbers, he is bound to save him?" *See supra* note 42 and accompanying text. It is worth noting that, according to most opinions, this duty only extends to other members of the Jewish community. This perhaps surprising rule will be explained later in Part III.B *Principle #2: Love vs. Autonomy*. *See infra* note 265 and accompanying text. However, under the concept known as "*Darkei Shalom*" (Way of Peace), the *Halakhic* duty to aid may also extend towards non-Jews. *See* KARO, *supra* note 77, § 426.

152. For the language of the four states' statutes, see *supra* notes 131, 132, 134, 135.

153. *See* WIS. STAT. ANN. § 930.34(2)(a). For the language of this statute, see *supra* note 134.

154. *See* KARO, *supra* note 77, § 426.

155. *See* VT. STAT ANN. tit. 12, § 519(a); WIS. STAT. ANN. § 930.34(2)(a). For the language of the Vermont and Wisconsin statutes, see *supra* notes 131, 134.

156. *See* MINN. STAT. ANN. § 604A.01(1) (West 2000); R.I. GEN. LAWS § 11-56-1 (1956). For the language of the Minnesota and Rhode Island statutes, see *supra* notes 132, 135.

pedestrian is being mugged but does not actually witness this to be so—then no duty to aid arises.

Lastly, the *Halakhic* duty to aid includes a duty to rescue another's property.[157] If a person sees or knows that another's property is at risk of being damaged or stolen, the duty requires intervention to save it.[158] In contrast, none of the duty-to-aid statutes extend to property.[159]

2. Element #2: Nature of Aid Required by the Duty

Part II.A discussed how the *Halakhic* duty to aid is an all-encompassing duty including both the rescuer's person and purse.[160] The duty requires a rescuer, who is personally unable to provide the necessary aid, to solicit or even hire the assistance of another who can render the necessary aid.[161]

Rabbis in later generations have debated the extent to which the rescuer must commit financial resources to secure the necessary aid. One opinion holds that there is no monetary limit.[162] Another opinion holds that the rescuer need not commit more than twenty percent of her financial resources.[163] One modern commentator has tried to reconcile these two opinions, suggesting that the former opinion governs "where the bystander is called upon as an individual to save someone in immediate peril,"[164] while the latter opinion governs when the bystander has been solicited by an original bystander, and is thereby acting as a citizen of the community.[165]

In contrast, none of the duty-to-aid statutes expressly requires the rescuer to commit financial resources to the rescue operation,[166] nor has any court imputed such a requirement into a duty-to-aid statute. Instead, all four

157. For a discussion about the relation between the duty to aid and duty to rescue property, see *supra* note 54 and accompanying text.

158. *See* BABYLONIAN TALMUD, *Bava Kama* 31b. *See* Besser & Kaplan, *supra* note 71, at 198.

159. Of course, in every jurisdiction in this country, a person does have a duty to return lost property under common law or statute. *See* PROSSER, *supra* note 3, § 15, at 89-95. However, no court has extended this duty to rescuing the property of another at risk of being stolen, lost, or damaged.

160. *See supra* note 73 and accompanying text.

161. For a discussion of hiring assistance, see *supra* note 71.

162. This opinion is based on Rashi's commentary on the *Talmud* in *Tractate Sanhendrin* 73a. To review his opinion, see *supra* note 70. However, even according to this extreme opinion, the rescuer need not go into debt in order to save another person. *See* Kirschenbaum, *supra* note 66, at 85 (citing RABBI ELIJAH BEN SAMUEL OF LUBLIN, RESPONSA YAD ELIAHU 43 (Amsterdam ed., 1712)).

163. *See* Kirschenbaum, *supra* note 66, at 86 (citing RABBI SHALOM MORDECAI SCHWARDON OF BREZAN, 5 RESPONSA MAHARSHAM, Response 54 (Satmar ed., 1926)).

164. Kirschenbaum, *supra* note 66, at 85.

165. *See id*. at 85-86. Reconciliation of the two opinions is important because the first opinion—i.e., Rashi's opinion—is from an earlier generation. As such, it is virtually mandatory authority over rabbinic bodies and opinions in all subsequent generations. *See generally* STEINSALTZ, *supra* note 25.

166. For the text of the duty-to-aid statutes, see *supra* notes 131, 132, 134, 135.

statutes require the rescuer to provide "reasonable assistance."[167] No court has construed the precise meaning of this term in the context of the statutory duty to aid. The Minnesota statute expressly says that reasonable assistance "*may* include obtaining or attempting to obtain aid from law enforcement or medical personnel."[168] The Wisconsin statute, arguably the most expansive in this respect, expressly says that a person who falls under the statutory duty "*shall* summon law enforcement officials or other assistance or shall provide assistance to the victim."[169]

As noted above, the *Halakhic* duty to aid also covers situations in which a rescuer is coming to the aid of someone who is being assaulted.[170] Rabbis in later generations[171] determined that to fulfill this duty a rescuer could even kill the pursuer,[172] so long as three conditions were met: (1) killing, as opposed to just injuring the pursuer, is the only way to prevent the crime from occurring;[173] (2) the pursuer is in the process of committing a capital

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167. *See* MINN. STAT. ANN. § 604A.01(1) (West 2000); R.I. GEN. LAWS. §11-56-1 (1956); VT. STAT. ANN. tit. 12, § 519(a) (2000); WIS. STAT. ANN. § 940.34(3) (West 2000). For the text of these statutes, see *supra* notes 131, 132, 134, 135.

168. MINN. STAT. ANN. § 604A.01(1) (West 2000) (emphasis added). For the full text of this statute, see *supra* note 132.

169. WIS. STAT. ANN. § 940.34(2)(a) (West 2000) (emphasis added). *See supra* note 134.

Because no court has yet had the opportunity to construe the meaning of these provisions, a couple of important questions remain unresolved concerning the exact nature and extent of aid required by the statutes. First, only Wisconsin expressly obligates the rescuer to solicit the assistance of others to provide the necessary aid. Minnesota only recommends that reasonable assistance "*may* include" soliciting the help of others, but does not obligate the rescuer to do so. Therefore, it is possible that, in Minnesota, a rescuer who is *personally* unable to provide the necessary aid may not be obligated to solicit the assistance of another. Of course, this rescuer would still be subject to the reasonable assistance standard, but this term remains highly ambiguous. For instance, it is unclear whether this standard would require Seinfeld to endure the inconvenience of finding a law enforcement official or someone capable of helping the person being mugged. Furthermore, it is unclear whether Seinfeld would be obligated to hire such a person. In Wisconsin, he would apparently have these obligations, but in Minnesota there is no clear conclusion, and in the other two states, there is even more uncertainty.

Second, Wisconsin and Minnesota expressly provide alternatives to providing personal aid. *See supra* notes 168-69 and accompanying text. Beside this language, one can only look to the reasonable assistance standard to determine the nature of aid required by the statutes. Using the previous example, it is unclear whether Seinfeld would be acting correctly if he had personally attempted to save the person being mugged rather than soliciting the assistance of a nearby law enforcement official. On one hand, Seinfeld's aid could seem unreasonable, therefore violating the statute's reasonableness requirement. On the other hand, punishing Seinfeld, who, with the best intentions, tried to save the person being mugged seems unfair and harsh. There is no way to resolve this question beyond referring to the reasonable assistance standard, but it is unclear how courts would implement this standard in situations like this one.

170. For discussion of the duty in cases of assault, see *supra* notes 74-91 and accompanying text.

171. These are the rabbis of the *Talmud*. *See supra* note 43.

172. *See* BABYLONIAN TALMUD, *Sanhendrin* 73a.

173. *See* BABYLONIAN TALMUD, *Sanhendrin* 74a; MAIMONIDES, MISHNAH TORAH, *supra* note 96, *Murder and the Preservation of Life* 1:13. However, if merely injuring the pursuer would have been

crime;[174] and (3) the victim will be killed or humiliated as a result of the crime.[175]

The rabbis also determined that in the event the rescuer were later brought before a court for killing or injuring the pursuer, the rescuer's defense would not be a type of excuse or justification. Instead, it would be understood that the rescuer was fulfilling an affirmative obligation.[176] In other words, the rabbis interpreted the *Mishnah* as saying not that one is merely permitted to kill the pursuer in order to prevent the crime, but rather, one is obligated to do so.[177]

No duty-to-aid statute expressly authorizes a rescuer to kill a pursuer.[178] However, in certain situations, the common-law "defense of other" defense can shield a rescuer who kills a pursuer against civil and criminal liability.[179] Of course, unlike *Halakha*, this common-law defense only provides a justification or excuse for the rescuer's actions. It does not establish an affirmative duty.[180]

3. Element #3: Conditions Limiting the Duty

Few conditions limit the *Halakhic* duty to aid. However, a rescuer is not obligated to sacrifice her own life to rescue a victim.[181] Nonetheless, this limitation does not mean that the rescuer is absolved of her duty once she is exposed to any degree of danger.[182] This point can be inferred from the

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sufficient, then the rescuer is liable for committing a capital crime. *See id*. For a commentary on this section of Maimonides work, see the KESSEF MISHNEH. For a discussion of this point in English, see Besser & Kaplan, *supra* note 71, at 215.

174. For the definition of a "capital crime" under *Halakha*, see *supra* note 79.

175. *See* BABYLONIAN TALMUD, *Sanhendrin* 74a. If the victim will not be killed or humiliated, then the rescuer is permitted only to injure but not kill the pursuer. *See id.* In regards to this third condition, in situations in which a victim is at risk of being humiliated, but not killed, the rescuer can kill the pursuer only *before* the pursuer has humiliated the victim. If the victim has already been humiliated before the rescuer is able render aid, then the rescuer is not permitted to kill the perpetrator in order to prevent a second offense. *See* BABYLONIAN TALMUD, *Sanhendrin* 73a.

176. *See* MISHNAH, *Sanhendrin* 73a; TOSAFOS, COMMENTARY ON THE BABYLONIAN TALMUD, *Sanhendrin* 73a; MAIMONIDES, MISHNAH TORAH, *supra* note 96, *Murder and the Preservation of Life* 1:13. *See also* CHIDUSHEI HARAN, *supra* note 71. For a discussion in English of rescue as an affirmative obligation, see Eliash, *supra* note 93, at 625.

177. *See supra* note 176.

178. For statutory text, see *supra* notes 131, 132, 134, 135.

179. *See generally* Prosser, *supra* note 3, § 20, at 129-31.

180. *See id.*

181. *See* Eliash, *supra* note 93, at 623. *See also* BABYLONIAN TALMUD, *Bava Metzia* 62a ("If two are traveling in a desert and one has a pitcher of water, and if both drink they will die, but if only one drinks, he can reach civilization, Rabbi Akiva came and taught: That your brother may live with you, your life takes precedence over his life.").

182. *See* RABBI OVADIA YOSSEF, RESPONSA YECHAVE DAAS 84 (1975) (discussing whether a person has a duty to donate bone marrow or a kidney)); Eliash, *supra* note 93, at 623 (citing Rabbi I.

Baraisa,[183] which states that a rescuer must come to the aid of another, even if the latter is being attacked by beasts or robbers.[184]

The duty-to-aid statutes, in contrast, contain three significant conditions that can limit or absolve the rescuer's duty altogether. First, all four statutes include the so-called "easy rescue" limitation, which provides that a rescuer has a duty to aid only to the extent that the aid can be rendered without danger or peril to herself or others.[185]

Only one court has interpreted an easy-rescue limitation. In *State v. Joyce*, the defendant beat and kicked his son in the presence of several passive onlookers.[186] The defendant argued that because the statute required the onlookers to intervene if the beating exposed his son to grave danger, the lack of intervention was a tacit approval of his conduct, or at least an indication that he was not beating his son too badly.[187] The court held that, by virtue of the easy-rescue limitation, the statute did not require the onlookers "to intervene in a fight."[188]

The second important limitation on the statutory duty to aid is absolution of any duty to render aid if others are performing the duty already.[189] The third limitation is that the statutes do not require a person to render aid if doing so would interfere with important duties owed to others.[190]

Zilberstein, *How Far a Person Has to Risk Himself in Order to Save Others*, 41 ASIA 5 (1986) (discussing whether a doctor has a duty to risk himself to treat an infectious disease).

183. For an explanation of the *Baraisos*, see *supra* note 41.

184. For a discussion of a rescuer's obligation to take risk, see *supra* notes 41-42 and accompanying text.

185. *See* MINN. STAT. ANN. § 604A.01(1) (West 2000); R.I. GEN. LAWS § 11-56-1 (1956); VT. STAT. ANN. tit. 12, § 519(a) (2000); WIS. STAT. ANN. § 940.34(2)(d)(1) (West 2000). For the language of these statutes, see *supra* notes 131, 132, 134, 135. The duty-to-report statute in Ohio is the only related statute that does not expressly contain an easy rescue limitation. *See* OHIO REV. CODE. ANN. § 2921.22 (West 2000).

186. 433 A.2d 271 (Vt. 1981).

187. *See id*. at 273.

188. *Id*.

189. Only the statutes in Vermont and Wisconsin expressly contain this limitation. *See* VT. STAT. ANN. tit. 12, § 519(a) (2000); WIS. STAT. ANN. § 940.34(2)(d)(3) (West 2000). For the language of these statutes, see *supra* notes 131, 134. Although the Minnesota and Wisconsin statutes do not expressly include this limitation, it might be implied in the "reasonable assistance" standard. That is, to the extent others are already providing the necessary aid, reasonable assistance does not require the potential rescuer to help the others in their rescue efforts.

This is an important limitation because many of the difficult cases in this area involve group rescue situations. For example, in the Genovese murder, if one of the neighbors had rendered aid, then this limitation would have absolved the other thirty-seven neighbors from assisting Genovese.

190. For example, at an emergency scene, a parent would have a greater duty to rescue his child than a stranger's duty under the judicially created special relationship exception. *See supra* notes 114, 115. Only the Vermont and Wisconsin statutes expressly contain this limitation. *See* VT. STAT. ANN. tit. 12, § 519(a) (2000); WIS. STAT. ANN. § 940.34(2)(d)(2) (West 2000). For the text of these statutes, see *supra* notes 131, 134.

4. Element #4: Immunity

The preceding three sections have examined various respects in which the *Halakhic* duty to aid is more expansive than the statutory duty to aid. The next two sections present ways in which the rabbis mitigated the potential severity of the *Halakhic* duty to aid.[191]

The rabbis provided the rescuer with an extremely generous grant of immunity.[192] According to most opinions, the immunity provision releases the rescuer from liability even if the rescue operation is conducted in a negligent or reckless manner.[193] Additionally, the immunity provision protects the rescuer from claims brought by third parties.[194] Therefore, in the *Seinfeld* example, if Kramer had unintentionally injured the person or property of a third party during the rescue effort, under the *Halakhic* duty to aid, Kramer would not be liable.[195]

All four duty-to-aid statutes also include immunity provisions that shield

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191. The rabbis were particularly concerned that, if they did not mitigate the severity of the duty, then potential rescuers would not fulfill their duty. *See infra* note 192. This severity would produce two negative results. First, potential rescuers would not go to the aid of others in danger, and therefore, these victims would die or suffer serious injury. Second, and perhaps more importantly, potential rescuers would violate their Biblical commandment to rescue their fellow. *See supra* note 100 and accompanying text.

192. In the words of the *Talmud*, "This is not based on [the strict letter of] the law because if you do not say so, the result will be that no one would save his fellow from the hand of his pursuer." BABYLONIAN TALMUD, *Sanhendrin* 74a.

193. *See* Eliash, *supra* note 93, at 625.

> For example, when a girl fainted in her employer's house, her employer tried to help her using a traditional "medical" treatment—a bottle of schnapps. However, by mistake the employer gave her gasoline and the girl died. Rabbi Moshe Sofer (who is known as the Chasam Sofer, the highest authority of Austro-Hungary in the eighteenth century) released the employer from any liability because she had done what she could have done, attempted to save the girl's life. She had good intentions with poor performance.

Id. at 625-26.

194. *See* MAIMONIDES, MISHNAH TORAH, *supra* note 96, *Torts: Wounding and Damaging* 8:14. For a discussion of this point in English, see Kirschenbaum, *supra* note 66, at 87 ("The special mitzvah nature of the obligation to save someone in peril impelled the Rabbis to make an enactment providing for the exemption of the rescuer from any tort committed in the course of the rescuer operation.").

195. *See* MAIMONIDES, MISHNAH TORAH, *supra* note 96, *Torts: Wounding and Damaging* 8:12.

> If one chases after the pursuer in order to rescue the pursued, and he breaks objects belonging to the pursuer or anyone else, he is exempt. This rule is not [a matter of] strict law, but is an enactment (in Hebrew, *takkanah*) made in order that one should not refrain from rescuing another or lose time through being too careful when chasing a pursuer.

Id. The next section, Part II.C.5 *Element #5: Compensation*, shows why the rescuer is released from liability, not only if she destroys property of third parties, but also if she destroys property owned by the *victim*. As this Note will discuss, the victim must compensate the rescuer for her efforts. Therefore, any damages to the victim's property is merely deducted from the compensation the victim owes to the rescuer. *See infra* note 201 and accompanying text.

rescuers against certain forms of liability.[196] However, in three respects, these immunity provisions are not as generous as the *Halakhic* immunity provision. First, the statutory immunity provisions shield rescuers against negligence but not recklessness.[197] Second, the rescuer loses immunity status if she receives or even expects to receive compensation for the rescue effort.[198] Third, the statutes do not expressly protect rescuers from claims brought by third parties,[199] nor has a court had an opportunity to impute such a broad meaning to any of the statutes.

5. Element #5: Compensation

As a second means of mitigating the potential severity of the *Halakhic* duty to aid,[200] the rabbis granted the rescuer compensation rights against the victim.[201] In general, the rescuer is entitled to compensation for the expenses incurred during the rescue operation, including the costs of hiring another to rescue the victim.[202] If the rescue occurs during work hours and therefore the rescuer sacrifices her wages, she is at least entitled to receive a minimal wage.[203] If the rescuer deems this amount to be insufficient, the rescuer may also sue the victim to recover fully for the loss involved in leaving work.[204]

Moreover, the rescuer is entitled to compensation from the victim "even if

196. *See* MINN. STAT. ANN. § 604A.01(2) (West 2000); R.I. GEN. LAWS § 11-56-1 (1956); VT. STAT. ANN. tit. 12, § 519(b) (2000); WIS. STAT. ANN. § 940.34(3) (West 2000). For the language of these statutes, see *supra* notes 131, 132, 134, 135.

197. *See* MINN. STAT. ANN. § 604A.01(2) (West 2000); R.I. GEN. LAWS § 11-56-1 (1956); VT. STAT. ANN. tit. 12, § 519(b) (2000); WIS. STAT. ANN. § 940.34(3) (West 2000). For the language of these statutes, see *supra* notes 131, 132, 134, 135.

198. *See* MINN. STAT. ANN. § 604A.01(2) (West 2000); R.I. GEN. LAWS § 11-56-1 (1956); VT. STAT. ANN. tit. 12, § 519(b) (2000); WIS. STAT. ANN. § 940.34(3) (West 2000). For the language of these statutes, see *supra* notes 131, 132, 134, 135. This point concerning compensation will be discussed further in Part II.C.5 *Element #5: Compensation.*

199. *See* MINN. STAT. ANN. § 604A.01(2) (West 2000); R.I. GEN. LAWS § 11-56-1 (1956); VT. STAT. ANN. tit. 12, § 519(b) (2000); WIS. STAT. ANN. § 940.34(3) (West 2000). For the language of these statutes, see *supra* notes 131, 132, 134, 135.

200. For the reasons why the rabbis were concerned about the potential severity of the duty, *see supra* note 191.

201. That is, although the *Halakhic* duty imposes a significant burden on the rescuer, she at least knows that she will likely not incur any financial loss for her efforts. *See* ABULAFIA, *supra* note 51; HIMEIRI, *supra* note 77. For a discussion of this point in English, see generally Kirschenbaum, *supra* note 66, at 83-92. Kirschenbaum notes that "[t]he rescuer does have the right to sue the rescued party in order to recover the money he expended." *Id.* at 86.

202. *See* MAIMONIDES, MISHNAH TORAH, *supra* note 96, *Torts: Robbery and Lost Objects* 13:19. For a discussion of this point in English, see Kirschenbaum, *supra* note 66, at 91; Besser & Kaplan, *supra* note 71, at 213.

203. *See* 11 TALMUDIC ENCYCLOPEDIA, *Hashevat Avedah* 82-84. For a discussion of this point in English, see Kirschenbaum, *supra* note 66, at 90.

204. *See* Kirschenbaum, *supra* note 66, at 90.

the victim protests, wishes not to be rescued, and later refuses to compensate the rescuer."[205] Some rabbis have even held that the court can impose a lien on the victim's property and require that her heirs compensate the rescuer.[206]

However, other rabbis have refused to extend the rescuer's compensation rights to such an extent. Some rabbis have held that the rescuer is not entitled to compensation if the rescued party is bankrupt.[207] However, the rescued party's bankruptcy does not alter the rescuer's obligations.[208] Some rabbis have also maintained that the rescuer can only recover expenses if the rescue effort is successful.[209] If the attempt fails, the maximum recovery is the minimum wage of the labor expended.[210] Finally, other rabbis have asserted that the rescuer cannot recover from anyone besides the rescued party, excluding even close relatives.[211]

All of the various opinions limit the rescuer's compensation rights in two other important respects. First, the rescuer cannot sue the victim to recover damages for personal injuries suffered during the rescue operation.[212] This situation exists because, under *Halakha*, an injured party may only sue the actual tortfeasor for personal injuries.[213] Therefore, a victim who does not directly cause the rescuer's injuries is not legally obligated to pay the rescuer's damages.

Second, the rescuer is not entitled to any compensation if she did not

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205. Kirschenbaum, *supra* note 66, at 86 (citing RABBI MEIR BEN BARUCH, RESPONSA MAHARAM ROTHENBERG, 4 Prague Collection resp. 39 (M.A. Bloch, ed., 1969)). For example, this rule will govern a case where a physician provides aid to an unwilling patient.

206. *See* Kirschenbaum, *supra* note 66, at 86-87 n.17.

207. *See* Kirschenbaum, *supra* note 66, at 91. *But cf.* RABBI MOSES MAIMONIDES, COMMENTARY TO THE MISHNAH (establishing that once the victim is no longer bankrupt, the victim has a moral obligation to compensate the rescuer).

208. *See* RABBI MENACHEM HIMEIRI, BET HEBECHIRAH, *Sanhendrin* 73a. *See generally* RABBI ASHER BEN YEHIEL (ROSH), *Sanhendrin* 8:2. In recent years, some rabbis have held that this rule governs cases involving physicians and impoverished patients. According to these opinions, the doctor is obligated to provide aid irrespective of the patient's ability to pay. If there are a number of physicians in a specific locality, then the community should either establish a system of rotation for the free treatment of the impoverished or institute state-supported medicine. *See* Kirschenbaum, *supra* note 66, at 87 n.21 (citing RABBI ELIEZAR WALDENBERG, Ramat RACHEL § 24, *in* RESPONSA ZIZ ELIEZER (1957); Rabbi Yitzhak Ze'ev Kahana, *Sinai* 46, *in* PEKUACH NEFESH BAHALACHAH 129-30 (1960)).

209. *See* Kirschenbaum, *supra* note 66, at 92 n.37 ("This ruling is derived *a fortiori* from the case of an unsuccessful attempt to salvage someone's property.") (citing BABYLONIAN TALMUD, *Bava Kamma* 166a).

210. *See id*.

211. *See* Kirschenbaum, *supra* note 66, at 92 (citing RABBI ASHER BEN YEHIEL, *Sanhendrin* 8:2).

212. *See* Kirschenbaum, *supra* note 66, at 91. Therefore, the rescuer can sue the victim to recover expenses incurred during the rescue operation but cannot sue to recover damages for personal injuries. *See supra* notes 202-04 and accompanying text.

213. *See supra* notes 202-04 and accompanying text.

incur any expenses in her rescue effort.[214] Therefore, although the rabbis established incentives for the rescuer through compensation rights, they did not go so far as to give the rescuer any mandatory reward or gratuity for her rescue efforts.[215]

The duty-to-aid statutes take a very different approach with respect to the rescuer's compensation rights. Under all four statutes, the rescuer does not have any right to sue the victim to receive compensation for the rescue effort.[216] Indeed, as noted above,[217] rescuers who expect or receive compensation for their aid automatically lose immunity status.[218]

6. Element #6: Consequences of Noncompliance with the Duty

As noted in Part II.A, the *Halakhic* duty to aid is not enforced through human courts but rather through a Divine judge, namely, G-d.[219] Although courts do not impose any sanctions for violating the *Halakhic* duty, it nevertheless should be considered a legal duty, not solely a moral duty.[220] Describing the truly legal quality of the *Halakhic* duty to aid, one contemporary legal scholar wrote:

> Those of us familiar with John Austin's theory that only what is sanctioned is law, will have doubts as to whether the Jewish duty of helping and saving is a legal one. But in Jewish Law there was not and there is not such a doubt. Neither the Talmudic scholars nor later scholars have had even the slightest doubt that the duty is a legal one . . . . [Jewish law] refers to a G-d fearing society with a belief in a Heavenly Tribunal. The model is that of a person for whom divine sanction is a real, concrete matter. As such, he views these duties as "legal" in nature.[221]

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214. *See* Kirschenbaum, *supra* note 66, at 87. This rule is based on a fundamental principle in *Halakha*: "Though one has derived benefit, if the other has thereby sustained no loss, there is no liability [on the part of the former] to pay." BABYLONIAN TALMUD, *Bava Kamma* 2b.

215. *See* Kirschenbaum, *supra* note 66, at 90 (citing TOSAFOS, COMMENTARY ON THE BABYLONIAN TALMUD, *Bava Metzia* 31b).

216. For the language of the four states' statutes, see *supra* notes 131, 132, 134, 135.

217. *See supra* note 198 and accompanying text.

218. *See* MINN. STAT. ANN. § 604A.01(2) (West 2000); R.I. GEN. LAWS § 11-56-1 (1956); VT. STAT. ANN. tit. 12, § 519(b) (2000); WIS. STAT. ANN. § 940.34(3) (West 2000). For the language of these statutes, see *supra* notes 131, 132, 134, 135.

219. For a discussion of human and Divine judgment, see *supra* notes 96-98 and accompanying text.

220. For an illustration of legal and moral duty, see *infra* note 221 and accompanying text.

221. Eliash, *supra* note 93, at 623-24. The following true story, which occurred approximately 400 years ago, illustrates the true legal nature of the *Halakhic* duty to aid:

In contrast, all four duty-to-aid statutes impose penalties for noncompliance. Rhode Island has the most stringent penalty. Under its statute, a violator can be jailed up to six months, or fined as much as $500, or both.[222] In Wisconsin, a violator can be found guilty of a Class C misdemeanor and jailed up to thirty days, or fined as much as $500, or both.[223] In Minnesota, a violator can be found guilty of a petty misdemeanor, and a court can impose a civil penalty of not more than $300.[224] Vermont sets a $100 maximum penalty.[225]

In sum, the *Halakhic* duty to aid is more expansive than the statutory duty to aid with respect to nearly every element of analysis. However, to lessen the potential severity of the *Halakhic* duty, the rabbis provided the rescuer with extremely generous immunity protections and compensation rights.[226] Also, the *Halakhic* duty to aid is enforced not through human courts but through a Divine judge.[227]

III. FUNDAMENTAL PRINCIPLES UNDERLYING THE *HALAKHIC* AND STATUTORY DUTIES TO AID

Part II analyzed the many different respects in which the two duties differ and showed that the *Halakhic* duty is far more expansive than its American counterpart. Part III explores three of the fundamental principles underlying

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> All the Jews in the city-state of Ankona in Italy were deported. The Duke of Pizaro, another city-state in Italy, was ready to accept the deported Jews. They promised him that all the Jewish international traders from all the Mediterranean ports would ship their goods to the Port of Pizaro instead of the Port of Ankona. The Jews boycotted the Port of Ankona, but after a while they found that the Port of Pizaro was not as good as the Port of Ankona, and they were losing money. Merchants do not like to lose money and they started to go back to the boycotted Ankona. The Jews of Pizaro found themselves under a risk of deportation from Pizaro. They applied to the highest Rabbinical authority of Turkey and the Balkans, Rabbi Moshe Mittrani (who is known as the Mabit). Rabbi Mittrani, based on the Jewish "good Samaritan" doctrine, ordered the international traders to send the ships only to the Port of Pizaro while he decided who would compensate them for the damages they suffered because of it (in principle the Jews of Pizaro had to bear these losses, but until they could collect the money, every Jew in the world had to participate because every one was obligated). If you read Rabbi Mittrani's decision you do not find a request or recommendation; you find a standard judicial decision which imposes a legal duty with no doubt that it will be fulfilled.

Id. at 624 (citing RABBI MOSES MITTRANI (MABIT), RESPONSA 237).

222. *See* R.I. GEN. LAWS § 11-56-1 (1956).

223. *See* WIS. STAT. ANN. § 940.34 (West 2000); *id*. § 939.51(3)(c).

224. *See* MINN. STAT. ANN. § 604A.01 (West 2000); *id*. § 609.02 (4a).

225. *See* VT. STAT. ANN. tit. 12, § 519(c) (2000).

226. *See generally supra* Part II.C.4 *Element #4: Immunity*; Part II.C.5 *Element #5: Compensation*.

227. For a discussion and illustration of the *Halakhic* duty as legal and moral, see *supra* notes 96-98 and accompanying text.

Halakha and American law generally and explains how these principles account for the many differences observed in Part II. These three principles are: (1) *Halakha* understands freedom primarily in terms of one's capacity to seek a higher purpose in life, whereas American law understands freedom primarily in terms of one's capacity to live free from unwanted intrusions; (2) *Halakha* places the value of loving one's fellow as oneself before the value of individual autonomy, whereas American law reverses the importance of these values; (3) *Halakha* takes a "good man" view of law, whereas American law takes a "bad man" view; and, related to this, *Halakha* presupposes the existence of a Divine judge, whereas American law does not.

A. Principle #1: Different Notions of Freedom

Halakha understands freedom primarily in terms of one's capacity to seek a higher purpose in life.[228] Therefore, true freedom is liberation from whatever constraints and forces that prevent a person from realizing her higher purpose.[229] Because *Halakha* establishes that this purpose can only be found in the Divine commandments,[230] a person is free in the truest sense only when she fulfills these commandments.[231]

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228. *See generally* RABBI SHNEUR ZALMAN OF LIADI, TANYA ch. 31; RABBI YAAKOV TAUBER, BEYOND THE LETTER OF THE LAW 318-19 (1995); Rabbi Yaakov Tauber, *Is Judaism a Theocracy?*, *at* http://www.chabadonline.com/scripts/tgij/paperp/Article.asp?/ArticleID=2184 (last visited Jan. 20, 2001). This idea is illustrated well in the fact that Moses demanded that Pharoah emancipate the Jewish people from slavery, not for their own sake, but so that they could receive the *Torah* and Divine commandments at Mount Sinai and thereby be able to serve G-d. *See Exodus* 7:26 ("Send out my People *so that they may serve Me*.") (emphasis added). Therefore, according to the *Torah*, true freedom does involve a form of servitude. Only, rather than serving temporal and finite forces, one serves G-d. *See, e.g.*, *Leviticus* 25:55 ("For the Children of Israel are slaves unto Me, they are My slaves, whom I have taken out of the land of Egypt.").

229. *See* RABBI MENACHEM MENDEL SCHNEERSON, 7 IGROT KODESH (1953). Schneerson teaches:

> Every day a person must "go out of Egypt," that is, he must escape from limits, temptations and obstructions that his physical existence places in the way of his spiritual life . . . . Only then can he enjoy real freedom, the sense of serenity and harmony which is the prelude to freedom and peace in the world at large.

Id.

230. *See generally* RABBI SHNEUR ZALMAN OF LIADI, TANYA. For a discussion of *Halakha* as the product the will of G-d, see also *supra* note 29 and accompanying text.

231. *See* MISHNAH, *Avos* 6:2.

> The Tablets were the work of G-d, and the writing was the writing of G-d, *charut* (engraved) on the Tablets. Do not read *charut* but *cherut* (freedom), for there is no free man except one who occupies himself with the study of the *Torah*; and anyone who occupies himself with the study of *Torah* becomes elevated.

Id. For a discussion of this point in English, see Besser & Kaplan, *supra* note 71, at 194-95 (citing BABYLONIAN TALMUD, *Kiddushin* 31a; BABYLONIAN TALMUD, *Avodah Zorah* 3a; BABYLONIAN

In contrast to *Halakha*, American law has primarily defined freedom in terms of one's capacity to live free of unwanted intrusions.[232] American courts, especially in this past century, have frequently struck down legislation that imposes morality on individuals and that deprives them of their personal autonomy.[233] Indeed, modern courts have continued to uphold the common-law no-duty rule out of a respect for this notion of individual autonomy.[234]

These conflicting notions of freedom are clearly reflected in the *Halakhic* and statutory duties to aid and help explain why they differ so greatly. For example, with respect to *Element #1: Conditions Triggering the Duty* and *Element #2: Nature of Aid Required by the Duty*, it is now easier to understand why the rabbis were able to impose such a heavy burden on the rescuer.[235] Unlike American judges and legislators, the rabbis did not need to contend with the issue of individual autonomy.[236] To the contrary, the rabbis believed that, by imposing such an expansive duty, they were counteracting selfish instincts within a potential rescuer that would prevent fulfillment of the Divine commandment of saving another.[237]

Conversely, legislators in America have thus far only been able to establish a reasonable assistance standard.[238] The following statement might express the underlying rationale for this standard:

> To the extent the rescue effort only requires reasonable assistance, then the benefits[239] of aiding the victim outweigh the costs of infringing on the rescuer's individual autonomy. However, when the

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TALMUD, *Bava Kamma* 38a, 87a.).

232. *See* Agulnick & Rivkin, *supra* note 106, at 96 ("Deeply ingrained in the American psyche is the individual's desire to live free from government interference. Accordingly, American law has long respected the autonomy of the individual and has been reluctant to punish for failure to rescue."). *See also supra* notes 109-12 and accompanying text.

233. For a discussion of individualism, see *supra* note 112 and accompanying text.

234. *See supra* note 109.

235. *See supra* Part II.C.1 *Element #1: Conditions Triggering the Duty*; Part II.C.2 *Element #2: Nature of Aid Required by the Duty*.

236. *Halakha* is also concerned with individual autonomy but defines it very differently than the American legal system. According to *Halakha*, the truest desire of a person is to fulfill G-d's will as it is manifest in the Divine commandments. Therefore, when one observes the commandments, she is actually acting in conformity, not merely with G-d's will, but also with her *own* will. When one opposes G-d's will, she is being directed, not by her own will, but by an external, materialistic dimension of her soul. As such, the person who follows G-d's will and observes His commandments acts in an autonomous fashion, while one who does not, and instead follows the dictates of her external self, acts in a heteronymous fashion. *See generally* RABBI SHNEUR ZALMAN OF LIADI, TANYA.

237. *See generally* RABBI SHNEUR ZALMAN OF LIADA, TANYA..

238. For a discussion of the reasonable assistance standard, see *supra* note 167 and accompanying text.

239. *Cf.* Jain, *supra* note 38, at 1198-1200 (arguing that an individualist-oriented person recognizes two potential benefits in the duty to aid: (1) the benefit of saving the actual victim; and (2) the benefit of knowing that others will be required by law to provide the same aid on her behalf).

> rescue effort requires more than reasonable assistance, the balance shifts in favor of the rescuer's autonomy interest, and therefore, it is no longer proper to impose a duty to aid.

This rationale can also help explain why the statutes generally do not require the rescuer to hire or solicit the help of others and, with respect to *Element #3: Conditions Limiting the Duty*, why the rescuer is not required to expose herself to danger.[240] These requirements would force the rescuer to exert an extraordinary effort, and at that point, the interest in autonomy prevails.

The different notions of freedom are particularly evident in *Element #5: Compensation*. Recall that according to the *Halakhic* duty to aid, the rescuer is entitled to compensation for the costs of the rescue operation, even if the victim does not wish to be saved and refuses to pay the rescuer.[241] On one hand, this rule clearly demonstrates the minimal significance that *Halakha* accords to an individual's desire to live free of unwanted intrusions. On the other hand, all of the duty-to-aid statutes preserve the common-law no-duty rule that the rescuer is not entitled to compensation for rescue efforts under any condition.[242]

B. Principle #2: Love vs. Autonomy

One of the most fundamental principles in the *Torah* is the injunction to love one's fellow as oneself.[243] This injunction is not only a fundamental principle but is also one of the Divine commandments.[244] This commandment is clearly connected to the *Halakhic* duty to aid. If one must love her fellow as herself (the Love Principle), then it is altogether sensible that one must save her fellow from danger. Indeed, because of the close

240. *See supra* note 185 and accompanying text.

241. *See supra* note 205 and accompanying text.

242. *See supra* Part II.C.5 *Element #5: Compensation.*

243. "You shall love your fellow as yourself." *See generally* KEHOT PUBLICATION SOCIETY, KUNTRES AHAVAT YISRAEL 5-12, 25-68 (Rabbi Zalman Posner et al. trans., rev. ed. 1998); RABBI SHNEUR ZALMAN OF LIADI, TANYA, ch. 32. *See also* BABYLONIAN TALMUD, *Shabbat* 31a ("What is hateful to you, do not inflict upon your fellow man; this is the entire Torah, the rest is commentary."); MIDRASH, *Vayikra Rabbah* 24 ("Rabbi Akiva said: 'this [commandment to love one's fellow as oneself] is a great rule in the *Torah*.'"); JERUSALEM TALMUD, *Nedarim* 9:4; RABBI YOSEF YITZCHOK SCHNEERSOHN, LIKKUTEI DIBBURIM 412 ("The Baal Shem Tov declared that [love of one's fellow] is the first portal that leads into the courtyards of G-d."). Additionally, some prayer liturgies begin with the statement, "I hereby take upon myself the commandment, 'You shall love your fellow as yourself.'" RABBI SHNEUR ZALMAN OF LIADI, SIDDUR TEHILLAT HASHEM 12 (Rabbi Nissen Mangel trans., 2d compact ed. 1988).

244. *Leviticus* 19:18. *See also* RABBI MOSES MAIMONIDES, SEFER HAMITZVOT, *Positive Mitzvah* 206 (enumerating the injunction to love one's fellow as oneself as one of the 613 Divine commandments).

connection between these two commandments, there should be no surprise that the verses from which they are derived are virtually adjacent to one another.[245]

The Love Principle is especially manifest in the first three elements of analysis. Recall the many conditions that can trigger the *Halakhic* duty to aid and the extent of aid required, once the duty is triggered.[246] Indeed, as discussed in the third element of analysis, the rescuer is still required to aid the victim even if the rescue effort puts the rescuer in danger.[247] This seemingly irrational requirement makes sense, however, in light of the Love Principle. Just as one would surely, out of self-love, expose herself to danger in order to save her life, then, under the Love Principle, she must do the same for her fellow. The only difference is that when she saves her fellow, rather than acting from a natural self-love, she acts out of a supernatural love for another, which has been commanded by G-d.[248]

Obviously, the American legal system has never recognized the Love Principle, or at least, it has not done so explicitly.[249] As noted above, America and the legal tradition out of which it arose have always placed a tremendous value on individual autonomy (the Autonomy Principle).[250] Therefore, in America if one wishes to love her fellow as herself, she may of course do so, but it is inappropriate for law to require this love.[251]

However, by digging deeper, one can see that many laws exist in America today that do indeed infringe upon the Autonomy Principle.[252] The existence of the modern welfare-state illustrates this point well.[253] The dozens of state and federal programs that comprise the welfare system, as well as the billions of dollars in taxes used to fund these programs,[254] show that the American legal system, at least in part, recognizes some form of the Love Principle.[255]

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245. The verse, "One should not stand," is found at *Leviticus* 19:16. The verse instructing a person to love one's fellow as oneself comes only two verses later at *Leviticus* 19:18.

246. *See supra* Part II.C.1 *Element #1: Conditions Triggering the Duty*; Part II.C.2 *Element #2: Nature of Aid Required by the Duty*; Part II.C.3 *Element #3: Conditions Limiting the Duty.*

247. *See supra* note 182 and accompanying text.

248. *See supra* note 244.

249. *See infra* text accompanying notes 250 and 251.

250. For a discussion of autonomy in the American legal tradition, see *supra* notes 109-12 and accompanying text.

251. *See supra* notes 109-112 and accompanying text.

252. For a discussion of duties infringing on American autonomy, see *infra* note 255 and accompanying text.

253. *See* THOMAS R. DYE, POLITICS IN AMERICA 624-27 (4th ed. 2001); U.S BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 121, 124, 389, 392, 393 (1999).

254. *See* U.S BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 121, 124, 389, 392, 393 (1999).

255. *See* Jennifer Bagby, Note, *Justifications for State Bystander Intervention Statutes: Why Crime Witnesses Should Be Required to Call for Help*, 33 IND. L. REV. 571, 579-80 (2000) (arguing

This proposition—that America is partially open to the Love Principle—can be used to explain the evolution of the duty-to-aid rules. Indeed, this author suggests that one can best understand the evolution of these rules as the result of an ongoing tension between the Autonomy Principle (justifying the no-duty rule) and the Love Principle (justifying the duty to aid).[256]

Courts first circumscribed the no-duty rule by establishing certain exceptions, the most important of which has been the special-relationship exception.[257] Recall that courts initially limited this exception to traditional relationships in which one party was dependent upon the other, or where there was a mutual interdependence between them, for example, parent-child or spouse-spouse relationships.[258] By imposing liability on such parties, the special-relationship exception effectively requires these parties to act in conformity with a love that they *should*, whether by tradition or nature, feel for one another in any event. That is, because a parent *should* love her child, the special-relationship exception imposes a legal obligation upon the parent to do so, even if she would rather not.[259]

Moreover, that courts have expanded the scope of the special-relationship exception beyond traditional relationships (i.e., carrier-passenger, host-social guest, prison employees-inmates, girlfriend-boyfriend relationships) suggests that they are becoming increasingly favorable to the Love Principle.[260] Whereas initially courts limited the exception to relationships consisting of traditional or natural love, they are now requiring individuals to manifest a nontraditional love of sorts. For example, when a court rules that a prison employee has a legal obligation to come to the aid of an inmate,[261] the court is effectively requiring the employee to act out of a supernatural love that society has determined it wishes to embody in law.[262]

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that America has long imposed various forms of civic duties).

256. *Cf.* Roberts. v. United States, 445 U.S. 552, 570 (1980) (Marshall, J., dissenting) (arguing personal privacy and autonomy are "countervailing social values" against the value of coming to the aid of victims of criminal conduct).

257. For exceptions to the common-law no-duty rule, see *supra* notes 114-16 and accompanying text.

258. *See supra* notes 114-16 and accompanying text.

259. *But see* Jain, *supra* note 38, at 1186 (arguing that the justification for this exception is that the nature of the special relationship "alert[s] both potential rescuers and victims to the victims' right to depend on the rescuers").

260. *See supra* text accompanying notes 117-24.

261. *See supra* note 123 and accompanying text.

262. This point suggests that the *Halakhic* duty to aid is similar to its American counterpart, *even in those jurisdictions that do not have a statutory duty to aid*. Inasmuch as these common-law jurisdictions, like *Halakha*, recognize the Love Principle, then the difference between them is merely one of degree. That is, these common-law jurisdictions recognize the Love Principle but establish that it should govern only in certain narrow cases (i.e., those involving special relationships), whereas *Halakha* establishes that it should govern in all cases. Or put differently, because *Halakha* perceives

Lastly, the greatest proof for the expansion of the Love Principle is found in the various duty-to-aid statutes,[263] and particularly, the four *general* duty-to-aid statutes discussed in this Note. Put differently, these statutes represent an even greater broadening of the definition of a special relationship. That is, by creating a general duty to aid, these statutes effectively require that a special relationship exist even between *complete strangers*.[264] Therefore, in these four states, at least with respect to the duty-to-aid question, the Love Principle seemingly has surpassed the Autonomy Principle.[265]

However, in spite of the expansion of the Love Principle in this country, it would be incorrect to claim that the Love Principle has entirely overtaken the Autonomy Principle. First, although a duty to aid now exists in this country, only a handful of states have adopted it.[266] In every other jurisdiction, the common-law no-duty rule still prevails.[267] Second, even with respect to the duty-to-aid statutes, themselves, the Love principle has not altogether supplanted the Autonomy Principle. Recall the number of restrictions that limit the statutory duty to aid.[268] These limitations demonstrate that concerns for individual autonomy still lurk beneath even the general duty-to-aid statutes.[269] Therefore, although the new statutes show that the Love Principle is expanding, it is clear that the Autonomy Principle is not completely buried. To this extent, the statutory duty to aid remains quite different from the *Halakhic* duty to aid.

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that there must be a special relationship between every member of the community, it establishes that the special relationship exception should be the general rule! *Halakha* establishes that there must be a special relationship between every member of the community because of the Divine commandment to love one's fellow as oneself. *See supra* notes 243-45 and accompanying text.

263. For a listing of states with limited duty-to-aid statutes, see *supra* note 17 and accompanying text.

264. Of course, this general duty is still subject to numerous limitations. *See* statutes cited *supra* notes 131, 132, 134, 135 and accompanying text.

265. Some may regard the *Halakhic* duty to aid as racist and bigoted inasmuch as it only applies to members of the Jewish community. *See supra* note 151. However, as discussed above, the *Halakhic* duty to aid, as well as the common law and statutory duty to aid, may be based on the same principle and only diverge in their application. *See infra* note 262 and accompanying text. The common law took the most restrictive view and imposed this duty only in certain special relationships situations. The recent duty to aid statutes, in one sense, take the most expansive view and impose the duty in all situations, although the statutes contain many conditions that severely limit the duty. The *Halakhic* duty to aid takes a middle ground by expanding the duty to every member of the Jewish community (i.e., one's larger family) but not beyond to humanity in general. Thus, the *Halakhic* duty to aid does not reflect any animosity to non-Jews. Instead, it represents a different attempt to implement legally the same principle that all three approaches recognize.

266. *See* states listed *supra* notes 17, 20.

267. *See supra* note 6 and accompanying text.

268. *See* Part II.C.1-3.

269. For restrictions on the statutes' duty to aid, see *supra* notes 109, 238-40 and accompanying text.

C. Principle #3: "Good Man" vs. "Bad Man" View of Law

Oliver Wendell Holmes was one of earliest thinkers in this country to argue in support of the so-called "bad man" view of law:

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds reasons for his conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.[270]

According to Holmes, American law operates on the fundamental principle that law can only influence people's behavior insofar as they are able to ascertain readily the flesh and blood consequences of their actions.[271]

Halakha takes a different view of humanity and maintains that, while human beings certainly have a bad side, they are fundamentally good.[272] Accordingly, *Halakha* sets forth laws that conform with this dual nature for good and bad.[273] *Halakha* presupposes "a G–d fearing society with a belief in a Heavenly Tribunal. The model is a person for whom a divine sanction is a real, concrete matter."[274]

The belief in a Divine judge that rewards and punishes[275] is related to the *Halakhic* view that human beings have a dual nature for good and bad. On one hand, the fact that sanctions come from G-d and are imposed in ways that are not readily ascertainable reflects the view that human beings are good. That is, this view of punishment presupposes that people can be influenced to behave in a certain way without the threat of a direct, physical punishment. A human being can understand that actions have consequences that transcend the immediate here and now.

On the other hand, that *Halakha* sanctions people at all demonstrates its presupposition that human beings have a potential for bad. If human beings did not have any potential for bad and instead were only capable of fulfilling the will of G-d, sanctions would be entirely unnecessary. However, a potential for bad does exist, and therefore, *Halakha* must set forth

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270. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

271. *See id*. *See also* JAMES A. HENDERSON, THE TORTS PROCESS 96-98, 293-97 (5th ed. 1999).

272. On one hand, *Halakha* recognizes that humanity has a propensity for bad and for violating the will of G-d: "the inclination of the heart of man is evil from his youth." *Genesis* 8:21. *See also Genesis* 6:5. On the other hand, the *Torah* indicates that humanity is fundamentally good. "G-d created man in His image, in the image of G-d." *Genesis* 1:27. *See generally* RABBI SHNEUR ZALMAN OF LIADI, TANYA.

273. *See* Eliash, *supra* note 93, at 624.

274. *Id*.

275. For a discussion of moral and legal duty, see *supra* notes 95-98 and accompanying text.

consequences for misbehavior, even if they are not readily apparent.

These two very different views of human nature explain why the *Halakhic* and statutory duties to aid diverge with respect to sanctions. As discussed above, persons violating the *Halakhic* duty to aid are not punished by the courts, as is always the case in *Halakha* with violations of positive duties to act.[276] Violators are ultimately punished but by the Divine judge.[277] This system of Divine sanction reflects the dual nature of humanity assumed by *Halakha*.

Consistent with the bad man view of law, the statutory duty to aid does establish specific, though minimal, sanctions for noncompliance.[278] One could even argue that prosecutors have rarely tried to enforce the duty-to-aid statutes precisely because of the nominal sanctions they entail.[279] That is, under the bad man view of the law, prosecutors have calculated that it is not worth the time, money, and effort to enforce these laws given the limited effect they have on influencing behavior. Any effect on behavior brought about by imposing the statutory sanctions would be outweighed by the costs incurred in doing so.

IV. ARGUMENTS AGAINST THE STATUTORY DUTY TO AID AND HOW *HALAKHA* MIGHT RESPOND

Two principal arguments, one theoretical and one practical, have been leveled against the duty to aid:[280] (1) the theoretical argument is that a duty to aid infringes upon one's individual autonomy;[281] (2) the practical argument is simply that a duty to aid is impossible to enforce.[282]

A. Argument #1: Duty-to-Aid Statutes Infringe upon Individual Autonomy

The American legal system has assigned a special value to individual autonomy (the Autonomy Principle).[283] The most ardent supporters of this

276. *See supra* Part II.C.6 *Element #6: Consequences of Noncompliance with the Duty*.

277. *See supra* notes 95-98 and accompanying text.

278. For penalties imposed by the four general duty-to-aid statutes, see *supra* notes 222-25 and accompanying text.

279. For a discussion of enforcement issues, see *supra* notes 137-38 and accompanying text. *See also* Stewart, *supra* note 3, at 424.

280. For a list of the other arguments that have made against the duty to aid, see notes 36, 37 and accompanying text.

281. *See supra* note 38.

282. *See supra* note 39.

283. *See* Arcuri, *supra* note 37, at 476 ("In a democratic society, the basic and most obvious argument against forcing people to help others is that such a law will interfere with an individual's freedom and privacy."). *See also supra* notes 109-12 and accompanying text.

principle argue that laws are justified only to the extent that they are aimed at protecting and furthering autonomy.[284] Accordingly, governments may pass laws that prevent one individual from doing harm to another.[285] In such cases, one individual is not respecting another's autonomy, and therefore, the law may legitimately sanction the individual's actions.[286] However, governments should not pass laws that force one individual to confer benefits on another. In these cases, one individual is simply minding her own business and has in no way harmed another. As such, she is outside the province of law and should be left alone, even if, as a result, the other individual will suffer great harm.[287] If she wishes to confer a benefit upon that individual and to save her from this harm, she may of course do so, but the law may not force this course of action.

The *Halakhic* response to this argument is very simple: the Autonomy Principle should not be the fundamental principle by which the legitimacy of laws are measured.[288] To the contrary, justice is measured by the extent to which laws embody the fundamental duties that persons owe to one another. And more specifically, laws are just to the extent that they recognize the most fundamental duty of loving one's fellow as oneself (the Love Principle).[289] When a person performs this duty and loves her fellow as her own self, she realizes a higher purpose in life and thereby achieves true freedom.[290]

At first blush, these ideas might appear quite radical. And indeed, stated in this extreme form, they are. However, the discussion of the Love and Autonomy Principles in Part III demonstrates how the *Halakhic* response is not entirely alien to the American tradition. The evolution of the duty-to-aid rules shows that the Love Principle is gaining ground on the Autonomy Principle.[291] To this extent, the *Halakhic* response may not elicit as much opposition as one might think. That is, to the extent that American law seems to be moving toward the Love Principle and away from a strict Autonomy principle, the *Halakhic* response may gain greater favor in the coming years.

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284. *See* Givelber, *supra* note 37, at 3174 ("[T]he proper function of law is to protect individual rights against infringement." (quoting Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 676 (1994))); Jain, *supra* note 38, at 1198-2000; Lipkin, *supra* note 109, at 277 ("[T]he formation of the state is justified only if it reflects the individual's autonomous choices."); Kaplan, *Iverson Act*, *supra* note 36, at 69-70.

285. For example, governments may pass laws that prohibit murder, assault, and theft.

286. *See supra* notes 283-84.

287. *See supra* notes 283-84.

288. *See supra* notes 228-31 and accompanying text.

289. *See supra* notes 243-44 and accompanying text.

290. *See supra* note 231.

291. *See supra* note 262 and accompanying text.

B. Argument #2: Duty-to-Aid Statutes are Impossible to Implement

Proponents of this argument maintain that enforcement of duty-to-aid statutes requires extensive investigation and adjudication, which is extremely costly and time-consuming.[292] The Seinfeld incident helps to illustrate the difficulties of implementing a statutory duty to aid. First, a prosecutor would need to show that Seinfeld and his friends saw or knew, depending on the jurisdiction, that the victim was in peril and in need of assistance.[293] However, some of the Seinfeld group might be aware of the situation and thus be under a duty to provide aid, while others might not. Sorting out who was and was not aware would be difficult.

Moreover, the prosecutor would have difficulty showing that the Seinfeld group did not qualify for the easy-rescue limitation.[294] That is, the foursome could easily argue that they did not render aid because they thought they would have been injured if they had tried to intervene. Additionally, the Seinfeld group could argue that they did not call the police because they reasonably assumed that someone else had already reported the incident. In that case, they would be exempt because the statutes absolve one from aiding another if the aid is already being provided.[295]

Indeed, if someone had called the police, the prosecutor could still argue that no one in the Seinfeld group was aware of the call, or at least, not all of them. If so, the prosecutor would still have the difficulty of distinguishing those who knew of the call from those who did not. Moreover, even if a call had been made and the prosecutor could determine precisely who was aware of the call, it is possible that their reasons for refusing to provide aid would still be illegitimate.[296] It would be impossible for the prosecutor to assess the mental state of each person and distinguish between those who responded legitimately and who did not.

The *Halakhic* response is again very simple: These practical concerns are entirely justified, and therefore courts should not try to enforce the duty. Accordingly, the *Halakhic* duty to aid does not set forth any sanctions, or not any humanly-imposed sanctions at least.[297] Instead, *Halakha* takes the "good man" view of the law and establishes that laws can influence behavior even when those laws are not supported by readily ascertainable flesh-and-blood

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292. *See supra* note 39. *See also supra* 137 note and accompanying text.
293. *See supra* notes 155-56 and accompanying text.
294. For a discussion of the easy-rescue limitation, see *supra* note 185 and accompanying text.
295. *See* supra note 189 and accompanying text.
296. That is, they choose simply not to render aid. Their choice did not rest on legitimate grounds; e.g., they thought they would have been injured; they thought that aid was already on the way.
297. *See supra* notes 95-98 and accompanying text.

sanctions.[298] The *Halakhic* duty to aid gives the rescuer the choice of performing the duty or answering to the Divine judge. Moreover, the Divine judge presupposed by *Halakha* has a perfect knowledge of the facts, which include not only external events but also the inner workings of one's mind and heart.[299] With this perfect knowledge, the Divine judge can assess the appropriate penalty.[300]

In other words, *Halakha* is not concerned with exacting perfect justice on Earth. It recognizes that the attempt to do so is practically impossible because of the limits of human knowledge. Indeed, an attempt at perfect justice on earth could result in punishing the innocent or the commission of other miscarriages of justice.[301] Therefore, with its presupposition of a Divine judge who possesses a perfect knowledge of the facts, *Halakha* is content to catch up with the wrongdoer at a later time. In the eyes of *Halakha*, this lack of justice on earth is not forgiveness but deferral.[302]

This response might seem even more radical than the full ascendancy of the Love Principle discussed in the previous section. In many ways this response does contain extremely radical ideas, especially the belief in a Divine judge. However, not all of these ideas are alien in American law. Although Justice Holmes's bad man view of the law is the majority opinion in the American legal system, it certainly is not the only opinion.[303] Some American legal thinkers have taken the *Halakhic* view that humanity is basically good and therefore capable of responding to unenforceable rules. Indeed, many scholars now study small communities and industries in this country that are largely governed by unenforceable rules.[304] These studies confirm the good man view of the law that rules can influence behavior even if they do not carry immediate flesh-and-blood sanctions.[305]

However, even after a thorough examination of American and common law, one will not find any mention of a Divine judge that works hand in hand with an earthly court. The closest thing to the Divine judge is the famous

298. *See supra* notes 272-74 and accompanying text.

299. By His very nature, a Divine judge has these powers. If He did not have perfect knowledge of the inner workings of one's mind and heart, He would not be Divine.

300. *See* KAPLAN, HANDBOOK, *supra* note 95, 270-71 (quoting BABYLONIAN TALMUD, *Shabbat* 105b; BABYLONIAN TALMUD, *Sanhendrin* 90a; BABYLONIAN TALMUD, *Nedarim* 32a).

301. This recognition of the dangers of attempting to execute perfect justice in this world explains why *Halakha* imposes far stricter requirements on the admission of evidence in court. Only a small fraction of evidence that is admissible in American courts would be admissible in an *Halakhic* court. *See generally* BABYLONIAN TALMUD, *Sanhendrin*.

302. *See supra* note 221 and accompanying text.

303. *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW 4-6 (1969).

304. *See generally* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

305. *Id.*

"conscience" that the law often mentions.[306] Although statements about the "conscience" suggest a belief in a higher authority that judges human actions, it is not given the same concrete, legal status as the Divine judge in *Halakha*.[307] Therefore, until America explores the possibility of a Divine judge, the gap between the *Halakhic* and statutory duties to aid might be irreconcilable.[308]

V. CONCLUSION

The *Halakhic* duty to aid is, in several respects, far more expansive than the statutory duty to aid. The *Halakhic* duty to aid is more easily triggered, and once it is triggered, it requires the rescuer to make an extraordinary effort to save the victim. Moreover, unlike the statutory duty to aid, the *Halakhic* duty to aid requires the rescuer to continue her rescue efforts, even if doing so is dangerous. To mitigate the potential severity of the *Halakhic* duty, the rabbis provided the rescuer with generous immunity protections and compensation rights. Also, the *Halakhic* duty to aid is enforced not through human courts but through a Divine judge.

These differences originate in the following different principles on which *Halakha* and American law are built: (1) *Halakha* defines freedom primarily in terms of one's capacity to seek a higher purpose in life, whereas American law defines freedom primarily in terms of one's capacity to live free of unwanted intrusions; (2) *Halakha* places the value of loving one's fellow as oneself before the value of individual autonomy, whereas American law reverses the importance of these values; and (3) *Halakha* takes a "good man" view of law, whereas American law takes a "bad man" view, and related to this, *Halakha* presupposes the existence of a divine judge, whereas American law does not.

Despite these different principles, the gap between the *Halakhic* and statutory duties to aid has shrunk considerably. This narrowing has primarily derived from the fact that America has been increasingly open to the

306. *See, e.g.*, *Union Pac. R.R. Co. v. Cappier*, 72 P. 281, 282 (Kan. 1903).

> [W]itholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are not found in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure.

Id. at 282.

307. *See supra* note 221 and accompanying text.

308. *Cf.* Rabbi Omar Furmansky, Patterns of Existence, (Sept. 2000) (unpublished manuscript, on file with the Geulus Yisrael University Library) (arguing that an essential step to bridging the gap between *Halakha* and other legal systems is their acknowledgment of a Divine judge, and more generally, their acknowledgement of the existence of G-d).

Halakhic principle that one should love one's fellow as oneself. However, as long as the American legal system ignores the possibility of a Divine judge, the differences between the *Halakhic* and statutory duties to aid will persist.

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