

# The Virtue of Mercy According to Maimonides: Ethics, Law, and Theology\*

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## ■ Abstract

This article explores Maimonides's position with regard to mercy in various aspects—ethics, law, and theology—and examines its unity. The first section discusses Maimonides's view on the question of mercy in the moral plane: is mercy a virtue? It begins with a short discussion of the Aristotelian stance and then analyzes Maimonides's view. It shows that Maimonides rejected the philosophical critique of mercy and deemed it a virtue. The second section discusses Maimonides's view in the judicial plane: may a judge show mercy in judgment and be lenient when ruling? It also explores how Maimonides justifies the negation of mercy in the legal plane in contrast with his view of mercy as a virtue. The third section explores Maimonides's view of mercy in the theological context. In his discussion of the divine attributes Maimonides interprets the attributes of “merciful and gracious,” and offered a metaphorical interpretation. Since humans are mandated to imitate God, this interpretation has consequences in the normative sphere. The theological discussion therefore raises the question of the moral and legal standing of mercy from a new perspective. It also raises the question of the relation between Maimonides's position in the *Guide of the Perplexed* and that in his halakhic compositions. Are these two apparently different positions compatible?

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## ■ Introduction

The question of the moral and legal standing of mercy has concerned philosophers, theologians, and jurists from the ancient period to the present. Maimonides, who may be included among each of these groups, examined the various aspects of this issue. In his works on ethics—his introduction to Tractate Avot (*Shemonah Peraqim*) and *Laws Concerning Character Traits (Hilkhot De 'ot)*—he discusses the moral aspect of this question. His legal works—*Laws Concerning the Sanhedrin* and additional places in the *Code (Mishneh Torah)*—examine the legal facet; and the *Guide of the Perplexed* discusses mercy in terms of theology.

Maimonides fashioned his position regarding mercy mainly in light of the Biblical and Talmudic tradition. This tradition, however, is not uniform, and different voices arise from within it. On the one hand, the Bible unquestionably views mercy favorably. The virtue of mercy is one of God's attributes: "a God merciful and gracious."<sup>1</sup> Humans are commanded to follow in his ways and copy his attributes, and accordingly must be merciful. The Rabbis in a tannaitic midrash to Exodus expounded: "Just as He is gracious and merciful, so be thou also gracious and merciful."<sup>2</sup> They also expounded in *Sifre on Deuteronomy*:

"To walk in all His ways" (11:22): These are the ways of "The Lord, God, merciful and gracious" (Exod 34:6). Scripture says, "And it shall come to pass, that whosoever shall call by the name of the Lord shall be delivered" (Joel 3:5)—how is it possible for man to be so called by the name of the Lord? Rather, as God is called "merciful," so should you be merciful; as the Holy One, blessed be He, is called "gracious," so too should you be gracious, as it is said, "The Lord is gracious and full of compassion" (Ps 145:8).<sup>3</sup>

On the other hand, the Torah prohibits mercy in judgment. Regarding penal law, it declares: "You must show him no pity";<sup>4</sup> and for monetary law: "nor shall you show deference to a poor man in his dispute"<sup>5</sup> and "do not favor the poor."<sup>6</sup> Needless to say, the Rabbis embraced these prohibitions and established that "they may not show pity in a judgment."<sup>7</sup> Maimonides therefore had to clarify, or decide, in which circumstances the virtue of mercy is to be followed, and which call for strict justice.

<sup>1</sup> Exod 34:6; Num 14:18; Joel 2:13; Jonah 4:2; Ps 86:15; 103:8; 111:4; 112:4; 145:5; Neh 9:31; 2 Chr 30:9. See *Theological Dictionary of the Old Testament* (ed. G. Johannes Botterweck et al.; trans. D. E. Green; 15 vols.; Grand Rapids: Eerdmans, 2004) 13:437–54; *Encyclopaedia Biblica* (9 vols.; Jerusalem: Bialik Institute, 1976) 7:364–67 (Hebrew).

<sup>2</sup> *Mekhilta de-Rabbi Ishmael, Shirah 3* (trans. Jacob Z. Lauterbach; 2 vols.; Philadelphia: Jewish Publication Society of America, 2004) 1:185; *b. Šabb.* 133b; *y. Pe'ah* 1:1, 15b.

<sup>3</sup> *Sifre: A Tannaitic Commentary on the Book of Deuteronomy*, para. 49 (trans. Reuven Hammer; New Haven: Yale University Press, 1986) 105–6.

<sup>4</sup> Deut 19:13; 25:12.

<sup>5</sup> Exod 23:3.

<sup>6</sup> Lev 19:15.

<sup>7</sup> *m. Ketub.* 9:2–3.

Along with the Talmudic tradition, Maimonides was familiar with the Greek and Arabic philosophical tradition. A prominent voice in this philosophical tradition not only opposes mercy in judgment, it also refuses to view it as a virtue. The opposition to judicial mercy is based on the disparity between mercy and justice. The role of judicial proceedings is to see that justice is done, and not to diverge from it, not even for the sake of compassion.<sup>8</sup> The refusal to deem mercy a virtue is based on criticism of the sentiment of compassion, the harshest of which was leveled by Socrates and Plato.<sup>9</sup> Compassion reflects an assessment of certain things the loss of or harm to which are to be regretted, following which one should feel compassion. According to Socrates and Plato, however, the source of one's happiness is to be found within oneself and should not be dependent on external factors over which one has no control. The troubles that befall a person through no fault of his or her own should not cause sorrow, nor any resultant compassion. A feeling of compassion confirms the false assumption of the value of external circumstances and of their influence on a person's happiness.<sup>10</sup>

Aristotle rejected this radical approach. He maintained that humans need basic external conditions, including people and the social contexts that facilitate them. Harm to these existential conditions or to one's intimates is liable to cause a person undeniable suffering. But even Aristotle did not regard compassion to be a virtue or motive for moral behavior. Ethical conduct must come from considered reflection and choice, and not out of a sense of compassion.<sup>11</sup> Maimonides rejected the philosophical critique of the moral standing of compassion, and rather followed the Biblical and Talmudic tradition. As was noted, however, this tradition is equivocal, and Maimonides was forced to determine in which circumstances compassion is a virtue, and in which it is prohibited.

The aim of this article is to explore Maimonides's position with regard to mercy in its various aspects and to examine its unity. In the first section we will discuss the question of mercy in the moral plane: is mercy a virtue? We will begin with a short discussion of the Aristotelian stance, followed by an analysis of Maimonides's position. We will then examine the way this view is expressed in various legal texts (*halakhot*) in his *Code*. The second section discusses this question in the judicial plane: may a judge show mercy in judgment and be lenient when ruling? Here, too, we will explore Maimonides's fundamental view and the manner in which it is expressed in his rulings. The third section will discuss mercy in a theological

<sup>8</sup> Socrates already stressed in his trial defense that he did not ask for mercy from his judges, since they were obligated to base their judgment solely on the law; see Plato, *Apology*, end of the first speech.

<sup>9</sup> Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge: Cambridge University Press, 2001) 354–64.

<sup>10</sup> The Greek and Roman Stoics embraced and developed this view. See Tad Brennan, "Stoic Moral Psychology," in *The Cambridge Companion to the Stoics* (ed. Brad Inwood; Cambridge: Cambridge University Press, 2003) 257–94.

<sup>11</sup> Nussbaum, *Upheavals of Thought*, 297–353; see also the discussion of Aristotle, below.

context. In his discussion of the divine attributes Maimonides interpreted the attributes of “merciful and gracious,” and offered a metaphorical interpretation. Since humans are mandated to imitate God, this interpretation has consequences in the normative sphere. The theological discussion therefore raises the question of the moral and legal standing of mercy from a new perspective. It also raises the question of the relation between Maimonides’s position in the *Guide* and his position in the halakhic works. Are these two apparently different positions compatible?

Before we proceed, a comment on terminology is in order. The main Hebrew term which Maimonides uses in this context is *raḥamim*. This term may be translated by three different words: mercy, pity, and compassion. Indeed, *raḥamim* may refer to each of these terms, depending on context.<sup>12</sup> *Raḥamim* may mean mercy, namely, certain actions or behavior characterized by a lenient treatment of a person who is subject to one’s power; for example, leniency shown by a judge. This word might also refer to pity or compassion, that is, a feeling of sympathy with another person’s distress or suffering. While translating and discussing Maimonides’s texts I have used the appropriate term for each context.<sup>13</sup>

### ■ Is Mercy a Virtue?

Maimonidean ethics is based on virtues. The central feature of an ethics of virtues is the good deed that ensues from a person’s character traits, and not only out of a sense of duty. Consequently, an ethics of virtues is not characterized by mandatory rules of the permitted and forbidden, but rather by the development of traits that will lead a person to do the right thing in one’s given circumstances. The question, therefore, is whether, for Maimonides, mercy is a character trait that a person should adopt: is it a virtue? This question involves also the question of whether the sentiment of compassion which leads to merciful behavior is a virtue. Since the development of Maimonidean ethics was profoundly related to Aristotle’s ethics and the Aristotelian Arab tradition, we should begin our discussion with this tradition.

#### *The Aristotelian Tradition*

In his *Rhetoric*, Aristotle defined pity as follows:

Pity may be defined as a feeling of pain caused by the sight of some evil, destructive or painful, which befalls one who does not deserve it, and which we might expect to befall ourselves or some friends of ours.<sup>14</sup>

<sup>12</sup> Eliezer Ben Yehuda, “*Raḥamim*,” *A Complete Dictionary of Ancient and Modern Hebrew* (16 vols.; Jerusalem, New York, and London: Thomas Yoseloff, 1948–1959) 13:6541–43 (Hebrew); *Theological Dictionary of the Old Testament* (ed. Botterweck) 13:437–52.

<sup>13</sup> I prefer “compassion” to “pity,” unless the latter appears in the translated sources, because “pity” has come to have a nuance of superiority and patronizing of the sufferer. See Aharon Ben-Ze’ev, *The Subtlety of Emotions* (Cambridge: MIT Press, 2000) 327–52; Nussbaum, *Upheavals of Thought*, 301–4.

<sup>14</sup> Aristotle, *Rhet.* 2.8 (1385b) (*The Basic Works of Aristotle* [ed. Richard Mckeon; New York:

According to this definition, pity is a feeling of pain resulting from our being cognizant of the undeserved suffering of another. A person who should suffer, such as an offender who receives punishment, should not arouse our pity. For Aristotle, pity originates in the fear of the pitier that he himself or someone close to him will endure similar suffering. A person who feels safe in the face of suffering will not feel pity, while one who deems himself in close danger will take pity on the sufferer. Along with an emotional element (pain), the feeling of pity also has a cognitive element, which includes an assessment of the degree of suffering by the other person (is it significant suffering?), the circumstances of the suffering (is it fitting that he suffers?), and the probability that the pitier or someone close to him is liable to endure similar anguish.<sup>15</sup> In Aristotle's analysis, pity is fundamentally an egotistic emotion that originates in self-concern. Continuing in this vein, Aristotle does not view pity as an emotion that brings a person to help one's fellow, to extricate him from the trouble in which he finds himself, or to aid him in overcoming this suffering. Accordingly, pity can hardly be seen as a feeling worthy of fostering or as a virtue.

Aristotle's analysis of pity in this context is descriptive and instrumental. It appears in *Rhetoric* to enable the speaker to use it for legal and political purposes. The short discussion in *Poetics* is of a similar nature. Aristotle mentions pity to understand tragedy as a literary form.<sup>16</sup> Aristotle does not examine pity from the normative perspective, and definitely does not relate to it as a trait worthy of emulation, in either of these works.<sup>17</sup> In *Nicomachean Ethics*, which discusses the normative plane, Aristotle does not list pity as a virtue. He consequently states explicitly that the feeling of pity cannot be considered as a virtue.<sup>18</sup> This is not due solely to the nature of the feeling of pity (as an egotistical sentiment); it mainly results from the fact of it being a feeling or a passion. Aristotle distinguishes between passions and states of character. A passion is a mental response that a person experiences without choice. Consequently, it cannot be said that any passion is good or bad. A state of character, in contrast, is the ability to control the passions by means of reason and will, and it can be assessed as good or bad. Aristotle classifies pity as a passion, and not as a state of character, and thus does not deem it a virtue.<sup>19</sup>

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Random House, 1941]). Aristotle uses the Greek word *eleos* which might be translated pity, compassion, or mercy. In this context, the English translations preferred pity.

<sup>15</sup> Nussbaum, *Upheavals of Thought*, 297.

<sup>16</sup> Aristotle, *Poet.* 13 (1453a).

<sup>17</sup> Nussbaum (*Upheavals of Thought*, 297) places Aristotle among the supporters of compassion, but she seems to read too much into his position. Although Aristotle recognized compassion as a natural feeling, he did not deem it to be a virtue. See Brian Carr, "Pity and Compassion as Social Virtues," *Philosophy* 74 (1999) 411–29.

<sup>18</sup> Aristotle, *Eth. nic.* 2.5 (1105b–1106a).

<sup>19</sup> On the relationship between virtues and feelings, see L. A. Kosman, "Being Properly Affected: Virtues and Feelings in Aristotle's Ethics," in *Essays on Aristotle's Ethics* (ed. Amelie O. Rorty; Major Thinkers Series 2; Berkeley: University of California Press, 1980) 103–16. For a detailed

Alfarabi, who served as a primary philosophical source for Maimonides,<sup>20</sup> followed Aristotle. He classified compassion as a passion and did not list it as a virtue. Alfarabi suggested an analysis of the soul, which is not found in Aristotle, according to which the soul is comprised of five parts or faculties: the nutritive, the sensory, the imaginative, the appetitive, and the rational. While describing these faculties Alfarabi mentions compassion as part of the appetitive faculty.<sup>21</sup> The situation of compassion in this part of the soul, the place of desires and passions, is fitting with its lack of moral status, but it would allow Maimonides, who borrowed this analysis, to relate to compassion in a different way.

### *Maimonides*

Maimonides, unlike Aristotle and his followers, deemed compassion to be a virtue. He noted that the Torah does not only command the performance of good deeds, it also requires the acquisition of virtues, among which it includes compassion: “[The Torah] commands us to conduct ourselves in certain qualities of character, such as the command to act with kindness, mercy, pity and love.”<sup>22</sup> Patently, then, Maimonides understood compassion differently from Aristotle. He did not see compassion solely as a passion, but as a character trait that can, and should, be nurtured. We should begin with the place of compassion in the human soul and its nature, in accordance with Maimonides’s analysis in *Shemonah Peraqim*. Maimonides, following Alfarabi, discerned five faculties of the soul and located being compassionate in the appetitive faculty.<sup>23</sup> Maimonides held that reason and will can control this faculty, and consequently can be commanded. Thus, the situation of compassion in this part of the soul allowed Maimonides to present it as a virtue. In several places he stresses that man can be commanded regarding the virtues, including that of compassion.<sup>24</sup> In the *Guide*, in his explanation of the

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analysis of the traits that Aristotle considers to be virtues, see Howard J. Cruzer, *Aristotle and the Virtues* (New York: Oxford University Press, 2012).

<sup>20</sup> Pines, in translator’s introduction to *The Guide of the Perplexed* (trans. Shlomo Pines; Chicago: University of Chicago Press, 1963) lxxviii–xcii. On the influence of Alfarabi on Maimonides’s ethics see: Herbert Davidson, “Maimonides’ ‘Shemonah Peraqim’ and Alfarabi’s ‘Fusul Al-Madani,’” *PAAJR* 31 (1963) 33–50; Jeffrey Macy, “A Study in Medieval Jewish and Arabic Political Philosophy: Maimonides’ Shmonah Peraqim and Alfarabi’s Fusul Al-Madani” (PhD diss., Hebrew University, 1982). For a general survey of Maimonides’s knowledge of Greek and Arab Philosophy, see Herbert A. Davidson, *Moses Maimonides: The Man and His Work*, (New York: Oxford University Press 2005) 86–121.

<sup>21</sup> Al-Farabi, *Fusul Al-Madani: Aphorism of the Statesman* (ed. and trans. D. M. Dunlop; Cambridge: Cambridge University Press, 1961) 29–30. Alfarabi, *The Political Writings: Selected Aphorisms and Other Texts* (trans. Charles E. Butterworth; Ithaca, NY: Cornell University Press, 2001) 14–15.

<sup>22</sup> *The Commandments: Sefer ha-Mitzvoth of Maimonides*, Ninth Principle (trans. Charles B. Chavel; 2 vols.; London: Soncino, 1967) 2:397.

<sup>23</sup> *The Eight Chapters on Ethics (Shemonah Peraqim): A Psychological and Ethical Treatise* (ed. and trans. Joseph I. Gorfinkle; New York: AMS Press, 1966) 42–43.

<sup>24</sup> *Eight Chapters*, chap. 2 (Gorfinkle, 47); *Mishneh Torah, Laws Concerning Character Traits* 1:1; see especially *Laws of Repentance* 5:2.

prohibition “no animal from the herd or from the flock shall be slaughtered on the same day with its young,”<sup>25</sup> he writes: “For the love and the tenderness of a mother for her child is not consequent upon reason, but upon the activity of the imaginative faculty, which is found in most animals as it is found in man.”<sup>26</sup> Maimonides recognized that the feeling of compassion towards one’s offspring is common to humans and animals as well. It is, therefore, not consequent upon reason. Humans, however, can control this feeling and nurture it.

Maimonides included the charge to adopt the virtue of compassion within two important commandments. The first is to “Love thy neighbor as thyself” (Lev 19:18). This mandate does not specify the performance of any certain action; it rather requires one to embrace the general attitude of loving one’s fellow. Maimonides divided this attitude into several virtues, as was mentioned in a passage which was partly cited above: “[The Torah] commands us to conduct ourselves in certain qualities of character, such as the command to act with kindness, mercy, pity, and love, this being contained in the verse, ‘And thou shalt love thy neighbour as thyself.’”<sup>27</sup> These virtues combine emotions and actions that follow them. This formulation indicates an important aspect of compassion for Maimonides. Contrary to Aristotle, it is not a sentiment that is focused on the self, but rather man’s attitude directed to the other, which leads to the performance of righteousness and kindness.

The second central commandment that incorporates the virtue of compassion is “to resemble God,” which Maimonides lists in the Book of Commandments:<sup>28</sup>

By this injunction, we are commanded to be like God (praised be He) as far as it is in our power. This injunction is contained in His words, “And thou shalt walk in His ways,”<sup>29</sup> and also in an earlier verse in His words, “[What doth the Lord thy God require of thee, but to fear the Lord thy God,] to walk in all His ways?”<sup>30</sup>

On this latter verse the Sages [in the *Sifre*] comment as follows: “Just as the Holy One, blessed be He, is called Merciful, so shouldst thou be merciful; just as He is called Gracious, so shouldst thou be gracious; just as He is called Righteous, so shouldst thou be righteous; just as He is called *Chasid* [a term bespeaking kindness, goodness, etc.], so shouldst thou be a *chasid*.”<sup>31</sup>

<sup>25</sup> Lev 22:28.

<sup>26</sup> *Guide* 3:48 (trans. Pines, 599). Ibn Tibbon’s classic translation used the Hebrew term *raḥamim* here. The connection between pity and the imagination is apparently related to the Aristotelian conception that pity is an emotion that results from fear, lest the pitier or one of those close to him suffer tribulation. This fear has its source in the imagination.

<sup>27</sup> *The Commandments*, Ninth Principle (trans. Chavel), 2:397. The Arabic terms are: *alraphah*, *alraḥmah*, *alšaphaqah*, *altwaddud*. Ibn Tibon translated the terms to Hebrew: *ḥemlah*, *raḥmanut*, *šedaqah*, *ḥesed*. See also *The Commandments*, Positive Commandment 206 (trans. Chavel).

<sup>28</sup> *The Commandments*, Positive Commandment 8 (trans. Chavel), 1:11–12.

<sup>29</sup> Deut 28:9.

<sup>30</sup> Deut 11:22.

<sup>31</sup> *Sifre on Deuteronomy*, para. 49.

This injunction has already appeared in another form in His words, “After the Lord shall ye walk,”<sup>32</sup> which the Sages explain<sup>33</sup> as meaning that we are to imitate the good deeds and lofty attributes by which the Lord (exalted be He) is described in a figurative way—He being indeed immeasurably exalted above all such description.

Maimonides emphasizes that this commandment calls upon a person to imitate the actions and virtues by which God is portrayed in the Bible “in a figurative way.” In this expression, Maimonides alludes to his view that God cannot be described by any attribute. One can describe him only by his actions. All Biblical attributes are, therefore, just metaphors.<sup>34</sup> Following the midrash, he lists four virtues which are to be emulated: “merciful,” (*raḥum*), “gracious” (*ḥanun*), “righteous” (*ṣaddiq*), and “*ḥasid*.”<sup>35</sup> These four terms are identical or at least close in their meaning to those mentioned in the context of “Love thy neighbor as thyself.”<sup>36</sup> Similar to what we saw above, these virtues, too, reflect a combination of the emotional and practical aspects. Contextually, the commandment to “walk in His ways” is proximate, if not actually identical to, that of “Love thy neighbor as thyself.” The difference between them is apparently expressed in the degree of applicability. “Love thy neighbor as thyself” is limited to “your neighbor,” which Maimonides (following the Rabbis) understands as encompassing Jews alone.<sup>37</sup> “Walk in His ways,” in contrast, is universal and applies to all God’s creatures.<sup>38</sup> Accordingly, the obligation to act compassionately by force of the principle of imitating God expands the scope of the duty to be compassionate from that given by “Love thy neighbor as thyself.”<sup>39</sup>

The principle of the mean is central to Maimonides’s ethics: “The right way is the mean in each group of dispositions common to humanity; namely, the disposition which is equally distant from the two extremes in its class, not being nearer to the one than to the other.”<sup>40</sup> If compassion is a virtue, then it must be assumed that it

<sup>32</sup> Deut 13:5.

<sup>33</sup> *b. Soṭah* 14a.

<sup>34</sup> This is explained at length in *Guide* 1:54, and will be discussed below, in section 3.

<sup>35</sup> *Ḥasid* is from *ḥesed*, which is grace. The English translator could not use Gracious because it was already occupied for *ḥanun* and therefore gave a transliteration.

<sup>36</sup> See principle nine of *Sepher Hammišvot*. Maimonides used different language in each context. In positive commandment 8, he used Hebrew following the Midrash cited. In principle nine, he used Arabic. According to the Ibn-Tibon translation (see note 27 of this article), three terms are identical (*raḥum*, *ṣaddiq*, *ḥasid*) and one is close in meaning (*ḥanun* close to *ḥemlah*).

<sup>37</sup> *Sepher Hammišvot*, Positive Commandment 206; *Laws of Mourning* 14:1.

<sup>38</sup> This was noted by Shalom Rosenberg, “And You Shall Walk in His Ways,” in *Israeli Philosophy* (ed. Asa Kasher and Moshe Hallamish; Tel-Aviv: Papyrus, 1983) 72–92 (Hebrew).

<sup>39</sup> See, for example, *Laws Concerning Slaves* 9:8 and *Laws Concerning Kings* 10:11 (both are discussed later in this article).

<sup>40</sup> *Laws Concerning Character Traits* 1:4 (*Mishneh Torah: The Book of Knowledge* [trans. Moses Hyamson; Jerusalem: Boys Town, 1962] 47b). For a comparison to the mean of Aristotle, see Marvin Fox, “The Doctrine of the Mean in Aristotle and Maimonides: A Comparative Study,” in *Interpreting Maimonides: Studies in Methodology, Metaphysics, and Moral Philosophy* (Chicago: University of Chicago Press, 1990) 93–123.



reflects the middle path. Maimonides states in *Laws Concerning Character Traits*: “We are bidden to walk in the middle paths which are the right and proper ways, as it is said, ‘and thou shalt walk in His ways’ (Deut. 28:9). In explanation of the text just quoted, the Sages taught, ‘Just as God is called merciful, so you should be merciful; just as He is called gracious, so you should be gracious.’”<sup>41</sup> The midrash on which Maimonides bases this did not link “walk in His ways” to the mean. Maimonides added this connection. Since God’s ways are “right and proper,” they necessarily represent the mean. In this context, he presents the virtue of compassion as an ideal example of the mean. He does not specify between which extremes it is located (as he does do for other virtues), and simply assumes that, as one of God’s ways, it reflects the mean.<sup>42</sup>

### *The Virtue of Mercy in Practice*

In several places in the *Code*, Maimonides advocates acting mercifully and compassionately, and elaborates its practical consequences. He writes in *Laws of Gifts to the Poor* 10:2:

No man is ever impoverished by almsgiving (*ṣedaqah*), nor does evil or harm befall anyone by reason of it, as it is said, “And the work of righteousness shall be peace” (Isa. 32:17). He who has compassion upon others, others will have compassion upon him, as it is said, “That the Lord may [. . .] show thee mercy, and have compassion upon thee” (Deut. 13:18). Whosoever is cruel and merciless lays himself open to suspicion as to his descent, for cruelty is found only among the heathens, as it is said, “They are cruel, and have no compassion” (Jer. 50:42). All Israelites and those that have attached themselves to them are to each other like brothers, as it is said, “Ye are the children of the Lord your God” (Deut. 14:1). If brother will show no compassion to brother, who will? And unto whom shall the poor of Israel raise their eyes? Unto the heathens, who hate them and persecute them? Their eyes are therefore hanging solely upon their brethren.<sup>43</sup>

Maimonides identifies almsgiving (*ṣedaqah*) with compassion, and his preaching for the former is subsumed within his exhortations to act with the latter. He raises four rhetorical arguments for *ṣedaqah* and compassion, all of which are based

<sup>41</sup> *Laws Concerning Character Traits* 1:5–6.

<sup>42</sup> This example supports the position that the mean for Maimonides is not a practical guide for every situation but a general principle that characterizes the appropriate behavior in every situation. Maimonides did not expect that a person would mechanically measure the distance between the two extremes and would act accordingly in every case. He rather meant that a person should consider the relevant circumstances and determine the appropriate behavior accordingly. This appropriate behavior would reflect a certain middle-way that fit the specific situation. See Aviram Ravitsky, “The Doctrine of the Mean and Asceticism: On the Uniformity of Maimonides’ Ethics,” *Tarbiz* 79 (2011): 439–69, at 439, 445–48 (Hebrew).

<sup>43</sup> *The Code of Maimonides, Book Seven: The Book of Agriculture* (trans. Isaac Klein; New Haven: Yale University Press, 1979) 89.

on Talmudic sources.<sup>44</sup> The first argument, “No man is ever impoverished by almsgiving, nor does evil or harm befall anyone by reason of it,” originates in *Mekilta on Deuteronomy*.<sup>45</sup> The second, “He who has compassion upon others, others will have compassion upon him,” has its source in the Talmud.<sup>46</sup> The third argument, “Whosoever is cruel and merciless lays himself open to suspicion as to his descent,” similarly is of Talmudic origin.<sup>47</sup> The fourth argument is “All Israelites and those that have attached themselves to them are to each other like brothers. . . . If brother will show no compassion to brother, who will?” The idea that all Israel are brothers appears in several midrashic passages,<sup>48</sup> but only Maimonides makes rhetorical use of this notion in support of compassion.

The third argument is worthy of special attention. According to it, the virtue of compassion is so characteristic of Jews that its absence casts doubt on a person’s lineage and consequent ability to marry a Jew. This notion recurs in several places in Maimonides’s writings.<sup>49</sup> An informative example of this concept is set forth in *Laws Concerning Forbidden Intercourse* 19:17.<sup>50</sup> Maimonides begins this *halakhah* by stating that “All families are presumed to be of valid descent, and it is permitted to intermarry with them in the first instance.” He then mentions a few exceptions connected with invalid social and moral behavior. He thereby emphasizes that descent is not the sole criterion for determining a person’s Jewish identity, and character traits are to be considered, as well. The last exception is of relevance to our discussion: “if a person exhibits impudence, cruelty, or misanthropy, and never performs an act of kindness, one should strongly suspect that he is of Gibeonite descent” (and not an Israelite). This has its source in the Talmud,<sup>51</sup> where it discusses

<sup>44</sup> These rhetorical arguments are aimed to persuade the masses to be compassionate and kind. The philosophical basis for charity is rooted in Maimonides’s ethics and theology. For this matter one should refer to *Guide* 3:53–54 where he discusses the terms *hesed*, *mišpaṭ*, and *šedaqah* (grace, justice, and righteousness). In these chapters, Maimonides develops the idea that the duty of giving charity (and being involved in social justice in general) is based on the duty to emulate God (see the third section of this article). The scaling of the eight degrees of charity with the beneficiary self-sufficient at the peak (*Laws of Gifts to the Poor*, 10:7–14) also results from emulating God’s action.

<sup>45</sup> *Midrash Tanna'im* on Deut 15:9 (ed. Hoffmann, 83).

<sup>46</sup> *b. Šabb.* 151b.

<sup>47</sup> *b. Beṣah* 32b; R. Y. Karo (in *Keseṣ Mišneh*) and R. David ben Solomon ibn Zimra (*Radbaz*) referenced *b. Yebam.* 79a, which also contains this motif in the context of the Gibeonites; see below.

<sup>48</sup> *Mekhilta de-Rabbi Ishmael, Bešallah.*, parashah 3 (= trans. Lauterbach 1:209); *Exod. Rab.* 1:27; *Num. Rab.* 9:11; *Tanh.*, *Našo' 1*. Obviously, the idea of brotherhood among the Israelites is already Biblical, and can be found in many commandments that employ the wording “your brother.”

<sup>49</sup> *Laws Concerning Repentance* 2:10; *Laws of Wounding and Damaging* 5:10; *Laws Concerning Forbidden Intercourse* 19:17; *Laws Concerning Slaves* 9:8 (the two latter sources are discussed extensively below). For a discussion of Maimonides’s view of Jewish identity, see: M. Kellner, *Maimonides' Confrontation with Mysticism* (Portland, OR: The Littman Library of Jewish Civilization, 2006) 238–41. Kellner emphasizes the cognitive aspect (e.g., what should a Jew believe in?). In these texts, we see the ethical aspect.

<sup>50</sup> *The Code of Maimonides, Book Five: The Book of Holiness* (trans. Louis Rabinowitz and Philip Grossman; New Haven: Yale University Press, 1965) 125.

<sup>51</sup> *b. Yebam.* 78b–79a; *y. Qidd.* 4:1, 68b.

the Biblical narrative of the revenge taken by the Gibeonites on the sons of Saul.<sup>52</sup> In the Biblical account, David was forced to hand over Saul's male offspring to the Gibeonites in order to lift the famine in the land. The Gibeonites took their revenge on Saul's sons and impaled them on the mountain. The Talmud relates that in consequence David ruled that the Gibeonites cannot join the Israelites, since "This nation is distinguished by three characteristics. They are compassionate, bashful, and benevolent. . . . Whoever possesses these three characteristics is fit to join this nation."<sup>53</sup> Consequently, whoever does not exhibit these three distinguishing marks is unworthy to become part of the Jewish people. Maimonides draws a legal conclusion (*halakhah*) from a literary interpretation (*aggadah*): the Jewishness of anyone who acts as the Gibeonites did is to be questioned. Halakhic authorities do not always base *halakhah* on *aggadah*. For example, Alfasi (Rif) did not include this narrative or the consequent ruling in his book. Maimonides's decision to impart halakhic and moral force to this passage reflects not only his willingness to draw *halakhah* from *aggadah* but also the importance of compassion for him.

*Laws Concerning Slaves* 9:8, which ends the Book of Acquisition, contains one of the finest and most complete expressions of Maimonides's conception of the duty to act mercifully and compassionately:<sup>54</sup>

It is permitted to work a heathen slave with rigor. Though such is the rule, it is the quality of piety and the way of wisdom that a man be merciful and pursue justice and not make his yoke heavy upon the slave or distress him, but give him to eat and to drink of all foods and drinks. The Sages of old were wont to let the slave partake of every dish that they themselves ate of and to give the meal of the cattle and of the slaves precedence over their own. Is it not said: "As the eyes of slaves unto the hand of their master, as the eyes of a female servant unto the hand of her mistress" (Ps 123:2)? Thus, also the master should not disgrace them by hand or by word, because scriptural law has delivered them only unto slavery and not unto disgrace. Nor should he heap upon the slave oral abuse and anger, but should rather speak to him softly and listen to his claims. So, it is also explained in the good paths of Job, in which he prided himself: "If I did despise the cause of my manservant, Or of my maidservant, when they contended with me. . . . Did not He that made me in the womb make him? And did not One fashion us in the womb?" (Job 31:13,15). Cruelty and effrontery are not frequent except with heathen who worship idols. The children of our father Abraham, however, i.e., the Israelites, upon whom the Holy One, blessed be He, bestowed the favor of the Law and laid upon them [righteous] statutes and judgments, are merciful people who have mercy upon all. Thus also it is declared by the attributes of the Holy One, blessed be He, which we are enjoined to imitate: "And His

<sup>52</sup> 2 Sam 2:21:4–6.

<sup>53</sup> *b. Yebam.* 79a.

<sup>54</sup> *The Code of Maimonides, Book Twelve: The Book of Acquisition* (trans. Isaac Klein; New Haven: Yale University Press, 1951) 281.

mercies are over all His Works" (Ps 145:9). Furthermore, whoever has compassion will receive compassion, as it is said: "And He will show thee mercy, and have compassion upon thee, and multiply thee" (Deut 13:18).

The *halakhah* opens with the proper attitude to the heathen slave, and closes with praise of the virtue of compassion in general. Maimonides incorporates within the *halakhah* Biblical verses and Talmudic sources, and he formulates a fundamental position regarding compassion. His starting point is the letter of the law that is indicated by the Torah and Rabbinical dicta: "It is permitted to work a heathen slave with rigor."<sup>55</sup> He then adds that one should not remain within the bounds of strict law, but rather act in accordance with its complementary moral obligation: "that a man be merciful and pursue justice." The phrase "virtue of mercy [*middat haraḥamim*]" has a dual meaning in Rabbinical language: in the substantive plane, it represents an attitude of compassion, while in the normative sphere, it stands for a norm that exceeds the strict law. When the Talmud says that a certain sage acted toward one's fellow with "the virtue of mercy," this means that he acted compassionately with him, and did so even though strict law did not require it.<sup>56</sup> This *halakhah* is based on such a distinction. A person must act compassionately with his heathen slave, that is, mercifully and respectfully, even though the strict law does not require this of him. Maimonides then lists the practical consequences of compassionate behavior. First is properly caring for all the slave's needs. Maimonides takes especial note of the duty to "give him to eat and to drink of all foods and drinks," and mentions the actions of "the Sages of old" (the sages of the Talmud) who behaved in such a manner.<sup>57</sup> He then proceeds to state the ban of disgracing and that "scriptural law has delivered them only unto slavery and not unto disgrace," which also is of Talmudic origin.<sup>58</sup> He next determines the requirement to treat one's heathen slave with respect, to "speak to him softly and listen to his claims," finding support for this in Job: "If I did despise the cause of my manservant, Or of my maidservant, when they contended with me."<sup>59</sup> He then speaks generally in praise of compassion and in censure of cruelty, while stressing once again that compassion is a typical Israelite virtue.<sup>60</sup>

<sup>55</sup> As R. Yosef Karo attests, Maimonides draws this conclusion from the fact that the prohibition "You shall not rule over him ruthlessly" (Lev 25:43, 46) refers solely to the Hebrew manservant (*Keseḥ Mišneh* ad loc.). See also, *Siphra*, *Behar* 6:6 (ed. Weiss, 118b); *b. Soṭah* 3b.

<sup>56</sup> *y. B. Qam.* 8:4, 6c (see also *b. Ketub.* 52b).

<sup>57</sup> This is based on several Talmudic sources. *y. B. Qam.* 8:4, 6c relates that R. Yohanan would give his slave the same meat that he would eat and the same wine that he would drink; and *b. Ketub.* 61a tells of a few sages who acted in this manner. *b. Ber.* 40a states in the name of Rab: "A person may not eat before he gives to his beast"; and *b. Giṭ.* 62a attests to sages who did so.

<sup>58</sup> *b. Nid.* 47a (in the name of Samuel).

<sup>59</sup> Maimonides's source is *Gen. Rab.* 48:3.

<sup>60</sup> The mention of Abraham's offspring alludes to *b. Beṣah* 32b, but also is compatible with *b. Yebam.* 79a and *p. Qidd.* 4:1, 65b.

Maimonides mentions two sources from which the Israelites learned to act compassionately. The first is the laws of the Torah, which cause the Israelites to be “merciful people who have mercy upon all.” This point requires further explanation. The laws of the Torah do not require compassion for slaves, and permit one “to work a heathen slave with rigor.” How, then, are we to learn from the Torah to “have mercy upon all”? It seems that, for Maimonides, the specific laws of the Torah do not fully exhaust the ethical ideal. The laws of the Torah are rules that guide a person toward a moral goal that is found beyond them. This moral end is being merciful to all.<sup>61</sup> In jurisprudential terms, one may say that, along with the Torah’s explicit rules, it also contains implicit principles, including being merciful to all. The second source mentioned by Maimonides is the commandment to imitate God. God’s attribute of mercy is directed to all his creatures, as it is said, “And His mercies are over all His Works.” Accordingly, man, too, must be merciful to all.<sup>62</sup> Maimonides concludes the *halakhah* with a blessing from the Talmud: “whoever has compassion will receive compassion, as it is said: ‘And He will show thee mercy, and have compassion upon thee, and multiply thee.’”<sup>63</sup>

It is worthwhile to dwell on the language Maimonides uses to define the status of the obligation to act mercifully with one’s slave: “the quality of piety and the ways of wisdom.” Anyone who is sensitive to the language of Maimonides will see that this singular expression combines two different elements of Maimonidean ethics. In *Laws Concerning Character Traits*, Maimonides defines “the ways of wisdom” as the mean, “which is equally distant from the two extremes,” while “the quality of piety” is a distancing from the mean to one side or the other.<sup>64</sup> Maimonides generally recommends “the standard of wisdom” as the proper way for every person, and reserves “the quality of piety” for people who have to mend their ways, or for exceptional individuals who seek a special path.<sup>65</sup> And now Maimonides prescribes

<sup>61</sup> Isadore Twersky, *Introduction to the Code of Maimonides* (New Haven: Yale University Press, 1980) 418–30. For an additional reference to the laws of the Torah as laws of mercy, see *Laws of Sabbath* 2:3: “Hence you learn that the ordinances of the Law were meant to bring upon the world not vengeance, but mercy, lovingkindness and peace.”

<sup>62</sup> Maimonides emphasizes the universality of mercy in additional places. Especially noteworthy is what he writes in *Laws of Kings* 10:11, in which he discusses the obligation to treat the resident alien (*ger tošab*) decently and kindly and extends it to idolaters, as well. For an analysis of this *halakhah*, see Gerald J. Blidstein, “On the Standing of the Resident Alien in Maimonides’ Thought,” in *Studies in Halakhic and Aggadic Thought* (Beer-Sheva: Ben-Gurion University of the Negev Press, 2004) 155–64 (Hebrew).

<sup>63</sup> *b. Šabb.* 151b.

<sup>64</sup> *Laws Concerning Character Traits* 1:5; *Shemonah Peraqim*, chapter 4. Norman Lamm, “The Sage and the Saint in the Writings of Maimonides,” in *Samuel Belkin Memorial Volume* (ed. Moshe Carmilly and Hayim Leaf; New York: Erna Michael College of Hebraic Studies, Yeshiva University, 1981) 11–28 (Hebrew); Hannah Kasher, “‘Hakham,’ ‘Hasid,’ and ‘Tov’ in Maimonides’ Writings: A Study in Terms and Their Reference,” *Maimonidean Studies* 4 (2000): 81–106.

<sup>65</sup> The various works differ on this point. Maimonides writes in *Shemonah Peraqim* (chapter 4) that the upright path is the mean, while the trait of piety (*hasidut*) is meant only for those who need to mend their ways, or to erect a protective barrier for those who are liable to stray from

merciful behavior as both “the quality of piety and the ways of wisdom.” What is the nature of this combination? Maimonides apparently wanted to say that mercy contains both elements. In the legal plane, merciful behavior is deemed “the quality of piety,” since strict law does not require it. In, however, the moral plane, it is “the ways of wisdom,” that is, conduct that behooves every person and is not meant solely for the pious.

## ■ The Judicial Standing of Mercy

### “They May Not Show Pity in Judgment”

Despite the above, Maimonides finds no place for mercy in the realm of law. In his *Sepher Hammišvot* he lists two Torah prohibitions of showing mercy in legal proceedings. One commandment refers to monetary law: “A judge is forbidden to have pity on a poor man”;<sup>66</sup> and a second refers to penal law: “a judge is forbidden to pity one who has slain a man, or caused him the loss of a limb, in fixing the penalty.”<sup>67</sup>

In *Laws Concerning the Sanhedrin* 20:4 Maimonides formulates a general rule forbidding being merciful in legal proceedings that applies to all legal realms:

The court is forbidden to spare a murderer. It should not say, “This one is already slain; what good will it do to execute the other?” and thus prove lax in the duty of putting the murderer to death. For Scripture says: “And thine eye shall not pity him, but thou shalt put away the blood of the innocent from Israel” (Deut 19:13). So too, the court is forbidden to show pity for one who is liable to payment of fine. It should not say: “This man is poor, he did it unintentionally.” Payment is to be exacted from him to the limit of his ability, not allowing pity (to interfere with the law), as it is said: “And thine eye shall not pity” (Deut 19:21).

Likewise, in cases that do not involve action in tort, no compassion is to be shown to one who is poor. Say not: “This man is poor, his opponent rich. Since I and the rich man are under obligation to support him, I will give

the middle path. In *Laws Concerning Character Traits* 1:5, in contrast, he presents “the standard of piety” in a positive, and even praiseworthy light, as a level above the “middle paths.” Some scholars maintain that Maimonides changed his opinion (see Twersky, *Introduction*, 459–68), while others assert that he retained his early view (see Ravitsky, “Doctrine of the Mean,” 466–68, and the literature he references).

<sup>66</sup> Negative Commandment 277: “This prohibition is contained in His words, ‘Neither shalt thou favour a poor man in his cause’ [Exod 23:3]. The Negative Commandment regarding this matter is found again in His words, ‘thou shalt not respect the person of the poor’ [Lev. 19:15].” (*The Commandments* [trans. Chavel] 2:260).

<sup>67</sup> Negative Commandment 279: “This prohibition is contained in His words, ‘Thine eye shall not pity’ [Deut 19:21]” (*The Commandments* [trans. Chavel], 2:261). Nahmanides argues for the enumeration of an additional commandment that specifically prohibits showing mercy to a murderer; see Nahmanides’s glosses to *Sepher Hammišvot* (Negative Commandment 13) and Chavel’s discussion: *Sepher Hammišvot of Maimonides with Critical Comments by Nahmanides* (ed. Hayyim Dov Chavel; Jerusalem: Mossad Harav Kook, 1981) 406 (Hebrew).

judgment in his favor and he will be able to maintain himself honorably.” Therefore, the Torah admonishes: “Neither shalt thou favor a poor man in his cause” (Exod. 23:3), and it is said: “Thou shalt not respect the person of the poor” (Lev 19:15).<sup>68</sup>

In this passage Maimonides lists three prohibitions, in three legal realms: capital cases, the laws of fines, and tort law. Along with each prohibition, he counters a possible argument in favor of mercy in the relevant realm. The three prohibitions, as well as the three claims, originate in Tannaitic midrashim. The prohibition of pitying the murderer and the reasoning that “This one is already slain; what good will it do to execute the other?” is mentioned in *Mekilta on Deuteronomy*, and, in a slightly different wording, in *Sifre on Deuteronomy*.<sup>69</sup> The prohibition of showing pity to one liable to a fine and the argument that “This man is poor, he did it unintentionally,” too, have their source in *Mekilta on Deuteronomy*.<sup>70</sup> The prohibition against taking pity on the poor man in monetary law and the argument that “This man is poor. . . . Since I and the rich man are under obligation to support him, I will give judgment in his favor” appear in *Siphra*’ and additional sources.<sup>71</sup> Thus, Maimonides combined the prohibitions in the Torah and the midrashim in a single comprehensive *halakhah*.<sup>72</sup>

Somewhat of a crack in Maimonides’s emphatic stand apparently is to be found in the following *halakhah* in *Laws Concerning the Sanhedrin* 2:3:

Neither a very aged man nor a eunuch is appointed to any Sanhedrin, since these are apt to be wanting in tenderness;<sup>73</sup> nor is one who is childless appointed, because a member of the Sanhedrin must be a person who is sympathetic [*rahman*].<sup>74</sup>

Maimonides based this law on the Babylonian Talmud, to which he added the reason.<sup>75</sup> The disqualification of someone who is not merciful seemingly cannot accord with the prohibition of being merciful in judgment. If it is forbidden to be merciful in judgment, then why must a judge be a merciful person? We

<sup>68</sup> *Code of Maimonides, Judges*, 60–61.

<sup>69</sup> *Midrash Tanna'im* on Deut 19:13 (ed. Hoffmann, 115); *Sifre on Deuteronomy*, para. 187 (trans. R. Hammer) 207.

<sup>70</sup> *Midrash Tanna'im* on Deut 19:21 (ed. Hoffmann, 118). See R. David ibn Zimra (*Hil. Sanhedrin* 20:4), who mentions this source. See also *Sepher Hammišvot*, Negative Commandment 279.

<sup>71</sup> *Siphra*’, *Qedošim* 2:4 (ed. Weiss, 89); *Mekilta’ deRabbi Šimon bar Yoḥac* Exodus, 23:3 (ed. Epstein-Melamed, 214); *Siphrey ‘Al Sepher Deḅarim* on Deut 17 (Finkelstein, 28); *Midrash Tanna'im* on Deut 1:17 (ed. Hoffmann, 9).

<sup>72</sup> He reiterates this in *Laws of Wounding and Damaging* 1:4; *Laws of Creditor and Debtor* 1:4.

<sup>73</sup> *Yeš bahem aḳzariyut*, literally, they exhibit cruelty.

<sup>74</sup> *Code of Maimonides, Judges*, 8. The opposite is stated regarding one who incites to idolatry: “On the tribunal trying his case are appointed a very aged man, a eunuch, and a childless man, because they are not likely to show him compassion” (*Laws Concerning the Sanhedrin* 11:5; *Code, Judges*, 32).

<sup>75</sup> *b. Sanh.* 36b. Cf. *t. Sanh.* 7:2; *y. Sanh.* 4:2, 22a.

cannot assume that in this *halakhah* Maimonides contradicted the general rule he established in *Laws Concerning the Sanhedrin* and in *Sepher Hammišvot*. We must, therefore, understand the disqualification of all those who are mentioned in this *halakhah* because they are liable to be excessively severe in judgment, and not because he might rule leniently.<sup>76</sup> Furthermore, in this *halakhah* Maimonides lists being merciful as a virtue and character trait, not as a directive for action or judicial policy. The Judge must be merciful so he can issue a just verdict, not a merciful one. Let me elaborate this point. In this chapter, he enumerates seven traits necessary for any judge.<sup>77</sup> In this *halakhah* he adds that a judge in capital cases must also possess the virtue of mercifulness. This is because in capital cases the court plays a double role of both prosecutor and advocate: “one congregation judges and another congregation delivers [both in the same court].”<sup>78</sup> In this context, a judge must be capable of finding arguments in favor of the accused. Maimonides assumed that a judge without the virtue of mercy could not properly defend the accused.<sup>79</sup> The demand that a judge sitting on the Sanhedrin must have the character trait of mercy does not necessarily imply, however, that he should actually be merciful (that is, lenient) when pronouncing judgment. To the contrary, the virtue of mercy is necessary so that the judge will be able to deliver a true judgment. Maimonides’s stance regarding mercy in penal judgments therefore remains in force. A judge may not be merciful in judgment, neither in capital cases nor in those involving the imposition of fines.

Maimonides’s opposition to mercy in judgment is especially pronounced in monetary law in which the picture that emerges from the Talmud is more complex than as regards capital cases. The Tannaitic sources ban mercy in monetary cases,<sup>80</sup> but the Talmud mentions several instances that teach of the judge’s ability to take into account considerations based on mercy.<sup>81</sup> In all these cases, Maimonides consistently rules against being merciful in judgment. The prime example of this is a case found in the Babylonian Talmud.<sup>82</sup> Porters were hired to bring a barrel of

<sup>76</sup> For that matter there is no difference between the very aged man, eunuch, and the one who is childless. Compare R. Menahem Meiri’s interpretation to this law: “For all those who possess cruelty, you see that we strive for deliverance [from a guilty sentence] and pursue merit [i.e., acquittal]” (*Beit Habbehiraḥ, Sanh.* [ed. Sofer, 164]).

<sup>77</sup> *Laws Concerning the Sanhedrin* 2:7.

<sup>78</sup> *m. Sanh.* 1:6 (ed. Danby, 383).

<sup>79</sup> See the midrash regarding the inciter: “‘Neither shall thou spare’—do not seek to justify him” (*Siphrey ‘Al Sepher Debarim, pišqah* 89 [Sifre on Deuteronomy (trans. R. Hammer) para. 89, 139]); *b. Sanh.* 33b; the ruling by Maimonides: *Laws of Idolatry* 5:4.

<sup>80</sup> *Siphra*, *Qedošim* 2:4 (“You shall not be partial to the poor”); *Mekilta’ deRabbi Šimon bar Yoḥai*, Exodus, 23:3 (ed. Epstein-Melamed, 214): “You shall not show deference to a poor man [in his dispute]” (*Mekilta de-Rabbi Shimon bar Yoḥai* [trans. W. David Nelson; Philadelphia: Jewish Publication Society of America, 2006] 358–59); *m. Ketub.* 9:2 (“They may not show pity in a legal suit” [ed. Danby, 258]).

<sup>81</sup> E.g., *b. Ketub.* 52b; *b. B. Meš.* 83a.

<sup>82</sup> *b. B. Meš.* 83a. Cf. *y. B. Meš.* 6:6, 11b. This instance is discussed extensively in the scholarly



wine, which they negligently broke. The owner seized their garments and delayed their payment until they would compensate him for the damage. The porters turned to Rab, who accepted their claim, and ordered the owner to return their garments and pay their wages. He cited the verse “So follow the way of the good and keep to the paths of the just”<sup>83</sup> in support of his decision. The case indicates that, by the letter of the law, the owner was entitled to compensation from the porters and to withhold their garments and wages. The porters did not deny their responsibility. Their only argument was: “We are poor men; we have worked the entire day. We are hungry, and we have nothing to eat.” This argument is not based on the law, but addresses the judge’s mercy. Rab’s ruling, too, is not based on the letter of the law, but on the principle that one must act in “the way of the good.” Most commentators viewed this principle as an expression of conduct *liphnim miššurat haddin* (beyond the strict demands of the law).<sup>84</sup> The concept of *liphnim miššurat haddin* is a broad one, and comprises various considerations.<sup>85</sup> In this case, the ruling was based on mercy.<sup>86</sup> R. Isaac Alfasi (*Rif*) cites this episode in his laws as part of his binding summary of the Talmudic pericope, from which one may infer that mercy may enter into a judge’s considerations.<sup>87</sup> A similar approach was prevalent among Franco-German medieval halakhic authorities.<sup>88</sup> Maimonides, unlike Alfasi, and certainly in contrast with the Ashkenazi authorities, did not cite this episode as law. His ruling, instead, reflects the letter of the law: “Where one transports a barrel from place to place for hire and it breaks, the rule of the Law is that he must pay.”<sup>89</sup> He did not make any exception and did not mention the special

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literature. See Moshe Silberg, *Talmudic Law and the Modern State* (ed. Marvin S. Wiener; trans. Ben Zion Bokser; New York: Burning Bush, 1973) esp. 95; Ephraim E. Urbach, *The Sages: Their Concepts and Beliefs* (trans. Israel Abrahams; Jerusalem: Magnes, 1975) 330–32; Menachem Elon, *Jewish Law: History, Sources, Principles* (trans. Bernard Auerbach and Melvin J. Sykes; 4 vols.; Philadelphia: Jewish Publication Society of America, 1994) 1:156; Shmuel Shilo, “On One Aspect of Law and Morals: *Liphnim Mishurat Hadin*,” *Israel Law Review* 13 (1978) 359–90.

<sup>83</sup> Prov 2:20.

<sup>84</sup> Rashi (*b. B. Meš.* 83a) interpreted “the way of the good” as: *liphnim miššurat haddin*, and this understanding was followed by most of the commentators (even though the narrative does not use this term). Tosafot (*b. B. Meš.* 24b, s.v. *liphnim miššurat haddin*), in contrast, finds here another principle, one which imposes a broader obligation.

<sup>85</sup> At times *liphnim miššurat haddin* denotes conduct not required by the letter of the law, but which is fitting in terms of justice or equity. At times this refers to a specific exemption which a person waives or other circumstances. See Shilo, “On One Aspect.”

<sup>86</sup> This is not a correction of the law based on justice or equity, or a voluntary waiver of the exemption granted by the law. The porters are responsible for the damage, and the only reason to make a concession to them is their economic situation. See *Nimmuqey Yoseph*, which states explicitly: “That is, to be merciful to people” (*Rif, b. B. Meš.* 51b).

<sup>87</sup> *Rif, b. B. Meš.* 51b.

<sup>88</sup> As is the ruling of *Raban* (R. Eliezer ben Nathan of Mainz) and his grandson *Ravya* (R. Eliezer ben Joel ha-Levi of Bonn), cited in *Mordekay, b. B. Meš.*, 157, followed by many of the Franco-German decisors. This school developed a general principle of allowing a judge to rule *liphnim miššurat haddin*. See Elon, *Jewish Law*; Shilo, “On One Aspect.”

<sup>89</sup> *Laws of Hiring* 3:2, 3 (trans. Pines, 12–13).

circumstances of the Talmudic narrative. Maimonides refused to view this episode as binding, for a clear reason: Rab's ruling is based on mercy, and for Maimonides, such a ruling is invalid.<sup>90</sup>

The question, then, is how we are to explain the disparity between the moral plane, in which mercy is deemed a virtue, and the legal one, in which it is invalidated. If mercy is a virtue, then why is the court forbidden to act in accordance with it? Presumably, Maimonides ruled as he did due to the explicit prohibition of mercy in the Torah and the Talmud. The question remains, however, how he explained the gap between mercy being a virtue and the absolute ban on it being a consideration in judgment. As we shall now see, Maimonides related to this, in some places, directly, and in others, indirectly. Although he formulated a single rule, the justification he offers for this principle is not uniform. The reason for the prohibition of mercy in penal cases is different from that for monetary law; we will discuss these realms separately.

### *Penal Cases*

The question of the attitude to mercy in penal cases must be examined against the background of the theory of punishment, that is, against the background of the reasons justifying the imposition of punishment generally, and the considerations determining the level of punishment for each transgression and in each specific instance. Maimonides examines this issue in the *Guide* while discussing the reasons for the commandments pertaining to punishment:

The utility of this is clear and manifest, for if a criminal is not punished, injurious acts will not be abolished in any way and none of those who design aggression will be deterred. No one is as weak-minded as those who deem that the abolition of punishments would be merciful on men. On the contrary, this would be cruelty itself on them as well as the ruin of the order of the city.<sup>91</sup>

The aim of punishment is deterrence and the prevention of future crime. In another place in the *Guide* he lists four considerations that determine the severity of the crime, in terms of deterrence: (1) the severity of the crime, (2) the frequency of the crime, (3) the degree of temptation to commit the crime, and (4) the possibility of the crime's discovery. The more serious, frequent, tempting, and difficult to discover the crime, the more severe the punishment to be imposed.<sup>92</sup> The purpose of deterrence includes both personal deterrence (of the accused), and general deterrence, of other

<sup>90</sup> This ruling fits Maimonides's general approach to *liphnim miššurat haddin* as an ethical norm that addresses the litigant's goodwill. See: *Laws of Robbery and Lost Property* 11:7, 17. He, therefore, would not allow a judge to rule *liphnim miššurat haddin* or on the basis of mercy.

<sup>91</sup> *Guide* 3:35 (the sixth class) (trans. Pines, 536).

<sup>92</sup> *Guide* 3:41 ("Introduction") (trans. Pines, 560). See Ya'akov Bazak, "Maimonides' Views on Crime and Punishment," in *Jewish Law and Current Legal Problems* (ed. Nahum Rakover; Jerusalem: Jewish Legal Heritage Society, 1984) 121–26.

potential transgressors, and actually, of the entire public. Maimonides states that refraining from imposing punishment is foolish, since it frustrates the purpose of punishment and leads to “the ruin of the order of the city.” The problem with taking mercy into account is therefore the harm done to its social utility. In another passage, he writes: “for pity for wrongdoers and evil men is tantamount to cruelty with regard to all creatures.”<sup>93</sup>

It should be stressed that for Maimonides the problem of mercy in punishment is not one of deviating from justice, that is, the retribution due the accused. His doctrine of punishment is not based on retribution, and the harm is not at variation from the retribution. For the sake of comparison, under the prevalent contemporary penal doctrine, criminal punishment must be based on a fitting retribution for the criminal.<sup>94</sup> In this conception, the goal of punishment is to impose on the criminal a just punishment, in accordance with the severity of the crime that he committed and the degree of his culpability. The more severe the crime and the greater the degree of the accused’s culpability, the more severe the punishment. From the perspective of retributive punishment, the problem of considerations of mercy is the harm to justice; accordingly, the proponents of this doctrine usually reject such consideration.<sup>95</sup> In contrast, from the viewpoint of the doctrine of deterrent punishment, which is held by Maimonides, the problem is that of harm to the social utility.

### *Monetary Law*

The different branches of monetary law have different purposes. In the *Guide* Maimonides relates to two main groups of monetary laws. One group is the laws of damages (tort law), and the other consists of two subgroups: property law and the laws governing commercial negotiations.<sup>96</sup> As regards the laws of damages, Maimonides states that they are mainly concerned with “putting an end to acts of

<sup>93</sup> *Guide* 3:39 (trans. Pines, 554).

<sup>94</sup> Immanuel Kant is the major spokesperson of the theory of retribution in punishment. See Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (trans. W. Hastie; Edinburgh: T&T Clark, 1887) 195–204. Following Kant, this approach became widespread among philosophers and legal experts. See, e.g., H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968) esp. 210–37; see also Hugo Adam Bedau and Erin Kelly, “Punishment,” *Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/punishment>.

<sup>95</sup> Jeffrie G. Murphy, “Mercy and Legal Justice,” in *Forgiveness and Mercy* (ed. Jeffrie G. Murphy and Jean Hampton; Cambridge: Cambridge University Press, 1989) 162–86; Daniel Statman, “The Moral and Legal Standing of Mercy,” in *Directions in Criminal Liability: Inquiries in the Theory of Criminal Law* (ed. Eli Lederman; Tel Aviv: Taubenschlag Institute of Criminal Law, Tel Aviv University, 2001) 9–51 (Hebrew). For a different opinion, see Alwynne Smart, “Mercy,” in *The Philosophy of Punishment: A Collection of Papers* (ed. H. B. Acton; New York: St. Martin’s Press, 1969) 212–27; Richard G. Fox, “When Justice Sheds Tears: The Place of Mercy in Sentencing,” *Monash Law Review* 25 (1999) 1–28.

<sup>96</sup> *Guide* 3:35 (the fifth and seventh classes).

injustice and with the prevention of acts causing damage.”<sup>97</sup> That is, their chief aim is deterrence and prevention, similar to the objective of penal law. Surprisingly, Maimonides does not mention the reason for corrective justice or the fitting compensation that the injurer has to pay to the injured party.<sup>98</sup> Nonetheless, he mentions the inclusion of the element of justice connected to the degree of the injurer’s responsibility in differing circumstances. Thus, even when the main goal is the prevention of future damage, the obligation to pay should be imposed on a person in accordance with the degree of his responsibility. As regards property law and the laws governing transactions, he writes that justice is their central and dominant principle: “For they consist in an estimation of the laws of justice with regard to the transactions that of necessity occur between people.”<sup>99</sup> He lists several examples, such as preventing unfair gain (swindling) and the obligation to make fair payment to watchmen. Maimonides does not, however, offer here an exhaustive definition of the concept of “justice.” Such a definition appears in one of the last chapters of the *Guide* (3:53), as part of a discussion of the terms *hesed* (lovingkindness), *mišpat* (judgment), and *šedaqah* (righteousness). He defines justice as follows: “justice being granting to everyone who has a right to something, that which he has a right to and giving to every being that which corresponds to his merits.”<sup>100</sup> Maimonides continues by providing two examples of the concept of justice: giving a hired man his wages and paying a debt. In each of these instances, a person gives the one so entitled his due.<sup>101</sup> In Aristotelian terms, these rights can be seen as corrective justice, while Maimonides does not use this term. In any event, the question is: does mercy have any place among the purposes of tort law? As we saw above, considerations of deterrence do not include mercy, and therefore mercy has no place within the aims of the laws of damages. Similarly, it is not within the principle of justice of other monetary laws. If the purpose of monetary laws is to give to someone what he is entitled by virtue of corrective justice, then mercy contributes nothing to this aim. To the contrary, it undermines the goals of the law.<sup>102</sup>

<sup>97</sup> *Guide* 3:40 (trans. Pines, 555).

<sup>98</sup> Maimonides did not explicitly mention anywhere in his writings the Aristotelian distinction between distributive and corrective justice (*Eth. nic.* 5.3–4 [1131a–1132b]). Even without this distinction, however, the principle of fitting compensation could still have been raised. For a discussion of this point and an original analysis of Maimonidean tort law, see Yuval Sinai and Benjamin Shmueli, “Calabresi’s and Maimonides’s Tort Law Theories: A Comparative Analysis and a Preliminary Sketch of a Modern Model of Differential Pluralistic Tort Liability Based on the Two Theories,” *Yale Journal of Law and the Humanities* 26 (2014) 59–133, esp. 115–20.

<sup>99</sup> *Guide* 3:42 (trans. Pines, 568). See *Guide* 3:40 for the commandments relating to the laws of damages.

<sup>100</sup> *Guide* 3:55 (trans. Pines, 631). See Zeev Harvey, “Justice and Rights in Maimonides’ Teaching,” in *Jewish Political Tradition throughout the Ages: In Memory of Daniel J. Elazar* (ed. Moshe Hellinger; Ramat Gan: Bar-Ilan University Press, 2010) 137–43 (Hebrew).

<sup>101</sup> Harvey, “Justice and Rights,” noted that the concept of right appears also in *Guide* 3:49, in connection with a wife’s *ketubah* (marriage contract) and the payment of the fee of a harlot (before the Giving of the Torah). These examples are of the same type, and exemplify the same principle.

<sup>102</sup> Maimonides mentions mercy as the reason behind the laws relating to the hired worker (*Guide*

The distinction that Maimonides draws in this chapter of the *Guide* between *ṣedeq* (justice) and *ṣedaqah* (righteousness) will aid in clarifying the relationship between justice and mercy.<sup>103</sup> He notes that *ṣedaqah* is derived from *ṣedeq*, but has a completely different meaning. On one hand, *ṣedeq*-justice is “granting to everyone who has a right to something that which he has a right to.” On the other hand, *ṣedaqah*-righteousness is something beyond justice. As Maimonides puts this: “the fulfilling of duties with regard to others imposed upon you on account of moral virtue, such as remedying the injuries of all those who are injured.” The difference between the two terms is therefore the following: a person’s obligation to act with *ṣedeq* toward someone else ensues from the latter having some right. The examples that Maimonides uses are those of giving a hired man his wages and paying a debt. In contrast, a person’s obligation to perform *ṣedaqah* towards another does not result from any right of the latter. It rather derives from “moral virtue.” For instance, a person’s obligation to give charity to a poor person does not result from the right of the latter, but is based in virtue. In summation, Maimonides defines *ṣedaqah* as “every good action performed by you because of a moral virtue with which you perfect your soul.”<sup>104</sup> According to this definition, the concept of *ṣedaqah* as righteousness is broader than the usual understanding of *ṣedaqah* as “charity.” In this context, *ṣedaqah* is “every good action performed by you,” that is, every type of aid to one’s fellow. Mercy is not part of justice, but of righteousness. It does not follow from any right of another person, it rather results from moral virtue.

In Maimonides’s view, the role of judgment in monetary law is to enforce *ṣedeq*, that is, to guarantee the rights of people, and not *ṣedaqah*, which is a matter of personal perfection. He accordingly distinguishes between *din*—the letter of the law—and *lipnim miššurat haddin*. The court is authorized to compel a person to act in accordance with the letter of the law, since this obligation ensues from justice. It is not entitled to obligate someone to act *lipnim miššurat haddin*, since this exceeds the bounds of *ṣedeq* and belongs to the realm of *ṣedaqah*. Consequently, the court does not have the authority to force someone to act mercifully, since mercy exceeds the bounds of the letter of the law, and pertains to the realm of *ṣedaqah*. Why must law reign in the realm of justice, and the realm of righteousness be avoided? Maimonides does not answer this outright, but now the answer is not difficult to find. First, there is a fundamental contradiction between *ṣedeq* (justice) and *ṣedaqah* (righteousness). The former means maintaining a person’s rights and obligations, while the latter requires a person to waive a right or to do something

3:42). He explains the prohibition of delaying the hired worker’s wages as a question of mercy, as well as the worker’s right to eat from the vineyard in which he works. This reason, however, underlies the legislation. Once this has been anchored in law, it is the hired worker’s right to receive his wages on time and to partake of the vineyard. The judge who tries such cases will grant these to him as a right, and not out of mercy.

<sup>103</sup> *Guide* 3:53. See especially Eliezer Hadad, *The Torah and Nature in Maimonides’ Writings* (Jerusalem: Magnes, 2011) 223–52 (Hebrew).

<sup>104</sup> *Guide* 3:55 (trans. Pines, 631).

beyond the call of duty. Judgment cannot be concerned at the same time with *sedeq* and *šedaqah*. If judgment were to compel a person to perform *šedaqah*, it would undermine the concept of right. A destitute debtor would demand that the creditor forgo repayment of the loan in the name of *šedaqah*; a poor injurer would expect the injured party to eschew compensation in the name of this ideal, and so forth. Moreover, *šedaqah*, by its very nature, is undefined and almost limitless. One can always act kindly to another, and in varying degrees. Which level of kindness should the court impose on the individual? What degree of concession will the individual be required to make in favor of the other? These questions cannot be decided by judgment, and must be left for the individual to resolve.

### ■ Mercy and *Imitatio Dei*

Maimonides bases the obligation to act mercifully on the principle of *imitatio Dei*: “Just as God is called gracious, so you should be gracious; just as He is called merciful, so you should be merciful.”<sup>105</sup> This principle requires explication from (Maimonides’s) philosophical viewpoint. If God, “He being indeed immeasurably exalted above all such description,” cannot be described by positive attributes, then how can humans imitate him?<sup>106</sup> In *Sepher Hammišvot*, Maimonides formulated the commandment of imitating God while being aware of this problem; he stated that this imitation is of “the good deeds and lofty attributes by which the Lord (exalted be He) is described in a figurative way.”<sup>107</sup> Maimonides formulated implicitly in this concise formulation what he would discuss explicitly in the *Guide*. First, the imitation is not of God himself but of his “good deeds.” God’s “essence” cannot be described, but only his “deeds” that are expressed in nature.<sup>108</sup> Second, the attributes used by the prophets to portray God are depicted “in a figurative way,” that is, as metaphors that portray his actions. The divine attributes are not to be interpreted literally, because they denote emotions and mental traits, while God does not have a soul: “Nor is He, may He be exalted, endowed with a soul, so that He might have a habitus pertaining to Him—such as clemency, modesty, and similar things.”<sup>109</sup> Accordingly, the only way to understand his attributes is on the basis of these being metaphors. Maimonides therefore employs a double methodology of distancing the attributes from God. First, any description of God is not of God himself, but of his acts, that is, of nature. Second, his deeds are not described directly, but only metaphorically. The interpretation of the attributes must uncover which natural

<sup>105</sup> *Laws Concerning Character Traits* 1:6. As we have seen, this is anchored in the commandment of “Love thy neighbor as thyself,” but the main principle at work here seems to be that of *imitatio Dei*, which is broader and more comprehensive.

<sup>106</sup> Howard Kreisel, “Imitatio Dei in Maimonides’ Guide of the Perplexed,” *AJS Review* 19 (1994) 169–211; idem, *Maimonides’ Political Thought* (Albany, NY: SUNY Press, 1999) 125–58.

<sup>107</sup> *The Commandments*, Positive Commandment 8 (trans. Chavel), 1:12.

<sup>108</sup> *Guide* 1:50–51. See Maimonides, *The Guide of the Perplexed* (ed. Michael Schwarz; Tel Aviv: 2002), 113, n. 7 (Hebrew).

<sup>109</sup> *Guide* 1:52 (trans. Pines, 116).

phenomena or forces that they represent. In 1:54 of the *Guide*, Maimonides sets forth an interpretation of the attribute of mercy:

One apprehends the kindness of His governance in the production of the embryos of living beings, the bringing of various faculties to existence in them and in those who rear them after birth—faculties that preserve them from destruction and annihilation and protect them from harm and are useful to them in all the doings that are necessary to them. Now actions of this kind proceed from us after we feel a certain affection and compassion, and this is the meaning of mercy. God, may He be exalted, is said to be “merciful,” just as it is said, “Like as a father is merciful to his children” [Ps 103:13], and it says, “And I will pity them, as a man pitieth his own son” [Mal 3:17]. It is not that He, may He be exalted, is affected and has compassion. But an action similar to that which proceeds from a father in respect to his child and that is attached to compassion, pity, and an absolute passion, proceeds from Him, may He be exalted, in reference to His holy ones, not because of a passion or a change.<sup>110</sup>

God’s mercy is expressed by imparting the natural forces necessary for the process of creating embryos and the growth of children. The use of this example is understandable, because compassion typically depicts a parent’s concern for their children.<sup>111</sup> It seems, however, that the definition of compassion is not limited to this context, and Maimonides’s intent is more general. God’s attribute of mercy is expressed in the imparting of the powers that enable creatures, humans and animals, to develop and protect themselves.<sup>112</sup> Maimonides explains that the prophets portrayed these natural faculties as compassion, for if humans would do similar things, they would do so out of “affection and compassion.” That is, the prophets used humanizing language. Why did they use human metaphors, instead of neutral or “scientific” wording? The answer is because their aim was not only to depict God’s deeds (that is, nature); it also had a moral purpose. They wanted to offer humankind a model of virtues which it was to adopt. In order to achieve goals similar to God’s, such as concern for living creatures, people must develop the suitable character traits. According to this understanding, man must imitate the “lofty attributes by which the Lord is described in a figurative way,” among them mercy and compassion.

The continuation of chapter 54 in the *Guide*, however, seems to indicate a different conclusion:

It behooves the governor of a city, if he is a prophet, to acquire similarity to these attributes, so that these actions may proceed from him according to a determined measure and according to the deserts of the people who are affected by them and not merely because of his following a passion. He should not

<sup>110</sup> *Guide* 1:54 (trans. Pines, 125).

<sup>111</sup> This is indicated by the verses mentioned by Maimonides, and from the etymology of *rahamin-rehem* (womb).

<sup>112</sup> See Hadad, *Torah and Nature*, 234–42.

let loose the reins of anger nor let passion gain mastery over him, for all passions are evil; but, on the contrary, he should guard against them as far as this lies within the capacity of man. Sometimes, with regard to some people, he should be “merciful and gracious,” not out of mere compassion and pity, but in accordance with what is fitting. Sometimes, with regard to some people, he should be “keeping anger and jealous and avenging” in accordance with their deserts, not out of mere anger; so he may order an individual to be burned without being angry and incensed with him and without hating him, because he perceives the deserts of that individual and considers the great benefit that many people will derive from the accomplishment of the action in question.<sup>113</sup>

According to this passage, the ideal ruler’s actions must be grounded in rational thought, and not in any emotions, “for all passions are evil.” The thought that drives the ruler’s actions must include considerations of justice, “but in accordance with what is fitting,” as well as utilitarian ones, “and considers the great benefit that many people will derive.” Such considerations will likely lead him to be “merciful and gracious” towards certain people, and “keeping anger and jealous and avenging” towards others. These terms do not refer to the sentiments of compassion and anger, but to different types of actions. “Mercy” denotes positive, rewarding actions of benefit for people, while “vengeance” refers to negative, punitive actions. Rational considerations of justice and utility must guide such actions, and not emotion. Maimonides exemplifies this with the ruler who orders “an individual to be burned without being angry and incensed with him and without hating him, because he perceives the deserts of that individual.” The ideal ruler of a city must act only out of reason, while completely neutralizing his feelings. Sometimes he will be “merciful and gracious,” and at others, “keeping anger and jealous and avenging,” as the case dictates and as is fitting. From this aspect, mercy is not preferable to vengeance. Each kind of response must be fitting to the specific circumstances. In the continuation of the chapter, however, Maimonides adds the following: “In spite of all this, it behooves that acts of mercy, forgiveness, pity, and commiseration should proceed from the governor of a city to a much greater extent than acts of retaliation.”<sup>114</sup> Maimonides nevertheless advises that merciful acts must be more numerous than punitive measures. He gives a formal reason for this: “For the ‘thirteen characteristics’ are all of them, with one exception, ‘characteristics of mercy.’” We may assume the existence, beyond the formal reason, of a substantive one, which would not be difficult to discern. In the final analysis, the ruler’s actions are meant to be beneficial to the city, and not to harm it. If he punishes more than he takes positive steps, destroys more than he builds, he is acting counter to what his position demands of him. This observation by Maimonides is to be viewed as an external criterion for examining the ruler’s policy. If the ruler, after having weighed what he deems just and utilitarian, acts in a way in which punishments

<sup>113</sup> *Guide* 1:54 (trans. Pines, 126).

<sup>114</sup> *Guide* 1:54 (trans. Pines, 127).



outweigh the positive acts, he is presumed to be acting incorrectly. In essence, his reasoning must be based on what is fitting and what brings benefit to many people, and not on pity and mercy.

The principle of *imitatio Dei* is understood differently in the *Guide* than it is in *Sepher Hammişvot* and the *Code*. According to the halakhic compositions, a person must imitate God by adopting the virtues: “Just as He is gracious and merciful, so you should be gracious and merciful.” In contrast, the *Guide* teaches that the ruler of a city is to resemble God by disregarding or transcending them: “He should not . . . let passion gain mastery over him, for all passions are evil.”<sup>115</sup> According to the halakhic works, a person must act mercifully, while the *Guide* would have the actions of an individual (the ruler of a city) dictated solely by reason. The question arises: what is the relationship between these two interpretations and the two ensuing ethical models? Is the model of the *Guide* meant to replace that of the early compositions? Finally, did Maimonides see mercy as a virtue, or perhaps, did he prefer conduct based solely on rational criteria?<sup>116</sup>

Our starting point for resolving this question is the context in which Maimonides presents the latter model in the *Guide*. Chapter 54 is dedicated to an interpretation of the revelation to Moses in the cleft of the rock in Exod 33. Maimonides offers a philosophical interpretation of the attributes that the Lord revealed to Moses, and draws a conclusion pertaining to the “governor of a city.” This conclusion is more political than ethical. It is not concerned with the personal perfection of the ruler; it rather addresses his way of action or his policy as a ruler. In the end of the chapter, Maimonides expressly relates to its political nature:

We have gone beyond the subject of this chapter; however, we have made clear why Scripture, in enumerating His actions, has confined itself here to those mentioned above, and that those actions are needed for the governance of cities. For the utmost virtue of man is to become like unto Him, may He be exalted, as far as he is able.<sup>117</sup>

The Torah mentioned these thirteen attributes because they are needed for “the governance of cities.” The Lord revealed to Moses specifically the attributes meant for a political end, since man’s ultimate purpose is to imitate God in the manner in which cities are governed.<sup>118</sup>

<sup>115</sup> *Guide* 1:54 (trans. Pines, 126)

<sup>116</sup> This is part of a broader question regarding the relation between the ethics of the *Guide* and that of *Shemonah Peraqim* and *Hil. De ’ot*. According to one scholarly view, in the *Guide* Maimonides presents an ethics different from that in his halakhic works. See Herbert Davidson, “The Middle Way in Maimonides’ Ethics,” *PAAJR* 54 (1987) 31–72, at 65–68; see also David Shatz, “Maimonides’ Moral Theory,” in *The Cambridge Companion to Maimonides* (ed. Kenneth Seeskin; New York: Cambridge University Press, 2005) 180–81. Other scholars, in contrast, argue that, despite the differences, Maimonides presents a uniform ethics. See Ravitsky, “Doctrine of the Mean.” The current article is limited to a discussion of *rahimim*.

<sup>117</sup> *Guide* 1:54 (trans. Pines, 127–28).

<sup>118</sup> This is consistent with what he writes in the concluding chapters of the *Guide* (3:53–54).

Accordingly, the two interpretations of *imitatio Dei* have patently different goals that do not compete with each other. The first interpretation, which was set forth in *Sepher Hammissvot* and the *Code*, is a universal ethical model that is directed to everyone. According to this interpretation, a person must adopt the attributes used to figuratively describe God, to act mercifully and compassionately, and to act kindly toward every person. The second interpretation, which appears in *Guide* 1:54, is of a political nature, and is intended to present the ideal model of a political leader. For Maimonides, the ruler of a city is to act according to the dictates of reason, in accordance with considerations of justice and utility, and not out of sentiments of mercy or anger. Maimonides obviously had in mind Moses, the political leader and prophet, who acted in accordance with these principles. This found full expression in Moses's legislative activity, that is, the Torah.<sup>119</sup> The Torah is a collection of "statutes and ordinances so righteous" that are based on what is correct and proper, and not on anger or mercy.<sup>120</sup> Notwithstanding the reference to Moses, the general language used by Maimonides teaches that this principle does not refer solely to Moses. This is a political ideal that must guide every political governor. Every such ruler must strive to act in a manner that is based solely on reason, even if we assume that not everyone is capable of reaching the level of Moses.<sup>121</sup>

The two different interpretations of *imitatio Dei* and the two models that they represent (the ethical and the political) reflect the distinction between the standing of mercy in the moral sphere and in the legal plane. The universal ethical model of the principle of *imitatio Dei* underlies the obligation to adopt the virtue of mercy in the moral plane. By force of the obligation to imitate God, people must act mercifully and kindly with their fellows. In contrast, the political model of *imitatio Dei* is at the basis of the charge of a ruler to enact laws based on justice and utility, and of the judge's duty to act in accordance with these aims. The goals of a legal system are to ensure justice (*sedeq*) and not righteousness (*šedaqah*), to guard people's rights, and to ensure their safety and welfare. Personal ethics, however, exceeds these goals, and demands that at times a person forgo his right and perform acts

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This parallelism has been discussed extensively. See, for example, Eliezer Goldman, "The Worship Peculiar to Those Who Have Apprehended the True Realities," in *Expositions and Inquiries: Jewish Thought in Past and Present* (ed. Avi Sagi and Daniel Statman; Jerusalem: Magnes; Ein Tzurim: Yaacov Herzog Center for Jewish Studies, 1996) 77–86 (Hebrew); Hadad, *Torah and Nature*, 223–52. Much has been written on the place of the political ideal for Maimonides. See Aviezer Ravitsky, "Philosophy and Leadership in Maimonides," *Da'at* 57–59 (2006) 31–59 (Hebrew), and the literature the article references.

<sup>119</sup> On the Torah as an expression of the Mosaic legislation, see Jacob S. Levinger, *Maimonides as Philosopher and Codifier* (Jerusalem: Bialik Institute, 1989) 155–64 (Hebrew).

<sup>120</sup> Maimonides (*Guide* 1:54) emphasizes that even laws such as "you must not let anything that breathes remain alive" (Deut 20:16) are not founded in retaliation. Rather, they have a logical goal: "So that they may not teach you to do all the abhorrent things that they do" (Deut 20:18).

<sup>121</sup> Howard Kreisel, "Imitatio Dei," 178.

that go beyond the call of duty. Thus, Maimonides's discussion of mercy in the theological and political context is consistent with his conception of the standing of this virtue in the moral and legal dimensions.

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