The Bystander's Duty to Rescue in Jewish Law*

Aaron Kirschenbaum, J.D.

Abstract

In Judaism, the bystander's duty to come to the rescue of his fellow man who is in peril is religious, ethical and legal. A citizen is expected to engage in the act of rescue both personally and with his financial resources. He is required, however, neither to give his life nor to place his life in substantial jeopardy to save his fellow. Moreover, there is no ethical requirement to donate an organ in behalf of another; nevertheless, such an act is today regarded as of special nobility and piety. Although failure to come to one's neighbor's rescue incurs no criminal sanction, the legal nature of the duty is evidenced by (1) the right of the rescuer to sue for all financial losses incurred as a result of the rescue operation, (2) the rescuer's immunity to liability, and (3) the exemption he enjoys from all positive legal, civil, and ritual duties while he is actively engaged in the rescue operation.

In the early hours of the morning of March 14, 1964, a young woman named Kitty Genovese was attacked on her way home in Queens, New York. The unknown assailant made several separate attacks on her over a period of about forty minutes, and she finally died of the stabs he had inflicted on her. As the police subsequently ascertained, at least thirty-eight neighbors had heard her screams for help, some may have also seen her struggle, yet no one intervened – not even to call the police.

This example of neighborly inaction generated widespread discussion and analysis. Newspaper reporters made special reports of the incident. The University of Chicago Law School sponsored a "Conference on the Good Samaritan and the Bad – the Law and Morality of Volunteering in Situations of Peril, or of Failing to Do So." The American Psychological Association (in 1966) held a

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special session devoted to the problems of the "unconcerned bystander." Numerous studies, papers and articles were written with the Kitty Genovese incident as their point of departure.

Social scientists and legal scholars, philosophers and moralists have shown widespread interest and concern in learning how people really behave in situations which thrust them into the potential role of one's brother's keeper – and why. Much time and effort have been invested in discovering how society, by the values it fosters and the code of behavior it sponsors, affects that behavior – allowing for indifference and actually cultivating a desire not to get involved, or, on the contrary, encouraging active intervention to assist a fellow human being in peril and thus transforming the unconcerned bystander into a Good Samaritan.

With these questions in mind, we turn to the Jewish legal system to learn how historic Judaism coped with these problems.

I. Biblical Exegesis

The Talmudic ethico-legal duties of the innocent bystander, i.e., one who happens to find himself in the presence[1] of a person in peril – in danger of being victimized by a crime or in distress caused by some natural threat or catastrophe – are summarized by Maimonides (1135-1204) in his *Code* as follows:

> If one person is able to save another and does not save him, he transgresses the commandment *neither shalt thou stand idly by the blood of thy neighbor* (Leviticus 19:16). Similarly, if one person sees another drowning in the sea, or being attacked by bandits, or being attacked by wild animals, and, although able to rescue him either alone or by hiring others, does not rescue him; or if one hears heathens or informers plotting evil against another or laying a trap for him and does not call it to the other's attention and let him know; or if one knows that a heathen or a violent person is going to attack another and although able to appease him on behalf of the other and make him change his mind, he does not do so; or if one acts in any similar way – he transgresses in each case the injunction, *neither shalt thou stand idly by the blood of thy neighbor...* (*ibid.*)

1. "Presence" in all its possible meanings: physical proximity or various degrees of knowledge and awareness with the concomitant ability to rescue the victim or to ward off the danger.

> Although there is no flogging for these prohibitions, because their breach involves no action, the offense is most serious, for if one destroys the life of a single Israelite, it is regarded as though he destroyed the whole world, and if one preserves the life of a single Israelite, it is regarded as though he preserved the whole world. (Maimonides, *Torts*, "Murder and Preservation of Life" 1:14, 16).

The scriptural words upon which Jewish law bases the obligation to come to the assistance of one in peril, *lo ta'amod 'al dam re'eka*, are found in the following context:

> Ye shall do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor favor the person of the mighty; but in righteousness shalt thou judge thy neighbor. Thou shalt not go up and down as a talebearer among thy people; neither shalt thou stand idly by the blood of thy neighbor: I am the Lord (Leviticus 19:15-16).

The Jewish interpretation, found in the *Talmud (Babylonian Talmud Sanhedrin* 73a), is the unique contribution of rabbinic teaching to the exegesis of the Leviticus passage. Although its literary formulation emanates no later than from the third century C.E., thereby antedating Maimonides by at least nine hundred years, the early Talmudic masters (*Tannaim*) who transmitted it regarded it as hoary tradition. It is thus from time immemorial that the verse, *lo ta'amod 'al dam re'eka*, has served as the traditional Jewish version of what modern lawyers refer to as "the law of the Good Samaritan."

As if to fortify the Good Samaritan principle, the Tannaim went further and enlisted the law of lost articles, as follows:

> Whence do we know [that one must save his neighbor from] the loss of himself? From the verse (Deuteronomy 22:2) *and thou shalt restore it to him* (*Sanhedrin* 73a).[2]

Examining both tannaitic statements, this one and the one cited by Maimonides above, later scholars attempted to formulate the particular contribution of each one. Thus the later rabbis in the Talmud itself raise the question of the apparent superfluity of the two verses teaching the same duty to rescue. They come to the

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2. Because they viewed the suffix *it* as superfluous, the Tannaim interpreted it as meaning *him*, and therefore understood the verse as commanding, *and thou shalt restore him* [a person who is losing his life] *to himself*.

conclusion that the verse, *thou shalt not stand idly by*, broadens the duty from the person to the purse, i.e., it obligates the bystander to go to extraordinary lengths to save the victim – even to the extent of actually hiring help – whereas the duty to rescue derived from the law of lost articles would have been limited to one's personal ability – no more (*Sanhedrin* 73a). Early medieval scholars raise the converse question: If *thou shalt not stand idly by* is all encompassing, what need did the Tannaim have to derive anything from *thou shalt restore it to him*? Their answer: The latter verse includes the duty to come to the assistance of one who is in distress but not in any peril, e.g., one who is lost in a forest but would eventually be able to find his way out.

Other medieval scholars add that the duty of rescue is not limited to circumstances creating a clear and present danger; even if the peril is somewhat obscure and doubtful, the duty to enter into a rescue operation is not thereby diminished. Whether the duty exists vis-a-vis a person attempting suicide or one whose negligence created the peril is a matter of dispute among the rabbinic authorities of the past four centuries (Kirschenbaum, 1976:14).

II. The Legal Nature of the Obligation to Rescue

In the second paragraph of the Maimonidean passage quoted at the beginning of the previous section, it is stated that the innocent bystander who deliberately fails to come to the aid of one in peril is not subject to legal punishment.

Why is this so?

Does this indicate the halacha (Jewish law) regards the duty of the Good Samaritan as simply a moral one?

Classical Jewish law, i.e., the authoritative Talmudic exposition of the formal law of Sacred Scripture, prescribes flogging for the breach of any negative commandment whose punishment is not otherwise specified. The infliction of stripes, however, is limited to those prohibitions whose violation involves an overt act; prohibitions whose violation comes about through covert inaction do not entail flagellation, certainly not the death penalty.

This limitation, however, is more of an indication of classical Jewish penological theory than it is of the nature of the prohibitions which are thereby excluded. Earthly punishment, in Jewish theory, is aimed at the active, flagrant violation of the law; it is not employed to induce general obedience to the law nor to force citizens to do their duty.

Hence in the context of Jewish legal teaching, the Maimonidean comment, already quoted:

> Although there is no flogging for these prohibitions [of standing idly by the blood of one's neighbor], because breach of them involves no action, the offense is most serious, for if one destroys the life of a single Israelite, it is regarded as though he destroyed the whole world, and if one preserves the life of a single Israelite, it is regarded as though he preserved the whole world (Maimonides, 1949:1:14-16).[3]

Is no mere pious mouthing but an ethical imperative of the first magnitude.

It is a fact of history that in Jewish society – biblical, Talmudic and medieval – non-prosecutable injunctions, by their sheer religious weight, were effective in their deterrent power.

It would be misleading, therefore, to interpret the lack of judicial punishment in Jewish law for the innocent bystander who fails in his duty to come to the rescue of his fellow man in distress as indicating that the duty is merely moral. Rather Jewish law views such failure as nonfeasance, a formal offense of inaction (*delictum mere omissivum*) where action is a duty required by law.

III. The Extent of the Obligation to Rescue

A. In Monetary Terms

We have already seen that, according to the Talmud, had the duty of the bystander to come to the rescue of his fellow man in peril been derived as an extension of the law regarding the restoration of lost property, it would have been limited to the personal ability of the rescuer. *Thou shalt not stand idly by*, however, implies an allencompassing duty – including one's financial resources as well.

But this obligation does not represent a lien on the property of the bystander; the duty remains a personal one. Thus, although one's financial resources must be utilized *without apparent limit*[4] in order to save the victim, the rescuer has the right to sue the rescued

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3. Numerous mss. and early editions do not have the word "Israelite." On the history and significance of these variants see Urbach (1971:268-284).

4. "*Thou shalt not stand idly by* means that thou shalt not hinder thyself. Rather *go to any extent necessary* in order to save the life of the fellow" (italics provided for the translation of *hazor 'al kol ha-zedadim*) (Rashi, *Sanhedrin* 73a).

party in order to recover the money expended (Rabbi Meir Halevi Abulafia, *Yad Ramah*, *Sanhedrin* 73a). This holds true even if the victim protests, wishes not to be rescued, and later refuses to compensate the rescuer.[5] On the other hand, even if the latter is destitute and may subsequently plead bankruptcy, the duty of the rescuer remains unchanged (Rabbi Asher ben Yehiel, died 1327, *Sanhedrin* 8:2).

The rescuer's right to compensation for expenditures and losses incurred are alluded to rather briefly and superficially in the sources. It seems to me that rabbinic authors found it unnecessary to go into detail because the Talmudic references to the law of lost objects as being relevant to the duty to rescue people in peril meant to them that the rules of compensation which obtain in restoring lost objects to their owners – which are spelled out in great detail in the Talmud, commentaries and codes – could be applied, where necessary and appropriate, to cases involving the saving of life – with proper provision being made occasionally for the special significance of the latter.

An examination of the rules of compensation for the restoration of lost property yields the following conclusions:

1. The actual act of rescue, being the fulfillment of a religious duty (mitzvah), warrants no monetary compensation (*Tosafot*, s.v. *im*, *Bava Mezia* 31b).
2. If the actual act of rescue takes places during working hours and, therefore, requires the sacrifice of the rescuer's pursuit of a livelihood, he is entitled to a minimal wage.[6] If this is unsatisfactory to him, he must receive court permission for full compensation for the loss involved in leaving work. If the court is not in session, the law of lost objects declares that his own economic interests take priority over the economic interests of his fellow (Mishna *Bava Mezia* 2:9). This declaration is obviously inappro-

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5. Rabbi Meir ben Barukh, died 1293 (*Responsa Maharam Rothenberg*, IV:39) referring specifically to a captive who is redeemed and then obligated to compensate his rescuers for their expenditures on the ransom. The principle is then extended to all who must be rescued under the scriptural law of *thou shalt not stand idly by*, including a patient who refuses treatment; the physician is obligated to treat him and may subsequently receive his fee (determined by the courts or by the current rates) despite the protestations of the patient; Rabbi J. Engel, died 1920 (*Gilyonei Hashas*, *Sanhedrin* 73a).

6. *Kefoel batel*, "as an unemployed laborer," the definition of which is the subject of extended discussion; for a digest of the opinions involved in this definition, see *Talmudic Encyclopedia* (Hebrew), XI, "*Hashavaht Avedah*," pp. 82-84.

priate in the case of the peril of one in distress; it seems clear that in the latter case full compensation for the labor of the rescuer would be the rule.[7]

3. Expenditures made legitimately by the rescuer would also be recoverable in full (Maimonides Torts, "Robbery and Lost Objects," 13:19; *Tur* and *Shulhan Arukh Hoshen Mishpat* 267:26).
4. The cost of damages and disabilities incurred by the rescuer in the course of the rescue operation, however, could *not* be recovered by the rescuer. The Jewish law of tort obligates the tortfeasor, and the tortfeasor only, for damages incurred; no one else – not even the one as interested as the rescued party himself – is so obligated.[8]

Although the above is but a broad outline, it suffices to give us a general view of how Jewish law copes with the problems of losses incurred by the Good Samaritan.

The personal nature of the duty that one has to rescue has led at least one later medieval authority to limit the rescuer's right to recover the losses he incurred in the course of his rescue operation in a number of ways.

1. The rescued party must, it is true, compensate his rescuer for his losses. But if the former is bankrupt, he need not make said compensation, *even if he subsequently comes into fortune* (Mishna *Peah* 5:4 and *Tur, Yoreh De'ah* 253[4]).
2. The rescuer's right to be compensated for his losses exists *only if the rescue operation is successful*! If he failed in his attempt, his right for compensation is, at most, that of a minimum wage for labor expended.[9]
3. The obligation to compensate the rescuer for his losses *devolves upon the rescued party himself and upon no one else, not even his close relatives* (Rabbi Asher ben Yehiel, *Sanhedrin* 8:2).

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7. Full compensation for losses sustained by the rescuer in the absence of court permission or in the absence of explicit warranty by the rescued party when circumstances of speed and anxiety preclude the possibility of making such warranty is also evident from *Rosh* (*Bava Mezia* 2:28).
8. The *obligatio* of the rescued party to reimburse his rescuer for his labor and expenditures, as that of an owner of a lost object to reimburse the one who found and returned it to him, is, in all probability, that of an implied contract of labor. (See further *Bava Mezia* 101a and Maimonides *Torts* ["Robbery and Lost Objects" 10:4] for the rabbinic analogue to *negotiorum gestio*.) Such contracts in Jewish law do not cover disabilities of the laborer incurred in the course of his employment.
9. This ruling is derived a fortiori from the case of an unsuccessful attempt to salvage someone's property (see *Bava Kama* 116a [bot.]).

It is relevant to note that these three limiting rulings were not regarded as discouraging bystanders to do their duty. On the contrary, the very reasoning behind them is:

> ...For the reason [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 [i.e.,] 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 (Rabbi Samuel ben Moses de Medina of Salonica, died 1589, *Responsa Rashdam*, *Yoreh De'ah* Resp. 204).

B. At the Cost of the Rescuer's Life

Much more complicated is the question to what extent the bystander is duty-bound to come to the rescue of one in peril when such action would endanger his own life. Is selfsacrifice a legal duty? Jewish law answers in the negative, but a word of explanation is called for. The explanation concerns itself with two tannaitic passages. On the one hand, one may not commit murder to save one's own life.

> Rabbi Johanan said in the name of Rabbi Simon ben Jehozadak: By a majority vote it was resolved in the upper chambers of the house of Nithza in Lydda that in every [other] law of the Torah, if a man is commanded "Transgress and suffer not death," he may transgress and not suffer death, excepting idolatry, incest [which includes adultery] and murder (*Sanhedrin* 74a).

It is generally agreed that this conference at Lydda took place during and in the face of the Hadrianic persecutions which posed a most serious threat to Jewish religious life in Palestine ca. 135 C.E. (Graetz, 1908:154-156, 428-430; Halevy, 1918:371-372).

On the other hand, one need not sacrifice one's own life to save someone else's.

> If two are traveling on a journey and one has a pitcher of water – if both drink they will die, but if only one drinks, he can reach civilization.
>
> The Son of Patura taught: It is better that both should drink and die rather than that one should behold his

companion's death.

> Until Rabbi Akiba came and taught: *That thy brother may live with thee* (Leviticus 25:36) – thy life takes precedence over his life (*Bava Mezia* 62a).

Not much is known about (Judah?) the Son of Patura. He probably lived about the end of the first century or the beginning of the second century C.E. Rabbi Akiba himself died during the Hadrianic persecutions. Thus, the two tannaitic teachings, that of the conference at Lydda and the one emanating from the controversy between the Son of Patura and Rabbi Akiba, are more or less contemporaneous.

In order to understand the reasoning behind these two statements, we cite the following passage regarding the refusal of the rabbis to allow one to commit murder in order to save his own life.

> And how do we know that this principle applies in the case of murder, i.e., that murder may not be committed to save one's life?
>
> It is common sense.[10] Even as one who came to Rava and said to him, "The governor of my town has ordered me, 'Go and kill so-and-so; if not I will slay thee.'"
>
> Rava answered, "Let him rather slay you than that you should commit murder. What makes you think that your blood is redder than his? Perhaps his blood is redder than yours." (*Talmud Yoma* 82b; *Sanhedrin* 74a).

The apparent contradiction in the two passages produces the principle that, all things being equal, one may not decide – *by affirmative action* – whether one's life takes precedence over that of one's neighbor: In the first passage, affirmative action would have been tantamount to declaring that his companion's blood was redder than his own – a declaration which Jewish ethics is not prepared to endorse. There are situations in life where inaction is the lesser of two evils (Kirschenbaum, 1976:27).

Our exposition heretofore has been devoted to a situation where the Good Samaritan can save his fellow man only at the price of his own life. Under such circumstances rabbinic law exempts the citizen from the duty of selfsacrifice and absolves him from any

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10. Heb., *sevara*, the legal-human logic of the ethicoreligious authorities.

moral blame.[11,12]

C. At the Risk of the Rescuer's Life

Is one obligated to come to the rescue of his neighbor in distress if the rescue operation *may* involve a risk to one's life and to one's well being?[13] How serious must the risk be in order to qualify it under the exemption of self-sacrifice? Or, at what point does the danger to the life or the well-being of the bystander become so remote as to be inconsequential in the face of one's duty to save someone in peril?

This question as to whether the Good Samaritan need put his own life in *possible* danger to save his fellow from *certain* death is the subject of sustained controversy among rabbinic authorities. Summarized briefly, *rabbinic law today declares officially that there is no such duty*, but qualifies this declaration in a number of ways: (1) it exhorts the citizen, "One must not overly protect oneself"; (2) it urges each case to be judged on its own merits, "It seems that everything depends upon the individual circumstances"; (3) the volunteer who does endanger his life and limb is extolled as acting above and beyond the call of duty and as performing a saintly act (*middat hasidut*); (4) the degree of jeopardy which legally exempts

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11. In other words, the whole purpose of the obligation, *thou shalt not stand idly by*, is the preservation of life. If its fulfillment can be accomplished only at the sacrifice of life (of the would-be rescuer), then its purpose has been undermined and frustrated. Under such circumstances the obligation falls away.
12. What is the status of the citizen who, above and beyond the call of duty as defined by rabbinic law, elects to give his life to save another's? The question arose in Jewish history with regard to martyrdom for any reason other than those prescribed by religious law, namely the avoidance of idolatry, or incest and adultery, or of murder. Maimonides (*Knowledge*, "Fundamentals of the Law," 5:4) considered such self-sacrifice as sinful; the *Tosafot* (*Avodah Zarah* 27b, s.v. *yakhol*, at end) regarded it as meritorious. "The Ashkenazi Talmudists were instinctual rather than rationalistic in their attitude to martyrdom – an attitude characteristic of most medieval German Jewry. The Tosafists reacted negatively to the problem as it is viewed in the halacha. They recoiled – 'Heaven forbid!' – from such formal halachic reasoning that does require martyrdom of a person forced to worship an idol in private, and they demanded obligatory *Kiddush Ha-Shem* (*Tosafot Avodah Zarah* 54a)" (Lamm, 1972; cf. Jacobs, 1957).
13. Regarding the hero of the New Testament story (Luke 10:30-37), it has been aptly pointed out "that the original Good Samaritan extolled by St. Luke was fortunate in not arriving on the scene until after the thieves had set upon the traveler, robbed him and beaten him half to death. The Samaritan cared for him and showed him great kindness, but he did not put himself in any peril by doing so. Perhaps this is about as much as can be reasonably asked of the ordinary mortal man" (Barth, 1966:163).

the bystander from his duty must be a most substantial one, great enough to deter him from saving his most precious possessions had they been in similar circumstances; and (5) exceptionally, the medical practitioner is expected to treat patients even under circumstances which represent serious danger to his own life.

D. At the Cost of the Rescuer's (Non-Vital) Limb

> If a tyrant says to a Jew, "Allow me to amputate one of your limbs" (an amputation which represents no danger to life), "or else I will kill your fellow Jew," some [authorities] say that he is obligated to allow his limb to be amputated since he would not die (Rabbi Menahem Recanati, died early 14th century, *Sefer Recanati* 470).

This rather startling decision, which makes contributions of organs for transplanting obligatory under Jewish religious and ethical law, is the product of an Italian legalist and mystic of the late thirteenth and early fourteenth centuries. The startling nature of the decision is also evident from the fact that about 250 years later it is quoted verbatim and sent to *Radbaz* (Rabbi David ben Zimra, died 1573, one of the leading rabbinic authorities of his day) with a request for his reaction.

Refuting the prooftext offered by his Italian predecessor, Rabbi ben Zimra maintained that no precedent could be cited for such an obligation. Indeed, there was always the possibility that an operation of this sort might prove to be dangerous to the life of the individual. And he concluded:

> Moreover, it is written, *And her* [i.e., the Torah's] *ways are ways of pleasantness* (Proverbs 3:17); the laws of our Torah, therefore, must be in consonance with reason and intelligence. How can one imagine that a person would allow his eye to be blinded or his hand or foot to be cut off so that his fellow not die?
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> I, therefore, see no justification for his decision. It is an act of saintliness (*middat hasidut*) [i.e., above and beyond the legal requirement], and happy is the man who can live up to it.
>
> If, however, there is a possible risk of life, then [one who agrees to the amputation] is a foolish saint (*hasid*

> *shoteh*),[14] for the *possible* danger to oneself takes precedence over the *certain* danger to one's fellow.
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> I have written what appears in my humble opinion [to be the correct understanding of the law] (*Responsa Radbaz* III, 1053 [628]).

Radbaz's responsum persisted to this century as the leading decision on the matter. Thus, even according to those who maintained that one is obligated to place oneself in jeopardy in order to save another, Judaism ordained neither a legal obligation nor a moral imperative to actually amputate or donate a limb or an organ to save someone else's life. On the other hand, although an operation of this kind invariably involved a measure of danger to the amputee or donor, the tendency of the authorities was not to denigrate the volunteer but rather to view his act – albeit with some hesitation – as a saintly one.[15] However, as these operations of transplantation

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14. Allusion is being made to the following Talmudic passages: "[Rabbi Joshua] used to say: A foolish saint... brings destruction upon the world. What is a foolish saint like? E.g., a woman is drowning in the river, and he says, 'It is improper for me to look upon her and rescue her'" (*Sotah* 21b on Mishna *Sotah* 3:4).

15. *Middat hasidut* is a Talmudic expression (e.g., *Hullin* 130b). It is usually translated "a saintly act," "saintly conduct" – the connotation being that the extraordinarily pious act is evidence that the one who performed it is of saintly character. A few years ago, a team of psychiatrists undertook to study donors in renal homotransplantations to find out how they had become involved, how they had made their decisions, what surgery had meant to them, and how they had fared emotionally and psychiatrically about a year (on the average) thereafter. Among their findings was, I believe, a new dimension in *middat hasidut*. During the immediate postoperative period, usually a month or two, the donors received a good deal of attention from families, friends, even strangers who had heard of their sacrifice. Soon thereafter, after they ceased to be celebrities, they noted certain changes in their attitudes or ideas of themselves which they considered more lasting. A typical example is the statement of a forty-year-old male donor, four weeks postoperatively: "I feel better, kind of noble. I am changed, I have passed a milestone in my life, more confidence, self-esteem... In every way I am better. For realizing how far I could go for others, I am up a notch in life... I value things more, big and small things... I come in contact with others a bit more. My pleasures are bigger and have more meaning." Another representative quotation, this time of a fifty-nine-year-old female donor, eighteen months postoperatively: "I am a better person for having done it, more understanding, not nearly as critical. I have improved in many ways, even am more respectful of myself as a person. I feel, if I can do this, I can do anything" (Fellner and Marshall, 1970:269-281). Viewed in this dimension, *middat hasidut* should be translated (in the words of Sorokin) as "creative altruism" – "creative" in the sense that the self is realized with the help of others, for the biological need to help is fulfilled by the very act of altruism (Titmuss, 1970:212; see also, Sorokin, 1954). Making provisions for expressions which characterize the modes of thinking of our secular society, we perceive *middat hasidut* as conduct which sometimes engenders and nurtures saintliness, rather than conduct which

became routine, with concomitant decrease in danger, rabbinic hesitation to grant approval to them has become markedly less, and the saintliness of the act has been receiving increasingly greater recognition and appreciation.

This tendency has reached its culmination in the responsum of former Sephardic Chief Rabbi of Israel Ovadia Yosef, published only a few years ago (Yosef, 1976: 25-43).

On the basis of Talmudic texts and post-Talmudic opinions, Rabbi Yosef, too, sees in *Radbaz* the decisive arbiter settling the question raised: (1) one is not obligated to put oneself in serious jeopardy to save one's fellow. (2) One may not donate a vital limb, if the transplantation represents serious danger to the donor.

However, recognizing presentday transplantation procedure as involving a degree of danger to the donor *less* than that contemplated in the strictures of *Radbaz*, Rabbi Yosef rejects the prohibition of one colleague and overcomes the hesitation of another and permits, nay, gives his blessing to the donation of a kidney to a patient in dire need thereof in the following words:

> But according to the information we have received from competent and God-fearing physicians, the danger [to the donor] involved in extracting a kidney is generally very small. Inasmuch as *Radbaz* and those of his school hold, therefore, that under such circumstances the mizvah, *thou shalt not stand idly by*, obtains, it follows that we must allow a healthy person to donate one of his kidneys, to save the life of his fellow Israelite whose life is seriously threatened by a disease of the kidneys. Great is the mizvah of saving human life, and it [the mizvah] will afford the donor the protection of a thousand shields. In any event, the donation must be performed by competent physicians; and he who fulfills a *mizvah* shall know no evil. (Yosef, 1976)

The essential legal-ethical limitations on the obligation of the bystander to come to the rescue of one in peril, then, are based upon the real possibility that the life of the bystander may be endangered (cf. Jakobovits, 1959: 96-98). Hardship, suffering and great inconvenience, it is clear, cannot serve as bases of exem-

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reflects and evidences it. This perception of *middat hasidut* would be in line with the doctrine popular among the medieval moralists according to which inner disposition is very often created or conditioned by one's external actions, and not vice versa.

ption,[16] neither can the fact that the would-be rescuer would undergo personal humiliation in order to accomplish the rescue serve as a basis for his exemption from the mitzvah of *thou shalt not stand idly by* (Rabbi J. I. Unterman, 20th century, *Shevet mi-Yehudah*, vol. 1, pp. 20-21, contra the possibility raised by Rabbi Shelomoh Kluger, died 1869, *Hokhmat Shelomoh*, *Hoshen Mishpat* 426:1). Thus, although it would be extravagant to characterize Jewish law as *obligating* one to contribute an organ to save someone's life, it is clear that, as a result of modern medical advancement, Jewish religious authorities regard such contribution as a meritorious act of the highest order.

IV. Encouraging the Would-Be Rescuer

A. Exemption from Other Duties

The basic rule of Jewish law declares that all ethical, civil, religious and ritual positive duties are suspended if their implementation or fulfillment would create or sustain danger to human life.[17] "Would" is interpreted most broadly: "would certainly" (*vadai*), "would probably" (*safek*). Similarly "saving life" is interpreted as including "prolonging life substantially" (*hayyei 'olam*) and "prolonging life minimally" (*hayyei sha'ah*).

This was made abundantly clear by the rabbis of Israel before the third century in their exposition of the laws of the Sabbath, one of the most sacred institutions of Judaism.

> [Although the preparation and administration of medicines involved the violation of the Sabbath restrictions in human activity], Rabbi Matthia ben Heresh said: If one has pain in his throat, he may pour medicine into his mouth on the Sabbath, because it is a possibility of danger to human life, and every danger to human life suspends the [laws of the] Sabbath (Mishna *Yoma* 8:6).
>
> Speed is of the essence.
>
> Our Rabbis taught: One must remove debris [i.e., an

16. "...And it goes without saying that one is obligated to undergo all sorts of suffering if thereby his fellow's life is spared or saved" (Rabbi Abraham Gombiner, died ca. 1683, *Magen Avraham*, *Orah Haim* 126). All suffering short of actual torture is probably meant (Rabbi Eliezer Y. Waldenberg, 20th century, *Responsa Tsits Eliezer*: IX, 9a).
17. He whose perverted sense of values leads him to forget this basic rule can never be more than "a foolish saint"; see above.

> act ordinarily forbidden on the Sabbath] to save a life on the Sabbath; and the more energetic one is, the more praiseworthy is one; and one need not obtain permission from the rabbinical court (*Yoma* 84b).
>
> Hesitation is sinful.
>
> They have taught: The energetic one is praiseworthy, the [authority who is] consulted – insulted, and the inquirer – a murderer (*Palestinian Talmud Yoma* 8:5).

B. Immunity from Tort Liability

In order to appreciate the interest Jewish law evinces in encouraging the innocent bystander to be a Good Samaritan, it is necessary to present a brief exposition of some of the more salient features regarding tort liability.

The basic law of torts in Jewish law is clear:

> Man is always [in the category of one who has been] "forewarned" [and hence liable for damages] whether [he acts] inadvertently or willfully under coercion or voluntarily, whether awake or sleep (Mishna *Bava Kama* 2:6; *Sanhedrin* 72a; Maimonides *Torts*, "Assaults and Damages" 1:12; 6:1).

The high regard with which the halacha holds private property and protects it from damage, trespass and theft is vividly illustrated by the Talmudic interpretation of an episode in David's career.

Scripture says: *And David longed and said, Oh that one would give me water to drink of the well of Bethlehem, which is by the gate. And the three mighty men broke through the host of the Philistines and drew water, out of the well of Bethlehem that was by the gate*, etc. (II Samuel 23:15-16). [And David refused to drink the water for it was acquired through "the blood" of men] (*Bava Kama* 60b).

Now, in rabbinic psychology, "water" conjures up an association with Torah (divine law), and "the gate" is the courthouse, i.e., where Torah is studied, expounded and applied to life. David's longing for water, therefore, is interpreted as a desire to understand a problem of scriptural law; and he sent his inquiry to the rabbinic scholars of his generation at "the gate," i.e., at the House of Study.

What was his difficulty?

> Rabbi Huna said: [The problem was this: In his battle

> with the Philistines,] there were [near the battlefield] stacks of barley which belonged to Israelites but in which the Philistines had hidden themselves, and what he asked was whether it was permissible to rescue oneself through the destruction of another's property.
>
> The answer they dispatched to him was: [Generally speaking] it is forbidden to rescue oneself through the destruction of another's property; you, however, are King, and a king may break [through fields belonging to private persons] to make a way [for his army] and nobody is entitled to prevent him [from doing so] (cf. *Sanhedrin* 20b).

We may disregard, for our purposes, the royal prerogative and the concession to military exigencies. The answer – as it applies to the ordinary citizen – is somewhat startling: "generally speaking, it is forbidden to rescue oneself through the destruction of another's property." The definitive law is thus as follows:

> Even if one is in mortal danger and must steal from his fellow in order to save his own life, he may do so only on condition that he intends to make subsequent payment (*Shulhan Aruch, Hoshen Mishpat* 359:4).

In other words, although "nothing may stand in the way [to impede] the preservation of human life" (*'en davar ha'omed bifnei pikuah nefesh*), the destruction of someone's property *without intention to compensate* is not necessary for the preservation of life. The same preservation of life could be accomplished by the same indispensable destruction of property if said destruction is perpetrated *with* the intention to compensate (e.g., *Yad Ramah*, *Sanhedrin* 73b).

With this cursory presentation of tort liability in Jewish law, we have arrived conceptually at our central problem: What is the legal position of an innocent bystander, intent upon fulfilling Scripture's command not to stand idly by the blood of his neighbor, who, in the course of his act of rescue, commits a tort?

The Code of Maimonides expounds the position of Jewish law in this matter.

> If one chases after the pursuer in order to rescue the pursued, and he breaks objects belonging to the pursuer or to anyone else, he is exempt. This rule is not [a matter of] strict [i.e., biblical] law [of torts], but is [an enactment,

> *takkanah*] made in order that one should not refrain from rescuing another or lose time through being too careful when chasing a pursuer[18] (Maimonides Torts, "Wounding and Damaging," 8:4).

The fourth-century Talmudic source of this provision clearly recognized that the biblically ordained strict principle of near-absolute tort liability[19] was being violated here. Thus Rabbah (or Rava) in the Talmud justifies this "violation" as being in the public interest.

> For if you were not to rule thus [but rather make the rescuer liable], no one would put himself out to rescue a fellow man from the hands of a pursuer.

Lest one be inclined to give an inordinately narrow interpretation to this exemption from tort liability and to limit it strictly to a bystander intent upon saving a victim from a criminal act and to nothing else, we hasten to add that said exemption applied to all would-be rescuers from natural catastrophes as well as man-made harms.

Actually, the Talmud records a much earlier exemption from tort liability granted in the interests of rescuing a human being in trouble. The exemption is embodied in one of the ten stipulations made with the Israelites by Joshua when he apportioned the Land to them in accordance with their tribes. It is limited to the alleviation of the condition of a person who is lost in the woods or in the thickets of a vineyard and cannot find his way back to his settlement.

> He who sees his fellow wandering in the vineyards is permitted to cut his way through when going up and to cut his way through when coming down and ruin thereby the place upon which he is treading until he brings him into the town or onto the road. And just as it is meritorious to do so in behalf of his fellows, so it is meritorious to do so in behalf of oneself. So also one who himself is lost in the

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18. Maimonides' formulation is a rewording of a dictum of Rabbah, or his disciple Rava (textual readings vary; cf. *Tosafot*, *Ketubot* 30b, s.v. *rav ashi*), both prominent rabbis of fourth-century Babylonia; the dictum is found in *Bava Kama* (117b) and *Sanhedrin* (74a).
19. For if, as we have seen, one may not save himself by destroying or by appropriating another's property, it follows a fortiori that one may not save others by such measures.

> vineyard may cut his way through when going up and cut his way through when coming down until he reaches the town or the road [for it was in accordance with this understanding that Joshua apportioned the Land to Israel] (*Bava Kama* 81b).

That the paramount motive underlying Joshua's stipulation was the eagerness of the law to facilitate the rescue of a person who has lost his way and to give this consideration top priority is evident from the Talmudic exegesis of the above-cited passage.

> What is the meaning of "so also"? [Is the latter case not obvious?]
>
> You might have thought that this is only the case of a *fellow man* wandering, in which case [the rescuer] knows where he [the rescuer] is going, that he [the rescuer] may cut his way through, whereas in the case of being lost himself, when he [the lost person] does not know where he is going, he [the lost person] should not be permitted to cut his way through but should have to walk round about the boundaries. We are therefore told that this is not so (*Bava Kama* 81b).

The whole point of Joshua's stipulation is the creation of immunity to tort liability (i.e., for the destruction of branches and vines).

We have thus arrived at the official encouragement Jewish law gives to people who come to the assistance of their fellow citizens in order to rescue them from peril. This encouragement takes the form of (exceptional) immunity from liability for any tort committed in the course of the rescue operation.[20]

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20. The solution, of course, is eminently sensible; and really much ado should not be made of it. See the similar provisions of the Czechoslovak Civil Code of 1964 and of the Civil Code of the Republic of China, in its General Principles of 1929 (both cited by Rudzinski, 1966: 117-119). I should like, however, to contrast this *premedieval* dictum with the Anglo-American law of today. In an article entitled, "The Good Samaritan and the Bad," Professor Gregory (1966:28) of the University of Virginia Law School, puts it bluntly: "Our law says [he declares] that you do not have to volunteer to relieve others from danger not due to your own fault; but if you *do* volunteer – if you engage in some activity that is followed by harm to such another – then a court may let a jury scrutinize what you did and call it actionable negligence – *no matter how hard you tried* [italics provided]. Many people aware of this think it much wiser to do nothing at all. If you are not under a duty to "fease," the nonfeasance can never be held actionable. But if you do engage in feasance toward anybody, then under most circumstances you must "fease" carefully. Moral:

C. Religious Incentives

Religious incentives to save someone in peril are dual in nature: coercive and hortatory.

Saving human life is a religious commandment, and Jewish traditional law ordains physical coercion for the fulfillment of one's religious duties.[21]

As our inquiry into the Jewish religious law of the bystander comes to a close, reference must be made – albeit superficially – to the socio-psychological impact of the religious concept of mitzvah and its profound hortatory effect on Jewish behavior.

> Rabbi Hanania ben Akashya said: The Holy One, blessed be He, desired to make Israel acquire merit; He, therefore, multiplied for them Torah and commandments; as it is written (Isaiah 42:21), *The Lord was pleased for His righteousness' sake, to make the teaching* [Torah] *great and glorious* (Mishna *Makkot* 3:16).

This mishna epitomizes the traditional Jewish attitude toward each and every commandment of God as embodied in Scripture[22] as a mark of divine favor granting the Jew the privilege of serving his

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Don't ever "fease" unless you have to!"

Israeli law is not much better. (Cf. Yadin, 1970:260-262). Professor Gregory is not very proud of his legal system. In a footnote he writes, "Of course, I do not want to be understood as advising people never to help others who are in danger or distress." He does not; but the law implicitly does. See also Prosser (1971:340-343) who correctly attributes this serious lacuna to the general Anglo-American reluctance to countenance nonfeasance as the basis of any liability. I might add that, technically speaking, the Good Samaritan, duty-bound to come to the rescue of his fellow, is exempt from liability for the objects he broke whether they belonged to the pursued or to any other person.

21. Although the primary source (*Ketubot* 86a) ordains said coercion for the fulfillment of *positive* commandments, it is evident from *Tosafot* (s.v. *akhpie*, *Ketubot* 49b and *Bava Batra* 8b) that the commandment *thou shalt not stand idly by* would also be subject to coercion (1) either because it is a commandment – albeit formulated negatively – to do something positively or (2) because the supplementary commandment, *thou shalt restore him to himself* (see above), informs *thou shalt not stand idly by* with positive characteristics – similar to the commandments of *zedakah* cited by *Tosafot*. Some authorities maintain that there is no distinction between positive and negative duties; all duties may be enforced by coercion (Rabbi Pinhas Horowitz, died 1805, *Sefer Hafla'ah*, and Rabbi Akiva Eger, died 1837, *Novellae*, both on *Ketubot* 49b). Other authorities, however, maintain that coercion to perform positive commandments is the exclusive prerogative of the courts and may be carried out in the extreme, whereas the physical prevention of the violation of the negative commandments is the duty of any private citizen but may not be carried out in the extreme (Rabbi Aryeh Leib Heller, d. 1813, *Meshovev Netivot* 3:1, paragraph 3).

22. Traditionally numbering 613 (*Makkot* 23b).

Creator by fulfilling His wish: the more commandments, the more ways in which this privilege is granted.

> The deed is the test, the trial and the risk. What we perform may seem slight, but the aftermath is immense. An individual's misdeed can be the beginning of a nation's disaster... Even a single deed generates an endless set of effects; initiating more than the most powerful man is able to master or to predict. A single deed may place the lives of countless men in the chains of its unpredictable effects...
>
> Just as a man is not alone in what he *is*, he is not alone in what he does. A mitsvah is an act, which God and man *have in common*. We say, "Blessed art Thou, Lord, our God, King of the universe, who has sanctified us with *His* mitsvot"... The spirit of mitsvah is *togetherness*. We know, He is a partner to our act (Heschel, 1962:284, 287).

And, as for the would-be rescuer who fails, it would be best to remember the words of Edmond Cahn:

> ...And herein too there is a truthful commentary on the consequences and outcomes of morally righteous conduct. For the rescuer all too often fails of his rescue and injures or kills himself in the effort. There can be no guarantee of success. Some will be saved, others will be lost. The only guarantee we have – the only one we are entitled to – is that attempts of this kind glorify our existence which without them would be like grass and like dust (Cahn, 1959:196).

V. Analysis and Concluding Summary

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer (Cardozo, 1921).

These memorable words were used by Judge Benjamin Cardozo for the limited purpose of extending the liability of a railway company for damages beyond those suffered by the actual victim to those suffered by a would-be rescuer (*Wagner v. International Rail-*

way Co., 232, NY 176 [1921]). They may be used with equal effectiveness to express the spirit of Jewish law, which, regularly compelling active benevolence between man and man, makes it incumbent upon a bystander to come to the aid of someone in peril.

In this respect, Jewish law is similar to the law of most European countries but differs from Anglo-Saxon law.[23] This duty to rescue is derived from the peculiar interpretation the Talmudic rabbis gave to two biblical verses, *thou shalt not stand idly by the blood of thy neighbor* (Leviticus 19:16), and *thou shalt restore him* [a person who is losing his life] *to himself* (Deuteronomy 22:2). It obtains even if the success of the rescue operation is in serious doubt from the onset or cannot accomplish more than a brief prolongation of life.

Indeed, with the scriptural mandate clearly enunciated in the Talmud, Jewish religious authorities – ethicists in the first instance – have during the past eighteen-hundred years examined every aspect of the duty: its extent, its applicability, and its enforceability, leaving us with a veritable heritage of thought and concern regarding this ethico-legal imperative.

Thus, the Maimonidean formulation of the Jewish law of the Good Samaritan does not restrict the duty to rescue to outsiders *witnessing* or *finding* a person in distress. It extends the duty to anyone informed or aware of the danger to another's life. The essential criterion is "if one person *is able* to save another." Ability is determined by a combination of factors: geographic proximity, mental awareness, know-how and physical disposition. Nor does Jewish law distinguish between a natural danger and a man-made one. An innocent bystander is required to go to great personal effort, even to suffer hardships and to incur serious financial loss, in order to save the life of his fellow. On the other hand, he is not duty-bound to give his own life or limb to save his fellow.

Moreover, the duty required by the scriptural commandment, *lo ta'amod 'al dam re'eka*, is a general obligation. It is not based upon any special relationship based on law contract between the bystander and the person in distress, such as parent and child, husband and wife, guardian and ward, guide and tourist, policeman, fireman, or lifeguard and public, shipmaster and crew or passenger,

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23. Except in certain states of the United States.

master and servant, host and guest, etc. (Rudzinski, 1996:92-93).[24] Although the duty of the physician to his patient may be somewhat different in this respect, the essence of *lo ta'amod* remains a general human one.

Again, although the innocent bystander who willfully fails to come to the rescue of those in peril is, according to Jewish law, liable neither to civil suit nor criminal prosecution, the duty of the Good Samaritan in Judaism may not be relegated to the realm of mere religious morality and personal conscience.

The legal nature of the duty of rescue is evidenced in a number of ways:

1. Although the duty to rescue is independent of the financial condition of the person in peril, the rescuer has the right to sue the person rescued for all financial losses the former incurred as a result of the rescue operation.
2. The bystander actively engaged in the rescue operation is exempt from all other positive legal, civil, religious and ritual duties.
3. The rescuer is immune from liability for any tort committed in the cause of his effort to save the victim in peril. Not only may the rescued party not sue him (a possibility in the present Anglo-American law!); no one whose property has been destroyed may bring an action for tort against him.

In conclusion, three points arise for our careful consideration.

1. As a result of the breakdown of the forceful role played by traditional religion in modern life, the religious undertones accompanying legal imperatives have lost their power to encourage citizens to perform their duties without direct legal sanctions. Has this radical transformation which society has undergone affected the willingness and readiness of people to come to the rescue of those in distress? Should religious authorities work for the introduction of positive criminal and civil provisions[25] making

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24. To Rudzinski's list, we might add the comrade relationship in the Israeli Defense Forces which had become well-nigh legendary. Israeli army solidarity dictated that in and after any battle, raid or skirmish, no soldier – dead or wounded, known or unknown to his rescuer – was left in the field. It is a known fact that soldiers retrieved their comrades often at great personal risk. One of the traumas of the Yom Kippur War was the weakening of this quasilegal obligation.
25. The Portuguese provision regarding the duty to rescue, for example, is unusual in that it appears in a *civil* code, and "the failure to come to the aid of the attacked results in liability for damages (*sera possible de dommages interets*)" (Rudzinski, 1966:99).

for a statutory duty to come to the rescue of one in peril?[26] Of course, legislation of this type would be faced with such practical difficulties as (a) establishing the degree of the bystander's awareness of the victim's dangerous condition, (b) defining the degree of proximity between the bystander and the victim (e.g., the only available surgeon is in one city and the dying patient in another), (c) in the case of attempts at rescue that aggravate a situation, distinguishing between an innocent, upright bystander and an officious troublesome meddler, and similar anomalies. But legislation is always faced with these kinds of difficulties. On the other hand, does the lack of such legislation really signify that citizens are in fact callous to the plight of those in peril? In other words, legislation, in order to be enforceable, would in all likelihood be aimed at acts of indifference that are blatant and reasonably easy to prove. But such instances of Bad Samaritanism are rather rare; where they do occur, the adverse publicity and public scorn would probably be potent educative as well as penal forces. Is legislation, then, necessary? Would not the adoption of the provisions of Jewish law – guaranteeing the Good Samaritan compensation for his losses, exemption from all other duties that devolve upon him at the time, and immunity from tort liability – be sufficient in putting society, as expressing itself in its legal system, on record as creating a legal duty to rescue and as holding said duty in the highest regard?

2. A second question which modern religious authorities must face is the lacuna in traditional law and society regarding the dependents of an innocent bystander who dies or is disabled as a result of his rescue attempt. Traditional Jewish society had established ways of caring for widows and orphans. Some welfare states have their ways. Would it not be proper for religious leaders to press for special provisions whereby the community would regard these dependents as entitled to specific benefits?
3. Regarding Good Samaritan behavior, a social psychologist makes the following remarks:

> We don't know whether there are differences between cultures, between emergent societies and established societies, between cultures in which the father dominates,

26. Cf. Rudzinski (1966:119-124): "Is the introduction of such a legal duty desirable?" The proposal refers to ethicolegal provisions of the halacha; there is no intention, of course, to foster the legislation of its moral provisions (*middat hasidut*).

> those in which the mother dominates, or, as in our case, the children dominate; between urban groups and rural groups, between religious, God-intoxicated Bible Belts and agnostic, cocktail-intoxicated groves of academe, even between the criminal and the conformist (Freedman, 1966:171).

Were the law to be a mere reflection of the behavior dominant in a given society, psychiatric and sociological observations such as the one just quoted would constitute the last word in the matter. Law, however, does help shape social attitudes and personal behavior.[27] Indeed, religious law and ethical norms are built principally for such purposes. Thus, Judaism, through its code of behavior, has been striving continuously throughout its history to shape human conduct and to raise human conduct to the highest ethical level possible. Ironically, though, just at a time when Western society – as opposed to traditional Judaism – is experiencing a strong movement to limit the role of law in intervening to enforce "morality" (e.g., in questions involving abortion, adult homosexuality, or the use of drugs), there is strong dissatisfaction with the (e.g., Anglo-American and Israeli) legal indifference to the plight of the person in peril (cf. Sheleff, 1976:190-208).

It is our hope that the study of the Jewish law of the innocent bystander – how the law places duties upon him, encourages him to fulfill them and protects him as he discharges them – may serve as a positive contribution to modern legal thinking.[28]

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27. Despite the inevitable discrepancy between the real behavior in a given society and its respective ethical ideal, "many of the aspects of the actual conduct seem to be colored or permeated somehow by the predominant ethical system" (Sorokin, 1962:II, 480).
28. See Kirschenbaum (1976) for full documentation.

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Note: Unless otherwise noted, the citations for the classical sources of Jewish law are taken from the standard editions.

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