Chapter 1

Law, Virtue, and Supererogation in the Halakha

The Problem of Lifnim Mishurat Hadin *Reconsidered*

Jewish ethicists have devoted much attention in recent years to the question of the relationship between ethical and legal responsibilities within the Jewish tradition.[1] In particular, much discussion has focused on the question of whether Judaism recognizes an ethic independent of Jewish law (halakha) and, if so, how we should understand the relationship between this "extra-legal" ethic and the halakha. While discussions of this issue incorporate a vast range of rabbinic sources, the concept of *lifnim mishurat hadin* (lit., "beyond the line of the law")[2] figures prominently in the debate and, so, deserves special attention. The phrase *lifnim mishurat hadin*, which occurs a number of times in rabbinic literature, apparently refers to the morally praiseworthy action of doing more than the law requires or, as we would say, going above and beyond the call of (legal) duty. The very fact that the traditional sources recognize such a category suggests that Judaism does indeed recognize a type of moral action that is not embodied in the halakha. Yet, the precise status of actions designated as *lifnim mishurat hadin* remains very much in doubt. Some have argued that this concept reveals an implicit recognition on the part of the rabbis that the law is not invariably just, so that in fulfilling one's legal duty one does not always discharge one's moral duty.[3] Others, however, have suggested that *lifnim mishurat hadin*, rather than standing in opposition to the law, is in fact part and parcel of one's legal responsibility in the broadest sense.[4] Halakha, on this view, encorporates both strictly legal duties (din) and extra-legal/ethical duties (*lifnim mishurat hadin*). Still others have held that the concept has not been used consistently throughout the tradition, but rather evolved from a strictly moral, extra-legal standard in the talmudic period to a fully actionable

legal norm in medieval times.[5] The scholarly debate about the status of *lifnim mishurat hadin* is further complicated by the fact that a variety of traditional sources can be cited in support of each of these positions.

Despite the wide range of disagreement, however, all who have written on the meaning of *lifnim mishurat hadin* readily concede the significance of the issue at hand. Indeed, one can hardly discuss the relationship between ethics and law in Judaism without coming to terms with the problem of *lifnim mishurat hadin.* This is because, in asking about the status of *lifnim mishurat hadin,* we confront the question of whether Judaism allows for the existence of an ethic "independent of the halakha." The answer to this question, in turn, will determine whether or not Jewish law embodies all Jewish ethical norms. So, at stake is the very comprehensiveness of halakha as a moral system, for we wish to know to what extent the halakha encompasses all of one's ethical responsibilities. And, given the centrality of halakha to the whole of Jewish tradition, it is apparent that one's answer to this question may shape decisively one's stance on many other legal and ethical issues that arise within the tradition.

My own discussion of *lifnim mishurat hadin* and its significance unfolds in three parts. First, I systematically review all the talmudic sources that mention the term in an attempt to discern its precise definition. Part of the confusion that has arisen concerning the meaning of *lifnim mishurat hadin,* I believe, stems from the fact that the very character of actions so designated has not been carefully defined. By looking closely at each of the contexts in which the term is used, we will be able to specify more precisely the special character of the actions that this term denotes. From the issue of definition I turn to the problem of interpretation. Here two questions are of central importance. First, what appears to be the moral significance of the term *lifnim mishurat hadin* as the talmudic sages used it and, second, how have post-talmudic authorities understood this concept and its relationship to legal norms? The answers to these questions, as I have already indicated, are varied and complex, for the textual evidence is itself ambiguous on the question of the relationship between *lifnim mishurat hadin* and law. I assess the merits of three competing positions on the status of *lifnim mishurat hadin* and then offer a new interpretation of both the ethical and legal dimensions of this concept. In the concluding section, I consider briefly the implications of this new interpretation for the issue of the relationship between law and ethics in Judaism. I shall contend that our understanding of *lifnim mishurat hadin* has significant bearing on this issue, though not in the way that scholars generally have been inclined to assume.

Talmudic Sources

The term *lifnim mishurat hadin* appears only nine times in the Babylonian Talmud, including one source that also appears in two midrashic compilations.[6] Two basic questions will guide our examination of these sources: in what context does the term appear and what sort of action does the term seem to designate? Once we have succeeded in determining the denotation of the term, we can proceed to explore its moral significance, specifically in relation to legal norms.[7]

I. Legal Sources

1. Baba Qamma 99b
   A. There was a certain woman who showed a denar [an ancient coin] to Rabbi Ḥiyya [who] told her that it was good.
   B. Later she came again to him and said to him, "I showed it [to others] and they told me that it was bad, and in fact I could not pass it."
   C. He [Ḥiyya] said to Rab, "Go forth and change it for a good one and write down in my register that this was a bad transaction."
   D. But why should he [Rabbi Ḥiyya] be different from Dankho and Issur, who would be exempt [from reimbursing a customer under these circumstances] because they needed no instruction [that is, because they are experts and so are assumed to be correct about the authenticity of the coin, even if others do not concur in their judgment]? Surely Rabbi Ḥiyya also needed no instruction [and so should not be required to reimburse the customer who could not pass the denar.]
   E. Rabbi Ḥiyya acted *lifnim mishurat hadin*, on the principle learned by Rabbi Joseph [in explication of Exod. 18:20]:
   F. "And shalt show them" means the source of their livelihood;
   "the way" means deeds of lovingkindness;
   "they must walk" means the visitation of the sick;
   "therein" means burial;
   "and the work" means the law;
   "which they must do" means *lifnim mishurat hadin.*

The present passage appears as part of a larger discussion that concerns whether the expertise of a moneychanger affects his liability when he makes an error. The expert moneychanger, it is argued, need not reimburse customers if he makes a mistake. The case of Rabbi Ḥiyya is introduced in order to challenge that position by offering an instance in which an expert in fact made such a reimbursement. In response to this challenge, the Talmud proposes that Ḥiyya did not act in accordance with the law, but rather *lifnim mishurat hadin*. That is, he voluntarily made good on a transaction, sacrificing his own monetary gain for the sake of his customer's, even though he was not legally required to do so.

We deal here, therefore, with the case of a privileged individual, for whom acting *lifnim mishurat hadin* means forgoing his exemption from a legal duty by conforming to the standard that applies to the ordinary person. The key elements appear to be the voluntary nature of the act and the fact that it involves greater self-sacrifice (in this case, monetary sacrifice) than is expected of a person in that situation. In addition, though the purpose of Ḥiyya's action is not explicitly stated, the fact that he acts in response to a request from a customer implies that his motivation is simply to redress her grievance. Acting *lifnim mishurat hadin*, then, entails forgoing a legal right with respect to another for the purpose of helping that person. The explication of Exodus 18:20 (F) will be dealt with in source 8 below.

2. Baba Metsia 30b
   A. Rabbi Ishmael son of Rabbi Yose was walking on a road when he met a man carrying a load of sticks.
   B. The man put them down, rested, and then said to him [Ishmael], "Help me to take them up."
   C. "What is it [the wood] worth?" [Ishmael] inquired. "Half a zuz" was the answer.
   D. So he [Ishmael] gave the man the half zuz [thereby acquiring ownership] and declared it ownerless. [By rendering the sticks ownerless, Ishmael avoids violating the law that requires one to help a person with a load]. Thereupon [the man] reacquired it [thereby again placing Ishmael in the position of one who is obligated to help with this load.][8]
   E. He [Ishmael] gave him another half zuz and again declared it ownerless. Seeing that he was again about to reacquire it, [Ishmael] said to him, "I have declared it ownerless for all

but you." {A brief discussion follows about the legitimacy of declaring property ownerless in this restricted way.}

F. Was not Rabbi Ishmael son of Rabbi Yose an elder for whom it was undignified [to help one to take up a load. If so, why did he act as if he were obligated to help the man with his load.]?

G. He acted *lifnim mishurat hadin.*

H. For Rabbi Joseph learned [concerning Exod. 18:20]:
"And thou shalt show them" refers to their house of life;
"the way" refers to deeds of lovingkindness;
"they must walk" refers to the law;
"that they shall do" refers to *lifnim mishurat hadin.*

This passage appears in the midst of a discussion of whether an elder is relieved of the obligation to help a neighbor load and unload an animal, an act presumed to compromise his dignity. The case of Rabbi Ishmael is cited to demonstrate that a sage should help a neighbor with his load. The question at (F), then, is meant to challenge this view by proposing that Ishmael was exempt from this duty. In response (G) it is suggested that, while Ishmael had no duty to help the man with his load, he chose to do so anyway, to do more than the law expected of him. Here again, the term *lifnim mishurat hadin* is employed with reference to a person who has been exempted from a general legal duty due to his exceptional status. Again, the individual in question acts voluntarily, though not necessarily at his own initiative, since his help has been enlisted by the other man. Both here and in the previous case, it should be noted, acting in this extra-legal fashion does not constitute violating any positive legal duty. Neither Ḥiyya nor Ishmael act in a way that could be called illegal. Rather, each has a right to refrain from acting in accordance with the general duty incumbent upon others, but chooses to forgo that legal right.

3. Ketubot 97a

A. The question was raised: if a man sold [a plot of land] but [on concluding the sale] he was no longer in need of this money, may his sale be withdrawn or not?

B. Derive the answer from the following case: There was a certain man who sold a plot of land to Rav Papa because he was in need of money to buy some oxen, and, as eventually he did not need it, Rav Papa actually returned the land to him.

C. Rav Papa acted *lifnim mishurat hadin* [and so his action in this case cannot serve to establish that one is legally bound to rescind a sale under these conditions.]

This passage appears in the context of a discussion about the conditions under which a contract of sale may be rescinded. If the seller makes the sale conditional upon his ability to use the proceeds for a specific purpose (for example, moving to the Land of Israel) and subsequently discovers that he cannot do so, he may rescind the sale. But what if he has made no such explicit condition, though he enters the transaction with this intent? In this case must the buyer return the property he has bought if the seller asks him for it? The case concerning Rav Papa (B) suggests that the buyer has such an obligation. But this claim is defeated (C) by the statement that, in returning the property, Rav Papa did more than the law required. Unlike the previous two cases, here we are concerned with an ordinary individual, not one who is of exceptional status and so exempt from a specific legal duty. Nonetheless, the structural elements that we noted earlier are present in this situation as well. Specifically, Rav Papa is said to act *lifnim mishurat hadin* when he voluntarily forgoes a legal right (in this case, to keep the land that has been sold legitimately to him) for the purpose of helping another individual (who wishes that he had not entered into this transaction). Once again, the act in question entails both financial loss and some measure of personal inconvenience for the person who refrains from exercising his legal right. The motivation to act in this way, though not stated in any of these texts, can only be an altruistic one. Acting *lifnim mishurat hadin* begins to emerge here as a demonstration of generosity, both financial and personal.

4. Baba Metsia 24b
   A. Rab Judah once followed Mar Samuel into a market of whole-meal vendors and asked him, "What if one found a purse here [may one keep it]?"
   B. Mar Samuel answered, "It would belong to the finder."
   C. [Judah asked,] "What if an Israelite came and indicated an identification mark?"
   D. Mar Samuel answered, "[The finder] would have to return it." (*ḥyb lhḥzyr*)
   E. [Judah objected, "You maintain] two [contradictory positions." That is, if objects left in crowded places belong to the finder (B), then how can it also be the law that it must be returned to an Israelite (D)]?

F. Mar Samuel answered, "[It should be returned]" "*lifnim mishurat hadin.*"
G. Thus the father of Samuel found some asses in a desert, and he returned them to their owner after a year of twelve months—*lifnim mishurat hadin.*

The case before us is intended to clarify one's responsibility to return lost objects to Israelites. According to Mishnah Baba Metsia 2:1, an object found in any place where there are frequent crowds belongs to the finder, because the original owner is presumed to have given it up. The finder, therefore, is exempt from the general obligation to return the lost object to its original owner. The question then arises whether this law applies even in places where the majority of people are Israelites, who are presumed to return lost property, or only where the majority of people are heathens, who are presumed not to do so. This case stands somewhat apart from those just examined in that the action deemed *lifnim mishurat hadin* is presented as a requirement, rather than as a voluntary act of generosity. This is the force of the language at D (*ḥyb lhḥzyr*), "one is required to return it." Unfortunately the text does not enable us to distinguish whether the finder is compelled to act thus as a matter of legal or of moral duty (or both). Could the man be forced to return the purse and could legal action be taken against him if he refused? If so, we would surely regard his obligation as a legal one. On the other hand, Samuel may mean simply that he ought to return the purse, even though the law does not require it.[9] This latter reading would be most consistent with the sources examined earlier, though this alone should not be allowed to prejudice our reading, as we have no assurance that the term is used consistently throughout the talmudic sources. In either case, it appears that acting *lifnim mishurat hadin* constitutes a kind of duty, whether moral or legal we cannot be sure. Nonetheless, this case, like those that preceeded, reaffirms the view that acting *lifnim mishurat hadin* will entail financial loss for the individual involved. The appended case about Samuel's father (G) offers little help in determining the denotation of the term. We can only assume, since this is nowhere stated, that one has no legal obligation to return a lost object after twelve months. In doing so, then, Samuel's father could be described as acting *lifnim mishurat hadin.*

5. Berakhot 45b
A. Raba said, "The following statement was made by me independently and a similar statement has been reported in the name of Rabbi Zera:

B. 'If three persons have been eating together, one interrupts his meal to oblige two [that is, for purposes of saying the introduction to the grace after meals, which requires a minimum of three persons, one person interrupts his meal to join with the other two who are ready to say grace],
C. but two do not interrupt their meal to oblige one.' "
D. But do they not? Did not Rav Papa break off for Abba Mar his son, he [Papa] and another with him? [If so, this appears to contradict the rule just stated at B.]
E. Rav Papa was different because he acted *lifnim mishurat hadin.*

The question here is the extent to which a man is required to inconvenience himself for the sake of others with whom he is eating. While the general rule is that two individuals are not obligated to inconvenience themselves for the sake of a third, Rav Papa and a companion did so anyway. They were prepared to forgo their legal right to continue their meals uninterrupted in order to enable a single individual to participate in a communal grace. In doing so they acted *lifnim mishurat hadin.* While this case concerns a matter of personal convenience alone, rather than of monetary loss, we have seen that this too has been a common element in the cases where our term is employed. This again highlights the character of *lifnim mishurat hadin* as an act of unexpected generosity or self-sacrifice.

II. Nonlegal Sources

Let us turn now to those talmudic sources that employ the term *lifnim mishurat hadin,* though not in the context of a legal discussion. As we shall see, these references both reinforce and greatly augment what we have already learned about the term and its meaning.

6. Berakhot 7a
   A. Whence do we learn that the Holy One who is Blessed prays?
   B. It is written [Isa. 56:7]: "I will bring them to my holy mountain and I will make them joyful in my house of prayer" [lit., 'the house of my prayer.']
   C. It does not say 'their prayer,' but rather 'my prayer,' thus we learn that the Holy One who is Blessed prays.

D. What does God pray?
E. Said Rav Zutra bar Tuvia, Rav said, "May it be My will that My mercy may suppress My anger and My mercy may prevail over My other attributes, so that I may deal with My children according to the attribute of mercy and may on their behalf enter *lifnim mishurat hadin.*"
F. It was taught: Rabbi Ishmael ben Elisha says, "I once entered into the innermost part [of the Sanctuary] to offer incense and saw Akatriel Yah, the Lord of Hosts, seated upon a high and exalted throne."
G. He said to me, "Ishmael, my son, bless Me!"
H. I replied, "May it be Your will that Your mercy may suppress Your anger and Your mercy may prevail over Your other attributes, so that You may deal with Your children according to the attribute of mercy and may on their behalf enter *lifnim mishurat hadin.*"
I. And He nodded to me with His head.
J. Here we learn that the blessing of an ordinary man must not be considered lightly in your eyes.

The notion that God is capable of acting *lifnim mishurat hadin* may seem at odds with the sources examined so far. Since previous sources have led us to suppose that this phrase refers to the person who sacrifices some monetary or personal gain for the benefit of another, it is difficult to see how this could be relevant to God's actions. The connection becomes apparent, however, when one notes the association of *lifnim mishurat hadin* in this text with the quality of mercy (E,H). Just as one individual may act benevolently by relinquishing a claim against another, so too God is here urged to act generously or mercifully by suppressing the legitimate anger aroused when Israelites sin. The use of the term *lifnim mishurat hadin* ("beyond the line of the law") is in fact quite appropriate in this context, for God is being asked to forgo the divine right to punish Israel under the terms of their covenant, which, throughout biblical and rabbinic literature, is conceived as a kind of legal right. When God refrains from exercising this right of retribution against Israel, it can therefore be said that God acts more generously than is required by the terms of the covenant. It is important to note that here, as in the cases discussed earlier, God's acting in this way does not constitute a violation of the covenant, for the terms of that agreement permit God to punish Israel for its sinful behavior but do not require God to do so. God is free, as

are individuals, to act more mercifully than the law expects of them, and doing so is what is meant here by the term *lifnim mishurat hadin.*

7. Avodah Zarah 4b
   A. Said Rabbi Joseph, "No one should recite the Amidah of the Musaf service on the first day of the New Year during the first three hours of the day in private, lest, since judgment is then proceeding, his deeds may be scrutinized and the prayer rejected." . . .
   B. But have you not said, "During the first three hours the Holy One who is Blessed is occupied with the Torah, [while during the second three hours God sits in judgment over the whole world?" In that case, why should one be concerned that a prayer will be rejected during the hours when God is occupied with Torah?]
   C. You may reverse [the sequence of God's activities during these two periods of the day, thereby resolving the problem just mentioned] or, if you wish, you may say it need not be reversed.
   D. [Thus, during the first three hours, when God is occupied with] the Torah, which Scripture designates as 'truth,' as it is written, "buy the Truth and sell it not" (Prov. 23:23), the Holy One who is Blessed will not act *lifnim mishurat hadin,*
   E. [whereas during the second three hours, when God is sitting in] judgment, which is not designated by Scripture as 'truth,' the Holy One who is Blessed may act *lifnim mishurat hadin.*

As in the previous text, God's acting *lifnim mishurat hadin* is discussed in the context of God judging Israel. The point of this passage is that when truth is at stake, God will scrutinize Israel's deeds most carefully. At such times God cannot be expected to act with special benevolence. By contrast, when God is engaged in judgment, which does not require adherence to a strict standard of truth, the deity may show mercy to Israel. In short, acting "truthfully" requires that God give Israelites exactly what they deserve, neither more nor less. This attitude, in the context of either divine or human behavior, is not compatible with the thrust of *lifnim mishurat hadin,* which, as we have seen, entails giving others more than they deserve by the canons of strict justice.

8. Mekhilta of Rabbi Shimon bar Yoḥai (Exod. 18:20)
   Mekhilta of Rabbi Ishmael (Masechta d'amalek, Yitro 2)

A. Eleazar Hamodai says, " 'And thou shalt show them:' that you shall show them their house of life; (some mss.: "show them how to live")
B. 'the way:' that means visiting the sick;
C. 'they must walk:' that means burial of the dead;
D. 'therein:' that means the practice of deeds of lovingkindness;
E. 'and the work:' that means the law; (Mekhilta de Rabbi Ishmael: "the line of the law;" *shurat hadin*)
F. 'that they shall do:' that means *lifnim mishurat hadin.*"

This explication of Exodus 18:20, familiar from sources 1 and 2 above, juxtaposes *lifnim mishurat hadin* with other examples of righteous behavior. In doing so, the text appears to be making two significant points about the status of extra-legal actions. First, doing more than one's legal duty is consistent with observing the law. Indeed, it is much like other deeds of lovingkindness that one performs out of a sense of compassion for one's fellows. This, of course, accords well with the view of *lifnim mishurat hadin* that emerges from the sources just examined. Moreover, this willingness to do more than the law requires is itself required by the biblical verse cited. The idea appears to be that the Torah ordains all acts of righteousness, including both fulfilling one's prescribed legal duties and exceeding these duties. This midrash then supports the view that *lifnim mishurat hadin* is obligatory in some sense. This, of course, does not necessarily imply that this is a duty actionable in a court of law. It may still be the case that one who fails to act *lifnim mishurat hadin* is liable to no punishment, just as there may be none for failing to visit the sick or to bury the dead. Rather, the point is that these are all righteous acts that, punishable or not, are part and parcel of what God expects of Israel.

9. Baba Metsia 30b
   A. 'That they shall do;'—that means *lifnim mishurat hadin.*
   B. [Commenting on this explication of Exod. 18:20,] Rabbi Yoḥanan said, "Jerusalem was destroyed only because they gave judgments therein in accordance with biblical law (*din Torah*)."
   C. [How can this be?] Were they then to have judged in accordance with untrained arbitrators? [Surely not. So what can be the meaning of Rabbi Yoḥanan's statement?]
   D. Rather say this: [Jerusalem was destroyed] because they based their judgments on biblical law [alone] and did not act *lifnim mishurat hadin.*

This last talmudic reference to *lifnim mishurat hadin* is significant in that it provides a number of new insights into the meaning of the term. First, this is the only source that explicitly contrasts our term with another, in this case *din Torah*. Since other occurrences of this term in rabbinic literature can support several readings, including "biblical law,"[10] "the correct law,"[11] and "strict law,"[12] its exact meaning in this context is not clear. What is clear is that this standard, which in any case is an explicitly legal one, is not as demanding as *lifnim mishurat hadin*. This reinforces what we have gleaned from other references to the term. The most striking and unexpected point is Yoḥanan's opinion that failing to act beyond one's legal duty could bring such dire consequences. How can we account for the view that divine punishment would result from simply dispensing justice, that is, judging in accordance with the law and compelling people to fulfill their legal duties? The answer may lie, in part, in the juxtaposition of law and *lifnim mishurat hadin*, which we noted in the last source. God expects people not only to uphold the law but also to be merciful and compassionate where the law does not specifically require them to do so. The point of the passage, then, is not that judging in accordance with the law is wrong and so deserving of punishment,[13] but rather that this, in itself, is not all that God expects of Israel. Rather, God expects, and earthly courts should demand, that people act more mercifully than the letter of the law requires. The reference to the destruction of Jerusalem, then, may have additional significance. Perhaps judging in accordance with the established law alone is adequate in ordinary times, but during a period of great sinfulness, such as that which preceded the destruction of Jerusalem, Israelites must show special compassion to one another if they are to merit similar treatment from God. In any event, the effect of the passage is to heighten greatly the significance placed on acting *lifnim mishurat hadin*, perhaps even to the point of making it, rather than mere observance of the law, the primary standard of righteous behavior.

Let us stand back from this body of material now and attempt to summarize what we have learned about the way in which the rabbis used the term *lifnim mishurat hadin*. To be sure, not all of these texts are in complete agreement, particularly about the degree to which actions of this sort are obligatory. Nor is it our purpose here to harmonize these discrepancies in the interests of supporting the belief that the rabbis concurred about substantive issues when in fact they did not. Our task is to sketch as precisely as possible those points that our sources have in common, as well as to delineate the points of divergence.

It appears that, within the talmudic sources, *lifnim mishurat hadin* has a rather carefully circumscribed meaning. First, in every case the term is implicitly or explicitly contrasted with legal duties. This, of course, is evident from the very terminology that we have been examining. "Beyond the line of the law" must refer to an action that is both distinct from and defined in relationship to "the law." But this point is underscored, as we have seen especially in the legal sources, by the fact that the term is consistently employed in the context of discussions about whether one has a legal duty to perform some specific action. In classic talmudic fashion precedents are brought ("on this occasion, rabbi x did such and such . . .") to demonstrate that some action constitutes a legal duty. The counterclaim that this action was performed *lifnim mishurat hadin*, however, immediately defeats the suggestion that it could be a legal obligation. As we have seen, the term actually is more closely related to the notion of legal rights than of legal duties.

It would appear that the concept of *lifnim mishurat hadin* parallels most closely notions of waiver in Anglo-American jurisprudence. While the concept of waiver arises in a wide range of legal contexts, the fundamental element is "a voluntary relinquishment or renunciation of some right, a forgoing or giving up of some benefit or advantage, which, but for such waiver, a party would have enjoyed."[14] Specifically, the term denotes waiving a legal right to act, or to refrain from acting, in some specified manner. 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. In this sense, *lifnim mishurat hadin* has a moral dimension that distinguishes it from other sorts of waivers that could be exercised for any of a number of reasons, including monetary gain or self-interest. This moral dimension is present also in those sources that speak of God as the moral agent. God has a legal right, established by the covenant at Sinai, to punish Israel for its sins, a right that God may voluntarily choose not to exercise out of compassion for the people.

It follows from this basic fact that *lifnim mishurat hadin* is not an absolute, unvarying standard of action, but one that is relative to specific individuals or circumstances. That is to say, just as different people may have different legal rights, so too what is meant for them to act *lifnim mishurat hadin* will vary, depending upon the extent and nature of these rights. Thus

an exceptional individual (cases 1, 2) is said to act "beyond the line of the law" when he or she waives a special exemption and acts as the ordinary person is obligated to do. If the ordinary person acted in the very same way, he or she would simply be fulfilling a legal duty, not acting *lifnim mishurat hadin*. We see then that our term refers to an individual's willingness to do more than the law requires of that particular person, whatever that may be. In this context, it is also worth noting that none of the sources establishes any upper limit on the extent of such actions. One may do only slightly more than the law requires or a great deal more and in either case one's action deserves the designation *lifnim mishurat hadin*.[15]

As we have also seen, one who acts *lifnim mishurat hadin* invariably gives up something, whether tangible property or an intangible benefit, for the sake of another. Often this loss is financial, as in the case of the moneychanger's reimbursing his customer or the man returning lost property. In other cases, it is a matter of an elder's forgoing his honor to help relieve another person's burden or inconveniencing oneself while eating to enable another person to join in the grace after meals. More to the point, the personal sacrifice that invariably accompanies an act of this sort is an expression of compassion or generosity. This point emerges most clearly in sources 6 and 7, where God's acting *lifnim mishurat hadin* is explicitly associated with the divine attribute of mercy. The same attitude is implied, however, in each of the other cases as well. Most notably, it is concern for others and acting compassionately toward them that unites the list of righteous deeds—visiting the sick, burying the dead, obeying the law, acting *lifnim mishurat hadin*—that the midrashic writer associates with the injunction of Exodus 18:20.

It is particularly important to note that in no case does acting *lifnim mishurat hadin* entail violating a legal duty. That is, we speak only of cases in which one waives a legal right, never cases in which one violates a legal duty. The term then does not encompass acts of conscientious objection, for example, when one violates the recognized law out of a felt duty to a higher authority. In short, the concept of *lifnim mishurat hadin* sanctions certain actions that the law does not require but never sanctions actions that the law does not permit.

Nor does acting beyond the line of the law, as our sources have described it, imply that the law itself in these particular instances is fundamentally unjust. Again, the contrast to cases of conscientious objection is illuminating. In the latter case, one's action is prompted, at least in part, by the conviction that to perform one's legal duty would be immoral.[16] By contrast, (with the sole exception of source 9), our sources suggest that it would

be morally quite acceptable for the elder not to unload his neighbor's animal or for God to give Israel the punishment she rightly deserves. Indeed, in the cases we examined, those who follow the law are not chastised; rather, those who do more than the law requires (or less than the law permits) are praised. The point, then, is not that fulfilling the law is morally wrong, but rather that those who are exceedingly righteous sometimes act in a way that transcends their (merely) legal obligation.

While the forgoing conclusions may appear self-evident, they have not been acknowledged by many who have discussed the importance of *lifnim mishurat hadin*. The following passage from Leo Landman's discussion of law and conscience in Judaism is typical of many treatments of the topic.

> The Halachah, too, took cognizance of the "higher law," that is, obedience to conscience, although the term is not found. Man was enjoined to live not only in accordance with din (law) but also in accordance with a higher moral order which could not be enforced by the bet din (court). The Sifra (Mekhilta) derived the concept of *lifnim mishurat hadin* and ordained that man must follow a way of life "beyond the line of legal justice." The Halachah, however, also saw that the "higher law" was ordained by the law itself. To live "beyond the line of the law" was not left to the discretion of an individual nor to his own sense of kindness.[17]

Such an interpretation of *lifnim mishurat hadin* has no basis in the rabbinic sources that employ that term. None of the sources examined here suggest either that *lifnim mishurat hadin* refers to the dictates of conscience in general or that such a "higher law" takes precedence over the provisions of the written law. If such a view can be found within the tradition, it is not to be associated with the term before us, which, as we have seen, refers to a much more restricted sort of moral behavior and then only within a certain context. To be sure, the willingness to waive one's legal rights out of concern for the other party may in some instances be a matter of obedience to conscience. But this is quite a different matter from identifying *lifnim mishurat hadin* with the dictates of conscience and the "higher law" in general and then proceeding, as Landman does, to argue that this term refers to "the highest degree of ethical perfection to which man may aspire."[18]

Nor do these sources support the view presented by Boaz Cohen, who argues that *lifnim mishurat hadin* refers to a principle of equity or fairness that represents one's moral duty, independent of one's actual legal responsibility in any given case.[19] In every legal system, Cohen suggests, there are occasions

when the established law does not adequately serve the ends of justice. In such cases, the rabbis invoked the concept of equity or *lifnim mishurat hadin* whereby they derived one's legal duty not from strict legal principles, but from principles of ethics or justice that were independent of the written law.

> While numerous hermeneutical rules are preserved in the Talmud, the overriding principles motivating their interpretations are rarely stated, nevertheless we may distinguish two paramount attitudes that determined to a large extent their interpretation, that is strict law versus equity. There were times when the sages deemed it wise to accept the *ius strictum*, and the interpretation of the law was in keeping with the letter. In other instances equity was the supreme consideration and interpretation was in accordance with the spirit of the law. The problem confronting the rabbis was the same that faced the expounders of every other code of law. "A system of law must consist of a body of invariable rules or it will neither grow nor persist, at the same time it must do substantial justice." Equity is denominated *lifnim mishurat hadin* . . . and contrasted with *shurat hadin* strict law. . . . Instances are recorded in the Talmud of scholars who yielded in matters where the law was on their side, in accordance with the principle of *lifnim mishurat hadin*. The equitable man, says Aristotle, is one who does not strain the law, but is content to receive a smaller share although he has the law on his side. . . .
>
> While considerations of equity were undoubtedly the prime factors which actuated the rabbis to deviate from the letter or the *ius strictum*, there were other motives which were just as compelling, such as public welfare or the interest in a peaceful society.[20]

This interpretation of *lifnim mishurat hadin* is problematic, however, for it relies on the identification of that term with the concept of equity. But principles of equity, at least as they have developed in western legal systems, encompass a broad range of moral principles concerned with ensuring just remedies that the established law itself cannot provide. Yet, none of the sources we examined invoked *lifnim mishurat hadin* in the context of rectifying a past injustice, or preventing a potential inequity, that was caused by adherence to the law. In fact, as we have seen, the term occurs primarily in reference to actions that individuals take on their own initiative, rather than in obedience to judicial injunctions, as Cohen imagines. Cohen may, of course, be correct in claiming that *lifnim mishurat hadin* signifies a moral

duty, as distinct from a legal one. But, if so, it is a far more restricted duty than his identification of the term with principles of equity suggests.

In contrast to these very broad interpretations, we have seen that the talmudic authorities consistently employed the term *lifnim mishurat hadin* in reference to quite specific sorts of acts within certain limited contexts. Both the definition of such an act as a waiver of one's legal rights as well as the moral praiseworthiness of acting in this way as an expression of generosity or compassion appear to have been well established by talmudic times. The sources differ only in their assessment of what I have called the "status" of such actions. That is, if we were to ask the talmudic authorities whether an action performed *lifnim mishurat hadin* was a moral duty, or a legal duty, or no duty at all but simply an act of great generosity, it appears that the answer would be unclear at best. For the sources do not speak with one voice on this issue, but rather provide the basis for several divergent interpretations of the status of such actions. Let us turn then to resolving this ambiguity, for in determining the precise relationship between *lifnim mishurat hadin* and law we stand to gain new insight into the character of Jewish ethics.

The Status of *Lifnim Mishurat Hadin*

Even a cursory review of the talmudic sources that employ the term *lifnim mishurat hadin* reveals an apparent lack of unanimity about the degree to which such action is obligatory. To be sure, none of the sources speaks directly to the question at hand and, in the absence of direct statements concerning the status of such actions, we are left to draw inferences from the claims that are made. But it is not difficult to discern within the sources at least two tendencies concerning its moral force.

On the one hand, we have the view attributed to Rabbi Yoḥanan that failure to act *lifnim mishurat hadin* brought about the destruction of Jerusalem. This surely can only be understood as implying that such actions, from God's perspective at least, were obligatory, for the result of shirking this duty is divine retribution. The notion that actions of this sort are obligatory is further reinforced by the frequently cited midrash on Exodus 18:20, which suggests that *lifnim mishurat hadin*, like the law itself, is a positive biblical injunction. Finally, in one of the cases we examined (source 4), the language of the text suggests at least obliquely that one has the obligation to do more than the law requires, not simply the option of doing so.

On the other hand, the contexts in which *lifnim mishurat hadin* is mentioned consistently portray this as an optional act. We never hear of anyone

being compelled to act in this fashion, nor do the legal sources give even the slightest hint that one has a legitimate claim against a person for failing to act in this way. Even more important, as we have noted earlier, each time the rabbis refer to an action as *lifnim mishurat hadin* they do so precisely to preclude its being regarded as a legal precedent. This provides the clearest evidence that the term did not denote the performance of a legal duty in any ordinary sense. So the talmudic sources as a whole suggest both that *lifnim mishurat hadin* is obligatory (though in what sense they do not say) and that it is optional.

This very ambiguity appears to have generated among later rabbinic authorities a range of positions on the extent to which *lifnim mishurat hadin* represents a legal standard such that failure to act in this way is actionable in a court of law. As we shall see, the positions fall along a spectrum from the view (1) that these are acts of extreme piety or supererogation to the view (2) that one is legally obligated to act *lifnim mishurat hadin* just as one is required to fulfill the dictates of the written law. Between these extremes lies the position (3) that *lifnim mishurat hadin* represents a moral duty as distinct from a legal duty insofar as such actions were demanded by the "spirit of the law" though not by its letter.

The first view, that *lifnim mishurat hadin* is a form of supererogation, is championed by Maimonides in a passage from his Mishneh Torah [Code of Jewish Law]. In his discussion of proper ethical behavior, he notes that saints in ancient times sometimes deviated from the (Aristotelian) mean by being exceedingly humble or generous. This is the case, he says, with those who acted *lifnim mishurat hadin.*

> Whoever is particularly scrupulous and deviates somewhat from the exact mean in disposition, in one direction or the other, is called a saint. For example, if one avoids haughtiness to the utmost extent and is exceedingly humble, he is termed a saint, and this is the standard of saintliness. If one only departs from haughtiness as far as the mean, and is humble, he is called wise, and this is the standard of wisdom. And so with all other dispositions. The ancient saints trained their dispositions away from the exact mean toward the extremes; in regard to one disposition in one direction; in regard to another in the opposite direction. This was supererogation (*lifnim mishurat hadin*). We are bidden to walk in the middle paths which are the right and proper ways, as it is said, "and you shall walk in His ways" (Deuteronomy 28:9).[21]

For Maimonides, *lifnim mishurat hadin* represents a standard of saintly behavior characterized by extreme humility. On Maimonides' view, such actions are in no way required, for, in general, people do not have the ability, much less the duty, to become saints. Indeed, Maimonides' point in the passage just quoted is that such extreme piety is generally not even desirable. One should strive toward the mean in all one's actions and, to the extent that acting *lifnim mishurat hadin* violates this moral norm, it is to be avoided. This same view emerges, though less explicitly, in another passage from Mishneh Torah where Maimonides summarizes the law concerning the return of lost property to an Israelite (case 4 above). He notes that, "even though it (the lost object) belongs to him (the finder), one who wishes to walk in the good and upright path and to act *lifnim mishurat hadin* returns the lost object to the Israelite who identifies it."[22] Here too, it is seems that Maimonides regards actions of this sort as optional or supererogatory. It is neither a legal nor a moral obligation for the finder to return the lost object, but rather just the sort of thing that a scrupulously pious person will want to do. On this view, it seems that the primary distinction between law and *lifnim mishurat hadin* is that the former represents the standard of behavior required of all, while the latter represents the behavior that especially pious persons occasionally and voluntarily exhibit.[23]

This view of *lifnim mishurat hadin* accords well with descriptions of supererogation given by contemporary moral philosophers.[24] Supererogatory acts entail unusual self-sacrifice. As such they are the mark of "saints and heroes" whose behavior exceeds socially accepted moral norms. By definition, one can have no duty either legal or moral to perform acts of supererogation, and failing to do so, by implication, carries no negative moral judgment. This seems to be precisely the sort of moral category that encompasses *lifnim mishurat hadin*, as Maimonides describes it.

A second, radically different view is represented by those authorities who interpret *lifnim mishurat hadin* as a fully enforceable legal standard, that is, as part and parcel of the din or halakha.[25] This appears to have been the position taken by Nachmanides in his commentary to Deuteronomy 6:18, "you shall do the right and the good."

> And our rabbis have a fine interpretation of this. They said, "This refers to compromise and *lifnim mishurat hadin*." The intent of this is that, initially, He had said that you should observe the laws and statutes which He had commanded you. Now He says that, with respect to what He has not commanded, you should

> likewise take heed to do the good and the right in His eyes, for He loves the good and the right. And this is a great matter. For it is impossible to mention in the Torah all of a person's actions toward his neighbors and acquaintances, all of his commercial activity, and all social and political institutions. So after He had mentioned many of them . . . he resumes to say generally that one should do the good and the right in all matters, to the point that there are included in this compromise, *lifnim mishurat hadin*, and the like . . . so that he is regarded as perfect and right in all matters.

The point of Nachmanides' comment is that "acting beyond the line of the law" is itself a divine commandment, just like the specific laws that one finds enumerated in the Torah. It is not mentioned explicitly in Scripture simply because it could not be, for it refers to the general principle of acting righteously, a principle whose specific applications are far too numerous to be spelled out fully in Scripture. Nonetheless, and this is the crux of the matter, the standard of righteous behavior referred to as *lifnim mishurat hadin* is no less obligatory than the law itself. It is "beyond" the law only in the very restricted sense that the content of this norm has not been indicated specifically in the written law. It follows that people who act *lifnim mishurat hadin* are not "saints," nor have they done anything extraordinary, as Maimonides would have us believe. Rather, they have simply done what God expects and what the law demands, implicitly if not explicitly. It is this position that seems to have led many medieval authorities to include *lifnim mishurat hadin* among the 613 commandments of the Torah. The implication of this view, of course, is that there is no qualitative moral distinction between *lifnim mishurat hadin* and law, for both are obligatory, both have their origin in divine imperative, and both therefore represent actionable standards that apply equally to everyone in the community of Israel.

A third view is proposed by Aharon Lichtenstein in his well known essay, "Does Jewish Tradition Recognize an Ethic Independent of Halakha?" While Lichtenstein's analysis of the issue and of the sources is often somewhat confusing, his own position appears to fall somewhere between those of Maimonides and Nachmanides described earlier. He argues on the one hand that *lifnim mishurat hadin* is an ethical norm distinct from din in the narrow sense. That is, it is not generally understood as an actionable legal norm, notwithstanding the view of some medieval authorities to the contrary. But neither is it simply a matter of optional, pietistic behavior. It is an ethical duty, an imperative for all Jews no less than the halakha itself, though not a