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. 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. 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? Or, in the terms in which the question has been traditionally analyzed, ought the law impose a “general duty to aid”?

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

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.\textsuperscript{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”\textsuperscript{7} and “the aid can be rendered without danger or inconvenience to the one who could undertake the rescue.”\textsuperscript{8}

Many commentators have noted the “shocking” results that the no-duty rule often produces.\textsuperscript{9} For example, in Osterlind v. Hill, the defendant was in the business of renting boats to patrons for use on Lake Quannopowitt.\textsuperscript{10} The defendant rented a canoe to the plaintiff, even though the defendant knew that the plaintiff was heavily intoxicated.\textsuperscript{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.\textsuperscript{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.\textsuperscript{13}

Although the no-duty rule remains the established rule in this country,\textsuperscript{14} its scope has eroded considerably during the past century.\textsuperscript{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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\item 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.”).
\item People v. Oliver, 258 Cal. Rptr. 138, 142 (Cal. Ct. App. 1989).
\item 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).
\item 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. 1971); 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).
\item 160 N.E. 301, 302 (Mass. 1928).
\item Id.
\item Id.
\item Id.
\item For a statement and discussion of the no-duty rule, see supra notes 6-8 and accompanying text.
\item For discussion of the erosion of the no-duty rule, see infra notes 16-20 and accompanying text.
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exception. Additionally, in the last thirty years, eight states have circumscribed the no-duty rule even further by passing limited duty-to-aid statutes. An example of a limited duty-to-aid statute is the Massachusetts statute referred to above. Massachusetts requires an individual to render aid to a stranger but only to the extent of reporting certain crimes to law-enforcement officials. 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. 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. The emergence of these statutes, coupled with the earlier judicial exceptions, suggests that the duty to aid is gaining increasing acceptance in this country.

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. As this Note discusses in great detail, the Halakhic duty to aid...
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.\footnote{Halakha has its origins in the so-called Written and Oral Torah\footnote{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). \footnote{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.}} that G-d\footnote{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).} revealed to Moses more than 3,300 years ago at Mount Sinai.\footnote{See MISHNAH, Avos 1:1. See generally COHEN, supra note 23, at 10; KATZ, supra note 25, at 57-61.} 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.\footnote{See COHEN, supra note 23, at 8-10; KATZ, supra note 25, at 62-63.} 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.\footnote{See generally RABBI SHNEUR ZALMAN OF LIADI, TANYA; STEINSALTZ, supra note 25, at 1-10.} 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.\footnote{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.} A comparison of these duties and the values
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

31. See infra Part III.A Principle #1: Different Notions of Freedom.
33. The expression “bad man view of the law” was first coined by Oliver Wendell Holmes. See supra note 270 and accompanying text.
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.  

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.  

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:  

"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? From the verse [in Leviticus 19:16]: ‘One should not stand over the blood of his fellow.’”

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

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.

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.” 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. This principle must be true if one believes that the words of Torah are the words of G-d. A perfect being must use perfect speech. No breath can be wasted.

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.
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.” 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. 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. 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.

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” and (2) the verse in Deuteronomy: “you shall return it [i.e., himself] to him.” 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.

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. 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. If the Torah only provided the verse in Deuteronomy and not the verse in Leviticus, then one would mistakenly think, for reasons...
that will be discussed momentarily, that the Halakhic duty to aid is limited to the personal ability of the rescuer. 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.

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.” Therefore, this verse, by itself, only teaches that one has a personal obligation to render aid to another in danger. It does not teach that a person might also have an obligation to solicit and hire others to render the necessary aid. 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. From other sources, the rabbis knew that the duty to return lost property is indeed limited to the personal ability of the finder. 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.

As noted above, 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. “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. On the contrary, she must stop standing, and instead, seek out and solicit or

60. See BABYLONIAN TALMUD, Sanhedrin 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.
63. See BABYLONIAN TALMUD, Sanhedrin 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, Sanhedrin 73a.
65. See supra note 54 and accompanying text.
67. See id.
68. See supra note 59 and accompanying text.
69. See BABYLONIAN TALMUD, Sanhedrin 73a.
70. RASHI, COMMENTARY ON BABYLONIAN TALMUD, Sanhedrin 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.\footnote{See Abulafia, supra note 51. For further elaboration on the requirement to seek out actively the assistance of another, see the commentary on Sanhedrin 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.}{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.\footnote{See generally Kirschenbaum, supra note 66, at 84-85.}{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.”\footnote{See id. at 84.}{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.\footnote{See infra Part II.C.2 Element #2: Nature of Aid Required by the Duty.}{74}

The first explicit articulation of these rules appeared in the Mishnah,\footnote{The details of these rules are discussed infra Part II.C.2 Element #2: Nature of Aid Required by the Duty.}{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].”\footnote{MISHNAH, Sanhedrin 73a.}{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.\footnote{See TOSAFOS, COMMENTARY ON THE BABYLONIAN TALMUD, Sanhedrin 73a; RABBI MOSES MAIMONIDES, COMMENTARY TO THE MISHNAH: ABULAFIA, supra note 51; RABBI MENACHEM HEMEBIRI, BET HEBEHIRAH, Sanhedrin 73a. See also RABBI YOSEF KARO, SHULCAN ARUCH, Hoshen Mishpat § 60.}{77}

However, others held that the rescuer is actually saving the pursuer,\footnote{See RASHI, COMMENTARY ON THE MISHNAH, Sanhedrin 73a.}{78} on the belief that the rescuer prevents the pursuer from committing a capital crime\footnote{A “capital crime” in Halakha basically refers to murder or a severe sexual crime, such as rape. See BABYLONIAN TALMUD, Sanhedrin 73a (Artscroll ed.) 21-22 n.2-3.}{79} and thereby “saves” the pursuer from committing a severe sin that ultimately would be punishable by death in any event.\footnote{See infra notes 83-86 and accompanying text.}{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
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{85} Therefore, the killing “saves” the perpetrator from committing these graver transgressions.\textsuperscript{86}

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

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\item \textsuperscript{81} MISHNAH, Sanhedrin 73a.
\item \textsuperscript{82} See RASHI, COMMENTARY ON THE MISHNAH, Sanhedrin 73a.
\item \textsuperscript{83} See BABYLONIAN TALMUD, Sanhedrin, 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. \textit{Id.} If his parents admonish him and he ignores their warnings, he is flogged in court. \textit{Id.} If he still persists in his behavior, he is put to death, provided numerous criteria are satisfied. \textit{Id.} Another individual, discussed in Sanhedrin 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, Sanhedrin 72a. A verse in \textit{Exodus} says that when the homeowner kills the thief, “there is no blood-guilt.” \textit{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.
\item \textsuperscript{84} See BABYLONIAN TALMUD, Sanhedrin 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.
\item \textsuperscript{85} See infra note 86.
\item \textsuperscript{86} See BABYLONIAN TALMUD, Sanhedrin 72a, which states: The \textit{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 \textit{Torah} stated: Let him die [while he is still] innocent, and let him not die guilty [of a capital crime.]
\item \textsuperscript{87} See supra note 77 and accompanying text.
\end{itemize}
to the victim.\textsuperscript{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.\textsuperscript{89} According to Halakha, a minor cannot be convicted and punished for committing a crime.\textsuperscript{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.\textsuperscript{91}

Finally, in accordance with a fundamental principle in Halakha that no criminal punishment is assigned to violations of positive duties to act,\textsuperscript{92} the rabbis held that a court cannot sanction a would-be rescuer who breaches the Halakhic duty to aid.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{88} See Tosafos, Commentary on the Babylonian Talmud, Sanhedrin 73a (noting that a subsequent passage in the Talmud says that, in the case involving the betrothed maiden, the rescuer “saves her”).
\textsuperscript{89} See Babylonian Talmud, Sanhedrin 72b.
\textsuperscript{90} See Babylonian Talmud, Shabbat 89b; Mezrahi, Rashi, Commentary on Exodus 21:12.
\textsuperscript{91} See Rashi, Commentary on the Babylonian Talmud, Sanhedrin 72b; Abulafia, supra note 51.
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{94} See Mishnah, Sanhedrin 4:5.
\textsuperscript{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].
\textsuperscript{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.

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enforcement and non-enforcement or between those which are humanly enforced and divinely enforced. 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.” 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.

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. This fact explains why the rabbis based the Halakhic duty to aid on verses in the Torah as opposed to human reason and understanding. 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, they nevertheless concluded that its justification must rest on the Torah. Human intellect can understand and rationally accept the Halakhic duty to aid, but in the rabbis’ eyes, intellect cannot justify its ultimate truth.

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

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 Maharshad, 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.


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.\footnote{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).}

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).\footnote{Id. at 473-75; 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.} 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.\footnote{Ziegler, supra note 17, at 528-37.} 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.\footnote{Id.}

Additionally, courts were concerned about interfering with personal autonomy.\footnote{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. 573, 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. See Kaplan, Iverson Act, supra note 36, at 68-70. 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.\textsuperscript{112}

However, in response to some of the outrageous results that the no-duty rule often produced,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{117} The exception now includes relationships between carrier and passenger,\textsuperscript{118} innkeeper and guests,\textsuperscript{119} land possessor and invitees,\textsuperscript{120} storeowner and patron,\textsuperscript{121} host and social guest,\textsuperscript{122} prison employees and inmates,\textsuperscript{123} and even girlfriend and boyfriend.\textsuperscript{124}
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. 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. The attack lasted for more than thirty minutes. Moreover, at one point the murderer even left the scene. Yet, no one tried to help Genovese nor even report the crime to the police. Under New York law, a common-law state, the neighbors had committed no legal wrong.

The Genovese incident produced a national uproar, and the public demanded that legislatures respond with duty-to-aid laws. In 1965, Vermont became the first state to pass a duty-to-aid statute. In 1983, Minnesota enacted the country’s second duty-to-aid statute after another her a duty to assist him after he took an overdose of drugs in her bathroom).

125. See Silver, supra note 109.
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 exist 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. Shortly thereafter, Wisconsin and Rhode Island 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.

Although these four statutes have been in effect for more than twenty years, prosecutors have tried to enforce them in remarkably few instances.
Courts have interpreted these statutes in even fewer cases. Accordingly, at this point, the true scope of these statutes remains highly ambiguous.

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. In LaPlante, the defendant hosted a party at her home. At one point during the evening, some of her guests told LaPlante that they planned to physically assault another guest at the party. Later in the evening, they carried out their intentions and brutally beat the victim, while LaPlante and others passively watched. The court ruled that the defendant had violated her duty under the statute to provide aid or summon assistance.

In summary, largely due to concerns with interfering with individual autonomy, the common-law no-duty rule remains the predominant rule in this country. 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, 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.

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. But even though these statutes have been in effect for more than twenty years, enforcement has been rare.

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. 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. Under the statutory duty to aid, three of the four states have established this same rule. Only the Wisconsin statute is limited to criminal acts. Furthermore, the Halakhic duty to aid is triggered whether the rescuer sees or merely knows that another is in danger. 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. 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. If a would-be rescuer only knows that another is in danger—say, Seinfeld is merely told that the
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. 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. In contrast, none of the duty-to-aid statutes extend to property.

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. 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.

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. Another opinion holds that the rescuer need not commit more than twenty percent of her financial resources. 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,” 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.

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

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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 Sanhedrin 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 Eliyahu Ben Samuel of Lublin, Responsa Yad Eliyahu 43 (Amsterdam ed., 1712)).
163. See Kirschenbaum, supra note 66, at 86 (citing Rabbi Shalom Mordecai Schwardon of Brezan, 5 Responsa Maharscham, 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 generations171 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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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, Sanhedrin 73a.
173. See Babylonian Talmud, Sanhedrin 74a; Maimonides, Mishnah Torah, supra note 96, Murder and the Preservation of Life 1:13. However, if merely injuring the pursuer would have been
and (3) the victim will be killed or humiliated as a result of the crime.\textsuperscript{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.\textsuperscript{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.\textsuperscript{177}

No duty-to-aid statute expressly authorizes a rescuer to kill a pursuer.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{181} Nonetheless, this limitation does not mean that the rescuer is absolved of her duty once she is exposed to any degree of danger.\textsuperscript{182} This point can be inferred from the

\textsuperscript{174} For the definition of a “capital crime” under Halakha, see supra note 79.

\textsuperscript{175} See BABYLONIAN TALMUD, Sanhedrin 74a. If the victim will not be killed or humiliated, then the rescuer is permitted only to injure but not to 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 to render aid, then the rescuer is not permitted to kill the perpetrator in order to prevent a second offense. See BABYLONIAN TALMUD, Sanhedrin 73a.

\textsuperscript{176} See MISHNAH, Sanhedrin 73a; TOSAFOS, COMMENTARY ON THE BABYLONIAN TALMUD, Sanhedrin 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 623.

\textsuperscript{177} See supra note 176.

\textsuperscript{178} See generally Prosser, supra note 3, § 20, at 129-31.

\textsuperscript{179} See id.

\textsuperscript{180} 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.’”).

\textsuperscript{181} See RABBI OVAZIA YOSSIF, 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, which states that a rescuer must come to the aid of another, even if the latter is being attacked by beasts or robbers.

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.

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. 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. The court held that, by virtue of the easy-rescue limitation, the statute did not require the onlookers “to intervene in a fight.”

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. 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.

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).

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

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

See M-NN. 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).


See id. at 273.

Id.

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.

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.\textsuperscript{191}

The rabbis provided the rescuer with an extremely generous grant of immunity.\textsuperscript{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.\textsuperscript{193} Additionally, the immunity provision protects the rescuer from claims brought by third parties.\textsuperscript{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.\textsuperscript{195}

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

\textsuperscript{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.

\textsuperscript{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, Sanhedrin 74a.

\textsuperscript{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.

\textsuperscript{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.”).

\textsuperscript{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. 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. Second, the rescuer loses immunity status if she receives or even expects to receive compensation for the rescue effort. Third, the statutes do not expressly protect rescuers from claims brought by third parties, 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, the rabbis granted the rescuer compensation rights against the victim. 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. If the rescue occurs during work hours and therefore the rescuer sacrifices her wages, she is at least entitled to receive a minimal wage. 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.

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

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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; Hillel, 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. 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.

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. However, the rescued party’s bankruptcy does not alter the rescuer’s obligations. Some rabbis have also maintained that the rescuer can only recover expenses if the rescue effort is successful. If the attempt fails, the maximum recovery is the minimum wage of the labor expended. Finally, other rabbis have asserted that the rescuer cannot recover from anyone besides the rescued party, excluding even close relatives.

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. This situation exists because, under Halakha, an injured party may only sue the actual tortfeasor for personal injuries. 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 HEBECHRRAH, Sanhendrin 73a. See generally RABBI ASHER BEN YEHEIL (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, Sinui 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 YEHEIL, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{216} Indeed, as noted above,\textsuperscript{217} rescuers who expect or receive compensation for their aid automatically lose immunity status.\textsuperscript{218}

\section*{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{221}

\begin{itemize}
\item \textsuperscript{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.
\item \textsuperscript{215} See Kirschenbaum, supra note 66, at 90 (citing TOSAFOS, COMMENTARY ON THE BABYLONIAN TALMUD, Bava Metzia 31b).
\item \textsuperscript{216} For the language of the four states’ statutes, see supra notes 131, 132, 134, 135.
\item \textsuperscript{217} See supra note 198 and accompanying text.
\item \textsuperscript{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.
\item \textsuperscript{219} For a discussion of human and Divine judgment, see supra notes 96-98 and accompanying text.
\item \textsuperscript{220} For an illustration of legal and moral duty, see infra note 221 and accompanying text.
\item \textsuperscript{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:
\end{itemize}
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. 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. 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. Vermont sets a $100 maximum penalty.

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.

Also, the Halakhic duty to aid is enforced not through human courts but through a Divine judge.

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

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).


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. Therefore, true freedom is liberation from whatever constraints and forces that prevent a person from realizing her higher purpose. Because Halakha establishes that this purpose can only be found in the Divine commandments, a person is free in the truest sense only when she fulfills these commandments.

228. See generally RABBI SHENEUR 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/gjj/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.”). 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.

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

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.

230. See RABBI SHENEUR 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.

Id. See generally RABBI SHENEUR 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, Avot 6:2. 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. 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. Indeed, modern courts have continued to uphold the common-law no-duty rule out of a respect for this notion of individual autonomy.

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. Unlike American judges and legislators, the rabbis did not need to contend with the issue of individual autonomy. 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.

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

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

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

235. 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 heteronomous fashion. See generally RABBI SHEUER ZALMAN OF LIADI, TANYA.

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

237. 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. 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. 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.

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. This injunction is not only a fundamental principle but is also one of the Divine commandments. 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 Rabba 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

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.
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).

Courts first circumscribed the no-duty rule by establishing certain exceptions, the most important of which has been the special-relationship exception. 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. 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.

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. 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, the court is effectively requiring the employee to act out of a supernatural love that society has determined it wishes to embody in law.
Lastly, the greatest proof for the expansion of the Love Principle is found in the various duty-to-aid statutes, 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. Therefore, in these four states, at least with respect to the duty-to-aid question, the Love Principle seemingly has surpassed the Autonomy Principle.

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. In every other jurisdiction, the common-law no-duty rule still prevails. 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. These limitations demonstrate that concerns for individual autonomy still lurk beneath even the general duty-to-aid statutes. 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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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 punishes275 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

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 SHINEUR 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. Accordingly, governments may pass laws that prevent one individual from doing harm to another. In such cases, one individual is not respecting another’s autonomy, and therefore, the law may legitimately sanction the individual’s actions. 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. 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. 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). 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.

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. 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.

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

\(^{292}\) 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. 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. With this perfect knowledge, the Divine judge can assess the appropriate penalty.

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. 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.

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. 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. 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.

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

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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
“conscience” that the law often mentions.\textsuperscript{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 \textit{Halakha}.\textsuperscript{307} Therefore, until America explores the possibility of a Divine judge, the gap between the \textit{Halakhic} and statutory duties to aid might be irreconcilable.\textsuperscript{308}

V. CONCLUSION

The \textit{Halakhic} duty to aid is, in several respects, far more expansive than the statutory duty to aid. The \textit{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 \textit{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 \textit{Halakhic} duty, the rabbis provided the rescuer with generous immunity protections and compensation rights. Also, the \textit{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 \textit{Halakha} and American law are built: (1) \textit{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) \textit{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) \textit{Halakha} takes a “good man” view of law, whereas American law takes a “bad man” view, and related to this, \textit{Halakha} presupposes the existence of a divine judge, whereas American law does not.

Despite these different principles, the gap between the \textit{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

\textsuperscript{306} See, e.g., \textit{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.

\textit{Id.} at 282.

\textsuperscript{307} See supra note 221 and accompanying text.

\textsuperscript{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 \textit{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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