

DUTY TO ASSIST: A COMPARATIVE ANALYSIS OF TALMUDIC, ISLAMIC, AND CHINESE CIVIL LAW

AUDREY PAIGE SAUER*

INTRODUCTION

What duty do members of society owe to one another? If a stranger is drowning in a river, or injured on the side of the road, is one obliged to stop and help? And is this a moral duty, or should it be a legal duty as well? These are all questions implicated by duty to assist laws.

Duty to assist (also interchangeably called duty to aid or duty to rescue) is “a concept of tort law and refers to the duty of a person to rescue another who is in a dangerous situation.”¹ Duty to assist laws are a uniquely apt arena for legal and ethical debate, because they are “positive duties”—that is, a law that requires an individual *take action*, in the form of rendering assistance to those in distress.² This stands in contrast to “negative duties,” which require an individual to *refrain from* certain acts, such as harming or injuring others.³ While negative duties tend to be universally accepted and non-controversial, positive duties are more contentious because they present an apparent challenge to personal liberty (by asking an individual to sacrifice something for another).⁴ Thus, a legal system’s treatment of duty to assist laws can highlight how it views individuals and society and the relationship between them.

Different legal systems have vastly different perspectives on, and legal approaches to, duty to assist laws. Three fascinating legal systems that invite legal discourse regarding duty to assist laws are: Talmudic law, Islamic law, and the Chinese civil law system.

In analyzing the following legal systems, an important clarification is that duty to assist laws are commonly confused with “Good Samaritan laws.” The two are not the same and carry different legal definitions. Duty to assist laws create a legal obligation to render aid to someone in distress.⁵ Good

¹ *Duty to Rescue Law and Legal Definition*, U.S. LEGAL (2019), <https://definitions.uslegal.com/d/duty-to-rescue/>. Hereinafter I will refer to duty to assist/duty to rescue/ duty to aid according to the term most commonly used in the legal system being discussed.

² Raymond A. Belliotti, *Negative and Positive Duties*, 47 THEORIA 82, 82 (1981).

³ *Id.*

⁴ See Adnan Zulfiqar, *Collective Duties (farḍ Kifāya) In Islamic Law: The Moral Community, State Authority and Ethical Speculation in the Premodern Period*, U. PA. SCHOLARLY COMMONS 1, 319 (2018).

⁵ *Duty to Rescue Law and Legal Definition*, U.S. LEGAL (2019), <https://definitions.uslegal.com/d/duty-to-rescue/>.

Samaritan laws, on the other hand, create no obligation to render aid, but grant someone who voluntarily chooses to render aid to another (a “Good Samaritan”) immunity from civil liability for harms caused by the volunteer’s negligence in the course of rendering aid.⁶ Good Samaritan laws often work alongside duty to assist laws, and thus the presence or absence of Good Samaritan immunity in a given legal system will be briefly touched upon as a part of the duty to assist analysis.

I. TALMUDIC LAW

In Judaism, the duty to aid a fellow Jew who is in peril is a deeply rooted religious, moral, and legal obligation. The Halakah sets forth a legal duty to aid in Choshen Mishpat 426:

The obligation for a man to save his friend in body, money, or the like. One who saw his fellow drowning, or threatened by thieves or by a wild animal, and could have either saved him himself or hired others to save him – and he did not – . . . has transgressed, “Do not stand idly by the blood of your neighbor.”⁷

This Halakhic duty to aid comes directly from a commandment of the Torah. Leviticus explicitly says, “do not stand idly by the blood of your neighbor.”⁸ In writing the Talmud, rabbis interpreted this verse as creating a duty to come to the assistance of others who are in peril.⁹ In other words, an individual should not “stand idly by” (do nothing) when witnessing a neighbor’s “blood” being spilt (referring to physical injury or danger to life). Mishnah offers a straightforward explication of this duty: “Anyone who can save and does not save transgresses 'do not stand by the blood of your neighbour.'”¹⁰ The rabbinical exegesis in Gemara further explains, “From where is it derived that one who sees another drowning in a river, or being dragged away by a wild animal, or being attacked by bandits, is obligated to save him? The Torah states: ‘You shall not stand idly by the blood of another.’”¹¹

⁶ *Good Samaritans Law and Legal Definition*, U.S. LEGAL (2019), <https://definitions.uslegal.com/g/good-samaritans/>.

⁷ SHULCHAN ARUCH, Choshen Mishpat 426.

⁸ TORAH, Leviticus 19:16.

⁹ See Shaya Rochester, *What Would Have Seinfeld Done Had He Lived in a Jewish State? Comparing the Halakhic and Statutory Duties to Aid*, 79 WASH. U. L. Q. 1185, 1190-97 (2001). The duty to aid can also be derived from Deuteronomy 22:2, “you shall return it to him,” however, rabbinical interpretations of this verse, and how rabbis ultimately reconciled it with Leviticus 19:16, implicate complex Halakhic analyses beyond the scope of this paper. For a detailed explanation of the topic see *id.*

¹⁰ MISHNEH TORAH, Murderer and the Preservation of Life 1:14.

¹¹ SANHEDRIN TALMUD 73a:7.

The duty to aid under Talmudic law is a positive legal duty, meaning that it creates an obligation that calls for action; Jews are commanded not to be idle, but to *do something* to try to save another from harm. The Halakhic duty to aid is also an expansive duty. The duty to aid is not limited to scenarios in which an individual actually witnesses or finds a person in danger, rather, it applies whenever one is “informed or aware of the danger to another’s life.”¹² What caused the harm or perilous situation is also irrelevant. Halakha does not distinguish between natural and man-made dangers, such as a flood versus a car accident—the duty to aid applies to both.¹³ Furthermore, the duty extends so far as to require one who cannot directly aid another to solicit or hire aid, even at financial expense.¹⁴

There is no duty to put one’s life in possible danger in order to aid another, however, some level of risk taking is demanded by Halakha. According to rabbinic authorities, a would-be rescuer “must not overly protect oneself.”¹⁵ Thus, short of risking life or limb, a rescuer is expected to make all feasible attempts to perform a rescue. That being said, a rescuer who goes above and beyond the legal requirement and endangers his life or limb in order to save another “is extolled as acting above and beyond the call of duty and as performing a saintly act (*middat hasidut*).”¹⁶

One reason Halakha can demand so much of a rescuer is because, in conjunction with imposing a duty to aid, the Talmud also grants the rescuer immunity from tort liability.¹⁷ This legal immunity is analogous to the protections common law systems often grant under “Good Samaritan Statutes,” and operates as an important counterpart to imposing a duty to aid. Tort immunity ensures that one fulfilling his Halakhic duty to aid is free to undertake whatever actions he deems necessary in order to facilitate the rescue, without feeling the need to restrain his rescue efforts out of fear of facing later legal penalties for negligent harms that may be caused along the way.

¹² See Aaron Kirschenbaum, *The Bystander’s Duty to Rescue in Jewish Law*, 8 J. RELIGIOUS ETHICS 204, 218 (1980).

¹³ See *id.*

¹⁴ See Rochester, *supra* note 9, at 1204-05.

¹⁵ Kirschenbaum, *supra* note 12, at 211.

¹⁶ *Id.*

¹⁷ See *id.* at 215-16.

Despite extensive commentary on the nature and scope of the Halakhic duty to aid, Rabbinical Courts are notably silent on *enforcing* the duty to aid. Surprisingly, there is no criminal punishment prescribed for violations of the duty to aid, and rabbis have held that courts cannot sanction an individual for breaching this Halakhic duty.¹⁸ This is due to a fundamental principle in Halakha regarding the treatment of positive duties, which prescribes that violations of positive duties to act are not assigned criminal punishment.¹⁹ In Talmudic law, only negative duties are enforced by human courts—all positive duties are enforced by God.²⁰

This approach to positive duties is not a dismissal of the duty to aid, nor does it diminish the importance of the duty; rabbis still consider a violation of the duty to aid to be “a most serious offense.”²¹ Ultimately, the lack of enforcement by rabbinical courts reflects the fact that Talmudic law is a legal system of inextricable religious, legal, and normative traditions. The divine character of Talmudic legal norms means that law permeates everyday life beyond the courtroom.²² For members of the Jewish faith, obedience to the law is an affirmation of love of God.²³ Many suggest that this love of God, not fear of legal punishment, motivates compliance with the law.²⁴ Consistent with this understanding, the Halakhic duty to aid—although unanimously considered a legal duty in Talmudic law, not merely a moral duty—is “not enforced through human courts but rather through a divine judge, namely, G-d.”²⁵ Thus, the Halakhic duty to aid gives the rescuer a choice: perform one’s duty to aid, or answer to the divine judge.²⁶

Divine judgement is not considered any less powerful or less weighty than earthly legal judgement and creates no impetus for skirting the law. The Hebrew Bible tells that an omniscient and omnipotent God resides over man: “For the LORD is an all-knowing God; By Him actions are

¹⁸ See Rochester, *supra* note 9, at 1196.

¹⁹ See *id.*

²⁰ See *id.*

²¹ *Id.*

²² See H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 109 (5th ed. 2014).

²³ See *id.*

²⁴ See *id.*

²⁵ Rochester, *supra* note 9, at 1211-12.

²⁶ See *id.* at 1223.

measured.”²⁷ Even if an individual has plausible deniability for not fulfilling his Halakhic duty to aid another, he cannot conceal the truth of his actions in the face of Divine judgement, because “God knows ... whether a person truly lacked the ability to help or merely didn’t feel like it.”²⁸ Divine judgement is not equatable with notions of “conscience,” or mere internal guilt on the individual level—Divine judgement has concrete, legal status in Halakha.²⁹ In Halakha, lack of immediate flesh and blood sanctions on earth does not constitute forgiveness for wrongdoing, but rather is a deferral of penalty to a later time.³⁰

This concept of imposing legal obligations—while seemingly simple and morally logical—is violently rejected by other legal systems.³¹ So why does Talmudic law so strongly embrace such a duty? The Halakhic duty to aid seems to be a natural product and reflection of two main underlying influences in Talmudic law: (1) the concept of Mitzvah, and (2) the law’s historical function as a form of “social glue” for the Jewish people throughout the diaspora.

Unlike legal systems that enunciate individual rights, Talmudic law is a doctrine of individual obligation, called Mitzvah.³² There are two types of Mitzvot:³³ positive Mitzvot, or deeds which the Torah commands, and negative Mitzvot, or deeds which the Torah prohibits.³⁴ These obligations are strongly binding on individuals in the Jewish community.³⁵ Mitzvot apply to both men and women in all times and places,³⁶ and, unlike legal rights, these legal obligations cannot be waived.³⁷ The duty to aid is

²⁷ TANAKH, I Samuel 2:3.

²⁸ Rabbi Jack Abramowitz, “Good Samaritan” Law: *The prohibition against doing nothing when another is endangered*, OU TORAH, <https://outorah.org/p/5886>.

²⁹ See Rochester, *supra* note 9, at 1223-24.

³⁰ See *id.* at 1223.

³¹ Notably the common law system, which imposes no general duty to aid, see RESTATEMENT (SECOND) OF TORTS § 314 (1965).

³² See GLENN, *supra* note 22, at 127.

³³ Mitzvot being the plural of Mitzvah. See Malka Touger, *Introduction to Positive Mitzvos*, JEWISHKIDS.ORG., https://www.chabad.org/kids/article_cdo/aid/9817/jewish/Introduction-to-Positive-Mitzvos.htm.

³⁴ See *id.*

³⁵ See GLENN, *supra* note 22, at 127.

³⁶ See Abramowitz, *supra* note 28.

³⁷ See GLENN, *supra* note 22, at 127.

number 297 of the 365 negative Mitzvots in the Rambam’s Sefer HaMitzvot.³⁸ As such, the fulfillment of this Mitzvah is linked with living a Godly life and attaining personal salvation. For members of the Jewish faith, performing one’s Mitzvah obligations is a way to show one’s love of God.³⁹ Mitzvah brings an individual closer to God, because an act of Mitzvah is understood as an act done not merely for God, but *with* God: “[Man] is not alone in what he does. A mitzvah is an act, which God and man *have in common* The spirit of mitzvah is *togetherness*. We know, He is a partner to our act.”⁴⁰ It is through divine deeds of Mitzvah that man may “walk in the ways of the Lord.”⁴¹ Thus, in Judaism, the bystander does not act solely to save his fellow man from danger, but also to save himself.⁴² By discharging his religious obligation to come to the aid of others, a member of the Jewish faith has served God and will ultimately receive heavenly reward.⁴³

Another important, formative aspect of Talmudic law has been its historical function as a form of social glue for the Jewish community. Throughout much of history, Jews have lacked important unifiers such as political sovereignty and a single geographical region to call home, due to years of political conquest and the resulting diaspora. Diaspora refers to the geographical scattering (or dispersion) of a people from their original homeland.⁴⁴ 597 B.C. is considered to be the beginning of the Jewish diaspora, however, conquest and exile of Jewish people from their homelands began as early as 722 B.C. when the Assyrians conquered Israel.⁴⁵ The Jewish people were subsequently victims of conquest by the

³⁸ See Malka Touger, *Negative Commandment 297*, JEWISHKIDS.ORG., https://www.chabad.org/kids/article_cdo/aid/8948/jewish/Negative-Commandment-297.htm. The duty to aid is a negative mitzvot, because it is a prohibition of inaction; in Leviticus, the Torah prohibits standing by and refraining from saving another who is in danger. *See id.*

³⁹ See GLENN, *supra* note 22, at 115.

⁴⁰ ABRAHAM J. HESCHEL, *BETWEEN GOD AND MAN: AN INTERPRETATION OF JUDAISM* 84 (1959).

⁴¹ *See id.* at 85.

⁴² *See* Kirschenbaum, *supra* note 12, at 209.

⁴³ *See id.*

⁴⁴ *See* Cambridge Dictionary, *Diaspora*, CAMBRIDGE U. PRESS (2019), <https://dictionary.cambridge.org/us/dictionary/english/diaspora>.

⁴⁵ *See* Richard Hooker, *Ancient Jewish History: The Diaspora*, JEWISH VIRTUAL LIBR. (2019), <https://www.jewishvirtuallibrary.org/the-diaspora>.

Babylonians, Greeks, and Romans,⁴⁶ resulting in Jewish peoples becoming scattered throughout the Middle East and beyond.⁴⁷

The Jewish diaspora was long and unhappy: Jews were left without a homeland for two millennia, and, during that time, exile became considered the “normal” condition of the Jews.⁴⁸ Under some subjugations, Talmudic teaching was faced with harsh opposition. Some states banned Talmudic teaching or burned the Talmud—yet Jewish identity was able to survive by maintaining its oral tradition.⁴⁹ In other instances, despite being subjected to external rule, Jews remained allowed to live according to their own laws.⁵⁰ Thus, under varying conditions of persecution and turmoil, Jews were able to retain their religion, identity, and social customs by clinging to their religion and its most sacred core—the Torah.⁵¹ As a result, Talmudic law became critical to defining Jewish identity; “Absent a territory or state, it has been said, the Talmud itself became a homeland.”⁵²

The duty to aid is one of the many reciprocal obligations that enabled Talmudic law to successfully preserve Jewish identity throughout the diaspora and in the absence of a formal, centralized system of authority. As discussed previously, the Talmud is a doctrine of individual obligations, not individual rights.⁵³ As such, the Halakhic duty to aid is an obligation to help others, *not* a right to receive help from others. This slight semantic distinction has a drastic impact on how the law operates and how it affects the adhering community. An individual right to receive aid would require enforcement by a central state,⁵⁴ which, throughout much of the Jews’ diasporic history, Talmudic law notably lacked. In contrast, an individual obligation to provide aid to others is self-fulfilled and divinely enforced,⁵⁵ allowing the law to transcend geographical and systematic limitations created by the diaspora. Thus, framing the

⁴⁶ See GLENN, *supra* note 22, at 100.

⁴⁷ See Hooker, *supra* note 45.

⁴⁸ See William Safran, *The Jewish Diaspora in a Comparative and Theoretical Perspective*, 10 ISRAEL STUD. 36, 37-38 (2005).

⁴⁹ See GLENN, *supra* note 22, at 123.

⁵⁰ See Hooker, *supra* note 45.

⁵¹ See *id.*

⁵² GLENN, *supra* note 22, at 121.

⁵³ See *supra* note 32 and accompanying text.

⁵⁴ See GLENN, *supra* note 22, at 127.

⁵⁵ See Rochester, *supra* note 9, at 1211-12; see also, *supra* note 25 and accompanying text.

duty to aid as an obligation of Mitzvah, and not as a right, ensured that the law could be universally followed, enforced, and maintained on the individual and communal level, without requiring formal, centralized systems of authority.

The Halakhic duty to aid also works to physically preserve the Jewish community in body—a very real and important need given the Jews’ long history of persecution. The passage of Leviticus “do not stand idly by the blood of your neighbor”⁵⁶ has been traditionally interpreted as creating a duty for Jews to aid not just anyone, but specifically fellow Jews. Chofetz Chaim explains that, in interpreting Leviticus, a man who is in the category of “your neighbor” refers to “a people who is with you” in Torah and in mitzvot, i.e. other Jews.⁵⁷ Supporting an interpretation consistent with self-preservation, Mishnah reads: “[I]f any man has caused a single life to perish from Israel, he is deemed by Scripture as if he had caused a whole world to perish; and anyone who saves a single soul from Israel, he is deemed by Scripture as if he had saved a whole world.”⁵⁸ Although scholars debate whether the limiting phrase of “Israel” is the most historically accurate version of the text, or if it was originally written instead to refer to all mankind (including gentiles),⁵⁹ the traditional interpretation remains limited to souls of Israel.⁶⁰

This communal limitation on the Halakhic duty to aid can be rationalized as a natural reflection of the Jewish people’s long history of being victims of antipathy, persecution, and even massacre at the hand of outsiders. In the mind of Rabbi Magriso (a writer of important Talmudic commentary who had seen the Jewish people tormented by war and inquisition) the “blood” referenced in Leviticus was potentially very real, and the need to teach members of the Jewish community to save fellow Jews from peril was very concrete.⁶¹ Therefore, in Talmudic law, imposing a religious obligation to save a fellow Jewish soul

⁵⁶ TORAH, Leviticus 19:16.

⁵⁷ See Chofetz Chaim, *Part One, Against Lashon Hara* 8:5.

⁵⁸ MISHNAH SANHEDRIN 4:5.

⁵⁹ See, e.g., Philologos, *The Origins of the Precept “Whoever Saves a Life Saves the World”*, MOSAIC MAG. (Oct. 31, 2016), <https://mosaicmagazine.com/observation/history-ideas/2016/10/the-origins-of-the-precept-whoever-saves-a-life-saves-the-world/>; Benedict Roth, *How the Talmud’s Idea of Equality Got Lost*, JEWISH CHRON. (Apr. 19, 2012), <https://www.thejc.com/judaism/features/how-the-talmud-s-idea-of-equality-got-lost-1.32936>.

⁶⁰ See Chofetz Chaim, *Part One, Against Lashon Hara* 8:5.

⁶¹ See Melissa Crespy, *Our Neighbor’s Blood*, JEWISH THEOLOGICAL SEMINARY (May 1, 2004), <http://www.jtsa.edu/our-neighbors-blood>.

serves dual purposes: it is both a means of fostering a sense of community amongst an oppressed Jewish people, and a means of encouraging Jews to physically preserve the life blood of that community when outsiders seek to spill it.

In summary, the Halakhic duty to aid is simultaneously a religious act of Mitzvah, a legally binding service to God, and a form of social glue that helped maintain the social and physical existence of the Jewish community throughout their tenacious history. The duty to aid reflects Talmudic law's communal nature and necessary goal of self-preservation. Aiding others is extolled as a deeply spiritual commitment, and one that is essential to making earthly life meaningful:

[T]he 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.⁶²

II. ISLAMIC LAW

Like Talmudic law, Islamic law is a religious legal system based in obligations, rather than individual rights.⁶³ The Quran enumerates numerous duties, both individual obligations (*farḍ al-'ayn*) and collective duties (*farḍ al-kifāya*, hereinafter referred to as *kifāya* duties), which together encompass a complete range of behaviors that are mandated by Islamic law.⁶⁴ The distinction between individual obligations and collective duties is rather straightforward: responsibility for performing (and accountability for failing to perform) an act that is considered an individual obligations is assigned to one person, whereas responsibility and accountability for collective duties are assigned to everyone.⁶⁵ The duty to rescue in Islamic law is a collective duty, or *kifāya* duty, meaning that the responsibility for performing this duty is shared by the community.⁶⁶

⁶² See Kirschenbaum, *supra* note 12, at 217 (quoting Edmond Cahn).

⁶³ See GLENN, *supra* note 22, at 203-04 (observing that, in Shari'a law, "there is no word corresponding to that of 'right'" and that "rights are both unnecessary and potentially disruptive of mutual obligation.").

⁶⁴ See Zulfiqar, *supra* note 4, at vii.

⁶⁵ See *id.*

⁶⁶ See *id.* at 31.

Unlike Talmudic law, Islamic law has no specific textual source establishing a duty to rescue.⁶⁷ It is a common misconception that the Quran explicitly establishes a duty to rescue, due to a verse of the Quran that is frequently quoted out of context.⁶⁸ The Quran echoes the language of Leviticus 19:16 that the Talmudic duty to aid is based upon, with a remarkably similar passage. The thirty-second verse of the fifth Sura of the Quran reads:

We decreed upon the Children of Israel that whoever kills a soul unless for a soul or for corruption [done] in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely. And our messengers had certainly come to them with clear proofs. Then indeed many of them, [even] after that, throughout the land, were transgressors.⁶⁹

This passage is not a borrowing from or plagiarism of the Talmud; rather, it is understood to be Jewish literature revealed to Muhammad by God's messengers.⁷⁰ When taken in context with the entire fifth Sura, however, it is in fact commentary on (and criticism of) Judaism,⁷¹ not the Quran establishing a duty to rescue that applies to Muslims.⁷²

How did the *kifāya* duty to rescue develop absent an explicit enumeration of such a duty by the Quran or Sunnah? The answer lies in the fifth fundamental source of Shari'a law: *Ijtihad*. The duty to rescue is classified under *Fiqh*, which is Islamic jurisprudence; i.e. the acts of Islamic scholars deriving religious rulings from, and developing a deeper understanding of, Shari'a law's primary sources (primarily, the Quran).⁷³

⁶⁷ See *id.* at 344.

⁶⁸ Even then-sitting U.S. President Barack Obama inaccurately quoted this verse of the Quran in his famous "A New Beginning" speech delivered in Cairo in 2009. See Barack Obama, *Remarks by the President at Cairo University*, WHITE HOUSE (June 4, 2009), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-cairo-university-6-04-09>.

⁶⁹ SAHIH INTERNATIONAL QURAN 5:32.

⁷⁰ See Philologos, *supra* note 59.

⁷¹ See *id.* (explaining that "[m]uch of Sura 5 consists of an attack on Jews and Christians for thinking that they alone possess divine truth and are the sole objects of God's concern.>").

⁷² See e.g., Michael L. Brown, *The Shocking Truth About the Most Quoted Verse in the Quran*, ASK DR. BROWN (Nov. 18, 2015), <https://askdrbrown.org/library/shocking-truth-about-most-quoted-verse-quran>.

⁷³ See Al-Islam, *The Literal and Figurative Definition of Jurisprudence*, AHLUL BAYT DIG. ISLAMIC LIBR. PROJECT (2019), <https://www.al-islam.org/the-basics-of-islamic-jurisprudence-hassan-al-ridai/literal-and-figurative-definition-jurisprudence>.

For matters of tort law, such as a duty to rescue, judges can establish a legal duty based on their interpretation of Shari'a sources, and can declare a duty exists in a particular case largely at their independent discretion.⁷⁴ Thus, the *kifāya* duty to rescue was developed by jurists interpreting the Quran and employing deductive reasoning in order to prove that the duty to aid exists and deliberate its scope.⁷⁵ However, because Islamic judges are only bound by Shari'a sources, not precedent, there is disagreement amongst them in understanding and applying Shari'a texts.⁷⁶ Although some scholars have concluded that there is no general legal duty to rescue, only a moral duty owed to God, a duty to rescue has been legally recognized in some judicial rulings.⁷⁷ Judicial rulings have recognized that a legal duty to rescue, and liability for violations of this duty, exists in three situations: (1) when a person is able to help a person in peril but refrains, he will be held liable, (2) when a person is the cause of the harm, there is a duty to come to the aid of the victim, and (3) when a person is called to for help by someone in peril, there is a duty to rescue.⁷⁸

In addition to judicial commentary, there has been extensive discourse by Islamic legal scholars on the existence, nature, and scope of a *kifāya* duty to rescue.⁷⁹ The *kifāya* duty to rescue has traditionally been used by jurists as a theoretical platform to discuss broader notions of ethics and moral dilemmas, and, more specifically, for analyzing what triggers *kifāya* duties and the ethical underpinnings of *kifāya* duties as a whole category.⁸⁰ Thus, although recognized by some Shari'a courts as a part of the more modern development of tort law,⁸¹ throughout most of Islamic law's history the duty to rescue has primarily been treated as a tool for moral discourse and speculation.⁸² This focus on theoretical discourse, rather than creation of substantive law, is not unusual in Islamic law: scholars observe that, "as a result of

⁷⁴ See Majed Alshaibani, *Compensatory Damages Granted in Personal Injuries: Supplementing Islamic Jurisprudence with Elements of Common Law*, IND. U. L. 1, 40 (2017).

⁷⁵ See Zulfiqar, *supra* note 4, at 344.

⁷⁶ See Alshaibani, *supra* note 74, at 44.

⁷⁷ See *id.* at 41.

⁷⁸ See *id.* at 41-42.

⁷⁹ See Zulfiqar, *supra* note 4, at 306-400.

⁸⁰ See *id.* at 309.

⁸¹ See Alshaibani, *supra* note 74, at 40-44.

⁸² See Zulfiqar, *supra* note 4, at 312.

the centrality of rational inquiry in the quest for salvation and conceiving the basics of the ethical good life, Islamic theology and ethics placed relatively greater emphasis on the procedural integrity of inquiry rather than its substantive conclusions.”⁸³

The majority of scholarly discussions about the *kifāya* duty to rescue are based upon a hypothetical scenario of a drowning person, in which individuals standing on a riverbank observe someone drowning in the river. In contemplating the obligation owed by onlookers to the drowning man, jurists claim that “it is not sufficient for bystanders to remain onlookers: their proximity to the imminent emergency situation triggers a duty for each of them.”⁸⁴

Despite this basic agreement that there exists a duty to rescue another person who is in danger, there is a lack of consensus on the specific requirements and scope of the duty (thus, a lack of *Ijma*). Some jurists assume individual capacity to perform a rescue must be present in order for the duty to be triggered, meaning a child or an individual lacking mental capacity would not be required to perform a rescue.⁸⁵ Others argue that lack of ability does not matter, and performance is obligated even in the absence of capacity.⁸⁶

Where the duty to rescue falls on the hierarchy of obligations is another debate among jurists. Some jurists suggest that the duty to rescue takes prominence over individualized (*‘ayn*) religious obligations, such as daily prayer and fasting.⁸⁷ They rationalize that these obligations can be delayed, because there is a unique immediacy of the need to act in a rescue scenario, which is not present in religious obligations. One scholar, Qarāfī, explicitly states: “preservation of life and limb...takes precedence over obligations of worship (*‘ibādāt*), thus the duty to save a drowning person or someone burning in a fire, or something similar, takes precedence even over prayer.”⁸⁸

⁸³ See *id.* at 313 (quoting Mohammad Fadel).

⁸⁴ See *id.* at 335.

⁸⁵ See *id.* at 336.

⁸⁶ See *id.* at 336-37.

⁸⁷ See *id.* at 341.

⁸⁸ See *id.* at 342 (quoting Qarāfī, *Furūq*, vol. 2, 332).

Although liability for failing to perform a rescue can be imposed by Shari'a courts,⁸⁹ the ultimate enforcement of most *kifāya* duties, like the duty to rescue, comes in the form of reward or punishment in the afterlife.⁹⁰ As in Judaism, Muslims believe in a concept of Divine Judgement. This is because Muslims do not believe life is limited to time on earth, but that life is "prolonged by other stages; these are the stay in the tomb, then the resurrection for the Day of Judgement and finally the eternal abode of either heaven or hell."⁹¹ One need not be successful in a rescue in order to fulfill their duty and receive reward in heaven. According to jurists, "attempted performance of a duty is considered equivalent to its successful performance."⁹² This is largely because *kifāya* duties are not outcome oriented, but value oriented. Fulfilling one's duty should be motivated by morality and demonstrating one's gratitude to God.⁹³ As in Talmudic law, Divine Judgement cannot be skirted, because the Quran also recognizes an omniscient and omnipotent God. The Quran states "GOD is fully aware of everything you do"⁹⁴ and "GOD will judge among you on the Day of Resurrection regarding all your disputes."⁹⁵

Having explored *how* the duty to rescue developed in Islamic law, the next inquiry is *why* it developed the way it did. Islamic jurist discussions suggest that the *kifāya* duty to rescue developed as a natural extension of two prominent principles in Islam and Sharia law: (1) humanitarianism as an underlying theme permeating the Quran, and (2) the importance of Islamic ethics (*akhlaq*) and law as a mode of ethical discourse.

In Islam, humanitarian acts and the duty to help others are religious obligations by which all Muslims are bound.⁹⁶ Such obligations permeate the text of the Quran. Specifically enumerated humanitarian duties include giving money to the poor (*zakat*), endowing property for the common good

⁸⁹ See Alshaibani, *supra* note 74, at 40-44.

⁹⁰ See Zulfiqar, *supra* note 4, at 89.

⁹¹ See Jamal Krafess, *The Influence of the Muslim Religion in Humanitarian Aid*, 87 INT'L REV. RED CROSS 327, 330 (2005).

⁹² See Zulfiqar, *supra* note 4, at 344.

⁹³ See *id.* at 12-14.

⁹⁴ QURAN 22:68.

⁹⁵ QURAN 22:69.

⁹⁶ See Krafess, *supra* note 91, at 328.

(*waqf*), feeding the hungry, and caring for orphans, to name just a few.⁹⁷ These obligations have been broadly interpreted to encompass modern day projects, such as building and expanding the educational system and health care, funding food aid programs, and even financing surgical operations.⁹⁸

The duty to rescue is another branch of this same tree and can be understood as stemming from the same deeply rooted humanitarian principle of Islam. The Hadith states: “Amongst humans God loves those who help their fellow men” and “God loves the one who comes to the aid of the afflicted”⁹⁹

Coming to the aid of others who are in need is both an obligation and an act of worship for Muslims: “When a Muslim undertakes a humanitarian action he does so primarily as an act of worship, to be nearer to God ... [h]e cannot declare himself a believer if he does not come to the aid of his fellow men.”¹⁰⁰

Unlike some other *kifāya* duties, the obligation to assist others who are in distress is not limited to aiding only fellow Muslims: “Quranic texts and hadiths do not exclude the non-Muslim from humanitarian aid.”¹⁰¹ Thus, some humanitarian obligations expand the moral community of Islam to encompass all of humanity, and create an even broader obligation to aid persons in peril. The duty to rescue, in particular, has been discussed by jurists as an opportunity to present perspectives on law that extends beyond Muslims.¹⁰² In Islam, “the duty to rescue has broad application to all human beings.”¹⁰³ This reflects how humanitarian obligations are tied to Islam’s overarching goals of prioritizing human welfare and promoting societal betterment.

As discussed above, the *kifāya* duty to rescue has been primarily used by jurists as a platform for ethical discourse.¹⁰⁴ Ethics play a central role in Islam and Shari’a law. Islamic ethics, called *akhlaq*, “are those universal standards of right and wrong that prescribe what humans ought to do as taught by the

⁹⁷ See generally Krafess, *supra* note 91 (discussing humanitarian aid in Islam).

⁹⁸ See Krafess, *supra* note 91, at 340-41.

⁹⁹ See *id.* at 330.

¹⁰⁰ See *id.* at 341.

¹⁰¹ See *id.* at 329.

¹⁰² See Zulfiqar, *supra* note 4, at 311.

¹⁰³ See *id.* at 311.

¹⁰⁴ See *supra* notes 80-83 and accompanying text.

Quran, and demonstrated in the exemplary life (actions and words) of the Prophet.”¹⁰⁵ Good *akhlaq* includes having good conduct and good moral character.¹⁰⁶ The Quran and Hadith are replete with ethical messages that confirm the importance of good *akhlaq*. The Prophet’s character is esteemed in the Quran, which says of the Prophet, “indeed, you are of lofty character”¹⁰⁷ and “truly, your character is Excellent.”¹⁰⁸ Thus, the Prophet was considered the perfect embodiment of good *akhlaq* as should be emulated by all Muslims. The Prophet himself is said to have proclaimed, “the only reason why I am sent is to perfect good Akhlaq.”¹⁰⁹

Given the importance of ethics in the Quran and Hadith, it is no surprise that ethics also permeate Islamic law. Shari’a is unique in that ethical discourse is recognized as a legitimate function of the law. While all laws can be understood as reflecting a community’s normative goals and values to some degree, in Islam ethics are not limited to inadvertently influencing on the law; rather, ethics purposefully *inform* the law.¹¹⁰ Thus, while some legal systems shy away from deep ethical discussions, Islamic law embraces these discussions. This is because Shari’a is not simply a set of codified rules, but it is a comprehensive code of behavior in which law and morals implicate every aspect of daily Muslim life. The very word Shari’a means “the way or path to follow.”¹¹¹ As such, Shari’a is a largely normative legal system that seeks to guide human behavior and promote a code of ethics.¹¹² Shari’a “is concerned with ethical standards as much as legal rules indicating not only what man is entitled or bound to do in law, but also what he ought, in conscience, to do or refrain from doing.”¹¹³ As a result, Islamic ethics and Islamic law operate together and are inseparable from one another.¹¹⁴

¹⁰⁵ Abdulmajeed Hassan Bello, *Islamic Law and Islamic Ethics: Interrogating the Relationship*, 2 INT’L J. RELIGION & TRADITIONS 9, 11 (2016).

¹⁰⁶ See *Importance of Akhlaq (Good Character) According to Quran and Sunnah*, QURAN READING (Mar. 7, 2018), <http://www.quranreading.com/blog/importance-of-akhlaq-good-character-according-to-quran-and-sunnah/>.

¹⁰⁷ QURAN, Al-Qalam: 4.

¹⁰⁸ QURAN, Al-Qalam: 5.

¹⁰⁹ *Importance of Akhlaq*, *supra* note 106.

¹¹⁰ See Zulfiqar, *supra* note 4, at 333.

¹¹¹ GLENN, *supra* note 22, at 183.

¹¹² See Bello, *supra* note 105, at 10-11.

¹¹³ *Id.* at 10.

¹¹⁴ See *id.* at 16.

Ethical discourse has also been a way for jurists to use the law to engage with idealistic principles, and not merely employ the law in order to respond to practical concerns or earthly disputes. For Islamic jurists, law was often considered “the language of morality.”¹¹⁵ Creating legal obligations, such as *kifāya* duties, was a way for the law to serve as a vehicle for implementing moral principles.¹¹⁶ This reflects the multiple, coinciding roles of Muslim thinkers, who were not just jurists but also theologians.¹¹⁷ As a result, Shari’a can never be taken in isolation as pure law, for it is inextricably intertwined with religion, morals, and ideals.

The duty to rescue is similarly impossible to understand isolated from this web. The duty to rescue is not religious revelation, nor is it a mere explication of a legal principle, instead it is the product of jurists using the law as a forum to discuss how they think religion, law, and morals all *should* interact to determine an ideal standard for human behavior. In this same sense, the duty to rescue has traditionally been a popular topic for ethical discourse amongst Islamic jurists because “the duty to rescue is an opportunity for jurists to reveal their aspirations for the law.”¹¹⁸ Like other *kifāya* duties, the duty to rescue is an attempt to use the law to contemplate how Muslims might lead an exemplary life on the “straight path”¹¹⁹ as ordained by God.

In summary, the duty to rescue in Islamic law is a product of *Ijtihad* and arose as a result of Muslim thinkers interpreting Shari’a sources to determine that a duty to rescue others in peril exists and further deliberate the nature and scope of this duty. Scholarly discussions surrounding the *kifāya* duty to rescue suggest that the duty reflects a natural extension of the humanitarian obligations set forth in the Quran, and also reflects the central importance of Islamic ethics (*akhlaq*) and the unique role of law as a forum for ethical discourse.

¹¹⁵ See Zulfiqar, *supra* note 4, at 24.

¹¹⁶ See *id.*

¹¹⁷ See *id.* at 313-14 (quoting Vasalou, *Mu’tazilite Ethics*).

¹¹⁸ *Id.* at 310.

¹¹⁹ QURAN 5:16.

III. CHINESE CIVIL LAW

Standing in contrast to both Talmudic law and Islamic law is the civil code of China. Despite the presence of religious influences throughout China's history, the modern day Chinese legal system is primarily a civil law system that is secular in nature.¹²⁰ In other words, China does not rely on religion or divine revelation as sources of law.¹²¹ Law also plays a much smaller role in the daily lives of the Chinese, as compared to the lives of Jews and Muslims. While Talmudic and Islamic law encompass all aspects of followers' daily lives and behavior, China's civil law system consists of a codified set of state laws and leaves most regulation of daily life outside of the scope of formal law.¹²² However, that does not mean that aspects of Chinese life not covered in formal law are without a source of guidance. Confucian traditions have historically played an influential role in Chinese society, and these traditions continue to influence Chinese way life in everything from lifestyle and behavior to social structures and personal relationships.¹²³

Within this framework of formal civil law coexisting with normative Confucian traditions, it may come as a surprise that a duty to assist others who are in danger is not present in either domain in China. Unfortunately, a recurring scene in modern day China is a pedestrian being hit by a car and left lying on the street to die, while dozens of bystanders pass by without stopping to render aid.¹²⁴ One infamous accident that brought China's refusal to aid to the forefront of the nation's attention was the death of Xiao Yue Yue in 2011. A surveillance camera overlooking an alleyway street in Guangdong captured footage of two-year-old Xiao Yue Yue being hit by two vehicles over a span of seventeen minutes.¹²⁵ During

¹²⁰ See GLENN, *supra* note 22, at 326.

¹²¹ See *id.* at 320.

¹²² See *id.* at 326.

¹²³ See John H. Dunning & Changsu Kim, *The Cultural Roots of Guanxi: An Exploratory Study*, WORLD ECON. 329, 330 (2007).

¹²⁴ See, e.g., Mengyun Tang, *Does China Need "Good Samaritan" Laws to Save "Yue Yue"?* 47 CORNELL INT'L L. J. 205, 205-06 (2014); Man Yee Karen Lee *The Role of Law in Addressing the Good Samaritan's Dilemma: A Chinese Model?* 2 ASIAN J. L. & SOC'Y 55, 55-56 (2015).

¹²⁵ See Lee, *supra* note 124, at 56; see also Little Yue Yue, YOUTUBE (Oct. 21, 2011), https://www.youtube.com/watch?v=oL-a_tkt5fs (capturing the hit and run accident that killed Xiao Yue Yue and the emotional reaction of her parents grieving her death).

those seventeen minutes, over eighteen people passed by as Yue Yue lay dying on the pavement,¹²⁶ with some people even physically stepping over and around the injured toddler, yet no one stopped to help.¹²⁷ When an old woman finally came to Yue Yue's aid, it was too late—she died a few days later from her injuries.¹²⁸

Xiao Yue Yue's death spurred national outcry, and even “national soul searching,” as the people of China tried to grapple with such a horrific event and what was deemed to be “callous” inaction on the part of so many bystanders.¹²⁹ Understanding why Chinese citizens often choose not to render aid to injured victims like Yue Yue requires inquiry into both China's formal civil law system and informal Confucian traditions, and an analysis of why neither system resulted in the development of a duty to assist.

While many civil law countries have duty to assist laws in place,¹³⁰ China does not. This may be due to the relatively recent development of Chinese civil law, coupled with China's longstanding history of legal reticence. In China, the use of formal, written law dates back to ancient times, when every dynasty had its own set of codes (such as the “Jiuzhanglv” of the Han Dynasty and the “Tanglvshuyi” of the Tang Dynasty).¹³¹ However, what is recognized as the modern Chinese civil law system was not adopted until the establishment of the Republic of China in 1912, and the subsequent People's Republic of China in 1949.¹³² As a result, the first source of tort law did not appear in China until 1986, in the General Principles of Civil Law.¹³³ A wave of special tort statutes were then written in the 1990s,¹³⁴ but a

¹²⁶ See Lee, *supra* note 124, at 56.

¹²⁷ See Little Yue Yue, YOUTUBE (Oct. 21, 2011), https://www.youtube.com/watch?v=oL-a_tkt5fs.

¹²⁸ See Lee, *supra* note 124, at 56.

¹²⁹ *Id.* at 56.

¹³⁰ Duty to rescue laws are codified in many European civil law countries, including France, Spain, Portugal, Italy, Austria, Belgium, Germany, and Russia, as well as almost all Latin American countries. See Tang, *supra* note 124, at 213-14.

¹³¹ See Yi Gong Liu, *Chinese Legal Tradition and its Modernization*, HONG KONG DAVID C. LAM INST. EAST-WEST STUD. 1, 10 (2009).

¹³² See *id.* at 11.

¹³³ See Wei Zhang, *Understanding the Law of Torts in China: A Political Economy Perspective*, 11 U. PA. ASIAN L. REV. 171, 175-78 (2016).

¹³⁴ See *id.*

comprehensive promulgation of tort law was not enacted until the 2009 passage of the Tort Liability Law.¹³⁵

None of these codified sources of tort law established a duty to assist people in danger, nor did they contain an immunity clause to grant would-be-Good-Samaritans immunity from potential tort liability incurred in the course of performing a rescue. This omission may reflect an intentional avoidance of creating extensive laws, due to China's long history of "legal reticence" as enforced by Confucian and Buddhist influences throughout China's history.¹³⁶

Traditionally, a prominent role for law in Chinese society was not considered necessary or desirable. Both Confucianism and Buddhism "refused to take positive law very seriously."¹³⁷ Confucianism in particular considered many personal life matters best not reduced to writing, but instead best left to be governed by traditional instruments of social harmony, such as *li*.¹³⁸ This is because Confucian thought rests on the presumption of underlying human good; that is to say, the belief that humans are innately moral, unlike other belief systems in which humans are considered naturally sinful.¹³⁹ Furthermore, Confucius was a vocal critic of litigation, and considered lawsuits something to be avoided at all costs.¹⁴⁰ Thus, the role of formal law in Chinese society was historically limited in its scope, and had little perceived utility, making China less likely to enact a duty to assist law that would expand the law to apply to matters of daily life that have been traditionally kept outside of the scope of formal law.

The coexisting nature of China's formal civil code and Confucian traditions means that matters not covered by statute are often directed instead by the informal social traditions that continue to heavily influence Chinese daily life. In regard to assisting someone in danger, however, social traditions have not

¹³⁵ Tort Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective Jul. 1, 2010), 2010 P.R.C. LAWS 21 (China).

¹³⁶ See GLENN, *supra* note 22, at 324-26.

¹³⁷ *Id.* at 332.

¹³⁸ See *id.* at 328-29.

¹³⁹ See *id.* at 338.

¹⁴⁰ See *id.* at 325.

been enough to successfully encourage Chinese to render such assistance. Despite the traditionally collectivist nature of Chinese culture, multiple factors have impacted Chinese attitudes towards strangers and cultivated a strong aversion to assisting others. These are: (1) the principle of *guanxi*, (2) the rapid urbanization and changing socio-economic landscape of modern-day China, and (3) a series of bad court rulings that imposed legal liability on Good Samaritans.

A very important and influential principle in Chinese society is that of *guanxi*. *Guanxi* is a complex social concept, that can be loosely understood as a network of personal relations based on the exchange of favors.¹⁴¹ *Guanxi* can be visualized as a series of circles, centered on the individual, which expand outwards to encompass people based on their personal relation to the individual. The first circle consists of a “personal core” of immediate family, the second is a “reliable zone” of good friends and other relatives, and the third is an “effective zone” of broader relatives and friends.¹⁴² The degree of treatment others are accorded is based upon their relationship to the individual in *guanxi*.¹⁴³

Thus, *guanxi* creates a “difference between those who are close and those who are distant.”¹⁴⁴ As a result, *guanxi* creates a duty to protect one’s family and those within *guanxi*, but not strangers. Chinese proverbs also do not favor strangers, and even go as far as to say, “each person should sweep the snow on his own doorsteps and should not fret about those on his neighbours.”¹⁴⁵ This creates no incentive to come to the aid of strangers who are in danger, such as a pedestrian hit by a car in the middle of the city. Under *guanxi*, no duty is owed to such a stranger. In fact, “it is the absence of *guanxi* that is used to justify inaction when injured strangers need help.”¹⁴⁶

Some consider *guanxi* to be an “egocentric” principle that cultivates indifference.¹⁴⁷ However, *guanxi* may also be understood as a traditional principle that has not transposed well to modern times. In

¹⁴¹ See Qingxiu Bu, *The Good Samaritan in the Chinese Society: Morality vis-à-vis Law*, 49 INT’L J. L. CRIME & JUSTICE 46, 50 (2017).

¹⁴² See Yunxiang Yan, *The Culture of Guanxi in a North China Village*, 35 CHINA J. 1, 4 (1996).

¹⁴³ See Bu, *supra* note 141, at 49.

¹⁴⁴ See *id.* (quoting Xiaotong Fei).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 50.

¹⁴⁷ See, e.g., Bu, *supra* note 141, at 49-50; Lee, *supra* note 124, at 65.

ancient China, when the vast majority of Chinese lived in small rural communities, “guanxi could be used as a positive influence to unify society.”¹⁴⁸ This is because *guanxi* used to naturally encompass the entire village/community: “Unlike in urban settings where one can enjoy a movie or have a drink in a place surrounded by strangers, in village society all social and leisure activities take place among people who are connected through *guanxi*.”¹⁴⁹ Although people close in *guanxi* still received prioritized treatment over those distant in *guanxi*, no one was completely outside the sphere of *guanxi* in the way that modern day strangers are. Families would also be connected by a long-shared history (and well established *guanxi*) due to life being much less transient and allowing for less socio-economic mobility than life today. In rural farming communities, “economic imperative led one ‘to live where one’s father or grandfather lived, and where one’s children will continue to live,’” and as a result, families ended up residing in the same community of well-known neighbors for generations.¹⁵⁰

Furthermore, because *guanxi* is a fluid dynamic, not a static social structure, people in rural communities continuously worked to maintain their connections with every member of the community through gift-giving and mutual assistance, and favors were routinely extended in every aspect of life.¹⁵¹ *Guanxi* was more than a mere social pleasantry in village life: it was essential to survival. In times of grave need, such as famine, when villagers had to rely on assistance from family and friends, *guanxi* could mean the difference between life and death. Community members with good *guanxi* could expect to share food with neighbors to survive, while those with bad *guanxi* risked receiving no assistance and being left to starve.¹⁵²

In this context, it seems clear that *guanxi*, as it traditionally operated, would compel everyone within the village to come to the aid of a fellow villager in imminent peril (such as drowning in a river, or being hit by a car). Yet the modern-day implications of *guanxi* are vastly different. This is largely due to

¹⁴⁸ Bu, *supra* note 141, at 50.

¹⁴⁹ Yan, *supra* note 142, at 9.

¹⁵⁰ Lee, *supra* note 124, at 64.

¹⁵¹ See Yan, *supra* note 142, at 4, 9.

¹⁵² See *id.* at 19.

increased urbanization. Today, more Chinese citizens reside in cities than ever before, with 60% of China's population living in cities as of 2018 (compared to just 18% in 1978).¹⁵³ This mass migration from rural communities to urban areas has resulted in large cities that are composed of many people from different parts of China—and of vastly different backgrounds and social status—now living in close proximity to one another, essentially creating “communities of strangers.”¹⁵⁴ As a result, the closely knit, interdependent social network found in rural village life no longer exists for most urban dwelling Chinese due to the sheer geographic size, high population, and greater social diversity of cities. The “intimacy, trust, and interdependence” that once characterized rural life have been replaced by “estrangement, distrust, and independence.”¹⁵⁵

A lack of community and interdependence amongst those living in urban areas of China has been further exacerbated by modern-day China's increased focus on financial and economic advancement. China has undergone drastic and rapid economic change over the past forty years. Today, China is the world's second largest economy and boasts a population of 1.4 billion people.¹⁵⁶ This dramatic economic growth was accompanied by a shift in national ethos. In ancient China, Confucius did not actively promote wealth accumulation; he taught that "gentlemen pursue ideals in their lives; small people pursue wealth."¹⁵⁷ However, in the 1980's, during the early stages of its economic boom, China embraced a new slogan of “to get rich is glorious.”¹⁵⁸ While wealth accumulation has had the great effect of helping lift millions of Chinese out of poverty,¹⁵⁹ it has also resulted in a shift away from traditional values. Some

¹⁵³ See Kenneth Rapoza, *China Cities Rising as World's Most Powerful*, FORBES (Jun. 7, 2019), <https://www.forbes.com/sites/kenrapoza/2019/06/07/china-cities-rising-as-worlds-most-powerful-shanghai-bests-san-francisco/#2c7013254b4d>.

¹⁵⁴ Bu, *supra* note 141, at 50.

¹⁵⁵ *Id.*

¹⁵⁶ *The World Bank in China: Overview*, WORLD BANK GRP. (Oct. 1, 2019), <https://www.worldbank.org/en/country/china/overview>.

¹⁵⁷ Fang Xinghai, *Getting Rich Has Withstood 2,000 Years of Philosophy*, SHANGHAI DAILY (Apr. 11, 2012), http://www.china.org.cn/opinion/2012-04/11/content_25114701.htm.

¹⁵⁸ *Id.*

¹⁵⁹ See *The World Bank in China: Overview*, *supra* note 156.

argue China has become a “moral vacuum,” due to wealth maximization being prioritized over moral and civic obligations.¹⁶⁰

In addition to social and economic factors, China’s legal system has also influenced citizens’ attitudes towards assisting others. A series of highly publicized court cases in the 2000’s involving individuals who provided aid to strangers who had been injured, had the unfortunate effect of discouraging bystander intervention in China. A look at the court’s rationale in these cases makes it clear why they had such a powerful discouraging effect on the public, and why China recently passed a Good Samaritan law in response.

The first and most well-known case that sparked the beginning of the “Good Samaritan dilemma” in China was *Xu v. Peng* (hereinafter, the Peng Yu case).¹⁶¹ In 2007, 65-year old Ms. Xu fell to the ground when getting off a bus, breaking her leg, and Peng Yu offered her help and accompanied her to the hospital.¹⁶² In response, Ms. Xu alleged that Peng Yu was responsible for her injuries, and sued Peng \$7,000 for her medical expenses.¹⁶³ Despite a lack of evidence that Peng Yu was in fact at fault for Ms. Xu’s injuries, the judge found for Ms. Xu and awarded her \$6,000 in compensation.¹⁶⁴ The most problematic aspect of the court’s holding was the “common sense” rationale that “only the guilty rescue the injured.”¹⁶⁵ The judge determined that Peng Yu would not have come to the aid of Ms. Xu “unless he was guilty of injuring her in the first place.”¹⁶⁶

After the Peng Yu case, several courts throughout China followed the Peng Yu rationale and produced similar verdicts. In the case *Wang Xiuzhi v. Xu Yunhe* (2009), 69-year-old Wang fell and was injured after attempting to jump over a guardrail in the middle of a road.¹⁶⁷ Xu Yunhe saw the accident

¹⁶⁰ See Bu, *supra* note 141, at 49.

¹⁶¹ See *Xu v. Peng* (Nanjing Gulou Dist. People’s Ct. Apr. 1, 2007) (China).

¹⁶² See Tang, *supra* note 124, at 206-07.

¹⁶³ See *id.* at 207.

¹⁶⁴ See Melody W. Young, *The Aftermath of Peng Yu: Restoring Helping Behavior in China*, 22 PACIFIC RIM L. & POL’Y J. ASS’N 691, 693 (2013).

¹⁶⁵ See Tang, *supra* note 124, at 209.

¹⁶⁶ *Id.* at 207.

¹⁶⁷ *Id.*

from his car and stopped to help Wang.¹⁶⁸ Wang sued Xu, alleging that Xu had knocked her down and caused her injuries, and the court—without determining that Xu had actually knocked Wang down—awarded Wang damages.¹⁶⁹ Another similar verdict was issued in a 2010 case of injured bike riders suing the motorists who stopped to help them, and the men who had offered help were held liable for the bikers’ medical expenses.¹⁷⁰

These cases embittered Chinese attitudes towards helping others, because they “left the Chinese public with the impression that Good Samaritans cannot resort to the legal system for help when victims falsely accuse them.”¹⁷¹ The primary problem with these cases was the court’s rationale regarding defendant liability. In all cases, the court applied a “common sense” principle that aiding another is evidence of guilt, and also put the burden of proof on the defendant to show that they had not caused the plaintiff’s injuries.¹⁷² As a result, these cases directly caused people to alter their behavior in order to avoid potential legal liability.¹⁷³ If aiding another would be treated as determinative of guilt, and a defendant could not be sure that they would be able to accrue enough evidence to prove their innocence, the most rationale decision became choosing not aid anyone at all. In addition, the costs of litigation and large sums in damages that innocent defendants were often made to pay in such cases further discouraged people from aiding others.

One might ask, why do so many cases of victims falsely accusing Good Samaritans for causing their injuries arise in China? This phenomenon has been understood as partly created by a lack of social welfare and lack of affordable medical care in China.¹⁷⁴ Large medical bills and plaintiffs’ inability to pay incentivizes extortion via fraudulent litigation.¹⁷⁵ Furthermore, courts have encouraged this behavior

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 206, 212.

¹⁷² *See id.* at 209, 221.

¹⁷³ *See Bu, supra* note 141, at 223.

¹⁷⁴ *See id.* at 56.

¹⁷⁵ *See id.*

by creating the impression that the law allows victims to falsely accuse Good Samaritans and plaintiffs are likely to prevail in doing so.¹⁷⁶

In response to the Good Samaritan dilemma created by the Peng Yu case, in October 2017 China passed a new civil code protecting Good Samaritans from civil liability. Article 184 in Civil Law General Rules states: “If the rescuer voluntarily carries out emergency relief which has caused damages to the persons in danger, the rescuer shall not bear Civil Liability.”¹⁷⁷ Although this code symbolizes a step in the right direction, some argue it is not enough to solve China’s Good Samaritan dilemma.

One criticism of Article 184 is that it does not address the real concern of Chinese citizens, which is that a Good Samaritan will be falsely accused by the victim of causing the initial injury.¹⁷⁸ The new law only offers immunity from liability for harm incurred *in the course of helping* someone—this offers a defendant no protection if a plaintiff falsely claims the defendant was the one who injured them in the first place.¹⁷⁹ In addition, Article 184 does not resolve the problematic court reasoning established by the Peng Yu case. Chinese courts need to correct the Peng Yu reasoning by doing away with the “common sense” rationale of aid being determinative of guilt and shifting the burden of proof to the plaintiff, in order to produce fairer verdicts and restore Chinese citizens’ faith in the legal system.¹⁸⁰

In sum, China’s lack of a duty to assist law, and its citizens’ aversion towards aiding others, is the product of many factors. The altered functioning of *guanxi* and China’s rapid urbanization and economic boom have shifted China’s attitudes away from a collectivist lifestyle that depending on aiding others towards a more independent lifestyle that often lacks the social bond found in smaller communities. Also, Chinese courts’ problematic reasoning and unfair verdicts in the Peng Yu case and other similar cases created a strong disincentive to help others out of fear of legal liability. Although China has since enacted

¹⁷⁶ See Tang, *supra* note 124, at 220.

¹⁷⁷ General Rules of the Civil Law (promulgated by the Nat’l People’s Cong., Mar. 15, 2017, effective Oct. 1, 2017), art. 184, 2017 P.R.C. LAWS 66 (China).

¹⁷⁸ See Donald Clarke, *China’s new Civil Code and the Good Samaritan law*, CHINA COLLECTION (Oct. 10, 2017), <https://thechinacollection.org/chinas-new-civil-code-good-samaritan-law/>.

¹⁷⁹ See *id.*

¹⁸⁰ See Tang, *supra* note 124, at 220-24.

a Good Samaritan law, further legal reforms may be needed in order to address the real concerns of Chinese citizens.

IV. COMPARATIVE ANALYSIS

The Talmudic, Islamic, and Chinese civil law systems all offer unique perspectives on the duty to assist. When comparing these three systems side by side, both commonalities and differences can be found amongst them, which help suggest why each system's views regarding a legal duty to assist developed the way they did.

Both Talmudic and Islamic law recognize a duty to assist others in peril.¹⁸¹ As religious legal systems, Talmudic and Islamic law have many similarities. Both systems rely on divine revelation, or the word of God, as passed down through oral tradition and core written works (the Torah and the Quran).¹⁸² While the Torah explicitly establishes a duty to assist in Talmudic law,¹⁸³ Islamic law derived its legal duty to assist from the Quran via independent legal reasoning, or *Ijtihad*.¹⁸⁴ Whether explicit or inferred, both Talmudic and Islamic law suggest that religion naturally lends itself to creating a legal duty to assist others. One reason for this is that religion does not shy away from creating positive duties in the same way that pure law often does—rather, religion favors creating positive duties as a means of cultivating individuals' relationship with God.¹⁸⁵ Performing acts in service to God, such as coming to the rescue of another, can be an essential part of living in “the way” or according to “the path” that God ordains for his followers.¹⁸⁶

In contrast, China's civil code system lacks these religious influences, and also lacks a legal duty to assist.¹⁸⁷ Although Confucianism was historically a large influence in China, and remains influential

¹⁸¹ See *supra* Parts I, II.

¹⁸² See *supra* Parts I, II.

¹⁸³ See *supra* note 8 and accompanying text.

¹⁸⁴ See *supra* notes 73-78 and accompanying text.

¹⁸⁵ See *supra* notes 40, 100 and accompanying text.

¹⁸⁶ See GLENN, *supra* note 22, at 183 (explaining that Shari'a means “the way or path to follow”); QURAN 5:16 (stating that God will lead followers on the “straight path”).

¹⁸⁷ See *supra* Part III.

today,¹⁸⁸ Confucianism is typically regarded as a philosophy, or way of life—not a religion.¹⁸⁹ Despite the social and cultural influence of Confucian thought, Chinese law remains intentionally secular in nature.¹⁹⁰ Thus, China’s civil code does not seek to engage in the same ethical or theological discourse that the Torah and the Quran do. In the absence of a duty to assist ordained by God, such a duty does not seem to naturally arise. While the supreme authority of God can hardly be questioned in establishing a duty to assist in Talmudic and Islamic law, human authorities, such as China’s National People’s Congress, may reasonably shy away from creating positive duties because humans are considered less authorized to interject subjective notions of morality into the law.

What Talmudic and Islamic law also have in common, to the exclusion of China’s civil law, is that law encompasses every aspect of followers’ everyday life.¹⁹¹ Both the Torah and the Quran include rules for, and commentary on, how to perform daily tasks, such as prayer, family relations, and even foods that should and should not be eaten.¹⁹² China’s civil code is much more limited in its scope, and historically focused mostly on criminal law and punishments, due to China’s historical aversion to implementing extensive formal law.¹⁹³ When law is inextricable from everyday life, as it is in Talmudic and Islamic law, the law unavoidably touches on personal interactions and social matters, such as helping others who are in peril. On the other hand, when law is its own distinct entity, it has a less pervasive impact on human behavior in daily life.

The scope of the duty to assist is also unique in each legal system. Each legal system differs in how it defines the moral community relevant for the duty to assist. Talmudic law traditionally limits the scope of its duty to aid to only require Jews to aid other Jews who are in peril.¹⁹⁴ Islamic law creates a

¹⁸⁸ See *supra* note 123 and accompanying text.

¹⁸⁹ See Tu Weiming, *Confucianism*, ENCYCLOPEDIA BRITANNICA (2019), <https://www.britannica.com/topic/Confucianism>.

¹⁹⁰ See *supra* notes 120-21 and accompanying text.

¹⁹¹ See *supra* notes 22, 64 and accompanying text.

¹⁹² See, e.g., TORAH Leviticus 11 (specifying kosher foods); QURAN 11:114 (directing the observation of daily prayer).

¹⁹³ See *supra* notes 136-40 and accompanying text.

¹⁹⁴ See *supra* notes 57-60 and accompanying text.

much broader duty to rescue, by requiring Muslims to come to the aid of anyone in peril, regardless of the victim's religion.¹⁹⁵ The traditional Chinese principle of *guanxi* also creates a social and cultural duty to assist others, but is selective and systematic in determining which specific relations an individual owes an obligation to.¹⁹⁶

The relevant moral community is largely the product of the different underlying goals of the duty to assist in each system. Talmudic law and Chinese *guanxi* are similar in that they both limit the scope of the moral community to a group of connected, interdependent people who need to rely one another in order to survive. In Talmudic law, limiting the moral community by common religion, i.e. members of the Jewish faith, helped achieve an important goal of preserving Jewish identity and physical life during years of persecution and the diaspora.¹⁹⁷ Similarly, *guanxi* traditionally functioned so as to apply (in varying degrees) to all members of a shared farming community, in order to make necessary collective activities (such as harvesting crops) possible and help the community survive difficult times, such as seasons of famine.¹⁹⁸

In comparison, Islamic law creates a much broader moral community that encompasses all humankind.¹⁹⁹ This is because the underlying goal of the *kifāya* duty to rescue is less pragmatic than the duty to assist established by Talmudic law or the Chinese principle of *guanxi*. The duty to rescue in Islamic law is less focused on the physical preservation of life within its own community, and more focused on fostering good ethical behavior amongst its adherents, called good *akhlaq*.²⁰⁰ This may be partly due to the fact that literal survival is less necessary to the *kifāya* duty to rescue because Islam already has numerous other obligations in place that provide for the physical preservation of the Muslim community—such as *zakat* (giving money to the poor) and *waqf* (endowing property for the common

¹⁹⁵ See *supra* notes 101-03 and accompanying text.

¹⁹⁶ See *supra* notes 141-43 and accompanying text.

¹⁹⁷ See *supra* Part I.

¹⁹⁸ See *supra* Part III.

¹⁹⁹ See *supra* note 101 and accompanying text.

²⁰⁰ See *supra* Part II.

good).²⁰¹ In addition, the ethical focus of the *kifāya* duty to rescue reflects the prominent role of ethical discourse in Islamic law, as well as the importance of good *akhlaq* (ethical behavior) as advocated by the Prophet Muhammad.²⁰² Traditionally, the duty to rescue in Islamic law has been treated primarily as a forum for ethical discourse, offering an opportunity for Islamic jurists' to express their aspirations for the law.²⁰³ This idealism seems to be what encouraged Islamic jurists to expand the moral community to include all humankind.

Finally, the mode of enforcement of the law differs under Talmudic, Islamic, and Chinese civil law. How one's actions undertaken in attempt to aid another are assessed, and how punishment is enforced, seems to directly impact how willing individuals are to actually come to the aid of others. Both Talmudic and Islamic law believe in divine judgement—that is, enforcement by God upon an individual's death.²⁰⁴ What is unique about divine judgement is the all-knowing, infallible nature of God's knowledge in assessing an individual's performance (or non-performance) of a prescribed duty.²⁰⁵ There is little incentive to ignore one's obligation to aid others when God cannot be fooled. In addition, the stakes of performance are high under divine judgement, because an individual's heavenly reward depends upon their earthly actions.

In contrast, China's civil code is subject to enforcement by human courts. As demonstrated by the Peng Yu case and the similar stream of cases following it, human courts are subject to flawed human reasoning and can sometimes create undesirable outcomes.²⁰⁶ Judges lack the all-knowing abilities of a divine power, and thus must take the time to investigate facts and determine fault based on the limited amount of information known to them. When facts are not properly investigated or are wrongly construed, such as in the Peng Yu case, the public can quickly lose faith in the legal system.²⁰⁷ Without

²⁰¹ See *supra* note 97 and accompanying text.

²⁰² See *supra* note 109 and accompanying text.

²⁰³ See *supra* note 118 and accompanying text.

²⁰⁴ See *supra* notes 25-26, 90-91 and accompanying text.

²⁰⁵ See *supra* notes 27-28, 95 and accompanying text.

²⁰⁶ See *supra* notes 161-170 and accompanying text.

²⁰⁷ See *supra* note 171 and accompanying text.

this belief that the innocent will be protected and justice will be served, there is little incentive to submit one's self to the mercy of such judgement at all. As a result, Chinese courts have effectively discouraged Chinese citizens from coming to the aid of others, in order to avoid interacting with an unreliable system of enforcement and being wrongly subjected to legal tort liability.²⁰⁸

CONCLUSION

To conclude, there is much that can be learned about a legal system by analyzing its perspective on a legal duty to assist others in danger. Talmudic law, Islamic law, and Chinese civil code all vary in their stance on the existence of a duty to assist, its legal source, its scope, and the underlying goals that the duty to assist aims to serve. Each system's duty to assist law (or lack thereof) is the product of the historical, religious, social, cultural, and economic influences that impacted the growth and development of law in that system. Fascinating moral, ethical, and legal discourse can all be had, simply by asking: what duty do members of society owe to one another?

²⁰⁸ See *supra* note 173 and accompanying text.

* J.D. Candidate 2020, William & Mary Law School.