

Does Judaism Recognize the Supererogatory?



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Abstract This chapter puts forward a *prima facie* argument for a Jewish form of anti-supererogation before finding that no such argument can do justice to the Jewish tradition. Instead, the question becomes: what form of supererogation can Jewish law recognize? Qualified forms of supererogation would allow the Jewish philosopher to preserve certain theological and philosophical desiderata, but an unqualified form of supererogation sits more easily with a central approach to the nature of Divine revelation. Accordingly, the shape of a Jewish supererogation has deep consequences for Jewish philosophy at large.

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1 Introduction

Readers of this book will know already that “supererogation” is a technical term referring to that class of actions, if there be such a class, that go beyond the agent’s ethical responsibilities, duties, or obligations. One standard way to make sense of our question, therefore, is to ask whether—from a Jewish perspective—the following list is exhaustive of all possible actions¹:

1. Actions that are good to do and bad not to do.
2. Actions that are neither good to do nor bad not to do.
3. Actions that are bad to do and good not to do.

If Judaism doesn’t recognize the supererogatory, then Judaism thinks that our three-part division of actions is exhaustive. If, however, Judaism *does* recognize the

¹ In posing the question this way, I’m following (Urmson, 1958), (Chisholm, 1963) and (Heyd, 2019).

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supererogatory, then it recognizes a fourth category of action, beyond the three we've already listed, namely:

4. Actions that are good to do but not bad not to do.

This way of framing the question helps us to understand what we mean by “recognizing” or “failing to recognize the supererogatory.” Fine. But we should, of course, ask, what is Judaism? This is a much harder question to answer. The adage, that for any two Jews there are at least three views, is borne out by experience and applies even to the question as to what Judaism is. But for our purposes, we don't need a particularly sharp definition. We can relate to Judaism, in the context of this paper, as a multivalent intellectual tradition set around a canon of texts: the Hebrew Bible, the works of the classical Rabbis—namely, the classical Midrashim, Mishna, Tosefta, and the Babylonian and Jerusalem Talmuds—in addition to the medieval, modern, and contemporary commentaries to these texts, whose authors viewed Jewish law (*halakha*) as authoritative, even as they disagreed as to its content, and the responsa literature (in which Rabbis respond to questions posed to them in correspondence). Ultimately, the question of this paper is whether or not that literature makes room for the notion of supererogation.

Of course, as a multivalent tradition, with multiple voices, Judaism doesn't always have just one clear answer to a question but often makes room for a variety of different approaches. Perhaps there are strands of the tradition that recognize the supererogatory and strands that don't. But sometimes you do find consensus, for example—nobody in this literature sanctions idol worship (in any circumstance) or the consumption, by Jews, of pork (except for in extreme cases, in which life and death hang in the balance). Does the recognition of the supererogatory fall within such a consensus? Many people, familiar with the Jewish tradition, would instinctively say, “yes.” After all, the *halakha* recognizes four categories of actions:

1. Actions that are obligatory;
2. Actions that are not obligatory, forbidden, encouraged, or discouraged;
3. Actions that are forbidden; and,
4. Actions that are neither obligatory nor forbidden, but which are nevertheless encouraged.

The fourth category includes (but isn't limited to) those actions which the Rabbis describe as *lifnim mishurat hadin* (literally: *beyond, or before, the line of the law*). The existence of this fourth category is reason to think that Judaism does recognize the supererogatory. And yet, despite the fact that it's ultimately doomed to fail, a *prima facie* case can be made for a Jewish anti-supererogationism.

2 Jewish Anti-Supererogationism

Supererogation is, if it exists at all, a phenomenon that relates to the ethical. Its existence entails that, alongside the ethically mandated, the ethically forbidden, and the ethically neutral, there's a category of actions that are praiseworthy *without* being ethically mandatory.

It should go without saying that what is ethically mandated might not always be *legally* mandated. That all depends upon the system of law in question. Accordingly, the fact that Jewish law divides actions into four categories—the mandatory, the forbidden, the neutral, and the encouraged—doesn't entail that Jewish *ethics* makes a similar four-way division. Perhaps Jewish ethics is more demanding than Jewish law. Jewish law doesn't command and probably doesn't even specifically encourage, a person to jump on a live hand grenade to save the life of others. Perhaps this would be a good candidate for a supererogatory deed. But then again, the fact that Jewish law doesn't pronounce on this issue doesn't mean that Jewish ethics is similarly silent.

Perhaps Jewish ethics makes obligatory anything that's worthy of ethical praise, even if Jewish law is less exacting. The Babylonian Talmud (tractate Baba Metzia 30b) cites Rav Yochanan, who said, "Jerusalem was destroyed because [its inhabitants] judged [each other in accordance with] Torah law within it." The Talmud then asks, incredulously, "should they have followed the law of the Magians instead?!" Ultimately, the Talmud interprets Rav Yochanan to have meant the following: Jerusalem was destroyed "because they based their judgements solely upon Torah law and did not act *lifnim mishurat hadin* [Literally: *they did not go beyond, or before, the line of the law.* More colloquially, it means: *they did not go beyond the letter of the law.*]"

At least on a first reading, the temptation would be to see Rav Yochanan's statement, and its Talmudic gloss, as distinguishing between Jewish law and Jewish ethics. The problem in Jerusalem wasn't that the Jews were judging their cases of civil conflict according to the wrong law books. Jewish law was the appropriate legal system for that. The problem was that they were too litigious to begin with and were unwilling to compromise. They demanded what was rightfully theirs by dint of Jewish law but neglected to treat one another kindly, ethically, going beyond the letter of the law.

But, if that's the right reading, and if acting *lifnim mishurat hadin* literally means acting in accordance with an ethic that's higher, or more demanding, than Jewish law, then we have no reason to think that Judaism does or doesn't recognize the supererogatory. Supererogation, if it exists at all, isn't about going beyond the simple demands of the *law*; it's about going beyond the simple demands of *ethics*. In encouraging us to act *lifnim mishurat hadin*, and therefore, to go beyond the letter of Jewish law, Jewish texts are not taking a stance on whether we should, and whether it's even possible, to go beyond the minimal demands of *ethics*. The category of *lifnim mishurat hadin* is, on this reading, a red herring. It is a notion that relates to Jewish

law, rather than to ethical obligation, and thus tells us nothing about Jewish attitudes to supererogation.

Admittedly, the category of *lifnim mishurat hadin* is just one candidate for supererogation in Jewish literature. In the Catholic tradition, and in much of the philosophical literature, post-Urmson (i.e., after Urmson, 1958), the supererogatory tends to be associated with saintly and heroic action, rather than going just a little further than one is strictly obligated to go.² But still, to the extent that halakhic Judaism is so centrally dedicated to the articulation of Jewish law, we're likely to find the same problem emerge with other Talmudic or Rabbinic candidates for supererogation. They're likely to tell us to go further than the law requires, whilst remaining silent as to whether one should or could go further than ethics demands.

But then, when we reflect upon the notion that Jewish law, according to Jewish sources, is based upon Divine revelation; when we reflect upon the idea that Jewish law was designed to govern a "priestly kingdom and a holy nation" (Exodus 19:6) so as to give rise to a people that would be a "light unto the nations" (Isaiah 42:6), it becomes extremely counterintuitive to imagine that there could be much of a gap between the demands of Jewish law and the demands of ethics. The idea that Jewish law is the product of Divine revelation might lead us to think that it would differ from secular law, which is the product of human decision-making.

Depending upon the aims and objectives of a secular legal system, we can imagine a lacuna of varying size between the demands of the law and the demands of ethics. But in a system where the laws have been given by God, for the above-stated purposes, you might think that any such gap would evaporate. Accordingly, an extreme position emerges, in the literature, according to which Jewish law itself is the key determinant as to what is ethical and what isn't. Indeed, this was the position of Rabbi Avraham Yeshaya Karelitz (1878–1953, otherwise known as the *Chazon Ish*). He declared that "it is the halakhah which determines the forbidden and permitted in ethics."³

If that's true, then how could there possibly be actions that are demanded by ethics, but not called for by the halakha? On the other hand, what do we make of Rav Yochanan's statement, and its Talmudic gloss, which *do* imply a great gulf between the demands of Jewish law and the demands of Jewish ethics? Such a gulf that it led to the destruction of Jerusalem.

One way to proceed would be to recognize that the halakha itself enjoins us to go *lifnim mishurat hadin*. We are, on this suggestion, *commanded* by Jewish law, to go further than its own explicit demands. This suggestion is most famously associated with Rabbi Moses Nachmanides (1194–1270), though it could be argued that this was the point that Rav Yochanan was trying to make about the destruction of Jerusalem. In the book of Leviticus (19:2), God tells the Children of Israel that, "you shall be holy, for I, the Lord your God, am holy." In his commentary to this verse, Nachmanides writes:

² One important exception to this trend has been the work of David Heyd (cf. e.g., Heyd, 1982, §7.4).

³ (Karelitz, 1996, p. 19).

The meaning thereof is as follows: The Torah has admonished us against immorality and forbidden foods, but permitted sexual intercourse between man and his wife, and the eating of [certain] meat and wine. If so, a man of desire could consider this to be a permission to be passionately addicted to sexual intercourse with his wife or many wives, and be among winebibbers, among gluttonous eaters of flesh, and speak freely all profanities, since this prohibition has not been [expressly] mentioned in the Torah, and thus he will become a sordid person within the permissible realm of the Torah!⁴ Therefore, after having listed the matters which He prohibited altogether, Scripture followed them up by a general command that we practice moderation even in matters which are permitted... And such is the way of the Torah, that after it lists certain specific prohibitions, it includes them all in a general precept. Thus after warning with detailed laws regarding all business dealings between people, such as not to steal or rob or to wrong one another, and other similar prohibitions, He said in general [Deuteronomy 6:18], “And thou shalt do that which is right and good,” thus including under a positive commandment the duty of doing that which is right and of agreeing to a compromise [when not to do so would be inequitable]; as well as all requirements to act “beyond” the line of the law [i.e., *lifnim mishurat hadin*].⁵

Nachmanides expands upon this point in his commentary to Deuteronomy 6:18, and its injunction that the Israelites do what is “right and good in the eyes of the Lord.” There he explains that it isn’t possible for a finitely long law book to set out explicit instructions to cover every eventuality. For that reason, once a sufficiently large set of laws have been delineated, we find more general injunctions to be holy, and to do the right and the good.

Is Nachmanides calling for supererogation here, and—somewhat paradoxically—encoding it as a legal *obligation*? Perhaps he’s merely encoding an obligation to act *equitably*. Equity, as Aristotle defines the notion (*Nicomachean Ethics*, 1137a-1138a), is what’s called for when the abstract demands of justice, applied to a specific situation, will lead to an injustice, because the explicit law code fails to be sensitive to the very specific details of the case at hand. In other words, equity is “a correction of law where it is defective owing to its universality.” Accordingly, to act equitably isn’t really to act beyond the demands of justice. It is rather to enact, in a given situation, “a correction of law where it is defective owing to its universality.” Aristotle’s notion of equity, therefore, distinguishes between the formal requirements of the law—which we could call *legal justice*—and what might be called *true justice*. It follows therefore, that equity isn’t to go *beyond* the demands of justice. It is merely the “correction of legal justice” in the name of true justice.

Nevertheless, David Heyd argues that equity can “in principle be viewed as one type of supererogation,” even if only a “degenerate” case of it: “[I]ts corrective character makes it supererogatory only in the *qualified* sense: ideally it should have been part of justice, as Aristotle himself implies” (Heyd, 1982, p. 48). So, if Judaism commands us to be equitable in our dealings with others—as Nachmanides implies—there is thereby room to say that it *commands* the supererogatory (even if only a degenerate case of it). Moreover, Nachmanides sees the injunction to be holy, and to

⁴ Rabbi Lichtenstein and Shmuel Shilo translate this phrase—*naval birshut hatorah*—as “a scoundrel with Torah license” (Lichtenstein, 2004, p. 39; Shilo, 1978, p. 370).

⁵ As translated by Charles Chavel (with one very minor amendment of my own), see: https://www.sefaria.org.il/Ramban_on_Leviticus.19.2.2?lang=en.

do the right and the good, as having two elements: (1) to seek compromise, and (2) to go beyond the letter of the law. The first element seems to point in the direction of equity—the second element seems to push further—in the direction of more standard forms of supererogation (e.g., doing good deeds that we're not obliged to do) and suberogation (e.g., refraining from doing certain permitted deeds, or at least from indulging in them, when to do so would be dishonorable).⁶

Interestingly, in his commentary to Maimonides' *Sefer Hamitzvot*, in which Maimonides lays out what he takes to be the 613 commandments of the Torah, Nachmanides doesn't go so far as to list either equity or supererogation, in the form of acting *lifnim mishurat hadin*, among them (neither does Maimonides). Nevertheless, it's clear from what he wrote in his commentary to the Torah, that Nachmanides viewed these things, if not as fully-fledged *commandments*, then at least, to quote Rabbi Lichtenstein (2004, p. 41), "as a normative duty, incumbent upon—and expected of every Jew as part of his [or her] basic obligation." But it was Rabbi Isaac of Corbeille (d. 1280) who extended Nachmanides' logic to its ultimate conclusion when he did go so far as to include, in his own count of the 613 commandments, the duty to act *lifnim mishurat hadin*.⁷

Rabbi Isaac's inclusion of *lifnim mishurat hadin* within the body of Jewish law allows us to recover the theologically appropriate link between halakha and ethics. Sometimes, the explicitly codified laws of the Torah fall short of what's ethically demanded, but at those times, the Torah's more general injunction to act ethically kicks in. What Rav Yochanan, and his Talmudic gloss meant, wasn't that there's a gulf between the demands of halakha and the more exacting demands of ethics. There can be no such gulf. Rather, what they meant was that the explicit and specific laws of the Torah, when unencumbered by the additional Torah law of acting *lifnim mishurat hadin*, is what gives rise to such a gulf. The Jews of Jerusalem were particular regarding 612 of the 613 commandments, but they didn't act *lifnim mishurat hadin*.

Where does this leave us regarding the question of supererogation? In one fell swoop, we seem to have made the halakhic system relevant to the study of ethics again, by insisting upon its encompassing every demand of ethics, but we also seem to have undone any connection between the notion of *lifnim mishurat hadin* and the notion of supererogation. After all, if there is a *commandment* to act *lifnim mishurat hadin*, then it turns out that we have an obligation so to act. And if we have an obligation so to act, it can hardly be considered supererogatory. Indeed, if the category of *lifnim mishurat hadin* is truly to be viewed as *obligatory*, then we need to revise the four-fold division of actions into the following new five-fold schema:

1. Actions that are explicitly mandated in the codes of Jewish law;
2. Actions that are neither halakhically obligatory nor forbidden;
3. Actions that are explicitly prohibited in the codes of Jewish law;
4. Actions that are obligatory, even though they are not explicitly mandated in the codes of Jewish law, but fall under the more general exhortations of the law, to be holy and good; and

⁶ For more on the notion of suberogation, see (Driver, 1992).

⁷ *Sefer Mitzvot Katan*, §49.

5. Actions that are forbidden, even though they are not explicitly prohibited in the codes of Jewish law, but whose prohibition falls under the more general exhortations of the law, to be holy and good.

The fourth and fifth lines of this list, on this understanding of the concept, are what maps onto the category of *lifnim mishurat hadin*. You might think that line 4 refers to the supererogatory, and that line 5 refers to the suberogatory. But that would be a mistake. Both lines delineate legally binding obligations. So, either we say, perhaps with Nachmanides, that Jewish ethics really is broader than Jewish law; that it is possible to be a scoundrel with the full sanction of Jewish law, but that with its notion of going *lifnim mishurat hadin*, Jewish *ethics* demands much more from us. But if that's the case, then the category of *lifnim mishurat hadin* is merely telling us to go further than a legal system that doesn't fully accord with the demands of ethics. It isn't telling us to go further than the demands of ethics themselves. It therefore tells us nothing about supererogation; not to mention it's giving up on the moral perfection of Jewish law. Or, we say with Rabbi Isaac of Corbeille that there is no room, within the parameters of Jewish law, for unethical behavior, and that acting *lifnim mishurat hadin* is itself a halakhic obligation. But, if that's the case, then there's no room for the supererogatory. If an action is good and right, then it's obligatory. So understood, and contrary to popular opinion, the category of *lifnim mishurat hadin* is either silent about, or amounts to an outright denial of, the supererogatory.

Having made this Jewish case against the supererogatory, we can immediately see a number of problems. In the history of religious philosophy, anti-supererogation tends to be associated with a Lutheran or Calvinist ethic according to which, as summarized by Heyd (2019), "The demands of God are so extensive that human beings have not the slightest chance of ever satisfying them, let alone going beyond them." If every possible good is actually obligatory for us to perform, would we have time to sleep, or earn a living? This Protestant resignation in the face of God's extensive demands runs out of kilter with the Jewish sources. Indeed, the Talmud, on four separate occasions, invokes as a principle of Jewish law that, "The Torah was not given to ministering angels."⁸ This principle is used to limit how demanding our interpretation of the law can be, since the law was given to human beings; not to angels. The law should be possible to keep. God doesn't make unrealistic demands. Rabbi Eliezer Berkovits recognized this to be one of the meta-principles at the heart of Jewish law. He called it *the wisdom of the feasible* (Berkovits, 1983, p. 8). Note that this potentially goes beyond the claim that *ought implies can*. It tells us that a halakhic ought implies a "can-with-relative-ease."⁹

⁸ Babylonian Talmud, tractates Berachot 25b, Yoma 30a, Kiddushin 54a, and Me 'ilah 14b.

⁹ Daniel Statman rightly notes, in correspondence, that (a) "observing halakha is often not that easy," and that (b), "the examples offered by philosophers for [the claim that] *ought implies can* are usually not examples in which the agent literally *can't* do X." Accordingly, I may have made too much of the distinction between the doctrine that ought implies can, and the halakhic notion of feasibility. On the other hand, different halakhic authorities place different weights upon the notion of feasibility. Observing the halakha as understood by one halakhic authority can often be much easier than observing the halakha as understood by another halakhic authority; depending upon how

As codified in the most authoritative code of Jewish law, the *Shulchan Aruch*, of Rabbi Yosef Karo (1488–1575), Jews are commanded, where feasible, to give 10% of their income to charity. It is then codified as “laudable” to give up to 20%. Rabbi Moshe Isserlis (1530–1572), in his gloss on these laws, warns us not to give more than 20%, lest we squander our wealth and become dependent on charity ourselves (Shulchan Aruch, Yoreh Deah 249:1). But if anything good is obligatory, then surely it would be obligatory for us all to give every penny we earn that isn’t required for our own subsistence. If something were laudable, wouldn’t it automatically be obligatory? Likewise, we’re commanded to stay up until midnight on the first evening of Passover, and then we’re told that those who stay up longer are to be praised.¹⁰ But if it’s praiseworthy, shouldn’t it be obligatory? Could that really be what Rabbi Isaac meant, when he included *lifnim mishurat hadin* in the 613 commandments? What happened to the Torah not being given to ministering angels?

When Rabbi Isaac includes *lifnim mishurat hadin* in the 613 commandments, he explicitly cites Rav Yochanan’s statement about the destruction of Jerusalem. In that context, as in a number of other contexts in the Talmud,¹¹ going *lifnim mishurat hadin* seems to mean nothing more than being willing to compromise upon that to which one is strictly entitled in cases of civil law. In fact, as Shmuel Shilo demonstrates, when the Talmud invokes the principle, in cases of civil law, to act *lifnim mishurat hadin* tends to mean nothing more than to waive a special exemption given to you, and not to the general population, by Jewish law (Shilo, 1978, p. 364).¹² Perhaps that’s all that Rabbi Isaac ever meant. He didn’t mean to encode, as one of the 613 commandments, an obligation to do anything and everything that could be considered to be laudable. Perhaps he merely meant to encode a willingness to compromise upon one’s legal rights, and to waive special exemptions, in the name of equity in civil law. True, equity may be a (degenerate) form of supererogation, but it’s a far cry from transforming every laudable deed into an obligation. If that’s the case, then the inclusion of acting *lifnim mishurat hadin* within the body of the law shouldn’t be viewed as the denial of the supererogatory.¹³

they understand the notion of feasibility, and what weight they place upon it. On the more liberal ends of the spectrum, therefore, you might find “feasibility” given a wider scope than the “can” of *ought implies can*. But I concede to Statman that this isn’t always, and certainly not obviously, the case.

¹⁰ See, e.g., *Mishne Torah, Hilkhhot Hametz U’Matza* 7:1.

¹¹ Babylonian Talmud: tractates Ketubot 97a, Baba Metzia 24b, *Ibid.*, 30b, and Baba Kama 99b.

¹² Having said that, in the Babylonian Talmud, Ketubot 97a, *lifnim mishurat hadin* is used to waive not a special exemption, but a regular right. Based on his own analysis of all of the primary Talmudic sources, Newman (1998, p. 29) is inclined to define *lifnim mishurat hadin* in terms of a waiver: “Whether we are concerned with an elder who has a right to refrain from unloading animals (but does so anyway), or a man who has a right to keep the property that has been sold to him (but returns it to the seller), the term *lifnim mishurat hadin* designates a willingness to waive voluntarily some benefit or right to which one is entitled by law. In each case, it is implied that the party who waives the right in question does so out of a concern for the other party, who would be harmed or disadvantaged if the right were exercised.”

¹³ In correspondence, David Heyd makes the following point: Calling for people to waive their legal rights is sometimes equivalent to a call for equity, but it might sometimes be a call for something

Indeed, the centrality of *feasibility* to the edifice of Jewish law will make it very hard to sustain a robust anti-supererogationism. But if we really can't make the case for a Jewish anti-supererogationism, does that mean that we have to accept that the demands of Jewish law really are less than ideal; since the laudable isn't always obligatory? The answer to this question will depend upon the shape that Jewish supererogation might take. And you won't be surprised to hear that this has been subject to debate.

3 Qualified Supererogation

The one pleasing consequence of Jewish anti-supererogation is that it resolutely refuses to believe that the Torah leaves out any ethical imperative; and, like any form of anti-supererogation, it refuses to believe that there could be good deeds that we're not obligated to perform. In other words, it zealously guards the connection between axiology (value) and deontology (duty). If there's something good that you could do, then you *should* do it. One way to respect the halakhic wisdom of feasibility,¹⁴ without breaking the link between axiology and deontology, and without conceding that the Torah demands less than ethical perfection, is to adopt a qualified form of supererogation.

Qualified forms of supererogation insist that value generates duty, but that duties are not uniformly distributed. What we call the supererogatory, on this qualified view, are the duties that only certain people have, or the duties from which many people are exempt. Supererogatory actions are still, on this account, *duties*—but they are *qualified* duties because they only apply to certain people.¹⁵

more obviously supererogatory. “If the letter of the law says that you have in a particular case to do X but it goes against the *spirit* of the law to do X (since the law could not foresee the particular unethical implications of this case), then it is a case of equity” but, he continues, “if you compromise with a thief who stole your property because he is poor and you leave him with half of the property, this is not equity but an act of supererogation.” I concede the point. To gauge its relevance would require us to better understand the situations in which Rabbi Isaac would demand that a person waive his legal rights, and when he would make no such demand. Moreover, even if Rabbi Isaac always demands the supererogatory waiving of rights in cases of civil law, it's still a very limited inclusion of the supererogatory into the body of Jewish law. Remember: to include it as a demand of Jewish law is to rob it of its supererogatory status and render it an obligation. So, even if Heyd is right that Rabbi Isaac is demanding more than mere equity here, he has still left plenty of room for the truly supererogatory beyond the body of Jewish law.

¹⁴ For more on this notion, and its roots in Jewish literature, see (Berkovits, 1983, p. 8) and the Bablyonian Talmud, tractates Berachot 25b, Yoma 30a, Kiddushin 54a, and Me 'ilah 14b.

¹⁵ The three-way distinction between anti-supererogation, qualified-supererogation, and unqualified-supererogation is owed to Heyd (1982). As examples of different forms of qualified supererogation, Heyd (2019) cites: Richards (1971), who speaks of “supererogatory duties”; John Rawls, who relates to supererogatory actions as duties falling under an exemption, when the agent waves the exemption (Rawls, 1971, p. 117); Raz (1975), who similar to Rawls, thinks of supererogatory actions occurring when an agent disregards a second-order reason that counts as a permission not to act, in favor of a first-order reason so to act (1975); and Shlomo Cohen's idea of “forced

One might think that Maimonides adopts a qualified supererogationism in his treatment of *lifnim mishurat hadin*. In his codex, the *Mishne Torah (Hilkhot De'ot 1:5)*, Maimonides presents two character types—the pious and the wise. He writes:

One who controls himself with increased restrictions, and distances himself even from the mean tendency [i.e., the golden mean], a little one way or a little the other way, is called devout [i.e., pious]. How may one do it? One who will distance himself from the extreme point of arrogance and become exceedingly humble is called devout for, this is the tendency of piety. If one distances himself to the mean point only and practices meekness he is called a wise man for this is the tendency of wisdom. A like pathway exists in all the rest of the tendencies. The ancient devotees diverged their tendencies from the middle-path facing the two extremes; some tendency they bent opposite to the last extreme and some tendency they bent opposite the first extreme. This is more than being within the limits of the law [i.e., this is acting *lifnim mishurat hadin*]. As for us, we are charged to walk in these middle-paths, which are the good and straight paths, even as it is said: “And thou shalt walk in His ways” (Deut. 28 9).¹⁶

In other words, the Torah enjoins us to calibrate our character traits to the golden mean—don't be too serious, but don't be too jocular either. This is the wise path of the sage. It is, of course, one of the main teachings of Aristotle's *Nicomachean Ethics*. The pious, by contrast, act *lifnim mishurat hadin* and go beyond the mean, towards extreme piety. The reason that this can, and has, been confused with qualified supererogation is that it looks as if there's a special duty, the duty to go *lifnim mishurat hadin*, and that this special duty falls only upon an ethical elite: the pious; but not the rest of us.

One reason for thinking that this can't be the right interpretation is that it would be uncharacteristic of Maimonides to place sagacity below any other characteristic, even piety. Indeed, for Maimonides, sagacity and true virtue come hand in hand with one another. Another reason for revising our understanding of this passage is how Maimonides uses the phrase *lifnim mishurat hadin* in other places in his legal code.

Basing himself on the Talmud (*Baba Metzia 24b*), Maimonides rules that there are certain circumstances in which a person isn't obliged to return an item of lost property. But, in such a case, “He who wants to take the good and the straight road and act *lifnim mishurat hadin* should return the lost article” (*Mishne Torah, Laws of Theft and Lost Property*, 11:7). This isn't put forward as an obligation so much as a choice that's open to anybody to make, without compulsion. Similarly, basing himself on the Talmud's use of “*lifnim mishurat hadin*,” Maimonides rules that a respected elder is exempt from various obligations that may be socially embarrassing for a person of his station, but rules that if this respected elder wants to “follow the good and straight road,” he should act *lifnim mishurat hadin* and waive his exemption (Ibid., 11:17; Ibid., *Laws of Murder and the Preservation of Life*, 13:4). As Shilo (1978, p. 372) notes:

supererogation” (2015), according to which some actions are such that one isn't blameworthy for failing to do them, but one has still done something wrong.

¹⁶ As translated by Simon Glazer, https://www.sefaria.org/Mishneh_Torah%2C_Human_Dispositions.1.5?lang=en&with=all&lang2=en.

We can conclude from Maimonides' phraseology that not only is the ordinary individual free from having to act *lifnim mishurat hadin* but even those persons—including sages and scholars—who are exempted from returning a lost article under certain circumstances, and from helping with loading and unloading, are not duty-bound to act *lifnim mishurat hadin*.¹⁷

As Shilo notes, every instance in which the Talmud invokes the principle of *lifnim mishurat hadin*, it is discussing the actions of sages (and, we could add, in some instances, God Himself)¹⁸ rather than the actions of the everyman. Bringing all of these considerations together, I want to suggest my own understanding of Maimonides' view.

¹⁷ In the very next page, Shilo confuses matters. He argues that, as far as Maimonides is concerned, and in conflict with certain episodes quoted in the Talmud, we do not demand even from the *pious* that he act *lifnim mishurat hadin*, when doing so would incur a monetary loss. But, if what we've said until now is correct, then, strictly speaking, Maimonides never demands that the pious (or anyone else) act *lifnim mishurat hadin*. Instead, acting in that manner is sometimes offered as an option, but never a duty.

¹⁸ For an example of the concept applied to God, see Babylonian Talmud, Tractate Brachot 7a, where—somewhat bizarrely—God is depicted as praying (“to whom?” you may ask) that He will go *lifnim mishurat hadin* in His interactions with the Jewish people. In many Rabbinic texts, God's attributes of justice and mercy are presented as being in *prima facie* tension with one another. God is here depicted as praying for his Mercy to overcome his justice.

David Heyd suggests, in correspondence, that God doesn't pray for his actions to accord with justice, since his nature is to be just, and thus he necessarily acts in accordance with justice. By contrast, Heyd suggests, God prays to act mercifully, in this Talmudic story, because mercy is thought of, by the Rabbinic authors of the text, as falling within the realm of Divine discretion. The idea is, therefore, that God's mercy—unlike his justice—is supererogatory.

If the tension between God's justice and his mercy is more than *prima facie*, and turns out to be *ultima facie*, then—when God acts mercifully, there's a sense in which he isn't acting justly. This would undermine Heyd's suggestion that God's mercy is discretionary while his justice is necessary. On the other hand, there are good reasons for thinking that the tension, however vividly portrayed by the Rabbis, between God's mercy and his justice can only *really* be *prima facie*.

Indeed, the Rabbis (in Tractate Avoda Zara 4b) seem to make a distinction between the times in which God is learning Torah, and the times in which he sits in judgment. When he is learning Torah, they suggest, his mercy isn't manifest, and he isn't inclined to act *lifnim mishurat hadin*. When he sits in *judgment*, by contrast, his mercy *is* manifest because he is inclined to act *lifnim mishurat hadin*. One way to understand what's being said, by this conceit, is that we should distinguish, as we did when discussing Aristotle's treatment of equity, between *legal justice* and *true justice*. When God is studying law as an abstract text, there isn't room for mercy. At that point, he relates to justice in terms of *legal justice*, which creates the *prima facie* conflict between God's mercy and his justice. But, when he sits in *judgment*, no longer pontificating on the law as an abstract concept, but engaging with the concrete realia of people's lives, the relevant species of justice is *true justice* which *is* compatible with God's manifestation of mercy.

And yet, despite there being no *ultima facie* conflict between God's justice and his mercy, it certainly seems that, in the Rabbinic imagination, and in consonance with Heyd's reading of God's prayer, God's mercy is discretionary, in a way that his justice isn't. Indeed, Rabbi Meir understands Exodus 33:19 to be saying that God exercises a discretionary prerogative to show grace and mercy to whomever He will, even if the recipients are not worthy of it.

Going further that this distinction between God's non-discretionary justice, and his supererogatory mercy, one might think, along with Adams (2002), that there is some sort of conceptual confusion in thinking that God has any obligations whatsoever. If that's the case, one might think that all of God's deeds go beyond His duties—since he has no duties—and thus, all of his actions are supererogatory!

The only circumstances in which Maimonides sanctions the cultivation of extreme character traits are (a) against haughtiness, and in favor of extreme humility, (b) against anger, and in favor of extreme calm, and (c) when the agent in question is seeking to fix a prior imbalance. For example, even though the ideal is to seek moderation, a person who is struggling with carnal desire, might be best advised to adopt, if only temporarily, a life of extreme asceticism, in order to fix the imbalance, and steer the agent back to the golden mean.¹⁹ It is in this context that we should understand the Talmud's stories of pious sages waiving their legal exemptions, mucking in with the common-folk (so to speak), by acting *lifnim mishurat hadin*.

The exemptions granted to sages, not to trouble themselves with people's lost property, and not to involve themselves with loading other people's donkeys, are well motivated. They are designed to underline the important social status of a sage, to protect his precious time, and to inspire respect for the learned. But these exemptions can lead the sage himself away from extreme humility, towards haughtiness and pride. In such cases, it may be wise for the sage (if only from time to time) to wave their exemptions, and to act *lifnim mishurat hadin*, so as to keep any incipient haughtiness in check. This is a good thing to do, but very much, *ex post facto*. Moreover, the tendency to act *lifnim mishurat hadin* would be no part of a Maimonidean description of the ideal virtues, because a person only needs to act that way if he's worried that the privileges of his station will go to his head. A more virtuous person wouldn't need to act *lifnim mishurat hadin* because their humility would be more secure than that.

On my reading of Maimonides, to act *lifnim mishurat hadin* is never a duty, not even for an elite. Moreover, there's a sense in which recourse to it, though sometimes appropriate, is always far from ideal.

Even though Maimonides, on my reading, doesn't treat the category of *lifnim mishurat hadin* as a form of qualified supererogation, there certainly are thinkers in the Jewish tradition who did. For example, Rabbi Azaria Piccio (1579–1647), also drawing from the fact that all of the human Talmudic examples of people acting *lifnim mishurat hadin* concern pious sages, concludes that the halakha itself makes two sets of demands regarding ethical behavior: "One is for the ordinary and the other for the exceptional individuals."²⁰

One of the central Talmudic cases in discussions of *lifnim mishurat hadin* doesn't even invoke the phrase itself but certainly looks to be an example of the same phenomenon. I quote:

Rabba bar bar Ḥanan [hired] some porters who broke his barrel of wine [which he had hired them to transport]. He took their cloaks [as payment for the lost wine]. They came and told Rav.

[Rav] said [to Rabba bar bar Ḥanan], "Give them their cloaks [back]."

[Rabba bar bar Ḥanan] said to him, "Is this the *halakha*?"

[Rav] said to him, "Yes, [as it is written,] "That you may walk in the way of good men" (Proverbs 2:20)."

¹⁹ *Mishne Torah, Hilkhot De'ot* 2:2–3.

²⁰ *Sefer Binah Le'ittim*, §12.

[Rabba bar bar Ḥanan] gave them [back] their cloaks.

[The porters] said to [Rav], “We are poor people, and we toiled all day and we are hungry, and we have nothing.”

[Rav] said to [Rabba bar bar Ḥanan], “Go and give them their wages.”

[Rabba bar bar Ḥanan] said to him, “Is this the *halakha*?”

[Rav] said to him: “Yes, [as it is written,] “And keep the paths of the righteous” (Proverbs 2:20).”

(Tractate Baba Metzia 83a)

Interestingly, a very similar story is related in the Jerusalem Talmud, but there, the employer is not a distinguished sage.²¹ That should, at least, raise the prospect that there’s a difference of opinion between the Jerusalem and (the more authoritative) Babylonian Talmud on this issue. Perhaps the reason that the Babylonian Talmud concentrates on a case in which the employer is, himself, a pious sage is that acting *lifnim mishurat hadin* can only be called obligatory for them. Perhaps Rav wouldn’t demand such action from regular people, but only from the elite.

Maimonides doesn’t cite this case in his code but in a reading that agrees with Rabbi Piccio, Rabbi Shlomo Ha-Cohen of Vilna (1828–1905) cites this incident at the end of a responsum, in order to share a “wonderful thing that I heard from Rabbi Shlomo Ze’ev, our Rabbi and teacher, of blessed memory.”²² On Rabbi Shlomo Ze’ev’s reading of the story, Rav is trying to send a subtle message to Rabba bar bar Hanan. Rav quotes a verse from Proverbs that actually refers to two types of path: “the way of the good” and “the paths of the righteous.” These two types of path, according to Rabbi Shlomo Ze’ev, symbolize the two levels of ethical injunction to be found in the Torah. One level binds the regular person, keeping them on the way of the good. The other level binds the righteous. Of course, it would be good for the ordinary people to emulate the righteous and walk in their paths too, but only the righteous are so obligated.

Even if Maimonides doesn’t generally think of *lifnim mishurat hadin* as a category of qualified duties that fall only upon an ethical elite, it does seem that Maimonides believed in the existence of duties like that. In fact, there’s one instance in which Maimonides tells us that a person “*must* take particular care” to act *lifnim mishurat hadin*. That is to say, he recognizes one sort of case in which to act *lifnim mishurat hadin* isn’t a choice, but an obligation. When delineating the contours of a particular sin, called *hilul Hashem*, sometimes translated as blasphemy, and the related commandment of *kiddush Hashem*, the sanctification of God’s name, he writes:

There are other things included in blasphemy, although they are not of themselves either among the mandatory or prohibitive commandments, as for example, when a great man, famed for his learning and piety, will do something that the public will suspect him on account thereof, even though such deeds be not transgressions, yet he has committed blasphemy, as for example: if he makes a purchase and does not pay for it at once, although he has the money and the vendors are claiming it and he delays them; or if he indulges in frivolity, or doth eat and drink with and among the ignorant, or if his speech with his fellow men be

²¹ Jerusalem Talmud, Baba Metzia 6:6.

²² *Azei Broshim*, *Hilkhot Nedarim* §53.

not polite, or if he does not receive them pleasantly, but acts as one looking for strife and shows anger. In such and like matters, all measured by the standard of the greatness of such scholar, he must take particular care, and act exceedingly better than the law requires [*lifnim mishurat hadin*].

Admittedly, it's not immediately clear why refraining from behaving rudely and from being mean should count as cases of supererogation. But Maimonides continues:

Conversely, if the scholar restrains himself, speaks politely to his fellow men, and when among them acts like one of them, and receives them pleasantly, takes abuse from them but never gives abuse to them in return, respects them, even those who do not respect him, acts in business honestly, does not remain in company with the unlearned, nor visits their assemblies, and is rarely seen otherwise than to be engaged in the study of the Torah, wrapt in the prayer-garment and adorned with phylacteries, and performs his duties exceedingly more than the law requires [*lifnim mishurat hadin*], provided he does not go to extremes and does not act so ridiculously, so that all praise him and love him and crave to imitate his actions, behold he doth sanctify the Lord [thereby fulfilling a commandment of the Torah], and concerning him, the verse speaks, saying: "And He said unto me, thou art my servant, Israel, in whom I am glorified" (Isaiah 49.3).²³

And thus, it seems that Maimonides uses the phrase *lifnim mishurat hadin* in two different ways. Generally, he uses it to refer to a non-obligatory category of actions in which a person waives a legal exemption, or deviates from the golden mean, as a precautionary procedure to counter various spiritual and psychological dangers. That form of action, *lifnim mishurat hadin*, is neither an ideal virtue nor obligatory, even for some subsection of humanity. But the second sense of the phrase, as it appears here, in his discussion of blasphemy, comes much closer to the view of Rabbis Piccio, and Shlomo Ha-Cohen. As a person becomes more well-known for his sagacity and piety, he becomes a walking ambassador for the Torah and its way of life. To the degree that this is true, that person comes to be obligated by more and more duties.

And thus, Maimonides, like Rabbis Piccio and Shlomo Ha-Cohen, allows for the existence of supererogatory actions. It's not as if these actions slip through the net of the halakhic system. Rather, these actions exist as qualified halakhic duties that only come into force when a person has come a long way in their journey towards ethical perfection. In the meantime, the masses can continue to discharge their lesser obligations, as they walk along the path of the good, all the time aspiring to elevate themselves to the paths of the righteous, upon which the righteous are obligated to walk. In this way, a Jewish qualified-supererogationism allows for us to respect the wisdom of the feasible, which doesn't place unrealistic obligations upon the masses, whilst insisting that every single good deed is actually a Torah-mandated obligation, even if these obligations don't fall on every person equally.

Even if Maimonides thinks of *lifnim mishurat hadin*, on rare occasions, in terms of a qualified duty, falling only on certain ethically advanced individuals, he does sometimes use the injunction of *imatatio Dei* to exhort us, all of us, and not just the ethical elite, to go beyond the minimal requirements of Jewish law.²⁴ And thus,

²³ Mishne Torah, Hilkhot Yesodei Hatorah, 5:11, as translated by Simon Glazer https://www.sefaria.org/Mishneh_Torah%2C_Foundations_of_the_Torah.5.11?lang=en.

²⁴ See, for example, *Mishne Torah, Laws of Slaves* 9:8.

his use of *imatatio Dei* might constitute the introduction of a non-qualified form of supererogation into the legal world of Maimonides. What would a Jewish, unqualified supererogationism look like?

4 Unqualified Supererogation

We've already mentioned, in passing, the phenomenon of Jewish laws that conflict with our ethical sensibilities. This is not a new phenomenon. The Rabbis themselves were, seemingly, perturbed by certain laws. For example, Deuteronomy 21 grants a victorious Jewish army certain sexual rights over female captives. The soldier must first of all take the woman he desires back to his home, leave her to grieve her losses, shave her hair and pare her nails, and more. Once the process is complete, the soldier has a right to make this woman his wife, via a consummation of the relationship, with or without her consent. If he no longer desires this, instead of becoming his wife, she becomes a free and equal citizen of Israel.

The Rabbis were shocked by the depravity of these laws. They had pioneered a legal system in which conjugal rape was forbidden.²⁵ By contrast, it wasn't made illegal in Finland until 1994. Lichtenstein didn't make it illegal until 2001. No wonder the Rabbis—given their views on this issue—were dismayed by the provisions of Deuteronomy 21. This was their defense: these laws are a concession to the evil inclination of men.²⁶ In times of war, soldiers are prone to act in horrendous ways. God knew that if he commanded an ancient people not to rape in times of war, they would not listen. But a larger number of potential rapists *would* listen if they were told that they could have their evil way, but in a restrained and delayed fashion. The picture that emerges still isn't pretty, but the Rabbis comforted themselves with the notion that this was merely a compromise with the evil inclination of mankind.

But, if that's the case, if Jewish law sometimes compromises with the cultural situation of the community to whom it was revealed, then we shouldn't too quickly endorse an equivalence between the halakha and the ethical. To respect the Rabbinic notion that the Torah sometimes addresses itself to the evil inclination of man, we might want to temper the *Chazon Ish's* insistence that the halakha alone determines what is ethical and what isn't. A more moderate attitude recognizes that the demands of ethics, at any given time, might differ in various ways from the demands of halakha (perhaps in ways that echo the differences that John Rawls recognized between ideal and non-ideal political theory). The halakha might be aimed towards inculcating virtues and bringing society ever closer to the ethical ideal without being identical to a code of ethics. I would associate this position with Rabbi Aharon Lichtenstein

²⁵ So rules Maimonides (Mishne Torah, Laws of Forbidden Relations 21:12), based upon numerous Talmudic injunctions, for example, the Babylonian Talmud, Tractate Eirubin 100b. The Israeli Supreme Court appealed to such passages in Jewish law in order to affirm that conjugal rape is illegal in the State of Israel (Cr. A. 91/80, Cohen v. State of Israel).

²⁶ Babylonian Talmud, Tractate Kiddushin 21b.

(1933–2015), who maintained that the religious and the ethical are “inextricably interwoven,” without going so far as to claim, with the *Chason Ish*, that the ethical and the halakhic are indistinguishable.²⁷

We can recognize, with Rabbi Lichtenstein, that the halakha cannot be entirely divorced from the ethical, since the very *raison d'être* of the Torah and its law is to shape a people and a culture and to bring them closer to God. But we can recognize that there may be a gap between the legal requirements of the halakha at any given time, and the requirements of ideal ethics.

Indeed, and as I argue at length elsewhere (Lebens, 2020, pt. II), an abundance of Jewish sources gives rise to the notion that the revelation of the Torah is a work in progress. One way to express this thought is to talk of two different Torahs.²⁸ There is the heavenly Torah, which—according to the Midrashic tradition, and hinted at in the book of Proverbs (Chap. 8)—existed before the creation of the universe. This Torah is perfect. The Torah that was revealed to us on Mount Sinai, by contrast, is the best approximation of that heavenly Torah that we are ready and able to receive. As Torah literature continues to proliferate, and the body of Jewish law expands and evolves, guided by the hand of providence, the thought is that the earthly Torah inches closer to its heavenly paradigm.

In the book of Deuteronomy (5:19), the theophany at Sinai is described with these words: “The Lord spoke those words to your whole congregation at the mountain, with a mighty voice out of the fire and the dense clouds, and no more.” The words which we have rendered “and no more” are, in the original Hebrew, ambiguous. They could be read as attaching to the words that God spoke. The meaning would then be that God spoke those words and no more. That is to say: he said nothing else. Alternatively, they could be read as attaching to the mighty voice. Their meaning would then be different. They would mean: “it did not cease,” which is to say, the voice heard at Sinai is still echoing today. Siding with the second reading, Rabbi Isaiah Horowitz (1555–1630, known as *the Shla*) argues that every generation of rabbinic law was, in a sense, uttered at Sinai. It was somehow latent in the voice we heard there, as a potential; a potential that is only actualized when the time is right, by Rabbis who hear the echo of Sinai, and have a great deal of understanding concerning the specifics of their time, in terms of “earthly affairs,” and the status of the “souls of the generation.”²⁹

With this sort of picture in mind, and with the Rabbinic notion that the Written Torah made certain compromises with the non-ideal cultural situation into which it was revealed, we make room for the notion that Jewish law itself is (a) a work in process and (b) aimed at bringing an imperfect society progressively closer to the ideal. In this vein, we can begin to understand the argument of Rabbi Nahum Rabinovitch (1928–2020), for example, according to which the Torah was never resigned to the institution of slavery, despite appearances to the contrary, but was

²⁷ (Lichtenstein, 2004, p. 38).

²⁸ Although a less radical way to express a similar thought is simply to distinguish between the Torah, which is unchanging, and its interpretation, which is subject to evolution.

²⁹ *Shnei Luchot Habrit, Toldot Adam Beit Chachma (Telitaah)*.

specifically designed so as to wean us off of it (Rabinovitch, 2003). Rabbi Eliezer Berkovits makes similar claims about the Torah's attitude to women's rights, a process which he thought was far from over (Berkovits, 1990).

With this theory of a cumulative relation, and Torah as a process, we move towards a much less qualified form of supererogation. This form of supererogation says the following:

- At least for a Jew, to do one's duty, at any given time in history, is to do the minimal baseline required by Jewish law. To think that God commands us to do less than our duty is unthinkable. But there will often be more that can be done, and the Torah encourages us to do it. It encourages us, all of us, without qualification, to act *lifnim mishurat hadin*.

This takes us back, it seems, to the position of Nachmanides. On the one hand, in his commentary to the Pentateuch, he talks of a commandment to be holy, and a commandment to do the right and the good, and he interprets these injunctions in terms of acting *lifnim mishurat hadin* (which demands equity, in addition to more standard forms of supererogation). But, at the same time, and unlike Rabbi Isaac of Corbeille, he didn't include any of these injunctions in his authoritative list of the 613 commandments of the Torah. Rabbi Lichtenstein suggests that, in order to make sense of this sort of position, we could distinguish between Halakha with an upper-case H, and halakha with a lower-case h (Lichtenstein, 2004, p. 51).

Expanding upon this suggestion, we could say the following. Lower-case-h halakha refers to the explicit injunctions of Jewish law as they are codified at any given time. It is those injunctions that calibrate matters of formal duty. But the Halakha with an upper-case H includes all of the exhortations of the Torah to go further than the halakha with a lower-case h. The Halakha with an upper-case H doesn't add any new *duties* to the law books, but it does calibrate our ethical aspirations, and the ideals to which we should try to conform, even if the wisdom of feasibility entails that these cannot be considered to be fully-fledged obligations. Or, if you prefer, you could say that Nachmanides' commandment to act *lifnim mishurat hadin* is a commandment of the ideal and heavenly Torah, even if it isn't one of the 613 commandments that are halakhically obligatory in the hear-and-now of the earthly Torah.

This unqualified Jewish supererogationism denies that every value has to come along with an associated duty. Instead, we could distinguish between formal duties and quasi-duties. The former are those actions that we are really obliged to perform—and all of those actions, without remainder, are prescribed by Jewish law. The quasi-duties, by contrast, constitute something like a set of aspirations, or regulative ideals.³⁰ Perhaps as we progress, or as society progresses, some of the quasi-duties become fully fledged formal duties, either for individuals, or for the community (as happened with monogamy in Jewish law, for example)³¹—but there will always be

³⁰ I'm grateful to David Heyd for pointing out how similar this suggestion is to Henri Bergson's idea of a two-tiered morality, of which the higher tier was called "the morality of aspiration" (Bergson, 1956).

³¹ The captive woman of Deuteronomy 21 is probably another good example of this phenomenon, since it's hard to imagine any mainstream or responsible halakhic authority argue that this Biblical

space (at least until the messianic age) to do more than our formal duties call upon us to do. There will always remain (at least until the messianic age) the domain of the supererogatory; which Nachmanides calls *lifnim mishurat hadin*, and which Maimonides might include under the category of *imitatio Dei*.

In fact, you might think that something is sometimes lost in transforming an aspiration into an obligation. Rabbi Lichtenstein notes that if husband and wife consult the halakhic sources in search of a clear prescription for how their relationship should unfold, and what dynamic they should strive to achieve in their relationship: “How intense, how superficial, how cordial?” They will be disappointed. The “Halakha does not tell you” (Lichtenstein, 2007). The situation is the same for those looking for halakhic guidance as to what sort of parent to be:

Do you intend the relationship to be formal or chummy? The [Babylonian Talmud] ([tractate] Kiddushin 32a) teaches that a father who foregoes the honor due him *may* do so; does it say anywhere whether a parent *should* do so? There are differences between cultures and families. When we are at home, my children can poke fun at my wife and at me. It is part of the scene, and we take it in stride and with joy. One would never have spoken in that way in my parents’ home, and it would never even have occurred to anyone to speak that way in [Rabbi Joseph Soloveitchik’s] family.³² It is not that the degree or quality of the love is different, but the manifestation is different.

(Ibid.)

Some things simply shouldn’t be legislated, either by legal or ethical norms. To legislate them would be to formalize something that should be left intuitive, and to render lifeless and impersonal something that should be personal and alive. To think that every value can be translated into a maxim and then codified as a duty is to do violence to the world of value. That is the cost of anti-supererogation and even qualified supererogation—it wants to turn every value into the sort of duty that could be codified into a law book (or an ethics manual). But some things shouldn’t be reduced to the formulaic prose of a law book (or an ethics manual); so says the unqualified supererogationist. It’s not just, as Nachmanides notes, that no law book could be long enough to legislate for every situation. It’s not just, given the cultural, technological, and environmental changes that would inevitably accompany the unfolding of history, it was desirable for the Torah only to give general guidance on various issues. It’s also that some values are ruined by being transformed into obligations or duties.³³

right is still in force, since today a military can and should be expected to enforce better discipline (see, for example, *Penini Halakha, Sefer Ha’am ve’Ha’aretz* 4:18—I’m grateful to Rabbi Jeffrey Saks for this reference).

³² Rabbi Soloveitchik (1903–1993) was the most prominent Rabbinic proponent of Modern Orthodoxy in America. He was the teacher and father-in-law of Rabbi Lichtenstein.

³³ Thanks to Rabbi Jeffrey Saks for discussion of this issue. In correspondence, David Heyd rightly points out how important it is to reflect on why some values shouldn’t be transformed into duties. After all, “such transformation could raise the level of happiness in the world.” Heyd’s own view is that “the value underlying the distinction between supererogation and obligation is in the *personal freedom* of each individual to express his or her altruistic intentions.” I agree that this is *a* value that underlies the distinction between supererogation and obligation. I imagine that there are others too.

More can be said about the category of *lifnim mishirat hadin*. For example, there is an ongoing debate as to whether its injunctions are halakhically actionable; that is to say, whether Jewish courts are authorized to enforce the injunctions of *lifnim mishurat hadin*.³⁴ It would also be interesting to investigate the Talmudic distinction between a *chova* (literally: an obligation) and a *mitzva* (literally: a commandment). Since, on some occasions, the Talmud reports that a certain good deed isn't a *chova* but is still a *mitzva*.³⁵ What is the difference? Is the later supererogatory? Or do both categories actually refer to an obligation, and the distinction is only to do with whether or not the obligation is actionable? But as an unqualified supererogationist might say, one could always do more!

What I hope to have achieved is this. I have argued that very few Jewish sources can be interpreted as being against supererogation, given the Torah's wisdom of feasibility. Thus, having established that Judaism must recognize some form of supererogation or other, the question becomes, what form?

On the one hand, a qualified supererogation championed by Rabbis Piccio, Shlomo Ha-Cohen, and perhaps Maimonides, allows us to hold onto the intuitive connection between axiology and deontology, and makes room for the claim that Jewish law, even as it currently stands, includes every ethical duty, even if it doesn't extend those duties to all people. On the other hand, an unqualified supererogation, as championed by Nachmanides, avoids reducing intuitive and living values into rigid lifeless formulas, and makes room for a different theory of the revelation; a theory that gives us more room for making sense of the ethically troubling facets of the Jewish legal tradition. Then again, this theory of revelation might be disquieting to those, like the *Chazon Ish*, who think that the Torah as we have it today, in our hands, is the final word on what is ethical and what isn't. And thus, the form of supererogation that Judaism adopts has all kinds of downstream consequences and opens up questions about the very nature of the Torah itself.³⁶

References

- Adams, R. (2002). *Finite and infinite goods: A framework for ethics*. Oxford University Press.
 Bergson, H. (1956). *Two sources of morality and religion*. Doubleday.
 Berkovits, E. (1983). *Not in heaven: The nature and function of halakha*. Ktav Publishing House.
 Berkovits, E. (1990). *Jewish women in time and torah*. KTAV Publishing House.

I have the sense that Rabbi Lichtenstein was worried about a species of authenticity and sensitivity to the specific contours of the ethical moment that are sullied and/or obscured when certain values are transformed into duties. Perhaps this authenticity and sensitivity are merely a corollary of the personal freedom of which Heyd speaks, but perhaps there's something else that's also at stake. As the great Rabbinic sages say, when they're not yet certain that they have the answer to their own question—*tzarich iyyun* (literally: this requires further thought!).

³⁴ For more on that debate see (Shilo, 1978).

³⁵ See, for example, Babylonian Talmud, Tractate Ketubot 49b.

³⁶ Sincere thanks to David Heyd and Daniel Statman, whose comments on a previous draft saved me from a good deal of embarrassment. Any remaining infelicities are my responsibility alone.

- Chisholm, R. (1963). Supererogation and offence: A conceptual scheme for ethics. *Ratio*, 5, 1–14.
- Cohen, S. (2015). Forced supererogation. *European Journal of Philosophy*, 23(4), 1006–1024.
- Driver, J. (1992). The suberogatory. *Australasian Journal of Philosophy*, 70, 286–295.
- Heyd, D. (1982). *Supererogation: Its status in ethical theory*. Cambridge University Press.
- Heyd, D. (2019). Supererogation. In: E. N. Zalta, (Ed.), *Stanford encyclopedia of philosophy*.
- Karelitz, A. Y. (1996). *Sefer Hazon Ish: Emunah u-Vitahon*. Bnei Brak: Sifriyati.
- Lebens, S. (2020). *The principles of judaism*. Oxford University Press.
- Lichtenstein, A. (2004). Does Jewish tradition recognize an ethic independent of Halakhah? *Leaves of faith: The world of jewish living* (pp. 33–56). KTAV Publishing House.
- Lichtenstein, A. (2007). *On raising children*. <https://etzion.org.il/en/philosophy/great-thinkers/harav-aharon-lichtenstein/on-raising-children>
- Newman, L. E. (1998). *Past imperatives: Studies in the history and theory of Jewish ethics*. State University of New York Press.
- Rabinovitch, N. (2003). The way of torah. *The Edah Journal*, 3(1), 1–34.
- Rawls, J. (1971). *A theory of justice*. Harvard University Press.
- Raz, J. (1975). Permissions and supererogation. *American Philosophical Quarterly*, 12, 161–168.
- Richards, D. (1971). *A theory of reasons for action*. Clarendon Press.
- Shilo, S. (1978). On one aspect of law and morals in Jewish law: Lifnim Mishurat Hadin. *Israel Law Review*, 13(3), 359–390.
- Urmson, J. (1958). Saints and heroes. In: A. Melden (Ed.), *Essays in moral philosophy*. Seattle: University of Washington Press.