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Sheldon Nahmod

IIT Chicago-Kent College of Law, snahmod@kentlaw.iit.edu

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THE DUTY TO RESCUE AND THE EXODUS META-NARRATIVE OF JEWISH LAW

by Sheldon Nahmod*

I. INTRODUCTION

Suppose, to use a familiar example,¹ a person is walking along a Lake Michigan beach and sees a stranger² drowning. Despite the misleading impression given by the New Testament's Good Samaritan tale,³ under Jewish law

* Distinguished Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology. B.A., University of Chicago; J.D., LL.M., Harvard Law School; Master in Religious Studies, University of Chicago Divinity School. I would like to thank Steve Heyman and Avi Soifer for their helpful comments on an earlier version of this article, and David Gerber for his encouragement. I also thank Rabbi Jack Engel and Rabbi Mark Gottlieb of Skokie Valley Traditional Synagogue for their assistance. This article was presented at various stages to students at the Dawn Schuman Institute for Adult Jewish Education, to congregants of Skokie Valley Traditional Synagogue on Shavuot, to the University of Chicago Jewish Law Students Association and at the Workshop on Law, Culture and the Humanities.

1. Torts and criminal law teachers often use this hypothetical when they teach affirmative duties. It is also the hypothetical used by Professor James Barr Ames in his classic lecture on law and morals. James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 111-13 (1908). However, it is not new. The same hypothetical is discussed in the Babylonian Talmud at *Sanhedrin* 73a (Harry Freedman trans., Soncino Press 1935) and is the basis for the rules summarized almost 900 years ago in MAIMONIDES, MISHNEH TORAH: TORTS-LAWS OF MURDER AND PRESERVATION OF LIFE ch. 1:14 (Eliyahu Tauger trans. 1997), set out later.

2. As will be seen, that the person in danger is a "stranger" is significant, particularly under American common law.

3. See *Luke* 10:30-35, setting out the parable of the Good Samaritan, where the priest and the Levite saw a man ambushed by robbers, beaten and left for dead. Although any danger to them had apparently passed, the priest and the Levite avoided the man. In contrast, a Samaritan did in fact help him by taking care of his wounds, bringing him to an inn and leaving money with the innkeeper for his further care.

This parable is told by Jesus to a lawyer wishing to know how to gain eternal life. When Jesus refers him to the Jewish legal principle that one must love one's neighbor as oneself (*Deuteronomy* 6:5 and *Leviticus* 19:18), the lawyer asks, "Who is my 'neighbor'?" *Luke* 10:29. After Jesus concludes the parable, he asks the lawyer which of the three—the priest, Levite or Samaritan—was a "neighbor"? *Luke* 10:36. Not surprisingly, the lawyer responds that it was the Samaritan because he showed mercy. See *Luke* 10:37. Jesus then instructs the lawyer to do the same in order to gain eternal life. *Id.*

Several things are worth mentioning. First, the priest and the Levite in the parable clearly violated Jewish law since they were in no danger. Second, it is a Jewish lawyer whom Jesus engages in this dialogue. Third, there is some ambiguity in the parable regarding the attitude of Jesus toward Judaism. On the one hand, because Samaritans were

there is a legal obligation to rescue imposed on the individual⁴ and an affirmative obligation imposed on the community to protect persons against harm from others.⁵ In marked contrast, under American common law as conventionally understood there is no affirmative legal duty to rescue, even if the rescue could be accomplished at little or no risk to the prospective rescuer.⁶ Furthermore, under the United States Constitution there is no affirmative constitutional duty on the part of government to protect persons against harm from others.⁷ What I propose to do in this article is explore these and related duty/no-duty issues under both Jewish and American law, with a decided emphasis on the former.

In Part A, I briefly describe the major characteristics of Jewish law, on the assumption that most readers are unfamiliar with it.⁸ Part B focus on the individual's duty to rescue and, more briefly, on the community's duty to rescue under Jewish law.⁹ Part C deals with the individual's duty to rescue under American common law and the community's duty to rescue under American constitutional law.¹⁰ Finally, after briefly addressing the assumptions of the two legal systems regarding the relationship between the individual and the community, I argue in Part D¹¹ that the Jewish law of rescue cannot be understood in isolation from a seminal meta-narrative of Jewish law.¹² This meta-narrative, set out in the Pentateuch's Book of Exodus,¹³ is the story of God's promise to the Patriarchs to make the Jewish people a great nation in their own land, the subsequent descent of this people into slavery in Egypt, their ultimate redemption by God from slavery and powerlessness, the revelation on Sinai and the covenant between them, and the God who insisted that they never forget their historical

considered both political enemies and theological outcasts by mainstream Judaism, the episode may be interpreted as an attack on mainstream Judaism for its overemphasis on law, as against mercy. On the other hand, Jesus may be insisting on the restoration of mercy as a crucial component of mainstream Judaism.

4. See discussion *infra* notes 32-60 and accompanying text.

5. See discussion *infra* Part B.2. However, the primary focus of this Article, insofar as it deals with Jewish law, is on the individual's duty to rescue.

6. See discussion *infra* notes 63-75 and accompanying text.

7. See *DeShaney v. Winnebago County Dep't of Soc. Services*, 489 U.S. 189 (1989), discussed *infra* notes 76-94 and accompanying text.

8. See discussion *infra* notes 17-31 and accompanying text.

9. See discussion *infra* notes 32-62 and accompanying text.

10. See discussion *infra* notes 63-94 and accompanying text.

11. See discussion *infra* notes 95-127 and accompanying text.

12. While the Exodus meta-narrative of Jewish law is the focus of this Article, I make some observations about American law meta-narratives in the Conclusion. See discussion *infra* notes 128-131 and accompanying text.

13. The Pentateuch, often referred to as the Torah, is the Five Books of Moses: Genesis, Exodus, Leviticus, Numbers, and Deuteronomy. It is the first and most important part of the Hebrew Bible, which also consists of Prophets and Writings. The Hebrew Bible is not the same as the Old Testament in the Christian canon, which, among other things, orders the Prophets and Writings differently.

experience.¹⁴ The meta-narrative,¹⁵ which is intimately related to the concept of *imitateo dei* elaborated in the Book of Leviticus, grounds the legal obligation of the Jewish people, individually and collectively, not only to empathize¹⁶ with those in situations of vulnerability, helplessness, and danger, but to rescue them as well.

A. An Overview of Jewish Law

Jewish law, known as Halakhah,¹⁷ is for the most part¹⁸ based on

14. See *infra* notes 124-127. As instructed by the Pentateuch, this historical experience is narrated annually by the Jewish people at the Passover Seder. It is also referred to repeatedly in daily and Sabbath prayers.

15. See Robert M. Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). See also Samuel J. Levine, *Halacha and Aggadah: Robert Cover's Nomos and Narrative*, 1998 UTAH L. REV. 465 (1998).

16. Empathy means “understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other . . .” Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987).

17. The word Halakhah comes from the Hebrew root halokh, meaning to “go” or to “walk.” Thus, the word Halakhah, which literally means “going,” “walking” or, even better, “the way,” has come to mean the detailed code of norms of the Jewish religion. However, it has been pointed out that the “identification of Judaism with behavioral conformity to the detailed reveals a limited vision of the tradition and of halakhah itself. Halakhah revolves around two poles: the legal, that is, specified and detailed rules of behavior, and the relational, that is, the yearning to give expression to the intimate covenantal relationship between God and Israel. Both these poles have shaped halakhic thought and practice.” David Hartman, *Halakhah*, in CONTEMPORARY JEWISH RELIGIOUS THOUGHT 309, 309-10 (Arthur. A. Cohen & Paul Medes-Flohr eds., 1987).

18. I say “for the most part” because there have been occasions when Rabbis have announced takkanot, or legislative-type decrees, that have the binding effect of Halakhah even though not based on, or reasoned from, the Hebrew Bible or Written Law (“Torah”). “[T]he history of takkanot goes back almost to the beginning of Jewish law . . . [and they] are used either to fill a lacuna in the law that cannot be treated through interpretation or precedents, or to amend an existing law . . . [T]here are many takkanot on issues of property and communal obligations (such as taxation) since the Torah is largely silent about those subjects.” ELLIOTT DORFF & ARTHUR ROSETT, A LIVING TREE 402-03 (1988). See also AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW 112 (N.S. Hecht et al. eds., 1996) [hereinafter HISTORY AND SOURCES OF JEWISH LAW]: “Enactments (takkanot) are the legal source for those laws that the Sages sought to initiate for reasons based on societal conditions. . . . There were cases in which the enactments contradicted the accepted law, even a law grounded in the scriptures themselves . . .”

Complicating matters even more is the Halakhic tradition that an Oral Law was given to Moses at the same time as the Written Law. This Oral Law was thereafter transmitted to subsequent generations, and was ultimately written down as the Talmud. See *id.* at 114-16.

Rabbinic interpretation of the text of the Hebrew Bible; it includes but is not limited to Biblical law.¹⁹ Contrary to popular impression perhaps, Jewish law covers not only religious and family-related topics but encompasses a whole range of civil and criminal matters.²⁰ Moreover, its development did not cease with the Roman defeat of Israel almost two millennia ago but continued (and continues) through the process of Rabbinic interpretation.²¹ Still, since that defeat no centralized decision making authority of Jewish law has existed, despite the recognition of the State of Israel by the United Nations in 1948.²² As a result, authoritative legal decisions have long been made by different Jewish communities around the world through a consensual method in consultation with leading Rabbinic authorities.²³

Jewish law is suffused with religion and does not separate law and morality: legal wrongs are also sins.²⁴ As elaborated by Rabbinic authority, frequently casuistically, Jewish law is considered a continuation of God's revelation on Sinai.²⁵ In part for this reason, the very study of law is a holy act, akin to prayer.²⁶ Various Midrashim even portray God as studying his own Torah²⁷ and occasionally disagreeing with Rabbinic interpretations although ultimately committing himself to the majority rule.²⁸ In a very real sense, the Torah and Rabbinical interpretation constituted, and continue to constitute, the Jewish community through Halakhah.²⁹

19. See HISTORY AND SOURCES OF JEWISH LAW, *supra* note 18, at 114-16.

20. See DORFF & ROSETT, *supra* note 18, at 13 (discussing common misconceptions about Jewish law).

21. See generally HISTORY AND SOURCES OF JEWISH LAW, *supra* note 18, at chs. 7-16.

22. See DORFF & ROSETT, *supra* note 18, at 363-65.

23. *Id.* at 303-37 (dealing with responsa literature).

24. See Moshe Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306 (1961).

25. See *Talmud, Pirkei Abot* [Ethics of the Fathers] 1, Mishneh 1 (Hyman E. Goldin trans. 1962).

26. See *Talmud, Berakoth* 8a.

27. See *Talmud, Abodah Zarah* 3b (portraying God as spending one-quarter of his time studying Jewish law and another quarter teaching school children).

28. See *Talmud, Baba Mezi'a* 59a-59b (tells the justly famous and important story of the disagreement on a ritual matter between Rabbi Eliezer and the Sages). Although Rabbi Eliezer was able to summon miracles in support of his legal position, including a Bat Kol (a heavenly voice), the Sages disregarded these miracles and ruled that because the Torah was not in heaven but rather on earth, the will of the majority governed pursuant to Exodus 23:2 ("One must follow the majority."). Later, Elijah the Prophet met a Rabbi who asked him what God had done when his legal position was repudiated by the Sages. "He laughed with joy . . . and said 'My children have defeated me. My children have defeated me.'" *Id.* at 59b.

29. According to traditional Judaism, the acceptance of the Covenant on Mount Sinai and hence of the Torah's obligations transformed the Jewish people from a group connected primarily by blood into one connected by common religious beliefs and

All of this is, of course, very different from American law. The Constitution is not of divine origin and judicial decisions interpreting it are not divinely inspired and authorized. Also, there is no necessary connection between the Constitution and American law on the one hand and religious or secular morality on the other.³⁰ Further, the Supreme Court is the centralized decision making authority on constitutional interpretation issues, with its decisions being the “supreme law of the land.”³¹

B. Duties Between Individuals and Duties of the Community to the Individual Under Jewish Law

1. Duties Between Individuals

a. The Biblical Source-Text

The textual basis in the Pentateuch of an individual’s duty to rescue is Leviticus 19:16, which declares: “Do not stand by idly when your fellow’s life is at stake, I am the Lord.”³² The Rabbis of the Talmud interpreted this negative command as imposing a duty to rescue the person who is in trouble.³³ A parallel

behavioral norms. These behavioral norms, as elucidated by Rabbinic interpretation, are still considered to be authoritative. *See Talmud, Pirkei Abot* [Ethics of the Fathers] 1, Mishneh 1 (“Moses received the Torah on Sinai, and handed it down to Joshua, and Joshua to the elders, and the elders to the prophets, and the prophets handed it down to the Men of the Great Assembly.”). However, not every segment of the Jewish community would agree with these observations. For example, the Reform Jewish movement does not recognize the authority of Halakhah. *See* Michael A. Meyer, *Reform Judaism, in* CONTEMPORARY JEWISH RELIGIOUS THOUGHT, *supra* note 17, at 769-72. In its view, therefore, Halakhah does not constitute the Jewish Reform community. *See id.*

30. *See, e.g.,* the First Amendment that provides in relevant part that “Congress shall make no law respecting an establishment of religion . . .” U.S. CONST. amend. I. Nevertheless, certain provisions of the Bill of Rights may have moral principles at their core. For example, the Equal Protection Clause of the Fourteenth Amendment appears to embody the morally just principle of treating similarly situated persons in the same way. *See* U.S. CONST. amend. XIV, § 1.

31. *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

32. Author’s translation. *See also* 3 THE JEWISH PUBLICATION SOCIETY TORAH COMMENTARY 129 (1989)[hereinafter JPS TORAH COMMENTARY] (comments that this verse is difficult to interpret “because of the problems in ascertaining the sense of the Hebrew idiom *lo’ ta’ amod’al*, literally “do not stand over, by, near”). It then goes on to offer three possible interpretations, each proposed by various commentators. *See id.* The first is that one ought not to stand by inactively when one’s neighbor’s life is in danger. *See id.* The second is that one ought not to conspire or act against others. *See id.* The third, which it prefers, is that “one ought not to pursue one’s own livelihood in a manner that endangers another or at the expense of another’s well-being.” *Id.*

33. *See Talmud, Sanhedrin* 73a. This obligation applies to men and women alike.

affirmative duty is articulated in the Pentateuch at Deuteronomy 22:1-2 to include the rescue of the fellow's property,³⁴ and at Exodus 23:4-5 to include even the property of one's "enemy."³⁵

b. Maimonides

The great medieval sage Maimonides,³⁶ relying in large part on the Talmud's abbreviated discussion of verse 16 and the duty to rescue,³⁷ sets out the

However, it is not entirely clear whether a Jew has a Halakhic obligation to rescue a non-Jew, although in my view there should be such an obligation. It is true that the Hebrew word for "fellow" or "neighbor," *ray' ah' kha*, has been interpreted as referring to a fellow Jew only. See, e.g., MAIMONIDES, *supra* note 1, at ch. 4:11. "[I]f such a person [a gentile idolator] fell into the sea, one should not rescue him. . . [Verse 16] does not apply with regard to such individuals because they are not 'your brothers.'" Perhaps not surprisingly, this interpretation had special currency at a time when non-Jews were generally perceived as enemies of Jews. In addition, verse 16 is in Leviticus, the Priestly Code where it is the Jewish people who are instructed to be holy, and appears to be directed to them pursuant to the Covenant with God. Nevertheless, Genesis makes clear that every human being is created in God's image. See Walter S. Wurzburger, *Darkei Shalom [The Ways of Peace]*, GESHER 80, 86 (1977-78) (maintaining that "the ways of peace are treated as an ethical religious norm and not merely as a pragmatic device to safeguard Jewish self-interest.").

34. See Deuteronomy 22:1. "If you see your fellow's ox or sheep gone astray, do not ignore it; you must take it back to your fellow. [22:2] If your fellow does not live near you or you do not know who he is, you shall bring it home and it shall remain with you until your fellow claims it; then you shall give it back to him. [22:3] You shall do the same with his ass; you shall do the same with his garment; and so too shall you do with anything that your fellow loses and you find; you must not remain indifferent." 5 JPS TORAH COMMENTARY, *supra* note 32, at 199 (translation). The general obligation to return lost property is *hashavat 'avdedah* in Hebrew. Note that by virtue of verse 22:2, the individual is even required to take care of his neighbor's lost property until the neighbor finds it; there is no presumption of abandonment. See Deuteronomy 22:2.

35. Exodus 23:4. "When you encounter your enemy's ox or ass wandering, you must take it back to him." 2 JPS TORAH COMMENTARY, *supra* note 32, at 142 (translation). "Four different definitions of the 'enemy' in this context are suggested in the Mekhilta: a gentile idolator, a relapsed convert to Judaism, a Jewish apostate and a Jew who exhibits enmity toward another." *Id.* (footnote omitted).

36. Maimonides was born in Cordoba, Spain, in 1135 and died in 1204 in Egypt. He wrote the MISHNEH TORAH [Repetition of the Torah] and the GUIDE FOR THE PERPLEXED, a highly regarded philosophical work, among others. He was also a renowned physician.

37.

Whence do we know that if a man sees his neighbour drowning, mauled by beasts, or attacked by robbers, he is bound to save him? From the verse, 'Thou shalt not stand by the blood of thy neighbor'. But is it derived from this verse? Is it not rather from elsewhere? Viz., Whence do we know [that one must save his neighbour from]

rules of an individual's duty to rescue as follows:

Whenever a person can save another person's life, but he fails to do so, he transgresses a negative commandment, as [Leviticus 19:16] states: "Do not stand [idly by] while your brother's blood [is at stake]."

Similarly, [this commandment applies] when a person sees a colleague drowning at sea or being attacked by robbers or a wild animal, and he can save him himself or can hire others to save him. Similarly, [it applies] when he hears gentiles or *mosrim* conspiring to harm a colleague or planning a snare for him, and he does not inform him and notify him [of the danger].

And it applies when a person knows of a gentile or a man of force who [has a complaint] against a colleague, and he can appease [the aggressor] on behalf of his colleague, but he fails to do so. And similarly, in all analogous instances, a person who [fails to] act transgresses [the commandment]: "Do not stand [idly by] while your brother's blood [is at stake]."³⁸

The first hypotheticals Maimonides uses represent three categories determined by the source of the danger. The first category is persons in danger either innocently or through their own fault,³⁹ the second is persons in danger from others,⁴⁰ and the third is persons in danger from natural forces.⁴¹ In all three categories, each of which involves imminent danger, the individual is under the same obligation to rescue or to hire others to rescue.⁴²

Maimonides goes on to state that the duty to rescue goes beyond imminent danger to include even those situations where the individual becomes aware that others are planning future harm to another.⁴³ Here, the individual must

the loss of himself? From the verse, *And thou shalt restore him to himself!*—From that verse I might think that it is only a *personal* obligation, but that he is not bound to take the trouble of hiring men [if he cannot deliver him himself]: therefore, this verse teaches that he must.

Talmud, Sanhedrin 73a.

- 38. MAIMONIDES, *supra* note 1, at ch. 1:14.
- 39. *See id.* (the drowning person).
- 40. *See id.* (the person attacked by robbers).
- 41. *See id.* (the person attacked by a wild animal).
- 42. *See id.*
- 43. *See id.*

at least notify the other of the danger so that he can take steps to avoid it.⁴⁴ Furthermore, the duty to rescue may not be satisfied with notice alone where the individual can prevent the harm to another by “appeas[ing]” the potential aggressor.⁴⁵ In such cases, the individual must attempt to do so.⁴⁶

Because these rescue rules are primarily set out casuistically, there are a number of questions that Maimonides does not address. Is the duty to rescue limited to situations where the rescuer would be in no danger if a rescue were attempted, or does it extend to those situations in which there is some risk to the rescuer but that risk is less than the risk to the person in danger? What if the rescuer is negligent in the attempted rescue and worsens the other’s situation: is the attempted rescuer liable to the other or to his heirs? These questions were left to subsequent commentators for consideration and resolution who determined that no obligation exists to rescue another at the cost of the rescuer’s life.⁴⁷ There also appears to be no obligation to rescue when that would expose the rescuer to real danger.⁴⁸ However, there are several important caveats, including most importantly, that the risk to the rescuer must be both substantial and not overpredicted.⁴⁹ Also, where the rescuer incurs expenses in the rescue, the rescued person is under a legal obligation to reimburse. Moreover, the would-be rescuer who is negligent is immune from tort liability.⁵⁰

Maimonides makes very clear that this negative commandment of not standing by idly, which the Rabbis converted into an affirmative obligation to rescue, is exceptionally important.

Even though lashes are not given as punishment for the transgression of these prohibitions—because they do not involve [committing] a forbidden deed—they are nevertheless very severe. For whoever causes the loss of a Jewish soul is considered as if he destroyed the entire world, and whoever saves a Jewish soul is considered as if he saved the entire world.⁵¹

44. *See id.*

45. *Id.*

46. *See id.*

47. *See* Aaron Kirschenbaum, *The Bystander’s Duty to Rescue in Jewish Law*, 8 J. RELIGIOUS ETHICS 204, 210-11 (1980) (citing Halakhic authorities). *See also* discussion *infra* Part D 1 (regarding the famous dispute between Rabbi Akiva and Ben Peturah).

48. *See* Kirschenbaum, *supra* note 47.

49. *See id.* at 211.

50. *See id.* at 215-16.

51. MAIMONIDES, *supra* note 1, at ch. 1:16 (translator’s footnote omitted). The omitted footnote, relying on what Maimonides states in *Hilchot Sanhedrin*, explains that “lashes are given as punishment for the violation of a prohibition only when an actual deed is involved.” *See id.*

Under Jewish law an individual's duty to others includes giving charity to the poor and the needy.⁵² This charitable duty extends not only to identifiable persons who need financial and similar assistance, but to the community at large as well.⁵³ While one might have reached a similar conclusion by analogizing from the duty to rescue as derived from verse 16, the Pentateuch instead contains many concrete references to such obligations. For example, leaving grain in the field after the harvest for the benefit of the poor and resident aliens;⁵⁴ leaving land fallow during the seventh year in order that the poor have access to it;⁵⁵ and the remission of debts and slaves during the Jubilee year.⁵⁶ Deuteronomy 15:11 explains: "The poor will always be with you; therefore, I command you: willingly open your hand to your poor and needy brother."⁵⁷ According to Maimonides, charity is the most important positive commandment;⁵⁸ it applies to everyone, including poor people;⁵⁹ and it can be enforced in Rabbinic courts.⁶⁰

The obligations of charity, like the duty to rescue, are ultimately grounded on a meta-narrative of Jewish law. These obligations indicate rather clearly that individuals are not to view themselves as strangers, but rather as close-knit members of a family-like community who are to watch over and take care of one another.

2. Duties of the Community to the Individual Under Jewish Law

Just as the individual has a duty to rescue others in imminent danger, so too does the Jewish community have a duty to rescue persons in imminent danger.⁶¹ Furthermore, just as the individual has charitable obligations to the poor, the Jewish community is under a similar legal obligation to provide for the poor. This communal obligation includes, but is not limited to, money, interest free loans, food, medical care, education, and free burial.⁶² Thus, it is fair to say

52. See David Hartman & Tzvi Marx, *Charity*, in CONTEMPORARY JEWISH RELIGIOUS THOUGHT, *supra* note 17, at 47-54. The Hebrew word for "charity" is *zedakah*. *Zedek*, a closely related word, means "justice." See *id.* at 47.

53. See *id.* at 52.

54. See *Leviticus* 19:9-10.

55. See *Exodus* 23:11.

56. See *Leviticus* 25.

57. *Deuteronomy* 15:11. Compare the different view of poverty espoused by Jesus. See *Matthew* 26:6-9.

58. "[W]e are duty bound to observe the commandment (*mitzvah*) of *zedakah* more than all other positive commandments." Author's Translation of MAIMONIDES, MISHNEH TORAH: MATTENOT ANIYYIM [Donations to the Poor] ch. 10:1.

59. See *id.* at ch. 7:5.

60. See *id.* at ch. 7:3.

61. See 5 ENCYCLOPAEDIA JUDAICA 154-55 (1972) (captives, ransoming) and *Talmud*, *Bava Batra* 8a-8b.

62. See ENCYCLOPAEDIA JUDAICA, *supra* note 61, at 338, 345-48 (charity).

that the obligations between the individual and the community are reciprocal. Under Jewish law, the individual and the community are not strangers: the individual is a member of the community who must not be disavowed or abandoned by the community.

C. Duties Between Individuals and Duties of the Community to the Individual Under American Law

1. Duties Between Individuals

The conventional common law rule is that an individual has no affirmative legal obligation to rescue another, even if doing so would create no danger or inconvenience to the potential rescuer.⁶³ There is neither civil liability nor criminal guilt in such situations.⁶⁴ There are, however, several kinds of cases in which an affirmative duty to rescue may arise. One is when there is a special relationship of some sort between the potential rescuer and the person in danger.⁶⁵ This relationship can arise from contract, statute, or otherwise.⁶⁶ Another arises

63. Thus, in the famous case of *Buch v. Amory Manufacturing Co.*, 44 A. 809, 810 (N.H. 1898), the court declared: "With purely moral obligations the law does not deal. For example, the priest and the Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might, and morally ought to have, prevented or relieved." See also *Donoghue v. Stevenson*, 1932 App. Cas. 562 (appeal taken from Scot.): "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply."

64. However, a handful of states have enacted Good Samaritan legislation imposing an affirmative duty whose breach is punishable criminally. Currently, Vermont, Rhode Island, and Wisconsin have broad duty to aid statutes. See VT. STAT. ANN. tit. 12, § 519 (1973); R.I. GEN. LAWS § 11-56-1 (1994); WIS. STAT. ANN. § 940.34 (West 1996). Minnesota recently repealed such a statute. See MINN. STAT. ANN. § 604.05 (West Supp. 1983), repealed by 1994 Minn. Laws ch. 623, art. 5, 3 (West 1996). In addition, Florida, Massachusetts, Ohio, Rhode Island, and Washington require persons who witness violent crimes to notify the police. See FLA. STAT. ANN. § 794.027 (West 1996); MASS. GEN. LAWS ANN. ch. 268, § 40 (West 1991); OHIO REV. CODE ANN. § 2921.22(A) (West 1994); R.I. GEN. LAWS §§ 11-56-1, 11-37-1 (1994); WASH. REV. CODE ANN. § 9.69.100 (West 1988). The paucity of such legislation demonstrates the continuing power of the common law no-duty rule. See generally David C. Biggs, "The Good Samaritan is Packing": An Overview of the Broadened Duty to Aid Your Fellowman, with the Modern Desire to Possess Concealed Weapons, 22 DAYTON L. REV. 225 (1997); see also John T. Pardun, *Good Samaritan Laws: A Global Perspective*, 20 LOY. L.A. INT'L & COMP. L.J. 591 (1998).

65. See RESTATEMENT (SECOND) OF TORTS § 314A (1965) ("Special Relations Giving Rise to Duty to Aid or Protect"). See also *id.* at § 315 ("General Principle" regarding "Duty to Control Third Persons").

66. See *id.* at §§ 314-15.

when the individual has placed the other person in danger, even if innocently, or has voluntarily undertaken to act for the other person's benefit.⁶⁷ Thus, if the potential rescuer and the drowning person are truly strangers, no duty to rescue arises. However, if the potential rescuer is, say, a lifeguard, or if she accidentally pushes the person into Lake Michigan, then an affirmative duty to rescue exists.

An incredible amount has been written, much of it critical,⁶⁸ some not,⁶⁹ about the no-duty rule, so there is no need to reprise that literature here.⁷⁰ What

67. See *id.* at §§ 323-24.

68. For example, Professor Ames argues that, from a utilitarian perspective, an individual should have a duty to rescue another from death or great bodily harm where this could be done at little or no inconvenience to the rescuer. See Ames, *supra* note 1, at 112-13. In contrast, Professor Weinrib argues that, from a moral perspective, an individual has an affirmative duty to rescue not only in emergency situations but also with respect to poverty and starvation. See Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980). Compare Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472 (1987). Professor Bender criticizes the no-duty rule as "a consequence of a legal system devoid of care and responsiveness to the safety of others." Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 36 (1988). For a discussion of the duty to rescue from a law and economics perspective, see William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978); See also Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879 (1986).

69. For example, Professor Epstein defends the no-duty rule from a libertarian perspective. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973). Among other things, he maintains that when the law gets involved in such decisions, it displaces individual moral judgment. See *id.* Professor Bohlen defends the no-duty rule from an historical perspective. See FRANCIS H. BOHLEN, *The Basis of Affirmative Obligations in the Law of Tort*, in STUDIES IN THE LAW OF TORTS 33, 291-343 (1926). My colleague, Steven Heyman, criticizes these and other defenses of the no-duty rule and instead argues for a general duty to rescue based on (1) the existence of a common law duty of citizens, not as a matter of private law but rather of public law, to prevent felonies and (2) the strong support of this duty in classical liberal tradition under which government is formed to protect citizens against violence. In his view, "the classical liberal tradition provides a rationale for a general duty to rescue." He states:

In other words, although we began with the public duty recognized by the traditional common law, in its fully developed form the duty to rescue is not a purely public one. Instead, it is what I shall call a social duty--an obligation owed not only to the community itself but also to the other members of that community. Such obligations, I shall claim, apply as a matter of private as well as public law, giving rise to tort liability to individuals as well as criminal responsibility to the state.

Steven Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 680 (1994).

70. Much of that literature is collected and discussed in Heyman, *supra* note 69.

does seem clear is that under the common law the person in danger and the potential rescuer are for the most part considered to be autonomous strangers because there is no causal or other pre-existing relationship between them. For the common law to impose a duty to rescue would mean that the coercive power of government would be brought to bear on the potential rescuer to enter into a possibly dangerous or inconvenient relationship without his consent and against his will. Government would, at least for this purpose, be taking control of the potential rescuer's body and forcing it to act in a certain manner. In short, imposing a duty to rescue would directly interfere with the personal autonomy and liberty of the potential rescuer.⁷¹

This common law concern with personal autonomy and liberty parallels the Framers' concerns when they created the American form of government in the U.S. Constitution.⁷² They feared centralized authority, especially a legislature dominated by factions that, if unchecked, could become tyrannical and undermine individual freedom.⁷³ For this and other reasons, the Framers separated the three branches of government and instituted a system of checks and balances.⁷⁴ They also created a federal system in which the states would serve as buffers between the national government and the individual.⁷⁵ The Framers intended that the states would protect individual liberty from federal control. However, a major assumption underlying the Thirteenth, Fourteenth, and Fifteenth Amendments, ratified after the Civil War, is that the states themselves could constitute a danger to individual liberty; as a result, the national government was given power to prevent state deprivations of individual liberty. The task of reconciling these Amendments, particularly the Fourteenth Amendment, with legitimate federalism concerns is a controversial and never-ending process.

2 Duties of the Community to Individuals Under the Constitution

The Bill of Rights has been called a "charter of negative liberties."⁷⁶ The

71. See, e.g., Bender, *supra* note 68, at 33 (the no-duty rule demonstrates "liberalism's concerns for autonomy and liberty").

72. I do not suggest that these concerns are identical. Nor do I wish to conflate private-law and public-law duties. See *DeShaney v. Winnebago County Dep't of Soc. Services*, 489 U.S. 189 (1989).

73. See THE FEDERALIST NO. 10 (James Madison) (how the "republican principle" ameliorates the possibility of the tyranny of factions). The Framers' experience with the British monarchy was a factor as well.

74. See THE FEDERALIST NO. 51 (James Madison) (separation of powers and checks and balances).

75. See *id.* (Under the federal principle, "a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.").

76. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (Posner, R.). The dictum

implications of this dictum are perhaps most readily apparent from the notorious *DeShaney* case.⁷⁷ As is well known by now, the plaintiff infant, Joshua DeShaney, was beaten severely by his natural father upon being returned to his father's custody following an investigation of the father on suspicion of child abuse.⁷⁸ This investigation had been accompanied by the short-term removal of Joshua from his father's custody.⁷⁹ Ruling against Joshua in his section 1983 damages action⁸⁰ against social service officials who allegedly violated his substantive due process rights when they returned him to his father, the Supreme Court held that the Due Process Clause imposed no affirmative obligation on governments to protect their citizens from private harm.⁸¹ The Court emphasized that as a matter of constitutional interpretation the Due Process Clause was directed at abuses of government power, and not at failures to act, holding that "nothing in the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."⁸²

appears in the following:

There is a constitutional right not to be murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law. [citation omitted] But there is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order. Discrimination in providing protection against private violence could of course violate the equal protection clause of the Fourteenth Amendment. But that is not alleged here. All that is alleged is a failure to protect [decedent] and others like her from a dangerous madman, and as the State of Illinois has no federal constitutional duty to provide such protection, its failure to do so is not actionable under section 1983.

See id.

77. *See DeShaney*, 489 U.S. at 189.

78. *See id.* at 191-93.

79. *See id.* at 192.

80. For a comprehensive discussion of 42 U.S.C. § 1983, see SHELDON H. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983* (4th ed. 1997).

81. *See DeShaney v. Winnebago County Dep't of Soc. Services*, 489 U.S. 189, 197, 202 (1989).

82. *Id.* at 195. The Court's decision in *City of Canton v. Harris*, 489 U.S. 378 (1989), is distinguishable. There, the Court held as a matter of § 1983 statutory

The result in *DeShaney*, as distressing as it initially appears, may be defensible.⁸³ Had the Court ruled against the defendants, those similarly situated would face a real dilemma in such cases. If they removed a child on suspicion of child abuse, the parent might sue them for violating the parent's substantive due process rights. Conversely, if they didn't remove the child in such circumstances and the child was injured by his parent, the child might sue them for violating *his* substantive due process rights. More fundamentally, though, the Court was concerned with federalism. An affirmative duty in *DeShaney* might have meant that state and local governments were obligated to provide certain services—welfare and housing, for example—as a matter of substantive constitutional law. This would have undercut the autonomy of state and local governments in connection with their resource allocation decisions: it would also have displaced democratic decision making.⁸⁴

My purpose is not to evaluate *DeShaney* as much as it is to consider its meaning.⁸⁵ After *DeShaney*, the political community, namely, the government, is apparently under no *constitutional* obligation to rescue or otherwise assist its needy and helpless citizens.⁸⁶ After *DeShaney*, the relationship between the political community and the individual is parallel to the relationship at common law between individuals: they are legally strangers to one another, with no duty to rescue. In effect, *DeShaney* reasoned from, and applied, the private-law rule to the public-law setting. This “hands off” approach of *DeShaney* finds its roots in classical liberalism in which individual liberty and personal autonomy are paramount and the best government is that which governs least.

interpretation that a local government can be held liable for failure to train its employees where it acted with deliberate indifference to the rights of its citizens. *See id.* (emphasis added). Unlike in *DeShaney*, the Court here did not deal with constitutional interpretation.

83. *But see* Aviam Soifer, *Essay: Moral Ambition, Formalism, and the “Free World” of DeShaney*, 57 GEO. WASH. L. REV. 1513 (1989), for criticism of *DeShaney* on historical, legal, and moral grounds.

84. The Court observed that the Due Process Clause was “not [intended] as a guarantee of certain minimal levels of safety and security” which is instead left to democratic political processes. *DeShaney*, 489 U.S. at 195.

85. I portray *DeShaney* as representative of the Court’s general no-affirmative duty approach to constitutional interpretation. But constitutional provisions other than substantive due process may be read as imposing certain affirmative obligations on government. An example is the Fourteenth Amendment’s Privileges or Immunities Clause. Another is the Due Process Clause insofar as it mandates procedural due process protections. Nevertheless, the core holding of *DeShaney*—that government has no affirmative federal constitutional obligation to provide food, clothing, shelter or police and fire protection to its citizens—is still the law, even though the circuits continue to struggle with *DeShaney* issues in often tragic circumstances. *See* NAHMOD, *supra* note 80, at § 3:60 (4th ed. and 1999 Update) (collecting cases).

86. Even though they are under no federal constitutional obligation to help the poor, federal, state, and local governments are not prohibited from so doing as, in fact, most have done through welfare legislation.

The classical liberal approach is also apparent in the extent to which the Constitution in general, and the Bill of Rights in particular, imposes few, if any, affirmative obligations on citizens. For example, citizens are under no constitutional obligation to rescue others or to contribute to the community at large by way of charity, although there typically are *statutory* obligations to do so through taxation.⁸⁷ However, these statutory obligations are a matter of democratic choice and can be eliminated by majoritarian means.

In addition, the community's power to generate an individual's loyalty to it and to other citizens is severely limited by certain provisions of the Bill of Rights, which as a "charter of negative liberties,"⁸⁸ creates individual rights against government rather than individual responsibilities to government and to others. In this respect, one of the more significant of these provisions is the First Amendment.⁸⁹ The Religion Clauses prohibit government from using religion to enhance the emotional connection between the individual and the community. The Speech Clause prevents government from instituting a compulsory flag salute in its schools as a means of promoting patriotism.⁹⁰ At the same time it prohibits the government from criminalizing the burning of the American flag in political protest,⁹¹ thus protecting the destruction of a "sacred" political symbol.⁹² Indeed, the Speech Clause permits an individual to lower the moral tone of the community by trafficking (non-obscene) pornography without fear of legal sanction.⁹³

Under American constitutional law, the political community is under no obligation to rescue its citizens from danger, whether caused by others or by circumstances.⁹⁴ Its primary constitutional obligation under the Bill of Rights is to avoid harming its citizens, which effectively means that citizens have negative rights against the government. Citizens are autonomous individuals with whom the government need not, as a constitutional matter, affirmatively enter into a relationship. In a parallel fashion, citizens are under no constitutional obligation to the community to support it financially or to provide for its needy members;

87. As an obvious example, federal income taxes are paid to the national government that then distributes a portion of those taxes to the states, which in turn distribute money to those deemed needy under the criteria of statutory welfare programs.

88. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) ("The Constitution is a charter of negative liberties . . .").

89. "Congress shall make no [L]aw respecting an [E]stablishment of [R]eligion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the [P]eople peaceably to assemble, and to petition the Government for a redress of [G]rievances." U.S. CONST. amend. I.

90. See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

91. See *Texas v. Johnson*, 491 U.S. 397 (1989).

92. See generally Sheldon Nahmod, *The Sacred Flag and the First Amendment*, 66 IND. L.J. 511 (1991).

93. See *Miller v. California*, 413 U.S. 15 (1973); See also *American Booksellers v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

94. But see Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1992).

they are not even obligated to show loyalty to it.

D. The Individual, the Community, and the Exodus Meta-Narrative of Jewish Law

In light of the foregoing, American law and Jewish law view the individual quite differently. Under American law the political community does not constitute the individual: to the contrary, individuals constitute that community pursuant to the social contract. In this community, individuals are relatively autonomous and are strangers unless they agree to deal with one another. Further, the individual's body belongs to her and not to the government, with the result that the government has a heavy burden of justification before it can interfere with an individual's decisions regarding her body.⁹⁵

Like American law, Jewish law also views the individual as relatively autonomous and as a free agent who is responsible civilly and criminally for her own wrongful behavior.⁹⁶ However, Jewish law does not go as far as American law in certain respects. For instance, an individual's body is not solely her own but rather belongs, at least in part, to God; Jewish law thus prohibits self-inflicted physical harm.⁹⁷

American law and Jewish law view the community quite differently as well. Membership in the American political community is, at least theoretically, grounded on consent;⁹⁸ an individual's actual involvement in that community—such as voting, supporting a political candidate, or running for office—is clearly consensual. In contrast, under Jewish law the individual is born into the community as a Jew and is part of the Jewish community regardless of her own

95. See *Cruzan v. Director*, 497 U.S. 261 (1990).

96. The rule of individual legal responsibility applies equally to men and women. However, there are some indications of collective responsibility for certain individual sins. See *Joshua 7* and *2 Samuel 21:1-14*. Compare *Deuteronomy 24:16*, *Jeremiah 31:29-30* and *Ezekiel 18*. See generally Joel S. Kaminsky, *The Sins of the Fathers: A Theological Investigation of the Biblical Tension Between Corporate and Individualized Retribution*, 46 JUDAISM 319 (1997).

97. The Rabbis of the Talmud took language in *Deuteronomy 4:9* and *Deuteronomy 4:15* out of context and interpreted it to impose a legal obligation on the individual to take care of himself. Interestingly, this kind of interpretive move is not unusual: it is based in part on the assumption that texts can, independent of context, be interpreted to support different Halakhic rules and principles. For an extensive discussion of the kinds of risks a Jew should avoid based on these verses from Deuteronomy, see MAIMONIDES, *supra* note 1, at chs. 11-12.

98. The theoretical basis upon which those born into the American political community are deemed to consent to its form of government is beyond the scope of this discussion. See generally Kent Greenawalt, *Promise, Benefit, and Need: Ties that Bind Us to the Law*, 18 GA. L. REV. 727 (1984).

consent.⁹⁹ These comparisons between the American *political* community and the Jewish *religious* community are instructive because, while the Jewish religious community, unlike the American political community, is a *faith* community, it is nevertheless grounded in Halakhic, i.e., legal, norms of behavior. In a very real sense the individual is constituted by the community. Every adult member of that community is legally obligated to observe Jewish law, which includes rescue and charitable responsibilities to other members of the community. Moreover, according to the sage Hillel, one must never separate oneself from the community.¹⁰⁰ Indeed, membership in the Jewish community is considered so important Halakhically that the excommunication of an individual from the Jewish community was (and in some circles still is) the spiritual equivalent of that individual's death.

These different views of the individual and the community under Jewish law and American law help explain why American common law and constitutional law do not impose affirmative duties on individuals and governments to rescue others while Jewish law does. However, there is a deeper explanation of the Jewish legal position: the Exodus meta-narrative of rescue and redemption.¹⁰¹ According to the Pentateuch's Book of Exodus, God inverted the natural hierarchy of master and slave, rescued the Jewish people from Egyptian slavery, redeemed them from a position of utter powerlessness and eventually brought them to the promised land.¹⁰² The Pentateuch records that the Jewish people, in consideration for what God had done for them, covenanted with God at Sinai to observe his Law, to imitate him and thereby to become a holy people.¹⁰³

1. Imitateo Dei

It is important to return to Leviticus 19:16 and to situate it in its

99. One who is born a Jew remains a Jew Halakhically even if he or she renounces Judaism for atheism or another religion with fundamentally inconsistent faith principles and practices. "In Jewish religious law, it is technically impossible for a Jew (born to a Jewish mother or properly converted to Judaism) to change his religion. Even though a Jew undergoes the rites of admission to another religious faith and formally renounces the Jewish religion he remains—as far as the *halakhah* is concerned—a Jew, albeit a sinner." 3 ENCYCLOPAEDIA JUDAICA, *supra* note 61, at 211 (apostasy) (citing *Talmud, Sanhedrin* 44a). In contrast, an American citizen can renounce his or her citizenship. See 8 U.S.C. § 1481 (1999) (setting out the ways in which a United States citizen can voluntarily relinquish his or her nationality).

100. See *Talmud, Pirkei Abot* [Ethics of the Fathers] 2, Mishneh 5. This applies equally to good and bad times. "He who does not join the community in times of danger and trouble will never enjoy the divine blessing." *Talmud, Ta'anith* 11a (translation).

101. See concluding comments *infra* notes 128-131 and accompanying text on meta-narrative and American law.

102. See discussion *infra* notes 124-127 and accompanying text.

103. See *id.*

particular textual context in order to see the connection between the Exodus meta-narrative of Jewish law and the Levitical concept of *imitateo dei*.¹⁰⁴ Chapters 19 and 20 of Leviticus, which bracket 19:16, constitute that portion of the Pentateuch called *K'doshim*, which in Hebrew is the plural of "holy." Specifically, the first two verses of Chapter 19 are as follows: [19:1] "The Lord spoke to Moses, saying: [19:2] Speak to the whole Israelite community and say to them: You shall be holy, for I, the Lord your God, am holy."¹⁰⁵ These verses demand that the Jewish people be holy because their God is holy.¹⁰⁶ The emphasis on holiness and *imitateo dei* is clear not only from the immediately preceding chapter 18, which focuses on the laws of family purity, but also from the remainder of the portion *K'doshim* and from chapter 20. Thus, chapter 19 first speaks of revering one's father and mother and keeping the Sabbath; addresses idol worship; the proper way to make an "offering of well-being" (a sacrifice); leaving a part of one's field for the poor and the stranger; ensuring a fair judicial process; and prohibitions against stealing, swearing falsely, fraud, robbery, insulting the deaf, and dealing "basely" with one another.¹⁰⁷ All of this precedes verse 16, thereby indicating clearly that verse 16 sets out one of the ways of being holy by imitating God. For added emphasis of this point, verse 16 states "Do not stand by idly when your fellow's life is at stake" and ends with "I am the Lord."¹⁰⁸

The connection between verse 16 and holiness is further borne out by the subjects that follow it in chapter 19: prohibitions against silently hating your "brother," taking vengeance and grudge bearing, and the requirement to love your fellow as yourself.¹⁰⁹ These latter three are contained in verse 18, and, in particular, "loving your fellow as yourself" and its proximity to verse 16 are significant in several respects.¹¹⁰ That this part of verse 18 is followed, for emphasis, by "I am the Lord" just as verse 16 is, suggests that rescuing your

104. For a philosophical discussion of *imitateo dei* from a Jewish perspective, see SCHUBERT SPERO, MORALITY, HALAKHA AND THE JEWISH TRADITION 85-91 (1983).

105. 3 JPS TORAH COMMENTARY, *supra* note 32, at 125 (on Leviticus 19).

106. See SPERO, *supra* note 104. There is a slightly different formulation of *imitateo dei* at Deuteronomy 10:12-13, as follows: "And now, O Israel, what does the Lord your God demand of you? Only this: to revere the Lord your God, to walk only in His paths, to love Him, and to serve the Lord your God with all your heart and soul, keeping the Lord's commandments and laws, which I enjoin upon you today, for your good." 5 JPS TORAH COMMENTARY, *supra* note 32, at 107 (on Deuteronomy 10:12-13). A few verses later, the Exodus meta-narrative recurs in connection with helping the defenseless and the alien: "[God] upholds the cause of the fatherless and the widow, and befriends the stranger, providing him with food and clothing—You too must befriend the stranger, for you were strangers in the land of Egypt." 5 JPS TORAH COMMENTARY, *supra* note 32, at 108 (on Deuteronomy 10:18-19) (translation).

107. Author's Translation. See also 3 JPS TORAH COMMENTARY, *supra* note 32, at 125-29 (on Leviticus 19:3-15).

108. *Id.* at 129 (on Leviticus 19:16).

109. *Id.* at 129-30 (on Leviticus 19:17-18).

110. *Id.* at 130 (on Leviticus 19:18).

fellow and loving him as yourself are both essential for being a holy person (and people).¹¹¹

In addition, the proximity of verses 16 and 18 indicates that rescuing another and loving him as yourself are closely related conceptually. Suppose that an attempted rescue would put the rescuer in serious danger of his life. Verse 16 suggests that the rescue proceed nevertheless, while verse 18 suggests that because one need not love one's neighbor *more* than oneself, there is no duty to rescue. As it turns out, the Halakhic rule, based in part on the discussion of a famous Talmudic hypothetical, is that there is no obligation to rescue another where the rescue would cost the life of the rescuer.¹¹²

The hypothetical involves two individuals in the desert with only enough water for one to survive.¹¹³ Does the individual with the water have an obligation to share, with the result that both will certainly die? May he keep the water for himself and survive? What if he wishes to give the water to the other, with the result that he will die but the other will survive? Ben Peturah declared that they should share the water and both die,¹¹⁴ while Rabbi Akiva maintained that the one with the water may drink without sharing so that both do not die.¹¹⁵ Rabbi Akiva, whose approach prevailed, reasoned that there is no obligation to love your neighbor *more* than yourself.¹¹⁶

On the other hand, a person must not sacrifice *another's* life to save his own. The Talmud asks what a person is to do when a tyrant demands that he kill another or be killed himself.¹¹⁷ The Talmud's answer, through Raba,¹¹⁸ is that one must allow oneself to be killed rather than kill another.¹¹⁹ "Let him kill you rather than that you should commit murder; what [reason] do you see [for thinking] that your blood is redder? Perhaps his blood is redder."¹²⁰

111. The great Talmudic sage Hillel put this commandment in negative terms: "What is hateful to you, do not do to your comrade." *Talmud, Shabbat* 31a. Rabbi Akiva, another influential Talmudic sage, characterized this commandment as a "central principle" of the Torah.

112. See generally SPERO, *supra* note 104, at 218-26 (discussing the hypothetical and the "relationship between our duty to ourselves and our duty to others").

113. See *id.*

114. See *id.* at 220 (quoting *Talmud, Baba Mezi'a* 62a).

115. See *id.*

116. See *id.*

117. See *Talmud, Pesahim* 25b.

118. Raba was a prominent Talmudic sage who lived in Babylonia in the first part of the Fourth Century C.E. See HISTORY AND SOURCES OF JEWISH LAW, *supra* note 18, at 183.

119. See *Talmud, Pesahim* 25b.

120. These Talmudic discussions are part of a broader inquiry into the circumstances in which an individual may violate Halakhah in order to save a life. Interpreting Leviticus 18:5, which asserts that a person who observes the Torah "shall live in them" (*v'khai bah-hem*) (Author's Translation), the Rabbis, emphasizing the priority and sanctity of life, ruled that there are only three circumstances in which a person is obligated

In addition to verse 18, other verses following verse 16 describe further ways of promoting holiness. Of particular interest in chapter 19 are verses 33 and 34, which deal with the proper treatment of the *ger*, meaning a resident alien, but often translated as “stranger.” The Pentateuch not only insists that the resident alien be treated as a citizen and that he be loved as “yourself,” but it ties this commandment to the prior status of the Jewish people as “strangers” in Egypt.¹²¹ Further, verse 33 emphasizes the importance of this commandment, just as the Pentateuch does for the duty to rescue and the obligation to love one’s fellow as oneself, when it declares: “I the Lord am your God.”¹²² Finally, chapter 20 continues the theme of sexual immorality and family purity (first discussed in chapter 18) and just before the chapter concludes verse 26 restates the theme of holiness: “You shall be holy to Me, for I the Lord am holy, and I have set you apart from other peoples to be Mine.”¹²³

In short, the connection between the duty to rescue and holiness is emphasized by verse 16’s being imbedded in the Pentateuch portion *K’doshim* whose overall theme is holiness, and that it is immediately adjacent to other verses dealing with the behavioral norms required for being holy. Thus, when read in context, verse 16 is intended to promote the holiness of the Jewish people, both individually and collectively, through *imitateo dei*.

2. The Exodus Meta-Narrative of Rescue and Redemption

Leviticus announces certain Halakhic rules and principles designed to make the Jewish people holy as God is holy. The Jewish people are repeatedly enjoined “never to forget” the historical experience of slavery and the Exodus.¹²⁴

to sacrifice his life when threatened by tyrants. One, mentioned above, is murdering another. The other two Halakhic violations which one must avoid even at the cost of one’s life are incest and idolatry. See *Talmud*, *Yoma* 85b, *Sanhedrin* 74a. See generally Louis Jacobs, *Greater Love Hath No Man . . . The Jewish Point of View of Self-Sacrifice*, reprinted in MENACHEM KELLNER, *CONTEMPORARY JEWISH ETHICS* 181 (1978).

121. 3 JPS TORAH COMMENTARY, *supra* note 32, at 134 (on Leviticus 19:33). “When a stranger resides with you in your land, you shall not wrong him. [19:34] The stranger who resides with you shall be to you as one of your citizens; you shall love him as yourself, for you were strangers in the land of Egypt: I the Lord am your God.” See *id.* This is another example of an Halakhic obligation grounded in the Exodus meta-narrative.

122. 3 JPS TORAH COMMENTARY, *supra* note 32, at 134 (on Leviticus 19:33).

123. 3 JPS TORAH COMMENTARY, *supra* note 32, at 140 (on Leviticus 20:26) (translation). Significantly, chapter 21, which begins a new portion of the Torah called *Emor*, deals with laws governing the priesthood, thereby continuing the theme of holiness, but this time addressed not to the people as a whole but to the priesthood in particular. See *id.* at 142-46.

124. “In Judaism, memory is a collective mandate, both in terms of what is recalled and how it is recalled. From the Deuteronomic injunctions to ‘remember the days of old’ (32:7) and to ‘remember what Amalek did to you’ (25:7), to the persistent theme of

This injunction regularly appears in connection with laws dealing with the poor and the needy, debtor-creditor relations, and slavery. When read together with the frequent instruction to be holy and thereby to imitate God, this injunction grounds the legal obligation of the Jewish people, individually and collectively, not only to empathize with those in vulnerable and helpless situations, but to rescue them as well.¹²⁵

There are two aspects of this Exodus meta-narrative of rescue and redemption: the first is empathic and the second is contractual. The empathic, related to *imitateo dei*, reminds the Jewish people that God rescued them when no one else cared, when they were totally unable to help themselves, and when they were without hope. Indeed, as slaves they were at the very bottom of the political/social/economic hierarchy; it was then that they cried out to God and God saw their misery, and thereafter sent Moses to them.¹²⁶ Thus, the Jewish people are told to imitate God and become holy by empathizing with, and then rescuing, those in danger and helpless. The source of the danger doesn't matter: it can be the result of the endangered person's own fault in placing himself in a position of danger (as, perhaps, in the drowning hypothetical) or the result of simply finding himself in such a position through no fault of his own (as in the wild beasts or attacking robbers hypotheticals).

The second and contractual aspect of this meta-narrative instructs the Jewish people that their history as a people began in slavery and that, in consideration for their subsequent rescue and redemption from slavery, they entered into a covenant with God to observe his commandments, including the duty to rescue others in dangerous situations. They have an obligation to each other even where it might be risky for them to intervene on another's behalf and thus against their own self-interest to do so.¹²⁷ In addition, their prior status as

remembering 'that you were slaves in Egypt,' the content of Jewish memory has been the collective saga as first recorded in Scripture and as later recalled in collective, ritual settings." David G. Roskies, *Memory*, in CONTEMPORARY JEWISH RELIGIOUS THOUGHT, *supra* note 17, at 581.

125. It is worth noting that the Pentateuch contains a prior universalist meta-narrative that describes the creation of the world, the creation of humanity in the image of God, the destruction of the world through the flood because of the absence of law and its rebirth in Noah through God's covenant with him never again to destroy it. The Noachide covenant incorporates seven laws that are obligatory on every human being. These laws prohibit idol worship, the abuse of God's name, murder, adultery, theft and cruelty to animals. They also require the establishment of, and obedience to, courts of law. This meta-narrative thereby establishes the important principle that all law is God-given and has to be obeyed because of man's brutish nature.

126. See *Exodus* 2, 3.

127. Acting against one's self-interest in the rescue situation is comparable to the various Halakhic economic obligations of the rich to the poor which also run counter to the economic interest of the rich. For example, a creditor must return a debtor's pawned clothing to him overnight; a creditor must discharge a debtor's debt at Jubilee; land must be redistributed at Jubilee; a slave must be discharged after six years and at Jubilee. The

slaves in Egypt provides the opportunity for the Pentateuch to declare that, by virtue of the covenant, the Jewish people are now and forever God's "servants," having entered into a continuing relationship with him. In a very real sense, the meta-narrative grounds the Jewish people's duty to rescue one another in their debt to God.

II. CONCLUSION

My focus in this article is on the duty to rescue under Jewish law and its underlying Exodus meta-narrative of rescue and redemption. I used the American common law's no-duty rule and *DeShaney's* constitutional no-duty rule primarily as foils. Still, one possible American meta-narrative should be mentioned that may explain the no-duty approach. The meta-narrative of liberty and individual autonomy, coupled with suspicion of centralized government, might be derived both from sacred American texts such as the Declaration of Independence, the Constitution, and the Bill of Rights; and from important historical experiences like the Revolutionary War, the War of 1812, and perhaps the First World War, and, especially, the Second World War. The common law rule rejecting a duty to rescue,¹²⁸ together with *DeShaney*,¹²⁹ could be seen both as reflecting and promoting such a meta-narrative.¹³⁰

However, my purpose in this Article is not to explicate a meta-narrative of American law. Nor is it my purpose to argue that the Halakhic duty to rescue rule is preferable to the common law no-duty rule.¹³¹ Rather, my purpose is to

Jubilee rules in particular are designed to level the playing field and to ameliorate the inevitable economic inequalities in society. *See Leviticus 25.*

Along similar lines, it is significant that, shortly after the Ten Commandments are announced in Exodus, the Covenant Code sets out various rules governing slavery. Time and again, as mentioned in the text, the Jewish people are constrained to remember that they were once slaves in the land of Egypt. *See, e.g., Exodus 20:2, 22:21, and 23:9; Leviticus 19:34, 25:42, 25:55, 26:13, and 26:45; Deuteronomy 5:6, 5:15, 6:21-23, 7:8, and 8:14.*

128. *See supra* notes 63-75 and accompanying text.

129. *See supra* notes 76-94 and accompanying text.

130. It is not easy to ascertain the meta-narratives of a large, complex and evolving society like the United States. For example, a quite different meta-narrative from that mentioned in the text, in which equality and the need for centralized government would be vital, might be based on the history of American slavery, the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments, and subsequent race relations, including Jim Crow laws and the civil rights movement of the 1950's and 1960's. This kind of meta-narrative would have different implications for the duty to rescue. All that I am comfortable stating is that the meta-narratives of American law are being contested vigorously.

131. Because of the fundamentally religious nature of Jewish law, there are limits to the extent to which it is appropriate to apply Halakhic principles to American law, or even to reason by analogy from such principles to American law. *See* Suzanne Last Stone, *In*

demonstrate that the Halakhic rule is deeply imbedded in the Exodus meta-narrative of slavery and utter hopelessness in Egypt, followed by rescue and redemption by God, revelation on Sinai, and a perpetual covenant of holiness between the rescuer and the rescued. The importance of this meta-narrative of rescue and redemption is made clear by the Pentateuch's frequent reminders to the Jewish people of what God has done for them, often in connection with the promulgation of legal rules regarding the poor and the needy, and by the Pentateuch's insistence that they remember and ritually reenact it.

This meta-narrative of slavery, rescue, and redemption is based primarily on the text of the Book of Exodus, and hence on a story that is over three thousand years old. Still, the story is very much alive: it is recalled in daily prayer, in various rituals, and when the Pentateuch is read in the synagogue; and it is also reenacted at least yearly by Jewish families at the Passover Seder. To the extent that this Exodus meta-narrative remains both current and relevant, so too does the Halakhic duty to rescue.

Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary Legal Theory, 106 HARV. L. REV. 813 (1993).

