AN EVALUATION OF MAIMONIDES’ ENUMERATION OF THE 613 COMMANDMENTS, WITH SPECIAL EMPHASIS ON THE POSITIVE COMMANDMENTS

by

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A thesis submitted in conformity with the requirements for the degree of Doctor of Philosophy
Graduate Department of Near and Middle Eastern Civilizations
University of Toronto

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Abstract

The TaRYaG count, that is the traditional enumeration of the 613 commandments contained in the five Mosaic books (Torah), has gained a prominent place in Judaism. The count is based on a dictum found in the Babylonian Talmud and attributed to R. Simlai, a Palestinian rabbi of the late third century. No one did more to see this count achieve the importance it has than Moses Maimonides, the prominent 12th-century Jewish philosopher and perhaps the most important post-talmudic jurist of all times. M. offered an impressive methodology, made up of rules of individuation, identification and interpretation - in all, fourteen rules - to support his
proposed enumerative scheme and used it to critique all previous such attempts.

By his own account, Maimonides undertook this project with the sole aim to provide a comprehensive outline for his upcoming Code of Jewish Law. This thesis demonstrates the enormous difficulties inherent in such a project - difficulties that could not have passed unnoticed by such an accomplished author - and seeks to uncover any other reason or reasons that may have prompted him to adopt such a constraining count. The thesis concludes by speculating that Maimonides may have found it convenient to use the *TaRYaG* scheme in order to introduce into the list of commandments the beliefs in the existence of God and in His unity - beliefs that had previously not been considered commandments.

An ancillary product of the dissertation is the discovery that many of the commandment designations proposed in the enumerative scheme are abandoned in the *Halakhot*, a discovery that was noted, albeit only partially, by less than a handful of scholars over the past eight hundred and fifty years. The dissertation examines the proposed solutions and rejects them on a number of counts. A systematic analysis of these occurrences suggests a more consistent solution and reveals an aspect of Maimonides that has not been sufficiently appreciated, Maimonides the exegete and legal philosopher.

The agenda-oriented research also examines some of the important innovations contained in M’s list of positive commandments, the hermeneutics behind them and the politico-philosophical ideas that may have informed them.
To the memory of my father, z”l, a man of unusual foresight, a generous dose of skepticism, a trader’s decisiveness and clear and uncomplicated thinking.

To my mother, may she live and be well, to whom I will be forever indebted for sending me away to further my Jewish education at the cost of great sacrifice.
Acknowledgements

This journey began more than 45 years ago, while I was attending yeshivah in Baltimore. There I had the privilege to study under Rabbi Jacob Weinberg z”l, who was later to become the dean of the school. He initiated me in Rambam studies and fired up my young spirit with titillating insights and brilliant inferences drawn from whatever text was in his ken, be it Tanakh, Talmud, Rambam or another rishon. He taught me how to read. He taught me that to listen to a text one must silence all other sounds. He taught me that what a text did not say was as important as what it said. Alas, to my chagrin I was too young to learn all that he could offer, even if that had been possible.

After I got married and moved to Toronto, I had the fortune to meet up again with old friends from yeshivah days, disciples as it happens of Rabbi Weinberg z”l. First, my old roommate and closest friend, R. Uziel Milevsky, z”l, with whom I studied rabbinic works be-havruta. A few years later he left Toronto to become the chief rabbi of Mexico. Through the years of physical separation we kept in regular contact and reunited again in Toronto, not long before his untimely passing away. His creative and analytic mind were a constant inspiration; his enjoyment at hearing a hiddush was contagious, his intellectual generosity exemplary. I truly miss him.

Second, my present havruta, R. Moshe Hochman, yibadel le-hayim, with whom I have been studying on an almost daily basis for close to forty years. A good part of these years has been spent studying Rambam, and in particular the Sefer ha-Mitsvot and the Mishneh Torah. Held back by our Sages’ counsel to tone down our praises of those who are present, I will say
only that it has been a privilege and a supreme joy to spend many thousands of hours with him poring over texts. From him I learned the meaning of intellectual honesty, humility and patience, and from him I acquired a love for research. I know that he did not agree with me on many points of this dissertation and therefore I want to exonerate him of any criticism. And yet, I want to give him credit for what the reader finds pleasing and right in this work. Even where it may not represent his direct input, it certainly is the fruit of our daily engagement.

I also would like to single out R. Asher Turin, another friend from yeshivah days and an extraordinary talmid haham, who patiently reviewed with me an earlier draft of the entire dissertation. He not only helped me sharpen many an argument but also corrected outright errors that only a true talmid haham like him could detect on first reading. If any errors remain it is only because I did not wish to burden him with reviewing the later drafts.

There are many other people to whom I owe a debt of gratitude. In the first instance, I must acknowledge Fuerh Tang, who worked tirelessly on all the technical aspects of the dissertation, from filing, editing and keeping track of the various versions to the creation of a bibliography and its linkage to footnotes. Given my very poor computer skill, I seriously doubt that this dissertation could have come into being without her assistance. To Josie Parks, for editing and smoothing over my deplorable writing style while still making sure that the text retained the original meaning. To Sharon Moss for her attention to detail in the never-ending job of finding and correcting typographical errors — if the work still has typos it’s because I did not give her enough time to review it. To Andrew Moss for his ability and perseverance in searching for and obtaining difficult to find research material. To Effy Lev for his quick response to my cries of help whenever
my computer acted up. In general, to all my office co-workers, whose extra effort and dedication covered the many hours and days when I was absent, busy with courses, exams and research, and in particular, Henry Fenig, Danny Gordon, Rick Zauderer, Yakov Friedman and Brenda Lev.

My deep appreciation goes to my sons-in-law, Avi Horowitz and Dan Scheiner, for their patience in listening to my ramblings and for the many interesting and valuable suggestions that they made.

A very special thank you goes to Professor Yakov Elman. The final shape of this dissertation owes a great deal to his early intervention. Despite his busy schedule, he was gracious enough to read the entire manuscript in its final form, to which he offered many valuable suggestions. Thank you to David Sklare and Haggai ben Shammai for generously helping me understand some critical Judeo-Arabic terms, and to Jim Diamond and Hindi Najman for their interest and constant encouragement.

For grace under extreme time pressure, I must acknowledge Paul Nahme and Eva Mroczek, who prepared the comprehensive Index of Cited Passages of Maimonides’ Works in just two days.

Anna Souza, Graduate Administrator, and Jennie Jones, Assistant to the Chair and Office Manager, were instrumental in helping me navigate the administrative landscape. On more than one occasion, Anna went out of her way to help me with administrative matters that threatened to overwhelm me due to my limited capacity to follow bureaucratic instructions.

I am grateful to David Novak and Menahem Kellner for their valuable philosophical insights, to Tirzah Meecham for her innumerable observations on proper form and for her early constructive skepticism and to Herbert Bassler, my external examiner, for his animadversions. Their observations and criticisms enabled me to refine my argument and helped me avoid many
errors and omissions. I was privileged to write this dissertation under Harry Fox. I profoundly appreciate his input and, in particular, his sage counsel in matters of methodology and structure. I could not have asked for more.

Every writer must acknowledge by necessity the important role played by his wife, especially in a project that demanded the amount of time and attention that this one did. I wish here not only to acknowledge her contribution but, more humbly, to ask her forgiveness for eight years of near neglect. And yet, her contribution does not end with her selfless devotion. Nancy is also a wonderful listener, a gentle and intelligent critic and a great admirer. She is a true ezer ke-negdo. May God bless the fruit of her hands forever and may we see together grandchildren and great-grandchildren follow the enlightened and compassionate ways of our ancestors.
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Editions Used

The Sefer ha-Mitsvot, Nahmanides’ Hasagot, and the commentaries Megillat Esther, Qinat Sofrim and Lev Sameah are cited to the Frankel edition, either by page or by the particular commandment under discussion. The Mishneh Torah and its traditional commentaries are cited to standard printed editions; references are to treatise, chapter and halakhah. The Eight Chapters of Maimonides on Ethics (Shemonah Peraqim) is cited to Joseph I. Gorfinkle edition.

The midreshe halakhah are cited to the following:

Mekhila de-Rabbi Ishmael (“Mekhila”), eds. H.S. Horowitz and Y. Rabin;
Mekhila de-Rabbi Shimon bar Yohai (“Mekhila de-RaSHBY”), eds. Y.N. Epstein and A.S. Melamed;
Sifra (“Sifra”), ed. I.H. Weiss;
Sifre al Sefer Bamidbar ve-Sifre Zuta (“Sifre Numbers”; “Sifre Zuta”), ed. H.S. Horowitz;
Sifre al-Seefer Devarim (“Sifre Deuteronomy”), ed. L. Finkelstein.

For all the above works I provide page numbers besides the chapter or pisqa for ease of reference.

Translations and transliterations

Quotations of lemmas from the Short Enumeration or Minyan ha-Qatsar are from Hyamson (Mishneh Torah: According to the Bodleian (Oxford) Codex, 1965). For the Sefer ha-Mitsvot I used the English translation of C. Chavel (The Book of Commandments, 1984). For the Guide of the Perplexed, I used the 1962 edition by Pines and cited it by book, chapter, and page (in italics). For the Eight Chapters (EC) of Maimonides on Ethics I used Gorfinkle’s English translation. I have followed all of these translations quite faithfully; where I (infrequently) amended any of them, I noted it so. In contrast, the English of the MT is for the most part a free adaptation of the Yale University edition.

For scriptural quotations, I used the Soncino’s Pentateuch, edited by Dr. J.H. Hertz, to conform to Chavel’s use of biblical passages in his own translation of the Sefer ha-Mitsvot. There will be instances, however, when exegetical derivations will not quite conform to these scriptural translations. This is inevitable due to the fact that the language of Scriptures is rich in nuances and ambiguities. I did my best to adapt these translations so that the reader will follow the interpretation, though I am afraid I did not always succeed.

By Sages (with a capital “S”) I refer to the authorities in the Talmudic period.

The proliferation of transliteration systems found in scholarly works is nothing short of bewildering. Preferences are often a function of the scholar’s academic and geographical background. For example, a student in Lithuanian yeshivot will differentiate the tav (t) from the spirant variety (th). An Israeli student, on the other hand, accustomed to the modern Sephardic pronunciation will not. And so on. Biblical studies, because of their
emphasis on grammatical and morphological features have tended to use the scientific or academic system. This work, however, is halakhic in nature, not so much concerned with the biblical meaning of passages as with particular idioms of the interpreters, the Sages and medieval rabbis. I give the reader a Hebrew word or sentence where the translation given may leave doubts as to the precise intention of the original rabbinic text. With the exception of commonly used spellings, I have therefore adopted what I considered the simplest transliteration system, the “general-purpose style” of the SBL Handbook of Style (1999). Even then, I adopted some slight modifications and ignored the spirants $gh$, $dh$, $f$ and $th$, preferring instead to use $g$, $d$, $f$, and $t$.

Throughout the dissertation I use the terms $MT$ and Code of Law interchangeably though I am aware of the debate over whether $MT$ represents a “code” in the technical sense of the word. Where I use Code of Law my purpose is to draw special attention to the (ostensible) genre of the work rather than simply the work itself. On the other hand, I draw a conscious line between $MT$ and $Halakhot$. By the former I mean the entire work, including the Introduction (s) and the Headings to each treatise. When referring only to the text of the $MT$, I use the term $Halakhot$. I capitalize Headings because they ought to be treated as a separate work. While no doubt the Headings derive from the “Short Enumeration” and the Sefer ha-Mitsvot they contain many important differences in formulation. These, in turn, have legal and exegetical implications.
Chapter 1. Introduction

The TaRYaG\(^1\) count — that is, the traditional enumeration of the 613 commandments contained in the five Mosaic books (Torah) — has gained a prominent place in Judaism. The tradition, as we shall see below, is based on a midrash found in the Babylonian Talmud and, with some variants, in Midrash Tanhuma. No one has done more to see this count achieve the importance that it has than Moses Maimonides (M.), who used his own reconstruction of the list to frame the Mishneh Torah (MT), possibly the most important, and certainly the most comprehensive, code of law in Jewish history.

The Talmudic passage reads as follows:

R. Simlai when preaching said: Six hundred and thirteen precepts were communicated to Moses, three hundred and sixty-five negative precepts, corresponding to the number of solar days [in the year], and two hundred and forty-eight positive precepts, corresponding to the number of the members of man's body. Rav Hamnuna said: What is the [biblical] text for this? It is, Moses commanded us torah, an inheritance of the congregation of Jacob ['Torah’ being in letter-value, equal to six hundred and eleven], I am and Thou shalt have no [other Gods] [not being reckoned, because] we heard from the mouth of the Mighty [Divine].\(^2\)

\(^{1}\) TaRYaG is a mnemonic whose Hebrew letters when read numerically stand for 613 (T=400, R=200, Y=10, G=3).

\(^{2}\) bMakkot 23b-24a. M., when quoting the midrash, does not give the attribution, as is customary with him in his halakhic works, as if to underscore unanimity. See Sefer ha-
M. cites this *midrash* in his introduction to the *Sefer ha-Mitsvot (ShM)* and then adds,

[b]y way of interpretation [the Sages] have further said about [the number of] positive commandments corresponding to the number of limbs [in the human body], that it is as if each and every limb says to the person, ‘Perform a commandment with me’; and about [the number of] negative commandments corresponding to the number of days in a solar year, they said, it is as if each and every day says to the person, ‘Do not do this day a transgression.’

R. Simlai was a second-generation Palestinian *Amora* (pl. *Amoraim*, rabbis of the Talmudic period, 220 C.E. to the end of the fifth century C.E.) who lived around the late third century of our era. Did this *midrash* reflect a unanimous tradition? And were the *tannaim* aware of such an enumeration? Nahmanides, M.’s most prominent critic and the author of the *Hasagot* (“Critiques”) on the *ShM*, was one of the first scholars to struggle with this question. Pointing out that the *tannaim* never seemed to take into account the number of commandments in their talmudic disputations, Nahmanides wondered whether in fact the *tannaim* agreed with the count. Perplexed by this observation, Nahmanides concluded that R. Simlai’s count was the product of his own reckoning and that, in effect, not everyone agreed with

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*Mitsvot*, trans. Moshe ibn Tibbon, ed. Hayim Heller (Jerusalem: Mosad ha-Rav Kook, 1981) Note 51. This, of course, is relevant to the question raised by Nahmanides, as we shall soon see, of the normative character of the *midrash*. Secondly, M.’s version of the *midrash* reads, “Six hundred and thirteen precepts were communicated to Moses at Sinai,” and that is how he quotes it in the introduction and in the beginning of Rule 3.

3 This expansion is found in *Midrash Tanhumah, ki-Tetse* and in a number of other medieval sources, with slight variants. See *Sefer ha-Mitsvot*, ed. Heller, p. 4, n.53.
his exegesis and his count. Nevertheless, he agreed that the count was
normative because a number of talmudic passages and midrashim cited the
number TaRYaG in their arguments. He concluded that “because of the
widespread nature of this count…we will say that it was a tradition handed
down from Moses at Sinai.” On the other hand, Yeruham Fischel Perla,
while agreeing with Nahmanides’ conclusion, found it “somewhat strange”
that “nowhere do we find mention of the TaRYaG count, not in the Mishnah,
nor in the Tosefta and nor in the Sifra…and neither this count nor any other
count is mentioned in the entire Palestinian Talmud.” He reviews some of
the midrashim cited by Nahmanides as proof of the pervasiveness of the
count but finds that variant readings of these same midrashim seem to make
a deliberate point of avoiding the number TaRYaG. Nevertheless, he too
concludes that the tannaim of the Mishnah, Tosefta, Sifra, Sifre and Talmud
Yerushalmi probably did not disagree with the TaRYaG count since we do
not find an explicit alternative propounded. On the other hand, E.E.Urbach
declares categorically that “in the tannaitic sources this number [i.e., 613] is
unknown, and in the passages where it appears in the printed editions it is
only an interpolation that is wanting in the MSS.” After a careful review,
David Henshke finds no trace of the count in the manuscript witnesses to the
midrashim that in the printed versions make mention of TaRYaG. From this
silence, Henshke concludes that the exercise of counting mitsvot was an


5 Perla, Yeruham Fischel, Sefer ha-Mitsvot le-RaSaG, 3 vols. (Jerusalem: Hotsaat Qeset,

6 Urbach, Efraim E., The Sages, Their Concepts and Beliefs, trans. Israel Abrahams
amoraic affair (“following perhaps upon their systematizing approach”),
though he grants that the TaRYaG tradition may have traveled orally from
earlier times. He adds that one could safely conclude that the “TaRYaG idea
was not part of the mainstream of tannaitic consciousness.”

To be sure, there is some evidence that the tannaim engaged in
counting mitsvot, though without providing fixed totals for the entire
Pentateuch. An interesting example can be found in the following Pesiqta
de-Rav Kahana:

R. Yohanan said in the name of R. Shimon b. Yohai: Moses wrote for us three chapters (parashiyyot, pl. of parshah) in the Pentateuch, each containing sixty commandments (mitsvot). These are: parshat Pesahim, parshat Neziqin and parshat Qedoshim. R. Levi said in the name of R. Shila of the city of Tamarta: these chapters contain seventy commandments. R. Tanhuma said: They do not disagree, for he who proposes seventy commandments in parshat Pesahim, includes in it the parshah of phylacteries (tefillin); he who proposes 70 commandments in parshat Neziqin includes in it the parshah of the year of remission (shemitah); and similarly he who proposes 70 commandments in parshat Qedoshim includes in it the parshah of forbidden relations ( ervah).
A number of ingenious theories were advanced to identify the proposed number of mitzvot, but none of the solutions came close to matching the 60 mitzvot that ostensibly were embedded in every parshah. Bloch, who reviewed these solutions, was forced to conclude that the statement “Moses wrote to us three chapters…each containing 60 commandments” could not be taken in a rigorously precise manner. In the end, it was not difficult for Bloch to arrive at this conclusion, since the Pesiqta’s midrash provided sufficient measurable information — claiming sixty mitzvot within three clearly identified and limited pericopes. Unfortunately, as R. Simlai’s statement cannot be put to such a controlled test, no similar conclusion can be reached.

The above discussion raises important issues with regard to the antiquity, fundamental character and even normativeness of R. Simlai’s midrash of 613 commandments. In the end, it is more likely that the midrash of 613 commandments reflected only the individual count of an amora, conveniently packaged into an edifying homily.

dictum is attributed to R. Yudan in the name of R. Shimon b. Yohai. This midrash can also be found in the Yalqut Mishpatim, remez 307, which reads orlo instead of ervah.

9 Bloch, Moise, "Les 613 Lois," REJ 1 (1880) P. 201, note 2, cites a number of attempts. For example, Shlomo b. Eliezer ha-Levi in his Shlomo b. Eliezer ha-Levi, ‘Avodat ha-Levi (Venice: 1546) [incorrectly referenced by Bloch as Sefer Huiq Eloqim, Venice 1546], counts, following the enumeration proposed by M., seventeen commandments in parshat Pesahim, forty-one in Neziqin and forty-six in Qedoshim. Slightly different results were obtained by Hagiz, Moses b. Jacob, Sefer Elleh ha-Mitsvot (Amsterdam: 1713) And Gabriel J. Polak in Huiq ha-Eloqim (Amsterdam: 1831). S. Buber, in his notes to the Pesiqta de-Rav Kahana, suggested that mitzvot stood for verses. To find the sixty verses, Buber commenced and finished the parashiyyot in a totally arbitrary fashion, replacing one problem for another. Others suggested that the midrash referred to details of the laws, which, as we shall see, runs counter to the definition of commandment.
Yet this *midrash* prompted the greatest halakhic and philosophical authority of the Jewish medieval world to write a reasoned treatise on the correct method of enumerating the commandments. Why?

**Early Medieval Exegetes and the 613 Commandments**

We saw that Nahmanides resolved his doubts about considering the *TaRYaG* tradition to be normative, and thus a worthy object of study, once he had established that the tradition was found, uncontested, in a relatively wide number of talmudic *midrashim*. Other medieval scholars were not so persuaded. In their estimation, the *TaRYaG* count was inconsistent with an appropriate definition of *mitsvah* and how such a list of *mitsvot* should be presented.

The great Spanish exegete Abraham ibn Ezra (1089-1164), in a book composed for the express purpose of discussing and listing the laws of the Torah, gave the following opinion:

I need to raise a methodological point before I deal with the *mitsvot* because I saw scholars count 613 *mitsvot* in many different ways. There are those who count the boiling of a kid [in its mother’s milk] as one *mitsvah* and there are those who count it as three *mitsvot* on account of the fact that it is written in the Torah three times and that our Sages expounded each of those instances. There are many such instances. There are those who count the particulars and the general, sometimes the particulars by themselves and sometimes the general by themselves. And there are those who count as one *mitsvah* that which is formulated in two ways but whose intent is the same.

Truly [ve-al derekh mehqar ha-emet lit., “according to the way of true inquiry”], there is no limit to *mitsvot*, as the psalmist says, *I have seen that*
all things have their limit, but your commandment is broad beyond measure (Psalm 119:96). On the other hand, if we count only the general, the fundamental ones (ve-ha-iqarim) and the commandments that are binding for all time, the mitsvot do not add up to [’asuyot, lit., “are not made to be”] 613.

Abraham ibn Ezra is one of the earliest exegetes, if not the first, to critically raise methodological concerns. For example, how does one define “commandment”? Implicit in his commentary lies a rejection of the tradition of TaRYaG; it is simply impossible to arrive at R. Simlai’s total without first agreeing on a definition of mitsvah. In Ibn Ezra’s opinion, the number of commandments is indefinite; the count could range from fewer than 613 to many multiples of 613. Unfortunately, Ibn Ezra does not say what one is to make of R. Simlai’s exposition.

Judah ibn Balaam, another prominent eleventh-century Spanish exegete, was more explicit. Commenting on a dispute between two Babylonian geonim, Hefetz b. Yatsliah and Samuel b. Hofni, on whether the verse And you shall return to the Lord, your God (Deuteronomy 30:2) commands one to repent or is merely a wishful hope or a prediction, Ibn Balaam stated:

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10 Abraham ibn Ezra, Yesod Mora ve-Sod Torah, eds. Joseph Cohen and Uriel Simon (Ramat Gan: Bar Ilan University Press, 2002), Second Gate, pisqa 3-4, pp. 91-2. Some texts read asirit “one tenth,” instead of ’asuyot, “made,” the sense being that the commandments do not add up to one tenth of 613, or approximately sixty-one. See ibid., notes on line 24. Harry Fox has suggested to me that the number sixty-one may not be as implausible as it sounds: cf. M’s list of sixty obligatory commandments (see section 3:1). It is not clear what Ibn Ezra meant by “the general, the fundamental ones and the commandments that are binding for all time.” Are the last two descriptions a sub-set of the general? If not, in what respect are the general different from the fundamental commandments?
However, Hefetz, may his soul rest in Eden, was forced to bring this [mitzvah] in the count of mitsvot in order to fill the number mentioned by the early scholars in the dictum, “R. Simlai when preaching said: Six hundred and thirteen precepts the Israelites were commanded.” To my mind, the dictum was said only as an approximation.  

Ibn Balaam’s position was also based on a methodological rationale. He asserted that there are two basic categories of mitsvot. One category is made up of historical or contingent commandments; these need not be reckoned with after their time has passed. Good examples are the mitsvot associated with the Passover lamb offered in Egypt and the mitsvot related to the building of the portable Tabernacle in the desert. A second category is made up of commandments that are binding for all time. Ibn Balaam argued that the latter total “does not reach 613. This is the reason why Hefetz was forced to include in his count commandments that were not given at Sinai [and] commandments that were abrogated soon after the time of their performance.”

Here then was another exegete who believed that the “countable” mitsvot could not total the number proposed by R. Simlai if they were subjected to rational criteria of selection. In his opinion, the countable number, i.e., commandments binding for all time, did not reach 613 (though we have no way of knowing how close they came). Note that Ibn Balaam was apparently not willing to include commandments given outside of Sinai, as for example those given in the plains of Moab, which include all the new

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11 Harkavy, Abraham E., "Zikhron ha-Gaon Shmuel ben Hofni u-Sefarav," Zikaron le-Rishonim ve-gam le-Aharonim, vol. 2 (St. Petersburg: 1880), pp. 41-42. Also cited by Perla in his Introduction to Sefer ha-Mitsvot le-RaSaG.
commandments found in Deuteronomy. This is not unreasonable if one considers that R. Simlai stated that “six hundred and thirteen precepts were communicated to Moses at Sinai.” 12,13

The opinion of the two above-named exegetes matters for our appreciation of M.’s work. M. had a high regard for Ibn Balaam’s exegetical abilities, as we gather from a comment he makes in the Essay on Resurrection: “I was anticipated by the keen commentators on the meaning of the passage, men like…Ibn Balaam….”14 Though we have no way of knowing whether M. had seen Ibn Balaam’s comment regarding the number of countable mitzvot in the Torah, it is not unlikely that he was aware of it. With regard to Ibn Ezra, Perla has suggested that M. had seen and adopted

12 I assume this is why Ibn Balaam rejected Hefets’ view that And you shall return to the Lord, your God is a commandment, since it was stipulated in the plains of Moab. As for the words “at Sinai,” see our note above on the midrash of R. Simlai.

13 Two post-Maimonidean medieval scholars, Levi ben Gersonides (1288-1344) and Simeon ben Tsemah Duran (1361-1444), also impugned the precision of R. Simlai’s dictum. The latter stated, we do not rely on his [R.Simlai’s] interpretation in deciding the halakhah…The reason why this number is mentioned everywhere is that we find no other Sage who counted them, and so we have accepted his enumeration, and even if it misses or exceeds the enumeration, it approximates it (holekh sevivo, lit., goes around it)…(final comments in Duran, Simeon ben Tsemah, Zohar ha-Raqia (im perush Ziv ha-Zohar), ed. D. Abraham (Jerusalem: 1987), p. 225.

For the former, see RaLBaG’s Commentary to the Pentateuch, Exodus, Bo, p. 194, where he points out that M. went through “great stress” to arrive at the exact count of 613, but that this number contains only a “small approximation,” and R. Simlai “did not care to be precise about his exposition (lo hashash bo, lit., was not anxious about it).” Also see Berner, Baruch, "Yahaso shel ha-RaLBaG le-Darko shel ha-RaMBaM be-Minyan ha-Mitsvot," Iyyunim u-Biurim be-Divre ha-RaMBaM, vol. 12 (Ma’aleh Addumim: 1998), pp. 228-242.

some of Ibn Ezra’s principles; if so, he also must have been aware of Ibn Ezra’s dismissal of R. Simlai’s count.\textsuperscript{15} R. Simlai’s division of commandments into positive and negative was not popular among the early medieval halakhic taxonomists. As they saw it, the Law contained many sorts of indications besides positive and negative commandments, normally viewed as unconditional obligations. One could find for example indications of neutral, optional and supererogatory acts as well as many laws that were strictly contingent on circumstances. In fact, Hefetz b. Yatsliah, who used these broader categories, was forced to re-interpret R. Simlai’s and Rav Hammuna’s dicta, saying that “both positive and negative [mitsvot] are the more common and the more explicit. We find many like these in

\textsuperscript{15} Perla, Sefer ha-Mitsvot le-RaSaG, pp. 15-16. But see Twersky, I., "Did Ibn Ezra Influence Maimonides? [Hebrew]," Rabbi Abraham ibn Ezra, Studies in the Writings of a Twelfth-Century Jewish Polymath, eds. Isadore Twersky and Jay M. Harris, Harvard Judaic Texts and Studies (Cambridge: Harvard University Press, 1993) pp. 21-48, to the contrary. Fox, Harry, "Maimonides on Aging and the Aged in Light of the Esoterist/Harmonist Debate," The Thought of Moses Maimonides, eds. J. Robinson, L. Kaplan and J. Bauer (Lewiston NY: Edwin Mellen Press, 1990), pp. 319-83, in particular p. 341 and notes 123, 124 and 126 argues that M. may have been familiar with Ibn Ezra’s commentaries at least in the last years of his life. He bases this on the fact that M. recommends Ibn Ezra’s commentary to the Torah in a section of a will that he believes can authentically be attributed to M.. I show throughout this paper a number of examples of the affinity in exegetical methods and outlook that exists between M. and Ibn Ezra, which of course may simply be accounted for by their common Spanish intellectual legacy. It appears that those exegetes who exhibited philological independence and were the least beholden to talmudic interpretation also espoused a more systematic approach to counting mitsvot. The incompatibility of R. Simlai’s count with their systematic thinking and their independent exegetical approaches led them to deny authoritative status to R. Simlai’s exposition. It also appears to me that, at least according to the account of Ibn Balaam, the Gaon Samuel b. Hofni dismissed the normative worthiness of R. Simlai’s count, since he did not see the need to increase his count to achieve the 613 total. As we shall see, the systematic application of a number of rules to the popular geonic count left M. with fewer than 613 mitsvot. Unlike Abraham ibn Ezra or Judah ibn Balaam, however, M. worked to restore R. Simlai’s full count by introducing innovative commandments.
Scripture.”16 In other words, in Hefetz’ opinion, R. Simlai’s and Rav Hamnuna’s count contained more than just positive and negative commandments — those understood to be obligatory — and the midrashic dictum was a convenient oversimplification.

Though the 613 total was preserved in all these cases, the two-part classification of commandments based on the 248+365 metaphors was ignored by the Sages in the geonic period, in particular Simeon Qayyara, Isaac al-Bargeloni, Solomon ibn Gabirol and Saadia Gaon. They adopted a four-part classification divided into punishments (onshin), negative commandments, positive commandments and sections (parashiyyot). The four-part classification may have originated in a no-longer-extant amoraic or post-amoraic tradition. This can be inferred from a statement that Qayyara makes in the homiletic introduction to his list, opening with a formula that is typical of baraitot.17: “Our Sages have taught (shanu hakhamim): sixty-five sections (parashiyyot) are the essence of Torah, and each section was explicated by the Sages of Israel….” To some extent, the four-part classification better suited many of the types of commandments that came to be included.

In closing, I should note that R. Simlai’s midrash of TaRYaG spawned a remarkably extensive body of TaRYaG lists throughout the Jewish world.


17 This is unlikely though not impossible since baraitot tend to be tannaitic and there is little evidence, as we saw earlier, that tannaim engaged in a detailed mitsvah count. See Perla, Sefer ha-Mitsvot le-RaSaG, vol. I, p. 7 for an allusion in Midrash Tehillim to this division, and see Guttmann, Y. M., Behinat ha-Mitsvot u-Behinat Qiyyum ha-Mitsvot (Breslau: 1978), p. 22, who points to sources for the use of parashiyyot.
of the ninth through thirteenth centuries, many of which have been lost to us. Systematic attempts to classify the commandments were made by the geonim Saadia Gaon, Hefetz b. Yatsliah and Samuel b. Hofni, but we are not aware of any serious attempts to develop comprehensive criteria on which to construct these lists. Abraham ibn Ezra’s methodological comments were never put to use, as his Yesod Mora treats commandments rather loosely, without any sort of numerical constraint. It is also hard to discern any sort of halakhic significance attached to these types of lists. Most of the literary creativity associated with the composition of TaRYaG was channeled into liturgical poems (piyyutim) called azharot, which were read in synagogues on the Festival of Weeks (Shavu´ot). Possibly this fact alone accounted for the extraordinary popularity of the TaRYaG count.

M.’s Avowed Purpose in Enumerating the Commandments

What occasioned M.’s interest in the TaRYaG enumeration? M. tells us in the introduction to ShM that

after having completed our previous well-known work, wherein we included a commentary to the whole Mishnah (Perush ha-Mishnayot, PhM)...I deemed it advisable to compile a compendium which would include all the laws of the Torah and its regulations, nothing missing in it.

M. then proceeds to tell us that in the new work he would omit “differences of opinion and rejected teachings,” as well as attributions, and that he would compose the compendium in the language of the Mishnah, “so that it would easily be understood by most of the people.” He tells us further that “brevity with completeness” would be the goal of this work,
so that the reader thereof might encompass all that is found in the Mishnah and Talmud, Sifra, Sifre, and Tosefta, and more than that, all decrees and ordinances of the later Geonim, of blessed memory, as well as all that they have explained and commented upon concerning the prohibited and permissible, unclean and clean, invalid and valid, liable and free, pay and not pay, swear and free from swearing.

In an outburst of authorial pride, M. declares, “Outside of this work there [is] to be no need for another book to learn anything whatsoever that is required in the whole Torah, whether it be a law of the Scriptures or of the rabbis.”

After discussing the arrangement of the work that will follow M. finally explains why he needs a list of all scriptural commandments. He says:

Now, on account of this plan I deemed it advisable to enumerate first in the introduction to that work the number of all commandments, positive and negative, so that the scope of the work embraces all of them, not one commandment being left without being fully discussed….

The sense here is that M. wishes to cover every one of the scriptural commandments and their derivations and can assure himself of doing that only by listing them all. When he composed the MT, M. shuffled this list of commandments, following a different topical arrangement, placing a pertinent group of commandments at the head of each treatise. A little later on, M. says: “All this [I would do] in order to guard against omitting any topic from discussion, for only by including them in the enumeration of the commandments [heading the various treatises] would I insure against such
omission” (my emphasis). While the earlier statement appears to say that M. wished to make sure that he covered every one of the commandments, this statement says instead that the commandments heading the various treatises would serve as a reminder for all halakhic topics. In other words, the list of commandments would serve as a comprehensive writer’s outline.

It is difficult to countenance, however, the idea that M. intended the list of scriptural commandments to act as a comprehensive outline. For one thing, the MT has a number of treatises that deal with rabbinically ordained laws only, such as Hilkhot Eruvin and Hilkhot Megillah ve-Hanukkah. No mention of any of the scriptural commandments could have insured against the omission of these halakhot. Much the same can be said about three other treatises that deal with purely rabbinically conceived legislation, such as Hilkhot Zekhiyah u-Matanah, Hilkhot Shekhenim, Hilkhot Sheluhin ve-Shutafin. Finally, from a practical point of view, the enormity of the material, most of it rabbinically derived or rabbinically ordained, should have led M. to create a far more comprehensive outline if he was truly concerned about the possibility of overlooking a topic.

M. proceeds to discuss this list and now assumes without further justification that the list of commandments is identical to the TaRYaG enumeration. But this does not appear to be a compelling assumption. As we shall see, other scholars who preceded him downplayed its significance. M.’s own testimony reveals that the TaRYaG enumeration flourished in a non-juridical environment,

Similarly, whenever I heard the many azharot [lit., admonitions, functionally liturgical poems] which have been composed among us in the land of Spain My pangs have come writhing upon me [Dan 10:16], because I saw how popular and disseminated these
were. True, these authors are not to be criticized; they are poets, and not Rabbis, and as far as their art is concerned — namely, well balanced expressions and beauty of rhyme — they have performed with perfection.

Still, M. claims, these poets have all followed Qayyara, the tenth-century Babylonian Gaon and author of the *Halakhot Gedolot*, “and some of the later rabbis,” most probably referring to the Babylonian Gaon Hefetz b. Yatsliya. For all its apparent importance, Qayyara’s enumeration is a laconic, apodictic, and oftentimes very ambiguous list of commandments and, as we shall see, one that could hardly have constituted an authoritative legal source.

Having entered the *TaRYaG* fray, M. is overcome with a “feeling of distress.” He says, “Scholars engaged in enumerating the commandments, or in writing anything whatsoever on this topic, have all come forward with the strangest of theories that I could hardly describe their magnitude.” The more he thinks “about their fantasies — counting as they did matters which even on first thought would appear that they should not have been included,” the more he feels the “ill fortune” that has befallen his people. M. further complains that

…knowing …how widely accepted is this [Qayyara’s] enumeration among the people, I knew that if I were just to list the true and proper enumeration, without [advancing] proofs for it, the first person that will chance to read it will suppose that this is a mistake —

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18 In the contemplated second part of this work I plan to briefly survey some of the earlier enumerators and attempt to determine which ones were read by M. It is clear, however, from what he says here that he cared little about their differences and preferred to group them all together as followers of Qayyara. In effect, Qayyara became M.’s strawman.
his proof being that this is contrary to what some author had written.

As a result, M. set out to write a special treatise (maqqalah), the ShM. Written in an argumentative form, this treatise would spell out, so claimed M., the methods that ought to be followed to produce a logically correct and consistent enumeration. In it, M. would also identify and document each of the commandment claims he was making. Quite clearly, the reconstruction of the original list of commandments was no simple task.

**The Central Problem**

At this point, we must ask ourselves if the effort that M. was about to expend on the enumeration of the commandments was worth the result of having a list that would “guard against omitting any topic from discussion.” Arguably, M. could have far more easily produced a systematic and complete outline that simply sidestepped the constraint of a particular *number* of commandments. This is especially so given that he was planning to write a comprehensive code of law that would at any rate mention every one of the commandments. Recall that the *TaRYaG midrash* does not provide a list of the commandments, with the exception of the two that were heard directly from the Lord, and give no indication as to what might constitute a commandment. Anyone who attempted to reconstruct such an enumeration, if indeed one existed, would have to create an absolutely original set of criteria for selection. It is only by coincidence that an enumeration thus reconstructed could replicate the enumeration that the authors of the *midrash* had in mind.
There is also the matter of the midrash itself. The explanation given for the number 613 makes it clear that we are dealing with a homily (aggadah), not a normative tradition. In effect, the commandments are compared to the days of the solar year (365) and the number that was thought to represent all human limbs and organs (248), essentially to express ideas of constancy and dedication. It need not be said that a homily is hardly an appropriate basis for a serious jurisprudential work.

Our amazement grows when we consider that a list of commandments, any list, requires the compiler to decide on a set of individuating criteria, rules that would divide the totality of material constituting the legal portions of the Torah into separate units. By necessity, such individuation is subjective, certainly not sufficiently compelling to justify M.’s hyperbolic claim that his enumeration is “founded upon clear proof beyond a doubt” and that “the reader will see the mistake of all those who counted in a way contrary to ours.”

We shall see that Nahmanides, in his critique, tackled some of the many potentially thorny individuation issues. Though erudite and powerful, Nahmanides’s critique is not sufficiently systematic. He leaves unchallenged a great many more questionable, or at least non-compelling, individuations. In fact, it is clear that Nahmanides accepted M.’s overall scheme. M.’s four major

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20 In his own summary at the end of his critique, Nahmanides tells us that he removed altogether 26 entries from M.’s list of positive commandments, though not all of them the result of disagreements on individuation. Rosanes, Y., "Derekh Mitsvotekha," Sefer ha-
traditional apologists, Isaac de-Leon ("Megillat Esther"), Abraham Alegre ("Lev Sameah"), Hananiah Cases ("Qinat Sofrim") and Aryeh-Leib Segal-Horowitz ("Marganita Taba") did their best to uphold M.’s scheme in its entirety against the attacks of Nahmanides, never once calling into question the subjectivity of M.’s individuation scheme.

Of the early critics of M.’s enumeration, special mention should be made of RaBaD’s (R. Abraham ben David of Posquières) acerbic and short glosses to the *MT*, and Daniel ha-Bavli’s objections, appearing in a collection of queries sent to M.’s son, Abraham. Their critical comments are not numerous enough to undo M.’s structure but are clearly worth considering when assessing M.’s absolute claims. I shall have occasion to cite them.

Of all scholars after Nahmanides, Y. Perla is most successful in raising serious objections against M.’s edifice, some dealing with source documentation, some with interpretation of these sources and some with simple logic and individuation. Because Perla’s main concern is justifying and supporting Saadia’s enumeration, his sympathies clearly lie with Saadia and against M. and other enumerators. His frequent criticism of M.’s position is extraordinarily erudite, lucid, and thorough, though again, less than systematic if only because M.’s enumeration represents only an indirect concern. Though not totally apologetic with regard to M., given his interest

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*Mitsvot*, ed. S. Frankel (Jerusalem: 1995), argues that, to be consistent, Nahmanides meant to subtract as many as 32. At any rate, the number of deletions is minor compared with the potential differences that can arise from reasonably different individuation decisions. As an aside, it is worth noting that M.’s enumeration became the definitive work of this genre. In one way or another all subsequent enumerations either incorporated it in toto, as for example the Sefer ha-Hinukh of Aaron of Barcelona, or adopted it with only minor changes, such as Sefer Mitsvot ha-Gadol authored by Moshe b. Yaakov mi-Coucy.
in Saadia, Perla slips frequently into ad hoc and somewhat convoluted attempts to reconcile difficulties that often leave the more systematic reader less than satisfied. His massive three-volume, 2,000-page work, written in small cursive characters, presents a formidable reading challenge and is therefore not easily accessible to the general reader. I shall have many an occasion to cite him. Finally, returning to the question of individuation, I must not pass up an observation of Halbertal, who noted that

the creation of organizing categories is a very complex issue, constrained by what Scripture as well as what tradition say, and the categorizing criteria [itself] ….The demarcation between the particular and the organizing commandment is problematic and complex.  

I dedicate part of chapter 2 (sections 2.4 and 2.4.1) to problems in individuation. The examples given all have a significant bearing on the targeted number of commandments to which M. wishes to arrive. The absurdity of hitting on a firm and absolute list of commandments is so obvious that one must question whether M. truly believed that he could compile such a list. This suspicion leads us to look beyond the simplistic rationale offered by M. in the introduction to the ShM, to possibly a more fundamental agenda.

The Thesis

I shall argue that M.’s interest in TaRYaG, more specifically in R. Simlai’s midrash of the 613 commandments, was due to one very special

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reason: the need to demonstrate that the belief in the existence of a divine Lord defined as the First Cause of all existents and the belief in His unique Oneness constituted scriptural commandments.

At first, this is puzzling, as it would hardly appear to be an innovation. After all, if there is one thing we know for certain from R. Simlai’s dictum, it is that the belief in God and the belief in His oneness are part of the TaRYaG (though, as we shall see, not in the philosophical form presented by M.). Yet, it is a fact that neither Qayyara nor any of the composers of the agharot included these two articles of faith in their enumeration. Recall that these authors worked out of a slightly different TaRYaG tradition, one that saw the commandments classified into four categories — positive commandments, negative commandments, punishments and sections. This tradition was clearly not based on R. Simlai’s dictum, which as we saw, divided the universe of commandments into positive and negative commandments only. In light of the classificatory imprecision, it may just be that these geonim discarded R. Simlai’s dictum as being irrelevant from a jurisprudential point of view. Or, they may simply have passed it over because of its homiletical character. In either case, they would not have paid serious attention to Rav Hamnuna’s suggestion that I am and Thou shalt have no [other gods] stood for two commandments. A case can be made that the geonim’s neglect of R. Simlai’s dictum and Rav Hamnuna’s exegesis can be attributed to an even more fundamental reason, specifically, the question whether the Torah commands one to believe and/or acknowledge.

In my discussion of this question in section 5.3, I show that prior to M.’s writings, the prevailing opinion was that commandments generally applied only to actions and not to beliefs. I infer this from comments made by a pre-Maimonidean and widely read theologian, Bahya ibn Paquda,
author of one of the most popular Jewish works of piety, *The Duties of the Heart*. I shall show that, on M.’s own account, the status of dogmas as objects of commandment was a matter of great controversy among theologians/jurists. Notwithstanding this controversy, M. defended the notion that the acquisition of correct metaphysical notions is also a matter that can be commanded. Nevertheless, while the Simlai *midrash* provided the necessary halakhic support, Rav Hamnuna’s proof-text only went as far as to affirm the belief that the god represented by the Ineffable Name was the Israelites’ god and that it was He who took them out of Egypt. M. went well beyond the plain sense of the text when he re-interpreted this statement to be declaring the belief in a First Cause. I shall have occasion to discuss in the same section this bold and unexpected transformation and the profound theological truth that M. believed lay hidden in Rav Hamnuna’s explanation of R. Simlai’s dictum.

In chapter 3, I discuss the types of commandments that are contained in M.’s enumeration and the kind of assumptions that M. had to make to include these types under the heading of *mitsvot ´aseh*, essentially, obligatory commandments. We discover that besides the obligatory commandments his list includes contingent commandments, procedural commandments and mere descriptions, each category ever more removed from what one may reasonably call a *mitsvat ´aseh*. We take special note of the critics’ objections regarding “descriptive” commandments, especially Nahmanides’, and we dismiss Levinger’s and Horowitz’s attempts to justify these claims. Toward the end of that chapter, I demonstrate that M. is keenly aware of the relativity of his enumeration by presenting a list of sixty obligatory commandments (*mitsvot hekhrehiyot*) that he created and attached to the end of his section on positive commandments. The list is fashioned
around a man’s obligations, as opposed to a woman’s, who lives “in normal conditions”. The sixty obligatory commandments act as a foil to the larger list of 248 positive commandments, which is constructed upon a much broader understanding of the term mitsvat ‘aseh than which is commonly assumed. It also provides the key to our understanding of the way M. presented the commandments in the Halakhot, as I discuss a little later on.

I conclude that M. is not interested so much in the number of commandments that were legislated at Sinai as in the fact that the list of commandments contained the two fundamental beliefs of the religion. It is worth noting that M. was not the first scholar to propose that belief in God’s existence and His unity --- and in what those beliefs entail --- represent formal commandments. The distinction belongs to the Babylonian gaon Hefetz b. Yatsliah, who put it this way:

The first precept enjoins us to unite our mind and thoughts on the truths of the matter; to make our Creator exist in our heart, and to consider Him Lord of all things without a shadow of doubt, and without any other thought; to know that He is truth; as it is written: Know therefore this day, and lay it to thy heart, that YHWH is Eloqim, there is no-one else besides Him [Deuteronomy 4:39].

Hefetz explains the two divine terms and points to the end of the verse as proof that “He is one and that there is no other.” Hefetz later adds that he

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22 Hefets’ description of the first commandment was preserved for us by Judah b. Barzilai in his twelfth-century commentary on the Book of Creation, Judah ben Barzilai, Perush Sefer Yetsirah (Berlin: S. J. Halberstamm, 1885), pp. 55-56. For the partial quotes I have used Halper’s translation in Hefets, A Volume of the Book of Precepts.
is obliged to explain his proof that He exists — in his own words “that He is one and that there is no other” so that one “may be strengthened in the belief that He is one, and is the creator of all things.” Unlike Hefetz, however, M. was able to demonstrate the halakhic validity of these claims by resorting to an explicit rabbinic warrant.

I argue that M. needs to show in the ShM that he can compete with the geonic — principally, Qayyara’s — scheme and so he gamefully engages in an enumeration that he knows fully well cannot be absolute. He does this, as we said, in order to displace the reigning geonic scheme and replace it with R. Simlai’s scheme. M. is now able to commence his legal magnum opus with the unchallenged claim that the beliefs in the First and Necessary Existent and the oneness of this Existent are positive commandments (Hilkhot Yesode ha-Torah 1:1-1:7). A sign of M.’s extraordinary success is the fact that all halakhic authorities who follow him found it natural to include these two fundamental beliefs in their enumerations.23

In the first part of chapter 5, I discuss a number of other interesting innovations that M. introduces in his work vis-à-vis the previous enumerators. I divide these innovations into those for which M. adduces strong rabbinic evidence, such as a midrash that will state specifically that such and such is a commandment, and those for which M. offers scant evidence for the commandment claim that he makes. I focus on some of the latter and suggest that extra-rabbinic factors — ethical and philosophical considerations — may have influenced their enumeration. I take issue with

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23 It is worth noting that after first defending rather strenuously Qayyara’s omission of the First commandment (Hasagot to the first positive commandment), Nahmanides concedes that the belief in the existence of God ought to be enumerated “as opined by the Master” (Hasagot to the first negative commandment).
Twersky, who takes the 613 commandments as a given and then tells us that “the remaining task is completely deductive,” that is to say, one can logically assign each one of these commandments to one of the three ethical, political and philosophical goals that M. outlines in *GP*. Such is Twersky’s confidence that he asserts, “We could have undertaken to reconstruct the correlation between each commandment and the three goals” without perhaps considering whether the goals might have come before the commandments.

**Ancillary Products of the Thesis**

In chapter 6, I deal with a derivative of the principal thesis of the dissertation. If my thesis is correct, we ought to find evidence of M.’s relaxed attitude to the *TaRYaG* in his later writings, and in particular, in the *Halakhot* of the *MT*.\(^{24}\) In fact, we do.

M. heads the treatises of the *MT* with short captions, all taken from the Short Enumeration (*SE*) and the *ShM*, that is the list of 613 commandments. M. shuffles the original list, allowing negative and positive commandments to mix (as opposed to the division of the *TaRYaG* list into positive and negative commandments that we find in the *SE* and *ShM*) and groups the commandments topically. The Headings to the treatises, in aggregate, constitute exactly 613 commandments. Yet, when we move to the actual *Halakhot* we find that, in a great many cases, M. fails to designate a particular commandment as such. We start by noting that a declaration of

\(^{24}\) While our interest here lies with the *MT*, it is worth noting that M. never once mentions the 613 commandments in his lengthy survey of the biblical laws in the Guide, a work that postdates even the *MT*. My thanks to Harry Fox for this observation.
commandment appears at the beginning of each commandment under
discussion. These are formulaically expressed, such as “It is a positive
commandment to such and such” or sometimes, “It is a positive
commandment of (or from) the Torah to such and such.” This formulaic
device is absent in the Halakhot in as many as 109 instances of the
commandment claims previously made in the ShM — a surprisingly large
number.

Masud ben Aaron Hai Raqah (1690-1768), later followed by Kafih,
detected a number of such failures to designate, but unfortunately did not
widen their investigations sufficiently to cover the entire Halakhot. I
demonstrate that, as a result of this, Raqah offered an invalid solution to the
problem. I then subject the material to a systematic investigation and find
that one of the keys to understanding these failures to designate lies in the
realization that M. effectively changed his criteria for what represents a
mitsvat ‘aseh. I conclude that M. designates far fewer commandments as
mitsvoth ‘aseh in the Halakhot of the MT than he did in the SE/ShM because
he treats mitsvot ‘aseh in the Halakhot as unconditional obligations as well
as obligations that are contingent on the ordinary life of an ordinary person. I
suggest that this criterion was already foreshadowed by the list of the sixty
obligatory commandments discussed earlier. This change, along with other
changes, such as new individuations, explains a substantial portion of the
structural anomalies evident in the Halakhot. While these explanations carry
little juridical, exegetical or theological implications, the unexplained
balance of the 109 commandments does.

In chapters 7 and 8, I attempt to solve the remaining failures to
designate. In the process, I offer what I believe are some groundbreaking
suggestions regarding M.’s legal theory and scriptural hermeneutics. In
chapter 7, I propose that we take M.’s innovative discussion of what constitutes *divre sofrim* in Rule 2 to its ultimate and logical conclusion: a scriptural commandment can be derived only from a scriptural verse read in the light of its plain meaning (*peshateyh di-qra*). This conclusion follows a thorough review of the usage of the term *peshateyh di-qra* in the rules section and in the brief commandment descriptions of the *ShM*. This hermeneutic explains why a number of commandments previously designated as such in the *SE/ShM* are no longer viewed as scriptural commandments. I suggest that M. reclassified these commandments and moved them to the category of *divre qabbalah*, and more generally, *divre sofrim*. The halakhic status of *divre sofrim* is briefly discussed; I ask, are they to be treated as scriptural laws or merely as rabbinic laws? While I do not take sides in the (still) ongoing dispute, I point to an already substantial bibliography on the question. Nevertheless, on the assumption that at least some *divre sofrim* legislation has scriptural status, it behooves us to know in what practical way are commandments classified as *divre sofrim* distinct from scriptural commandments, if at all, and how M.’s re-classification would have affected these commandments. This is clearly a complex issue and remains a desideratum for further research. Suffice it to say for now that at least one instance\(^{25}\) can be found where M. makes a distinction between a purely scriptural law, i.e. one that is explicitly found in the scriptural text, and one that is not (even as it may enjoy scriptural force), and that is the case of “the bullock offered for the unconscious transgression of the congregation.” M. rules that

\(^{25}\) But see also *Hilkhot Shehitah* 5:3 and the commentary *ad loc.* of Maggid Mishneh (R. Yehudah Kelz).
If the court erred and gave a ruling such as would uproot some main principle of the Law (guf mi-gufe torah), and all the people acted on their authority, the court are exempt and everyone who so acted is liable to a fixed sin offering …The court never becomes liable unless they so rule as partly to annul and partly to sustain matters *not explicit and plainly stated in the Law*, whereupon the court becomes liable to the offering and they who act on their authority are not liable. (My emphasis; *Hilkhot Shegagot* 14:1-2).

In chapter 8, I take note of M.’s special use of the participle. The participle is a common mishnaic grammatical form, not particularly well suited to convey obligations. As Daube has noted, “it is in this function, as an expression of the course to be taken in accordance with proper interpretation and custom, that the participle became the typically rabbinic form of legislation.” Daube offers that participles describe “correct practices.” We add: These correct practices probably originate in some remote past, impossible to precisely locate along the continuum of the oral tradition, and are the result of “scribal” or rabbinic activity. Often, they were meant to define scriptural metaphors. In this light, we can identify correct practices with *divre sofrim*. Not coincidentally, M. tends to use participles when discussing commandments that were presented in the *SE/ShM* as scriptural commandments but that can no longer be categorized as such because they lack support in *peshateyh di-qra*. Some of the more dramatic examples of correct practices are: the recitation of the *Shema*, the precept to learn Torah and to teach it, the precept to bind phylacteries on the head and on the arm and the precept to affix a *mezuzah*. 
In chapter 9, we deal with commandments that were previously designated as such in the *SE/ShM* and that M. chooses now, in the *Halakhot*, to denote as simply *mitsvah*. I suggest that he does so to better reflect their more subtle standing of counsel rather than obligation. We note that behind each of these re-denominations stands one or more hermeneutic difficulty that would not permit M. to designate the commandment a *mitsvat ʿaseh*. Among the handful of precepts that M. calls *mitsvah* rather than *mitsvat ʿaseh* we find the counsels to love God, to fear Him and to imitate His ways. In all these cases, I suggest that M. has refined the scriptural message, creating a sort of ethical or intellectual imperative that falls just short of an obligation. Finally, I discuss two previously designated commandments that disappear from the radar, so to speak, in the *Halakhot*. In these two instances, it is clear that M. totally reverses his previous enumeration and does not label them as obligations, traditionally correct practices or counsels. We suggest hermeneutic considerations that may have led to these reversals.

As the title suggests, I have chosen to deal exclusively with the positive commandments. My interest in the positive commandments arose from the fact that it is far more difficult to identify positive than negative commandments. Let me explain. Negative commandments can be identified by two markers: scriptural language and punishment. In Rule 8 M. tells us that negative commandments can be identified linguistically by Scripture’s use of four terms: *lo*, *al*, *pen* and *hishamer*. He then warns us that, despite this well defined characteristic, one must still be careful to distinguish between a negative particle that reflects a prohibition and a negative particle that simply reflects a negation (*shelilah*). This he says requires “that the reader understand the context of the passage (*inyane ha-maamar*)”, at which point he will “quickly” make the proper distinction. *Crucially, there are no*
linguistic markers when it comes to positive commandments (see below, section 2.1). For this reason M. must lean heavily on rabbinic warrants that demonstrate that a particular scriptural sentence denotes an obligation (see below section 2.2 and the entire section 5.1, where I show how M. struggles with confirming evidence for his claims).

There is a second marker that enables one to identify and individuate negative commandments, and that is the presence of a punishment. In Rule 9 M. identifies/individuates an important number of negative commandment claims by adducing rabbinic evidence that state that these violations are liable to lashes. Conversely, he eliminates a significant number of prohibitions from being considered negative commandments because they are not punishable with lashes and considers these prohibitions simply reinforcing exhortations. In Rule 14 M. tells us that the presence of karet and mitat bet din are also markers of negative commandments (except for milah and pesah). Admittedly, while the presence of a punishment for a transgression is a sign that we are in the presence of a scriptural prohibition, i.e. a negative commandment, the converse is not always true as there are a number of exempting principles, such as lav ha-nitaq le-‘aseh, lav she-bi-kelalot and lav she-eyn bo ma’aseh. Nevertheless, the overarching principle, that all negative commandments are punishable, greatly facilitates their identification. This explains why M. in the Halakhot often can refer to negative commandments by simply stating that one who transgresses a certain scriptural prohibition is to receive lashes, without first stating that the transgressor violates a negative commandment. By contrast, individuals who trespass by not fulfilling positive commandments are not punishable. The precise nature of these commandments must therefore be spelled out clearly.
As suggested earlier, an explanation must be sought for such instances in which the Halakhot fail to do so.

In sum, the positive commandments allowed me to ask about them a number of interesting questions, namely, how did M. identify them? In the absence of punishments, are there various shades of positive commandments? If there are, can one discover them from the way M. formulates them?

One final point. On a number of occasions throughout the dissertation I raise certain problems and point out that M.’s hermeneutical enterprise would be best understood if we knew the precise order by which he wrote the various ‘treatises’, specifically, the Rules (of the ShM), the ShM, the SE and the Headings. This knowledge would allow us to observe M.’s train of thought and perhaps many of the reasons for shifting positions. In the absence of evidence from manuscripts and, more importantly, consistent cross references, one is guided by conjectures as well as simplistic assumptions on the way M. ‘ought’ to have written these treatises. While I have drawn some highly tentative conclusions along the way, these remain just that, tentative, conjectural and intuitive. A methodical and systematic analysis of this problem remains an important desideratum for those wishing to understand M.’s halakhic oeuvres and the development of his ideas.
Chapter 2. Some Important Definitions and Concepts

In this chapter I want to discuss certain terms that will become important for a fuller understanding of M.’s project. The terms are *mitsvah* (cs. *mitsvat*, pl. *mitsvot*), *mitsvat´aseh*, claims, data, warrants, entries and individuation.

2.1 Mitsvah

In a recent article, Jacob Chinitz insightfully states,

The Torah, for all its emphasis on law and legality, has a surprising lack of consistency in legal terminology. If it used just one term for obligation or command, such as *mitsvah*, and spoke only of such commands and the punishments for lack of compliance, it would have been seen as a systematic and consistent code of law. But such is not the case. The Pentateuch uses no fewer than 10 terms for ‘law,’ and there seems to be no particular, permanent meaning to these terms, except a degree of tendency in one direction or another.¹

In the Pentateuch, *mitsvah* is used to mean a commandment of God, as for example Deuteronomy 6:25 (referring to the assemblage for the Passover rituals), 8:1 (prefaced by “all,” referring to all the commandments), 15:5 (referring to the seventh-year release) and so on. It is sometimes used as an injunction, as for example, the commandments (*mitsvot*) of the Lord

¹ Chinitz, J., "Ten Terms in the Torah for Teachings, Commandments and Laws," Jewish Bible Quarterly 3.2 (2005). The ten terms that he lists are *din, tsaadqah, davar, mishmeret, mitsvah, torah, mishpat, hoq, ´edut, ot.*
specifying actions not to be taken (Leviticus 4:2), and sometimes it refers to a related group of positive and negative commandments, as in Deuteronomy 7:11 with reference to what is discussed in 7:2-5. Mitsvot (in the plural form) is used to represent a group of commandments, sometimes not clearly referenced (as in Numbers 36:13). Outside of the Pentateuch, mitsvah is also used as a commandment issued from a human. In the construct form we find mitsvat ha-leviim (Nehemiah 13:5) in the sense of that which is lawfully due to the Levites (and comparable in this usage to mishpat ha-Bekhorah, Deuteronomy 21:17).

Scriptural commandments can generally be identified by their grammatical form. They are expressed either in the imperative or in the imperfect. This, however, is not always the case. An 11th century Babylonian Gaon who showed a great interest in the taxonomy of commandments, Samuel b. Hofni, struggled with this question. The no-longer extant chapters nine and ten of his Treatise on the Commandments are described as follows in the table of contents: “Concerning the imperative, the words used for expressing an imperative, and that which makes an imperative to be an imperative,” and “Concerning the form of the prohibition, the words used for expressing a prohibition, and that which makes [a prohibition be a prohibition]”. ² In this particular — and exceptional, one might add — case,

² Sklare, E. David, Samuel ben Hofni Gaon and his Cultural World (Leiden: E. J. Brill, 1996), p.197. In the accompanying footnote 70, Sklare notes that the chapters are concerned with the linguistic forms through which imperatives and prohibitions are expressed, and that a sense of what might have been included can be gathered from the beginnings of question nine of his Ten-Questions, translated on pages 285-294. He further notes that “the question of how ‘command’ and ‘prohibition’ are expressed in Scripture, through the grammatical imperatives and other modes, is an important topic in usul al fiqh works.”
the Gaon did not work from within the rabbinic tradition and was clearly influenced by *Kalam* rhetoric and logic. Nevertheless, his concerns clearly highlight the difficulty of using grammatical modes to identify scriptural commandments.

The talmudic rabbis, too, differed in their interpretations, not only on what constituted a commandment but, even more important, about the type of commandment that Scripture intended. While multiple examples exist, a few interpretative controversies are sufficient to make the point:

1) *(bSotah 3a):*

   [To turn to] the main text: *And he be jealous of his wife* [Numbers 5:14] — this is voluntary (or, optional, Hebrew *reshut*) in the opinion of R. Ishmael, but R. Akiva says it is obligatory. *For her he may defile himself* [Leviticus 21:3] — this is voluntary in the opinion of R. Ishmael, but R. Akiva says it is obligatory. *Of them shall ye take your bondmen for ever* [*ibid.* 25:46] — this is voluntary in the opinion of R. Ishmael, but R. Akiva says it is obligatory.

   Naturally, their exegetical differences were far from capricious, as *Amoraim* explain. The point, however, is that Scripture required interpretation; it is not certain whether one may perform an action or must perform it.

2) In our next example, Scripture discusses a case where an involuntary manslayer goes out of his city of refuge. The verse (Numbers 35:27) states: *And the blood-avenger comes upon him outside the limits of the city of refuge, and the blood avenger kills* *[ve-ratsah goel ha-dam] the manslayer, there is no blood-guilt on his account.* The translation has
already rendered an interpretation, reading ve-ratsah goel ha-dam as “and the blood avenger kills.” But by taking the vav of ve-ratsah as conversive rather than conjunctive, we can alter the meaning significantly, having it now read, the avenger shall kill the manslayer. This difference in interpretation forms the basis for a tannaitic dispute (bMakkot 12a):

Our Rabbis taught: And the avenger of blood shall slay the manslayer, this means that it is an obligation for the blood-avenger [to slay the vagrant murderer]; if there be no blood-avenger, it is permissible for anyone [to do so]: these are the words of R. Yose, the Galilean. R. Akiva says [it means] that it is permissible for the blood-avenger [to slay the murderer], and everyone [else] is [not] responsible for him.

3) In our final example, we read If your kinsman is in straits and has to sell part of his holdings, his nearest redeemer shall come and redeem [vegaal] what his kinsman has sold (Leviticus 25:25). Again we find the same grammatical form, vav prefixed to a past tense of the verb “to redeem.” This gives rise to another tannaitic dispute (bQiddushin 21a):

For it was taught: [If your kinsman is in straits and has to sell part of his holdings, his nearest redeemer shall come] and redeem [vegaal] what his kinsman has sold: that is an option. You say, an option: yet perhaps it is not so, but an obligation? Hence it is taught: And if a man have no kinsman (Leviticus 25:26). But is there a man in Israel who has no kinsman? Hence it must refer to him who has [a kinsman,] who [however] refuses to repurchase it, [thus showing] that he has [merely] an option. These are the words of R. Joshua. R. Eliezer said: and he [shall] redeem what his kinsman has sold [implies] an obligation. You say, an obligation; yet perhaps it is not so, but an option? — Hence it is taught: and in all . . . you shall effect a redemption [ibid. 25:24].
As we move into the interpretative realm, we find that the rabbinic designation *mitsvah* has a number of possible meanings:

a. It can designate an absolute requirement, one that is indispensable for the performance of a ritual. This applies primarily to matters related to offerings and sacrifices. An example can be found in *[Menahot* 9a]:

> It was stated: If the meal offering was mixed outside the walls of the Temple court, R. Yohanan says, It is invalid; Resh Laqish says, It is valid. ‘Resh Laqish says, it is valid,’ for it is written, *And he shall pour oil upon it, and put frankincense thereon, and then, he shall bring it to Aaron's sons the priests; and he shall take out his handful* [*Leviticus* 2:1,2]; hence from the taking of the handful begins the duty of the priesthood (*mitsvat kehunah*).

b. Even when placed in apposition to an indispensable or essential act (*le-aqev*) in sacrificial matters, *mitsvah* can still connote an obligation, as in *Zevahim* 37b. *Zevahim* 4:1 discusses the number of blood sprinklings that is required for a sin offering to be efficacious. The House of Shammai maintains that two sprinklings are required in the case of a sin offering, while the House of Hillel maintains that one sprinkling is sufficient. The Talmud proceeds to examine their positions:

Rav Huna said, What is Bet Shammai's reason? The plural form *qarnot* [horns] is written three times, denoting six [applications], [thus intimating that] four are prescribed (*le-mitsvah*) while two [at least] are essential (*le-aqev*). But Bet Hillel [argue]: [The written forms are] *qarnat* [singular] twice, and *qarnot* [plural] once, which denotes four, implying that three [applications] are prescribed (*le-mitsvah*), while [only] one is essential (*le-aqev*).
Le-mitsvah does not mean that the sprinkling is preferable or commendable, as is often the case when the preposition lamed is prefixed to the term mitsvah. A later sugyah (80a) notes that one who fails to apply the necessary number of sprinklings transgresses the injunction not to diminish God’s commandments. The implication is that le-mitsvah here stands for obligation.³

3. It can stand for a preference (mitsvah le-khathilah), one that does not interfere with the execution of the commandment. Our first example concerns a betrothed woman who commits adultery. Scripture says then they shall bring out the damsel to the door of her father’s house, and the men of her city shall stone her with stones so that she dies (Deuteronomy 22:21). mKetubbot 4:3 deals with a number of such cases and then states:

One who had a father but no door to her father’s house or a door to her father’s house but no father, is nevertheless subject to the penalty of stoning, [for the regulation stating] the door of her father’s house was only intended as an [independent] precept (le-mitsvah).

That is to say, the verse indicates a preference, not an indispensable element of the penalty.⁴ Our second example deals with a person who, having enticed another Jew to practice idolatry, is to be killed by stoning. Scripture, addressing the enticed person, says: Let your hand be the first against him to

³ Entsiklopedyah Talmudit, ed. Meir bar-Elan (Jerusalem: 1947-2007), s.v. hovah, note 93. In this section I have made use of a number of other examples presented in this entry.

⁴ Note that Tosafot ad loc. s.v. en la petah struggles with the tanna’s liberal interpretation of the explicit stipulation and finds other cases where this is not done.
put him to death, and the hand of the rest of the people thereafter
(Deuteronomy 13:10). Sifre Deuteronomy, Reeh pisqa 89 (p. 152) says: “It is a mitsvah that he be killed by the enticed person, thereafter by the rest of the people,” which should be understood that it is preferable that the enticed person be the one to execute him; failing that, the enticer is executed by the people.5 Aware of the possible misunderstanding, the rabbis at times designate such a mitsvah as a mitsvah be-alma, “merely a mitsvah,” i.e. without significance.6

d. Menahot 10:5 states that after the bringing of the first sheaf of barley cut in the harvest (omer), which was offered sometime before noon, the new grain was permitted forthwith. In connection with this mishnah, the Talmud makes the following comment:

R. Yohanan and Resh Laqish both stated that even when the Temple stood, the [arrival of] daybreak [of the sixteenth day] rendered [the new grain] permitted. But is it not also written, Until you have brought [the offering of your God]? (Leviticus 23:14) — This is only a recommendation [le-mitsvah].

5 So RaSHi in his commentary to the Pentateuch, (RaSHi, (R. Solomon ben Isaac), "RaSHi: Commentary on the Pentateuch," Torat Chaim Chumash (1993)), paraphrasing the Sifre.

6 Similarly, bHullin 106a, in connection with the rabbinic ordinance of washing hands before eating fruits:

Raba, however, said to them: It is neither a duty [hovah] nor a meritorious act [mitsvah] but it is merely optional (reshut). This opinion [of Raba] differs from that of R. Nahman, for R. Nahman said: Whoever washes his hands for fruit is of those that are haughty in spirit (gassut ruah).

In this hierarchy, mitsvah stands here as something desirable but clearly less than obligatory and clearly more than optional.
Le-mitsvah here is not understood as a preference (*mitsvah le-khathilah*) but as a supererogatory act (*mitsvah min ha-muvhar*).7

e. **Mitsvah** may be interpreted as simply a good deed. Miriam’s act of waiting to see what would happen to Moses at the bank of the Nile after Moses’ mother had deposited him there is referred to as *mitsvah ze’ira* (small *mitsvah*), and “for a small deed one will receive a great recompense.”

8 Until now, no value judgment was attached to any of the forms of *mitsvah*. The connotation of *mitsvah* as a good deed can create great confusion at times, even among learned jurists. An interesting example can be found in *Hilkhot Bikkurim* 12:1, in connection with the commandment to break the neck of the firstling of an ass (P82). M. rules that “there is a positive commandment (*mitsvat ‘aseh*) for every Israelite to redeem the firstling of an ass with a lamb. If one wishes not to redeem it, it is a positive commandment (*mitsvat ‘aseh*) to break its neck….” This formulation prompts one of his sharpest critics, RaBaD, to exclaim,

> On my life, this comes neither from dialectics nor from calm reasoning — that this should be considered a *mitsvat ‘aseh*?!?...It is a transgression, and he is called a damager [*maziq*] and a destroyer of the property of a priest….

In the *ShM*, M. proves that breaking the neck (*’arifah*) is a commandment from the fact that the Sages used the expression *mitsvat*

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7 See Tosafot, *bMenahot* 5b, in Babylonian Talmud (Bavli), 20 vols. (Vilna, Poland: Romm, 1898), s.v. *heir ha-mizrah matir: nirah de-eyno ela mitsvah min ha-muvhar be-alma ve-afilu ‘aseh leika*.

8 *Targum Neofiti*, Numbers 12:16.
´arifah. RaBaD thinks that this expression was used only to parallel the redemption term, mitsvat pediyah (“the duty to redeem”) but that the rabbis never intended to call ´arifah a mitsvah.⁹ This is because he understood the term mitsvah to mean a good deed. M., on the other hand, used the term mitsvat ´aseh simply to signify an obligation, and did not intend to attach to it any type of value judgment.

2.1.1 Mitsvat ´aseh and mitsvat lo ta´aseh

In addition to the use of the plain term mitsvah in rabbinic sources, we also find the related terms mitsvat ´aseh and mitsvat lo ta´aseh and their abbreviated forms ´aseh and lo ta´aseh or merely the negative particle “no” (lav, lo). These terms, which constitute the subject matter of our investigation, are commonly translated in the English language as positive and negative commandments. While I will continue to use this translation for reasons of familiarity and elegance, the terms positive and negative do not accurately convey what is behind these rabbinic appellations. In effect, mitsvah (construct of mitsvah; pl. mitsvot) ´aseh should literally be rendered as a “commandment of ‘do,’” while mitsvat lo ta´aseh should literally be rendered as a “commandment of ‘do not do.’” More idiomatically, one ought to translate them as “obligations” and “prohibitions.”

There are certain scriptural charges that, on rabbinic interpretation, are charges in form but not in substance. These are positive injunctions that do not enjoin the stated action but simply prohibit the contrary of that action.

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⁹ See Yosef Qurqus’ interesting rebuttal of RaBaD, ad loc. Qurqus, Yosef, "Commentary," Mishneh Torah, ed. S. Frankel (Bne Brak: Hotsaat Shabse Frankel, 1975-2006).
The Sages treated these statements as positive commandments even though they convey only a prohibition (lav ha-ba mikhlaš `aseh, `aseh; they are also called issur `aseh in recognition of the fact that they are actually prohibitions derived from an `aseh). In the ShM, M. made occasional use of this hermeneutic for the purpose of advancing commandment claims. His main critics, RaBaD and Nahmanides, objected strenuously, arguing that these formal positive commandments did not represent direct obligations. For example, the High Priest is enjoined to marry a virgin by virtue of the verse He shall take a wife in her virginity. Yet the Sages interpreted the verse as prohibiting the High Priest from marrying a woman who was not a virgin. This did not deter M. from arguing that the law calling on a High Priest to marry only a virgin is a positive commandment (P38):

The Talmud says explicitly: ‘Rabbi Akiva held that even [the offspring of a union which was merely] contrary to a positive commandment was a bastard.’ As an example of a union which is merely contrary to a positive commandment they give the case of a High Priest who has a connection with a woman who is not a virgin. This is so because it is an accepted principle that a negative commandment which is derived from a positive commandment has the force of a positive commandment.

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10 See RaBaD’s glosses on P7, P60, P146, P149-52, P198 in MT, the Enumeration of the Commandments, Introduction to Sefer ha-Madd’a. RaBaD saw the Short Enumeration of the Commandments (“SE”) but did not see the ShM and so could only guess as to where M. made use of the lav ha-ba-mikhlaš `aseh hermeneutic. In the ShM we find M. using this principle explicitly only at P38, P60, P84 (explained at N89), P92, and implicitly at P149, P150/P151/P152. Nahmanides’ strictures first appear in the Hasagot to Rule 1 (pp. 40 and 48) and are given full vent in the Hasagot to Rule 4 (p.111) and to Rule 6 (pp. 131-2). See below. I have dealt with this issue on a number of separate occasions in this paper; see section 5.1 in comments to P84, P142, P146 and P149-52; section 6.1.1; and section 6.4. The issue deserves a fuller and more systematic treatment. I anticipate here my general conclusion: that M. ceased using formal positive commandments in the Halakhot as full-fledged positive commandments.
commandment. It is thus clear that this is a positive commandment.

There is no obligation on the part of the High Priest to marry a virgin; instead, he must refrain from marrying a non-virgin. Nevertheless, because the prohibition is derived from a positive commandment, it is considered a positive commandment. This then is a *mitsvat ʾaseh* in form but not in substance.

Can these strictly formal positive commandments be counted as regular positive commandments? The idea that a positive commandment implies directing an individual to do something and is not simply a prohibition dressed up as a positive statement was put forth by Nahmanides, based on the very same *midrash* of the 613 commandments that M. used to support his project. The extended version of the *midrash* cited by M. in the introduction to the *ShM* links the number of positive commandments to the number of limbs and organs in the human body: “It is as if each and every limb says to the person, ‘Perform a commandment with me’”; and links the number of negative commandments to the number of days in a solar year: “It is as if each and every day says to the person, ‘Do not do this day a transgression.’” The implication is that positive commandments can comprise only acts of commission. Furthermore, an inferred prohibition is simply an act of omission. As such, it constitutes a negative commandment. It should only be counted as a negative commandment, argues Nahmanides,
if it contains a fresh prohibition, one not covered by a standard, negatively phrased, negative commandment.\textsuperscript{11}

Finally, it is useful to point out at this point that while the term mitsvat āsheh is normally understood to represent an unconditional obligation, it can just as easily be applied to a conditional obligation. For example, one is under no obligation to acquire a house. If one were to acquire a house, however, one would be obligated to build a parapet for its roof. The building of a parapet can be called a mitsvat āsheh even though it is only a conditional or contingent obligation.

Scripture uses a casuistic formulation to describe such contingencies. Scriptural pericopes are introduced by the particles ki or im, generally translated as “if” or “when.” The Talmud takes note of these formulations and, after listing a number of these casuistic sections, declares that “when the mitsvah comes into your hands, you are bound to perform it [atah zaqeq la-āsotah], and if it does not [come into your hand] you are not bound to perform it.”\textsuperscript{12} The relativity of the term mitsvat āsheh will become critical in our evaluation of M.’s enumeration; I ask the reader to keep it in mind.

\section*{2.2 Claims, Data or Evidence, Warrants}

M. tells us in the introduction to the ShM that if he were to list just “the true and proper enumeration without [advancing] proofs for it, the first person that will chance to read it will suppose that this is a mistake — his

\textsuperscript{11} Nahmanides, Moses, "Hasagot ha-RaMBaN," Sefer ha-Mitsvot, ed. S. Frankel (Jerusalem: Bne Brak, 1995), end of Rule 6, arguing on behalf of Qayyara for omitting some of these entries.

\textsuperscript{12} Tractate Derekh Eretz Zuta, pereq ha-shalom, 4, cited in the Entsiklopedyah Talmudit, s.v. hovah, n. 236.
proof being that it is contrary to what some author has written.” M. emphasizes the need to provide proof in a later paragraph, stating that in order to explain the enumeration of the commandments, he would “bring proofs from the verses of the Torah and from the words of the Sages, of blessed memory, concerning their interpretation….”

Little attention has been paid to this particular aspect of the treatise. The majority of old and new commentators have concentrated on the merits of the Rules as valid criteria and on definitions. One exception is Peritz, a German scholar of the late nineteenth century who, in section V of his monograph Das Buch der Gesetze, appropriately entitled Der Nachweis, das die angeführten Bibelstellen wirklich Gebote oder Verbote sind und mitgezählt werden müssen, describes M.’s exegetical effort and catalogues a number of key linguistic markers and sources that M. used in his arguments.

For example, Peritz notes M.’s use of the terms mitsvat ‘aseh (P173, 198), ‘aseh (P4, 22, 31, 60, 204), mitsvah (P29, 37, 90 and P188 “milhemet mitsvah”), the pu’al participle metsuveh (“it is commanded”; p38, 185) and mitsvah ´alenu (“it is incumbent on us”; P157), all referring to positive commandments that M. adduced from Midreshe Halakhah and Talmud to support his claims. M. finds and makes similar use of terms to support negative commandments, such as mitsvot lo ta´aseh (N66, 154 and P198), lo ta´aseh (N229) and lav (N210) by themselves, and over al (“transgresses”) in N201. M. also makes argumentative use of the term “obligation” (hovah), as in P20, 44, 158 and 197, “from Scripture” (de-oraita) as in P175, 213, or,

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“from the Torah” (min ha-torah) as in P201 and 203. Peritz also notes M.’s use of composite terms such as mitsvat qiddush yadaim ve-raglaim (P24, the commandment of sanctifying of the hands and feet), mitsvat hatavat ha-nerot (P25, the commandment of trimming the lamps) and mitsvat bigde kehunah (P33, the commandment regarding the priest’s clothes).14

Peritz points to M.’s use of even more remote and indirect terminology in the Midreshe Halakhah, such as the expressions al korho (“against his will”; P23) and ke-meqayem gezerat ha-melekh (“fulfilling the decree of the king”; P33) for proof that we are in the presence of an obligation. Peritz notes that

from the words ‘Though the Torah has ordained an appointed time for the reading of the Shema, the Sages have appointed a time for prayer,’ M. concludes that not only the recital of the Shema is a commandment but that the obligation to pray is of scriptural force (P10), though times for prayer are rabbinic.

Finally, Peritz points to two instances (N194 and P9), where, absent some special linguistic marker, M. nonetheless draws complex inferences to deduce the existence of positive commandments.

While the exegetical variforms used by M. deserve a deeper and more careful study, Peritz’s remarks had the merit of highlighting the argumentative character of the ShM. As we saw earlier, M. expected to be challenged on the claims that he made, thus the need for justification. This means that the ShM is first and foremost a rhetorical work. The elements of its justificatory apparatus follow the outlines of a simple model, which I take

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14 These last two terms cannot be found in the talmudic literature.
from the basic argumentation theory developed by Toulmin.¹⁵ I resort to the model primarily for terminological rather than analytical reasons.

According to Toulmin, one can discern three elements in any basic argument: claim, data and warrant. In the ShM, M. puts forward claims, here called commandments. That these claims are often nuanced differently from the way they are enunciated in his other compositions, the SE, the heading to the treatises of the MT and the Halakhot themselves need not concern us at this time as we are now focused on the argumentative apparatus behind the claims made in the ShM.

M.’s first line of defense is, of course, the scriptural proof-text, what Toulmin calls data or evidence in his model. The scriptural proof-text would answer the question, on what is this claim based? We note that in a very small number of cases M. does not go beyond the data, as for example P15, P26, P27 and P39. I conjecture that the reason is because the scriptural proof-text is obvious enough or, alternatively, because a contemporary scholarly consensus may have developed around these commandments, even though we may no longer be aware of it today.

Very often the data are not sufficient because the scriptural proof-text is ambiguous, and M. needs to resort to authoritative interpretation. That is, he needs to answer the question, how does the scriptural proof-text lead to the claim being made? Here we come to the heart of the ShM’s argumentative presentation, the warrant. Warrants act as a bridge between the data and the claim. In the ShM, warrants take the form of rabbinic statements, drawn from midrashim (principally midreshe halakhah),

Mishnah, Tosefta or the two talmudim. It is crucial to note that M. operates under the assumption that the rabbinic interpretations of Scripture are determinative of the Law’s intentions and that his audience accepts this premise.

While generally “…data are appealed to explicitly, warrants implicitly,”¹⁶ this is not always so in our case. M. appeals to these warrants both implicitly, as for example when he cites a general principle (e.g., an inferred prohibition is to be treated as a positive commandment (P38); a positive commandment overrides a negative commandment (P112)), and explicitly, as when he resorts to a midrash for a particular interpretation or a statement that such-and-such verse is a mitzvot ‘aseh. In this last instance, a warrant will functionally resemble data/evidence. Rather than trying to distinguish functionally between data and warrant, I have decided to use the terms “proof-text” for scriptural evidence and “warrant” for all rabbinic evidence.

2.3 Entry

An important and basic distinction must be made at this point between M.’s work and that of Qayyara (or for that matter, the composers of azharot). While M. made claims, Qayyara merely listed entries in the form of quotes or paraphrases of scriptural verses. Qayyara and the authors of the azharot never articulated the claims that lay behind these quotes. The “deciphering” of these entries gave rise to a highly creative genre of works.

¹⁶ Toulmin, The Uses of Argument, p. 92
The best known of them are: Zohar ha-Raqia, on the azharot of Ibn Gabirol, by Simeon b. Tsemah Duran (1361-1444); a commentary in the introduction to the 1548 edition of the Halakhot Gedolot (Venice), by Abraham S. Traub; Netiv Mitsvotekha (Livorno, 1841), on the azharot of Yitshaq al-Bargeloni and Gabirol, by Shaul Cohen; and, more recently, a monumental commentary on Saadia’s Sefer ha-Mitsvot, by Yeruham Fischel Perla (1846-1934), entitled Sefer ha-Mitsvot le-RaSaG, which engages as well all the extant azharot and M.’s works. In the end, however, these deciphering attempts represent no more than highly speculative exercises, with little hope of ever achieving certitude in authorial intent. Moreover, little or no consensus was achieved for a large number of entries. Ironically, while M. engaged Qayyara with great zeal, one can never be absolutely sure, nor could M., that Qayyara meant what he was made to claim.

2.4 Individuation

We now come to a concept that by necessity underlies the efforts of all the enumerators of commandments, the principle of individuation. In what follows I quote from the excellent treatment of the subject by Hanina Ben-Menahem:

A theory of individuation [in the legal context] proffers a mode of dividing the totality of material constituting a legal system into separate units: Because of the vast amount of legal material which constitutes one legal system, we need to divide it into smaller units called laws in order to be able to refer to them. It is for legal philosophers to decide on principles of individuation. The division, undertaken by the legal philosopher to allow for exposition of the legal order, has prima facie, no practical consequences for the
addressee of the law. It does not determine how the law is to be applied, and is, in essence, purely theoretical.\textsuperscript{17}

Ben-Menahem refers to this type of individuation “as meta-legal individuation” and adds that meta-legal individuation “is constrained primarily by theoretical and aesthetic considerations.” It is important to note Ben-Menahem’s statement that “[a]ny metaphysical theory that seeks to classify the components of the system and determine their interrelations presupposes a division of the whole into distinct units amenable to categorization.”\textsuperscript{18}

While the subject of our study is the distinct units called commandments, it is worth noting that there exists at least one other enumeration whose distinct units were not the commandments but the Ten Articles (\textit{dibberot}, misnamed the Ten Commandments) given at Sinai. We refer here to the enumeration system used by Saadia Gaon in his \textit{azharot}.\textsuperscript{19} This highly stylized poem divides the 613 commandments unevenly and


\textsuperscript{18} Hanina, “Maimonides’ Fourteen Roots: Logical Structural and Conceptual Analysis,” p.5.

\textsuperscript{19} The \textit{azharot}, beginning with the words “a fire consumes and lights more than all lights” (\textit{esh okhla ve-noheret mi-kol noharot}), are found in the prayer book of R. Saadia Gaon interposed between the fourth blessing of the Amidah, called “holiness of the day” (\textit{gedushat ha-yom}), and the fifth blessing. Saadia Gaon, \textit{Siddur}, eds. I. Davidson, S. Assaf and B. I. Joel (Jerusalem: Meqitze Nirdamim, 1985), p. 184 and pp. 191-216.
allocates them, in response to some thematic affinity, to each one of the ten articles of the Decalogue.\(^{20}\)

M. was to his material what Aristotle had been to his biology, a philosopher and logician in the service of taxonomy.\(^{21}\) Yet, unlike Aristotle, M. was constrained to arrive at an exact number of distinct units. Inevitably, this led M. to occasionally “game” the exercise, counting distinct units where it might not be compelling to do so. Moreover, while M.’s rules of individuation, as we shall soon see, were eminently logical, they were not always warranted by the rabbinic material. In the pursuit of his objective, M. would go so far as to impose on the material a logic and a teleology that was foreign to the rabbinic mind, as his critics would note.\(^{22}\) We shall come

\(^{20}\) Saadia may not have been the first scholar to have arranged the \textit{mitsvot} in such a manner. See the discussion in Kasher, Menachem M., \textit{Torah Shelemah}, 44 vols. (Jerusalem: 1992-95), Exodus, vl. 16, pp. 203-13. It should be noted that this pattern was common among Karaite jurists and exegetes and may have had a polemical aim in sight. Saadia’s \textit{azharot} attained semi-canonical status; they are cited by RaSHi and Ibn Ezra in their comments to Exodus (24:12 and 20:1, respectively).

\(^{21}\) I am grateful to Dr. David Novak who pointed me in this direction. For an interesting overview of the important place that biology played in Aristotle’s philosophy, see Gotthelf, Allan and James G. Lennox, ed., \textit{Philosophical Issues in Aristotle’s Biology} (Cambridge: Cambridge University Press, 1987). According to the editors, Aristotle’s three main biological works, \textit{History of Animals, Parts of Animals}, and \textit{Generation of Animals}, comprised 58, 74 and 146 Bekker pages, or approximately 25% of the surviving Aristotelian corpus (p.5). That M. was acquainted with Aristotle’s zoological works can be ascertained from a quote found in his \textit{Moses’ Medical Aphorisms}. He may even have been the author of a summary of Aristotle’s Zoology. See Zonta, Mauro, "Maimonides as Zoologist? - Some Remarks on Aristotle’s Zoology Ascribed to Maimonides,” \textit{Moses Maimonides (1138-1204): His Religious, Scientific and Philosophical Wirkungsgeschichte in Different Cultural Contexts}, eds. G. K. Hasselhoff and O. Fraisse, Ex Oriente Lux. Rezeptionen und Exegesen als Traditionskritik (Würzburg: Ergon-Verlag, 2004).

\(^{22}\) See in particular Perla’s sharp criticism of Rules 7 and 11, in his Introduction to \textit{Sefer ha-Mitsvot le-RaSaG}, vol. 1, pp. 31-33, and 40-41, as well as his discussions on Ps 76 and Ps 101-102, vol. 1, pp. 581-6, and pp. 680-688, respectively. (Ps stands for the
across some of these points in later sections when we take up the analysis of individual claims.

2.4.1 Individuation Rules

The individuation rules, as defined by M. in the introduction to the ShM, constitute nine out of a total of fourteen rules, the others being rules of identification (Rules 1, 2, and 3) and rules of interpretation (Rules 5 and 8). The descriptions of the individuation rules that follow are accompanied in a few cases by some brief remarks. More on these rules will be discussed when we examine individual commandment claims. For a full discussion of the rules and relevant examples of their application, the reader is referred to the text of the Rules in the ShM.

Rule 4 – “We are not to include charges that cover the whole body of the commandments of the Torah.” That is to say, a commandment must enjoin one to do something specific. A statement like *Ye shall be holy* (Leviticus 19:2) should, M. notes, be taken to mean that one must fulfill the entire Torah, no specific action is being enjoined. As a result, it is incorrect

 positive commandments according to Saadía’s enumeration). For a contrary view, namely, that teleological thinking (usually assumed to be Aristotelian only) is already found in the Babylonian Talmud among some of the later Amoraim (especially Rava), see D. Novak, Natural Law in Judaism, pp. 95-105.

23 I follow here Ben-Menahem’s arrangement, with the exception of Rule 10, which I prefer to call a rule of individuation. The rules of identification, Ben-Menahem says, identify the halakhic material that is to be itemized by specifying which material is to be excluded on external grounds, rather than because of the nature of the material itself, as in the case of the rules of interpretation, which exclude non-imperative material.

to consider *Ye shall be holy* a commandment as some of his predecessors have done.

In the *ShM*, M. contends with the possibility that the commandments to fear God (P4) and to worship Him (P5) violate this constraint. His son, Abraham Maimonides, was asked whether the commandment to walk in God’s ways (P8) may not be a charge that covers the whole of the Torah.  

Abraham ibn Ezra appears to have anticipated M. here, calling this inclusive kind of statement a “high principle” (*kelal gavoha*), but because of his refusal to engage in an enumeration of commandments we cannot state with certainty that he meant to eliminate the “high principle” from being considered a commandment.

The fact that M. eliminates general charges from the count of commandments does not mean that he considers these charges as lacking any value. For example, at the end of Rule 4, M. states that, in keeping with the enunciated principle, neither *And ye shall circumcise the foreskin of your heart* (Deuteronomy 10:16) nor *and be no more stiffnecked* (*ibid.*.) ought to be enumerated, as apparently some of his predecessors did. M. explains that the former stands for “humble yourself and listen to all the commandments

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25 Abraham ibn Ezra, *Yesod Mora*, the Second Gate, p. 93. He also uses the expression “inclusive commandment” (*mitsvah kolelet*) on p.112. In Gate Seven, Ibn Ezra calls the verse that enjoins one to fear God a “verse that includes all the commandments.” The description is undoubtedly correct, but does it carry enumerative implications? I am not sure; therefore I am not confident about Perla’s claim that “he [Abraham ibn Ezra] anticipated him [M.] in this type of work [i.e., methodology for counting commandments] in his book *Yesod Mora.*” Perla, Introduction to *Sefer ha-Mitsvot le-RaSaG*, section 6, p.15.
which He has previously mentioned” and the latter for “do not rebel against accepting anything I have commanded you, and do not transgress it.” We meet these very same verses again in GP III:33, where M. says:

To the totality of purposes of the perfect Law there belong the abandonment, depreciation and restraint of desires in so far as possible, so that these should be satisfied only in so far as this is necessary….Similarly, to the totality of intentions of the Law there belong gentleness and docility; man should not be hard and rough, but responsive, obedient, acquiescent, and docile. You already know His commandment [mitsvatoth], may He be exalted: Circumcise therefore the foreskin of your heart, and be no more stiffnecked [Deuteronomy 10:16] …. 

Now, the reference to commandment (mitsvatoth) misled an otherwise astute reader of M., who argued that M. had contradicted himself from what he had stated in Rule 4.26 The true sense of M.’s words, however, is unmistakable. What M. is referring to here is the Law’s intentions, as he explicitly says at the beginning of the discussion, and not the Law’s commandments. In the Maimonidean hermeneutics, non-specific charges can be seen to denote intentions or goals towards which one must strive.27 At other times, as we shall have occasion to see, general, non-specific charges


27 Nachum L. Rabinovitch points out that goals can have halakhic implications. See his comments in Hilkhot Qeriyyat Shema 1:3, page 21, Mishnah Torah Hu ha-Yad ha-Hazaqah le-Rabbenu Moshe b. Maimon: Sefer Ahavah im Perush Yad Peshuttah, ed. and annotated Rabinovitch , Nachum L. (Jerusalem: Hotsaat Maaliyot, 1984), Rabinovitch expanded on this idea in an article entitled “Tsivvuyyim, Hiyyuvim u-Matarot.” Rabinovitch, Nachum L., "Tsivvuyyim, Hiyyuvim u-Matarot," Studies in Maimonides (Hebrew) (Jerusalem: 1998). Rabinovitch may not have been aware that M. already made explicit reference to this concept of goals in the passage that we quoted from the Guide.
nudge or arouse a person to do something that does not come under the rubric of obligation but that nonetheless may be commendable to do.

Rule 6 – “Where a commandment contains both a positive and a negative injunction, its two parts are to be counted separately, the one among the positive commandments, and the other among the negative.”

Rule 7 –“The detailed laws of a commandment are not to be counted [among the commandments].” M. called Rule 7 “‘a central pillar’ to lean on in the subject of our engagement.” Rule 7 forms the basis for a useful definition of what M. may consider a divine commandment, as proposed by David Novak:

a specific prescription, having a number of particular details, which is commanded for the sake of a more general reason. Thus the more particular details (diqduqim) are subsumed under a specific commandment, and the specific commandment is subsumed under a more general reason (ta’am).²⁸

Rule 9 – “The enumeration is not to be based upon the number of times a particular negative or positive injunction is repeated in Scripture, but instead is to be based upon the nature of the action prohibited or enjoined.”

Rule 10 — “Acts prescribed as preliminary (to the performance of a commandment) are not to be counted.”

Rule 11 – “The different elements which go together to form one commandment are not to be counted separately,” - or, restated perhaps more precisely, when the commandment calls for an assemblage of elements, then

²⁸ See Novak, David, Natural Law in Judaism (Cambridge: Cambridge University Press, 1998), p. 96. The more general reason is not to be counted as a commandment according to Rule 5.
the elements, individually, should not be called commandments. Rather, the
commandment is the purpose desired and must encompass all the elements
that fulfill that purpose. For example, the ritual cleansing of a leper is to be
accomplished by the leper bringing six elements and applying them as
prescribed. The rule says that we are in the presence of one commandment,
the cleansing of the leper, irrespective of the actions and number of elements
that have to be brought. A second example deals with the signs of
recognition of leprosy demanded from a leper: *His clothes shall be rent, and
the hair of his head shall go loose, and he shall cover his upper lip, and
shall cry: Unclean, unclean* (Leviticus 13:45). The purpose of this collective
action, avers M., is that “the leper is to be made recognizable so that we may
keep away from him.” The third example he gives deals with the
commandment of the palm-branch (*lulav*), which I hope to take up in a later
chapter. For purposes of the present discussion, suffice it to say that M.
believes that where the rabbis say the misperformance of one element
impairs (*meaqev*) the validity of the entire assemblage, then “in such cases it
is clear that they constitute one commandment.” Similarly, “wherever it will
be made clear to you that the desired goal [of a commandment] is not
obtained by any one of its elements, it is also obvious that it is their totality
that is to be counted.” Such would be the case if, for example, the leper rent
his clothes but did not perform the other three requirements. It is clear, M.
says, that the leper “has accomplished nothing; his being distinguishable is
not achieved until he has done all (the things mentioned).” This may be clear
to M. but it is a point totally overlooked by the main enumerators that
preceded him. Indeed, neither Qayyara, Saadia nor Gabirol make any
mention of the components or the whole of this requirement, even as they
discuss the cleansing/purification of the leper.
M. acknowledges here, however, that there is a point of “great difficulty entailed in grasping this Rule.” Specifically, that is “when the Sages say concerning the elements of a certain commandment that ‘they do not impair the validity of each other.’” The example he gives is the commandment of fringes (tsitsit). The Sages stated, “The absence of the blue thread in the tsitsit does not impair the validity of the white nor does the [absence of the] white impair the validity of the blue.” Do they constitute two separate commandments? Not if you are sensitive to their telos, insists M, who indeed counts tsitsit as one commandment (P14). He bases his conclusion on a Mekhilta exegesis on the verse And it shall be unto you for a fringe, which appears to indicate that one purpose is still indicated.29

In sum, where an assemblage of elements is enjoined, one must look for purpose, and it is that purpose that is the commandment. No single element can be considered a commandment. M.’s teleological approach to the classification of commandments stands out here quite clearly.

Rule 12 – “The successive stages in the performance of a commandment are not to be counted separately.” From a categorizing point of view, this rule is eminently logical. For example, the rituals prescribed for the burnt offering sacrifice, that the animal be slaughtered, flayed, cut into pieces, its blood be sprinkled in such-and-such a manner, etc., constitute a totality and can reasonably be counted as one — but one what? Is there any rabbinic warrant that would lead us to think that this ritual is to be considered one commandment? If there is, M. does not tell us. And what

29 Nahmanides declares in amazement: “Did then the tanna [of the Mekhilta] come now to enumerate 248 positive commandments and to teach us that fringes (tsitsit) does not count for more than one entry? This is something about which it is not fitting that we make a mistake.” Hasagot to Rule 11.
about, for example, the successive offerings brought during the day — should they be considered one commandment — the Order of the Daily Sacrifices?

Rule 13 – “Where a certain commandment has to be performed on more days than one, it is not to be counted once for each day.” This rule implies that, for example, all the Additional Offerings of the New Moon ought to be counted as one, and so too all the Additional Offerings of the Sabbath and the Additional Offerings for each of the festivals — even though not all the Additional Offerings are different. There is some logic to this categorization, but, by the same token one could classify all Additional Offerings – taking Sabbath, New Moon and festivals together - as one, as for example Qayyara did, emphasizing their common denomination and disregarding any differences in the type and number of offerings that exist amongst them. Aside from problematic issues of individuation, it is not clear what these categories represent. Simply put, how do we know that mitsvot \ˈaseh equate with categories and not with individual components — independent offerings in this case? No rabbinic warrant was adduced that would designate these neat categories as individual and separate mitsvot \ˈaseh.

Rule 14 – “The modes of punishment are to be counted as positive commandments (and not each particular punishment).” For instance, M. argues that counting each flogging separately, as for eating nevelah (N180) or wearing shatnez (N42), would imply that there are as many positive commandments as there are negative commandments (which ordinarily

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30 See our comments to P41, section 4.1.
subject the transgressor to flogging), resulting in more than four hundred positive commandments! This argument, however, contains a fallacy, as Nahmanides pointed out.\(^{31}\) It is tradition, rather than the Torah, that stipulates flogging for the great majority of infractions that involve transgressions of negative commandments. In fact, we find only one explicit reference to flogging in the Torah and that is at Deuteronomy 25:1-3, in connection with punishing the guilty party in a litigation (see P224, N300). There are also stipulations relating to other punishments, including excision and the death penalty, for a limited number of offences. It is therefore not unreasonable, for an enumeration driven by textual references rather than logic, to treat all these punishments as separate commandments, even if they were categorized as punishments and not as positive commandments. This is precisely what Qayyara and other geonim did by creating a section of punishments (\textit{onshin}) in the \textit{TaRAyG} enumeration.

M. cited two reasons for refusing to go along with the geonic scheme, one substantive and one aesthetic. The substantive objection to a logic that M. describes as “still more perplexing,” is that some of the punishments are not meted out by the human courts but by God. As a result, they cannot be considered commandments in the formal sense of the term. One of the proponents of including punishments in the enumeration was the Gaon Hefetz b. Yatsliyah, author of a \textit{Sefer ha-Mitsvot}. M. quotes from the first chapter of Hefetz’ book, where he describes the section of punishments:

\(^{31}\) \textit{Hasagot} to Rule 14, p. 194.
“Among these are thirty-two subjects\textsuperscript{32} wherein He informs us that He, blessed be He, is in charge of executing, not us. And they are all guaranteed [\textit{ve-kulam ne’eravim}, lit., they are all being vouched for].” M. understands this last statement to mean that “the Lord has assured us that He will mete out extinction to this (sinner) and death to that one.” This reading seems a bit ingenuous, perhaps deliberately so, since Hefetz had earlier told us that “He informs us that He is in charge of executing.” Be that as it may, M. thinks that it is absurd to believe that heavenly punishments (excision, death by the hand of Heaven) can be counted among commandments since they clearly involve no judicial action. At first glance, this seems to be a serious objection.

Perla, however, has suggested a different and more charitable reading of this cryptic passage, one that would remove the logical objection. In this reading, Hefetz argues that while it is true that excision and death by the hand of Heaven are totally in God’s hands, the human courts can nonetheless interpose its own punishment, such as flogging the transgressor, and thus exempt him from the more serious consequences of his misdeeds. This, suggests Perla, is the correct interpretation of Hefetz’ statement: by commanding the community and its courts to flog the transgressor, the community becomes surety for the punishment.\textsuperscript{33} Viewed from this perspective, these punishments retain their character of commandments.

\textsuperscript{32} Hefets explains further on that the 32 subjects comprised 23 cases of those liable to excision (\textit{karet}) and nine liable to death by the hand of Heaven (\textit{mitah bi-yede shamayim}).

M.’s second objection is both aesthetic and practical. The geonic scheme resulted in some transgressions being listed twice, once as an admonition and once as a punishment, as for instance, the prohibition to profane the Sabbath and the punishment of death by stoning for one who profanes it. At first this suggests that M.’s concern is that we may end up over-counting commandments, exceeding the count of 613, an objection raised earlier. But this is not the case. The objection now has to do with aesthetics:

Only [it is necessary to point out] that the reason for this error is that in counting the punishments as commandments they become entangled: sometimes counting them alone, and sometimes counting the punishment and also the action for which that punishment is incurred, establishing them all as negative commandments without contemplation.

Recall Raz’s observation (cited by Ben-Menahem) that meta-legal individuations are “constrained primarily by theoretical and aesthetic considerations.” It is clear that M. is also driven by aesthetic considerations in his schematic presentation of the commandments.

Yet, one might entertain the possibility that M. insinuated here a second rationale, one based on totally practical considerations. To wit, M. did not want to become “entangled” when drafting his Code of Law; the geonic format was likely to confuse and lead to the double counting of commandments. While it is true that M. wrote an extensive section in the MT (Hilkhot Sanhedrin 18 and 19) dealing with punishments, the punishment provisions and stipulations were not considered commandments and did not interfere with his commandment-based headings to each Treatise. Since the count of mitsvot is relatively malleable, as we shall see
in chapter 4, it ought to be able to accommodate infringements subject to whipping and death penalties, the ‘punishment’ commandments. One must therefore look elsewhere for reasons to reject the inclusion of punishments in the TaRYaG list. M. insinuates here that the reason is indeed a practical one, to wit, that it would mess up the outline on which he hopes to construct an ordered and systematic Code of Law.

Individuation issues are complex and do not accept unique solutions. To borrow a mathematical term, one might think of the enumeration of commandments as an undetermined system. As we move to the following chapters we shall question the theoretical viability of obtaining a numerical target like 613.

An interesting example of such difficulties is foreshadowed in one of the observations that M. makes in his discussion of Rule 14. With respect to capital punishment M. says: “As for counting them [in the enumeration of the commandments] we shall count the four death penalties inflicted by the courts as four positive commandments.” To support this claim, M. cites the following rabbinic warrant:

Such indeed is the language of the Mishnah: ‘This is the commandment of those that are to be stoned [mitsvat ha-nisqalin, lit., the command of the stoned ones].’ Similarly [the Sages of the Mishnah] say: ‘In what manner is the commandment of burning performed [mitsvat ha-nisrafin, lit., the command of the burned ones]?’; ‘In what manner is the commandment of strangling [performed] [mitsvat ha-nehenaqin, lit., the command of the strangled ones]?’; ‘In what manner is the commandment of beheading
[performed] (*mitsvat ha-neheragin*, lit., the command of the beheaded ones)’.

Without going here into great detail, Nahmanides argues that, in his considered opinion, the obligation imposed on the courts to deal out justice and extirpate evil, covered under the command *Thus you will sweep out evil from your midst* (Deuteronomy 13:6), is the more encompassing category and that this category should be the enumerated commandment. Nahmanides dismisses M.’s warrant, claiming that *mitsvat ha-nisqalin*, etc., is not intended to designate a cardinal number — as for purposes of an enumeration — but rather to introduce the manner of handling each execution, basically answering the question “how.” In fact, this seems always to be the meaning of the rabbinic idiom made up of the construct form *mitsvat* attached to some particular command, as we shall discuss below.

M. appears to subvert a mishnaic expression to attain an unlikely individuation. The lack of a decisive warrant to support his claim makes

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34 *mSanhedrin* 7:1,2,3,4. M. inverts the order of the last two. In the SE/ShM these punishments are counted as P226-229.

35 We should note that M. makes here a second attempt to individuate each of the death penalties. He quotes Mekhila Vayaqhel, (p.347) on the verse *You shall kindle no fire throughout your habitations* (Exodus 35:3): “Lighting fire, which is included in the categories of work prohibited on the Sabbath” is singled out for special mention to teach us that just as the Sabbath laws cannot be disregarded in the specially-mentioned form of execution by burning (*ahat mi-mitot bet din*), so they cannot be disregarded in the case of the other forms of judicial execution (*kol she-ar mitot bet din*).” While it is true that this passage individuates execution by burning, it does not make it an individual *mitsvat ‘aseh*. Beneviste comes to the same conclusion, but only after he emends a passage in the Palestinian Talmud that at first appears to provide some support to M.’s claim. This passage is not found in our editions of the Palestinian Talmud. (Beneviste, H., *Dina de-Hayy, Constantinople* (1742-7), 2 volumes. Reprinted with citations of the SMaG, ed. Moses Batzri, 4 vols. (Jerusalem: Makhon Ketav, 1997), positive commandments #99,
Nahmanides’ argument appear the stronger. The point, however, is not who has the better argument but that neither enumeration appears to be compelling. On the other hand, a writer of a code of law would clearly choose to break down the various punishments, much as mSanhedrin had done earlier, to allow himself a detailed discussion of each of the forms of execution.

M. appears to be pursuing two objectives at the same time: a table of contents that is as detailed as possible for his Code of Law as he alluded to in the introduction to the ShM; and a precise numerical reconstruction of R. Simlai’s 613 commandments. These objectives do not always correspond (indeed, why should they?), resulting in inconsistency, redundancy, the mistaking of species for genus and other problems. Confirming this impression, Halbertal notes that

the creation of organizing categories is a very complex issue, constrained by what Scripture as well as what tradition say, and the categorizing criteria [itself] ….The demarcation between the particular and the organizing commandment is problematic and complex.36

2.5 The Construct mitsvat in the Composite Term mitsvat-X

We saw in the example above that M. made use of the phrases mitsvat ha-nisqalin, mitsvat ha-nisrafim and so on, to individuate the four capital punishments (P226-229). Nahmanides criticized the use of these phrases for the purpose of individuation because, he argued, they were never meant as

p.578. It may still be that all four executions are part of one single positive commandment, as Nahmanides asserts.

such. Rather, these composite phrases were used to characterize the specific manner in which certain commandments, details of commandments or rabbinic ordinances are to be carried out. So for example, mSanhedrin 7:2 says: “The ordinance of them that are burnt (mitsvat ha-nisrafin) [is this]: they set him in dung up to his knees and put a towel of coarse stuff within one of soft stuff and wrap it around his neck;” and so on. Mitsvat-X would then best be rendered as “the proper way of doing X.” It is crucial to note that these activities need not be limited to the description of commandments in the sense given by M. As we shall see, they could represent details (diqduqim) of commandments, the sort that M.’s rules were designed to disqualify.

The capital punishment case is not the only instance in which M. makes use of this composite phrase mitsvat-X for purposes of individuation. He does so, for example, at P82, where he claims that breaking the neck of the firstling of an ass (´arifah) is an individual commandment, at P217, to justify the commandment claim that obligates the ritual of taking-off-the-shoe (halitsah) and at P233, to justify the commandment claim that one facilitate the redemption of a Hebrew maidservant (pediyah).37 For all three cases, M. adduces mBekhorot 1:7 that refers to ´arifah, halitsah and pediyah as mitsvat ´arifah, mitsvat halitsah and mitsvat pediyah. With this warrant, M. trumps the logic of Rule 7, which would look at these commands as no more than details of the general commandments of redemption of the firstling (pediyah), levirate (yibbum) and marriage to the maidservant.

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37 Formally made at P234. Both mitsvat yi´ud and mitsvat pediyah are mentioned in mBekhorot 1:7. Note that Scripture favors pediyah over ´arifah, yibbum over halitsah and yi´ud over pediyah.
(yi´ud). One gathers from these examples that this expression held a special significance for M., functioning for him as a warrant, as it were, for individuation. It is therefore surprising to find across a wide range of rabbinic literature the mitsvat-X expression used in connection with commands that M. would clearly not designate as commandments.

We begin our investigation with the very same mishnah (mBekhorot 1:7) that M. used to demonstrate the validity of his claims of ´arifah, halitsah and pediyah just discussed. The end of the mishnah states: “The duty of redeeming [mitsvat geulah] [an unclean beast that was dedicated to the Temple] falls upon its owner before all other men…. This duty was never enumerated in the list of commandments. Why would this case not lead M. to question the value of the expression mitsvat-X as an individuating marker?

Following are some further counter-examples:

1. mSukkah 4:5: “How was the rite of the willow-branch fulfilled?” (mitsvat ´aravah ketsad?)

Comment: In the Halakhot, M. calls this mitsvah a halakhah le-Moshe mi-Sinai and even uses the mishnaic expression (ketsad haytah mitsvatah?) Not only is mitsvat ´aravah not a positive commandment (Hilkhot Lulav 7:20-21) but it is not even scripturally mandated.

38 In Hilkhot Arakhin (5:1, see also 5:3), M. formulates this halakhah as follows: “In the case of one who consecrates an ahuzzah field, it is preferable (mitsvah) that he redeems it, for the owner has priority.” The principle is held valid for ahuzzah fields and unclean beasts according to b´Arakhin 27a.
2. *Menahot* 7:2: “…If a man removes the sinews of the hip he must remove all of it. R. Judah says: Only enough to fulfill the command to remove it (*kede le-qayem bo mitsvat netilah)*.”

Comment: The opinion of R. Judah is not normative — one must remove all of it. Nevertheless, the dispute is centered only on how much needs to be removed and not on the fact that there exists a command to remove the sinews (*mitsvat netilah*). There is, however, no positive commandment to remove the sinew, just a prohibition against eating it.

3. *Negaim* 14:6: “The command of the cedar wood [*mitsvat ets erez*]: It should be one cubit in length…”

Comment: In P110 M. subsumes the command of the cedar wood under the general commandment dealing with the purification of the leper. That is, the command of the cedar wood is treated only as a detail of the general commandment. Yet here, the *mishnah* refers to it as *mitsvat ets erez*. Should M. have individuated this command? Interestingly, the *Halakhot* also use here the expression *mitsvatoh* when referring to the cedar wood (*Hilkhot Tumat Tsara´at*, 11:1).

4. *Parah* 11:9: “The command of the hyssop [*mitsvat ezov*]: It should be made up from three stalks…”

Comment: M. enumerates the commandment to prepare the water for sprinkling (P105) but does not enumerate the manner in which, or the instruments with which, the sprinkling is carried out. Should it have been individuated? Not according to Rule 12, yet the rabbis called it *mitsvat ezov*!
5. Mekhilta de-Rabbi Shimon b. Yohai (on Exodus 21:6): “I might think that he should pierce [his ear] on the doorpost [mezuzah], and one can reason as follows: A door, on which one does not perform the command of mezuzah, yet one performs on it the command of piercing [mitsvat retsi´ah], a doorpost, on which one performs the command of mezuzah, surely one should perform on it the command of piercing [mitsvat retsi´ah]!”

Comment: M. enumerates the commandment of the Hebrew slave (P232). Clearly, mitsvat retsi´ah is subsumed under the general law of Hebrew slaves in accordance with Rule 7. Should M. have set aside Rule 7 in the face of the expression mitsvat retsi´ah? M. bases halakhah 3 of Hilkhot ´Avadim 9 on this midrash, making it almost certain that he was aware of the expression mitsvat retsi´ah.

The next and final example suggests a different individuation scheme:

6. Mekhilta de-Rabbi Ishmael on Exodus 12:16: “…From here they said: the command of phylacteries (mitsvat tefillin), the four sections [that go] on the arm are one bundle, the four sections (that go on, or belong on] the head are four divisions (totafot)…”

Comment: M. counts putting on each tefillin as two separate commandments (P12, P13) and provides proof for this decision.\(^{39}\) Admittedly, this midrash deals with the making or description of the tefillin, not the wearing of them. Nevertheless, it refers to both tefillin as mitsvat

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\(^{39}\) See Nahmanides, Hasagot to Rule 11, who argues that M. should have treated tefillin as one commandment if he had followed the logic he applied to the commandment of fringes.
tefillin. Should M. have changed his individuation and considered tefillin as one commandment?

In addition to the above, there are a number of rabbinic ordinances referred to by the expression mitsvat-X, suggesting that the term need not even refer to scriptural commandments. Examples include mitsvat megillah (tMegillah 2:9), mitsvat miun (tYevamot 13:1), mitsvat ha-ner (Avot de-Rabbi Natan, B version, 9) and mitsvat hanukkah (bShabbat 21b).

This discussion highlights the extraordinary complexities inherent in a project of meta-legal individuation, made many times more difficult by introducing into it rabbinic terminology and its inconsistent treatment of what constitutes a commandment.
Chapter 3. Typology of Mitsvot

We saw earlier that mitsvat ʾaseh stands in general for an unconditional obligation, a command to perform a certain action. What gives the term this meaning is the imperative form ʾaseh, literally “do!” appended to the construct form mitsvat. Recall also that R. Simlai’s midrash referred unequivocally to 248 mitsvot ʾaseh. Thus, if we wished to reconstruct such a list of commandments we would be advised to find 248 unconditional obligations, as well as conditional obligations that become unconditional under certain circumstances, as we have allowed above. Surprisingly, M.’s list of commandment claims presented in the ShM looks more like a catalogue of laws than a list of unconditional obligations. Indeed, the so-called positive commandments represent a variety of types: unconditional obligations, specific laws that specify a particular procedure but not an obligation, broad laws that contain a number of provisions and which again are not obligations, and finally descriptive laws, mere definitions of the referents of other commandments.

The geonic enumerations, starting from a different tradition with respect to the numerical composition of TaRYaG, attempted in their unique way to separate some of these types. Positive commandments were called mitsvot qum ʾaseh, literally ‘get up and do’ commandments.¹ Generally,

¹ In Talmudic literature this term is quite common, see e.g. mMakkot 3:4, tHullin 10:15, bSanhedrin 59a. According to the Rome MS., Qayyara sums up the section thus: “These then are two hundred positive commandments (mitsvot qum ʾaseh), that for each one individually reward is granted (she-al kol ahat ve-ahat nottlin sekhar).” For a discussion of the structure of commandments according to Qayyara and the importance of this mention of reward, see Guttmann, Behinat ha-Mitsvot pp. 36 ff.
these commandments represented unconditional obligations even if at times they were contingent on some situation. Parashiyyot, or sections, on the other hand, numbering 65 laws, listed procedures and broad laws containing many provisions, entries that could not properly be considered unconditional obligations.²

In his remarks at the concluding section of positive commandments, M. defines the various types of positive commandments in the following fashion. For better comprehension, I follow a slightly different order than the one he uses. M. explains that there are commandments that

are absolutely obligatory on every man, at all times, everywhere, and in all circumstances, as for instance, [those regarding] the fringes, the phylacteries, and the observance of the Sabbath. These we call unconditional commandments, because they are of necessity incumbent upon every adult Israelite at all times, everywhere, and in all circumstances.

² Modern commentators, among them Guttman, Perla and Zucker, maintain that the parashiyyot dealt only with obligations that are the responsibility of the community (or the courts). This view, however, does not easily explain a number of entries. While Perla for one justified these questionable entries through a brilliant display of pilpul, the tortuousness of such explanations is evident. See Perla’s lengthy introduction of parashiyyot in Sefer ha-Mitsvot le-RaSA G, vol. 3. For examples of such forced arguments, see Perla’s discussion of the beautiful captive (vol. 1, 578), of the Nazirite’s obligation to shave on cleansing (vol. 1, 680) and on shemitah (vol. 1, 554). In all these cases, parashiyyot can better be understood as laws that are applicable under certain conditions only rather than, and in apposition to, the immediate and unconditional obligations called mitsvot qum ‘aseh. It is worth noting that neither M. nor Nahmanides thought that parashiyyot dealt with communal obligations. M. makes some approving comments in his discussion of Rule 7 with respect to Qayyara’s use of parashiyyot since they resemble his own din or law formulation. This is the view I take here. Subsequently, M. criticizes Qayyara because “this matter was not completely clarified or apprehended by him; hence he counted among these sections matters he had already enumerated before, without being aware of [the repetition].” Nahmanides notes that Qayyara’s “understanding of parashiyyot is not properly explained and I will not expand on it” (Hasagot to Rule 10).
These unconditional commandments are of special significance, and I shall discuss them in some depth once we have dealt with the other types of commandments.

The next, and not so obvious, type of positive commandment is the contingent commandment. We came across these commandments in our discussion on *mitsvah* and indicated that these commandments are often introduced in the Torah by casuistic formulations beginning with the particle *ki* or *im*. In M.’s words, some commandments are obligatory on the individual who has performed a certain act, or to whom something has happened, as for instance the [commandments relating to] the sacrifices offered by one who has sinned unintentionally, or by a *zav*; and it is possible for a man to go through life without doing or experiencing any of these things. Again, there are among these commandments, as we have explained, certain laws, like the law of a Hebrew bondsman, of a Hebrew bondsmaid, of a Canaanite bondsman, of an unpaid bailee, of a borrower, and others mentioned above, which may never be applicable to a particular man, and which he may never be liable to carry out, throughout the whole of his life. Other commandments are binding only during the existence of the Temple....Others are binding only on owners of property...and it is possible for a man to be exempt from them because he has no property....

Akin to these contingent commandments are commandments that prescribe a procedure that must be followed under certain circumstances. The classic example of such a commandment is perhaps the law of divorce (P222), which M. formulates as follows: “We are commanded that divorce of a woman whom we wish to divorce must be accomplished by a bill of
divorce, and not otherwise.” The first opportunity that M. has to discuss procedure-commandments is at P95, where he claims that “we are commanded (Ar., al-amar) to apply the rules [laid down in Scripture] regarding the revocation of vows, that is, the rules (Ar. al-tashria) that we were taught to adjudicate these laws.” Immediately thereafter, M. explains:

This commandment, however, does not mean that we are bound in all cases to revoke vows. You must understand that precisely the same is true of every law that I enumerate: it is not necessarily a commandment to do a certain thing, but the commandment is that we must deal with the matter [in question] in accordance with this law.  

M. feels compelled to explain the logic of procedure-commandments once again, this time in connection with his discussion of the commandment of immersing in a ritual bath (P109). The commandment reads: “We are commanded to immerse ourselves in the waters of a ritual bath, and thus be cleansed of any of the kinds of uncleanness with which we may have been affected.” Then M. explains:

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3 M.’s point, that a certain law, teaching or procedure can also be called a commandment “because we must deal with the matter in question in accordance with this law” left a mark in the special terminology that he used, al-amar in the first explanation of the commandment and al-tashria in the second. Aware that al-amar represents a command and al-tashria does not, R. Yehoshua ha-Nagid, M.’s grandson, suggested that M. deliberately used the two terms to signal that, just like the annulment of vows is a teaching or instruction, not a direct order, and yet must be carried out (mitsvah hiyuvt), so too any and all entries that contain the term al-tashria (e.g. P108, 114-5, 117, 145, 149, 190) must be carried out even though they are only teachings. The practical equation al-amar-al-tashria exhibited in P95 illuminated, according to R. Yehoshua ha-Nagid, all future uses of al-tashria. In talmudic parlance, P95 stood as a binyan av for all similar entries.

In treating immersion as a positive commandment we do not mean that every unclean person is bound to immerse himself, as anyone who wears a garment is bound to put fringes on it, or as anyone who has a house is bound to make a parapet [for its roof]; my meaning is only that by the law of immersion anybody who wishes to cleanse himself from his uncleanness cannot accomplish this purpose except through immersion in water, after which he becomes clean.

It is unclear what made M. explain here the significance of this type of commandment after he had already explained the meaning of all such procedure-commandments at P95. It should be clear, however, that these types of commandments, be they contingent or procedural, are obligatory under certain circumstances — anyone who owns a Hebrew slave must let him go free after six years; in order to divorce, one must hand over a bill of divorcement to the woman concerned; one must build a parapet for a house soon after acquiring it; and so on. This is what we earlier called the relativity of positive commandments.

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4 It should be borne in mind that the need to immerse in a ritual bath was a matter of contention between the Rabbanite and the Karaite communities. In fact, M. was forced to issue a strong court order to uphold the Rabbanite practice. See Iggerot ha-RaMBaM, Ed. Shailat, vol. 1, pp. 175-85 for the taqanah and the background to it. Traces of the polemic can be detected even here, where M. says that “the book of truth [i.e. Scripture] makes it clear that whoever has been unclean and undergoes immersion is rendered clean…” Though Karaites rejected the Oral Law, they followed Scripture diligently. M.’s appeal to the “book of truth” is more rhetorical than real, as the requirement to immerse is not plainly stipulated. M. may have wanted to dwell on the point that immersion was a procedure and not an obligation, to counter Karaite accusations that the Rabbanites were misconstruing Scripture by arguing, as some did, that there was an obligation. Or M. may simply have wanted to emphasize his disagreement with his own coreligionists. For example, other enumerators, including Qayyara (Pq 171), counted “immersion in the proper time” (tevilah bizmanah) a qum ‘aseh.
I digress for a brief moment to present a dissenting view. Ben-Menahem argued that M. clung to an imperative model. He suggested that M. was aware that commandments like P222, the law of divorce, were “exceptional in not imposing an obligation on the individual.” Yet, rather than regard them as suggestions or guidelines, M. “regarded them as court-addressed commands to follow these guidelines.” Ben-Menahem thought that P95, dealing with the revocation of vows, “could, perhaps, still be construed as an imperative addressed to courts that pass judgment on violators.” Finally, noting that M. struggled with the problem, he argued that M. nonetheless clung to the imperative model even with regard to the claim of immersing in a ritual bath (P109), where it is “far more difficult to explain away the non-imperative, advisory nature of the precept.” Ben-Menahem concluded that

the thesis advanced by Hart, that the law should be individuated so as to reflect the fact that it directs and guides, not only through commands and prohibitions, but also by outlining the means for achieving desired ends, is not upheld by M.  

In the second section of this paper, where I deal with M.’s changing conception of (some) commandments in the Halakhot, I shall try to marshal evidence that M. indeed believed that in certain cases the law “directs and guides, not only through commands and prohibitions, but also by outlining the means for achieving desired ends.”

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Leaving aside this question, I believe that Ben-Menahem’s reading, namely that M. clung to the imperative model in the \textit{ShM} with regard to those commandments that I have deemed procedure-commandments (divorce, revocation of vows, immersion in ritual bath) and regarded them as “court-addressed commands to follow these commands,” is stretched and unnecessary. It is simpler, in my opinion, to argue that M. adhered to a relativistic position, that all commandments (except, as we shall see, the kinds of uncleanness) are obligatory under certain conditions.

The fourth and last type of commandment that one finds in the \textit{ShM} enumeration is best called descriptive, rather than prescriptive. In effect, these commandments define the referents of other commandments. Unlike those previously discussed, this type never imposes an obligation, regardless of circumstances. A total of thirteen commandments, all dealing with the kinds of uncleanness (P96-108), fall into the descriptive category. M. introduces them as follows:

The fact that we count each of the various kinds of uncleanness as involving a positive commandment does not mean either that it is an obligation, or that it is forbidden, to become unclean in one or other of these ways, as though this would entail a [violation of] a negative commandment. What we mean is that when the Torah says that one who touches this or that kind [of uncleanness] becomes unclean, or that this or that object makes one who touches it unclean in a certain way, this constitutes a positive commandment: that is to say, this law that we are bidden to observe is a commandment to declare that one who touches a certain thing when it is in a certain condition becomes unclean, but if it is in a different condition, he does not become unclean. The actual becoming clean is optional: if a man wants to become unclean, he does, and if he does not, he does not.
In one of the fiercest attacks on M.’s claims to be found in his entire critique, Nahmanides exclaims that, M.’s prolixity apart, he could not see his way clear to bringing the kinds of uncleanness into the count. The reason, in his own words, is that “they are optional (resḥut) from all angles, they have no connection to mitsvah (ein ba-hem inyan mitsvah) that they should deserve to be counted.” By “optional from all angles,” Nahmanides no doubt means to point out, as we did earlier, that there is no possible circumstance that would compel one to carry out these directives. As M. put it, “if a man wants to become unclean, he does, and if he does not, he does not.” Nahmanides develops the argument further and states that what the Torah forbids is to come into the sanctuary and/or to touch holy objects while in a state of impurity; in connection with these prohibitions, the Torah describes what kinds of things make one unclean and what kinds of things do not. This is comparable, he continues, to the prohibitions against bringing blemished animals to the altar (P91-95), which clearly require a special knowledge of what is and what is not considered a blemish. Yet, quite correctly, Nahmanides argues that M. did not enumerate the kinds of blemishes that are relevant with respect to these prohibitions. Why, then, count the kinds of uncleanness? In different words, kinds of uncleanness and blemishes are referents of certain types of prohibitions; they cannot themselves constitute commandments.
Jacob Levinger suggests that these types of commandments are distinct in that they are intended merely to establish certain legal concepts. He calls these legal concepts the products of positive law, handed down at Sinai, like all other commandments; they have no basis in the physical world (like blemishes, for example) or in metaphysics. “Certainly,” Levinger opines, “it is this unique conceptualization of uncleanness that justifies their being called commandments.” He adds that this is also the reason a qabbalist like Nahmanides, who takes a more ontological approach to uncleanness, would not accept them as commandments. Levinger argues for a rather far-fetched interpretation of M.’s position; nevertheless, this still does not help him deal with Nahmanides’ objection (“they are optional from all angles”). Moreover, while Nahmanides may indeed consider uncleanness to be more ontological than conceptual, his strictures are stated unambiguously; there is no room for equivocation or need to ascribe to him philosophical/theological positions in the understanding of uncleanness to justify or motivate his differences with M.

Other scholars have offered solutions to this conundrum but with little success. Horowitz has suggested that this group of commandments had a specific goal in mind, to wit, to caution the person who came into contact with uncleanness to be conscious of not coming into the sanctuary, eating sanctified food and causing others to become unclean. Though he admits that M. has already enumerated a number of full-fledged negative

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6 Levinger, Jacob, Darkhe ha-Mahshavah ha-Hilkhatit shel ha-RaMBaM (Tel Aviv: 1965) Pp. 73-74. But then, rather inexplicably, he compares them to P109, which, as we saw, M. treats as a procedural commandment.

commandments prohibiting the faithful from entering into the sanctuary (N77) and from eating sanctified food while in a state of uncleanness, he maintains that there is room for a positive commandment, to reinforce a special guardedness. This is undoubtedly a stretch. For one thing, the idea that a positive commandment should denote the exact same thing as a negative commandment has no precedent in the ShM, even when taking into account mirror-image commandments discussed in Rule 6, and would no doubt violate the spirit of Rule 9. More importantly, there is nothing in M.’s discussion to suggest that he intended this special guardedness. If he did, he would have spelled it out since that is the point of the whole injunction. Finally, Horowitz argues that blemishes are of a “fixed nature and they do not possess such a wide diversity of provisions.” This attempt to differentiate animal blemishes, which M. did not enumerate, from states of uncleanness is weak as well. We might ask, is a corpse or a carcass a more complex matter to identify or adjudicate than blemishes? And even if blemishes can be easily spotted and comprehended, why would we not be told what to do about them — is awareness a matter of complexity or a matter of gravity? Other than to ascribe to M. an almost unacceptable fault

8 He fails to note that there is an additional positive commandment to remove unclean persons from the camp (P31).

9 Somewhat similar defenses are offered by de-Leon, Isaac ben Eliezer, "Megillat Esther," Sefer ha-Mitsvot, ed. S. Frankel (1995) and Alegre, Abraham, "Lev Sameah," Sefer ha-Mitsvot, ed. S. Frankel (Jerusalem: 1995), pp. 248-250. Specifically, it is argued that the various kinds of uncleanness impose a duty to behave in concordance with the laws of each of them, like excluding oneself, keeping away from the area of the sanctuary, not touching or eating holy objects and so on. It is interesting to note that Lev Sameah concedes the value of Nahmanides’ argument (“while his words here are good and correct”), yet manifests little conviction of what he is about to say by conceding that “it is possible to defend M.…”. In my opinion, Nahmanides’ objection retains its full force.
— the lack of comprehension of elementary taxonomic logic —
Nahmanides’ acute observation blows a potentially fatal hole in the body of M.’s construct: if the kinds of uncleanness are not commandments, what are they? Increasingly, I submit, commandments come to resemble an organizing outline of a comprehensive Code of Law, one that finds it convenient, for example, to deal with the detailed laws of uncleanness in a separate treatise (Book of Cleanness - Sefer Taharah) rather than with the laws of priestly services (Book of Temple Service - Sefer ´Avodah). It appears that M.’s true objective, creating an outline, clashes with the alleged objective, that of reconstructing and validating the TaRYaG count. As we saw, M. was forced to define the terms mitsvat ´aseh and mitsvot qum ´aseh in a totally unconventional manner so as to be able to come up with 248 positive commandments. If all M. wanted to do was create an outline for the Code, what reason would there be for him to propose such a complex, unconventional and logically difficult to defend reconstruction of the commandments of the Torah? I shall return to this question towards the end of this study.

3.1 Unconditional Obligations, Also Called Absolutely Obligatory or Compulsory Commandments (mitsvot hekhrehiyot)

Earlier I broached the subject of absolutely obligatory commandments and promised to return to them because of their special significance.

At the very end of his concluding remarks on positive commandments M. offers a list of these commandments. In the original version of the ShM the commandments were only referred to by their place in the enumeration;
one of the translators and the printers supplied brief captions, but mistakes crept in the printed editions of the ShM. J. Levinger investigated the textual history of this list, diligently compared MSS. and printed editions, and affirmed the correctness of a certain group of MSS. It is thanks to him that one can study this important document with confidence. It is also to his credit that he highlighted the significance of this list and some of its implications in the area of halakhah and jurisprudence.¹⁰

This list of only sixty commandments demonstrates the truly contingent nature of the term obligatory or compulsory. M. makes this quite clear when he says that the list is predicated on a man, as opposed to a woman, who lives “in normal conditions: that is to say, that he lives in a house in a community, eats ordinary food, namely bread and meat, pursues a normal occupation, marries and has a family.” M. calls these commandments “compulsory commandments,” a term that is likely identical to the rabbinic hovah and that enjoys wide usage in rabbinic literature. He does not call them mitsvat ‘aseh; even less does he claim that these are genuine mitsvot ‘aseh in contrast to the other ones enumerated in his list. It is clear that one would not expect him to do so after having made such a strenuous effort to assemble and justify a collection of commandment claims that belong to a broad typology of commandments. I would submit, however, that this excursus reveals a degree of unease in M.’s mind about the proposed enumeration and leads the way to a reaffirmation of our conventional understanding of the term mitsvat ‘aseh, literally a command to do, to

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¹⁰ Levinger, Jacob, Ha-RaMBaM ke-Filosof u-ke-Poseq (Jerusalem: Mosad Bialik, 1989) Chapter 6 “The absolutely obligatory commandments (applicable) all the time.” As our discussion unfolds I hope to show the value of the list in our quest for understanding M.’s changing conception of the term mitsvat ‘aseh.
perform a particular action, as we saw earlier. On this account, a *mitsvat \'aseh* is not a theoretical concern, as a procedural commandment may be. It is certainly not a definition of a referent in another commandment. It is, as M. says, a commandment that is “absolutely obligatory on every man, at all times, everywhere, and in all circumstances, as for instance, [those regarding] the fringes, the phylacteries, and the observance of the Sabbath.” In addition, a *mitsvat \'aseh* could also be a contingent commandment, one contingent on events that occur to ordinary people in the ordinary course of life.
Chapter 4. Non-Compelling Individuations: Minuses and Pluses

M.’s methodological observations and strictures, spelled out in systematic fashion in the Rules, had the effect of dramatically reducing Qayyara’s total count. Based on a number of assumptions and conjectures, I estimate that the application of M.’s rules reduced Qayyara’s total of 200 positive commandments\(^1\) by approximately 64 entries.\(^2\) This means that M. had to “create” 112 positive commandments, 64 to replace the ones he had eliminated and 48 new ones, to arrive at the 248 positive commandments indicated in R. Simlai’s *midrash*. I certainly do not wish to imply that M. went about drafting his own list of commandments by revising Qayyara’s list. For all we know, M. began with a blank slate and proceeded without reference to Qayyara’s lists, though I have reason to suspect that indeed Qayyara held M.’s “center of vision” \(^3\) throughout his work. It is only for heuristic purposes that I describe M.’s enumeration as having been worked out of Qayyara’s list. At a minimum, this method provides a general conceptual framework for understanding their different approach to the enumeration of the commandments.

M. proceeded in three ways: (1) He “converted” some of Qayyara’s section (*parshah*) entries into positive commandments on a one-to-one basis.

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\(^1\) Recall that Qayyara counted 71 punishments or *onshin*, 277 negative commandments punishable by lashes, 200 positive commandments and 65 sections or *parashiyyot*.

\(^2\) See Excursus 1.

\(^3\) This felicitous term, first coined by William James, was suggested to me by Bezalel Safran.
For example, “the section of the cities of refuge” (*parshah* #3) became P182, the commandment to establish six cities of refuge; “the section of the Second Passover” (*parshah* #30) became P57, the commandment to slaughter the second Passover offering; “the section of the priestly blessings” (*parshah* #32) became P26, the commandment that the priests bless Israel; “the section of the trumpets” (*parshah* #35) became P59, the commandment to sound trumpets in the Sanctuary; and so on. (2) He converted other sections into more than one positive commandment by applying different individuating criteria. An example that will be examined below is M.’s treatment of the Additional Offerings (*musafin*). While Qayyara listed these as “the section of the Additional Offerings (*parshah* #41),” M. moved *musafin* over to the ledger of positive commandments and “converted” the single section into eight individual claims. These conversions will be the subject of this chapter, where I also hope to show that many such individuation decisions were not compelling. Finally, (3) M. introduced entirely new commandment claims. These innovations will be the subject of the next chapter.

I should caution that the totals of the commandments discussed in this chapter and the next one, dealing with (2) and (3) above, do not add up to 112 commandments. This is so for a number of reasons. First, the discussion regarding the conversion of individual sections into more than one commandment - (2) above - is not intended to be comprehensive. There are many conversions that do not merit special observation, if only because they have little to say about the subject of our interest, individuating criteria. Second, the one-to-one conversions dealt with in (1) above are not discussed further because, for the most part, they are relatively straightforward, as the
examples provided indicate. We shall have an occasion to discuss yet a third reason when we deal with innovations in the next chapter.

### 4.1 Non-Compelling Individuations

In earlier sections (2.3 and 2.3.1) we saw that M. chose to individuate executions to be carried out by the courts on the basis of a linguistic marker, the composite terms *mitsvat ha-nisqalin, mitsvat ha-nisrafin* and so on. We pointed out that the validity of this marker had been seriously questioned and we also showed that the composite term was used on more than one occasion without giving rise to individuations. In this section I will attempt to demonstrate that many more of the individuation decisions that M. made were not compelling. If such a demonstration convinces, doubts will be cast about the very feasibility and practicality of attaining a firm and definitive count, a doubt that could not have escaped the author of such an ambitious project.

The reader might well appreciate that even one example should suffice to prove this point. Still, one example could be explained away. The classical, apologetic commentaries on the *ShM* are proof of the extraordinary ability of talmudic scholars to reconcile, harmonize and rationalize away even the thorniest problems. I have therefore used multiple examples to highlight the problematic.

P41-43, P45, P47, P148, P150, P151

M. enumerates here eight commandments, comprising the Additional Offerings (*musaf*, pl. *musafin*), which were offered in the Temple on the
Sabbath, New Moons and festivals, and the daily offerings (tamid, pl. temidin). The musafin, which are listed in Numbers 28:9-39, exhibit only occasional differences amongst them. The section regarding Additional Offerings closes with the words, All these you shall offer to the Lord at stated times, and so on.

Deciding on a reasonable individuation scheme for these musafin is no simple matter. The geonim chose to count them all as one commandment. Typical of the lot was Qayyara, who listed it as “the section of twenty Additional Offerings.”

The number twenty breaks down as follows: Sabbath (1), New Moon (1), Tabernacles (8), Passover (7), Weeks (1), New Year (1) and Day of Atonement (1), paralleling their description in the scriptural section.

At the end of Rule 13, M. faults these scholars:

They have committed a most serious and strange mistake in connection with this principle: they counted all the musafin [of the entire year] - the musafin of the Sabbath, of the New Moons, and of the festivals - as one commandment! By the same token they should have counted resting [from work] on all the festivals as one commandment! That they did not do. But the Lord knows and is witness that they are not to be held accountable for that, since they have generally not followed one theory in their enumeration; instead, They have mounted up to the heaven, they went down to the depths [Ps 107:26]. The clear truth is as I have mentioned it to you - that every musaf constitutes a commandment in itself, just as resting [from work,

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shevitah] on every [separate] festival constitutes a distinct commandment. This is the correct theory.

M. himself counts eight musaf commandments for each of the seven occasions listed above, plus a musaf for the eighth day of Tabernacles (Shemini ´Atseret), which he separates from the festival of Tabernacles on the strength of a rabbinic warrant. Yet, in Rule 13, M. suggests that “we count only the nature of the charge [ha-inyan ha-metsuveh bo] we were commanded, regardless of the time element concerning its fulfillment” to reject the notion of counting, for example, all the New Moon days of the year as multiple commandments. With respect to the matter under consideration, this principle can just as well yield eight musafin commandments as one.

Surely there are arguments for and against this choice of individuation. For example, there are differences between some of the musafin, which may have justified their separate enumeration. On the other hand, every one of the days of Tabernacles has a different musaf and yet M. subsumed all those individual musafin under one commandment.

It is readily apparent that neither individuation is more compelling or rational than the other. The decision is not helped by the argument that “by the same token they should have counted resting on all festivals as one commandment! That they did not do.” Certainly, Qayyara could be faulted for inconsistency. The inconsistency, however, does not shed light on how one ought to individuate musafin. Similarly, M.’s consistency, counting as many restings and musafin as there are festivals, is no guaranty that the
individuation decision is correct. An argument could indeed be made that all restings and all *musafin* be counted as one.⁵

**P63-67**

In this group of commandment claims M. outlines the procedures to be followed by the priests in respect of the various sacrifices, the Burnt Offering (P63), the Sin Offering (P64), the Guilt Offering (P65), the Peace Offering (P66) and the Meal Offering (P67).

M. provides no justification for his individuation decision. Admittedly, these procedures are spelled out in Leviticus, each in a separate section, but M. never proposed the use of scriptural pericopes as an individuating criterion.⁶

Without a rabbinic warrant that would help him individuate the way he did, M.’s position is tenuous. For example, Nahmanides proposes a more general individuation, namely, that all the provisions of the offerings be subsumed under *and ye shall serve; I give you the priesthood as a service of gift* (Numbers 18:7).⁷ It would appear that, with his sights set on the *Code*,

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⁵ See below, P159. In fact, in my discussion of the *Halakhot*, I will try to show that M. changed the approach taken here.

⁶ Nahmanides notes that we have already been informed that certain people must bring offerings under certain circumstances; it is therefore only “logical” that these procedures be part of those commandments. For example, in P69 we are told that one who sins unintentionally must bring a Sin Offering. There should be no need to specify a separate commandment to tell us how to carry this out. Nahmanides admits that one could separate the requirement to bring the sacrifices from the command to the priests to carry them out in the proper fashion but thinks that the scriptural pericopes do not support this bifurcation. Nevertheless, he appears to relent somewhat from this objection and offers instead an alternative individuation. *Hasagot* to Rule 12, pp. 185-6.

⁷ Nahmanides explains the verse as follows:
M. preferred the logical classification proposed by the Mishnah, separating the expiatory prescriptions from the sacrificial procedures. The former are discussed primarily in *m*Keritot, the latter in *m*Zevahim and *m*Menahot. I submit that M.’s need for a logical way to order and outline the *Code of Law* biased his commandment count. At the same time, it cannot be denied that the expansion of the list certainly suited the goal of attaining the total of 248.  

P68-9

Here we find an example of M. modifying - without notice - a previously announced individuation criterion. In the end, neither criterion is more logical or more compelling than the other.

In Rule 7, M. has this to say with respect to the Sin Offering (*hatat*):

> Scripture has explained in Leviticus that he who unintentionally transgresses one of the commandments of the Lord - provided the error be in a matter for which the penalty is excision (*karet*) when committed willfully, and there is some act connected with it and

You [referring to the priests], shall serve in all aspects of the priesthood because it is a service and a gift, a service to Me and a gift to you since you find in it a remuneration as you partake of the Heavenly table.

The fact that the *Halakhot* also designated these procedures as positive commandments, despite the obvious lack of a need to “count” commandments in that work, as I shall discuss later, is not as problematic as it may seem. M. exercised his exegetical prerogatives and may have well understood the scriptural pericopes that begin with “this is the law of the Sin Offering (*zot torat ha-hatat*),” “this is the law of the Guilt Offering (*zot torat ha-asham*),” and so on (Leviticus 1:2-3, 6:18, 7:1, 7:11, and 6:7) as ordering the proper execution of these sacrifices. Admittedly, this argument could be used to justify M.’s stand in the *ShM*. Nevertheless, the point that I wish to emphasize is not that there cannot be a good rationale for the individuations proposed by M. but rather that these are not always compelling and that valid alternatives exist, such as for example, the one proposed by Nahmanides.
the sin involves a negative commandment, as we have explained it in the commentary to tractates Horayot and Keritot - must bring a Sin Offering, this constituting a positive commandment. Following this, Scripture sets forth fully the laws pertaining to this offering, devoting many verses thereto, stating: if the person who commits the error is one of the common people, he is to bring a female sheep or goat; if he be the prince, he is to be bring a male goat; and if he be the High Priest, he is to bring a bullock. And if the error committed be only with respect to idolatry, the transgressor - regardless of whether he be the prince, or one of the common people, or the High Priest - is to bring a female goat. Now [it is obvious that] changing of the kinds of animals from which the offering is brought does not alter the nature of the sacrifice itself - which is namely the offering for unintentional sin - into many, so that it may entail many commandments....[I]t is the charge to bring the offering which constitutes the positive commandment; that one person brings as his offering a female goat, and the other a male goat is merely a condition of that offering, and not every condition of a commandment is to be considered as a separate commandment.

One will note that M. has lumped together the Sin Offerings of the common people, the prince and the High Priest, because, as he says, “it is the charge to bring the offering which constitutes the positive commandment.” In the enumeration, M. follows through with this idea: P69 is set as the general commandment of the fixed Sin Offering.

Surprisingly, M. sets a second commandment in the matter of fixed Sin Offerings, the commandment specifying that the Court is to bring a Sin Offering if it gives a wrong decision (P68). Now, this may be viewed as an inconsistency, for, after all, the Court, too, brings a Sin Offering. M. has indicated that neither differences in the kind of animal nor in the type of sin
matters. It is clear that another, subtler or finer, individuation criterion is at play: P68 deals with a Sin Offering of the community, P69, with a Sin Offering of the individual. A further possible distinction is that the Court brings an offering for issuing an incorrect teaching even if its own members did not transgress (but others did), while the individual brings an offering only for actually committing a transgression. The differences between P68 and P69 then are potentially of a categorical nature and may justify a changed individuation. Be that as it may, neither individuation appears to be more “correct” than the other; it all depends on how fine one wants the enumeration/individuation to be. The finer it is, the better it will respond to the needs of an outline. Just as crucially, the finer it is the more helpful it will be to make up the numerical total of 248.

P74-77

This group of four commandment claims deals with those who are in need of a ritual of atonement (mehusre kapparah) before they are permitted to eat sanctified food, even though they have already undergone cleansing from impurity. They are: a man suffering a flux (zav), a woman suffering a

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9 See P72, where “the offering of higher or lower value” agglomerates different infractions. This question vexed Kalinberg, Y. Y., Seder ha-Mitsvot (Warsaw: N. D. Zisberg, 1861) Hilkhot Shegagot, p. 48b, s.v. yiqshe lan, who noted that “It has been many years that I have been baffled by this [problem] and could not find a correct solution, one that would be acceptable….” Kalinberg was baffled for three reasons: the fact that Rule 7 discarded the differences of animals as a criterion for individuation, the fact that P72 discarded the difference in transgression as a criterion for individuation, and, finally, the observation that the High Priest was fined with a Sin Offering for deciding incorrectly in matters of law, just like the Court (Hilkhot Shegagot, 15:1-2) and yet did not merit a separate entry.

10 Horowitz, Sefer ha-Mitsvot im Perush Yad ha-Levi ad loc., offers the differentiae but fails to note the changing individuation criterion and the non-compelling nature of it.
flux outside of her menstrual period (zavah), a woman who has given birth (yoledet) and a leper (metsora).

In comments to the last of these four commandments, P77, M. voices the obvious question: why not enumerate them all as one commandment, namely, those in need of atonement? His reply is that indeed this would be the case if the offerings incumbent upon those whose atonement is not complete were the same in all cases, and never altered….But because of the diversity of their offerings we are compelled…to count each offering separately.

Indeed, the zav and zavah must bring two turtledoves or two pigeons, one for a sin offering and one for a burnt offering, a birthing woman must bring a one-year old lamb for a burnt offering and a pigeon or turtledove for a sin offering and a leper must bring two male lambs, one for a guilt offering and one for a sin offering, and an ewe lamb for a burnt offering. That is to say, from a teleological point of view, all four mehusre kapparah should be subsumed under one genus, yielding one commandment claim, but in view of the diversity of their offerings M. has chosen to make four separate claims.

We now move to raise an objection to M.’s justification. Earlier, in our discussion of P68/69, we saw that M. subsumes a number of different offerings11 —”punishments” as he categorizes them in Rule 7 - under the commandment to offer a Sin Offering (P69) simply because they all fulfill

11 The common people bring a female goat or lamb, the ruler (nasi) brings a male goat, the anointed priest, a young bullock.
the same function. We also saw that M. explains in Rule 7 that “changing of
the kinds of animals from which the offering is brought does not alter the
nature of the sacrifice itself — which is, namely, the offering for
unintentional sin — into many, so that it entails many commandments.”

Contrary to what M. says here, and in light of Rule 7, then, the fact
that the four mehusre kapparah are required to bring different offerings
should not multiply their individuation. All mehusre kapparah should indeed
be subsumed under one commandment.\footnote{This question is raised by Perla, in Sefer ha-Mitsvot le-RaSaG, vol. 1, p. 684. Horowitz, Sefer ha-Mitsvot im Perush Yad ha-Levi, \textit{ad loc.}, notes this problem but blandly falls back on the argument that cleansing is different from punishment since we see that M. differentiates cleansing methods (P108, P109, P110). But this only begs the question. I find it interesting that Horowitz alludes to Perla but never mentions him by name and always tries to dismiss his questions.} A second objection to M.’s justification may be advanced based on his comments to P75. Zav and zavah share identical offerings but M. differentiates them, interestingly enough, on “pathological” grounds. He notes the different nature of “flows” in the male and the female, semen in one case, blood in the other; semen in the female or blood in the male would not constitute cause for impurity. As we saw above, M. argues that he would count all the mehusre kapparah as one commandment

if the offerings incumbent upon those whose atonement is not complete were the same in all cases, and never altered….But because of the diversity of their offerings we are compelled…to count each offering separately.

The implication is that in a case of identical offerings, nothing else would matter. Yet M. individuates each of zav and zavah on pathological
grounds even though their offerings are identical. This diversity of criteria with regard to offerings suggests a second (or third) arrangement: considering the identical nature of the offerings of the zav and zavah, M. should make three, instead of four, commandment claims: (1) zav/zavah, (2) the woman giving birth, and (3) the healing leper.

In short, there is nothing compelling about advancing here four commandment claims. M. could well have advanced one – the commandment of the mehusre kapparah - or three, by combining zav and zavah because of their identical offerings. The result of this non-compelling individuation “stretches” the count, bringing it closer to the desired total. It also responds well to the more detailed requirements of an outline for the Code of Law.

P91

The following example shrinks, non-compellingly, the potential count of positive commandments by one, though it also shows an inexplicable expansion of the list of negative commandments.

The commandment claim is to burn the remnants of the consecrated offerings (notar). There are two scriptural proof-texts enjoining such action: Exodus 12:10, in connection with the Passover offering, which states that the remnants must be burned by the next morning; and Leviticus 7:17, in connection with peace offerings (shelamim), which states that the remnants must be burned on the third day.

The ShM’s exegetical warrant is the Mekhilta on Exodus 12:10, yet the evidence proffered in the SE and the Halakhot is the Leviticus proof-text. The single commandment claim here contrasts with the way M. individuated the prohibition to leave over the remnants of offerings, where he counts four
separate commandments: the remnants of the Passover offering (N117), the remnants of the Festival offering (hagigah) of the fourteenth of Nisan (N118), the remnants of the Second Passover offering (N119) and the remnants of the Thanksgiving Offering (todah) (N120). This anomalous treatment was noted by Duran, who wondered why M. did not count two positive commandments, one related to the notar of the Passover offering and one related to the notar of the peace offerings. Offering apologia but without an explanation, Duran notes that the early enumerators individuated positive and negative commandments differently. He admits failing to understand their method and piously adds that “their apprehension is greater than ours.” 13 Duran’s puzzlement highlights the non-compelling and perhaps inconsistent nature of some individuations.

P114-117

This group of laws deals with valuations, vows made in favor of the Temple and expressed in terms of the value of one’s life, someone else’s life, cattle, a house or a field. They follow the form “I vow my own valuation.” The valuation scales are set by Scripture. These vows, called ʿarákhin in rabbinic parlance from the word for valuation, ʿarákhah, are sequentially discussed in one section, Leviticus 27:2-25, and are introduced

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13Duran, Zohar ha-Raqia, siman 40 (p. 42), and also the summary at the end of his commentary, p. 229. See also Perla, Sefer ha-Mitsvot le-RaSaG, Ps115, pp. 721-22, who provides a reasonable rationale for the single entry, but does not deal with the necessity of listing four negative commandments. In Hilkhot Pesule ha-Miqdashim, M. appears to be subsuming all the prohibitions into one. But see Babad, Joseph, Minhat Hinnukh, 3 vols. (Jerusalem: Makhon Yerushalayim, 1988), mitsvah 8, p. 54, s.v. ovar al lav. It should be noted that many of the issues that we meet in the enumeration of positive commandments are also present in the enumeration of negative commandments. I hope to be able to deal with them on another occasion.
by the words *When a person vows to set aside [ish ki yafli neder] a votary offering to the Lord.*

Qayyara lists only one entry, “the section of valuations [parshat ‘arakhin]” in *Parashiyyot* #25. M. appears to engage Qayyara when he says:

Let no one think that these four kinds of valuations have so much in common that they should be counted as a single commandment. They are four separate commandments, each one with its own distinctive regulations, though the name ‘valuations’ [‘arakhin] is common to them all.\(^{14}\) Hence it is not appropriate to count all the kinds of valuation as a single commandment just like it is not proper to count the kinds of offerings as a single commandment.\(^ {15}\) This becomes clear on careful consideration.

M. compares these votary pledges to offerings, each of which he lists separately (P63-67). But as we saw earlier, the separate individuation of offerings is itself not the result of a compelling argument. Moreover, one might accept the separate individuation that M. makes of offerings on the basis that they are discussed in discrete pericopes, headed by the expression “this is the law of” (zot torat ha-). This, however, is not the case with ‘arakhin, where the scriptural pericopes are linked by the conjunctive *vav*

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\(^{14}\) For “common to them all” M. uses a technical term translated in English as “homonym” (*Ar. astrakh*, translated by Tibbon as *shituf ha-shem*) and defined as a “likeness in respect to some notion, which notion is an accident attached to both of them and not a constituent element of the essence of each one of them” (*GP* I, 56:131). See Efros, Israel, *Philosophical Terms in the Moreh Nebukim*, Columbia University Oriental Studies, vol. 22 (New York: Columbia University Press, 1966), s.v. *shituf*, p. 119. See also Wolfson, H. A., "The Amphibolous Terms in Aristotle, Arabic Philosophy and Maimonides," *Harvard Theological Review* 31 (1938).

\(^{15}\) From “just” to “commandment” was inexplicably left out by C. D. Chavel.
and the conditional particle “if” (ve-im, “and if…”), suggesting their basic interconnection.

Finally, the very idea that these valuations should be called homonyms is questionable. In P75 M. explained that he would have entertained combining zav and zavah under one commandment claim if the nature of their flows were similar, but that was not the case. Zav and zavah are merely homonyms, he says, because the emissions that give rise to their designation, semen and blood, are not of a similar nature. They are, as we said then, pathologically distinct diseases. On the other hand, the “constituent element of the essence of each one”\(^\text{16}\) of the valuation laws is the monetary value of the pledge of the votary. For all these reasons, there are sufficient grounds to argue that the four commandments could be subsumed under one.

The difficulties encountered with the individuation of offerings (P63-67) are now multiplied. M. stretches his logical vocabulary but the results are distinctly non-compelling. The four valuations form a useful outline for their upcoming discussion in the Code but have little to contribute to a forcefully compelling list of commandments.\(^\text{17}\) Undoubtedly, the atomization of the laws of ´arakhin helped M. fill the gap left behind by the initial reduction of Qayyara’s total.

\(^{16}\) To use the GP’s definition. See note 14.

\(^{17}\) M. in the Halakhot has no problem in making the laws of arakhin one commandment: “It is a positive commandment to adjudicate the laws of arakhin as stipulated in the Torah….” (Hilkhot Arakhin ve-Haramin, 1:2).
These commandment claims deal with the six festivals, called here “the Sabbaths of the Lord” (Leviticus 23:38; *shabbetot ha-Shem*) whose common denominator is the fact that “no manner of work is to be done on [these sabbath days] except what is concerned with the preparation of food.”

M. makes a number of complex exegetical moves to prove that these sabbath days are positive commandments. He adduces that the term “holy convocations” (*miqraei qodesh*) found in all six festivals stands for “sanctify it” (*qadshehu*), which in turn means that no work should be done on those days except what is needed for the preparation of food. The sixth festival, the first day of Tishre (P163), is also characterized by Scripture as “solemn rest” (*shabbaton*) instead of just *miqraei qodesh*. *Shabbaton* has the meaning of “rest” and this term suits M. well because he has found a rabbinic warrant indicating that “*shabbaton* is a positive commandment.” Finally, M. wraps all six days together by pointing out that “all the days of the ‘appointed seasons’ are called sabbaths of the Lord [*shabbetot ha-Shem*].”

The exegesis, which is offered by way of an introduction (“you should know at the outset”) is a bit confusing. More critically, the exegesis does not make a case for individuating each one of the *miqraei qodesh*. At the end

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18 The conclusion does not follow from the premises. Only *shabbaton* is clearly labeled a positive commandment; its association with *miqraei qodesh* is forced. On the other hand, the wraparound statement *shabbetot ha-Shem* includes other festivals too, e.g. Sabbath, Day of Atonement, where all kind of work is forbidden. On this account, *miqraei qodesh* cannot be equated to *shabbaton*. But see the analogy (*heqesh*) of R. Yonah, *b*Shevu’ot 10a. Since a *heqesh* is not normally included in the thirteen hermeneutic rules, it may constitute for M. a valid hermeneutic for the purpose of supporting scriptural commandments. Similar exegetical problems are raised by a number of later scholars. See *Tsiyunim in Sefer ha-Mitsvot*, ed. Frankel, at P163.
of P167, in an attempt to separate these six festivals from Sabbath and the Day of Atonement, M. states:

You must know that the same law applies to each of the six [festival] days on which we are enjoined to rest, and none of them is subject to a restriction which does not apply to the others. We are also permitted to prepare food on each one of them. Hence the same regulations regarding ‘rest’ apply to all the festivals.

The fact that “the same law applies to each of the six festival days” is a perfectly good rationale for subsuming all the six festival days into one single commandment, the commandment to rest from work at appointed times.

In sum, the individuation of each festival is absolutely non-compelling. An equally valid argument can be made that “rest from all work other than the preparation of food” should be counted as one commandment, one that takes place a number of times during the year. This is especially so in view of the fact that all the festivals are included under one directive: *These are My fixed times, the fixed times of the Lord, which you shall proclaim as holy convocations (miqraei qodesh)* (Leviticus 23:2). In some ways, this requirement of “holy convocations” ought not to be much different than, for example, the commandment to dwell in a sukkah all the seven days of Sukkot, or the commandment to offer a burnt offering each day of the year, which are not counted as more than one commandment even though they take place over some or all the days of the year. M. himself points out the absurdity of counting them by the number of times that they
are performed (Rule 13).\textsuperscript{19} I have called attention on previous occasions to the fact that the enumerations often responded to M.’s need to provide for himself as detailed as possible an outline for the anticipated \textit{Code of Law}. This is not the case here, however. M. makes no distinction whatever \textit{in Hilkhot Yom Tov} between the different festival days in conformity with his views that “the same law applies to each of the six festival days.” Here, then, is a suggestion, one that may not be as far fetched as it seems if proper consideration is taken of the nature of the ‘exercise’. A great deal of trial and error manipulation is required to hit on an exact numerical target such as 248, the sum total of all positive commandments. In view of this, it is not difficult to see that, \textit{at some point through the exercise}, M. may have been in need of a plug-in number, say, 5 extra commandments, to reach his target; it is at this point that M. could have decided, conveniently and uncritically, to follow here the practice of the other enumerators\textsuperscript{20} and thus inflate the count and achieve the required total.

\textsuperscript{19} To make all these festival days part of one commandment does not mean that one must transgress \textit{all of them} to have nullified the positive commandment; doing work on \textit{any one} of these days effectively nullifies the positive commandment to rest from work. Conversely, resting on any one day fulfills the positive commandment, irrespective of what one does on other festival days. This is the intent of \textit{Hilkhot Yom Tov} 1:2. One does not need to count six different commandments to achieve this result.

\textsuperscript{20} Solomon ibn Gabirol, "Azharot," clearly counted the festival days separately, 2 in \textit{siman} 33, 3 in \textit{siman} 41, one in \textit{siman} 42. It is not clear to me whether Qayyara individuated them separately, or, as I think more likely, as one. See Pq 91-99, where we find: “rest \textit{[shvut]}, eight days” followed by a breakdown of the festival days. This breakdown may simply be a clarification and not a list of eight commandments, as Traub (\textit{Halakhot Gedolot} ed. A.S. Traub (Warsaw: 1874)) assumed. In Rule 13, M. accused “some [scholars]” of counting the Additional Offerings (\textit{musafin}) as one, something that they did not do with regard to resting on all festivals. The clear implication is that these scholars, whoever they were, counted the festivals separately. The fact that he speaks of “some scholars” and not the more personal “certain other (scholars)” (\textit{zulatenu}; see Rule
This is the commandment claim that one must rest on the tenth day of Tishre, the Day of Atonement. Here, too, we are in the presence of a non-compelling individuation. In his closing comments to P167, M. has already noted that “the resting enjoined for the Sabbath and the Day of Atonement involves all the abstentions [prescribed for the festivals] and many more besides, since on these two days we are not permitted to prepare food.” From a classificatory point of view, M. would arguably have done better had he combined the resting of the Sabbath day (P154) and the resting of the tenth of Tishre under the one rubric of “days of absolute rest.” On the other hand, the outline model provides a fair explanation for the advantage of separating the two since there is a significant body of laws and regulations that are particular to each of the two absolute resting days, the Sabbath and the tenth of Tishre. Of necessity, these days must be treated separately in a systematic and detailed Code of Law. The expansion to two commandments may have also answered a secondary objective, the need to find extra claims to inflate the list and thus attain the numerical target of 248 positive commandments.

2) suggests to me that he was not referring to Qayyara, contra Traub. Perhaps M. was referring to Gabirol and the likes of him.

21 One might counter-argue that whereas the Day of Atonement is characterized as *shabbaton*, Sabbath is not. But then again, *shabbaton* could not mean complete resting because it also used to characterize *Rosh ha-Shanah* (P163), and *Rosh ha-Shanah* is a festival in which one is permitted to prepare food. Moreover, *shabbaton* is extended to all the festivals to prove that it is a positive commandment to rest on that day (M.’s exegetical introduction to the festivals at P159, see above). Finally, it appears from P164 that it is precisely the word *shabbat* in the composite term *shabbat shabbaton* that M. construes as “resting from work,” not *shabbaton*. I conclude that it is the word *shabbat* that led M. to posit that one must rest from all work on the Sabbath and on the Day of Atonement.
M. claims here that
we are commanded to appoint a priest to speak to the
people when they go forth to battle, and to send back
any man who is unfit for battle, whether because he is
faint-hearted, or because his thoughts are preoccupied
with some matter that may prevent him from giving his
mind to fighting….This priest is called the Priest
Anointed for Battle.

M. notes that
all this procedure - the speech of the priest-anointed-for-war and its proclamation throughout the lines of
battle - is binding only in the case of a non-obligatory,
or permissible, war [milhemet reshut], to which alone
this law applies. In the case of an obligatory war
[milhemet mitsvah] there is no such procedure, neither
speech nor proclamation….22

The appointment appears to be entirely dependent on the advent of
war, it not being a permanent office. In light of P190 permitting the powers-
that-be to conduct non-obligatory wars in accordance with the provisions
stipulated in the Torah, one wonders why M. felt it compelling to enumerate
this procedure. More specifically, the appointment of the priest anointed for
war is a particular of the aforementioned procedure for conducting
permissible wars. As such, to individuate this law would contravene Rule 7,

22 The distinction, however, disappears in the Halakhot (Hilkhot Melakhim 7:1), where
the procedures for conducting war apply equally to both types of wars. M. now states that
“a priest is appointed to speak to the people at a time of war in both an obligatory war and
a permissible war (ehad milhemet mitsvah ve-ehad milhemet reshut).”
which states that the particulars of a specific commandment are not to be counted as a separate commandment.

M. appears to have accepted uncritically this commandment claim\textsuperscript{23} even though it appears to be not merely a non-compelling individuation but an outright contravention of one of his Rules.\textsuperscript{24} The utility of this enumeration, both for outlining the Code and for filling in the count, is evident. It is also conceivable that another consideration may have been present, a pedagogic one. Speaking through the mouthpiece of the priest, M. proclaims that every Israelite must be told “to lay down their lives for the triumph of the faith of the Lord, and for the punishment of the ignorants of the faith\textsuperscript{25} who ruin the order of the city.”\textsuperscript{26} The expressions “ignorants of the faith” and “the order of the city” have strong Farabian political overtones.\textsuperscript{27} The novelty here, and one that M. seems interested in conveying, is that one must lay down one’s life for the punishment of those who ruin the order of the good polis.

\begin{itemize}
\item \textsuperscript{23} Enumerated by Qayyara in “the section of the Anointed Priest,” \textit{parshah} #50 and by Solomon ibn Gabirol, “Azharot,” in \textit{siman} 85 as a \textit{qum ʿaseh}.
\item \textsuperscript{24} It is not of small interest to note that the \textit{Halakhot} do not designate this requirement a positive commandment. See chapter 6, below.
\item \textsuperscript{25} Chavel: “ungodly ones.” In \textit{MnT}: \textit{ha-sikhlin bah}.
\item \textsuperscript{26} Chavel: “social order.” In \textit{MnT}: \textit{yosher ha-medinot}.
\end{itemize}
These two commandments stand for claims to espouse a Hebrew maidservant anytime before the end of her period of servitude (P233) or, in the alternative, the obligation to help her buy back her freedom (P234).

Arguably, the obligation to facilitate her freedom can be subsumed in the obligation to espouse her by resorting to a binary type of formulation: “Espouse…or in the alternative, facilitate.” To meet this possible objection, M. takes recourse in a previously quoted baraita (bBekhorot 13a): “The duty of espousal has precedence over the duty of redemption (mitsvat yi´ud qodemet le-mitsvat pediyah)….” The non-compelling use to which M. has put this baraita, however, has already been discussed (“The construct mitsvat in the composite term mitsvat-X” - section 2.3.1).

As with P81/82 and P216/217, M. finds here an additional commandment. This clearly suits his need to create an outline that is as robust as possible within the constraints of a TaRYaG enumeration. It also helps to inflate the number of commandments, as indicated earlier.  

M. deals here with four claims relating to monetary damages caused by one’s property: the laws of injuries caused by an ox (P237, based on

28 There is some indication that M. considered and even thought that he had offered a single commandment in the place of these two claims. In his comments on P233 he says, “You must know that the laws concerning a Hebrew bondsman and the law concerning a Hebrew bondsmaid [my emphasis] are in force only when the law of the Jubilee is in force.” He again mentions the law of a Hebrew bondsmaid in his concluding remarks on the positive commandments. Of course, he may have used this expression as a short term for these two commandments. Qayyara, in “the section of the Hebrew maidservant,” Parashiyot #2, offers the other logical alternative.
Exodus 21:28, 35), the laws of injury caused by a pit (P238, based on Exodus 21:33), the laws of damage caused by a beast (P240, based on Exodus 22:4) and the laws of damage caused by fire (P241, based on Exodus 22:5). Why does he not choose instead one inclusive and overarching law, “the law of damages caused by one’s property”?

While admittedly one could find differences among the above rubrics to justify their individuation, the method of positing finer differences could easily backfire. For example, one could differentiate in the above between damage done to humans and damage done to property. Lacking a rabbinic warrant that we are in the presence of four commandments, we must conclude that this enumeration is not compelling.²⁹

In the Halakhot, M. shows his preference for the more general law, the laws of damage to property (Hilkhot Nizqe Mamon), which he then subdivides into the four rubrics noted here. This is similar to his earlier treatment with respect to the laws of those who require atonement (Hilkhot Mehusre Kapparah), which he subdivided into four “commandments,” the atonements of the zav, zavah, birthing woman and leper.

P242/243/244

M. deals here with three claims relating to the laws of bailees. According to the Oral Law’s interpretation, Scripture describes four kinds of

²⁹ Horowitz, Sefer ha-Mitsvot im Perush Yad ha-Levi, on P241, defends the arrangement on the basis of the first mishnah of Bava Qamma, which speaks about “the four principal [avot, lit., “fathers”] causes of damages.” However, avot, unlike mitsvah, was never used by M. as a linguistic marker for individuation. Moreover, avot is used here in contradistinction to toledot, subordinate or derivative causes. Finally, and more importantly, since M. does not adduce this source one must assume that he did not find it convincing.
bailees: an unpaid bailee (Exodus 22:6-8), a paid bailee (Exodus 22:9), a 
borrower (Exodus 22:13), and a hirer (Exodus 22:14). mShevu´ot 8:1 lists 
the four bailees, but bShevu´ot 49b explicates that these four types of bailees 
are governed by only three principles, with one principle applying to the 
borrower and the hirer alike.

M. cites bShavu´ot 49b as warrant for his decision to abridge the 
count to three bailees from four. The fact, however, that the mishnah found 
it convenient to discuss a specific number of bailee types should not make a 
compelling case for individuating commandments.30 The non-compelling 
nature of this individuation can be appreciated if we pay attention to the way 
M. classified these commandments in the Halakhot. There, he placed 
the paid bailee and the hirer in Hilkhot Sekhirut, and the unpaid bailee and the 
borrower in Hilkhot Sheelah u-Piqqadon.31 This classification suggests that 
we are in the presence of two commandments rather than three.

30 Lists of classes of damage or of agents who cause damage, accompanied by numerical 
totals, are useful mnemonic devices but are not intended to identify commandments. See 
for example bBava Qamma 4b:

Rav Oshaia taught: There are thirteen principal categories of 
damage: The Unpaid Bailee and the Borrower, the Paid Bailee 
and the Hirer, Depreciation, Pain [suffered], Healing, Loss of 
Time, Degradation and the Four enumerated in the mishnah, 
thus making [a total of] thirteen.

Yet, depreciation, pain, healing, loss of time and degradation are not commandments.

31 There is some evidence that originally M. wanted to write (or wrote) Hilkhot Piqqadon 
separately from Sheelah. See for example the end of chapter 7 of Hilkhot Hovel u-Maziq, 
where M. calls the treatise Sheelah u-Piqqadon by the name “inyan ha-piqqadon,” 
echoing the Sefer ha-Piqqadon monographs written by Saadia, Shmuel b. Hofni and Hai 
Gaon. In fact, Assaf has shown that before the final editing, M. had intended to write 
Sheelah and Piqqadon separately. Cf. Assaf, S., "Qeta’im mi-Sefer Yad ha-Hazaqah...be-
Etsem Ketav Yado shel ha-RaMBaM," Qeriyat Sefer, vol. 18 (1941), p.150. This means 
that, in all likelihood, the original arrangement of the Halakhot followed the meta-
halakhic individuation of the ShM, where M. conceived of three kinds of bailees.
In sum, Scripture discusses four kinds of bailees yet M. claims three commandments on the basis of a talmudic passage that relies on three principles to reduce the four bailees to three. At a later time, M. considered it proper to split the discussion of bailees into only two parts.

It is worth pondering whether the different laws of bailment would more profitably be subsumed in a broader category, such as civil laws (dine mamonot, lit., “the laws of monies”). This remains largely an aesthetic question. Interestingly, Qayyara (parshah #4) appears to have chosen the second route.

P245

M. claims here that “we are commanded concerning the law of buying and selling; that is to say the procedure by which a sale is to be effected between the vendor and the vendee.”

With the sole exception of a short passage that admonishes the parties of a transaction from taking unfair advantage, as by fraud (onaah; Leviticus 25:14-17), the legal portions of the Pentateuch do not legislate transactional laws. Lacking any sort of scriptural support, M.’s claim is just short of astonishing. Interestingly enough, M. appears to concede this difficulty. The adduced proof-text, And if thou sell aught unto thy neighbor, or buy of thy neighbor’s hand, etc. (Leviticus 25:14), does not describe a scripturally sanctioned form of acquisition. Rather, it occasions a rabbinic play on the word hand, “a commodity purchased from hand to hand, that is to say, acquired by the purchaser’s act of drawing to himself.” Commodity refers to movables and the “act of drawing to oneself” (meshikhah) is, as M. acknowledges, a rabbinic regulation (taqanah).
Similarly, M. points out, purchases of land and other types of property
reflect commercial practices and the rabbis use scriptural texts as convenient
supports or mnemonic crutches (asmakhta) to validate these practices. M.
makes a faint attempt to dress up acquisition law in the garb of a scripturally
sanctioned “law,” stating that “it has already been established that by Torah-
law the payment of money secures the purchase”; but this is only a tradition
and no scriptural support is ever adduced for this statement. Finally, it
should be noted that the proof-text is embedded in a section dealing with a
buyer or seller taking unfair price advantage (onaah) from his counterpart in
a transaction involving land; it is closer to being a discussion of unfair
commercial practices than a description of laws of acquisition.32 It is hard to
imagine why M. would have made such a farfetched commandment claim33
other than to fill an important gap in his outline of the MT. In effect, I am

32 Perla (Introduction to Sefer ha-Mitsvot le-RaSaG , vol. 1, section 8, page 47) too
makes this observation and concludes that there is no scriptural passage that deals with
the laws of acquisition claimed by M.

33 Horowitz, Sefer ha-Mitsvot im Perush Yad ha-Levi , P245 was right on the mark when
he exclaimed that “the words of our master are astounding.” After noting that M. proved
that all the modes of acquisition are but rabbinic ordinances, he asks, “What
commandment claim did he advance here that can be considered as having been given to
Moses at Sinai?” His apologetic answer is also astounding. The Torah, he says, did not
legislate modes of acquisition even as it was mindful of its benefits to society. The verses
And if thou sell aught unto thy neighbor, or buy of thy neighbor’s hand, make it obvious
that commercial transactions took place in early days, though, naturally, the types of
transactions were not spelled out. Instead, Horowitz asserts, the Torah suggests
(Horowitz does not explain how) that such standards be adopted, either through rabbinic
decrees or through commercial practice. The fallacy of this argument is readily exposed.
We can grant that laws of acquisition are beneficial for some or most societies, but there
is some distance between asserting this and asserting that the Torah wished to see such
laws prescribed. Could the Torah not remain silent with regard to acquisition (or other
civil) laws and let the “market” develop its own mechanisms, guided merely by an overall
proviso of fairness and justice? See also Perla, Sefer ha-Mitsvot le-RaSaG cited in the
previous note.
suggesting that M. created an entry even on the most tenuous of warrants (“it has already been established that by Torah-law the payment of money secures the purchase”) so that he could provide the proper reference to an important treatise in the upcoming MT, the Laws of Acquisition (Hilkhot Mekhirah). The absence of such a commandment from his enumeration would have made a mockery of his claim that “all this [i.e., the enumeration] [I would do] in order to guard against omitting any topic from discussion, for only by including them in the enumeration of the commandments [heading the various treatises] would I insure against such omission.”

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34 Having said this, we note again that M. does not craft a single “commandment” to reference the laws of gifts (Hilkhot Zekhiyah u-Matanah), neighbors (Hilkhot Shekhenim) and agencies and partnerships (Hilkhot Sheluhin u-shutafin). It would appear that, unlike the laws of buying and selling, these laws do not bear even the most “minimal” connection with scriptural law.
In our last chapter, we saw how certain individuation strategies—or shall we call them stratagems?—helped M. achieve, at least partially, the goal of enumerating 248 positive commandments. Though M. succeeded in making a robust number of claims, we took note of the fact that many of the claims did not exhibit compelling characteristics. One might say that many individuations resembled equations with more than one valid solution, with M. arbitrarily choosing one of them. Even with the assistance of individuation strategies that seemed to multiply commandments, however, the total was coming up short. M. had to find more commandment claims if he wanted to vindicate R. Simlai’s dictum. The way to accomplish this was to innovate, claiming commandments that had not been listed by Qayyara in either his list of qum ʿaseh or his list of parashiyyot.

But first a word of caution is needed with regard to innovations. Qayyara’s list is inconveniently terse, often vague, lacking in punctuation and designed around a different format than M.’s list. Therefore, no precise comparison between the two is possible. What appears to us as a Maimonidean innovation might have been referred to by Qayyara differently¹ or might have been included or subsumed under a different or more general rubric. While this difficulty is real, it should be pointed out that

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¹ A good example is the entry “faith” (Pq39), discussed in the second part of this chapter: does it mean belief in God or does it mean acting in good faith (in business)? Or Qayyara’s entry (Pq 149) “to cheer a bride”, does it refer to the rabbinic commandment to cheer a bride on the wedding day, or to the scriptural commandment to give happiness to a new wife for a full year? See infra, section 9.5. Many such examples exist.
an enormous amount of creativity has been expended and thousands of pages have been devoted to identifying entries and to reconciling azharot lists. Relying on their work, Hildesheimer found a total of 37 innovations in M.’s list of positive commandments. In the first part of this chapter I examine these 37 innovations, assess the arguments in their favour and look for what other factors, if any, might have driven M. to posit these claims. Note that the number of innovations identified by Hildesheimer should be viewed as a rock-bottom estimate. Given the commentators’ strong harmonistic efforts and the highly imaginative skills they brought to this enterprise, the number 37 is likely to be much lower than the one that can realistically be expected from a simple reading of Qayyara’s entries. In short, 37 is that number of innovative commandments that can be agreed upon by all major commentators of Qayyara’s list of commandments. For what it is worth, my own necessarily imprecise estimate yields a number of innovations that is slightly in excess of 70 commandments, about twice as many as found by Hildesheimer.

In the second part, I examine two additional claims after showing why I believe, contra Hildesheimer, that they are innovations, and again assess the arguments adduced by M. in their favor. I shall then try to demonstrate the extraordinary significance of these claims.

I preface this endeavor by first offering an insightful observation by one of the most erudite and astute commentators on the genre of enumerations, Yeruham Perla. In the introduction to his monumental work on Saadia’s Book of Commandments, Perla raises an obvious question: given that a pious Jew is obligated to keep all that is commanded in the Torah, to what purpose did the early rabbis (rishonim) toil in their investigations of the TaRYaG? For what purpose did tradition restrict the number of
commandments to 613 and suppose a large number of details and subordinate rules so as to hit on the exact total? What juridical motivations can be derived from this restriction and precise number? This is what he says:

These questions come from a basic lack of understanding, for it is clear that this enumeration has an important bearing on many of the scriptural commandments, according to the various views. In fact, it is clear that there is no explicit evidence in Scripture — or even in the Mekhîlta, Sîfra, Sîfre, Talmud and other such sources — for many of the positive and negative commandments enumerated by the various scholars: These commandments depend on the methodological underpinnings on which these enumerations were constructed. For it is clear that if, for example, following his Rules, M. eliminated from Qayyara’s count many positive and negative commandments that ought not to be included... by necessity he must search for other commandments that respond to his criteria so as to be able to complete the count of 613 commandments. And it is quite possible that he [M.] would not be able to draw support from among rabbinic sources for this large number of commandments, positive and negative, that would be consistent with his own Rules. Therefore, relying on the fundament that the scriptural commandments cannot total less than 613, he [M.] added such commandments from his own opinion (mi-da´ato), based on some tenuous allusions contained in the scriptural text, coupled with his own interpretation (sevarato), even though the evidence is not sufficiently compelling. Were it not for the fact that the number [TaRYaG] is fixed and known, he [M.] would not have innovated these commandments. (my emphasis)²

² Perla, Sefer ha-Mitsvot le-RaSaG Introduction, section 10, p. 56.
Perla points the way to what is interesting and original in M.’s innovations, and that is precisely those claims that are “based on some tenuous allusions in the scriptural text and coupled with his own reasoning.” I permit myself to add one further qualification: these innovative claims are generally informed by M.’s philosophical views, both theoretical and politico-ethical, and are premised on the assumption that the Torah is a teaching guide whose purpose is to instill in Jews correct and necessary beliefs.³

M.’s politico-philosophical views are well encapsulated in *GP*, part III, chapter 27. There he suggests that the true law, the Law of Moses, aims at two things, the welfare of the body, which is “prior in nature and time,” and the welfare of the soul, “indubitably greater in nobility” and achievable only after having achieved the first aim. The welfare of the body consists of “being healthy and in the very best bodily state” through finding food, shelter and so on. Man, however, is “political by nature” and can attain these aims only through political association. Therefore, the aim of the Law “consists in the governance of the city and the well-being of the states of all its people according to their capacity,” and it accomplishes this “through the abolition of reciprocal wrongdoing and through the acquisition of a noble and excellent character….” The Law also comes to bring the perfection of the soul, which consists in “the soundness of the beliefs and the giving of correct opinions.” M. calls this the “ultimate perfection” and the “only cause of permanent preservation.”

³ Generally for this view, see *GP* III:27-49.
In this scheme, all the commandments of the Torah must be classified according to one of three categories: practical and moral commandments, which operate on the welfare of the body, and intellectual, which operate on the welfare of the soul. This led Twersky to say:

Given these guidelines, established at the beginning of this section in chapter 27 of the Moreh [i.e., GP], the remaining task is completely deductive. One has to relate each of the 613 commandments to one of the three goals: (a) establishment of civilized society — principles of social utility and justice; (b) development of the ethical personality — principles of goodness and love of fellow man; or (c) intellectual perfection — true knowledge and experience of God. Had the remaining chapters of the Moreh been lost, we could have undertaken to reconstruct the correlation between each commandment and these three goals.\(^4\)

As we review some of M.’s innovative commandment claims, particularly those not supported by conclusive rabbinic warrants, we should take note of the fact that the task is not always deductive in the direction suggested by Twersky. M.’s hermeneutics suggests that quite often it was otherwise. In fact, M. formulated the idea and then inferred what the supporting text might have been. This was much as posited by Perla.

### 5.1 Examining the Evidence

To identify the contributions that reveal some special originality, I excluded from the list of innovations all those claims for which M. was able

to adduce strong evidentiary support. I contend that the balance, commandments with inconclusive evidence, were driven by M.’s philosophical bent, and that a closer look at them will reveal themes and ideas of special importance to M.

5.1.1 Strong evidence

By strong evidence I mean rabbinic warrants that support the claim that a specific proof-text constitutes a positive commandment. For the most part, these warrants, found mostly in the midreshe halakhah, describe a particular scriptural passage as a mitsvat ´aseh. M. makes categorical use of these designations even though it is not at all clear that the midrash applies the same criterion as M. has applied for designating positive commandments. That is, the midrash halakhah may simply have in mind the obligatory character of a scriptural command –thus the term mitsvat ´aseh, an obligation to do. Moreover, this obligation could constitute merely a detail or condition (mishpat, in the language of Rule 7) of a larger, overarching commandment. It would therefore not qualify as an independent and individuated claim, in the sense used by M. for example in Rules 7 and 10-13. For the purposes of this analysis I assume that M. believes that the technical terms ´aseh and mitsvat ´aseh used by the rabbis mean exactly the same thing that they mean to him. It is with this understanding that we can proceed to call the commandments claims detailed below as claims supported by strong evidence.

The following list of commandments is accompanied by a very brief comment summing up M.’s proof(s). Here, and throughout the rest of this
work, I present the positive commandment that is about to be examined in bold letters and as formulated by the Short Enumeration (SE).

P22. To watch over this edifice continually, as it is said, “...but thou and thy sons with thee shall minister before the tabernacle of the testimony” (Numbers 18:2).

More specifically, in the ShM, “to keep guard over the sanctuary, and to patrol it every night, throughout the night.”

Proof: Adduces Mekhilta (found only in our Sifre Zuta, Korah, p. 292): “And they shall keep the charge of the Tent of Meeting [Numbers 18:4]. [This verse] gives us only a positive commandment [be-aseh]....”

P84. To offer all sacrifices in the Sanctuary, as it is said, “and there thou shalt do all that I command thee” (Deuteronomy 12:14).

Proof: Sifre Deuteronomy, Reeh pisqa 70 (p. 133), fully cited and explained only in N89, where the counterpart negative commandment is discussed. M. considers the Sifre’s designation be-aseh with reference to the words there thou shalt do all that I command thee an ‘aseh in form, based on

5 Instead of “to patrol it,” MnT translates “to go around it,” which is also its rendition in the headings to Hilkhot Bet ha-Behirah. See Megorot ve-Tsiyunim, Mishneh Torah, ed. S. Frankel, 15 vols. (Bne Brak: Hotsaat Shabse Frankel, 1975-2006), Hilkhot Bet ha-Behirah 8:1. But see Sefer ha-Mitsvot, ed. and trans. Joseph Kafih (Jerusalem: Mosad ha-Rav Kook, 1971), note 23, on meaning of Arabic original.
the principle that a prohibition that is inferred from a positive statement is considered a positive commandment.\textsuperscript{6}

P87. That an exchanged beast (if a beast is exchanged for one that had been set apart as an offering) is (or becomes) sacred, as it is said, “...it and the exchange thereof shall be holy” (Leviticus 27:10).\textsuperscript{7}

Typologically, this commandment is descriptive rather than prescriptive and belongs to the fourth class of commandments reviewed earlier (section 3).\textsuperscript{8}

Proof: A 	extit{Gemara} in \textit{b}Temurah 4b, which calls \textit{temurah} an ‘\textit{aseh} for remediating the prohibited act of attempting to substitute a sacred animal. This statement is difficult to comprehend since \textit{temurah} calls for no particular action; it is simply an outcome. Nevertheless, M. can count on this

\begin{center}
\textsuperscript{6} Although this principle cannot transform the verse into an unconditional obligation, this is not a concern of the \textit{ShM}. In the \textit{Halakhot}, M. reads this verse as a straight, unconditional obligation. This requires a much more detailed examination of the use or non-use of this principle in the \textit{Halakhot}, an extremely confusing issue and one that cannot be fully and properly dealt with here. For now, see note 10 in section 2.1.1, above.
\end{center}

\begin{center}
\textsuperscript{7} Hyamson translated, “If a beast is exchanged for one that had been set apart as an offering, both become sacred, as it is said....”\textsuperscript{;} but M.’s formulation, \textit{li-heyot ha-temurah qodesh}, simply says that the exchanged beast, the \textit{temurah}, is sacred.
\end{center}

\begin{center}
\textsuperscript{8} The \textit{Sefer ha-Hinukh}, ascribed by some scholars to Aaron ha-Levi of Barcelona (1235-1300), who generally follows M.’s formulations, reflects a typical lack of appreciation for this type of commandment and restates it as follows: “…that the substituted animal remain holy and \textit{to treat} [our emphasis] both of them with holiness.” On this formulation, the commandment refers to the manner with which we ought to treat both animals, rather than to the effect of the attempted exchange, (Aaron ha-Levi of Barcelona, \textit{Sefer ha-Hinukh}, ed. C. D. Chavel (Jerusalem: 1952), \textit{mitsvah} 352.
\end{center}
explicit rabbinic warrant. It is worth noting that M. assigns to this highly idiosyncratic law a creative ethical-psychological motivation. He says,

> the Law has plumbed the depths of man’s mind and the extremity of his evil impulse. For it is man’s nature to increase his possessions and to be sparing of his wealth...if a man dedicated a beast to a sanctity of its body, perchance he would draw back, and since he cannot redeem it, he would change it for something of less worth. And if the right was given to change the bad for the good he would change the good for the bad and say, “It is good.” Therefore, Scripture has stopped the way against him so that he should not change it, and has penalized him if he should change it and has said: Both it and that for which it was changed shall be holy (Leviticus 27:10). (Hilkhot Temurah 4:13)

This may be, in fact, an important reason he wished to include this law in the enumeration despite its obvious difficulties.

P90. To burn meat of the holy (sacrifice) that has become unclean, as it is said, “And the flesh which toucheth anything that is unclean shall be burnt with fire” (Leviticus 7:19).

Proof: The Gemara (bShabbat 25a) calls disposing of Heave offering oil that has become impure by means of lighting a positive commandment (aseh).\(^9\)

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\(^9\) M.’s rabbinic warrant seems as obvious as it is unobjectionable. The fact that all geonim failed to list this entry is indeed puzzling. Later commentators have conjectured that the command was viewed as being part of the command to burn the remnants of a consecrated offering (notar), P91 in M.’s enumeration. See Duran, Zohar ha-Raqi, siman 40, p.41 and see Perla, Sefer ha-Mitsvot le-RaSaG, vol. 1, p.722. Perla engages in far-fetched and unsatisfactory casuistry to justify the geonim’s omission. See also Traub’s comments, in Halakhot Gedolot, Makhon Yerushlayim, p.25, gloss # 17.
To exact the debt of an alien, as it is said, “Of a foreigner thou mayest exact it; but that which is thine with thy brother, thine hand shall release” (Deuteronomy 15:3).

To the phrase “to exact the debt of an alien,” the ShM adds “and to press him for repayment, just as we are commanded to be merciful with the Israelite, and forbidden to exact payment from him.” To support this innovative entry, M. adduces Sifre Deuteronomy, Reeh pisqa 113 (p.173) which says, “Of a foreigner thou mayest exact it is a positive commandment (zu mitsvat ´aseh).”

The rabbinic warrant appears to be unobjectionable though an alternative reading of the midrash is possible, namely that the verse may be understood as permitting one to exact debt from an alien and inferring that one may not, however, exact debt from an Israelite. The inference would emphasize what the second half of the verse states explicitly. The first half of the verse is what the Sages called an inferred prohibition or a prohibition derived from a positive statement (issur ´aseh, lav ha-ba-mikhlal ´aseh), prohibitions that are (penally) treated as positive commandments, i.e., violators do not incur lashes, since these are reserved for the transgression of negative commandments. As a prohibition derived from a positive statement, the Sifre’s comment that “this is a positive commandment” may simply be taken to mean that this is deemed a positive commandment. On this reading, there is no positive commandment to exact debts from a foreigner.10

10 See de-Tolosa, Vidal, Maggid Mishneh (Printed in standard editions of Mishneh Torah), Hilkhot Malveh ve-Loveh 1:2.
These aliens, presumably heathens, are M.’s nemeses. As a result, M.’s understanding of the midrash appears ideologically tinged, though one must admit that the Sifre’s designation, zu mitsvat ʿaseh, is straightforward enough. An alternative reading to a similarly articulated midrash along the lines suggested above is actually found in the Talmud when discussing the commandment to lend to an alien at interest (P198, see immediately below).

P198. To lend to an alien at interest, as it is said, “Unto a stranger, thou mayest lend upon interest” (Deuteronomy 23:21). According to tradition, this is mandatory.

M.’s ideological stance with respect to the treatment to be accorded to heathens is given full expression in the ShM:

We are commanded to exact interest from a heathen to whom we lend money, so as not to help him or be kind to him, but rather to harm him, even in lending him money, by demanding interest, which we are forbidden to do in the case of an Israelite.

Proof: Sifre Deuteronomy, pisqa 263 (p. 285): “Unto a foreigner mayest thou lend upon interest: This is a positive commandment (zu mitsvat ʿaseh); but unto thy brother thou shalt not lend at interest: This is a negative commandment.”

As noted above at P142, this type of sentence may be read as permitting one to lend money with interest to a heathen and, by inference, forbidding such an action toward an Israelite. On such a

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11 This translation is interpretative. It can also be read: “Thou shalt lend.”
reading, the only normative implication of this verse is to prohibit the lending of money with interest to an Israelite. Critics adduce talmudic support for such a reading. Efforts were made to reconcile the Sifre’s position with the Talmud but they seem extremely stretched, and rob the Sifre of its exegetical originality and its unique terminology. M.’s proof is, to my mind, unobjectionable, though one may accuse M. of unwarranted selectivity. We cannot determine if this selectivity is tendentious or merely the result of an exegetical preference.

5.1.2 Inconclusive evidence

An important number of innovative commandments do not enjoy technically acceptable evidentiary support, the kind discussed in the preceding section. In all these cases, it is apparent that M. struggles to find a basis for the claims that he advances. It is easy to be left with the impression that the desire to make the claim precedes the ‘proof’. As Perla suggested, the commandment claims are “based on some tenuous allusions in the scriptural text, coupled with [the jurist’s] own interpretation” and, we might add, a number of ambiguous rabbinic statements. At the conclusion of a brief analysis of these innovations, I suggest some of the politico-philosophical ideas that may have informed this exercise and that were represented by these innovative commandment claims. In the Appendix I

12 Nahmanides, Hasagot to Rule 6. Similarly, RaBaD in his gloss to the SE. Strangely, RaBaD claims that “this [i.e. M.’s citation] is not found in the Sifre.” See also Daniel ha-Bavli, in Abraham Maimonides, "Teshuvot Rabbenu Abraham ben ha-RaMBaM," siman 10, and Abraham Maimonides’ reply.

13 See the insightful comments of David Vital, Keter Torah, cited by de-Leon, "Megillat Esther," rule 6, p. 131, s.v. ve-ahar kakh matsati.
present further exegetical difficulties for some of these claims and, more importantly, the way some of these commandments came to be formulated in the MT.

5.1.2.a Hovah, Be-al Korho, Hayav, Yakhol…Talmud lomar

These rabbinic expressions indicate obligation, especially where one might have thought that such was not warranted. M. adduces these terms to support a number of commandment claims but the proofs suffer from the same weakness that we suggested earlier in connection with the technical term mitsvat ´aseh, namely that they do not specify commandments as described by M. in his rules of individuation. Moreover, these terms lack the terminologically felicitous association with M.’s own mitsvat ´aseh that the rabbinic term mitsvat ´aseh enjoys. In short, there is nothing in these proofs that would make us believe that the scriptural proof-texts represent positive commandments as M. has defined them.

P23. That the Levite shall serve in the Sanctuary, as it is said, “But the Levite shall do the service of the tabernacle” (Numbers 18:23).¹⁴

Proof: Adduces Sifre Numbers, pisqa 119 (p. 145):

I might suppose that a Levite could choose whether to perform the service or not; Scripture therefore says, The Levites alone shall do the service: that is to say, he can be made to perform against his will (bal korho…ke-lomar she-zeh hovah ´alav).

¹⁴ More specifically, in the ShM, that “the Levites are commanded that they alone are to perform certain services in the sanctuary, such as closing the gates, and chanting during the offering of the sacrifices.”
P32. To show honour to a descendant of Aaron, and to give him precedence in all things that are holy, as it is said, “And thou shalt sanctify him” (Leviticus 21:8).

One of the versions of the ShM adds to this formulation a critical comment: “We are commanded to exalt the descendants of Aaron, to show them honor and deference, and to assign to them a high degree of holiness and dignity even overriding their own objections [my emphasis].”¹⁵ On account of this last definition, there are two claims here: one, to give the priest precedence in all things that are holy and, two, to compel him to maintain a high level of holiness.

Proofs: For the first claim, M. offers a passage in bGitin 59b: “Thou shalt sanctify him in all matters appertaining to holiness: that is to say, he shall be first in all holy matters; he shall have the first right to recite the Benediction at a meal; and he shall be first to receive a seemly portion.”

For the second claim, Sifra on Leviticus 21:6: “Thou shalt sanctify him — even against his will (be-al korho)”; and on 21:8 “They shall be holy unto their God — even against their will (al korham).”¹⁶

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¹⁵ The version underlying MnT’s translation has here “a prior and first standing” instead of “a high degree of holiness and dignity,” a reading that is consistent with the basic claim. See Tsiyunim ad loc., Sefer ha-Mitsvot, ed. Frankel, and see Sefer ha-Mitsvot, ed. Kafih, ad loc., note 64. Clearly, there is a fundamental difference between the two versions; in Kafih’s, the commandment has two distinct aspects; in MnT’s, only one.

¹⁶ Sifra, Emor pereq 1:6 (p.94b) and pereq 1:13 (p. 94c), respectively. A careful reading of the way M. formulates this commandment in the Halakhot (Hilkhot Kele ha-Miqdash
P85. To take trouble to bring sacrifices to the Sanctuary from places outside
the land of Israel, as it is said, “only thy holy things which thou hast, and thy
vows, thou shalt take and go [unto the place which the Lord shall choose]”
(Deuteronomy 12:26). It is learned by tradition that this verse refers to
sacrifices that come from outside the Holy Land.  

Proof: Sifre Deuteronomy, pisqa 77 (p. 142):

*Thy holy things* refers only to offerings [for which we
have become liable] outside the Land. *Thou shalt take,
and go* teaches us that one must concern oneself
(*hayav be-tipul*) with the transport of the offering until
he brings it to the Sanctuary.  

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4:1-2) shows that M. designates only the second aspect of the claim a positive
commandment; the first aspect appears to be only a rabbinic ordinance.

17 The last sentence in Hyamson’s translation reads: “It is learnt by tradition that this
verse refers to sacrifices that come from outside the Holy Land.” I have revised it to
reflect more accurately the rabbinic diction. I have rendered *godshe huts la-arets* as
“sacrifices for which we have become liable outside the Land,” in line with the citation of
the Sifre adduced in the ShM, though “sacrifices that come from outside the Holy Land”
is also possible.

18 Nahmanides, *Hasagot, ad loc.*, raises two objections to including this commandment in
the enumeration, one taxonomic (individuation) and one hermeneutic. Here we find a
particularly interesting divergence of views with regard to the use of *midreshe halakhah*.
Nahmanides argues that the talmudic exposition of this verse found in *b*Temurah 17b
should take priority over the *midreshe halakhah* (“it was more fitting to adopt the
talmudic *midrash*”) and adds, methodologically, that “it is [only] proper to use the
*midrashot* of the Talmud to frame *halakhah* and to consider them in priority.” This is
neither the first nor the last time that Nahmanides expresses his general disapproval of
M.’s recurrent use of the *midreshe halakhah*.  

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122
P 157. To discourse concerning the departure from Egypt on the first night of the Feast of Passover, as it is said, “And thou shalt tell thy son on that day, saying ...” (Exodus 13:8).

Proof: First M. adduces a well-known rabbinic saying (found in the Haggadah of Passover), “Even if we were all of us wise, all of us men of understanding, all of us learned in the Law, it would be incumbent upon us [mitsvah] to speak of the departure from Egypt.” The word mitsvah is, however, best understood here not as an obligation but as meaning “it is incumbent upon us,” “it is fitting,” “it is proper,” as in many other rabbinic pronouncements. 19

The second proof is drawn from an exposition found in the Mekhila de-RaSHBY on Exodus 13:3:

Since it is said, And it shall be when thy son asketh thee, etc., one might think (yakhol) that you are to tell your son if he asks you, but not otherwise. Scripture therefore says (talmud lomar), thou shalt tell thy son — even though he does not ask you. Again, one might think that [the duty rests only on one] who has a son [with him]; whence do we infer that it applies also to one who is alone, or among strangers? From the words of Scripture: Moses said unto the people: Remember [zakhor] this day [Exodus 15:3].

The midrash likely means that apart from one’s obligation to tell a son already alluded to in Exodus 13:3, Moses expresses a desire for all Israelites to remember the Exodus, irrespective of anyone else’s presence. M. then

19 See section 2.1, above.
adds, of his own, a crucial explanation: “That is, Moses told the people that God commanded us to remember the Exodus just as he ordained "Remember the Sabbath day, to keep it holy." Since the remembrance of Sabbath is a positive commandment (P155), this one is too. This is a daring and original move.

Miracles performed by God on behalf of the Israelites constitute a useful opinion and thus are worthy of being commemorated. The memory of these miracles must be perpetuated through constant repetition because, in the course of time, they can easily be rationalized away.

M. crafts an innovative commandment claim using an equally innovative exegesis. It is not unlikely that the claim is driven by special political considerations, as noted above.

5.1.2.b Use of Scripture’s self-referential allusions to the action being ‘commanded’

M. finds in various verbal forms of the stem ts.v.h indications that Scripture intends a mitsvat ´aseh, a stretch by any account. While rabbinic

20 This addition is M.’s own. It does not appear in our text of the Mekhilta, contra Shem Tov ha-Sefardi’s (Migdal Oz) understanding. See Kasher, Menachem M., Ha-RaMBaM ve-ha-Mekhilta de-RaSHBY (Jerusalem: Hotsaat Bet Torah Shelemah, 1980), p. 79.

21 That M. is satisfied with this exegesis is apparent from the fact that he repeats it in the Halakhot, Hilkhot Hamets u-Matsah, 7:1.

22 Cf. GP III:43 (572).

23 See GP III:50 (615-16): “…all miracles are certain in the opinion of one who has seen them; however, at a future time their story becomes a mere traditional narrative, and there is a possibility for the hearer to consider it untrue.” See the end of that long passage.
warrants are adduced to explain the scriptural referents, they do not specify a positive commandment as understood by M.

P146. To slay, according to the ritual, cattle, deer, and fowl, and then their flesh may be eaten, as it is said, “...thou shalt kill of thy herd, and of thy flock as I commanded thee” (Deuteronomy 12:21).

The ShM emphasizes “which becomes permitted food only by killing in this manner.”

Proof: Sifre Deuteronomy, pisqa 75 (p. 140):

*Then thou shalt kill:* as the consecrated offerings must be killed in a prescribed manner, so animals [not sacrificed but] killed for food must be killed in that manner. *As I have commanded thee:* this teaches us that Moses was [specifically] commanded (*nitstaveh*) concerning [the cutting of] the gullet and the windpipe, and concerning the [cutting] of the greater part [of either gullet or windpipe] in birds, and of the greater part of both in cattle.

M. clearly takes the term commanded (*nitstaveh*, a verbal form nitpael, related to the noun *mitsvah*) in a technical sense, to denote a *mitsvat ʿaseh*.

P34. That, when the Ark is carried, it should be carried on the shoulder, as it is said, “They shall bear it upon their shoulder” (Numbers 7:9).

While the indefiniteness of the SE parallels the eventual tenor and formulation of the Halakhot (*Hilkhot Kele ha-Miqdash* 2:12), the ShM is unequivocal when it comes to identifying who is being commanded: “that
the priests are to bear the Ark upon their shoulders” (my emphasis). This may be an indication that the SE followed the ShM chronologically. In fact, the central theme in the ShM is that this duty devolved on the priests for all times.

Proof: The proof-text for this claim is the following verse: But unto the sons of Kehat he gave none [of the wagons and animals], because the service of holy things belonged unto them: they bore them upon their shoulders (Numbers 7:9). Note, however, that there is little or no evidence here of a direct or mediated command to the sons of Kehat to carry the ark on their shoulders. We are simply told that they did so, with no reason given. To prove that bearing the ark on their shoulders was a divine command, M. adduces two passages drawn from the Writings (Ketuvim). The first refers to David’s commanding the priests and the Levites to bring up the ark for the second time. The book of Chronicles then records: And the children of the Levites [meaning here the Priests] bore the ark of God on their shoulders with the bars thereon as Moses commanded according to the word of the Lord (1 Chr. 15:15).

The context of the second passage is the division of the priests into twenty-four groups. The verse states, These were the orderings of them in their service, to come into the house of the Lord according to the ordinance given unto them by the hand of Aaron, their father, as the Lord, the God of

24 See note 30 below, and notes 42 and 51 in Chapter 9.

25 The priests here are descendants of Kehat.
The Sages explain this verse as implying that it is the task of the priests to perform the service of bearing the ark upon their shoulders, and that this is what the Lord, the God of Israel commanded. The Sifre says: According to the ordinance unto them...as the Lord, the God of Israel, had commanded him: where did He so command him? [In the verse.] But unto the sons of Kohat he gave none, because the service of holy things belonged unto them: they bore them upon their shoulders [Numbers 7:9]. (Sifre Numbers, pisqa 46 (pp. 51-52)

The last line of the Sifre Numbers, pisqa 45 (p. 52), which was not quoted by M., adds: “Thus the Levites did not innovate at all, everything was commanded by Moses and Moses was commanded by the Almighty [God].” This bit of inter-textual citation, expanded on by the Sifre, is M.’s putative evidence that Priests were commanded to carry the Ark on their shoulders, when and if it had to be moved.

5.1.2.c De-oraita, min ha-Torah

These are simply a pair of terms that indicate that the stipulations under discussion are of a scriptural, as opposed to a rabbinic, nature. Once again, no individuation is implied and therefore no proof is offered that these obligations are mitsvot ʿaseh.

P175. To give the decision according to the majority, when there is a difference of opinion among the members of the Sanhedrin as to matters of law, as it is said, “…to incline after many” (Exodus 23:2).
M. extends this principle beyond its obvious judicial context, as he makes clear in the ShM: “We are commanded to follow the majority if there is a difference of opinion among the Sages regarding any of the laws of the Torah” (my emphasis).

Proof: M. adduces a Gemara (bHullin 11a) that offers the words to incline after many as proof that “the rule that the majority opinion is to be accepted is scriptural (de-oraita).” M. strains to present here a major principle in jurisprudence. Some commentators have pointed out that a number of talmudic dicta assert that one thing or another is “scriptural” (de-oraita) and yet this designation does not make them positive commandments.26 At any rate, the issue here is not whether the principle is scriptural but whether such a principle deserves to be individuated. For example, under the commandment In righteousness shalt thou judge thy neighbor, interpreted in the ShM as treating litigants equally before the law (P177), M. could have subsumed a number of other procedural “details” too, such as abiding by a majority decision and inquiring into the testimony of witnesses (P179).27 Alternatively, M. could have renamed P176 “the law concerning the Judiciary” (din bet din) instead of the more specific “appointing judges and officers of the Court,” based on the verse Judges and officers shalt thou make thee in all thy gates ...and they shall judge the

26 For example, “majority [of something] is considered like the whole, a scriptural rule (rubbo ke-kulo de-oraita),” or “intervening objects [invalidate immersion], a scriptural rule (hatsitsin de-oraita).” See Duran, Zohar ha-Raqia, siman 52, p. 60. For Perla’s rebuttal, see Perla, Sefer ha-Mitsvot le-RaSaG, vol.1, 649-50.

27 This is suggested by Duran, Zohar ha-Raqia, siman 52, p. 60.
people with righteous judgment (Deuteronomy 16:18), and then included all the procedural rules under this law.\textsuperscript{28}

Although there is no quarrel about the transcendent importance of this legal principle, M.’s individuation is not compelling. What made him do it? In Excursus 3, I offer a suggestion.

P201. That the hired labourer shall be permitted to eat [while he is on hire, \textsuperscript{29}] as it is said, “When thou comest into thy neighbour’s vineyard [then thou mayest eat grapes thy fill ...]; when thou comest into the standing corn of thy neighbour [then thou mayest pluck the ears with thine hand ... ]” (Deuteronomy 23:25.26).

Proof: M. adduces mBava Metsi’a 7:2 to demonstrate that the right granted to a worker harvesting a field or vineyard to eat from the produce among which he is working is scriptural. The mishnah states: “These may eat [of the fruits among which they labor] by virtue of what is enjoined in the Law (\textit{min ha-Torah}): he that labors on what is still growing after the work is finished....”.

\textsuperscript{28} Something of this sort may have been intended by Qayyara, who lists “the section of Sanhedrin” (parshah \#1). For an example of a commandment that contains multiple injunctions that are only vaguely related to each other, see N281. Here one might argue that at the very least all these details are related to procedural matters.

\textsuperscript{29} I have followed a more literal translation of the Hebrew text. Hyamson has instead “of the produce which he is reaping.”
Note that while the commandment claim confers a right to the worker it does not impose an obligation on the owner. For this reason, none of M.’s predecessors saw fit to include this commandment in the enumeration of positive commandments. As discussed in chapter 3, M.’s broad typology of commandments can accommodate rights in the same manner as it accommodates procedures and other types of non-obligatory commandments.

5.1.2.d Exegesis in the Manner of Asmakhtot

M. supports the following two claims with verses that can hardly serve as an exegetical basis for his authority. These relatively far-fetched supports, often used to underpin rabbinic enactments, are called asmakhtot. It is important to note for now that M.’s reliance on what appear to be asmakhtot is incongruent with M.’s method of identifying and deriving scriptural laws, as we shall discuss in later chapters.

P17. That every person shall write a scroll of the Torah for himself, as it is said, “Write ye for yourselves this song” (Deuteronomy 31: 19).

In all the versions of the ShM this commandment appears as P18. The SE arrangement, listing first the commandment directed to the individual and then the commandment directed to the king (“besides the one which every individual should write”) is clearly the more logical one. On the other hand, the ShM, being essentially an argumentative work, listed the king’s
obligation first because this obligation may have influenced M.’s idea with respect to the existence of a general obligation for individuals.\footnote{This may be further evidence that the composition of the SE follows the ShM chronologically, a matter to which I hope to devote some time in the future. See above n. 24. Nachum L. Rabinovitch, Mishnah Torah Hu ha-Yad ha-Hazaqah le-Rabbenu Moshe b. Maimon: Haqdamah u-Minyan ha-Mitsvot im Perush Yad Peshuta, ed. and annotated Nachum L. Rabinovitch (Jerusalem: Hotsaat Maaliyot, 1997), p.112, makes a similar observation to explain the reversed presentation in the ShM, arguing that M. proved the general obligation for every individual to write a scroll of law from the sugyah in bSanhedrin 21b, which, in turn, is based on the pericope of the king and his own obligation to write a scroll of law. Therefore, in his argumentative work, M. had to address the obligation of the king before he could address the obligation of the individual. I make a somewhat similar argument, but, critically, I argue that in the final analysis the only basis for the general commandment is to be found in the king’s pericope.}

Proof: M. offers two demonstrations. The first is an inference drawn from the scriptural proof-text *Write ye for yourselves this song*, which refers to the song of *ha-Azinu* (Deuteronomy 32:1-43). “Since,” he argues, “it is not permissible to write [a Scroll of the Law containing only] certain sections of it, it follows of necessity that the words *this song* mean the whole of the Torah which includes *this song.*” This is probably based on Rabbah’s dictum, although M. provides the rationale. See immediately below.

The second demonstration comes from a *Gemara:*

Rabbah said: Even if one’s parents have left him a Scroll of the Law, he is nevertheless commanded to write one of his own, as it is said, *Now therefore write ye this song for you.* Abaye objected: The king is commanded to write a Scroll of the Law for himself, for he should not seek credit for one written by others, and [this surely implies that] it is only a king [who is enjoined to write a Scroll even if his parents have left him one] and not a commoner? To this the reply was: The rule is necessary only to oblige the king to write
two scrolls, as we have been taught: *He [the king] shall write him a copy of this law* means that he is to write for himself two copies. (*bSanhedrin* 21b)

From this passage M. infers that “the difference between the king and a commoner is that every man must write one Scroll of the Law, but the king must write two.”

M.’s proofs present a number of exegetical difficulties. Suffice it to say here that M.’s two proofs appear to be no more than *asmakhtot*, as the exegeses are inferential, forced and far removed from the plain sense of the text. Even Rabbah’s use of the word *mitsvah* may denote no more than a rabbinic enactment, as Perla shows. See the Appendix for a discussion of this issue and see chapter 8 for the way M. dealt with this commandment in the *Halakhot*.

While M.’s proofs are ambiguous and unconvincing, his motivation for advancing this commandment is not hard to comprehend. The commandment that every man write a scroll of Law teaches reverence for the law or, as M. would say with respect to all the commandments enumerated in *Sefer Ahavah* (*Book of Love*), this commandment brings about “useful opinions” — in this case, the very words of the Law.\(^\text{31}\)

P36. That the priests shall serve in the Sanctuary, in divisions, but on festivals, they all serve together, as it is said, “And if a Levite come ... (then he shall minister in the name of the Lord)…” (*Deuteronomy* 18:6-8).

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\(^{31}\) *GP* III:44. See also Introduction to *Sefer ha-Madd’a*, in the section describing the forthcoming treatises, though here M. does not mention this particular commandment.
Proof: M. adduces in the ShM parts of a long passage containing three verses:

*And if a Levite come [from any of thy gates out of all Israel, where he sojourneth,] and come with all the desire of his soul [unto the place where the Lord shall choose]; then he shall minister in the name of the Lord his God, as all his brethren the Levites do, who stand there before the Lord. They shall have like portions to eat, beside that which cometh of the sale of his patrimony.* (Deuteronomy 18:6-8)

The verse is expounded by Sifre Deuteronomy, pisqa 168 (p. 216/217), which M. cites:

*And come with all the desire of his soul*: one might interpret this verse to mean that he might come at any time to participate in the service of the sanctuary; Scripture therefore says *from any of thy gates*; that is, when all Israel is assembled in one gate [i.e. in one city — Jerusalem] during the three festivals.

M. concludes from this interpretation that the incoming Levites had a right to participate on an equal footing with their Jerusalemite brethren at the time of the festivals.

The second part of this Sifre is critical to M.’s other argument, namely that the *mishmarot* were instituted by Scripture:

One might think that all the divisions shared equally in the festival offerings, even in this which were not occasioned by the festivals themselves [namely, the daily burnt offerings brought in the morning and at dusk every day of the year]; Scripture therefore says *beside that which cometh of the sale of his patrimony*. What is meant by *sale of patrimony*? [One priestly elder says to another,] “Do thou [minister] in thy week, and I [will minister] in my week.”
From this M. derives that “they agreed on the rotation of the mishmarot; [the priests gave] their consent to the whole arrangement of the service into mishmarot, a new mishmar ministering in turn every week.”

Nahmanides vigorously contests M.’s last claim. He argues that, in their desire to uphold this scriptural passage after the mishmarot were instituted, the Rabbis found an exegetical way to authorize the praxis. Thus, claims Nahmanides, the midrash is a rabbinic asmakhta and not a full-fledged exegesis. The essence of his objections is that the divisions (mishmarot) were instituted by the prophets (tiqqun ha-neviim) and were not scripturally ordained. As Nahmanides already pointed out, M. changed his opinion in the Halakhot, where he ceases to maintain a scriptural case for the institution of mishmarot. See discussion in the Appendix.

M. goes to great lengths to find a scriptural basis for the priestly institution of mishmarot. At the same time he insists on the claim’s individuation by turning it into a positive commandment, yet adduces no authoritative interpretation of the scriptural data for it. M.’s agenda is suggested in the broader formulation of the commandment given in the ShM:

We are commanded that the priests are to minister in divisions (mishmarot), every division ministering one week, and that all divisions are not to minister at

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32 To determine when a midrash is a genuine interpretation of Scripture and when it is merely an asmakhta is critical for the construction of commandment claims. Differences of opinion between M. and Nahmanides in this respect lie at the bottom of some of their many disagreements regarding what constitutes a scriptural commandment. No adequate criteria have been proposed. We have noted a number of such differing assessments of the nature of midrash; see footnote 8 in section 7.1.

33 Hasagot, ad loc.
the same time,\textsuperscript{34} except during the festivals when all divisions are to share equally in the service and any [priest] who is present may sacrifice.

As we saw in P34, M. wishes to imprint on the Temple service a sense of decorum and orderliness in order to strengthen the “greatness of the sanctuary and the awe felt for it.”

5.1.2.e Plain Scriptural Evidence

In the following cases we find M. innovating strictly on the basis of a scriptural passage. At times, he adduces a rabbinic dictum but this is merely to aid in the interpretation of the verse.

P30. To remove (\textit{le-harim}, lit., lift off)\textsuperscript{35} the ashes from the altar, as it is said, “… and he shall take up the ashes” (Leviticus 6:3).

\textit{b}Yoma 24a discusses the symbolic act of lifting off a fistful of ashes, carried out with a specially designed tool. The total removal of ashes from the altar follows this symbolic taking up. The same root \textit{r.u.m} (“lift,” “raise”) is used in the headings to \textit{Hilkhot Temidin u-Musafin} and in the

\textsuperscript{34} Literally, “and that everyone’s hand should not busy itself at the same time” (\textit{ve-lo tiheye yad ha-kol mitasseqet yahad}), an idiomatic expression that conveys a sense of chaos and disorder.

\textsuperscript{35} Hyamson’s is correctly interpretive, and that is how we proceed to discuss it below.
Halakhot (2:10). Less precisely perhaps in the ShM it is stated “to remove the ashes daily from the altar.”  

Proof: M. adduces no rabbinic warrant in support of this individuation. The removal of ashes from the altar is neither an integral part of the sacrificial ritual nor a provision of it, it being designated a “removal [from the altar] service” (‘avodat siluq). The “removal service” stands a notch below an “offering [unto the altar] service” (‘avodat matanah) in importance, a distinction that carries legal consequences (bYoma 23b, Hilkhot Biat ha-Miqdash 9:8). The removal of the ashes from the altar, then, is an independent cultic service. In view of this, M.’s individuation is not wholly unreasonable, though the removal of the ashes could have been subsumed under the general heading of ma´arakhah (lit. layout, array), which would have included feeding a fire on the altar, keeping a fire perpetual and the removal of the ashes (Leviticus 6:1-6), as listed by Qayyara (section #9, found only in the Oxford ms.).

There is no gainsaying the ‘value’ of this commandment, with its emphasis on decorum and cleanliness when in the service of the Lord. Note that in the Halakhot, not normally given to explanations of a non-halakhic nature, M. justifies the change into special clothes alluded to above, reasoning that “it is not proper [derakh erets] that he [the priest] should pour wine for his master in the same clothes in which he cooked his food.”

36 This raises some interesting questions. See Perla, Sefer ha-Mitsvot le-RaSaG, vol. 1, p. 757.

37 Hilkhot Temidin u-Musafin 2:10, quoting a baraita attributed to R. Ishmael, bYoma 23b.
P86. To redeem cattle, set apart for sacrifices, that contracted disqualifying blemishes, after which they may be eaten by anyone, as it is said, “Nevertheless thou mayest kill (and eat flesh in all thy gates) whatever thy soul lusteth after” (Deuteronomy 12:15). By tradition it is learned that this verse refers only to sanctified things that have become unfit, and that they should be redeemed.

Proof: The tradition to which M. is referring in the above formulation can be found in the Sifre Deuteronomy, pisqa 71 (p. 134). M. is alone among all the enumerators to find here an obligation to redeem a blemished animal set aside for sacrifice. Others maintain that redemption is voluntary. M.’s selective use of sources, seeing here an obligation, is worth noting.  

P179. To examine witnesses thoroughly, as it is said, “Then shalt thou enquire and make search and ask intelligently....” (Deuteronomy 13:15).

The ShM adds, “We must exercise the most scrupulous care, so as not to give an ill-considered and hasty decision and so harm the innocent.” M.’s

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38 See di-Boton, Abraham, Lehem Mishneh (Printed in standard editions of Mishneh Torah), Hilkhot Isure Mizbeah 1:10. A review of talmudic sources leads Perla (Sefer ha-Mitsvot le-RaSaG, vol. 1, 758-60) to conclude that the redemption of blemished animals is a voluntary (reshut) act. Contrarily, Horowitz, Sefer ha-Mitsvot im Perush Yad ha-Levi, ad loc., finds enough evidence to turn this verse into an unconditional obligation. For M.’s apparent prioritization of midreshe halakhah over Talmud, see note 18, above, and see Sefer ha-Mitsvot, ed. Heller, N72, note 19.
gratuitous comment highlights his continued concern with procedural matters, a point made earlier in connection with our analysis of P175.\(^{39}\)

Proof: M. offers here no rabbinic warrant to prove that to examine witnesses is a positive commandment.\(^{40}\) There are no doubts about the meaning of the scriptural precept; the command is explicit and unambiguous. What is problematic is the need to individuate this law rather than to subsume it under a more general commandment, such as one that would cover the duties and prerogatives of a court. See my earlier comments at P175 and Excursus 3.

P187. To exterminate the seven Canaanite nations from the land of Israel, as it is said, “But thou shalt utterly destroy them ....” (Deuteronomy 20: 17).

Proof: M. adduces no direct rabbinic warrant in support of his claim, which he refers to as “an obligatory war” (\textit{milhemet mitsvah}),\(^{41}\) but spends a

\(^{39}\) The similarity of these concerns makes it difficult to understand why M. separated these two commandments in the \textit{MT} by placing them in two separate treatises: P179 in \textit{Hilkhot 'Edut} and N290 (“not to render a decision on one’s personal opinion, but only on the evidence of two witnesses who saw what actually occurred”) in \textit{Hilkhot Sanhedrin}.

\(^{40}\) Most puzzling, M. fails to adduce an extremely supportive talmudic passage, namely \textit{bSanhedrin} 32a: “R. Hanina said: By biblical law [\textit{devar torah}], both monetary and capital cases require inquiry and investigation, as it is written: ‘One manner of judgment ye shall have.’” With regard to the enumerators, Qayyara omits this entry though Saadia lists it. Gabirol’s poetic pronouncement is too vague for allowing certain identification, though Duran, \textit{Zohar ha-Raqia, siman} 53, p. 61 believes that Gabirol has our claim in mind; Perla, \textit{Sefer ha-Mitsvot le-RaSaG}, volume I, p.655, disputes this contention.

\(^{41}\) According to \textit{bSotah} 44b, the Sages and R. Judah agree that the conquest wars conducted against the seven nations, the war against the Amalekites as well as all
great deal of effort to validate it in the face of the obvious problem: these nations no longer exist. M. states at the outset that the opinion that this commandment is not binding for all time (which would disqualify it from being considered a positive commandment as per Rule 3) “will be entertained only by one who has not grasped the distinction between commandments that are binding for all time and those that are not.” After acknowledging that “no trace of them [the nations] remains,” M. notes that “it does not follow that the commandment to exterminate them is not binding for all time, just as we cannot say that the war against ´Amaleq is not binding for all time, even after they have been consumed and destroyed.” (Note: The proof from the analogy to ´Amaleq (P188) is circular, for one may well question the validity of that claim - they too have perished and disappeared.) The heart of the argument, however, is that “no special condition of time and place is attached to this commandment, as is the case with those commandments specially designed for the desert or for Egypt.”

defensive wars, are to be designated as obligatory wars, though they differ terminologically: the Sages term these obligatory wars milhemet mitsvah while R. Judah calls them milhemet hobah. M.’s follows the opinion of the Sages and calls these wars milhemet mitsvah. Both sides also agree that wars of expansion are to be categorized as voluntary wars, milhemet reshut. Where they disagree is in the way one is to categorize wars conducted to weaken a potential enemy. The sages insist that these wars should also be categorized as milhemet reshut since one is not obligated to conduct them, while R. Judah disagrees and calls them milhemet mitsvah. This third category carries certain legal consequences, which need not concern us at this time. According to R. Judah, while preventive wars are not strictly speaking obligatory their conduct is specifically legislated in Deuteronomy 20:1-9, hence its designation milhemet mitsvah, a commanded war. Nevertheless, as we saw above, its true meaning is that of an advisable war. From the fact that tannaim disagree about these categories it is reasonable to infer that these categories represent laws and commandments rather than descriptions of historical events that only hold an anticuarian interest. Still, it should be noted that the concept of milhemet mitsvah could have been retained in the halakhah by applying it to “a war to deliver Israel from the enemy attacking it,” as M. does in Hilkhot Melakhim 5:1, but without having to mention ´Amaleq and the seven nations.
This finely drawn distinction is also difficult to countenance since, at least implicitly, the command to exterminate the seven Canaanite nations appears to apply to a historically circumscribed period, the conquest and settlement of the Land of Israel.\textsuperscript{42} Even granting that no “condition of time and place” is attached to this commandment, M. would still have to deal with a second objection, this one raised by Daniel ha-Bavli, to the effect that a precept can no longer be incumbent on subsequent generations once the objective of the precept has been realized.\textsuperscript{43}

Regardless of the merits of the case, there can be little disagreement about the negligible practical value of such a commandment, seeing that the Seven Nations had already disappeared and had lost their national identity. Could M. have been led to posit this claim and to defend it as vigorously as he did for didactic considerations? The opening line of his commentary in the ShM betrays a unique concern. M. states that these nations had to be exterminated “because they constituted the root and very foundation of idolatry,” and further that “the object was to safeguard us from imitating their apostasy.” M. sees Scripture enjoining Israel to battle idolatry and heresy, not a specific people or ethnic group. M. returns to this theme time and again.\textsuperscript{44} It would appear then that the abiding value of this

\textsuperscript{42} This is not only the plain sense of the text but also a position defended halakhically by Tosafot. See b’Avodah Zarah 20a, s.v. de-amar qera.

\textsuperscript{43} Daniel ha-Bavli, She-elah #2, in Abraham Maimonides, “Teshuvot Rabbenu Abraham ben ha-RaMBaM,” page 543. He gives the examples of \textit{thou shalt set thee up great stones …and thou shalt write upon them all the words of this law} (Deuteronomy 27:2-3) and \textit{thou shalt set the blessing upon mount Gerizim and the curse upon mount Eval} (Deuteronomy 11:29).

\textsuperscript{44} Compare for example N48, which claims that one must not make a covenant with the seven nations. In the ShM, M. says: “We are forbidden to make a covenant with the
commandment lies solely in its theological message: idolatry must be destroyed and no trace left of it lest it causes Israelites to apostatize.\textsuperscript{45} It is worth noting that the \textit{MT}, being a practical code of law, sees no need to justify the commandment. For its purpose it is sufficient that an ever-present heretics and leave them undisturbed in their heresy.” See also N51, N52, N58, where the emphasis is on heresy rather than ethnicity.

\textsuperscript{45} Stern, Josef, "Maimonides on ´Amaleq, Self-Corrective Mechanisms and the War against Idolatry," Judaism and Modernity: The Religious Philosophy of David Hartman, ed. Jonathan W. Malino (Burlington: Ashgate Publishing Company, 2004), comes to a similar conclusion with respect to ´Amaleq and the seven nations, but, in my opinion, commits an error in the reading of an important passage in the \textit{GP} which, in turn, leads him to make an unjustified claim with regard to M.’s opinion about the Torah. On the basis of Guide III, 50:614, Stern claims that M. read Gen 36:12 as neutralizing, i.e., introducing a corrective, to the obligation to exterminate ´Amaleq (Deuteronomy 25:17) because M. demonstrated that the descendants of Esau were “fully assimilated” with the children of Seir and that, consequently, it was “impossible ‘today’ to identify the real, authentic, pure ´Amaleqites as opposed to those who are ´Amaleqites in name only (364-365).” Stern conjectures that M. was attempting to restrain individuals living in his time from acting against Christians whom they identified as descendants of ´Amaleq (369). He draws this conclusion from the following passage of the \textit{GP}:

Those whom you see today in Seir and the kingdom of ´Amaleq are not all of them children of ´Amaleq, but some of them are descendants of this or that individual and are only called after ´Amaleq because the latter’s mother belonged to them. If indeed M. thought that this was the message of Gen 36, one fails to understand how it was that the Israelites in the wilderness identified ´Amaleq and how Saul did the same a few hundred years later. In fact, there is no hint in Scripture of doubt in the mind of the Israelites that they were facing ´Amaleq. Stern acknowledges this problem when he says that “it makes no historical or chronological sense [368].” Yet Stern dismisses this chronological and historical concern because ostensibly the Torah is in M.’s opinion a “work of guidance to wisdom. It is wisdom relevant to his own contemporary situation that primarily concerns M. [\textit{ibid.}].” This conclusion is speculative and not warranted if we read M.’s words in their proper context. He says, “Consequently, Scripture explained their tribes [i.e., the tribes of Esau] and said that those whom you see today in Seir….” M. makes it clear that Scripture was actually speaking to its own ancient contemporaries and not to twelfth century Jewry. On M.’s account, the Torah puts the Israelites on notice to be extremely careful when identifying ´Amaleq because many of the tribes of Esau and Seir also identified with them. Nowhere does M. say that it is “impossible” to identify Amalekites or that they have been “fully assimilated.” The fact is that the Israelites identified and engaged the descendants of ´Amaleq a number of times, as in the wilderness and at the time of Saul.
possibility exists for fulfilling this commandment. The true value of the commandment is revealed only in the teleologically driven ShM., where it becomes clear that the commandment is to destroy “the root and very foundation of idolatry.” To M.’s way of thinking, this commandment represented indeed an eternal obligation.

P192. To prepare a place in the camp, as it is said, “Thou shalt have a hand [yad] without the camp” (Deuteronomy 23: 13).

The ShM provides more detail: “We are commanded that when our troops go to war we are to set aside a place outside the camp to which they are to go forth [to do their need], that they do it not indiscriminately in all places or among the tents, as other nations do.”

Proof: M. offers no proof to support his individuation.

M. follows Sifre Deuteronomy, pisqa 257 (p. 281), in translating “hand” (yad) as place (maqom). The adjacent verse 14 further directs combatants, And thou shalt have a paddle among thy weapons; and it shall be when thou sittest down abroad, thou shalt dig herewith, and shalt turn back and cover that which cometh from thee. The command to carry a paddle becomes a separate commandment, specifically P193. Logically, these two requirements could have been subsumed under the laws of conducting war, either P187 (obligatory war, milhemet mitsvah) or P190

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46 Camp, here, as in military camp. Hyamson translates interpretively: to have a place outside the camp for sanitary purposes.

47 Qayyara reckons the requirement to carry a paddle (Pq154) but, for some reason, omits the obligation to prepare a “place”. For a summary of possible explanations, see Hildesheimer, Naftali Tsvi, Haqdamat Sefer Halakhot Gedolot (Jerusalem: 1986), n. 388.
(optional war, milhemet reshut). Problematically as well, these commands, i.e. P192 and P193 — essentially regulations — could have been subsumed under one commandment given their common sanitary objective. In GP III:41:566, M. appears to take the view that these two regulations form a single commandment:

This book also includes the commandment to prepare a [Pines adds “secluded”, but he misleads rather than clarifies] place and a paddle. For one of the purposes of the Law consists, as I have made known to you, in cleanliness and avoidance of excrements and of dirt and in man’s [sic] not being like the beasts. And this commandment also fortifies, by means of the actions it enjoins, the certainty of the combatants that the Indwelling has descended among them — as is explained in the reason given for it: For the Lord thy God walketh in the midst of thy camp (ibid., 15) (my emphasis).

For M., cleanliness is a fundamental idea, a way to affirm a human being’s unique status in creation and special relation to the Divine. I would suggest that it was precisely this idea and his wish to emphasize it that

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48 The last objection can be attenuated with respect to the ShM, where there are in effect two such laws, one governing milhemet reshut and one milhemet mitsvah, following the exception given in rule 12, that details of a charge can be counted if they embrace more than one specific charge. For example, M. enumerates separately the admonition against offering an animal as sacrifice if it has not reached the age of acceptability and the obligation that we are to offer salt with every offering. Since these two injunctions apply to both P187 and P190, their independent enumeration is justifiable. This is not the case, however, in the Halakhot, where milhemet reshut and milhemet mitsvah are subsumed under one law, the only difference residing in the special case where the enemy does not surrender. See Hilkhot Melakhim 6:1-4. Thus, P192 and P193 constitute particulars of the general conduct of war in the Halakhot and ought not to be individuated. Heller, P191, note 10, proposes a far-fetched and unattested emendation to chapter 6 of Hilkhot Melakhim in order to remove a different difficulty; the result of this emendation, nevertheless, is to confirm that P192 and P193 apply equally to the two types of war.
primed M. to individuate these two regulations rather than to have them subsumed under the rules and regulations of warfare.

5.1.2.f Exegetical Transfers and Extensions

The following commandment claims cannot properly be grouped under one single hermeneutic. What is common to them is that M. appropriates a rabbinic interpretation and infuses it with new meaning, either by transferring it to a new domain or by extending it beyond its original scope.

P37. That the priests defile themselves for their deceased relatives, and mourn for them like other Israelites, who are commanded to mourn for their relatives, as it is said, “… for her, he shall defile himself” (Leviticus 21: 3).

This commandment claim contains two parts, to wit, that the priests must defile themselves for relatives and that they, as well as all Israelites, must mourn for their dead. The second part of the claim is supposed to be inferred from the first but the inference is difficult to sustain. What leads M. to this exegetical stress is that he has found a talmudic source that assumes that mourning is a scripturally mandated commandment (at least for the first day) in spite of the lack of an explicit scriptural command to that effect.

Proof: M. finds evidence that mourning is a scriptural obligation because the talmudic Sages held that mourning is not to be observed during a festival. The talmudic passage (bMoed Qatan 14b) reads as follows: “If the mourning begins before the Festival, the positive precept affecting all Israel [to rejoice in the Festival] overrides that affecting only the individual
commandment enjoining one [to mourn over his deceased relative].” M. concludes from the above that “it is clear that the obligation of mourning is scriptural, but is scripturally obligatory only on the first day, while the remaining six days [of mourning are obligatory only by] rabbinic ordinance.” The conclusion that the Sages consider mourning a scriptural obligation follows the opinion of many geonim and, in particular, M.’s principal halakhic authority, Isaac Alfasi.\(^{49}\)

In his search for scriptural evidence for the mourning commandment, the \(\text{ShM}\) adduces the following \textit{midrash}: “\textit{For her he shall defile himself}, is a positive commandment. If he [a priest] does not wish to defile himself he is made to do so against his will….\)” (Sifra, \textit{Emor parshah} 1:12, p.94a) The Sifra’s point is clear enough: priests must defile themselves for their dead relatives — that is, involve themselves with the burial of the dead person, even to the extent of coming into contact with the corpse — in spite of the general prohibition that forbids them to defile themselves for the dead. M. goes on to argue that “this itself is the commandment of mourning, that is to say that every Israeli person [\textit{Ar. shkhts}, but ‘male’ in \textit{MnT}] is obligated to mourn his relatives, that is, the five\(^{50}\) dead [relatives] for whom there is a duty (\textit{mete mitsvah}).” Using an \textit{a fortiori} inference, M. explains that

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\text{it is to confirm this obligation that He has expressly declared in the case of the priest, who is [ordinarily] forbidden to suffer defilement, that in respect of the five relatives] he must defile himself at}
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\(^{49}\) Alfasi’s ruling can be found in his \textit{Hilkhot ha-RIF, bBerakhot} 10a, and \textit{bMoed Qatan} 11b (Vilna edition pagination).

\(^{50}\) Some versions have six; see \textit{Tsiyunim, Sefer ha-Mitsvot, ad loc.} and see \textit{Sefer ha-Mitsvot, ed. Kafih, ad loc.} note 26.
any rate like all other Israelites, so that the law of mourning may not be lightly esteemed.

Towards the end of his comments, M. makes this connection again, noting that “even a priest is bound to observe mourning on the first day, and to defile himself for his [deceased] relatives. Understand this.” Clearly, M. is aware that the demonstration is forced and wants the reader to make the necessary leap. Karo jumps at M.’s suggestion:

“This proof is puzzling, for defilement is one matter and mourning another. One cannot draw an implication that a priest must mourn his relatives from the fact that He commanded that [the priest] defile himself for his relatives.” (Kesef Mishneh, Hilkhot Avel, 1:1.)

In short, M. struggles to find a basis for this commandment in Scripture. His approach is highly original but, ultimately, unsatisfying. While the Oral Law preserves a tradition to the effect that mourning constitutes a positive commandment (at least for the first day), Scripture is strangely silent. This stress forces M. to make a second and again largely unsuccessful attempt in the MT before abandoning the connection altogether in the GP (3:47). See Appendix.

In my opinion, there is no special politico-philosophical or theological drive behind this claim. Instead, I believe that M.’s forced attempts to find a basis in Scripture for this practice or precept was primed exclusively by the extraordinary respect that he held for the Oral tradition. This respectful attitude was foreshadowed in Rule 2, where he makes a rare concession and states that “if the Sages themselves clearly affirm that ‘it is of the essence of Torah’ or that ‘it is of scriptural authority,’ it is proper to count that

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particular law [among the commandments]” even though the law is not scripturally explicit.

P112. That the leper shall be universally recognized as such by the prescribed marks: “His garments shall be rent and the hair of his head dishevelled and he shall cover his upper lip and shall cry ‘unclean, unclean’” (Leviticus 13:45). So too, all other unclean persons should declare themselves as such.

Proof: Sifra, Tazri’a perq 12:5 (p.67d) homes in on the redundant prepositional phrase in The leper in whom the plague is (Leviticus 13:45) and concludes that it is Scripture’s intention to require absolutely anyone in whom the plague is [asher bo ha-neg’a] to rend his clothes and let his hair loose (i.e let it grow long). This, the midrash asserts, includes the High Priest, despite the well known prohibition against him doing so under normal circumstances. The waiver from the prohibition for a High Priest to look unkempt catches M.’s attention. He says:

It is an accepted principle among us that wherever you find a positive commandment and a negative commandment [applying at the same time] if you can fulfill both, well and good; but if not, the positive commandment overrides the negative commandment (yavo ‘aseh ve-yidhe et lo ta’a seh).

Therefore, M. deduces that since we find it laid down [by the Sages] that if a High Priest is leprous he must let his hair go loose and rend his clothes [the negative commandment notwithstanding], it follows that this is a positive
commandment [for every leper without exception to rend his clothes, etc.].

M.’s inference is not entirely convincing. The *midrash*, as we saw, arrives at the innovative conclusion that the law applies even to a High Priest by positing that the redundant prepositional phrase *in whom the plague is* must have come to emphasize the universality of the requirement and not by applying the well known talmudic principle of *yavo ʾaseh ve-yidhe et lo taʿaseh*, as M. presupposes. Yet, it is only the latter rationale that allows M. to claim that “the leper is to be made distinguishable” is a positive commandment. That is, the requirement that “the leper is to be made distinguishable” is perhaps not a positive commandment at all and the *midrash* is simply resorting to a special scriptural inference.  

To appreciate the extraordinary leap that M. makes to craft this claim, consider the following. The Sifra, which M. adduces as proof, does not speak to the essence of the commandment as seen by M., namely, that the leper is to be made distinguishable. It only tells us that even a High Priest must rend his clothes and let his hair go loose if he becomes a leper. In other words, the Sifra warrants that only the specified actions must be taken, not the collection of actions that make the leper distinguishable.  

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51 See Perla, *Sefer ha-Mitsvot le-RaSaG*, vol. I, P189, pp. 808-10. Horowitz, *Sefer ha-Mitsvot im Perush Yad ha-Levi*, p. 121, n. 5, acknowledges the problem but dismisses it by saying that the exegesis follows and is based on the knowledge that the hermeneutic principle is applicable in this situation. In other words, the *midrash* is integrative rather than creative. This misses the point: M. is intent on proving that these actions constitute a positive commandment, information that can only be conveyed if the *midrash* resorted to the self-sustaining principle of *yavo ʾaseh ve-yidhe et lo taʿaseh*.

52 Note that M. individuates the idea that a leper must make himself distinguishable despite the fact that it could have been subsumed under P101 (“that a leper is unclean and defiles”) – as a mere particular of the laws of the leper. In *Hilkhot Tumat Tsaraʿat* 10:7,
Our earlier discussion of Rule 11 touched upon this commandment (section 2.3). We noted that M. used this commandment to illustrate the idea that the related actions of a commandment ought to make them part of a single commandment claim. In this case, the various actions demanded of a leper constitute a single commandment. These are: *His clothes shall be rent, and the hair of his head shall go loose, and he shall cover his upper lip, and shall cry: Unclean, unclean* (Leviticus 13:45). The purpose of all these actions, avers M., is that “the leper is to be made recognizable so that we may keep away from him.” M. goes even further and states that “wherever it will be made clear to you that the desired goal [of a commandment] is not obtained by any one of its elements, it is also obvious that it is their totality that it is to be counted.” Such would be the case if and when the leper, for example, rends his clothes but does not perform the other three requirements. In such a case, the leper “has accomplished nothing; his being distinguishable is not achieved until he has done all [the things mentioned].” M.’s interpretation and his halakhic conclusion are novel and highly M. labels the requirement that a leper be secluded, derived from *he shall dwell apart; his dwelling shall be outside the camp* (Leviticus 13:46), a specific provision of the commandment (*din ha-metsora*) rather than an independent commandment. I assume, though it is by no means clear, that M. means a provision of P101 (so, too, de-Leon, "Megillat Esther," p. 291). Nahmanides, "Hasagot," in his addenda to the positive commandments, number 14 (p. 290), says that M. counted *he shall dwell apart; his dwelling shall be outside the camp* as an independent commandment. Duran, *Zohar ha-Raqia, siman* 80, p. 92 proposes to make P112 part of the independent commandment of *he shall dwell apart; his dwelling shall be outside the camp*. See the bibliography cited in note 469 of this edition and see also *siman* 45, p. 46 and the accompanying note. It is possible that both Nahmanides and Duran understood the leper’s obligation to remain secluded as a more general form of the obligation to keep people away from his person. For both of these jurists, therefore, the commandment was *he shall dwell apart; his dwelling shall be outside the camp*, whereas the requirements to rend clothes, keep the head covered, etc., constituted mere details of the commandment. In contrast, M. held that the leper’s obligation to display his impurity constituted the more general principle while the precept to live secluded was a detail.
original. We can find no support for this bit of teleological thinking in the specific rabbinic source adduced by M., or for that matter in any other source. These sources do no more than to uphold the obligation to carry out, independently, each of the actions prescribed in the verse.

In sum, M. views the individual actions teleologically, as he often does in the \textit{ShM}. To his way of thinking, Scripture is not after individual, unrelated actions that lack a cohesive purpose. Rather, Scripture is after an over-arching objective or \textit{telos}. The \textit{telos} sought by Scripture appears to be none other than the drawing of a clear demarcation between the clean and the unclean.

P149. To examine the marks in cattle, as it is said, “these are the beasts which ye may eat…” (Leviticus 11:2).

P150. To examine the marks in fowl, so as to distinguish between the unclean and the clean, as it is said, “Of all clean birds ye may eat” (Deuteronomy 14:11).

P151. To examine the marks in locusts, so as to distinguish the clean from the unclean, as it is said, “(yet these may ye eat of every flying, creeping thing that goeth upon all four) which have legs (above their feet)” (Leviticus 11:21). \(^{53}\)

P152. To examine the marks in fishes, as it is said, “These shall ye eat of all that are in the waters …” (Leviticus 11:9).

\(^{53}\) Note that this verse contains a description of the locusts, not the typical proof-text for the commandment. See discussion in text, below.
As in every instance where M. struggles with the formulation of a commandment claim and/or with the hermeneutic supporting it, traces of this struggle can be found in the linguistic variants of the extant versions of the ShM (and the MT). This commandment claim is just one of those instances. Though I am unable to determine with any degree of certainty the final form of this claim I am able to conclude that all the changes carry a similar message, that of promoting a rational act of separating the pure from the impure, what can be consumed from what cannot be. M. pursues this agenda by means of a forced, at times confusing but nonetheless creative exegetical exercise.

For the sake of simplicity, since there are no variant readings of the claims made in the SE as there are in the ShM, I assume that the words “to examine” in all four claims represent M.’s original intent. M. makes here a highly innovative claim but, as we shall soon see, the supporting argumentation in the ShM is confusing and unsatisfying.

54 The ShM versions appear to reflect at least two different literary or compositional stages. The MnT translation is similar to the language of the SE. It claims that the commandment mandates one to “examine” (livdoq) the tokens of the various animals and “[only] then would their consumption be permitted.” The Arabic versions (including Kafih’s) and the Shlomo ibn Ayub translation cited by Heller in the notes to his ShM edition read instead “that we were commanded about [Hebrew al; Arabic b; or “concerning”] the tokens” of the various animals. The former version would obligate one to examine the animals for tokens of fitness; the latter, simply to know the characteristics of animals that are fit for consumption. More formally, and in accordance with M.’s own suggestion at P95, the second version may be restated as follows: the commandment is that one must deal with the prescribed tokens in accordance with this law. The practical difference seems to be that, in the first case, one must examine every animal for fitness tokens before one can eat of its meat, while in the second case it is sufficient if one knows that the animal bears the prescribed tokens. The difference in formulation is also present in M.’s later compositions, as we shall see.
Proof: After explicitly prohibiting the consumption of living things that do not possess the requisite tokens (the subjects of the negative commandments 172 through 174), Scripture further enjoins the faithful:

*These are the living things which ye may eat among all the beasts that are on the earth. WHATSOEVER PARTETH, etc. among the beasts, that may ye eat* (Leviticus 11:2-3). As a proof-text for P149, M. cites the opening line of the verse, *these are the living things which ye may eat*, together with Sifra’s exposition on the closing statement of verse 3: “*That may ye eat: only that may be eaten, but not the unclean beast.*” (Sifra, *Shemini pereq* 3:1, p. 48b)

M. explains that what the *midrash* is doing is to infer a prohibition from the positive statement. As we have seen on a number of occasions, this type of prohibition, technically called ‘a negative commandment that is inferred from a do-statement’ (*lav ha-ba-mikhlal ´aseh*, also *issur ´aseh*) is formally treated as a positive commandment. M. shows himself satisfied with this “proof” (“thus it has been made clear that His words *that ye may eat* are a positive commandment”). Yet, other than the fact that the verse is formally designated as a positive commandment, we need to better grasp what precisely does the exegesis denote and what does M. actually demonstrate.

The *midrash* appears to say that Leviticus 11:2-3 adds a second prohibition against eating living things that do not possess the requisite tokens on top of the existing negatively formulated prohibitions, but it does so through the implications of an affirmative statement (*that ye may eat*). This at least is the way M.’s critics understood the *midrash*.55 Clearly, this

55 Interestingly, Daniel ha-Bavli would have M. derive the commandment to examine/know the tokens of living things roaming on land from *these are the living*
has nothing to do with the idea of examining or ascertaining the nature of the tokens.

To be sure, M.’s reading does appear to capture the sense of the midrash. Note that the proof-text that M. cites as the scriptural evidence for the claim “to examine the marks”, namely, verse 2, *These are the living things which ye may eat* differs substantially from the proof-text found at the end of verse 3, *that may ye eat*, and its midrashic exposition, which M. uses to prove that we are in the presence of a *lav ha-ba mikhlaš ʿaseh* and hence a formal ʿ*aseh*. It is verse 2 that describes the commandment claim and not, as the critics and ordinary readers have supposed, verse 3. To M., the deictic “these” (*zot*) conveys an act of choosing or ascertaining; hence the commandment to examine the tokens of fitness. In fact, this is precisely how Sifra, *Shemini parshah* 2:2 (p. 47d) understands this term. On the verse *These are the living things which ye may eat*, the midrash expounds: “It

**things which ye may eat among all the beasts that are on the earth** (Leviticus 11:2), in accordance with Sifra *Shemini parshah* 2:7 (p.48a); of birds from *these ye shall have in detestation* (Leviticus 11:13); and fish from *even these of them ye may eat* (Leviticus 11:22). Since the latter is said in relation to grasshoppers I suggest that he meant *these ye may eat of all that are in the waters* (Leviticus 11:9). In any event, M. uses none of these passages as his proof-texts. Crucially, Daniel ha-Bavli infers an additional, non-explicit prohibition against eating non-kosher living things (Abraham Maimonides, "Teshuvot Rabbenu Abraham ben ha-RaMBaM," *siman* 10, p. 277, s.v. *u-le-shitato*). Nahmanides, too, fails to see here anything other than a prohibition against eating non-kosher living things. This is evident from the fact that he rejects the idea that one fulfills a commandment (*naaseh mitsvah*) by eating a beast or a fish with the requisite tokens or that one transgresses by catching one of those animals and not eating it. Furthermore, since an explicit prohibition to eat non-kosher living things already exists, Nahmanides sees no reason to enumerate this additional injunction and finds Qayyara’s omission fully justified. Nahmanides, *Hasagot*, rule 6, p. 131, s.v. *ve-ani roeh*. As we saw, however, M. does not derive the existence of an inferred prohibition to eat non-kosher living things from this *midrash* but rather a commandment that one must examine the animal’s tokens before one may eat from its meat. Nahmanides could have questioned the relationship between the *midrash* and the presumed claim but he surely would not have misread the claim. Thus I am at a loss to understand his critique.
teaches us that Moses held the living thing, and on showing it to the Israelites, would say, ‘this you may eat, this you may not eat.’” The unusual presentation of the commandment, M.’s use of one proof-text to describe the claim and of another one to support the legal force of the claim, no doubt confused his critics, as we saw. And while Sifra’s exposition on verse 2 provides the color for M.’s innovative commandment, it does little to prove that we are in the presence of an obligation. M.’s hermeneutics remains problematic.

In his comment to P152, M. makes a subtle but dramatic and surprising exegetical about-face. First, he points out that the verse *These may ye eat of all that are in the waters* (Leviticus 11:9) implies that other fish are not to be eaten. M. adduces the well-known rule that a prohibition derived from a positive statement is deemed a positive commandment (*lav ha-ba-mikhlal ‘aseh, ‘aseh*) and concludes that “it is clear that His words *these may ye eat* are a positive commandment.” This demonstration follows the exegetical patterns presented in P149 and P150. After he is done with this particular demonstration, M. moves to offer a further explanation or clarification, applicable to the entire group just reviewed, which, on closer inspection, appears to be an entirely new explanation:

And what we meant to say that it is a positive commandment is what I said\(^{56}\) that we are commanded to decide on the basis of these tokens that one fish is permitted food, and another is not permitted, as

\(^{56}\) **Ve-ha-inyan be-amarnu she-hi mitsvat ‘aseh, mah she-hizkarti lekhah**, an idiomatic expression of re-statement, not captured adequately in Chavel’s “this means, as I have said, etc.” On M.’s intellectual dynamism and his ability to infuse a new rationale to an older and rejected position, see Henshke, D., "Maimonides as His Own Commentator [Hebrew]," Sefunot 23 (2003), pp. 117-163.
Scripture clearly says: *Ye shall separate between the clean beast and the unclean (and between the unclean fowl and the clean)* [Leviticus 20:25].

In this unexpected comment, M. shifts the weight of the exegetical proof away from the earlier proof-texts that essentially conveyed prohibitions to an entirely new verse. It is as if M. recognized that the inferred prohibitions do not, after all, denote what he claimed for them, namely, to command an examination of tokens with a view to deciding which living things are fit to eat and which are not. The new proof-text explicitly commands one to differentiate the clean living thing from the unclean. Still, M. is not done with the inferred prohibitions. Acutely aware that the newly adduced verse spells out but one activity and not four — thus implying only one commandment, not four — M. hangs on to the exegeses of the inferred prohibitions to support his individuating strategy:

The separation can be made only by means of the [prescribed] tokens, and therefore [the injunction to search for] the tokens in each of the four types [of living creatures] — animals tame and wild, birds, grasshoppers, and fish — is a separate and distinct commandment. We have already shown that [the Sages] regarded each of them as one of the positive commandments.

How the particular breakdown of the various prohibitions against eating non-kosher living things (cast as a positive commandment) can shed light on the new commandment to examine the tokens of living things prior
to consuming them is not explained and remains, in my opinion, problematic.\footnote{I suggest that what does stand out is M.'s desire to preserve four claims for his enumeration. See our discussion on individuation, section 2.4.}

By now it should be apparent that this group of commandment claims is neither textually nor midrashically driven. The verse \textit{Ye shall separate between the clean beast and the unclean} is not as comprehensive as M. would like it to be, since it refers to beasts and birds but omits fish and grasshoppers. Crucially, the exegesis lacks any sort of rabbinic support.\footnote{Cf. Daniel ha-Bavli, Abraham Maimonides, “Teshuvot Rabbenu Abraham ben ha-RaMBaM,” \textit{siman} 10, p.277, s.v. \textit{ve-od hinneh bier}.} On the other hand, the first attempt, making use of \textit{midrashim} that expound the verses to yield inferred prohibitions, is of questionable value. Inferred prohibitions are just that, prohibitions, and in no way do they convey obligations. While this anomalous use of inferred prohibitions — formally called “do’s” — to support claims of certain positive commandments is a general problem in the \textit{ShM} as we have noted on a number of occasions,\footnote{See, for example section 2.1.1, note 10.} it does betray the urgency of the larger didactic project. M. is intent at all costs to catalogue a list of commandments that will emphasize what to him are important themes. One of these themes is the absolute and categorical separation of various domains. To his way of thinking, lines of demarcation must at all times be clear and unequivocal. As a result, M. fashions commandments whose function is to draw these boundaries, separating the clean from the unclean, the pure from the impure, the priests from the
Levites and the Levites from the Israelites, the Israelites from the surrounding pagan nations.\textsuperscript{60}

P172. To heed the call of every prophet in each generation, provided that he neither adds to nor takes away from the Torah, as it is said, “... unto him ye shall hearken” (Deuteronomy 18: 15).

Proof: M. resorts to a \textit{midrash} that puts a unique spin on the verse \textit{unto him ye shall hearken} (Deuteronomy 18:15): “Even if he tells you to violate temporarily one of the commandments enjoined in the Torah, you must hearken unto him.” (Sifre Deuteronomy, \textit{pisqa} 175, p. 221) Included in this commandment is the prohibition for a prophet to disobey his own prophecy and the prohibition for a prophet to suppress a prophetic message. The Talmud (\textit{bSanhedrin} 89a) derives these various prohibitions from the verse \textit{Whosoever will not hearken unto My words which he shall speak in My name, I will require it of him} (Deuteronomy 18: 19). M. points out that, according to the Talmud, the scriptural verse indicates that transgressors are punishable by the Hand of Heaven.

Here again M. makes use of that curious hermeneutic, the inferred prohibition (\textit{lav ha-ba-mikhlal ʿaseh}). As we already saw, this principle

\textsuperscript{60} This concern bears a striking parallel to Platonic political thought with its use of different metals as symbols for the hermeticism of social classes. On the Platonic influence on M. see Strauss, Leo, "Quelques remarques sur la science politique de Maimonide et de Farabi," Revue des Études Juives 100 (1936), I quote (p. 14):

\begin{quote}
Et comme la science politique connue et jugée digne de quelque attention par Maimonide est une politique platonisante, ce seront, en fin de compte, les doctrines de La République et des Lois qui vont determiner la manière dont Maimonide comprend la Tora.
\end{quote}
allows one to treat the inferred prohibition as a positive commandment simply because the prohibition (i.e. that one must not disobey the prophet) is derived from a positive statement. Recall our discussion in 2.1.1 where we called these positive commandments in form rather than in substance.

Less controversially, M. could have based his claim on a genuine prohibition, _be no more stiffnecked_ (Deuteronomy 10:16), as Saadia did, 61 making it a negative rather than a positive commandment. I suspect, however, that only Sifre’s explication of Deuteronomy 18:15 provided M. with the appropriate basis on which to build the highly original exposition of the fundamentals of prophecy presented in his Introduction to the Mishnah and in _Hilkhot Yesode ha-Torah_ (chapters 7-10). M. makes a direct reference to the connection between P172 and the fundamentals of prophecy in the _ShM_ gloss to the commandment when he states that the commandment is to hearken to any genuine prophet [lit., prophet from among the prophets] and to do whatever he bids, even if it be contrary to one or more of the [scriptural] commandments, provided that it is only temporary, and does not involve a permanent addition to or subtraction from [the Law], as we have explained in the Introduction to the Mishnah.

In an important way, M.’s discussion of prophecy in the Introduction to the Mishnah is grounded on Deuteronomy 18:15-19 and Sifre’s interpretations of this passage. M. may well have understood that the Oral tradition viewed these verses as Scripture’s focal exposition of the laws of prophecy. It should therefore come as no surprise to find M. craft a positive commandment out of these verses despite the apparent hermeneutic

61 Perla, _Sefer ha-Mitsvot le-RaSaG_, vol. 2, Ns49, p. 97.
difficulty pointed out earlier. For the manner with which M. treats this commandment in the MT, see Appendix and see sections 6.1.1 and 9.4.

P178. That one who possesses evidence shall testify in Court, as it is said, “... and if one is a witness, and hath seen or known [if he do not tell, then he shall bear his iniquity]” (Leviticus 5:1).

Proof: Scripture makes it known that anyone who withholds evidence will suffer serious consequences, as it says, 

And if any one sin, in that he heareth the voice of adjuration, he being a witness, whether he hath seen or known, if he do not utter it, then he shall bear his iniquity (Leviticus 5:1).

The tenor of the verse is not one of enjoining witnesses to offer up evidence

62 Yet it is worth noting that M. was preceded in this by a number of enumerator-jurists, though, for some unexplained reason, Qayyara was not among them. A possible explanation might be that Qayyara does not list this entry because he does not normally count prohibitions inferred from positive statements (as proposed by Nahmanides, Hasagot to rule 6, p.131). But even this thesis would have Qayyara count this particular commandment since it does not duplicate an existing admonition. It is also puzzling that Qayyara does not list this commandment in the punishments (onshin) section, under “those who are liable to death by the hand of Heaven,” a category that is not type-specific and therefore can suitably include inferred prohibitions. For example, Qayyara lists under onshin “[a priest] that does not wash hand and feet from a basin,” also an inferred prohibition. Although Saadia lists this precept in his Decalogue-based azharot (under the third utterance), describing it as “my inheritance listens to the words of the prophet of God,” he omits it in the Sefer ha-Mitsvot, which Perla annotated. Perla does a commendable job explaining the omission (Perla, Sefer ha-Mitsvot le-RaSaG, vol. 2, Ns49, pp. 97-99). Another enumerator, with whom M. was familiar, Hefets b. Yatsliah, also lists this precept: “It is our duty to listen to the words of the prophet...” (ninth commandment). See “Mi-Sefer ha-Mitsvot shel Hefets b. Yatsliah,” PAAJR, ed. M. Zucker, vol. XXIX (1960-1961), p. 34. In note 21, Zucker points out that both Saadia in his Arabic Sefer ha-Mitsvot and Samuel b. Hofni counted this obligation.
but rather one of admonishing them against holding back evidence. The admonition is followed by a threat. The understanding that effectively we are dealing with an admonition rather than a precept, is confirmed by a little-noticed statement that M. makes in his comments to N297, the prohibition against neglecting to save an Israelite in danger of losing his life and/or his money. After stating that “[t]he Sages say\textsuperscript{63} that this prohibition [i.e., neglecting to save an Israelite in danger] covers also the case of one who withholds evidence...” he adds, “Scripture again refers to this matter: \textit{if he do not utter it, then he shall bear his iniquity} [Leviticus 5:1].” In other words, at N297, M. construes Leviticus 5:1 as conveying an admonition, i.e., a negative commandment, rather than a positive commandment.

Commentators have struggled to read some type of affirmative injunction into the text. R. David ibn Zimra (RaDBaZ, \textit{ad loc}.\textsuperscript{64}) emends (notionally) the verse and adds “must tell” after \textit{whether he hath seen or known}. RaDBaZ’s solution is self-serving: it supplies an invented affirmative statement to back up a presumed positive statement. Moreover, this type of solution ought to be used only in cases where one finds a clear rabbinic tradition supporting such a reading, which, as we learn below, is not the case here.\textsuperscript{64} Equally unsatisfactory is the solution offered by Duran, who

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\item\footnotesize\textsuperscript{63} M. is referring to Sifra \textit{Qedoshim, pereq} 4:8 (p.89a) on Leviticus 19:16, which he adduces a little further on.
\item\footnotesize\textsuperscript{64} The best examples are the ones in which M. sees a need to cite tradition in the reading of the verse. These are introduced by the formula “tradition taught” (\textit{lamdu mi-pi ha-shemu’ah}), as in P85, P86, P109, P128, and others. To be sure, these involve not textual manipulation but, for the most part, contextual manipulation — changing their meaning by transporting them from one context to another. Where some textual manipulation is required, M. can cite a number of traditions to support the difficult reading, as for example N194.
\end{itemize}
conjures up a syntactically impossible imperative, interpreting *he being witness* to mean that he is obligated to be a witness.\(^6^5\) If the scriptural evidence for this claim does not satisfy, neither does the rabbinic one.

M. states in the *ShM* that the “Sages adduce as proof of this obligation to give testimony” the above cited proof-text but, unfortunately, fails to cite the rabbinic source.\(^6^6\) In sum, there is no evidence of a positive commandment urging one to offer testimony, neither in Scripture nor in rabbinic literature. On M.’s own account, (comments at N297), the verse *[he do not utter it, then he shall bear his iniquity]* is only a special case of the overall prohibition to stand by while an Israelite is in danger of losing his life or his money.

This law is no doubt seen as a pillar of an effective judicial system — which may explain M.’s desire to craft out of *[he do not utter it, then he]*


\(^6^6\) *Kesef Mishneh* and Elijah of Vilnah point to *bBava Qamma* 56a, but this passage does nothing to support the existence of an obligation to provide testimony. Instead, the passage warrants that the verse, which promises an unspecified retribution, deals with the case of two witnesses who withhold evidence, while R. Joshua maintains that even one witness who withholds evidence incurs heavenly disfavor. The punishment for withholding evidence is scriptural, but where is the command to bring the evidence? Bothered by this lack of direct evidence, Yosef b. Habiba, in the beginning of his *Nemuqe Yosef* commentary to the sixth chapter of *Bava Qamma*, asserts that the obligation to testify is only a supererogatory act (*gemilat hesed*). [Yosef ibn Habiba, *Nemuqe Yosef* (Printed in standard editions of the Babylonian Talmud containing Hilkhot Alfasi)]. Other commentators have thought to have found their source in *mSanhedrin* 4:5. The *mishnah* has the witnesses complain about having to testify given the extraordinary trouble that they must go through and the severe admonishments they are served with to do so: “And if perchance ye would say, Why should we be at these pains? Was it not once written ‘and he being a witness, whether he hath seen or known, if he do not utter it, etc.’”? Implicit is the obligation to provide testimony, although, of course, one could read the retort as articulating the gravity of the sin of withholding testimony, with no affirmation being implied. See Yosef ibn Habiba, *Nemuqe Yosef*.
shall bear his iniquity a positive commandment urging one to provide testimony – despite scant scriptural or rabbinic evidence for it. For a possible motivation, see Excursus 3.

P189. Always to keep in remembrance what ´Amaleq did, as it is said, “Remember what ´Amaleq did unto thee” (Deuteronomy 25:17).

More specifically in the ShM:

We are commanded to remember what ´Amaleq did to us in attacking us unprovoked. We are to speak of this at all times, and to arouse the people [ha-nefashot] to make war upon him and bid the people [ha-am] to hate them, to the end that this matter be not forgotten, and that hatred of him be not weakened or lessened with the passage of time.

Proof: The scriptural evidence for this obligation and the parallel obligation not to forget ´Amaleq’s deeds is found in Deuteronomy 25:17-19: Remember what ´Amaleq did unto thee (v.17) and thou shalt not forget (v.19). To prove that these statements are normative and not mere rhetorical flourishes, M. adduces two essentially similar midreshe halakhah. The first is found in Sifre Deuteronomy, pisqa 296 (p. 314): “Remember what ´Amaleq did unto thee means [remembrance] in the spoken word; thou shalt not forget means [remembrance] in the heart”, to which M. adds, “That is, you are to speak such things as will ensure that the hatred of ´Amaleq is not

67 That is, his unprovoked attack. The MnT reads mitsvah instead of davar, which can variously be interpreted as the commandment to destroy ´Amaleq or the commandment to remember his misdeeds.
removed from men’s hearts.” The second is found in Sifra Be-Huqotai, parshah 1:3 (p.110c).\textsuperscript{68}

\textit{Remember what ´Amaleq did unto thee: one might think that this means in thy heart. But thou shalt not forget refers to forgetfulness of the heart: how then can one obey the injunction Remember [if that also refers to the heart? We must conclude that Remember means:] in the spoken word.}

While the adduced midrashim do not attach to these verses the label positive and negative commandments (as the Sifre does, for example, with regard to Deuteronomy 22:8, commenting on a similar mirror-image phrase),\textsuperscript{69} they are nonetheless supportive of the idea that these verses represent formal and distinct acts.\textsuperscript{70}

M. draws support from an incident related in Samuel I, 15:1-33. Just before sending Saul king of Israel on a mission to slay ´Amaleq, the prophet Samuel formally recalls the past wickedness of ´Amaleq, no doubt, suggests M., in fulfillment of the commandment to remember their nefarious past acts.\textsuperscript{71} But at this point we run into a difficulty. Scripture’s call to recount

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\item \textsuperscript{68} Some printed versions incorrectly referenced Sifre. See Sefer ha-Mitsvot, ed. Heller, \textit{ad loc.}, note 5.
\item \textsuperscript{69} Sifre Deuteronomy, \textit{Ki Tete pisqa} 229, (p.261) states: “Thou shalt make a parapet for thy roof [is] a positive commandment, that thou bring not blood upon thy house [is] a negative commandment.”
\item \textsuperscript{70} Nahmanides turns M.’s evidence against him by arguing that, on the basis of the same or similar midrashim, M. should have enumerated one or two additional commands (Nahmanides, "Hasagot," additions to the positive commandments, #7, p.288). See also de-Leon, "Megillat Esther," p. 289. This is one of the rare instances in which we find the Maimonidean apologist di Leon agreeing with Nahmanides.
\item \textsuperscript{71} This type of “demonstration,” drawn from the non-Pentateuchal books, was common amongst Karaite jurists and exegetes, but much less so amongst the Rabbanites, who
\end{itemize}
\end{footnotesize}
`Amaleq’s past misdeeds can simply be seen as providing a motivation or justification for the commandment to exterminate the vile nation. Normatively, it might even be taken to mean that one must recollect `Amaleq’s evil deeds and intentions when one is about to fulfill the commandment to kill an `Amaleqite. In other words, the duty to recall `Amaleq’s deeds is an integral part of the commandment to exterminate them. Even the Samuel passage can be interpreted to convey the idea that one must announce, verbally, the justification for wishing to destroy `Amaleq if and when one is set to do so. In fact, Samuel’s words (15:2): “Thus said the Lord of Hosts: I am exacting [paqadeti] the penalty for what `Amaleq did to Israel…” (JPS) tend more towards a justification for the coming action than a daily reminder of `Amaleq’s evil. The problem, however, is that, under Rules 10, 11 and 12, any command that forms part of another commandment or that is a preparation for it cannot be enumerated as an independent commandment. If to recall `Amaleq’s evil deeds is a justificatory declaration that one must make prior to destroying him in war, then Remember cannot be considered an independent positive commandment. M. sidesteps this problem by defining the obligation as “to speak of this at all times, and to arouse the people to make war upon him and bid the people to hate them, to the end that this matter be not forgotten, and that hatred of him be not weakened or lessened with the passage of time” (my emphasis). Accordingly, Remember is not a declaration made in conjunction with the commandment to exterminate `Amaleq. Rather, it is a daily reminder to all people of `Amaleq’s viciousness so that “this matter be tended to rely on the oral tradition for interpretation. See, for example, Levi ben Yafet, Sefer ha-Mitsvot, ed. Y. Algamil (Ashdod: Makhon Tiferet Yosef, 2004), passim.
not forgotten, and that hatred of him be not weakened or lessened with the passage of time.” On this definition, M. can posit an independent commandment. But whence such an understanding? How does M. know that Sifre intended this and not simply a justificatory declaration?

Interestingly, neither Qayyara nor any of the other extant enumerators who preceded M. included this commandment in their TaRYaG lists.72 Perhaps, these enumerators saw these verses as mere reminders of the obligation to destroy ´Amaleq (v.19). The scriptural obligation calling for ´Amaleq’s extermination could surely have sufficed. M., on the other hand, held as we saw that these verses represent a distinctly separate obligation.

M. brings to bear on the verse and on the interpretive rabbinic midrash a totally novel concept, the duty to remember and to remind others of those who have done the Israeliite nation harm and tried to destroy them, without provocation, so as to maintain fresh in their memory their hatred for him (or his hatred for them).73 This is a commandment independent of the duty to wipe out ´Amaleq. Not coincidentally, this commandment is of

72 It is in connection with this passage on ´Amaleq that Abraham ibn Ezra takes the opportunity to ridicule the baale azharot, charging that the enumerators are like those who count the number of blades of grass in their books of medicine, without recognizing the medicinal utility of these blades. Then, shifting to the singular, Ibn Ezra charges that “he thinks that they [i.e., thou shalt not forget and remember] are two [commandments].” The shift to the singular suggests that he was referring to one paytan in particular. After noting that there are many such mirror-image phrases in the Torah, Ibn Ezra concludes that these poets pay no attention to the plain sense of the text and prefer instead to focus on the formal structure of the verse (Abraham ibn Ezra, Yesod Mora, end of the second gate, p. 108). The reference to the one paytan who counted both verses is of interest as we have not found any of the extant geonic works doing so.

73 I note with puzzlement the absence of this obligation from M.’s list of the sixty compulsory positive commandments. For a discussion of this list, see section 3.1, above.
tangible value and can be carried out unconditionally – precisely at a time when the commandment to *exterminate* ʿAmaleq is practically impossible to carry out. As M. has already noted (at P187), ʿAmaleq has already disappeared or it can no longer be identified.

**5.2. Conclusion of Part I**

As we conclude this review of M.’s innovations, we feel entitled to question Twersky’s categorical assumption. It would appear that at least some of the innovations owe their existence to external considerations, i.e. themes that for one or other reason M. wished to emphasize. The point is subtle but I hope nonetheless to have provided at least a few clear instantiations of this idea.

When we summarize these innovations we find a number of recurrent themes. Throughout, M. appears preoccupied with the Platonic goal of a well ordered state. This includes the concept that each citizen should engage in one craft only (P23, P34), that worship and sacrifices should be conducted at only one location (P85). It also includes appeals to orderliness (P36) and cleanliness (P30, P192). Reverence towards the ‘guardians of society’, i.e. the Priests (P32) must be instilled, but, in this religious state, there is even a greater reverence, namely, to “fortify the belief in the greatness of the sanctuary and the awe felt for it, so that on seeing it, man should be affected by a sentiment of submission and servitude (*GP* III:45).” Quite noticeable are M.’s concerns with clear demarcations, as between ritually clean and unclean things (P149-52), between those who have been secluded because of
their wicked ways and those who “direct their ways aright”\textsuperscript{74} (P112). We also find that the law is concerned with a well functioning judicial system and the adoption of just procedures (P175, P178 and P179), possibly under the influence of the Muslim courts and their new interest in procedural matters (see Excursus 3). In this Platonic society, useful beliefs must continuously be instilled in its inhabitants, about the importance of the law (P17), about miracles (P157), and about the validity of Mosaic prophecy, its immutability and eternal nature, and the role other prophets may come to play (P172). In the same way, the masses must be instilled with an incessant, living hatred for evil (P189) and for idolatry and paganism (P187), even when their perpetrators and practitioners can no longer be located or identified. Finally, we also find a special concern for mercy towards animals (P146, “the easiest death”, GP III:26) and the appeal to kindness and pity for the indigent that goes beyond the normal canons of compensation (P201).

In the next section, we find M. introducing a momentous idea in Jewish halakhah: dogma. The case for an externally driven construction becomes even more compelling.

5.3 Innovations (Part 2): The Introduction of Dogma into Halakhah
5.3.1 ”Uncertainty” Surrounding Dogma and its Place Among the Mitsvot

\textsuperscript{74} As per Hilkhot Metsora, 16:10. M.’s concern with demarcations can also be seen in the fact that he dedicated an entire treatise to Holiness ( qedushah), which he understood to signify separation. See M.’s own description of this, the fifth, treatise, at the beginning of Sefer ha-Madd’a.
In the introduction to mAvot, referred to as Eight Chapters (EC), M., following closely on Aristotle’s taxonomy of the soul as expanded and mediated by al-Farabi,\(^{75}\) states that the soul is made up of five faculties, the nutritive, the sensitive, the imaginative, the appetitive and the rational. In chapter two of EC, M. deals with those faculties in which transgressions, observances, virtues and vices reside. He says:

Know that transgressions and observances of the Law have their origin only in two of the faculties of the soul, namely the sensitive and the appetitive, and that to these two faculties alone are to be ascribed all transgressions and observances. The faculties of nutrition and imagination do not give rise to observance or transgression, for in connection with neither is there any conscious or voluntary act.

On the other hand, one can speak of conscious or voluntary acts in connection with the sensitive and the appetitive faculties and therefore the latter faculties can be called the media of transgression and obedience. What about the rational faculty — can transgression and observance be ascribed to it even if no action proceeds from it? By the rational faculty, M. means man’s intellect, which “enables him to understand, reflect, acquire knowledge of the sciences, and to discriminate between proper and improper actions.”\(^ {76}\) The rational faculty’s functions are both speculative and practical.

\(^{75}\) The Aphorisms of the Statesman (Fusul al-Madani) served as M.’s blueprint for EC. See Davidson, Herbert, "Maimonides' Shemonah Peraqim and Alfarabi's Fusul al-Madani," PAAJR XXXI (1963).

\(^{76}\) Towards the end of chapter one of EC. Gorfinkle renders "proper and improper actions" but his vorlage, the Tibbon translation, has megunah ve-naeh, more accurately, "ugly and fair". Note that M. paraphrases al-Farabi almost verbatim: "Through the
To repeat the question, can transgression and obedience be spoken of with relation to the intellectual faculty? Here, M. says, opinion is divided. As regards the rational faculty uncertainty prevails [or there is confusion], but I maintain that observance and transgression may also originate in this faculty, in so far as one believes a true or false doctrine, though no action which may be designated as an observance or a transgression results therefrom.

M. does not tell us who or what is behind this “uncertainty/confusion” or why it should even be a matter of doubt. Yet there is some evidence that, in fact, the duties of the mind were not considered commandments in the strictest sense and that this was held to be true by a significant number of

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rational faculty comes deliberation, by it he acquires the sciences and arts, and by it he distinguishes between the fair and ugly of actions.”

77 Haqdamot ha-RaMBaM la-Mishnah, ed. and annotated Y.Shailat (Jerusalem: Hotsaat Maaliyot, 1992), p. 273, has suggested that M. could have resolved this question by reference to the commandment of learning the Torah, an activity that is centered in the mind even as it also involves the appetitive and sensitive faculties. Shailat himself refutes this demonstration by arguing that M. was seeking an activity that solely and exclusively resided in the mind. I believe, however, that a more fundamental distinction between Torah studies and doctrines or beliefs is in order. The Torah holds divine instructions and admittedly a mental activity of sorts is required to follow them. These instructions, however, cannot be referred to as being correct or incorrect since they are not subject to logical demonstration, as beliefs are, nor are they empirically derived. For example, one cannot say that the dietary laws are correct, only that they are to be obeyed or not obeyed. Instructions are subject to obedience and do not fall in the category of beliefs. Obedience and disobedience, in turn, reside in the sensitive and appetitive faculties of the soul.
early medieval rabbinic authorities. We learn about this from some remarks made in a work called The Duties of the Heart (al-Hidayat ila Faraid al-Qulub, or Hovot ha-Levavot in the Hebrew translation). Its author, Bahya ben Joseph ibn Paquda, of whom very little is known, was an eleventh century rabbinic scholar who lived in Muslim Spain. As its title suggests, he wrote this work because he felt that the duties of the heart were being neglected even by those who were most punctilious about the performance of the commandments.

By all accounts, the work was extremely popular from the very moment of its appearance and came to have a profound influence on Jewish pietistic practice and literature. In his apologia for undertaking this work, Bahya first offered an interesting classification of the commandments. He divided the obligations of the religious man into two parts, the duties of the body and its members, with which one expresses outward obedience, and the duties of the heart, with which one expresses inward obedience. Duties of the body included such things as

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The consensus of scholars today is that M. was not only well acquainted with this work but may have been influenced by it (private communication from Prof. Haggai ben Shammai).

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prayer, fasting, almsgiving, learning his Book and spreading the knowledge of it, fulfilling the commandments concerning the Tabernacle, the palm branch, the fringes, the doorpost, the railings on the roof, and the like, all of which can be wholly performed by man’s physical body. (Introduction, 89)

Inward obedience, on the other hand, was expressed in the duties of the heart. Some of the most important (positive) duties of the heart included “to believe in the Creator of the world, who brought the world into existence from nothingness; to believe in pure monotheism, free from a belief in any other gods; to assent to obeying God in our hearts,” and so on. Negative commandments were made up by things such as rancor, envy and vengeance, and by a denial of the theological doctrines listed above (ibid., 87).

For Bahya, inward obedience had to precede and accompany outward obedience: “Thus I have come to know for certain that the duties of the members are of no avail to us unless our hearts choose to do them and our soul desires their performance” (89).

80 M. may agree with a part of this statement, but for the most part this classification has no bearing on his

80 Or again, …what determines the punishment is the participation of both heart and body in the act — the heart in the intention and the body in carrying out the heart’s intention….Since now, the foundation and the pillar of action is the intention of the heart and conscience, the knowledge of the duties of the heart should come before and stand above the knowledge of the duties of the members (ibid.,91).

81 If, for example, M. held, as some believe he did, that commandments require intention (kavvanah) and if intention can be defined as intention to perform a commandment, i.e., to obey the lawgiver.
perplexity. What is significant, however, is a statement that Bahya makes in connection with the numbers of duties of the heart and of the members. Bahya says that when he counted the duties of the heart “I found that their details were very numerous…for the duties of the members are limited in number, about 613 commandments in all, while the duties of the heart are many and their details innumerable.” Now, since the duties of the heart include, among other things, the belief in the Creator and the belief in pure monotheism, one can deduce that these two dogmas are not included in the TaRYaG. Why this should be so, Bahya does not say, although it is clear that in the circles that Bahya frequented commandments included only acts “that can be wholly performed by man’s physical body.”

While Bahya kept the duties of the heart separate from the TaRYaG commandments — though giving them priority of knowledge and importance — M. moved to incorporate a sub-set of these, in particular the belief in the type of existence of God and the belief in pure monotheism, into the TaRYaG count. How M. accomplished this feat is the subject of the next section.

A small detour to examine Qayyara’s position is now in order. I see no reason to accept Hildesheimer’s identification of these two commandments with Qayyara’s entry Pq39, “and belief” (ve-emunah). For one thing, it follows a group of commandments devoted to the relationship between man and his fellow man: “to clothe the naked” (Pq33); “to bury the dead” (Pq34); “to console the mourner” (Pq35); “to visit the sick” (Pq36); “to love peace” (Pq37); “and justice”; (Pq38), and finally, “and belief,” or, as other versions have it, “and truth” (emet). It is likely that Qayyara is referring to the love of truth or to the conduct of business with honesty, as in
the rabbinic expression, “did you carry on transactions with honesty?” (nasata v-natata be-emunah?). The existence of God and His oneness should logically have been placed earlier, together with “love of God” (Pq23) and “fear of God” (Pq24), if not right at the outset, given their obvious importance. I prefer to follow Nahmanides (Hasagot to P1), who unequivocally declared that “with all that, I saw that the author of the Halakhot [i.e., Qayyara] did not count this commandment [the existence of God] among the 613.” According to Nahmanides, Qayyara’s omission is due to the fact that commandments are orders from the Almighty, but the belief in His existence is the “fundament and root” on which all the commandments are based. That is, the notion of commandment presupposes the belief in His existence; therefore belief in His existence cannot be counted among the commandments.

The difference between Qayyara’s implicit notion of lawgiver and the type of deity of those who affirmed such a notion is vast. Qayyara could be satisfied with almost any type of superior lawgiver, as primitive as one might imagine him, provided this notion formed the basis for obedience of the laws. On the other hand, for those who felt it necessary to incorporate into the commandments a belief in a refined philosophical definition of God,

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82 The declaration of His oneness, via the recitation of the Shema, is the first entry in Qayyara’s list of positive commandments. For the possible meaning of the entry “to believe,” see Hildesheimer, Haqdamat, nn. 333 and 335.

83 It is the same with Shelomo ibn Gabirol, who tended to follow Qayyara’s enumeration. Moses ibn Tibbon, the first expositor of Gabirol’s Azharot, thought that Gabirol had counted this commandment in line 11 which reads, “I took you out, I admonished you, I guided you, in righteous ways,” but the line appears to be no more than a preamble to the immediately following list of commandments. Duran, Zohar ha-Raqia, ad loc., pages 3-4, disputes Tibbon’s reading on interpretive grounds.
the idea of a “primitive” supreme lawgiver would not do. In fact, it might have been downright heretical. It is worth noting that M. was not the first scholar to propose that belief in the existence of God is a commandment. The distinction belongs to the Babylonian gaon Hefetz b. Yatsliah, who put it this way:

The first precept enjoins us to unite our mind and thoughts on the truths of the matter; to make our Creator exist in our heart, and to consider Him Lord of all things without a shadow of doubt, and without any other thought; to know that He is truth; as it is written: 

Know therefore this day, and lay it to thy heart, that YHWH is Eloqim, there is no-one else besides Him [Deuteronomy 4:39].”

84 Hefets’ description of the first commandment was preserved for us by Judah b. Barzilai in his twelfth century commentary on the Book of Creation (Sefer Yetsirah), ed. Halberstam, (Judah ben Barzilai, Perush Sefer Yetsirah ) pp. 55-56. Hefets explains the two divine terms and points to the end of the verse as proof that “He is one and that there is no other.” Hefets later adds that he is obliged to explain his proof that He exists — in his own words “that He is one and that there is no other” so that one “may be strengthened in the belief that He is one, and is the creator of all things.” For the partial quotes I have used Halper’s translation in Hefets, A Volume of the Book of Precepts. Missing in Hefets’ apparatus is a rabbinic warrant to demonstrate the propriety of the commandment claim. See Davidson, Herbert, "The First Two Commandments in Maimonides’ List of the 613 Believed to Have Been Given to Moses at Sinai," Creation and Re-Creation in Jewish Thought: Festschrift in Honor of Joseph Dan on the Occasion of His Seventieth Birthday, eds. Rachel Elior and Peter Shafer (Tübingen: Mohr Siebeck, 2005), who also notes that M. had “precedents…for viewing belief in, or the knowledge of, the existence of God as a formal commandment of the Law” (p. 127), among them Bahya and Hefets ben Yatsliah, Samuel ben Hofni and Ibn Ezra. Treating it as a hypothesis, Davidson goes as far as to show that there is a “modicum of corroboration” for the idea that Hefets ben Yatsliah’s formulation of the first two positive commandments of the Law “was a springboard for Maimonides (p. 133).” So too does A. Hyman who states that “by the time of Maimonides it was accepted at least by philosophers, that belief in the existence of God and similar beliefs formed part of the system of mitsvot and that their affirmation was a matter of religious observation.” Hyman, A., "Rabbi Simlai's Sayings and Beliefs Concerning God," Perspectives on Jewish Thought and Mysticism, eds. A.L. Ivry, Elliot Wolfson and Allan Arkush (Amsterdam: 1998), p.52. But again, I cannot overemphasize enough the fact that none of
Hefets, however, adduces no rabbinic warrant to substantiate this claim.

I now return to M. and the remarks that he made in the second of *EC*. M. states that, in his opinion, observance and transgression may also reside in the rational faculty, though he does not indicate why he thinks so. On the other hand, he is quite certain of the goodness of possessing correct notions and correct moral dispositions, for he adds,

Now, as for the virtues, they are of two kinds, moral and intellectual, with the corresponding two classes of vices. The intellectual virtues belong to the rational faculty. They are (1) *wisdom*, which is the knowledge of the direct and indirect causes of things based on a previous realization of the existence of those things, the causes of which have been investigated; (2) *reason*, consisting of (a) inborn, theoretical reason, that is axioms, (b) the acquired intellect, which we need not discuss here, and (c) sagacity and intellectual cleverness, which is the ability to perceive quickly, and to grasp an idea without delay, or in a very short time.

Wisdom is the knowledge of the causes that lead to the knowledge of God;\(^85\) this knowledge, in turn, leads to happiness. M.’s mentor puts it syllogistically:

Since wisdom is particularly knowledge of the ultimate causes of every last existent, and the ultimate

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\(^85\) Gorfinkle refers the reader to *GP* I:69 and III:54. Davidson, "Maimonides’ Shemonah Peraqim," , p.121, already noted that this paragraph is a quotation from *Fusul* par. 7, expanded by explanations drawn from par. 31, 34 and 46.
end on account of which man exists is happiness, and the end is one of the causes, then wisdom is that which acquaints one with what is true happiness.\textsuperscript{86}

Would the law have intended one to acquire correct notions and yet make no effort to even allude to it? M. did not think so. If the law truly aims at the welfare of the soul, as he maintained that it did, then the law would need to encourage the acquisition of correct opinions. In M.’s words:

\begin{quote}
Among the things to which your attention ought to be directed is that you should know that in regard to the correct opinions through which the ultimate perfections may be obtained, the Law has communicated only their end and made a call to believe in them in a summary way — that is, to believe in the existence of the deity, may He be exalted, His unity, His knowledge, His power, His will, and His eternity. All these points are ultimate ends, which can be made clear in detail and through definitions only after one knows many opinions \textit{(GP III: 28:512)}.
\end{quote}

In short, to attain the “ultimate perfections,” man must acquire a correct notion of God and His oneness. Importantly, the “Law had made a call to believe in them,” that is, it commanded the acquisition of these notions.\textsuperscript{87}

\textsuperscript{86} \textit{Fusul}, para. #49. Al-Farabi goes on to explain the different and complementary roles of intellectual and practical wisdom:

Wisdom then acquaints one with true happiness, and practical wisdom acquaints one with what must be done to attain happiness. These two then are the two ingredients in the perfecting of man, so that wisdom is that which gives the ultimate end, and practical wisdom gives that by which the end is attained.

\textsuperscript{87} At this point I am short-circuiting the subtle distinction that M. makes between welfare and perfection as some scholars have suggested. See Galston, Miriam, "The Purpose of
M’s proof that these beliefs constitute a commandment is given in the *ShM*. In support of his first commandment claim, to know God, M. adduces an aggadic passage in *bMakkot* 23b:

Six hundred and thirteen [*TaRYaG*] commandments were declared unto Moses at Sinai, as the verse says, *Moses commanded us a Law* (Torah) (Deuteronomy 33:4); that is, he commanded us to observe as many commandments as are signified by the sum of the letter-numbers ToRaH. To this it was objected that the letter-numbers of the word ToRaH add up to only six hundred and eleven; to which the reply was: ‘The two commandments *I am the Lord thy God* and *Thou shalt have no other gods before Me* (Exodus 20:3) we heard from the Almighty Himself.’ That is, the Lord commanded 611 commandments to the Israelites through Moses, thus *Moses commanded a Law*, and two commandments directly.

As we saw earlier, this exegesis is attributed to Rav Hamnuna. M. ends this short comment by stating “Thus it has been made clear to you that the verse *I am the Lord thy God* is one of the 613 commandments, and is that whereby we are commanded to believe in God, as we have explained.”

To understand the compelling halakhic nature of this *midrash* we need first to understand the profound truth that M. believed lay hidden in it. Once again we must refer to *GP*. *GP* II chapter 33 is dedicated to explaining the unique event of the revelation at Sinai. M. offers first an interpretation of the text based on the “external meaning,” but then proceeds to tell us that the

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Law According to Maimonides,” *JQR* 69 (1978-9), and Harvey, Warren Zev, “Political Philosophy and Halakhah in Maimonides (Hebrew)” *Iyyun* 29 (1980). This difference may lie at the very heart of M.’s pedagogy. The uninitiated individual accepts with some minimum rational support the existence of God, while the enlightened individual seeks perfection through a thorough demonstration of His Existence and Oneness.
Sages “also have a dictum formulated in several passages of the *Midrashim* and also figuring in the Talmud.”

This *midrash* is none other than R. Simlai’s *midrash*, the *midrash* of the 613 commandments. Since what he is about to say stands in apposition to what he had called the external meaning of the text, we can infer that what follows is the “internal meaning” of the scriptural account. M. uses the *midrash* as an interpreter, or perhaps as an interpretive facilitator, of the prophetic parable of revelation. 88 On this basis, M. explains that the parable of the Sinaitic revelation is about two different kinds of revelations: that which Moses and all Israel heard directly from God — in the words of the *midrash* “I and Thou shalt not have” from the mouth of the Almighty” — and that which Moses communicated to the Israelites, the remaining commandments. The words *I and Thou shalt not have* convey two principles: the existence of the deity and His being one. 89 These principles, M. asserts,

88 The “external” (*zahir*) and “internal” (*batin*) meaning of parables, explained in the Introduction to part I of the *Guide*, is critical for an understanding of the project of the Guide. There, M. says that while the external meaning of parables “contains wisdom that is useful in many respects, among which is the welfare of human societies,” the internal meaning “contains wisdom that is useful for beliefs concerned with the truth as it is” (p. 12). For an in-depth discussion of this hermeneutic, see Stern, Josef, *Problems and Parables of Law: Maimonides and Nahmanides on Reasons for the Commandments* (Albany: State University of New York Press, 1998). For a critique of this work, see Kaplan, Lawrence, “Review of Josef Stern’s Problems and Parables of the Law: Maimonides and Nahmanides on Reasons for the Commandments (Ta´ame ha-Mitsvot),” *AJS Review* 26.2 (2002).

89 The plain meaning of *Thou shalt not have other gods before Me* is that it represents an admonition against believing in other gods, i.e., polytheism. M. regularly equates the notion of composite unity with polytheism. See, for example, *GP* I:60.
are knowable by human speculation alone.\textsuperscript{90} Now, with regard to everything that can be known by demonstration, the status of the prophet and that of everyone else who knows it are equal; there is no superiority of one over the other. Thus, these two principles are not known through prophecy alone. The text of the Torah says \textit{Unto thee it was shown [that thou mightest know that the Lord, He is God; there is none else beside Him]} [Deuteronomy 4:35]. As for the other commandments they belong to the class of generally-accepted opinions and those adopted in virtue of tradition, not the class of the \textit{intellecta}.\textsuperscript{91}

Yet, as recounted in Deuteronomy 5:22-24, Moses undertook to continue communicating God’s message at the specific behest of the Israelites, frightened as they were by the “voice” of God. The Sages are divided only as to when this took place. R. Joshua says it was after the

\textsuperscript{90} In his comments to this passage, Efodi suggests that M. understood “the Almighty” \textit{(ha-gevurah)} as referring to the human intellect; by means of his intellect, man can prove the existence and Unity of God. I am not so certain about the identification of the Almighty with the human intellect, but this much is certain: the Israelites “heard” the message directly, proving that there was no need for prophetic mediation.

\textsuperscript{91} The distinction between “the class of the \textit{intellecta},” on which demonstrative syllogisms are based, and “generally accepted opinions,” on which dialectic syllogisms are built, has been ascribed to Aristotle. The term “generally accepted opinions” corresponds to the Greek term \textit{endoxa}, which is defined as “what seem so to everyone, or to most people, or to the wise — either to all of those, or to most of them, or to the most famous and celebrated” (Aristotle’s \textit{Topic} I.i, 100b21-23). The Arabic term used here, \textit{almushthurath (mefursamot)} in the Hebrew rendering, has a slightly different connotation, referring rather to generally known things. See \textit{Les Guide des égarés}, trans. S. Munk (Paris: 1856), p. 39, n. 1. In \textit{GP} I:2 “generally accepted opinions” refers to the categories of good and bad (as opposed to true and false) and can also refer to the particular notions of certain societies. See the short bibliography on this concept, \textit{Moreh Nevukhim}, ed. Michael Schwarz, 2 vols. (Tel Aviv: Tel Aviv University Press, 2002), n. 5. See also "Maimonides' Treatise on Logic [English Translation]," \textit{PAAJR} 8, ed. and trans. Israel Efros (1938), chapter 8.
second commandment, and the Rabbis say after the tenth.  

Be that as it may, there is no hint in these traditions of a qualitative difference between the first and second sets of commandments. M.’s reading of the *midrash*, inferring the existence of two kinds of revelations at Sinai, is undoubtedly motivated and informed by his philosophical world view.

In sum, impelled by his ethico-philosophical approach to the law, M. looks for ways to incorporate fundamental beliefs about God into *halakhah*, for only in this way, can man attain perfection. For this purpose, the *mitsvah* must *per force* be identical with the theological doctrine and not, as Faur understood, that “by codifying the belief in God as a *mitsvah*, M. was stipulating that the belief is a covenantal or a legal obligation, and not a theological doctrine.”  

The *midrash* of the 613 commandments gives M.

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92 Shir ha-Shirim Rabbah, 1:2; see also the commentary on the Pentateuch by Hizkiyahu ben Manoah, Hizkuni, Torat Chaim Chumash (1993), on Exodus 20:1.

93 Faur, José "Law and Hermeneutics in Rabbinic Jurisprudence: A Maimonidean Perspective," Cardozo Law Review 14.6 (1993), p.1662 and n. 25. In a related note Faur adds, “Accordingly, ‘heretic’ is defined not as one who disbelieves in God but as ‘one who declares’ [ha-omer] that there is no God.” He incorrectly references Hilkhot Yesode ha-Torah 3:7-8. The correct reference is Hilkhot Teshuvah 3:7-8, where M. lists, among others, five classes of heretics and says about them that they “have no portion in the world to come, but are cut off and perish.” If Faur means to say that now that M. has made belief in the existence of God a commandment a heretic is no longer one who thinks that there is no God — as would be the case if it merely reflected theological doctrine — but one who says so, he is mistaken. I fully believe that M. would hold that he who *believes* there is no God is a heretic and, consequently, will have no portion in the world to come. M.’s description in Hilkhot Teshuvah of heretics as those who *say* that there is no God responds to a different objective, namely, to warn other members of the community from intermingling with heretics. These heretics cause other people to transgress, thereby adding to the gravity of their acts. This intent is made clear in Hilkhot Teshuvah 3:24, where M. states that “there are transgressions less grave than those mentioned, concerning which, however, the Sages said that whoever habitually commits them will have no portion in the world to come. One should therefore avoid and beware of such transgressors” (my emphasis). It is obvious that the only way one can “avoid and beware of such transgressors,” that is, recognize a heretic, is if the heretic says or does
the opportunity to do so, as it asserts, explicitly, that the knowledge of God and His oneness are commandments and, crucially, that they are to be reckoned as part of the *TaRYaG*. Finally, the distinctiveness of these two commandments, that they are demonstrable truths, is part of M.’s philosophical outlook and is read “into” the *midrash*.

P1. To know that there is a God, as it is said, “I am the Lord, thy God” (Exodus 20:2; Deuteronomy 5:6).

The *ShM* states the claim thus: “We are commanded in the belief of the divine Lordship; that is, to believe that there is a Supreme Cause; that is, to believe that there is a Supreme Cause that demonstrates what he is. See also 2:5 and see M.’s responsum #264, *Responsa, Blau*, II, 500-2, where the discussion revolves around “accepting them” in the community. I would therefore emend Faur’s statement to read that “by codifying the belief in God as a *mitsvah*, M. was stipulating that the belief is a covenental or a legal obligation, and not merely a theological doctrine.”

94 More plausibly, the author of the *midrash* intended to make *I am the Lord, your God* a commandment to believe in the God that took the Israelites out of Egypt, the God of History rather than the First Cause, as clearly suggested by the verse. For an interesting discussion on this point, see Harvey, Warren Zev. "The First Commandment and the God of History: Halevi and Crescas vs. Ibn Ezra and Maimonides [Hebrew]," *Tarbiz* 57.2 (1988).

95 Chavel: “to believe in God”, but this is not quite precise as I explain below. Arabic: *bitikad al-rububiyya*. In place of the SE’s “to know,” the *ShM* uses the more nuanced Arabic term, *itikad*, which semantically lies somewhere between knowledge and belief: It does not quite convey certain knowledge but neither does it convey mere belief. Perhaps it is best translated as “firm conviction.” See D. Z. Hilman in his *Tsiyunim* to Frankel’s edition of the *ShM* and see also Rawidowicz, Simon, "On Maimonides' Sefer ha-Madda," *Studies in Jewish Thought*, ed. Nahum N. Glazter. (Philadelphia: Jewish Publication Society of America, 1974), p.317. Moshe ibn Tibbon, one of the translators of the *ShM*, rendered *itikad* as “to believe” (*le-haamin*). Unfortunately, there is no word in the Hebrew language to convey the nuanced meaning of *itikad* and translators have had to choose between plain knowledge and plain belief. Hilman points out that the title of
who is the cause of everything in existence.” To be clear, M. is not simply asserting that God exists, but that the God that exists is the cause of all

Saadia’s well known theological treatise, *al-Amanat ve-al-Itikad*, was translated by Yehudah ibn Tibbon as *Emunot ve-De’ot*, showing that *itikad* ought not to be translated as belief, for which we find the Arabic term *al-amanat*, but rather as *de’ot*, opinions. Hilman also points to the use of *itikad* in the opening line of *GP* 1:50 as referring to knowledge. So too Kafih, in his note there. But see Moreh Nevukhim, ed. M. Schwartz, *petihah*, page 10, n. 15, who acknowledges the correctness of Tibbon’s translation of Saadia’s title work but believes that the Guide did not use it in that same sense and prefers to translate *itikad* as belief. Septimus notes that

*itikad* refers to any firm belief or conviction: true, false or heretical, rationally derived or otherwise. *GP* 1.36 (Kafih ed., p. 86) defines *kufr* as *itikad* about something, the opposite of what is the case. So Maimonides can term both true and polytheistic belief *itikad*….That *itikad* requires understanding and believing the proposition asserted implies nothing, however, about its truth and rationality.


With respect to the second term, *al-rububiyya*, Haggai ben-Shammai pointed out to me that this term is extremely rare in M.’s writings, not appearing in M.’s full Arabic text of the thirteen principles and not even once in the *GP*. Based on a number of Islamic sources, he suggested that the term can perhaps be rendered Lordship or divine Lordship. I adopted this translation as it also satisfies the Hebrew translators’ *ha-eloqut*.

96 M. uses two words here, Arabic *illa* and *sebeb* (Hebrew *ilah, sibbah*). Munk, *Guide*, p. 313, n. 1, believes that these terms are “completely synonymous” and quotes Averroes who comments in this respect: “*Sebeb* and *illa* are two synonymous nouns, said of four causes, namely, the efficient, the material, the form and the final.” Munk adds that “they are linked intimately with the Aristotelian system.” Perhaps the use of both synonyms came to emphasize cause, as if to say by the cause of causes.

97 Chavel has “creator” instead of “cause” (Arabic *alpaal, Hebrew po’el*). According to Efros, *Philosophical Terms*, s.v. *po’el*, the word stands either for “efficient cause” or for “doer.” Efros notes that doer “was chosen by the Mutakallimun with reference to the Creator rather than First Cause, which is the Aristotelian name, because of their belief in the constant coexistence of the Cause and the caused.” At this point and through the writing of the *MT*, M. deliberately avoided using the simpler and more forthright term “the creator”. He confirmed this in *GP* I:71 and in a late gloss to the first article of the Thirteen Articles of Faith. See text below. The surprising implication of this formulation is that one can fulfill the commandment without necessarily believing that He created the world.
things. This is also what he affirms in the *Halakhot, Hilkhut Yesode ha-Torah* 1:1-6.\(^98\)

M.’s various formulations of this dogma, in *Pereq Heleq*, *ShM* and in the *Halakhot*, are laden with Aristotelian terms and concepts. So, for example, we find the terms “cause” (*illa/sebeb*) and “one who brings forth all existing things,” terms that are not found in the pentateuchal text, in the adduced rabbinic *midrash*, or for that matter in any other rabbinic text. The first Article of the Thirteen Articles of Faith (*Pereq Heleq*) states:

There exists a Being, perfect in all ways of reality; He is the cause of all existing things; and the ground of their existence is in Him. His non-existence cannot be thought of, for if this were the case, all beings would not exist; on the other hand, even if we conceive the non-existence of all other beings, His existence will not be nullified.

The *Halakhot* in *Hilkhut Yesode ha-Torah* 1:1-3 echo this definition, calling God “one who brings forth all existing things” (*mamtsi kol nimtsa*). It has been rightly noted that this appellation “does not imply more than the definition of the dogma, i.e., that God is the first cause of all existence, its ground and principle and as such, He can be termed *mamtsi.*”\(^99\) Using terms

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\(^98\) Don Hasdai Crescas (d.1412?), a critic of Aristotle’s philosophy and one of M.’s strongest medieval critics, misunderstood M. and thought that, at least in the *Halakhot*, M. intended to affirm the belief in God’s existence. Crescas, Don Hasdai, *Or Adonai* (Tel Aviv: 1963), p. 3. Abarbanel (1437-1508) exposes this misunderstanding in Abarbanel, Yitshaq ben Yehudah, *Rosh Amanah*, ed. Menachem. Kellner (Ramat Gan: Bar Ilan University Press, 1993), chap. 7, p. 71. I do not plan to deal here with other interesting objections raised by Crescas as to whether one can command feelings or beliefs and so on. For a take on Crescas’ view, see Eliezer ben Porat, "Emunot ve-De´ot le-Mitsvot le-Da´at ha-RaMBaM ve-R. Hasdai Crescas," *Sinai* 120 (1997), pp. 216-229.

such as *mamtsi* and *ila/sbb*, M. deliberately avoids calling God by the epithet creator (*ha-bore*). M. confirmed that he was deliberately avoiding the use of creator in *GP* I:71:

For this reason, you will find in my works on the Talmud, whenever I have to speak of the fundamental principles of our religion or to prove the existence of God that I employ arguments which imply the eternity of the universe.

Years later, in a gloss to the First Article and, after stating that creation *ex nihilo* is a fundamental of the Mosaic Law, M. added,

As to what you see me go roundabout the matter of [the world’s] eternity according to the opinion of the philosophers, that is so that the proof of the existence of God can be established with certainty, as I explained in the *Moreh* (i.e. *GP*). (Shailat, *Haqdamot*, 142).

In *Hilkhot Yesode ha-Torah*, 1: 5-6, M. argues that the force of God can be proven to be infinite by the perpetuity of the revolution of the sphere, another Aristotelian concept.\(^{100}\) These definitions would seem to require a high degree of philosophical sophistication or, at the very least, a familiarity with Aristotelian principles. The question to be asked is, therefore, whether the faithful must become philosophically sophisticated before they can fulfill the first and second commandments. Since M. states as his intention in the introduction to the *MT* to make the law accessible to all — “the young and

\(^{100}\) Pines (Pines, Shlomo, "The Philosophical Purport of Maimonides' Halakhic Works and the Purport of the Guide of the Perplexed," *Maimonides and Philosophy: Papers Presented at the Sixth Jerusalem Philosophical Encounter, May, 1985*, eds. S. Pines and Y. Yovel (Dordrecht: M. Nijhoff, 1986), vol. 5, p. 467) already noted that “this perpetuity clearly implies the eternity of the world, ergo the proof propounded in these texts for the infinity of God’s force is only valid if the world is eternal *a parte ante.*”
the old” — the answer to this question must be negative. The faithful need not, in the first instance, be philosophers to fulfill these two commandments. If so, can the philosophically uninitiated take something useful out of these definitions? Following Kellner, I believe that they can.

Kellner suggests that M. wrote for a variety of audiences simultaneously “without drawing explicit attention to that fact.” M. wrote for Talmudists who had no background in philosophy, for Talmudists who aspired to become philosophers and for philosophers alike. Talmudists who read M.’s words thought that, because of the context, vocabulary and style, “they are reading a wholly traditional text, totally unobjectionable, and fully consistent with conventional religion as popularly understood.” On the other hand, the more philosophically sophisticated reader read the same passage and found in it “statements consistent with some of the more daring Maimonidean theses expressed [later] in GP.”

The faithful, uninitiated in philosophical matters, would take from M.’s definitions that (1) the belief in God is a foundational belief; (2) God is characterized as the creator of all things; (3) everything that is not God derives its existence from God, and cannot exist without Him.

101 Kellner, Menachem, “The Literary Character of the Mishneh Torah,” Meah She’arim: Studies in Medieval Jewish Spiritual Life, in Memory of Isodore Twersky, ed. Ezra Fleischer et al. (Jerusalem: Hebrew University Magnes Press, 2001). This in no way is meant to imply that M. intended to deceive his unsophisticated audience. Rather, as a master pedagogue, he allowed the reader, if he was able, to move up the ladder of religious sophistication. Regardless, M. demanded a minimum understanding of the foundational beliefs. For example, M. insisted that “children, women, stupid ones, and those of a defective natural disposition” be taught basic principles such as the incorporeity of God and His lack of affections despite their absolute inability to ever prove these doctrines. (GP I:35:81)

102 Kellner, "The Literary Character,” p. 33.
very special and unique kind, unlike any other kind of unity, and that it necessarily precludes His being corporeal. Finally, they would learn that this belief, too, is foundational and that “God brought us out of Egypt and heaped kindness upon us only on condition that we believe in His unity….”

M. suggests in GP II:33 cited above, that while all Israel heard the voice of words…only a voice [Deuteronomy 4:12] — that same voice through which Moses and all Israel apprehended I and Thou shalt not have — the message was not apprehended equally by all. “Know,” he says, “that with regard to that voice too, their rank was not equal to the rank of Moses our Master.” This, of course, could not be otherwise, given the differing levels of philosophical sophistication exhibited by the various members of the Israelite nation. Crucially, everyone, even the totally uninitiated in philosophical matters, “heard” the two principles.

In sum, the necessarily varying levels of understanding addressed at Sinai by the revelatory act, calibrated according to M. to a widely heterogeneous crowd, offered a working model for the pedagogic presentation of the two foundational credos. With proper training and effort, and subject to natural barriers, the philosophically uneducated can reach ever

103 ShM, P2.

104 M. states in the GP III:27:510 that the welfare of the soul “consists in the multitude’s acquiring correct opinions corresponding to their respective capacity” (my emphasis). M.’s pedagogic tendencies were not always well appreciated. Samuel ibn Tibbon, for one, his “official” translator and close student, attacked M. for presuming that the masses could rise to the philosophical heights needed to attain a proper understanding of divine matters and suggested instead that the masses be told to believe in the God who took them out of Egypt, the God of History. See Frankel, Carlos, “Ma’avar le-Talmud Neeman: Biqoroto shel Shmuel Ibn Tibbon al ha-RaMBaM,” Da’at 57.9 (2006).
higher levels of comprehension about divine matters and eventually come to love and fear God. As we shall see later on, the commandments to love God and to fear Him are but extensions of the first two commandments, not new commandments. For now, M. offers a sketchy and minimum definition of what everyone must know to fulfill these two commandments.\textsuperscript{105}

It is for this reason that in the \textit{Halakhot} M. does not enunciate the first commandment at the very beginning of the discussion, as one would expect. He does not say, “It is a positive commandment to realize that there is a First Being who brought every existing thing into being.” Instead, M. spends five \textit{halakhot} to perfect the most minimum and concise definition of what one must know with regard to God, at the end of which he can confidently state that “to acknowledge this truth is a positive commandment.”\textsuperscript{106}

P2. To acknowledge His Unity,\textsuperscript{107} as it is said, “The Lord our God, the Lord is One” (Deuteronomy 6:4).

\textsuperscript{105} In this respect, M., the pedagogue, imitated the Law, which had presented these notions in “a summary way” (\textit{GP} III:28:512). See our discussion of the commandment to love God in section 9.3.

\textsuperscript{106} M.M. Schneirson notes that M. presents in the \textit{Halakhot} general but foundational principles that fall just short of what the talmudic rabbis (bHagigah 13a) called “the heads of the topics,” since the latter can be communicated only to an individual who is “wise and able to draw conclusions independently” (as per \textit{Hilkhot Yesode ha-Torah} 2:12, 4:10-11). These principles, however, must be known by all at the beginning of their studies of the Torah. See Schneirson, M. M., “Mitsvat Yedi´at ha-Shem,” Hiddushim u-Biurim be-Shas u-be-Divre ha-RaMBaM (New York (770 E. Parkway): Yeshivat Tomkhe Temimim ha-Merkazit, 1985), vol. 2, siman 22, 5745, in particular pp.136 and 145.

\textsuperscript{107} Literally, “to unify Him” (\textit{le-yahado}). The Arabic equivalent of unification, \textit{tawhid}, “is a term applied to the belief, or the profession of faith, in One God” (Pines’ note 4 in \textit{GP} I:35:81). I left in place Hyamson’s rendition of \textit{yihud} as unity seeing that it conforms
More specifically the ShM reads, “We are commanded in the belief of unity,\textsuperscript{108} that is to say, to believe that the cause of all things in existence\textsuperscript{109} and their first cause is one.” This is the second of the two dogmas that M. innovatively introduced in the enumeration of commandments.

Proof: M. tells us that the injunction is contained in the phrase \textit{Hear O Israel: the Lord our God, the Lord is One} (Deuteronomy 6:4). In support of this claim, M. says that in most \textit{midrashim} you will find this explained as meaning that we are to declare the unity of God’s name, or the unity of God, or something of that kind. The intention of the Sages was to teach that God brought us out of Egypt and heaped kindness upon us only on condition that we believe in His unity, which is our bounden duty. The commandment to believe in God’s unity (\textit{mitsvat yihud}) is mentioned in many places, and the Sages also call this commandment ‘Kingdom \textit{malkhut},’ for they speak of the obligation ‘to take upon oneself the yoke of the Kingdom of Heaven [\textit{le-qabbel ´alav ol malkhut shamayim},’ that is to say, to declare God’s unity and to believe in Him.

M.’s sources fail to produce evidence for a separate and independent commandment to believe in His unity. Perla points out that the \textit{midrashim} with the one given by Efros, \textit{Philosophical Terms}, s.v. \textit{yihud}, p. 57 though it is possible that ‘oneness’ conveys a slightly more precise philosophical rendition. Note that oneness and unity have been used interchangeably in this dissertation.

\textsuperscript{108} Hebrew, \textit{be-emunat ha-yihud}. Arabic, \textit{b-itikad al-tuhid}. The Arabic term \textit{itikad} has already been discussed in connection with P1, where we showed that it stands for firm conviction. Chavel translated “to believe in the unity of God,” but the added words are not in the text.

\textsuperscript{109} Chavel translated “creator,” but \textit{paal} is “cause.” See note 97, above.
alluded to by M. relate to the declaration of unity made while reciting the Shema — which M. enumerates as P10. Furthermore, he notes that neither of the two expressions mitsvat yihud or mitsvat malkhut, which might have carried some weight as commandment markers, has been located.\(^{110}\) Besides, these terms could just as well have been identified with the declaration of unity made while reciting the Shema.

The expression “to take upon oneself the yoke of the Kingdom of Heaven” can be found in mBerakhot 2:2 in the name of the tanna R. Joshua b. Qorhah, and it is offered as justification for reciting the Shema before the section And it shall come to pass if ye shall hearken; this is thought to refer to taking the performance of the commandments (ve-ahar kakh meqabbel ‘alav ol mitsvot) upon oneself. However one wishes to understand the idea of accepting the yoke of Heaven — and likely it means to offer one’s life and possessions for His sake (i.e. qiddush ha-Shem) — to think that it mandates belief in His unity is tenuous. Kafih is forced to say that “one cannot adequately accept the yoke of Heaven without first recognizing the truth of His unity” but this of course puts the cart before the horse.

In Hilkhot Qeriyat Shema 1:2, M. reformulates this dictum, stating that one recites Shema first “because there is in it [i.e., the section of Shema], the unity of God, the love [for] Him and the study [talmudo] [of] Him. This is the great and essential matter on which all depends.”\(^{111}\)

\(^{110}\) Perla, Sefer ha-Mitsvot le-RaSaG, vol. 1, pp. 141-42. See also Sefer ha-Mitsvot, ed. Kafih, ad loc., note 11.

\(^{111}\) The commentators were clearly mystified by M.’s reformulation. See Kesef Mishne, ad loc. See also Isaac Almosonino, ’Edut BeYehosef, and David Luria, Yad David, both works cited by Kafih in his commentary on the Mishneh Torah, ed. Joseph Kafih, 23 vols. (Jerusalem: 1984-96), Hilkhot Qeriyat Shema 1:2.
reformulation avoids having to deal with a rabbinic expression that bears little or no relation to the interpretation that M. wishes to imprint on the commandment. Be that as it may, the scriptural commandment, in M.’s opinion, consists of the internalization of the belief in His unity and not its proclamation, as the rabbinic sources imply.\footnote{Neither Qayyara nor any of the other geonic enumerators thought that the commandment to declare the unity of God entailed anything but the recitation of the Shema. Qayyara, Pq1; Elijah ha-Zaqen, top line in strophe 21 (p. 6); Saadia, the twice daily recitation, P3 (evening), P4 (morning); Gabirol P1, (p. 5); and Isaac al-Bargeloni, P1 (p. 6b). See further our discussion of the commandment to recite the Shema in Chapter 8.}

Conspicuously absent from the argumentative apparatus is the 
midrash of the 613 commandments. As we saw earlier, M. interpreted this midrash to indicate that the words directly heard from God, I and Thou shalt not have, conveyed two principles, the existence of the deity and His being one. That M. does not adduce Thou shalt not have as a proof-text for this commandment may have something to do with the fact that the injunction is negatively phrased. Since positive commandments by definition must be phrased positively, Thou shalt not have would not do. Nevertheless, there is little doubt that M. relied on this midrash to make his case, which, otherwise, finds no echo in rabbinic sources.

M.’s ethico-philosophical approach informs the concept of God’s unity and compels him to find a place for it in the TaRYaG constellation. The goal of the commandment “to unify Him” is to attain intellectual virtue “through which the ultimate perfection may be obtained.” Along the way, M. subtly reinterprets and recasts a tannaitic statement that probably has more to do with praxis than with doxa. M. presents this innovative commandment claim in the ShM and advances a second commandment
claim (P10), that of reciting the *Shema* twice daily. While this second commandment appears almost superfluous, it is an appropriate concession for a popular work such as the *ShM*. In the more formal Code of Law, M. abandons this pretense, as we shall have an opportunity to discuss in Chapter 8.

* As we take leave of our exclusive focus on the *ShM*, I would like to make two general comments regarding this work. The *ShM* is, without any doubt, a work in progress. One can truly say that the *ShM* represents M.’s *first attempt* to unravel, identify and interpret the complete corpus of scriptural law (as opposed to the Oral Law, to which he dedicated the commentary to the Mishnah), a massive hermeneutic enterprise that will occupy him for at least 30 more years and that will develop through the *MT*, the *GP* and through various lengthy epistles. As we shall soon see, many of the *ShM*’s initial claims will be tweaked, changed or even omitted in the *MT* (and the *GP*) after, one presumes, careful re-consideration and deliberation. (Many of these changes will be noted throughout the rest of the dissertation). But note, as befits a great thinker, M. never ceased to change and revise his works until the very last days of his life. Every stage of M.’s life-works was infused with original and creative thinking. As a result, all his conclusions can be said to be of a tentative nature and no particular stage can be said to be more final or more conclusive than the prior one. This makes the *ShM* a self-contained work, with a method, approach and philosophy all of its own. For this reason, later changes should not be called ‘revisions’, rather they represent different methods, approaches and philosophies.
Secondly, because the *ShM* is addressed to a popular audience and because it is brief by virtue of its role as a prolegomenon of the Code, the *ShM* is more concerned with delivering general concepts rather than details of the law, and states these in mostly unambiguous terms. More importantly, the *ShM*’s style is didactic. One finds in the *ShM* a fair number of important theological, juridical, historiographical, and, most of all, politico-philosophical glosses, despite M.’s protestations (in the introduction to the *ShM*) that the *ShM* will restrict itself to short definitions of each of the 613 commandments. These glosses show an extremely original and fertile mind at work, one that attempts to engage a very wide audience of readers. Indeed, M. sets out to instruct Rabbanites, to persuade Karaite ‘truth-seekers,’ to polemicize with Karaite-sympathizers and committed Karaites and to impress enlightened Muslims and Muslim colleagues.

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114 Their existence can be inferred from a reply given by Abraham Maimonides to a correspondent who questioned M.’s interpretation of Scripture in the matter of one of his commandment claims (P8). Maimuni offered that “in this regard, we, the congregation of Rabbanites differ from the way of the Karaites”. This suggests that the inquirer was a Karaite, one, however, who was well acquainted with and who took seriously the Rules of the *ShM*. See Abraham Maimonides, “Teshubot Rabbenu Abraham ben ha-RaMBaM”, *siman* 63; see, too, M.’s comments at P109 and his reference to the “true book”.

115 See for example M.’s lengthy disquisition at P153, and see our notes 52 and 53 to chapter 7.
Certainly, its popular appeal was enhanced by the fact that, unlike the MT, the ShM was written in Judeo-Arabic, the vernacular of his world.

In sum, the ShM is not only an important work of halakhah, for the reasons outlined above, but is also an important work in the history of Jewish thought.

116 See Excursus 2.

Even a cursory read of the *MT* reveals in striking fashion the boldness and deliberation with which M. designates a *mitsvat ´aseh*. The declaration usually appears at the very beginning of the commandment being discussed and it is formulaically expressed as “it is a positive commandment to such and such” or sometimes as “it is a positive commandment of (or from) the Torah to such and such.” It is therefore surprising that so many Maimonidean scholars have failed to note the absence of such a formula on a significant number of occasions. One scholar who did note it was Masud ben Aaron Hai-Raqah (1690-1768), the author of the well-known *Ma´aseh Roqeha*, a commentary on all the books of the *MT*. Unfortunately, as we shall see, Hai-Raqah did not pursue this anomaly systematically and, as a result, came to the wrong conclusions. He was followed more recently by Joseph Kafih, who picked up Hai-Raqah’s suggestion and applied it to a slightly wider sample; he too, however, failed to take note of the far more systematic nature of the omission and thus failed to understand its momentous implications.¹

6.1 The Enumeration According to the *Halakhot*

¹ R. David ibn Zimra (RaDBaZ) attempted to tackle a somewhat related question, offering a series of improbable and at times unintelligible *ad hoc* answers. RaDBaZ, (R. David ibn Zimra), *Sheelot u-Teshuvot ha-RaDBaZ u-Leshonot ha-RaMBaM* (Warsaw: 1882), *Orah H ayyim, siman alef*. I reprint it in full in Excursus 4. I am satisfied that his approach has nothing to add to our inquiry.
M.’s topical discussions in the Halakhot typically begin with a bold, simple and clear statement that such-and-such is a positive commandment (or a negative commandment, as the case may be). These statements almost invariably take the form of “it is a positive commandment to such and such.” Here are a few examples, taken from the first two books of the MT, Sefer ha-Madd’a (Book of Knowledge) and Sefer Ahavah (Book of Love): “It is a positive commandment (mitsvat ‘aseh) to adhere to Sages…” (Hilkhot De’ot 6:2); “It is a positive commandment to destroy idolatry and its appurtenances…” (Hilkhot ‘Avodah Zarah 7:1); “It is a positive commandment to pray daily…” (Hilkhot Tefillah 1:1); “It is a positive commandment on every Israelite male to write a scroll of Law for himself…” (Hilkhot Tefillin u-Mezuzah ve-Sefer Torah 7:1); “It is a positive commandment from the Torah to recite grace after the meal…” (Hilkhot Berakhot 1:1). We also find slight variations of this formula, as for example: “Circumcision is a positive commandment on which one incurs excision, as it says…” (Hilkhot Milah 1:1); “Abstention from work on the seventh [day] is a positive commandment, for Scripture says, But on the seventh day thou shalt rest” (Hilkhot Shabbat 1:1); and “The Nazirite is bound by a positive commandment to let the head of his hair grow long, for Scripture says, He shall let the locks of the hair of his head grow long” (Hilkhot Nazir 1:1).

Where the object of the commandment is not self-evident or where it is too complex or subtle to be conveyed by a simple term, M. digresses briefly and then returns to designate the commandment as a mitsvat ‘aseh.

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2 The additional phrase “from the Torah” appears on a number of other occasions. I believe that the more common expression is a short form of this longer formula. It is also possible that the extra emphasis may have been polemically motivated as we shall suggest on a number of instances. See e.g. note 52, section 7.4.
For example, at *Hilkhot Teshuvah* 1:1, M. first explains that a verbal confession is an integral part of repentance and then designates confession a positive commandment. A somewhat lengthier digression takes place at the beginning of the Book of Knowledge:

(1.1) The basic principle of all basic principles …is to realize that there is First Being ….All existing being[s] …exist only through His true existence…. (1:2) If it could be supposed that He did not exist…. (1:3) If, however, it were supposed that all other things were non-existent….Hence, His real essence …. (1:4) This is what the prophet means…. (1:5) This being is the God of the Universe…. (1:6) To acknowledge this truth is a positive commandment….

As discussed in an earlier section, this digression is absolutely necessary for a proper description of the commandment. A similar approach is used with respect to the commandment to know His unity, where M. offers a robust and lengthy definition of the meaning of Unity and then ends the presentation by adding: “to realize this truth is a positive commandment” (1:7).

All of these declarative designations begin by identifying the commandment, presenting the relevant scriptural proof-text, and reiterating at the end that it is a commandment. I will argue that deviations from this pattern are worthy of attention for they may signal a change of mind on M.’s part with regard to a claim made in the *ShM*. Henceforth, I will call these deviations “failures to designate,” to convey the idea that they did not occur by chance but rather were the product of design, as we will demonstrate below. Specifically, by a failure to designate I mean a failure to designate a commandment previously identified as such in the *ShM at the very moment that the subject matter is introduced in the Halakhot*. It is critical to note that
positive commandment labels applied by M. outside the *locus classicus* of the commandment and in the course of making a general point do not qualify as true designations. Therefore, designating each of the wearing of phylacteries (*tefillin*), the dwelling in booths (*sukkah*) and the taking of a palm branch (*lulav*) a *mitsvat ‘aseh*, as M. does in *Hilkhot Berakhot* 11:2, cannot take the place of the missing designation in its *locus classicus*. The salient point for discussion in *Hilkhot Berakhot* 11:2, blessing formulas, is not whether a particular commandment is of scriptural or rabbinic authority

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Conversely, designating the making of a parapet for one’s roof (*maaqeh*) a simple *mitsvah*, as M. does in that *halakhah*, and not a *mitsvat ‘aseh*, as he forthrightly declares in its *locus classicus*, *Hilkhot Rotsheah* 11:1, should not be adduced to demonstrate a change of opinion. By way of conjecture I would submit that M. may have wished to emphasize the immediate distinction between the commandments of *tefillin*, *sukkah* and *lulav*, which he gave as examples of unconditional obligations (*hobah*), and the commandments to build a parapet and to affix a *mezuzah* to a door which he simply labeled as commandments that are “akin to voluntary” (*dome la-reshut*) since one need not build himself a house. He called the former *mitsvat ‘aseh* and the latter simply *mitsvah*. That is to say, only unconditional obligations should have the right to be called *mitsvat ‘aseh*. Of even more interest is M.’s statement that “regarding all *mitsvat ‘aseh* that concern matters between man and God, be it a *mitsvah* that is not obligatory (*hobah*) or be it a *mitsvah* that is obligatory (*hobah*), one must pronounce a blessing over it prior to its fulfillment.” By *mitsvah* that is not obligatory M. refers to those he just mentioned, parapet and *mezuzah*. These I had designated as contingent commandments in chapter 3. It is worth noting that M. includes here contingent commandments under the designation *mitsvat ‘aseh*, presumably because they become obligatory under certain circumstances, but pointedly does not include procedure-commandments, such as the revocation of vows (P95), immersing in the waters of a ritual bath to achieve cleansing from impurities (P109), or the need to effect divorces by means of a divorce bill (P222) under this definition. Neither does he include any of the fourth type of commandments that we identified, the descriptive commandments. Therefore, no blessing is pronounced over them. Be that as it may, this seems to indicate that a change in criteria for what represents a *mitsvat ‘aseh* has occurred in the MT and that it has everything to do with what is obligatory. We shall expand on this idea through the rest of this chapter and chapters 7 through 9.
but rather whether or not the injunction is a *hovah* (“those that one must strain to do and run after them to fulfill them”).

Using this criterion, I found in the *Halakhot* 109 instances of failures to designate commandment claims previously made in the *ShM*—a surprisingly large number. As we examine them, we will find that a simple change in criteria will account for a substantial portion of this list. A further and material share is explained by changes in individuation. None of these explanations carry significant exegetical or theological implications. The balance of these 109 failures to designate, however, does — as we intend to show.

Table 1, below, identifies the 109 failures to designate.

**Table 1**

P3. To love Him.
P4. To fear Him.
P8. To imitate His good and upright ways.
P9. To hallow His name.
P10. To read the *Shema* twice daily.
P11. To learn Torah and to teach it.
P12. To bind the phylactery on the head.

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*Hilkhot Berakhot* 11:2. The *halakhah* groups well known positive commandments — for example the horn (*shofar*) that is blown on Rosh ha-Shanah and which is designated a *mitsvat ‘aseh* in *Hilkhot Shofar* 1:1 — with those that are not, as we shall see later on, such as *tefillin*, and treats them according to their popular understanding for ease of comprehension.
P13. To bind the phylactery on the arm.
P14. To make fringes.
P15. To affix the Mezuzah.
P18. That the King shall write a scroll of the Torah for himself, besides the one which every individual should write, so that he shall possess two scrolls of the Torah.
P26. That the priests shall bless Israel.
P34. That, when the Ark is carried, it should be carried on the shoulder.
P41. To offer up an Additional Sacrifice every Sabbath.
P42. To offer up an Additional Sacrifice every New Moon.
P43. To offer up an Additional Sacrifice on the Feast of Passover.
P44. To offer up the Meal Offering of the Omer\(^5\) on the morrow after the first day of Passover, together with one lamb.
P45. To bring an Additional Offering on the Feast of Weeks.
P46. To bring on the Feast of Weeks loaves of bread together with the sacrifices which are then offered up in connection with the loaves.
P47. To offer up an Additional Sacrifice on the New Year.
P48. To offer up an Additional Sacrifice on the Day of the Fast (Day of Atonement).
P49. To observe, on the Day of the Fast, the service appointed for that day.
P50. To offer up an Additional Sacrifice on the Feast of Tabernacles.
P51. To offer up an Additional Offering on the Eighth Day of Solemn Assembly, which is a feast by itself.

\(^5\) First fruits of barley harvest.
P68. That the Court of Judgment shall offer up a sacrifice, if they have erred in a judicial pronouncement.

P70. That an individual shall bring an offering, if he is in doubt as to whether he has committed a sin for which one has to bring a Sin Offering.

P71. That an offering shall be brought by one who has in error committed a trespass against sacred things, or robbed, or lain carnally with a bondsmaid betrothed to a man, or denied what was deposited with him and swore falsely to support his denial. This is called a Trespass Offering for a known trespass.

P72. To offer a sacrifice of varying value in accordance with one's means.

P74. That a man having an issue shall bring a sacrifice, after he is cleansed of his issue.

P75. That a woman having an issue shall bring a sacrifice, after she is cleansed of her issue.

P76. That a woman after childbirth shall bring an offering when she is clean.

P77. That the leper shall bring a sacrifice, after he is cleansed.

P87. That an exchanged beast (if a beast is exchanged for one that had been set apart as an offering) is sacred.

P95. To decide in cases of annulment of vows, according to the rules set forth in the Torah.

P96. That anyone who touches the carcass of a beast that died of itself shall be unclean.

P97. That eight species of creeping things defile by contact.

P98. That foods become defiled (by contact with unclean things).

P99. That a menstruating woman is unclean and defiles others.

P100. That a lying-in woman is unclean like a menstruating woman.
P101. That a leper is unclean and defiles.
P102. That a leprous garment is unclean and defiles.
P103. That a leprous house defiles.
P104. That a man, having a running issue, defiles.
P105. That the seed of copulation defiles.
P106. That a woman, having a running issue, defiles.
P107. That a corpse defiles.
P108. That the waters of sprinkling defile one who is clean, and cleanse [the unclean] from pollution by a dead body.
P109. That purification from all kinds of defilement shall be effected by immersion in the waters of a *miqveh*.
P113. To carry out the ordinance of the Red Heifer so that its ashes shall be always available.
P114. That one who vows to the Lord the monetary value of a person shall pay the amount appointed in the scriptural passage.
P115. That one who vows to the Lord the monetary value of an unclean beast shall pay its value.
P116. That one who vows the value of his house shall pay according to the appraisal of the priest.
P117. That one who sanctifies to the Lord a portion of his field shall pay according to the estimation appointed in the scriptural passage.
P119. That the fruit of fruit-bearing trees in the fourth year of their planting shall be sacred.
P127. To set apart the tithe of the corn for the Levites.
P128. To set apart the second tithe to be eaten by its owner in Jerusalem.
P129. That the Levites shall set apart a tithe of the tithes, which they had received from the Israelites, and give it to the priests.
P130. To set apart in the third and sixth year the tithe for the poor, instead of the second tithe.
P139. That houses sold within a walled city may be redeemed within a year.
P145. To decide in regard to dedicated property as to which is sacred to the Lord, and which belongs to the priest.
P148. To set the mother-bird free when taking the nest.
P149. To examine the marks in cattle.
P150. To examine the marks in fowl, so as to distinguish between the unclean and the clean.
P151. To examine the marks in locusts, so as to distinguish the clean from the unclean.
P152. To examine the marks in fish.
P159. To rest on the first day of Passover.
P160. To rest on the seventh day of that feast.
P162. To rest on the fiftieth day (from the time of cutting the Omer).
P163. To rest on the first day of the seventh month.
P166. To rest on the first day of the Feast of Tabernacles.
P167. To rest on the eighth day of that feast.
P168. To dwell in booths seven days.
P169. To take on that feast a palm branch and the other three plants.
P172. To heed the call of every prophet in each generation, provided that he neither adds to, nor takes away from, the Torah.
P173. To appoint a king.
P178. That one who possesses evidence shall testify in Court.
P181. To decapitate the heifer in the manner prescribed.
P183. To give the Levites cities to dwell in, these to serve also as cities of refuge.
P190. In a permissive war, to observe the procedure prescribed in the Torah.
P191. To anoint a special priest (to address the soldiers) in a war.
P199. To return a pledge to its owner.
P201. That the hired labourer shall be permitted to eat (of the produce which he is reaping).
P205. To rebuke the sinner.
P209. To honour the wise.
P214. That the newly-married husband shall give happiness to his wife.
P221. To deal with a beautiful woman taken captive in war, in the manner prescribed in the Torah.
P222. To divorce by a formal written document.
P223. That the woman suspected of adultery be dealt with as prescribed in the Torah.
P226. That the Court shall execute (sentences of death) by decapitation with the sword.
P227. That the Court shall execute (sentences of death) by strangulation.
P228. That the Court shall execute (sentences of death) by burning with fire.
P229. That the Court shall execute (sentences of death) by stoning.
P232. To deal judicially with the Hebrew bondsman, in accordance with the laws appertaining to him.
P233. To espouse a Hebrew maid-servant.
P234. To redeem her.
P235. To keep the Canaanite slave forever.
P236. That he who inflicts a bodily injury shall pay monetary compensation.

P237. To judge cases of injuries caused by beasts.

P238. To judge cases of damage caused by an uncovered pit.

P239. To adjudge a thief to pay compensation, or (in certain cases) suffer death.

P240. To adjudicate cases of damage caused by trespass of cattle.

P241. To adjudicate cases of damage caused by fire.

P242. To adjudicate cases of damage by a gratuitous depositary.

P243. To judge cases of damage of a paid depositary and a hirer.

P244. To adjudicate cases of damage of a gratuitous borrower.

P245. To adjudicate cases of purchase and sale.

P246. To adjudicate other cases between a plaintiff and a defendant.

P247. To save the pursued even at the cost of the life of the pursuer.

P248. To adjudicate cases of inheritances.

There are various ways one might account for this surprisingly large number of failures to designate a positive commandment that had previously been designated as such in the ShM: a) M. was careless in drafting the Halakhot; b) M. changed his mind and now believed that, on the basis of the same criteria he utilized in the ShM, there were only 139 (248 minus 109) positive commandments; c) M. did not change his mind but yet did not think it necessary to state in every case, for reasons that need to be explained, that such a command was a positive commandment; d) M. changed the criteria for defining a mitsvat ‘aseh used in the ShM; or e) M. changed his mind regarding some of the claims he made in the ShM in combination with c) and/or d).
Can M. be accused of slipshod writing? In medieval and modern rabbinic circles, the language of M.’s rulings is considered to be as capable of bearing inferences as talmudic discourses for its precision and care.  

6 See Malachi ben Yaaqov ha-Kohen, *Yad Malachi, Kelale ha-Gemara u-Klale ha-Posqim u-Klale ha-Dinim* (N.p., n.d.), paragraph 3, citing *Mishpette Shmuel siman* 120, and *Migdal Oz*, “in many places.” Levinger, *Darkhe ha-Mahshavah*, p. 13, attempts with some success to demonstrate that this reputation for extreme precision is somewhat overstated. He attributes this to the popular nature of the work — the *MT*, as he said in the introduction, was addressed to “young and old.” Words and phrases are sometimes used that lack precise values and one must come to the conclusion that they are no more than synonyms and synonymous phrases. For example, the side by side use of the words *mattar* and *geshamim* throughout *Hilkhot Ta’anit*, *yom ha-kippurim* and *yom ha-tsom* in *Hilkhot Kele ha-Miqdash* 8:3-5, *qibbets* and *tsiref* in *Hilkhot Maakhalot Asurot* 4:17, and so on. See also the second part of chapter 1, where Levinger deals with other types of imprecisions, such as internal contradictions. I would add other oddities as well. For example, new terms appear suddenly in certain discussions without prior definition (see, for example, “iggeret” in *Hilkhot Sotah* 4:8); cases cited almost verbatim from talmudic passages that cannot be understood without reference to the original source for an appreciation of context, the very opposite of what M. had attempted to do; contradictory terminology (see, for example, *Hilkhot Ishut* 15:17 vs. *Hilkhot Sotah* 4:18), etc. An intriguing contradiction that arises from two statements that sit side by side can be found at *Hilkhot De’ot* 2:3 and 4. In the first instance M. states that arrogance (govah lev) must be remedied by going to the opposite extreme. The person must deliberately humiliate himself until arrogance [govah lev] is rooted out from his mind and he has returned to the middle course which is the right way. After regaining the middle course, he should follow it the rest of his life. In this manner he should act with regards to all other character dispositions [de’ot]….  

In *halakhah* 4, M. states:  
There are character dispositions in which it is forbidden [asur] to go in the middle way but one should go to the other extreme, and that character disposition is arrogance. The right way is not merely being meek, but one should be of a lowly spirit [shefar-ruah] to the utmost….  

The contradiction is too blatant to allow us to believe that it came out of one literary stratum, that is, that it was not a later correction. In general, I believe that the greater share of these “imprecisions” can be attributed to a combination of stylistic considerations, the very ambiguity of the talmudic sources, and copyists’ errors. The monumental and highly ambitious scope of the work can account for some of the
Rabbinic literature is filled with thousands of observations, indications and rulings that are derived from the nuances of M.’s formulations — and even from his silence. *Halakhah* can be said to have been built on the back of the *MT*. On the basis of the subjective appreciation of hundreds of scholars, one might be tempted to conclude that the failure to include such an obvious and standard designation did not represent a mere oversight.

But there are two additional factors that make this conclusion a near certainty, factors that are intimately related to the very essence of M.’s project. First, M. displays an extraordinary interest, one might call it an obsession, in drawing clear demarcations between commandments of scriptural origin and those of rabbinic origin. This is as true of his commentary to the Mishnah as it is of the *MT* and of course of the *ShM*. In all these writings M. continuously reminds the reader of the sources of the Law - which commandments are scriptural and which are not. The reason that scriptural laws need to be identified is that they are more strictly enforced than rabbinic ones and unlike the latter can never be abrogated.

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8 Others have also taken note of this interest. For example, Feldblum states that “Maimonides is unique among the codifiers of Jewish law in his careful and systematic assignment of laws to …specific categories….Such categories are significant both halakhically and historically.” Feldblum, Meyer S., ”Criteria for Designating Laws: Derivations from Biblical Exegesis, and Legislative enactments,” *Maimonides as Codifier of Jewish Law*, ed. N. Rakover (Jerusalem: The Library of Jewish Law, 1987), p.45.

9 See, for example, *Hilkhot Mamrim* 1:5 and also 2:9.
Torah laws not only occupy a privileged position in M.’s jurisprudence but also in his theology. M. dedicates an important part of the GP to provide justification for the great majority of the Mosaic laws. The reason is that, in his opinion, these laws, unlike man-made laws (nomos) are perfect. The statement “it is a positive commandment to do such and such” - usually accompanied and supported by a scriptural proof-text - is as simple as it is unequivocal, and would serve well the exigencies of these demarcations. This is a good reason for M. not to forget to designate a commandment as such.

Second, the formula “it is a positive commandment to do such and such” is not only a rhetorically powerful and dramatic statement but also bespeaks authority. M. identifies more than 140 positive commandments throughout the entire Code of Law with this, or a slight variant of this, formula. It is unlikely that an author so attuned to rhetorical effect and so intent on establishing authority would have forgotten to use this formula on as many as 109 occasions.

10 GP II:39, 40.

11 On the author’s high self-evaluation of his work and on his expectations that “in coming days…all of Israel will fill all its needs with this [the MT]…” see M.’s letter to his disciple Yosef b. Yehudah, in Iggerot ha-RaMBaM, ed. Shailat, volume I, pages 300-1. M.’s high expectations came to be realized in very short order, likely a result of the quality and authoritativeness of the work. On the rapid dissemination of the MT, even during M.’s lifetime, see Twersky, Introduction to the Code of Maimonides, p. 518. On the nature of his expectations with regards to the MT, see Halbertal, Moshe, “What is Mishneh Torah? On Codification and Ambivalence,” Maimonides After 800 Years, ed. Jay Harris (Harvard University Press, 2007), p. 81-111. M.’s ambivalent designs with regards to the MT and its acceptance as the standard halakhic work throughout the Jewish world represented a distinctive stylistic feature of his writings. In section 9.4 I offer some examples of ambivalent writing in the formulation of halakhot.
I conclude with a reasonable degree of confidence that M.’s failure to
designate 109 commandment claims previously identified in the ShM is
deliberate. We can therefore assume that these omissions contain useful
information. In attempting to resolve the problem we must be careful not to
fall into the trap of providing 109 ad hoc, fit-to-order, solutions, which in the
end, is no solution at all. My approach will be guided by Ockham’s Razor,
the rule that philosophical or theological theories should provide an
economy of explanatory variables. All else being equal, I will consider the
principle that is likely to explain the greatest number of failures to designate
as being the most likely to be right even at the risk of standing long-running
conventions on their head. I ask the reader to judge my effort relative to the
goodness of fit and not on the presumed radicalness of the views espoused.
At the very least, these explanations should be treated as a first
approximation to a better understanding of M.’s complex exegetical, legal
and theological creation.

6.1.1 Using the term mitsvat ʿaseh: an example of studious precision

I argue above that M.’s failure to designate a commandment in the
Halakhot was deliberate and thus worthy of explanation. The example that I
am about to show does not deal directly with this particular problem but
rather shows the terminological care that M. exercises whenever he deals
with a positive commandment or one that has previously been identified as
such. This care must reflect back on the deliberate nature of the omissions
that we have identified. P172, the commandment that one must heed the call
of every true prophet, provides an interesting test case. The law is discussed
at great length and detail in *Hilkhot Yesode ha-Torah* 7:7, 8:2, 9:2 and 9:3. During the discussion of this commandment, M. repeatedly uses the term *mitsvah* and not the term *mitsvat ´aseh*, as one would expect, even though the commandment had been identified as *mitsvat ´aseh* in the *ShM*. To find out why, we need to turn to *Hilkhot Sanhedrin*, where M. lists all the scriptural violations and their punishments. In 19:3 we read:

[A] priest who performs service without having washed his hands and feet, though he incurs thereby the penalty of death [by divine intervention], is not flogged, because this is a positive commandment (*mitsvat ´aseh*). So too, a prophet who suppresses his prophecy, a prophet who acts contrary to his own words, and one who disregards the words of a prophet, are not liable to flogging — though these three offenders incur the penalty of death [by divine intervention] — the prohibition they transgress is derived by implication from a positive command, as it is said *Unto him ye shall hearken* [Deuteronomy 18:15], and a negative command derived by implication from a positive command is treated as a positive command (*ke-aseh*), the violation of which does not entail the penalty of flogging (my emphasis).

The requirement that a priest wash his hands and feet before he performs the service is called here a *mitsvat ´aseh* and is consistent with P24 and M.’s final ruling at *Hilkhot Biat ha-Miqdash* 5:1. Yet, the best that M. can say with regard to the command *Unto him ye shall hearken* is that it is considered “as an ´aseh,” even though he compares the violation and its consequence to the commandment to wash hands and feet. To say that it is “as an ´aseh” is to view *Unto him ye shall hearken* as a positive commandment in form and not in substance. As noted on previous
occasions, M. had changed his mind with respect to formal positive commandments by the time that he wrote the *Halakhot*, and he no longer considered them positive commandments.\footnote{See section 2.1.1 and notes.} This change relates to the change in criteria in the use of the term *mitsvat ḣaseh* that will be discussed later. Thus, we can appreciate the repeated use of the term *mitsvah* rather than *mitsvat ḣaseh* in *Hilkhot Yesode ha-Torah* (and even, I might add, his failure to designate!).\footnote{Note that M. modifies the talmudic principle, which states that a negative command derived by implication from a positive command is a positive command (*lav ha-ba-mikhlal ḣaseh, ḣaseh*). See, for example, b*Yevamot* 54b, 56b, and *passim*. For a similar change of the original formula, see *Hilkhot Ishut* 1:8.} In sum, this example demonstrates M.’s special care in the use or non-use of the term *mitsvat ḣaseh*.

### 6.2 The Hai-Raqah’s Thesis

In his opening comment to *Hilkhot Tefillah*, Hai-Raqah notes:

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\footnote{Later on we will show that *mitsvah* here simply means that one is prohibited from not listening to, or not obeying, the prophet, not that there is an obligation to actually find a prophet to whom one needs to listen. This is also understood in this way by *Lehem Mishneh* on *Hilkhot Yesode ha-Torah* 9:2-3, who argues that the command ought to be read as essentially denoting a prohibition, as if to say “do not violate the prophet’s words” (*de-inyano lav hu, lo taavor al divre ha-navi*). The appearance of P172 in the list of the 60 unconditional obligations is, however, quite puzzling; even when M. thought it proper to enumerate this commandment in the *ShM*, he certainly did not need to imply an active obligation. Moreover, if M. follows the well-known rabbinic tradition that held that prophecy was abolished after the destruction of the Temple, how can P172 be normative in the modern period so that it appears in the abbreviated list of obligations? J. Levinger’s interesting distinction between prophetic legislation and prophetic advice does not begin, in my opinion, to solve this problem. Levinger, *Ha-RaMBaM ke-Filosof*, “Ha-Mitsvot Hekhrehiyot”, pp. 84-87.}
One needs to investigate the holy ways of our master, his memory be blessed, in this composition, the reason why, with regards to some commandments, he wrote ‘it is a mitsvat ʿaseh to do so-and-so’ and at other times he totally failed to mention it, as in the case of the recitation of the Shema and others similar, and sometimes he says ‘this thing [davar zeh] is a mitsvat ʿaseh, as with respect to Sabbath where he writes ‘rest from work on the seventh is a mitsvat ʿaseh, etc.’’

Hai-Raqah then proceeds to offer an explanation that fits a limited number of observations and bids the reader to apply the explanation throughout.

Kafih takes note of this problem, advances the same thesis and applies it to a larger but still limited number of instances, all of them occurring in the Sefer Ahavah (Book of Love) and the Sefer Zemanim (Book of Seasons). He concludes by saying that “the Roqeah wrote something similar to [what I have offered].”

Hai-Raqah, and later, Kafih, argued that M. felt no need to designate a commandment as a mitsvat ʿaseh if it was absolutely explicit in Scripture (mefureshet le-gamre ba-torah). This criterion, in his opinion, explained why M. did not designate as positive commandments right at the outset the obligation to dwell in booths (sukkah) on the fifteenth of Tishre, the obligation to take a palm-branch ( lulav) on that festival, and the obligation to study Torah. Conversely, they argued, M. felt compelled to offer the designation mitsvat ʿaseh when the commandment was not explicitly stated

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in Scripture. They suggested this to be the case with respect to the obligations to pray (tefillah) and to consecrate the lunar month (qiddush ha-hodesh). Hai-Raqah does not deal with more than a handful of cases but suggests that the student may want to apply this method to other cases “if it is possible.” To Hai-Raqah’s first category — those commandments that he presumes are explicitly formulated in Scripture — Kafih adds the priestly blessings, phylacteries (tefillin), mezuzah, tsitsit and milah. To the second category — those commandments not explicitly formulated and thus necessitating a designation — he adds the obligations to write a Book of Law and to blow a horn on New Year.

Kafih’s thesis runs into difficulty almost immediately. The Halakhot designate the following commandments as positive commandments despite the fact that they are all explicitly mandated in Scripture: to recite grace over a meal (Hilkhot Berakhot 1:1); to rest from work on the Sabbath (Hilkhot Shabbat 1:1); to rest from work on the Day of Atonement (Hilkhot Shevatit ‘Asor 1:1); to eat matsah on the fifteenth of Nisan (Hilkhot Hamets u-Matsah 6:1); to discourse concerning the departure from Egypt on the first night of the feast of Passover (ibid. 7:1); to give half a shekel every year (Hilkhot Sheqalim 1:1); and to sound the trumpets in times of trouble (Hilkhot Ta’anit 1:1). Faced with counterexamples, Kafih applies talmudic casuistry to dismiss each case on an ad hoc basis.

But the counterfactual evidence does not end there. Moving beyond the Sefer Ahavah and Sefer Zemanim, we again find commandments that are explicitly mandated in Scripture and yet are designated as positive commandments. Following is a partial list from the Sefer ‘Avodah (The Book of Temple Service): the commandments to build the Sanctuary (Hilkhot Bet ha-Behirah 1:1), to revere the Sanctuary (ibid, 7:1), to make the
oil of anointment (*Hilkhot Kele ha-Miqdash* 1:1), to send away the unclean out of the Sanctuary (*Hilkhot Biat ha-Miqdash* 3:1), to offer up the regular daily sacrifices (*Hilkhot Temidin u-Musafin* 1:1); to keep fire always burning on the altar (*ibid*, 2:1); to offer incense twice a day (*ibid*, 3:1); that the High Priest shall give a Meal Offering daily (*ibid*, 3:18); to count 49 days from the time of cutting the Omer (*ibid*, 7:22). I have chosen these examples because they are counted by other enumerators and can therefore be deemed to be uncontroversial. Nevertheless, there should be no doubt that the list of counterexamples can be expanded greatly.

Their second, and complementary hypothesis, namely that commandments that are not explicitly mandated are always designated as positive commandments, is more difficult to test. This is simply because most commandments are in some way or another midrashic interpretations of scriptural texts. The line between what is explicit and what is implied is not always clear. In short, the distinction may be too subjective for a valid test.

With this caveat in mind, I have been able to find two counterexamples to the second criterion, commandments that are essentially a product of interpretation and yet are not designated as positive commandments. The first counterexample is the commandment that when the ark is carried, it should be carried on the priests’ shoulders (P34 in the *SE/ShM; Hilkhot Kele ha-Miqdash* 2:12). In the *ShM*, M. cites Numbers 7:9 as proof-text for this commandment. The verse, as we already demonstrated, does not yield a commandment and it is only via midrashic interpretation that M. can craft it into a commandment claim. According to the reasoning of Hai-Raqah and Kafîh, M. should have designated this midrashically — supported claim a positive commandment — yet he does not. The second
counterexample is the commandment to honor the wise (P209 in the
SE/ShM; Hilkhot Talmud Torah 6:1). The scriptural verse (Numbers 11:16)
speaks about honouring an old man (zaqen); a rabbinic midrash turns zaqen
into an acronym, standing for someone who has acquired wisdom (zeh she-
qanah hokhmah), i.e. a sage. Here again, M. should have designated this
claim a positive commandment if Hai-Raqah and Kafih were right; yet he
did not.

In sum, M.’s deliberate omissions, as we have taken them to be, of a
significant number of declarative statements in his main legal work
continues to beg for a consistent and more systematic explanation. The Hai-
Raqah/Kafih theory advanced to account for these omissions does not stand
close scrutiny. While it is conceivable that someone might be able to explain
away every counterfactual piece of evidence, as Kafih did with the
counterexamples he found in the Sefer Ahavah and Sefer Zemanim, the many
and thin justifications greatly weaken the thesis. More generally, their
explanations run counter to M.’s objectives in writing the MT – to make
clear to everyone, “young and old,” the learned and the ignorant, the layout
of the Law. On this basis, it is inconceivable that M. would have left it to the
reader to decide on the origin, force and status of each of the
commandments.

I offer below an explanation that I hope is as parsimonious as it is
consistent. It consists of a redefinition of the term mitsvat ’aseh as
understood in the ShM and a tightening of the individuation criteria utilized
in the ShM. I will also posit that a more mature and restrained analysis led
M. to change his mind on a small number of previous claims, in keeping
with the more conservative nature of the Halakhot.
6.3 A Redefinition of mitsvat ‘aseh

In chapter 3 we discussed the various definitions of mitsvat ‘aseh used in the ShM. We concluded that some of the commandment types, specifically the procedural commandments and the definition commandments, would be better characterized as laws rather than commandments since they are not consistent with the basic meaning of the term mitsvat ‘aseh, literally, the “commandment of do!”, much less with the equivalent, though less frequently used, term, qum ‘aseh, literally, “arise, do!” In short, procedure-commandments and descriptive commandments have none of the properties of active obligations and therefore can hardly be called mitsvet ‘aseh. M. was aware of this problem and, in an excursus at the end of the section on positive commandments, acknowledges that “it is possible for a man to go through life without doing or experiencing” commandments that relate, for example, to the offering of special sacrifices. He also acknowledges that many laws, such as those regarding a Hebrew bondsman, a Canaanite bondsman and an unpaid bailee, “may never be applicable to a particular man, and which he may never be liable to carry out, throughout the whole of his life.” After the conclusion of these acknowledgements, M. springs on the reader a “new” type of mitsvat ‘aseh, namely, obligatory (or compulsory) commandments, and states that there are only 60 of this type. We noted that this type of commandment, which resembles the rabbinic term hovah, comes closest to being identified with the term mitsvat ‘aseh.

M. includes in the list of these obligatory commandments a number of contingent commandments, such as, “it being assumed that… the man whom we regard as bound by these 60 unconditional commandments, is living in
normal conditions.” Under these “normal conditions,” in this case concerning a man who owns a house and eats meat, he becomes necessarily obligated to perform otherwise contingent commandments, such as the mezuzah, ritual slaughter, and building a parapet to his roof. On the other hand, the law that governs the revocation of vows (P95), to take M.’s first example of law (din) in the ShM, is not enumerated here because a husband is not obligated to revoke his wife’s vows even when she utters a vow. Finally, M. does not include commandments applicable to a particular caste, e.g. priests and Levites, nor commandments that are binding only when the Temple stands, such as the commandments of the assembly during the feast of Tabernacles (haqhel, P16) and the tithing of cattle (P78).

I submit that the list of 60 unconditional obligations is critical to an understanding of the term mitsvat ‘aseh in the Halakhot. Having systematically “proved” in the ShM the existence of 613 commandments, as well as having identified them, M. no longer needed to concern himself with the enumeration. His attention turned now to a Code of Law that would govern every aspect of the Jewish people well into the time of restoration of the third temple and its services. As a result, the commandments follow a more natural contour, dividing into obligatory commandments, the sort of unconditional duties that we saw in the list of 60, and laws. Because of the Code’s comprehensiveness and eternal nature, the list of obligatory commandments is expanded by (a) the commandments applicable to priests and Levites as well as those applicable to the common people, and (b) the commandments that are binding when the Temple is standing and operative. A word of caution. The list of 60 unconditional obligations, much like the ShM itself, is in many respects a ‘popular’ piece of writing. For example, the list does not distinguish between mitsvot de-oraita and mitsvot mi-divre.
sofrim. It is true that *mitsvot mi-divre sofrim* were thought to have been eliminated from the list of commandments, as M. took pains to explain in Rule 2. Still, a stricter application of Rule 2, as I shall demonstrate, found more such commandments and led to their reclassification in the Code of Law. While this reclassification did not change the *force* of the obligation – thus they remain unconditional obligations – it does have important legal consequences as I alluded to in the introduction to this dissertation.

As well, M. does not distinguish in this list of 60 obligations between commandments that constitute genuine obligations and those that could only be called counsels. I shall endeavor to show how and why M. signals this subtle and innovative distinction in the *MT*. Again, such a distinction best belongs in a comprehensive Code of Law.

The popular nature of this list is confirmed by the playful manner by which M. explains the numbers 60 (incumbent on all male) and 46 (incumbent on all female):

A mnemonic for the number of unconditional commandments is: ‘There are threescore queens’ ([Song of Songs 6:8](https://www.biblegateway.com/passage/?search= Song%20of%20Songs%206%3A8&version=KJV), and the mnemonic for the 14 of those [commandments] taken away for women may be remembered by the expression ‘their stay (*yad*) is gone’ ([Deuteronomy 32:36](https://www.biblegateway.com/passage/?search=Deuteronomy%2032%3A36&version=KJV); *yad* equals 14)…

Since the criteria used in this list for what constitutes a *mitsvat ’aseh* is in some respects broader than the one used in the *Halakhot*, the list of 60 unconditional obligations does not match the list of *mitsvot ’aseh* of the *Halakhot*. Still, this enumeration is important in that it provides the first indication of the criteria for positive commandments that M. will use in the *Halakhot*.
We are now in a position to explain a substantial portion of the failures to designate appearing in Table 1. The following claims fail to meet the revised criteria of mitsvat ‘aseh:

P70. That an individual shall bring an offering, if he is in doubt as to whether he has committed a sin for which one has to bring a Sin Offering.

P71. That an offering shall be brought by one who has in error committed a trespass against sacred things, or robbed, or lain carnally with a bondsmaid betrothed to a man, or denied what was deposited with him and swore falsely to support his denial. This is called a Trespass Offering for a known trespass.

P72. To offer a sacrifice of varying value in accordance with one's means.

P74. That a man having an issue shall bring a sacrifice, after he is cleansed of his issue.

P75. That a woman having an issue shall bring a sacrifice, after she is cleansed of her issue.

P76. That a woman after childbirth shall bring an offering when she is clean.

P77. That the leper shall bring a sacrifice, after he is cleansed.

P95. To decide in cases of annulment of vows, according to the rules set forth in the Torah.

P148. To set the mother-bird free when taking the nest.

P199. To return a pledge to its owner.

P247. To save the pursued even at the cost of the life of the pursuer.\(^{16}\)

\(^{16}\) Here is a good example of how M. treats a contingent commandment. M. begins to discuss the halakhot related to saving those who are pursued in Hilkhot Rotsheah 1:6. Yet it is not until halakhah 15 that M. gets around to posit that saving the pursued is a positive commandment:
These commandments are either contingent and do not occur under “normal conditions” or are not obligatory as, for example, where one wishes to remain unclean, or wishes to undergo purification but does not care to obtain atonement. It is the same with the odd group of descriptive commandments, i.e. commandments that define or that stipulate halakhic consequences but do not entail action, such as

P87. That an exchanged beast (if a beast is exchanged for one that had been set apart as an offering) is sacred.

P96. That anyone who touches the carcass of a beast that died of itself shall be unclean.

P97. That eight species of creeping things defile by contact.

P98. That foods become defiled (by contact with unclean things).

P99. That a menstruating woman is unclean and defiles others.

P100. That a lying-in woman is unclean like a menstruating woman.

P101. That a leper is unclean and defiles.

P102. That a leprous garment is unclean and defiles.

If one sees someone pursuing another in order to kill him, or sees someone pursuing a woman forbidden to him in order to ravish her, and although able to save them does not do so, he thereby disregards [bitel] the positive commandment Then thou shalt cut off her hand and transgresses two negative commandments…

Having avoided at the outset an outright declaration to the effect that saving the pursued is a positive commandment, M. carefully returns to the “scene of the crime” and affirms that, under certain circumstances and only under those circumstances, saving the pursued is an unconditional obligation. By this artifice, M. denies the existence of an outright obligation to save a pursued person by, for example, posting oneself in an area where crime is common. I submit that M. did not see fit to include this commandment in the list of the sixty unconditional obligations (mitsvot hekhrehiyyot) found at the end of the positive commandments in the ShM and discussed in section 3.1 for precisely the same reason.
P103. That a leprous house defiles.
P104. That a man, having a running issue, defiles.
P105. That the seed of copulation defiles.
P106. That a woman, having a running issue, defiles.
P107. That a corpse defiles.
P108. That the waters of sprinkling defile one who is clean, and cleanse [the unclean] from pollution by a dead body.
P119. That the fruit of fruit-bearing trees in the fourth year of their planting shall be sacred.

Recall that most of these commandment claims caused Nahmanides to vehemently declare that “they are optional [reshut] from every angle, they have no connection to mitsvah (ein ba-hem inyan mitsvah) that they should deserve to be counted.”

Finally, M. fails to designate as positive commandments the types of commandments that are, strictly speaking, laws and procedures, again, because they do not imply obligation of any kind. In this group we find:
P109. That purification from all kinds of defilement shall be effected by immersion in the waters of a miqveh.
P139. That houses sold within a walled city may be redeemed within a year.
P145. To decide in regard to dedicated property as to which is sacred to the Lord, and which belongs to the priest.
P181. To decapitate the heifer in the manner prescribed.
P190. In a permissive war, to observe the procedure prescribed in the Torah.
P221. To deal with a beautiful woman taken captive in war, in the manner prescribed in the Torah.
P222. To divorce by a formal written document.
P223. That the woman suspected of adultery be dealt with as prescribed in the Torah.
P232. To deal judicially with the Hebrew bondsman, in accordance with the laws appertaining to him.
P233. To espouse a Hebrew maid-servant.
P234. To redeem her.
P236 That he who inflicts a bodily injury shall pay monetary compensation.
P237. To judge cases of injuries caused by beasts.
P238. To judge cases of damage caused by an uncovered pit.
P239. To adjudge a thief to pay compensation, or (in certain cases) suffer death.
P240. To adjudicate cases of damage caused by trespass of cattle.
P241. To adjudicate cases of damage caused by fire.
P242. To adjudicate cases of damage by a gratuitous depositary.
P243. To judge cases of damage of a paid depositary and a hirer.
P244. To adjudicate cases of damage of a gratuitous borrower.
P245. To adjudicate cases of purchase and sale.
P246. To adjudicate other cases between a plaintiff and a defendant.
P248. To adjudicate cases of inheritances.

In sum, none of the above claims meets the Halakhot’s revised criteria for positive commandments, now understood as unconditional obligations.
Thus we have explained away 49 of the 109 failures to designate listed in Table 1.

6.3.1 Three reversals from the list of the 60 unconditional obligations

We argued that the revised definition of what constitutes a mitsvat \og asid\ in the Halakhot followed the one proposed by M. in the appendix to the positive commandments and which served as the basis for a special list of 60 commandments: unconditional obligations, effective under a very special set of circumstances. These circumstances were that “the man …is living in normal conditions, that is to say, that he lives in a house in a community, eats ordinary food, namely bread and meat, pursues a normal occupation, marries and has a family.” We find that while M. included in this list P9 (“To hallow His name”), P14 (“Fringes”) and P26 (“That the priests shall bless Israel”) he failed to declare them as positive commandments in the respective introductory statements of the Halakhot. I shall argue below that on further consideration M. did indeed reverse himself in the Halakhot and considered these commandments to be contingent rather than unconditional.\footnote{Other deviations of the Halakhot from the list of 60 unconditional obligations are not due to a reassessment of their unconditional/contingent status and will be dealt with in the coming chapters.} We examine these three commandment claims below.

P9. To hallow His name, as it is said, "And I will be sanctified in the midst of the children of Israel" (Leviticus 22:32).
Qayyara enumerates “sanctifying the Name” (*qiddush ha-Shem*) in his list of *qum ́aseh* (Pq28), but to M. this may not be an open and shut case. He had already argued, in Rule 4, that certain charges that cover the whole of the Torah and are therefore not specific ought not to be counted. One might similarly argue that *And I will be sanctified in the midst of the children of Israel* simply describes the result of His people fulfilling all the commandments and that it does not command a specific action. It is perhaps this problem that drives him to demonstrate that sanctifying the name is a positive commandment. M. takes his cue from *bSanhedrin* 74b that states: “Is a Noahide commanded to sanctify His Name or not? Listen to this: ‘The Noahides were commanded to observe seven commandments; but if they were [also] commanded to sanctify His Name, there are eight.’” “Thus,” M. concludes it has been made clear to you that this is one of the commandments that are obligatory upon Israel, the Sages having deduced this commandment from the words *I will be hallowed among the children of Israel* [Leviticus 22:32].

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18 Rava’s rejoinder to the *gemara’s* proof said in the name of the *amora* Abaye, that sanctifying the Divine Name by observing the seven Noahide laws is not a separate commandment but is included therein, would nullify the proof upon which M.’s argument rests, as observed by *Mishneh le-Melekh* (*Hilkhot Melakhim* 10:2). He offers a tentative but not entirely satisfying solution (*ve-yesh le-yashev*…). Ultimately, it may well be the case that the difference between Abaye and Rava rests on precisely the matter that exercised M.: is *qiddush ha-Shem* an independent commandment or merely a condition of the performance of all commandments, a statement that says that when one performs commandments properly one hallows His Name?
But while M. has demonstrated that the verse stands for a positive commandment, the nature of the charge itself has not been evinced. Specifically, what must one do to sanctify His name? In the *ShM*, M. is bold, waxing on the poetic:

The purport of this commandment is that we are in duty bound to proclaim this true religion to the world, undeterred by fear of injury from any source. Even if a tyrant tries to compel us by force to deny Him we must not obey, but must positively rather submit to death; and we must not even mislead the tyrant into supposing that we have denied Him while in our hearts we continue to believe in Him.

The simple meaning of these words is that, first and foremost, there exists an unconditional obligation to proclaim the true religion, i.e. monotheism, to the world. Moreover, this obligation must be carried out even in the face of danger.

M.’s accompanying exegesis does not quite support this bold position. M. discusses an incident told in the book of Daniel, which describes how Hananiah, Mishael and Azariah were ready to die at Nebuchadnezzar’s hand, “when he forced people to prostrate themselves before the idol, and all did so, the Israelites included and there was none there to sanctify the Name of Heaven, all being in terror.” Nowhere are we told that these three martyrs went around proclaiming the “true religion.” Rather, the three martyrs found themselves in that circumstance as a direct result of Nebuchadnezzar’s decree. M. confirms this understanding: “This commandment applies only in circumstances such as those of that great occasion when the whole world was in terror, and it was a duty to declare His Unity publicly at that time.” In other words, the opportunity presented itself for them to make a public
affirmation of the “true religion”; they had not gone about proclaiming the true religion. 

M. supports the public aspect of this commandment by adducing a revealing, Sifra, *Emor pereq* 9:6 (p. 99d): “On this condition I brought you out of the land of Egypt, that *ye sanctify My name publicly*” (emphasis added).\(^{19}\) Be that as it may, we note a subtle change in the nature of the commandment in the *ShM* itself, from constituting an unconditional obligation – and thus fitting to be enumerated in the list of 60 unconditional commandments – to constituting a contingent commandment, applying “in circumstances such as those of that great occasion.” M.’s statement to the effect that “this commandment applies only in circumstances such as those of that great occasion” (my emphasis) is highly innovative as it stipulates that *qiddush ha-Shem* can only be fulfilled under very special, and unique, circumstances: where the entire world is being forced to abandon monotheism. The implication being that, anything less public, less dramatic than the rejection of monotheism, and less encompassing (all people, not just Israelites) would not constitute grounds for *qiddush ha-Shem*.\(^{20}\) It is this latter thread that is taken up in the *Halakhot*.

\(^{19}\) The critical word *be-rabbim* (publicly) is missing in our edition. Heller is clearly aware of the plus in M.’s version because he quotes the *midrash* in full as we have it but makes no comment.

\(^{20}\) Heller’s edition, which reads “this commandment was only commanded for that great occasion” instead of “this commandment applies only in circumstances such as those of that great occasion,” has clearly a different meaning and may come from a different literary strata. In note 9 Heller offers three witnesses that seem to support our reading, including the text of the first edition of the *ShM* (Constantinople 1516), generally thought to be defective, and Ibn Ayub’s translation. Horowitz,Yad ha-Levi, *ad loc.*, glosses that there was no better opportunity to publicly sanctify God’s name than at the time of Hananiah, Mishaël and Azariah. In my opinion, he totally misses the momentous
In the fifth chapter of *Hilkhot Yesode ha-Torah* M. discusses the commandments of *qiddush ha-Shem* and its binary opposite, *hillul ha-Shem* (desecration of God’s name). As we noted in Table 1, M. fails to declare in the opening lines that *qiddush ha-Shem* is a positive commandment. In 5:1-4 M. stipulates the conditions under which one could commit a transgression rather than suffer death and, conversely, the conditions under which one must suffer death rather than transgress, at the hands of a coercive idolater. The details are not relevant for the present discussion; suffice it to say that they entail specific conditions and circumstances. In 5:4 M. states:

> When one is enjoined to die rather than transgress, and suffers death so as to not transgress, he sanctifies the name of God. If he does so in the presence of ten Israelites, he sanctifies the name of God publicly, like Daniel, Hananiah, Mishael and Azariah, Rabbi Akiva and his colleagues. These are martyrs, than whom none ranks higher….

Note that in the *Halakhot* M. deals explicitly with two kinds of sanctifications, a private act of sanctification and a public one. In what follows, M. spells out the circumstance under which *qiddush ha-Shem* is a positive commandment:

> When one is enjoined to suffer death rather than transgress, and commits a transgression and so escapes death, he has profaned the name of God. If the transgression was committed in the presence of ten Israelites, he has profaned the name of God in public, failed [*bitel*] to observe a positive commandment – to sanctify the name of God – and violated a negative commandment – not to profane His name.

implications of M.’s statement despite the fact that his edition is based on the Constantinople edition and reads here exactly as we have it.
Qiddush ha-Shem can be considered a positive commandment only where one is coerced to transgress a special class of injunctions in the presence of ten Israelites and chooses martyrdom instead.\textsuperscript{21,22} In sum, declaring qiddush ha-Shem a positive commandment, that is, an unconditional obligation, has to do with the way the claim is formulated. If qiddush ha-Shem translates to an obligation to “proclaim this true religion to the world, undeterred by fear of injury from any source” as is formulated in the ShM, then we are dealing with an unconditional obligation. If, on the

\textsuperscript{21} Levinger, Ha-RaMBaM ke-Filosof, pp.81-83, assumes that the qiddush ha-Shem referred to in the list of 60 unconditional commandments answers to the three definitions given in the Halakhot. (We discussed only the first and most important of these definitions). None of the definitions, he avers, can be said to represent unconditional obligations, incumbent on everyone, and he thus questions M.’s decision to include qiddush ha-Shem in the list of 60 commandments. His solution, that the ShM treats qiddush ha-Shem as a total personal commitment to give up everything in life, including life itself, for the glory of His name, and that this commitment is incumbent on everyone, misses, in my opinion, the main point of what the ShM claims. As we noted earlier, it is the proclamation of the true religion, at whatever cost, that is incumbent on everyone.

\textsuperscript{22} M. maintains a certain ambivalence in the Halakhot. On the one hand he portrays acts of sanctification/profanation that occur in the private domain and treats them with the utmost gravity. For example, in halakhah 3, M. rules that in a time of religious persecution (shaat ha-shemad) where the authorities issue decrees with the purpose of abolishing the Israelites’ religion or any of its precepts, the Israelite is duty-bound to suffer death rather than transgress, even if this coercion takes place in the private domain. M.’s source for halakhah 3 is the uncontested statement of R. Dimi in the name of R. Yohanan (bSanhedrin 74a) who asserted that in time of persecution one must suffer death rather than transgress even a minor commandment. Coupling this statement with the following one of Rabin, said in the name of R.Yohanan, it appears that this severity applies even in the private domain. On the other hand, M. indicates that the scriptural violations result only from actions taken in public, in the presence of ten Israelites. That is, in halakhah 4 it seems clear beyond doubt that the violations of the positive and negative commandments apply only in the public domain, not in the private one. M. appears never to lose sight of the essential message of the scriptural verse, so clearly articulated by Sifra, that ye sanctify my name in public. It is admittedly difficult to equate the severe stance of halakhah 3 with a mere rabbinic ordinance, and yet, the scriptural commandment is clearly formulated with public acts in sight.
other hand, *qiddush ha-Shem* is only a responsive obligation as is formulated in the *Halakhot*, namely, accepting martyrdom if and when one is forced to transgress any one of a small number of fundamental sins, then we are dealing with a contingent obligation. In such a case, the *Halakhot* can justifiably omit the declaratory statement that *qiddush ha-Shem* is a positive commandment.

P14. To make fringes

In the *SE*, the *ShM* and the Heading to *Hilkhot Tsitsit* M. states that there exists a positive commandment to make fringes (*tsitsit*). There is no mention of this commandment in the *Halakhot*. Instead, M. states in *Hilkhot Tsitsit* 1:5 that “…one who wears a cloak (*tallit*) having white or azure or both together has fulfilled one positive commandment.” (This is in line with the thesis already developed in the *ShM* that the white tassel and the azure thread are to be considered one commandment, not two, despite the fact that the absence of either the white tassel or the azure thread does not invalidate the other.) The point, however, is that the positive commandment is fulfilled by wearing such a *tallit* and not by making the fringes as indicated in the earlier works. Crucially, M. does not make a declaration in the introduction to the laws of *tsitsit* that there is a positive commandment to wear fringes. This leads us to believe that, indeed, there is no obligation to wear a *tallit* that has *tsitsit* attached to it and that, instead, we are dealing with a contingent commandment. This is confirmed in 3:10:
When is one obligated to fulfill the commandment of fringes? Anyone obligated by this commandment\(^{23}\) who covers himself with a garment fit\(^{24}\) for fringes must first affix fringes to it, and only then cover himself with it. If he has covered himself with it without fringes, he has nullified a positive commandment.…

Uniquely among the class of contingent commandments, M. adds:

Even though one is not obligated to purchase a *tallit* and wrap himself in it, so that he has to affix fringes to it, it is not fitting for a person who is pious (*hasid*) to exempt himself from this commandment; rather, such a one should always endeavor to be wrapped in a garment which requires fringes so that he fulfills this commandment….(3:11)

As a corollary of this discussion it can be seen that the introductory statement – the presence or absence of a declaratory statement with respect to a particular act being a positive commandment – leads to a proper appreciation of the nature of the commandment.

We might now ask, since it is unlikely that M. was not aware of the contingent nature of this commandment at the time he composed the list of 60 unconditional commandments, why did he include fringes in this list? I offer two highly speculative suggestions. The practice of wearing fringes was deeply entrenched among the “pious” of the masses where it came to be regarded as an obligation, somewhat along the lines of what M. says in 3:11.

\(^{23}\) See, for example, 3:9 for those who are exempt from this commandment.

\(^{24}\) See, for example, 3:1-2 for a discussion of the type of garment to which one must attach fringes.
Since the list of 60 unconditional obligations appears to have been constructed as a manual for normative behavior in day-to-day Egypt, M. was unwilling to disturb the pious practice. A corollary to this thesis is that the list of 60 unconditional obligations cannot be used as a source for what M. considered scripturally ordained positive commandments. Instead, the list would include normative as well as quasi-normative commandments, a subject to which we shall turn in chapter 7.

A second possibility is that M. included the making of fringes in the list, following the plain sense of the verse *bid them that they make them throughout their generations fringes in the corners of their garments* (Numbers 15:38), the understanding being that there is an unconditional obligation to affix fringes on every garment in one’s possession.\(^{25}\) In the Code, however, M. followed the normative rabbinic opinion, that “the point of the commandment is to wrap oneself with them,” as he rules in *Hilkhot Tsitsit* 3:8\(^{26}\) and not simply to affix the fringes on a garment. This rabbinic interpretation further allowed that the commandment only be required when one wrapped himself with a fit tallit or garment, in essence a contingent commandment.

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\(^{25}\) So held also by one of the talmudic authorities, *bMenahot* 42b. See chapter 7 for a discussion of M.’s views on the plain sense of the scriptural text (*peshateyh di-gra*).

\(^{26}\) *Ibid.* This is the reason why one does not pronounce a blessing over the affixing of the fringes.
In the previous example we showed how the plain sense of Scripture could have shaped M.’s early understanding of the scriptural commandment. We will have more to say on this in the next chapter. Here we find an example in which the information contained in the oral tradition helps M. determine the nature of the scriptural claim.

The laws of the priestly blessings (Hilkhot Nesiat Kapayim) are appended to the end of Hilkhot Tefillah, comprising chapters 14 and 15, on account of the fact that the priestly blessings form an organic part of the Amidah prayer.

Nothing in the opening lines of the halakhot would suggest that we are dealing here with a positive commandment. M. writes: “The priests bless the congregation [ha-kohanim nosim et kapehem, lit., the priests raise their hands] during the morning, additional (musaf), and ne’ila prayers….…” (14:1). Notably absent from the introductory statement is a declaration that the priestly blessings are a positive commandment. Other literary clues that point to the same conclusion are the absence of any sort of scriptural proof-text as evidence of the obligation and the use of the matter-of-factly participial form, matters that we shall take up in chapter 7. It would appear then that M. reversed himself from what he had claimed in the ShM and now held that the priestly blessings are rabbinic in authority. But is this so?

I do not think so. M. rules that a priest cannot be prevented from blessing the community, even if he is neither wise nor punctilious in the observance of the commandments, or even if people speak slightly of him, or even if his business dealings are not just… since it is a positive commandment [mitsvat ́aseh] incumbent on every single priest to bless the community, and we do not tell a wicked man to be more wicked, and refrain from
fulfilling commandments. (*Hilkhot Nesiat Kapayim* 15:6)

Again, at the very end of chapter 15, M. tells us that “Even though a priest who fails to ascend the platform has violated only one positive commandment ["bitel mitsvat ´aseh"], it is as if he had transgressed three positive commandments….“\(^{27}\) These rulings make it abundantly clear that M. had not changed his mind and that he continued to maintain that the priestly blessing constituted a positive commandment.

So how can we account for the *Halakhot’s* failure to designate this commandment a positive commandment in the opening lines? I believe that the answer lies in the exegetical basis for the commandment, first offered in *Hilkhot Nesiat Kapayim* 14:11. M. writes:

The priestly blessing is never recited in any language but Hebrew, as it says, And the Lord spoke unto Moses, saying: *Speak unto Aaron and unto his sons, saying: On this wise ye shall bless the children of Israel* [Numbers 6:22-3], and thus they learned from the oral tradition [*kakh lamdu mi-pi ha-shemu´ah*] from Moses: *On this wise ye shall bless – standing; On this wise ye shall bless – with raised hands; On this wise ye shall bless – in Hebrew; On this wise ye shall bless – face to face; On this wise ye shall bless –

\(^{27}\) The source for the statement that a priest who fails to ascend to the platform transgresses three positive commandments is *bMenahot* 44a. The statement appears to carry, at least for M., no legal force; it was merely a way for the rabbis to emphasize the importance of this duty and it is used here in the same manner. See Rule 9, p.161. On the other hand, the expression *bitel*, “cancelled” or “abrogated” or “nullified,” applies to genuine positive commandments, as opposed to inferred prohibitions. See above, chapter 5, note 65.
aloud; *On this wise ye shall bless* – with the explicit Name, if they are in the Temple, as we said.\(^{28}\)

Of critical importance is the fact that the oral tradition conceived of the priestly blessings as invoking the explicit or articulated Name. This could only be done in the Temple, as M. explains,

They recite the divine name as it is written, that is the letters *yod, heh, vav*, and *heh* are pronounced. This is what is universally called ‘the explicit name.’ Outside the Temple, they use its appellation, that is, *alef dalet*, since the name is expressed as it is written only in the Temple….The early Sages taught it to their worthy students and sons only once every seven years. All this out of esteem for the great and awesome name.\(^{29}\) (*Hilkhot Nesiat Kapayim* 14:10)

Tradition’s insistence that the priestly blessings invoke the articulated name, something that could only be done in the Temple, meant that the priestly blessings conducted outside of the Temple did not conform to the dictates of the scriptural commandment. In fact, M. may have conjectured that these blessings were simply the product of a rabbinical enactment (*taqanah*) or, even less formally, a popular practice that was ultimately sanctioned by the rabbis. While I found no indication in the midrashic and talmudic sources that would point to such a daring distinction – other than

\(^{28}\) M. offers here a summary of a lengthier exposition found in *bSotah* 38a. For each statement associated with *On this wise ye shall bless* we find a *tanna* showing that the norm can be deduced independently by various textual and analogical means. M. must have concluded that these *halakhot* were the product of an oral tradition “from Moses” rather than of implausible textual and analogical derivations.

\(^{29}\) In *GP*, M. dwells at some length on this matter, and argues that the articulated name, that is the tetragrammaton, “alone is indicative of the essence without associating any other notion with it.” *GP* I: 61 (149). See also I: 62.
the implications of “thus they learned from the oral tradition (kakh lamdu mi-pi ha-shemu´ah) from Moses” – neither did I find a contra-indication.

Armed with this insight, we are now in a position to offer a somewhat esoteric explanation for the unexpected introduction to Hilkhhot Nesiat Kapayim. Since M. held that there existed a distinction between blessings that are conducted in the Temple (scriptural) and blessings that are conducted outside of the Temple (rabbinic) – a distinction of which other jurists and practitioners were either unaware or did not approve – a declaratory statement to the effect that the priestly blessings are a positive commandment would necessarily have to be qualified. But it is quite possible that the qualification, the idea that the genuine, i.e. scriptural, priestly blessing belonged only in the Temple, would have led the common people to devalue the custom. To avoid this potential problem M. chose not to make the usual declaratory statement in the introduction. Instead, he informed his readers that the priestly blessing in the Temple was a scriptural commandment only in the body of the text, where the distinction between scriptural commandment and custom was much too subtle to be noted. This thesis seeks to explain M.’s use of the participle of correct practice rather than of the imperative form in the opening lines of Hilkhot Nesiat Kapayim. In these, M. was describing the priestly blessings that are conducted outside of the Temple and which are inserted into the Amidah prayer, not the scripturally mandated priestly blessings that only take place in the Temple.

A simpler and less dramatic explanation can also be offered, one that need not come on to the above-made distinction. This explanation would have M. hold that the priestly blessing is always a scriptural commandment
but that it is a contingent obligation not an unconditional one.\textsuperscript{30} The priest negates (\textit{bitel}) a positive commandment if and when he is asked to bless the congregation while he finds himself participating in communal services, and then fails to do so.\textsuperscript{31} This explanation is consistent with the thesis formulated earlier that M., in the \textit{Halakhot}, designates as positive commandments only unconditional obligations.

Yet a third explanation suggests itself, consistent with the first thesis. It would argue that the rabbinic sources were too vague to allow M. to pronounce himself with confidence about the exact claim of the scriptural commandment. M. was unsure if the command was applicable only in the Temple, or if it was applicable even outside of it – with the proviso that in such case God’s explicit name was not to be used.\textsuperscript{32}

\textbf{6.4. Revisiting Individuation}

As we saw in section 4.1, many \textit{ShM} individuations are non-compelling. One need only revisit them to further thin out Table 1.

\textsuperscript{30} Note that the verse speaks only about the form and manner by which the priests must bless the congregation, as it says \textit{On this wise ye shall bless the children of Israel}. The text does not require such a blessing.

\textsuperscript{31} See y\textit{Berakhot} 5:4 and \textit{Tur Orah Hayyim siman} 128 on his reading of \textit{Tg. Onqelos}.

\textsuperscript{32} I shall argue in section 9.4 that source ambiguity left tell-tale marks in M.’s presentation of some commandments. A consequence of this ambiguity is that M. deliberately omits the designation in the introductory statement but slips in the designation in the subsequent discussion, as he did here.
Moving from the simpler to the more complex cases, P68 is now subsumed in the *Halakhot* under P69, while P114-P117, the laws of ‘arakhin, are now condensed into one commandment: “It is a positive commandment to adjudge the laws of ‘arakhin as stipulated in the Torah” (*Hilkhot ‘Arakhin* 1:2).\(^{33}\) Commandments P149-152 are subsumed in *Hilkhot Maakhalot Asurot* 1:1 under one positive commandment: “Concerning the tokens with which one can differentiate between those domesticated and wild animals, owls, fishes and grasshoppers, that may be eaten and those that may not be eaten.”\(^{34}\) Another individuation scheme that was revised because of its non-compelling nature was the commandment claim to rest from work on the festival days.\(^{35}\) In the *Halakhot*, M. collapses these six commandments into one, stating that

anyone who rests from work [*melekhet ‘avodah*, a term that the rabbis understood as meaning the kind of work that is not related to the preparation of food] on any of these [six festival days] has fulfilled a positive commandment….\(^{36}\) (*Hilkhot Shevitat Yom Tov* 1:2)

\(^{33}\) The reader is entitled to object that the law of *arakhin* should not be designated a positive commandment because it is a law, and laws, as demonstrated earlier, are not obligatory commandments. I do not have a satisfactory answer and I believe that this case represents an exception to the rule. This odd formulation also caught the attention of a commentator who wondered why M. would not designate the adjudication of vows a positive commandment in the same way as he had designated the adjudication of *arakhin* a positive commandment, see Epstein, Baruch, *Arukh ha-Shulhan ha-Atid* (Jerusalem: Mosad ha-Rav Kook, 1969-75), *siman* 33, #8. Be that as it may, M. abridged the four claims into one.

\(^{34}\) M. created four positive commandments in the *SE/ShM* on the back of four individual inferred prohibitions (*lav ha-ba-mikhla ‘aseh*). See the earlier discussion on P149-152, section 5.1.2.f

\(^{35}\) See 4.1 above, P159-60, P162-63, P166-67.

\(^{36}\) That M. did not follow the same logical scheme with respect to the obligation of absolute rest prescribed for the Sabbath and the Day of Atonement is due to the fact that
In the *Halakhot*, M. omits the positive commandment designation to appoint a special priest to address the soldiers in war (P191). In section 4.1 we noted the lack of justification for individuating this claim since it represents no more than a particular of the laws of waging war.\(^{37}\)

In section 2.4, we noted the non-compelling nature of M.’s individuation of the four modes of capital punishment. In the *Halakhot*, M. resolves this issue in an elegant fashion. First, he describes the four modes of capital punishment and then he states: “[With reference to] each one of these deaths (kol mitah me-hen), it is a positive commandment for the court to execute by means of it those who are liable to it…. “ (*Hilkhot Sanhedrin* 14:1-2). M.’s formulation is ambiguous. He could mean that each of the

these two days of rest required separate treatises to deal with their particular sets of scriptural and rabbinic commandments and ordinances. In other words, the rest-from-work individuation was dictated by topical considerations, particular to the drafting of a code of law, rather than by theoretical considerations. Note, too, that the punishment for transgressing the prohibition to work is different for the Sabbath (stoning) than for the Day of Atonement (excision). See *Hilkhot Shevitat ʿAsor* 1:2.

\(^{37}\) At the time, we suggested that didactic considerations may have influenced M.’s decision. Notwithstanding this omission, the special educational message that M. wishes to convey does make its appearance in the *Halakhot*. In *Hilkhot Melakhim* 7:2-3, M. details the preparations for war and cites the particulars of the address of the special priest as recounted in the scriptural passage. In a special and seemingly redundant peroration at 7:15, M. tells us that once *the man who is fearful and fainthearted* (Deuteronomy 20:8)

joined the ranks of battle, he should put his reliance upon Him who is the hope of Israel, their Saviour in time of trouble. He should note that he is fighting for the oneness of God, risk his life, and neither fear nor be affrighted. Nor should he think of his wife or children, but forgetting them and all else, concentrate on the war…

This addition appears to be gratuitous but it is not: These eloquent and stirring words are designed to instill in the faithful a special zeal to combat heresy, the very same objective that I suspect led M. to individuate P191.
forms of execution collectively is a positive commandment or, alternatively, that each one of them, singly, is a positive commandment. At any rate, either he failed to designate, which would be in keeping with the non-compelling nature of the individuation, or he did not fail to designate, which would mean that we have no problem to deal with. We have thus explained the alleged or the real failure to designate P226 through 229 in the Halakhot.

To summarize, then, in this section we found that certain groups of related commandment claims were subsumed under one of their own group of commandments or under a different commandment claim, one that yields a more generic formulation. This was the case with:

P68. That the Court of Judgment shall offer up a sacrifice, if they have erred in a judicial pronouncement, now subsumed under P69 (“That an individual shall bring a sin offering if he has sinned in error by committing a transgression ...”).

P114. That one who vows to the Lord the monetary value of a person shall pay the amount appointed in the scriptural passage.
P115. That one who vows to the Lord the monetary value of an unclean beast shall pay its value.
P116. That one who vows the value of his house shall pay according to the appraisal of the priest.
P117. That one who sanctifies to the Lord a portion of his field shall pay according to the estimation appointed in the scriptural passage, (now subsumed under a general law of valuations);

P149. To examine the marks in cattle.
P150. To examine the marks in fowl, so as to distinguish between the unclean and the clean.

P151. To examine the marks in locusts, so as to distinguish the clean from the unclean.

P152. To examine the marks in fish, (now subsumed under a general law to differentiate all edible animals);

P159. To rest on the first day of Passover.

P160. To rest on the seventh day of that feast.

P162. To rest on the fiftieth day (from the time of cutting the Omer).

P163. To rest on the first day of the seventh month.

P166. To rest on the first day of the Feast of Tabernacles.

P167. To rest on the eighth day of that feast, (now subsumed under a general rule to rest on festivals);

P191. To anoint a special priest (to address the soldiers) in a war, (now subsumed under the commandment that governs the conduct of obligatory and permissible wars, Hilkhot Melakhim 7:1).

P226. That the Court shall execute (sentences of death) by decapitation with the sword.

P227. That the Court shall execute (sentences of death) by strangulation.

P228. That the Court shall execute (sentences of death) by burning with fire.

P229. That the Court shall execute (sentences of death) by stoning, (now subsumed under a general rule mandating the Great Court to execute all those liable by various methods).
The above list adds up to 16 altogether redundant individuations (Note that some of these claims are retained to take the place of the more generic individuation, e.g. P149-52 becomes one claim, P 226-229 becomes one claim, and so on.) These revised individuations present few conceptual difficulties. Explanations for the next group of failures to designate, however, demand a more imaginative approach. Necessarily, explanations will become more speculative.

P41-51

We saw earlier that M. listed separate positive commandments to account for each of the additional offerings (musafin) brought on festivals. In 4.1, we noted that M.’s individuation was not compelling and that he could as well have followed Qayyara’s scheme of listing just one commandment to account for all the musafin. Surprisingly, we find no mention anywhere in the Halakhot that any of these additional offerings is a positive commandment.

M. opens Hilkhot Temidin u-Musafin with a characteristically bold statement: “It is a positive commandment to offer two lambs as burnt offerings every day. They are called daily offerings [temidin]….” This designation corresponds to P39, the commandment to offer a burnt offering twice a day. One would expect a similar statement with respect to the additional offerings but, most puzzling, there is none. The additional offering for the Sabbath (P41) is mentioned only in passing — tucked away, so to say, in a mundane chapter that deals with the method of arbitration used by the priests to assume their turns. In response to a rhetorical question of how the services are performed on the Sabbath when both temidin and musafin are brought, M. explains that a special lot (payis) is cast for that day
and adds that the priest who handles the daily offering is also entitled to make the additional offering. In this unremarkable way M. introduces us to the additional offering of the Sabbath (Hilkhot Temidin u-Musafin 4:9).

Section 7:1 deals with the musaf of the New Moon, detailing the time of sacrifice, the number and kinds of animals to be offered and the type of offering (Burnt Offerings, Sin Offering). No mention is made of it being a mitsvat `aseh. The Passover musaf (7:3), the Feast of Weeks (8:1), the musaf of the first day of Tishre (9:1), the musaf of the Day of Atonement (10:1), the musaf of Tabernacles (10:3) and the musaf of the Eighth Day of Solemn Assembly (10:5) are all dealt with in similar fashion. M. does not designate any of these as positive commandments.

Also dealt with matter-of-factly is the Omer (meal offering of barley) that is brought on the second day of Passover together with the Additional Offering (7:3), and the loaves of bread that are brought with the Additional Offerings on the Feast of Weeks (8:1). Finally, M. dedicates an entire treatise to the rituals of the Day of Atonement, Hilkhot Yom ha-Kippurim, without once stating that the entire ritual of the day — considered one commandment in the ShM (P49) — is a mitsvat `aseh.

To justify this extraordinary failure to designate, I submit that M. came to see all the services of the day, effectively bounded by the twice-daily burnt offering (temidin), as representing one commandment. This position is not unreasonable when we consider the manner in which Scripture introduces temidin and musafin: Command the children of Israel, and say unto them: My food which is presented unto Me for offerings made by fire, of a sweet savour unto Me, shall ye observe to offer unto Me in its due season (Numbers 28:2). The verses then go on to describe the musafin applicable to each festival, each with its own temidin. Importantly, on each
occasion the verses remind the officiating priests that Ye shall offer these [the Additional Offerings] beside the burnt offering of the morning, which is for a continual burnt offering...it shall be offered beside the continual burnt offering.

The ShM offers at P49 an important clue in support of this hypothesis, namely, that the elements of a ritual that follow a certain order are to be considered as one commandment. First M. says that “we are commanded to perform the service of the day, that is to say, all the sacrifices and the confessions ordained by Scripture for the Day of Atonement, to atone for all our sins” (my emphasis). Immediately thereafter, M. adds,

The proof that the whole of this service in its totality constitutes only one commandment is found at the end of the fifth chapter of Yoma: ‘Concerning every ministration of the Day of Atonement mentioned in the prescribed order, if one service is done out of order before another one, it is as if it had not been done at all.’

By analogy, since the order of the day’s service is bound by the morning and evening temidin, it is sufficient for M. to designate the temidin as a positive commandment and ignore the musafin.38

P169

38 Admittedly, the order of the temidin and musafin is not a hindrance and the service is valid even if the musafin come first (Hilkhot Temidin u-Musafin 8:20). Nevertheless, the correct order is temidin first, followed by musafin and other offerings and temidin again, to end the day’s service. Also, the fact that there is no hindrance with respect to their order and that the lambs can be consecrated for either is all the more reason for seeing these offerings as essentially fulfilling one purpose.
In *Hilkhot Shofar ve-Lulav ve-Sukkah*, M. discusses at length the details of the taking of the four species (chapters 7 and 8). In 7:5, M. states that the four species are “one mitsvah…and together (lit., all of them) they are called mitsvat lulav.” In 7:13, when describing the obligation, M. employs a rarely used passive voice: “mitsvat lulav [that is, the combination of the four species, as per 7:5 above] is to be taken [le-hinatel] on the first day of the festival only — anywhere and at any time, even if this happens to be a Sabbath….” The use of the active voice “to take” (li-tol, as in the SE) would certainly have forced M. into the standard introductory formula — “it is a positive commandment to take…” — something which I surmise he wished to avoid. The omission of the declarative statement is patently obvious. One need only contrast the way M. introduces the commandment of taking the lulav with the way he introduces in the same treatise the commandment to blow the shofar: “It is a positive commandment of the Torah to listen to the sound of the shofar on *Rosh ha-Shanah*.”

Earlier (2.4.1), we pointed out that M. specified in Rule 11 that where the Torah enjoined an assemblage of elements one was to search for telos. No single element of the assemblage was to be considered a commandment, only the overall purpose constituted the commandment. In that discussion, and by way of example, M. offered, “… we have been commanded to rejoice before the Lord on the first day of Tabernacles,³⁹ and then He explains that that rejoicing be by taking (unto the hand) certain objects.”

³⁹ Actually, the verse (Leviticus 23:40) commands one to take the four kinds on the first day and to rejoice before the Lord seven days. The Sages interpreted this to mean that the taking of the four kinds for seven days was obligatory in the sanctuary while outside of the sanctuary the taking of the four kinds was obligatory for only one day. At P169 M. states that “we are commanded to take a palm-branch, and rejoice with it before the Lord seven days.”
other words, the “taking of the four kinds” is for the sake of something else, namely, to rejoice before the Lord. In short, instead of individuating mitsvat lulav, M. may have thought it more appropriate to subsume the four species under the commandment to rejoice on the festivals (P54).  

P113

In the ShM, this commandment is formulated as follows: “To prepare the red heifer, so that [its ashes] will be available for what has to be done in order to remove impurity [contracted because of] a dead body.” With “the law of the red heifer” (din parah addumah), the Heading to Hilkhot Parah Addumah moves well away from the active formulation of the SE/ShM. Meanwhile, the MT itself fails to designate the preparation of the red heifer a positive commandment.

The claim of the SE/ShM appears to contradict Rule 10, which states that it is not fitting to count acts that are preparatory to a final goal. Since the making of the ashes of the red heifer is only preparatory to the making of a water-of-sprinkling (mey niddah), M.’s logic of individuation dictates that it be subsumed under P108, which deals with the purifying and defiling properties of the waters of sprinkling. What may have prompted M. to individuate P113 was the fact that Scripture itself gives the making of the ashes an independent rationale when it indicates that the ashes shall be kept for the congregation for a water-of- sprinkling (Numbers 19:9). This may be


40 ySukkah 3:11 reports a dispute regarding the command to rejoice: does it refer to peace offerings (shelamim) or to lulav? See also bSukkah 43b, RaShi s.v. lulav nami. In other words, according to one opinion, mitsvat lulav was a way to carry out the commandment to rejoice in the festival.
read as enjoining the Israelites to prepare and set aside the ashes regardless of their eventual application.

The text that served as the basis of the positive commandment in the SE/ShM becomes in the Halakhot (Hilkhot Parah 3:4) the proof-text for only a detail of the overall preparation of the ashes of the red heifer. One third of the ashes were to be used to consecrate high priests who worked on other heifers, one third were to be used to sprinkle and purify those who became defiled through contact with a corpse, and the final third was to be set aside. M. grounds the disposition of the final third on the proof-text cited earlier, though there is little doubt that the practice of dividing the ashes into three thirds is non-scriptural.41

While the surface meaning of the verse may have given M. in the SE/ShM reason to individuate the preparation of the ashes of the red heifer, the talmudic rabbis attached no independent meaning to the act. Instead, they used it to support a detail of the overall preparation.42 As a result, M. in the Halakhot reclassified the verse shall be kept for the congregation from an injunction deserving of individuation to a detail of the greater law that deals with the functions of the waters of sprinkling (P108). The heading to Hilkhot Parah Addumah moves in that direction by calling this rubric “the law of the red heifer” (din parah addumah). In turn, P108 disappears from the count in

\[41\] No proof-text is adduced in either mParah or tParah, end of third chapter. See RaSHi’s commentary on Numbers 19:9 and the supercommentary of Mizrahi on RaSHi.

\[42\] Sifre Numbers, Huqat pisqa 124 (p.158) expounds the words shall be kept [ve-haytah ...le-mishmeret] for the congregation to teach that the waters, while still not mixed with the ashes, can be disqualified by distraction. M. adopted the ruling of the Sifre (see Hilkhot Parah 7:1) but resisted the far-fetched exegesis, preferring instead to treat this conclusion as a tradition (u-devarim elu divre qabbalah hen). No doubt he was of the opinion that the verse meant what it said.
the Halakhot as we saw earlier simply because it is a law rather than a mitsvat ἀσεh (recall its literal meaning “commandment of doing.”).

We have now offered solutions to explain away a further 12 failures to designate – entirely redundant commandment claims – by positing alternative (and sometimes more refined) methods of individuation. In total, we have offered explanations in this chapter for 80 out of a total of 109 failures to designate. To explain the remainder of the failures to designate we shall need to examine M.’s approach to the reading of the legal material in Scripture and the implications that it holds for categorizing the law according to its various sources, in particular, de-oraita and divre sofrim.
Chapter 7. Peshateyh di-Qra

In the foregoing sections we have seen how M.’s TaRYaG enumeration was erected on a framework of rules of individuation. We have also seen that for the most part these rules were driven by good sense and logic: They ran parallel, as it were, to the great Talmudic tradition and therefore, from a conceptual point of view, aroused little opposition. Those who dissented did so only with regard to details, since, as we have emphasized, there was more than one way to individuate commandments, just as there is more than one way to conceive of the purpose, function and affinity of a commandment.

The rules of identification, Rules 1, 2 and 3, however, were designed to filter out a number of geonic entries on the basis that, by definition, they could not belong to the Mosaic laws. Thus, Rule 1 eliminated rabbinic laws since they postdated the Sinaitic event. Rule 3 eliminated temporal commandments, commandments given for specific occasions, as they were always associated with the Israelites’ sojourn through the wilderness. Geonim were found on both sides of the divide regarding the counting of temporal commandments.¹ Conceptually, Rule 1 did not present a major

¹ Ibn Balaam argued that temporal commandments ought not to be included in the TaRYaG. According to Ibn Balaam, Hefets did count temporal commandments. (See 1.1 above.) Ibn Ezra sharply questioned the value of enumerating temporal commandments. His list of temporal commandments, however, contains some surprises. (See Abraham ibn Ezra, Yesod Mora, ha-Shaar ha-Sheni, pisqa 7, p. 95f.) Though M. accused Qayyara of counting temporal commandments, Nahmanides (Hasagot ad loc.) defended Qayyara’s position by redefining those commandments so that they no longer appeared to be of a temporal nature. His apology, however, runs into some difficulties when he tries to explain away terumat ha-mekhes (dues to be offered out of the booties taken in war)
challenge to the existing order. The Talmud was well aware of the difference in status and force between Torah law and rabbinic law — despite the occasional self-serving admonitions regarding the gravitas of rabbinic law.²

Rule 2, on the other hand, shook the very grounds of post-talmudic — and some would say talmudic — tradition. Traditionally, legislation derived from scribal hermeneutics was thought to stand on par with what the Torah ordered explicitly. By claiming that laws derived hermeneutically from Scripture ought not to be included in the TaRYaG, M. overthrew a long-standing tradition. In effect, M. drew a remarkable and revolutionary line in the sand, with the plain sense of Scripture on the one side and the hermeneutics³ of the rabbis on the other.

M.’s rule was so foreign to the rabbinic conception and to the rabbinic ear that it managed to mislead even one of his sharpest critics. Daniel ha-

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² See bEruvin 21b:
Raba made the following exposition: What is the purport of the Scriptural text: And, furthermore my son, be admonished: Of making many books etc.? My son, be more careful in [the observance of] the words of the Scribes than in the words of the Torah, for in the laws of the Torah there are positive and negative precepts; but, as to the laws of the Scribes, whoever transgresses any of the enactments of the Scribes incurs the penalty of death. In case you should object: If they are of real value why were they not recorded [in the Torah]? Scripture stated: ‘Of making many books there is no end.’
See also Shir ha-Shirim Rabbah, parshah alef, s.v. ki tovim dodekah mi-yayin: “[It was said in the name of the] friends of Rabbi Yohanan: the words of the scribes are more desirable than the words of the Torah.”

³ I use hermeneutics deliberately in line with the meaning that M. gave it in Rule 2 — derivations that are obtained by way of the application of the 13 hermeneutic rules of interpretation or via the principle of inclusion (ribbui). But the term divre sofrim, as these derivations are called, is broadened beyond simple derivations, as we shall see.
Bavli could not imagine that M. was disqualifying hermeneutic derivations from the category of *de-oraita*. He thought instead that M. was simply suggesting that hermeneutic derivations not be *counted* unless they were designated as being *guf torah* or *de-oraita* by the Rabbis themselves and that there was no doubt that the derivations were *de-oraita*.

Nahmanides, on the other hand, did not make this mistake. Taking proper notice of what M. said, Nahmanides unleashed a long and systematic critique of this rule. In example after example, Nahmanides showed that talmudic tradition had never drawn such a demarcation and that it had treated hermeneutic derivations with the same deference and force as the explicit injunctions of the Torah. Nahmanides ended his critique of Rule 2 with a fulminating indictment:

> [F]or this book of the master, its content is *delightful, full of love* [based on Song 5:16] except for this principle, which uproots great mountains of the Talmud and throws down fortified walls of the *Gemara*. For the students of the *Gemara*, this notion is evil and bitter. Let it be forgotten and not said.

This is not the place to review the complexities of M.’s position, its reconciliation with the numerous talmudic passages that appear to contradict it and its legal ramifications. Others have done so; their commentaries grace the pages of almost every printed edition of the *ShM*. I do believe, however, that the full implications of this powerful salvo have not been totally appreciated. Below, I will argue that reasonable explanations can be found.

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4 *Sheelah aleph* in Abraham Maimonides, "Teshuvot Rabbenu Abraham ben ha-RaMBaM," p. 541. Perla is correct to say that Daniel ha-Bavli anticipated Duran in this respect. See below.
for a number of otherwise thorny failures to specifically designate commandments if one is prepared to follow Rule 2 to its ultimate and radical conclusions.

7.1 Rule 2 and the Broad Meaning of *divre sofrim*

M. makes no secret in the *ShM* that when it comes to enumerating the commandments he will follow the *peshateyh di-qra*. This term will need to be explained, and we shall do so presently. The locus of M.’s thesis is his discussion of Rule 2, which he introduces in the following manner: “We are not to include all that is derived from Scripture by any of the thirteen hermeneutical principles by which the Torah is expounded, or by the principle of inclusion [*ribbui*].”  Though M. does admit some hermeneutically derived commandments into his enumeration, he argues that this is only when the tradents themselves (*hem be-´atsmam*) confirm that this interpretively derived teaching is “itself Torah” (*guf torah*) or “from the Torah” (*mi-de-oraita*), terms that the Sages used presumably to indicate that the tradition was of unquestioned Sinaitic origin. In this case, M. is of the opinion that the interpretive derivation represents an act of discovery rather than of creation, made possible by the “wisdom of the Torah” (*hokhmat ha-torah*) a term he uses in his introduction to the *PhM*, or what has been

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5 My own translation. The inference is that *some* derivations may be included. In Blau, Responsa, #355, M. alludes to “three or four” such instances. See note 23 in Appendix. Chavel’s translation leaves no room for exceptions: “We are not to include in this enumeration [laws] derived from Scripture by any of the thirteen exegetical principles by which the Torah is expounded, or by [the principle of] inclusion.” This is not borne out by the other translations, or by Nahmanides’ citation of the rule.
recently been called, the ‘omni-significance’ of each letter and word of the
written Torah. The talmudic reference to one of the thirteen principles and
the proof brought from it “is only to demonstrate the [profound] wisdom
contained in Scripture…” If, on the other hand, the tradents do not explain
or indicate that the derivation is “itself Torah” or “from the Torah” then one
is in the presence of purely a rabbinic creation. M. calls these derivations
“branches of the root” — deductions or inferences from scriptural texts, as
opposed to philological explanations or explanations of texts.⁶ Thus far, M.
deals with derivations, scriptural interpretations that result from the
application of the thirteen hermeneutic rules.⁷

A little further on M. deals with what he calls an even more egregious
error. In his words:

Their lack of knowledge has already brought them to
this more serious mistake: If they found [in the
Talmud] an interpretation of a certain verse, the

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⁶ For a good discussion of this distinction, see Halbertal, “Maimonides’ Book of
Commandments”.

⁷ Talmudic literature ascribed these rules to the tanna R. Ishmael. The hermeneutic rules
and some illustrations can be found in the introduction to the standard editions of Sifra,
under the name of Baraita (or Mekhilta) de-Rabbi Ishmael. Sifra is still quoted today
according to the edition of I.H. Weiss, published in Vienna in 1862. It was based on the
Venice printed edition, corrected according to the Yalqut Shimoni. It contains an
apparatus of references to parallels in rabbinic literature and short interpretive glosses.
The name Sifra or Sifra de-vei Rav already appears in the Babylonian Talmud. A textual
analysis of the tradition and its relation to midrash can be found in Alexander, Philip S.,
“The Rabbinic Hermeneutical Rules and the Problem of the Definition of Midrash,”
shorter version, comprising only seven middot or hermeneutic rules, was ascribed to the
tanna Hillel. See Towner, W. Siblley, “Hermeneutical Systems of Hillel and the Tannaim:
A Fresh Look,” HUCA 53 (1982). For a view that the hermeneutic rules were themselves
a halakhah le-Moshe mi-Sinai according to M., see Finkelstein, L., “Ha-De’ah ki 13 ha-
Middot hen Halakhah le-Moshe mi-Sinai,” Sefer ha-Zikaron le-Rabbi Shaul Liebermann,
interpretation requiring the performance or the prohibition of a certain act — duties which are no doubt of rabbinic authority — they count them among the commandments, even though the plain meaning of the verse [peshateyh di-qra; so too in the Arabic version] indicates in no way any of these things. This is contrary to the principle which [the Sages] of blessed memory, teach us: ‘A scriptural verse never loses its literal sense’ [ein miqra yotse mi-yede peshuto]. It is also contrary to the process of reasoning throughout the Talmud, as is evidenced from the fact that when the Sages speak of a verse from which many topics are derived by way of interpretation and various proofs — they ask [in conclusion]: ”But what is the verse itself about?” [gufe di-qra be-mai qa-medabber]. These [authors], however, depending as they do upon baseless comparisons, count among the Positive Commandments visiting the sick, consoling mourners, and the burying of the dead — all because of the following interpretation mentioned in connection with His words, exalted be He: And thou shalt show them the way wherein they must walk, and the deeds they must do – the way refers to deeds of loving kindness; they must walk refers to visiting the sick; wherein has reference to the burying of the dead; and the deeds, this refers to the laws; they must do, this has reference to more than the strict requirement of the law. On the basis of this text, these authors thought that each and every duty mentioned constituted a commandment in itself, but they were unaware that all these and similar duties are embraced within the terms of one of the Commandments explicitly stated in the Torah, as contained in His words, exalted be He, And thou shalt love thy neighbour as thyself.

A brief digression on the term asmakhta. When the rabbis created ordinances to protect the integrity of the Law, they would often append a
scriptural verse, either to lend them authority or simply for mnemonic purposes. Strictly speaking, they were not derashot (exegeses) but *asmakhtot* (lit., “something to lean on,” i.e. a supportive device). For the most part, they were recognized as such. From a practical point of view, *asmakhtot* were treated as laws of rabbinic authority and force. At times, the true nature of these *asmakhtot* came into question as they took on the look of a genuine exegesis. In most cases, however, the logic of the exegesis would define its true nature.⁸

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⁸ Sometimes, differences of opinion as to whether a particular exegesis was an *asmakhta* or not had little to do with the “logic” of the interpretation. A good example can be found in the *Hasagot* to P5. After citing a number of talmudic passages that appear to support the rabbinic origin of prayer, Nahmanides questions the nature of the midrashic exegesis adduced by M. to support his commandment claim, suggesting that it is merely an *asmakhta*, and thus a rabbinic ordinance. In M.’s defence, at least one commentator (de-Leon, ”Megillat Esther,” p. 211) has pointed out that characterizing the nature of a *midrash* is a difficult enterprise at best and that one can well come to the determination that the *midrash* is of a (Sinaitically) received character so long as it is not contradicted by the final authority that is the Talmud. The determination that a certain exegesis is an *asmakhta* according to these commentators is based in this case on factors that are extraneous to the *midrash* itself, such as, for example, its agreement with talmudic conclusions, and not on the fact that it sensibly reflects authorial intent. In general, Nahmanides viewed *midrashim* found in the *Midreshe Halakhah* as *asmakhtot* if they did not agree with the talmudic exegesis. This had more to do with his epistemological views than with his reading strategies. For a similar difference, see *Hasagot* to P36, N353. M., on the other hand, seems to have decided on the basis of internal exegetical logic. That is, if the interpretation flowed from the plain sense of the text, it could be considered a genuine derashah, otherwise, it was an *asmakhta*. For the purpose of this determination, it mattered little if the source of the interpretation was one of the *midreshei halakah* or the Talmud. For an attempt to provide general criteria for this divergence of views in the matter of *asmakhta*, see Horowitz, *Sefer ha-Mitsvot im Perush Yad ha-Levi*, comments to Rule 2. For a brief but excellent discussion on *asmakhtot* and their place in rabbinic exegesis, see Elon, Menachem, *Jewish Law: History, Sources, Principles*, trans. from the Hebrew by Bernard Auerbach and Melvyn J. Sykes, 4 vols. (Philadelphia: Jewish Publication Society, 1994), volume I, pp. 300-305. Elon, quoting I.M. Guttmann’s comprehensive study on *asmakhtot*, concluded that the term *asmakhta* does not imply …that the law in question cannot be connected with the verse in a logical and rational manner. It indicates rather that the halakhic authorities knew
It is clear that M. considered counting *asmakhtot* as commandments an even graver error than counting hermeneutic derivations, for he says:

Now if they had counted matters which are even clearer than that, and more conceivable that they be enumerated [among the commandments] — these being, namely, the laws which are derived through one of the Thirteen [Exegetical] Principles by which the Torah is expounded — the number of the commandments would then reach many thousands!

M. uses the general term *divre sofrim* to describe all non-scriptural commandments. He says, “Whatever they did not explicitly hear at Sinai are considered as coming from the ‘words of the scribes’ [*mi-divre sofrim]*.” It follows that the activity of the scribes (*divre sofrim*) extended well beyond their derivative work. Yet it was the derivative activity that most exercised the minds of M.’s critics and apologists. To be sure, M.’s true position with respect to the derivative activity of the scribes remains to this day a matter of great controversy, despite the fact that M. in the *ShM* calls them *de-rabbanan*, or rabbinical (so too in the Arabic original). Did M. mean to say that these derivations have a status of rabbinic law or merely that they are the product of rabbinic activity?

M.’s position has been interpreted in a variety of ways. It is noteworthy that no consensus has emerged to this day. The maximalist that the creative source of the particular was not interpretation but one of the other legal sources, such as tradition or legislation.

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9 See Neubauer, J., *Ha-RaMBaM al Divre Sofrim* (Jerusalem: 1957), for an extensive survey.
interpretation, espoused by Nahmanides, held that M. had effectively given *divre sofrim* legislation a normative status equivalent to rabbinic enactments. At the other extreme, scholars such as Simeon b. Tsemah Duran took the view that M. accepted the scriptural force of *divre sofrim* — it carried all the *gravitas* of Torah law — but excluded it from the enumeration, as only explicit commandments were to be enumerated.\(^\text{10}\)

As pointed out earlier, M. held that whatever was not heard explicitly on Sinai was considered to come from the “words of the scribes” (*mi-divre sofrim*). This included, of course, rabbinic decrees and ordinances\(^\text{11}\) and oral traditions,\(^\text{12}\) some of which were lightly attached to verses by way of hints and allusions and some of which bore no connection whatsoever to the text, such as *halakhot le-Moshe mi-Sinai*. Confirming what M. says in the *ShM*, we find the following statement in *PhM*, Miqvaot 6:7:

> I already explained that this expression ['measurements are *mi-divre sofrim*'] does not contradict what they said, namely, that measurements are a *halakhah le-Moshe mi-Sinai*, because everything

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\(^\text{10}\) As we have seen, this was the position of Daniel ha-Bavli. The two most prominent commentators on the *MT*, Joseph Karo and Vidal di Tolosa, also believed that *divre sofrim* enjoyed the status of scriptural law; see their commentaries in *Hilkhot Ishut*, 1:2. Nor, as we have said, have modern scholars come to a consensus. Levinger, Darkhe ha-Mahshavah, p. 46-50, concludes with a fair degree of confidence that *mi-divre sofrim* is of rabbinic force; D. Henshke argues strenuously for this view, summed up in Henshke, D., "Le-Havhanat ha-RaMBaM bein de-Oraita le-de-Rabbanan," *Sinai* 102 (1988), p. 205, n. 2. On the other hand, Shailat concludes that they have scriptural force. See his comments in *Iggerot ha-RaMBaM*, vol. 2, pp.451-452. See also, more recently, Rabinovitch, Nachum L., "Al Divre Sofrim she-Toqfam de-Oraita," *Studies in Maimonides [Hebrew]* (Jerusalem: 1998), p. 93-111.

\(^\text{11}\) This, in fact, is the typical usage of the term in the Mishnah. See, for example, *mTaharot* 4:7, 4:11 and *mYadayim* 3:2, where *divre sofrim* refer to rabbinic ordinances.

\(^\text{12}\) But see the following footnote.
that is not explicitly stated in Scripture is called ‘the words of scribes’ \([\text{divre sofrim}]\).^{13}

And again in \(PhM\), Kelim 17:12:

Don’t let their dictum ‘measures are from the words of the scribes’ \([\text{shiurim mi-divre sofrim}]\) confuse you when you consider their principle that all measures are \(\text{halakhah le-Moshe mi-Sinai}\), because in effect anything that is not explicitly stated in Scripture is called \(\text{mi-divre sofrim}\), even things that are \(\text{halakhah le-Moshe mi-Sinai}\). When they said \(\text{mi-divre sofrim}\) they meant to say that the matter is a tradition from the scribes, like all explanations and authoritative \(\text{halakhot}\) from Moses, or the ‘reforms of the scribes’ \((\text{tiqqun sofrim})\), like all enactments and ordinances. Remember this.\(^{14}\)

M.’s views with respect to \(\text{halakhah le-Moshe mi-Sinai}\) also engendered a great deal of controversy — a controversy that came second only to the one aroused by his theory regarding the hermeneutic activity of the scribes.\(^{15}\)

\(^{13}\) We need to exercise some caution with regard to this comment and the next one that M. makes in the \(PhM\). Levinger, \(\text{Darkhe ha-Mahshavah}\), and Henshke, "\(\text{Le-Havhanat ha-RaMBaM}\)," have both noted that M. may have been referring to the way the Mishnah and Talmud understood that term, not necessarily the way M. did, and that M. may have considered \(\text{divre sofrim}\) only what was hermeneutically derived by the scribes and not oral traditions.

\(^{14}\) The word “explanations” is puzzling in this context, because M. often interprets scriptural texts with the aid of these explanations and yet considers them \(\text{de-oraita}\). In the \(\text{ShM}\), he calls these traditional explanations \(\text{perushim mequbbalim}\), and in the \(\text{Halakhot}\) he refers to these interpretations “as it was learned from tradition” \([\text{lamdu mi-pi ha-shemu´ah}]\). See, for example, P198 and the corresponding \(\text{Hilkhot Malveh ve-Loveh}\) 5:1. For \(\text{mi-pi ha-shemu´ah}\), see 7.4, below.

\(^{15}\) On M.’s position that \(\text{halakhah le-Moshe mi-Sinai}\) must be considered \(\text{divre sofrim}\), see also M.’s response to Pinhas ha-Dayan, in \(\text{Responsa, Blau}\), #355, For a rejection of M.’s
between hermeneutic activity and *halakhah le-Moshe mi-Sinai*, and their terminological nuances, categories and terms such as *mi-pi ha-qabbalah*, *halakhah mi-pi ha-qabbalah*, **mi-pi ha-shemu´ah** and *halakhah mi-pi ha-shemu´ah*, were never explicitly discussed by M. I will speak further of this below.

I conclude this section by noting that the exact legal status of *divre sofim* laws — whether they enjoy scriptural or rabbinic force and whether they include some oral traditions like *halakhah le-Moshe mi-Sinai* — is not our direct concern here. Instead, our concern is with the category of scriptural laws, the category to which commandments belong. In the next section, we begin to tease out the hermeneutics that apply to this category.

### 7.2 Peshateykh di-qra, ein miqra yotse mi-yede peshuto

It is clear that M.’s pursuit of *peshateykh di-qra* is an attempt to uncover the original intention of Scripture, that stage of reading that has as yet not been interpreted, re-adapted and explicated by the analytic tools of the hermeneutists, jurists and courts. What does this term imply?

The Aramaic *peshateykh* and the Hebrew *peshuto* derive from *peshat* and *peshut* respectively. In biblical Hebrew, *peshat* meant “to strip” (a garment), “to flatten” it. Later, the term evolved to mean “extend” and “stretch out.” Over time, *peshat* became an exegetical term commonly

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thought to stand for the plain or simple meaning and was often contrasted with *derash*, commonly thought to stand for allegorical interpretation.

But in a more systematic study involving exegetical terms, Loewe noted, among other things, that the exegesis introduced by the words *peshateyh di-qra be-mai ketiv*, found in *b*Hullin 6a, were “scarcely less oblique than that which it had intended to replace.” And again, the *amora* Abaye’s explanation described as *peshateyh di-qra* at *b*Eruvin 23b “can scarcely be said to be any simpler than that which it is intended to supersede.”16 This is hardly, one might add, a judgement that supports the idea that *peshat* means “the plain sense of the text.”

Loewe admitted that in Abaye’s time the meaning of the word *peshat* as in *ein miqra yotse mi-yede peshuto* had evolved somewhat and seemed “to have been employed to counter exorbitant deductions from identity or close analogy of expression.”17 He noted further that for Abaye’s contemporary, Raba, “the term *peshat* apparently did mean the natural and explicit meaning of the text, at any rate within the context of this formula.”18 In the case in question (Deuteronomy 25:6), Raba stated (*b*Yevamot 24a) that the given, farfetched interpretation represented a unique exception to the rule of the plain meaning. As Loewe put it, “Raba’s language is formulated concessively; the exegetical means employed are here tolerated, because [it would seem] the biblical text can thus only be squared with halakhic

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principle.” 19 Yet Loewe showed that by the next generation, Rav Kahana could still remain ignorant of the method of the plain sense of the text as an exegetical tool.

Loewe concluded that peshat does not necessarily equal plain and literal exegesis, even though many scholars had assumed that it did from its earliest appearance in rabbinic sources. 20 In fact, he argued, peshat does not represent a particular reading strategy. Rather, it is a way of saying that a certain reading has achieved authoritative status:

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19 Ibid. p.166. In footnote 122, Loewe quotes Bacher as even going so far as to assert that the principle (of the plain meaning) is strongly emphasized by Raba. What follows is a brief digression that bears some relevance to the present discussion. In Hilkhot Yibbum 2:6, M. adduces tradition (mi-pi ha-shemu´ah lamdu) to interpret the words And it shall be, that the first-born that she beareth [asher teled; teled is in the imperfect] shall succeed in the name of his brother that is dead to mean the first-born of the mother of the deceased, in contradistinction to the plain and obvious sense, namely, that the verse is speaking about the first-born of the union of the levir and the wife of the deceased. In the PhM mYevamot 2:8, M. rationalizes this strange reading by suggesting that the future tense sometimes comes in place of the past tense. Weiss-Halivni, David, Peshat and Derash: Plain and Applied Meaning in Rabbinic Exegesis (New York/Oxford: Oxford University Press, 1991), p.57, concludes from this that “to Raba, interpreting out of context was unusual but clearly not impossible; here and there an exception was made….Maimonides… however, tolerated no exception.” I empathize with Halivni’s comment but the matter seems to me more complicated than that. When Raba made his statement, he may not have been referring to this part of the exegesis but rather to the second part, which deals with the words that his name be not blotted out of Israel. See RaSHI’s commentary, s.v. ve-afiqteih le-gamrei, and see R. Hananel, in Otzar ha-Geonim, ed. B. M. Lewin (Haifa, Jerusalem: 1928-1943), Yevamot, (1936), p. 301. The issue is whether we are dealing with giving the offspring of the new union the name of the deceased — the more literal reading — or whether through the use of a gezerah shavah we interpret the phrase to refer to the levir’s rights of inheritance. With respect to asher teled, Raba may indeed have agreed with M.’s reading here. Interestingly, this understanding of Raba’s observation implies that peshuto is closest to the literal meaning! For an interesting take on this sugyah and a proposed resolution to a contradiction in M.’s writings with respect to this question, see Benedict, B. Z., "Ha-RaMBaM be-Pesiqah, be-Parshanut, be-Hagut u-be-Hanhagah - Derekh Ahat Lo," Asufat Maamarim (Jerusalem: Mosad ha-Rav Kook, 1994).

20 Loewe, "The 'Plain' Meaning," p.178. Footnote 189 provides a rich bibliography.
The notion of traditional, familiar, and hence authoritative meaning of the text may not, indeed, always be to the fore, when the phrase *peshateyh di-qra* is employed; but I have yet to see its occurrence in a context which excludes such an understanding of it.\(^{21}\)

Other than this idea, one can conclude from Loewe’s study that the word *peshat* meant different things to different talmudic scholars and that, at least for scholars like Raba, the expression *ein miqra yotse mi-yede peshuto* did mean that a verse should be read for its plain reading.

In another, classic, study of exegetical terms, Gertner found that the Hebrew form of the noun occurs only in the phrase *ein miqra yotse mi-yede peshuto*, and then only three times. Each time, the term correlates with the idea that “the ordinary sense of the phrase in question should not be ignored.” Gertner concluded that the Hebrew noun *peshut* came to mean “the simple straightforward explanation, i.e. ‘unfolding’ of the text (explanation).”\(^{22}\) Gertner called attention to the fact that the ordinary meaning should not be confused with a literal interpretation in the extreme sense; sometimes, an allegorical interpretation better reflects the ordinary or plain sense. Gertner found, on the other hand, that the Aramaic *peshat*, though the exact equivalent of the Hebrew *peshut*, did not mean the same thing. Studying the context in which *peshateyh di-qra* appeared, Gertner concluded that a truly midrashic interpretation was designated and that rather than “simple” or “plain,” *peshat* came to mean “widespread” and


“widely accepted” by custom or tradition. This parallels Loewe’s conclusion.

Sarah Kamin reviewed the studies of a number of scholars, including Loewe and Gertner, and was not satisfied with any of their conclusions. Instead, she suggested that the terms *peshateyh di-qra* and *peshuto shel miqra* parallel the terms “verse” or “text”; that is, they merely point to the literary unit, to the actual wording of the text. In contrast, the question “in what is it written (*be-mai ketiv*)?” seeks to find the actual meaning of the text. Since the terms *peshateyh di-qra* and *peshuto shel miqra* do not imply a specific method of interpretation, the responses to the talmudic query with regard to the *peshateyh di-qra* can accommodate any number of interpretations, including literary and homiletic ones. Be that as it may, Kamin was certain that the terms derived from the root *peshat* do not reflect the kind of well-defined concept that fits into a discernable hermeneutic category.\(^{23}\)

A few years after Kamin’s work, Halivni made a valiant attempt to find a uniform meaning in terms that were associated with *peshat* throughout the rabbinic corpus. He worked through the different iterations of *peshuto* and *peshateyh* and concluded that there was no semantic distinction between the Hebrew and the Aramaic nouns, contra Gertner. Instead, he concluded that the word *peshat* yields throughout a uniform meaning of “extension, continuation, and derivatively, context.”\(^{24}\)

\(^{23}\) She does acknowledge that, specifically with respect to the expression *ein miqra yotse mi-yede peshuto*, the talmudic exegetes were referring to a literal reading. Kamin, Sarah, RaSHi’s Exegetical Categorization in Respect to the Distinction Between Peshat and Derash [Hebrew] (Jerusalem: The Hebrew University Magnes Press, 1986), pp. 31-48.

Halivni resorted to a great deal of tortured logic (pilpul) to prove his point, leaving his more “scientific” reader less than satisfied with the results. Interestingly, he tried to make certain cases fit his new mold even when peshat clearly stood for plain-sense reading.\(^{25}\) In the end, Halivni acknowledged that the dictum “no text can be deprived of its context” had emerged only by the “third century, and even then it was “not foolproof” as the second version of bYevamot 11b makes clear. He concluded that “the dictum was either not too well known or not honored by all scholars.”\(^{26}\)

In sum, if Kamin was right, and there is no reason to doubt her critical assessment, the term peshat and its derivations do not stand for a particular hermeneutic method — not plain sense, not literalism and not even contextual reading. If Halivni was right, context, as an interpretative

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\(^{25}\) For example, ein miqra yotse mi-yede peshuto in bShabbat 63a means just that, that the verse must also bear a simple, plain meaning. There is no reason — no difficulty that needs to be resolved — for one to read the exchange between Mar bar Rav Huna and Rav Kahana in any other manner. Halivni creates the difficulty by saying that “it is extremely unlikely that R. Kahana had not heard of the many derashot where biblical verses (or words) were metaphorically or allegorically explicated while at the same time retained their simple meaning” (p. 59). Therefore, Halivni has Rav Kahana split the verse that is being explicated into two. The first part — Gird your sword upon thy thigh — speaks about a sword and represents a metaphor for the words of Torah. In this way, Rav Kahana retains the simple meaning. The second part of the verse — your glory and your majesty — speaks only of the words of Torah. It is the words of Torah that are majestic, not the sword. Therefore one cannot deduce from here that the sword is an adornment, as R. Eliezer had done. Reading the verse in such an unnatural manner is reading it out of context. In response, Mar bar Rav Huna objected that no text can be deprived of its context (peshat), what is before and what is after, and that the sword must also be considered glorious and majestic. But this is a long and circuitous explanation for something that does not need explaining, and it is built on a speculative assumption that Rav Kahana acknowledges the absolute validity of plain reading. Yet Rav Kahana very clearly says, “I was eighteen years old and I had already studied the entire Talmud, yet I did not know that a text cannot be deprived of its peshat” (my emphasis). Can Rav Kahana be any clearer?

\(^{26}\) Weiss-Halivni, Peshat and Derash: , p. 63.
strategy, did not come to be seen as *peshat* until relatively late in the rabbinic period, “by the third century,” as he put it. It is critical to note that to the extent that *peshat*, as an exegetical tool, was not uniformly understood nor even widely known, it stands to reason that it did not play a major role in rabbinic interpretation. This is corroborated by the relatively sporadic appearance of terms derived from *peshat* in the talmudic and midrashic literature. This in turn makes M.’s methodological claim all the more surprising. Recall his words,

> This is contrary to the principle which [the Sages] of blessed memory, teach us: ‘A scriptural verse never loses its literal sense’ [*ein miqra yotse mi-yede peshuto*]. It is also contrary to the process of reasoning throughout the Talmud.

As we saw, this categoric statement finds little explicit support in the Talmud. It would appear that M. retrojects a medievalist — Andalusian, to be specific — perception of *peshat*, a reading sensitivity that was neither openly acknowledged nor possibly imagined by the rabbis of the first centuries of our era.\(^{27}\)

7.3 M.’s Understanding of *peshateyh di-qra*

From the way M. groups them together in Rule 2, *peshateyh di-qra* and *gufe di-qra* appear to be interchangeable terms.\(^{28}\) This is confirmed on reading the explanation that M. makes with respect to the verse *That he be not* (*ve-lo*) *as Korah and as his company* (Numbers 17:5) on two separate occasions. Calling it *peshateyh di-qra* in Rule 8 and *gufe di-qra* in N45, M. explains that the verse cannot be read as a prohibition despite the existence of the negative particle *lo*. To prove his point, M. introduces a *midrash* that reads the verse as a negation, namely that he who disputes the Aaronides’ rights to the priesthood will not suffer the fate of Korah and his companions, i.e. either being swallowed up into the earth or being consumed by divine fire. Instead, the litigants will suffer leprosy, which the *midrash* derives in a way that does not concern us here.\(^{30}\)

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\(^{28}\) It is interesting to note that M. took a synchronistic view of these terms, making none of the nuanced distinctions that were suggested by either Loewe or Gertner. See below.

\(^{30}\) While M.’s conclusion is correct to say that this phrase represents a negation and not a prohibition, a “plainer” reading of the verse suggests that the verse conveys a threat that those who presume to offer incense before the Lord in place of the Aaronides will be consumed by fire, as were Korah and his company of 250 rebels. In fact, this may be what M. has in mind when he first says that “the *gufe di-qra* is a threat.” Immediately thereafter, M. introduces the midrashic explanation in the following manner “And according to how the Sages explained the verse,” signaling that the Sages, too, thought that the verse is a negation and not a prohibition. If I am correct, M. shares with the *midrash* the idea that the particle *ve-lo* should not be read as a prohibition though he may differ in the actual meaning conveyed by the negation.
Since M. never formally explains what he means by *peshateyh di-qra/gufe di-qra* we must attempt to recover its meaning by examining the way this term is used throughout the *ShM*.

We begin by noting that the words being exposited must be able to convey a discrete idea. For example, the exposition on the verse *And thou shalt show them the way wherein they must walk, and the deeds they must do* cited by M. in his discussion in Rule 2 (quoted above), states,

> the way, refers to deeds of lovingkindness; *they must walk*, refers to visiting the sick; *wherein*, has reference to the burying of the dead; *and the deeds*, this refers to the laws; *they must do*, this has reference to more than the strict requirement of the law

This exegesis cannot represent a genuine interpretation of the verse because there is no hint in any of these individual components of the verse of what is being exposited. These expositions can only be called *asmakhtot*, words to which the rabbis “connected” some of their ideas. A more subtle deviation from *peshateyh di-qra* is noted at P94. Here, the underlying text provides support for the exegesis; but the text is cut up, unnaturally, to accommodate additional legal implications. The Sages (*b*Rosh ha-Shanah 6a) parse the verse *That which is gone out of thy lips thou shalt observe and do*, etc. (Deuteronomy 23:24) as follows: “*That which is gone out of thy lips*: this is an affirmative precept. *Thou shalt observe*: this is a negative precept. *And do*: this is an injunction to the Bet Din to make thee do,” and so on.

M. comments that although the Sages have minutely analyzed this verse, and explained each word in it separately, the general purport of all that they say amounts to this: that it is a positive commandment to fulfill any obligation which a man has taken upon himself…
After quoting the *midrash*, M. adds,

Now you know that no [commandment] can be derived from the mere words *That which is gone out of thy lips* and hence the sense of it must be what I have mentioned as the plain meaning of Scripture [*peshateyh di-qra*], namely that a man is obliged to carry out whatever his lips have uttered.

In other words, the word, the phrase or the statement must convey in full the meaning of the commandment. The text must literally unfold, as in the original connotation of the term *peshat*.

Similarly, the rabbis take the words *Ye shall not make yourselves detestable* in the verse *Ye shall not make yourselves detestable with any swarming thing that swarmeth* (Leviticus 11:43) out of context and admonish against eating and drinking filth or repulsive things. M. notes, at N179, that “one is not liable to whipping for [these violations] since the plain sense of the text [*peshateyh di-qra*] refers solely to creeping things…..”

Again, M. points out that the verse *ye shall not cut yourselves [lo titgodedu], nor make any baldness between your eyes for the dead*
(Deuteronomy 14:1), is used by some of the Sages “to (also) forbid dividing the people and causing faction and strife, understanding lo titgodedu as ‘you shall not form yourselves into factions [agudot],’” an alliterative play. Yet the only way to do so is to focus solely on the first two words of the verse and ignore the context. It is here that M. finds a warrant for his methodological assertion since “the gemara in Yevamot (13b) explains that lo titgodedu is required for its own context [gufe di-qra], the All-Merciful having said, ‘You shall not inflict upon yourselves any bruises for the dead.’” That is, the real meaning of the verse (gufe di-qra) must be found in the context and any other interpretation is a homily (derash). Of course, the Talmud saw nothing wrong with upholding both interpretations; it is M. who determines that the scriptural commandment is only and exclusively the one denoted by the context. Halivni’s understanding of peshat as “extension, continuation, and derivatively, context,” if perhaps forced when applied to the Talmud, is certainly an accurate description of M.’s understanding. In Rule 3 we find M. contrasting an intimation (remez) with peshateykh di-qra. He says

Again has a certain other scholar erred in respect of this principle [i.e. not to count laws that are not binding for all time] and counted [among the commandments the injunctions applying to the Levites:] And they shall not go in to see the holy things as they are being covered [ke-vala`] [Numbers 4:20]…. Now although [the Sages] do say: ‘An intimation [remez] against stealing a holy vessel [is found in the verse], And they shall not go in to see, etc. – the term an ‘intimation’ is sufficient evidence that this is not the plain sense [Chavel: the “literal sense“] [peshateykh di-qra] of the verse…
The term *ke-vala* could mean “cover,” “swallow,” or, perhaps, on the basis of this last meaning, “suddenly.” The Sages take advantage of this interpretive crux and use the term to allude to someone who “steals” a holy vessel, in particular, a libation jug. Nothing in the text, which deals with the dismantling and transport of the holy vessels of the portable Sanctuary in the wilderness, hints at such a possibility. Thus M.’s observation that the Sages’ intimation is not the *peshateyh di-qra*.

Again in N165, M. makes use of *peshateyh di-qra* to justify not reckoning three prohibitions stipulated for the High Priest in addition to those stipulated for all priests. While the Sages extracted some additional details from these apparent redundancies, M. does not think that they justify a separate enumeration because, according to *gufe di-qra*, these verses do not contain new information. Note that the relationship between the prohibitions that pertain to the priests and those that pertain to the High Priest outlined in N163, N164 and N165 is more complex and more difficult than is suggested here. ³² Suffice it to say that the use of *gufe di-qra* in this instance provides no additional insight into the nature of the principle that we are examining.

Still harping on the idea that Qayyara and those who followed his views erred grievously by failing to read texts properly, M. notes in Rule 2 that they based the obligation to reckon seasons on a literal reading of the verse *For this is your wisdom and understanding in the sight of the peoples* (Deuteronomy 4:6). M. assumed that their warrant was the following rabbinic homily: “Which branch of wisdom and understanding is *in the sight*
of the peoples? I must say, this is the reckoning of seasons and constellations.” M. does not explain here how one should read the verse but we know from his other writings that he thought that the verse was referring to statutes and laws (huqim u-mishpatim), as the context makes clear.\(^{33}\) Therefore, the expression in the sight of the peoples must be taken in a figurative sense.

M. respects the literal sense except where it clashes with the context, in which case he reinterprets the literal sense and adopts a metaphoric one.\(^{34}\)

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\(^{33}\) See the immediately preceding verse 5. In GP III:31:524, M. buttresses the idea that not only laws but statutes too are rational by citing the same verse:

And it says Which shall hear all these statutes [huqim] and say:
surely this great community is a wise and understanding people [end of verse 6]. Thus it states explicitly that even all the statutes [huqim] will show to all the nations that they have been given with wisdom and understanding.

Interestingly, Ibn Ezra made the same use of this verse:

And Moses our lord said with reference to all the commandments surely this great community is a wise and understanding people [Deuteronomy 4:6]. If they [the commandments] do not have reasons that we could comprehend, how would the nations say that these are righteous statutes Deuteronomy 4:8 and we, who adhere to them, wise?

Abraham Ibn Ezra, Yesod Mora, Shaar ha-Shemini, p. 150.

\(^{34}\) Where M. refers exclusively to literal readings he tends to use the Arabic word thr, the “outer” (nigleh, galui) meaning, which in Hebrew is translated as peshat. A good example can be found in the introduction to Pereq Heleg, where he discusses the reading strategies employed by certain people with regard to rabbinic material. Thr is contrasted with mtprsm, the allegorical method. See Haqdamot ha-RaMBaM la-Mishnah, Shailat’s edition, p. 133, note 1. See also, ShM, N46 (Ar. thr alqol, translated into Hebrew as peshat ha-lashon), and the beginning of N165 (Ar. thr alnts, translated as peshat ha-katuv). In both instances we are dealing with grammatical issues rather than contextual readings. In N165, M. deals with the interpretation of the words neither shall he go out of the sanctuary, nor [velo] profane the sanctuary of his God (Leviticus 21:12). In Rule 5, M. reads the verse to mean that the High Priest shall not go out of the sanctuary (when a relative dies) because he will profane the sanctuary if he abandons the service. At N165,
M.’s literal/contextual approach stands in contrast with that of Saadia Gaon, a practitioner of the *tawil* (metaphor) school of interpretation. According to Saadia, the literal interpretation of Scripture must be discarded in favor of *tawil* (metaphor) in four cases only: if it is contradicted by empirical evidence, by reason, by an explicit contradiction or by tradition. No weight seems to be given to context.\(^{35}\)

An additional implication lies hidden in M.’s method of *peshateyh di-qra*. At N4, M. cites the verse *Ye shall not make with Me – gods of silver, or gods of gold, ye shall not make unto you* (Exodus 20:20) as evidence for the commandment claim that one is forbidden to make figures of living things out of any substance, even if they are not for purposes of worship. This last (unexpected) condition is inferred from the last half of the verse. He adduces the words of the Mekhilta (Yitro 10, p.241): “Lest you should say: I am M. suggests an alternative *peshat ha-katuv*, namely that the high priest need not go out of the sanctuary (when a relative dies) since he does not defile the service if he were to stay and complete the service. Note that the *vav* of *ve-lo* could be read as a conjunctive *vav*, turning the phrase into a prohibition, namely, “and he shall not profane.“ M. clearly rejects this reading. Instead, as we just saw, he chooses to see the *vav* as standing for either “because” or “since.” Crucially, neither of these readings is labeled a *peshateyh di-qra*, which seems to confirm our conclusion that *peshateyh di-qra* stands for contextual readings.

\(^{35}\) Saadia Gaon, *The Book of Beliefs and Opinions*, Yale Judaica Series, ed. Samuel Rosenblatt (New Haven: Yale University Press, 1976), Treatise II, chapter 3 (100-101); Treatise V, chapter 8 (232), where he adds, “He…who imputes allegorical meanings to the precepts of the Torah, thereby fostering heresy, borders on the category of false prophets,” and Treatise VII, chapter 2 (265-6). Here M.’s views coincide with Saadia,: …the Law of ours with its statutes and ordinances [is not subject to change]. It is forever and all eternity; it is not to be added to or to be taken away from. Whoever adds aught to it, or takes aught from it, or misinterprets it, and strips the commandments of their literal sense [*mi-peshuttan*], is an impostor, a wicked man, and a heretic.

*Hilkhot Melakhim* 11:3 (uncensored version).
going to make them merely for ornaments, as others do in various countries, Scripture says: *ye shall not make unto you.*” *Unto you* is understood by the *midrash* to stand for one’s personal use rather than for worship. M. makes reference to other exegetical derivations from this verse and then notes that the verse also embraces “other matters that go beyond the scope of this commandment,” but the plain sense of the text (*peshateyh di-qra*) is what we have set out, as explained in the Mekhila.” To be fair, *peshateyh di-qra* still means taking the entire text in context, and that includes the second half of the verse, namely *ye shall not make unto you.* Concerned with scriptural intent, M. refers disapprovingly to expositions that seem to focus exclusively on the first half of the verse. M. adopts the Mekhila’s reading despite the fact that it is only one of several “plain” readings and not a compelling one. The reason may simply be that M. prefers to defer to rabbinic interpretations — so long as context is respected — because, I presume, their authors, being closer in time and mind-set to the text than contemporary ones, evince a superior understanding of the text.

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36 *Yotsim mi-kavvanat mitsvah zu* (*MnT*). Kafih, however, has it in the plural, *huts me-inyan mitsvot elu*. The singular seems more appropriate.

37 Cf. *bSanhedrin* 7b.

38 See, for example, the perhaps “plainer” interpretation of Saadia Gaon (also offered by Ibn Ezra), cited by no less than M.’s son, R. Abraham, who believed that the two halves of the verse convey two separate ideas — the prohibition of *shituf* (lit., partnership, i.e., imagining a second deity) and the prohibition to make physical representations of the divinity. See his comments to Exodus 20:20, Maimonides, Abraham, Torah Commentary: Genesis and Exodus [Hebrew] (Jerusalem: Qeren Hotsaat Sifre Rabbenu Bavel, 1984).

39 This recalls an expression found in the writings of the medieval *parshanim* with respect to rabbinic *midrash*: “Their understanding is deeper [lit., wider] than ours” (*da’atam rehavah mi-da’atenu*). Ibn Ezra’s commentary on the Pentateuch, *passim*. See also David Qimhi’s commentaries on Josh 4:11 and 2 Chr. 5:9.
In a similar vein, M. adduces *peshateyh di-qra* at N299 to claim that the verse *Nor shalt thou put a stumbling-block before the blind* (Leviticus 19:14) prohibits offering misleading advice. He bases this reading on Sifra, *Qedoshim parshah* 2:14 (p. 88d) that, on commenting on this verse, says: “if one is ‘blind’ in a [certain] matter, and asks you for advice, do not give him advice which is not suitable for him.” M. contrasts this interpretation with other rabbinic interpretations and ends by saying that “the *peshateyh di-qra* is as we have stated above [i.e., Sifra’s reading].” M. makes no mention of an alternative, literal, reading, even though context could be construed in that manner.40 Again, as in the previous case, M. gives priority to the *midrash halakhah*, thinking that it best represents original intent.41

In addition to literary context, M is sensitive to historical context. His comments to P34, discussed earlier (section 5.1.2), are an excellent example. If we recall, M. states that the priests are commanded to carry the ark on their shoulders. While he admits that the commandment was given to the Levites at the time of the Israelites’ sojourn in the wilderness, he argues that “this was only because of the limited number of priests then available, for Aaron was the founder” of the priestly clan. M. interprets the *halakhah* in light of reigning historical considerations.

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40 By contrast, Ibn Ezra appears to have thought that the verse prohibits the placing of a stumbling block in the way of a blind man, literally. See his comments to the Pentateuch *ad loc.*, and in Abraham ibn Ezra, *Yesod Mora*, *Shaar ha-Teshiyi*, p. 161 and the helpful note on line 30.

41 I presume that M. called this interpretation *peshateyh di-qra* and not “the accepted tradition” (*perush ha-mequbbal*), as he might have called it, because he too felt that the figurative meaning was better aligned to the intention of the verse.
A similar sensitivity to historical consideration is evident in his comments to P20. Adducing the method of *peshateyh di-qra*, M. offers a remarkably original and daring interpretation to Exodus 20:21, the command to build an earthen altar. This command is not only detached from the general commandment to build a sanctuary and all its vessels, appurtenances and parts that begins at Exodus 25:8, but it also stands in flagrant contradiction to an explicit commandment that calls on the Israelites to build an altar made of stone. In the absence of a *midrash* that can explain this verse without doing violence to the text, M. historicizes the command. His interpretation deserves a separate treatment. See Excursus 3.

In sum, according to M., *peshat* is a contextual reading of Scripture that adheres to the rules of language, literary conventions and historical context. M.’s *peshateyh di-qra* comes quite close to our modern conception of the plain sense of the text. It is literal, unless the context, or sometimes a linguistic convention, dictate that the word or phrase be taken figuratively. If we insert this conclusion into Rule 2, as we must given

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42 I follow Sarah Kamin’s definition of *peshat*, namely, that *peshat* is an empirical, contextual reading of Scripture that adheres to the rules of language, biblical literary conventions and historical context. Summarized by Cohen, Mordechai Z., *Three Approaches to Biblical Metaphor: From Abraham ibn Ezra and Maimonides to David Kimhi* (Leiden: Brill, 2003), p. 3. See the rest of the literature cited by Cohen in his note 10.

43 This is more than just “philologically defensible,” as Feldblum argues in an otherwise excellent article. In fact, what is philologically defensible is a description that can be applied to those interpretations that are taught by the oral tradition (*mi-pi ha-shemu´ah*), as I discuss later. Also, Feldblum confuses matters somewhat when he lumps together laws that are derived from the exercise of the 13 hermeneutic principles with laws that are stated as being explicitly under the category of philologically defensible (p. 48). The former belong to the category of *divre sofrim*, the latter to the category of *de-oraita*. Moreover, according to M. there is nothing philological about the derivative activity of the scribes. I agree wholeheartedly with Feldblum’s conclusion:
M.'s critique of those who do not follow *peshateyh di-qra*, we would be stating in effect that scriptural commandments must be grounded in the plain, contextual reading of Scripture. Where more than one interpretation is offered, M. gives absolute precedence to the reading that comes closest to taking context into account, since, in his opinion, only this reading truly expresses the lawgiver's intention. In such cases, all else being equal, we have also seen that M. defers to rabbinic *midrash*. If the reason for doing this is because he believed in the early rabbis’ superior familiarity with the language and *sitz im leben* of the period, then we are still affirming that M. values above all else plain sense interpretation.44

As an aside, it may be noted that M.'s emphasis on *peshateyh di-qra* leads to two rules that have not been discussed and that Hanina Ben-Menahem called rules of interpretation: Rule 5 ("The reason given for a commandment is not to be counted as a separate commandment") and Rule

44 Navigating close to the surface of the text, eschewing fanciful midrashic interpretations and analytic derivations, M. was then able to declare that his purpose in the third section of the *Guide* "is to give reasons for the [biblical] texts and not for the pronouncements of the legal science" (*GP* III:41:558). It is clear that the intent of the Lawgiver can only be properly understood if we attuned ourselves to the "plainness" of the text. In some respects, M.'s brand of interpretation resembles that of a modern day constitutional originalist, originalism being understood as a family of theories whose common starting point is that a constitution has a fixed and knowable meaning established when it is passed or ratified. Furthermore because M. adheres to a variant of originalism that emphasizes original intent rather than original meaning, he can further be characterized as an intentionalist. See Excursus 3.
8 ("A mere negative statement excluding a particular case from the scope of a commandment is not to be included among the negative commandments"). These rules appear to be logical extensions of the view that texts ought to be read contextually.45

7.4. “They learned it from the oral tradition” (mi-pi ha-shemu´ah lamdu)

The overwhelming majority of positive commandments (and, for that matter, negative commandments) are identified and rendered according to their plain sense (peshateyh di-qra). In a handful of cases, M. adopts a traditional reading that, as we shall see, carries the unique force and authority of being consensual. There is reason to believe that, even in these cases, M. simply meant to incorporate tradition into the commandment claim, leaving intact the plain sense of the text.

Hilkhot ´Edut 13:1 provides a good example. After citing the verse Parents shall not be put to death for children nor children be put to death for parents (Deuteronomy 24:16), M. comments: “It is taught by the oral tradition that included in this negative commandment is the exhortation not to condemn fathers to death on the testimony of their sons, nor sons on the

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45 Nahmanides, "Hasagot," Rules 5 and 8, shows that the talmudic rabbis did not always make these distinctions. These rules are good examples of the type of “Greek” logic, in this case linguistic logic, that M. tried to impose on the creative but unsystematic and unyielding corpus of rabbinic exegeses. Davidson, Herbert, Moses Maimonides: The Man and His Work (Oxford: Oxford University Press, 2005), p. 98, n. 124, notes that M. quotes in Rule 8 the “words” of the “students of the art of logic” and the quotation is taken verbatim from al-Farabi’s epitome of Aristotle’s De Interpretatione.
testimony of their fathers.” (M. leaves out the rest of the verse, *a person shall be put to death only for his own crime*, because it is clearly incongruous with the traditional interpretation.) Note well the words “included in this negative commandment.” M. seems to insinuate that the text retains its plain sense.\(^{46}\) This reading of M.’s intentions is consistent with the rabbinic dictum cited in Rule 2, “a text cannot be deprived of its plain sense” (*ein miqra yotse mi-yede peshuto*). The traditional interpretation does not uproot the plain sense of the text. The degree to which *peshateyhd* *di-qra* was ingrained in M.’s exegesis and how he struggled to maintain these readings even when he was “forced” to accept the traditional interpretation can be illustrated in the following example. In *Hilkhot Shemitah ve-Yovel* 13:5, M. writes, “The Sages have learnt by tradition that *may not be sold* [Leviticus 25:34] means ‘may not be changed’ — the field, the open space, and the city space, each one of the three must remain as it is forever after.” This contra-sense reading forms the basis of the claim at N228 in the *ShM* and in the *SE*, prefaced there by the words “it was taught by the oral tradition.” Yet, in the Heading to *Hilkhot Shemitah ve-Yovel* M. writes, “That one may not make a permanent sale of the open lands about their cities; these open lands can be redeemed at any time, before the Jubilee or after,” exactly in line with the plain sense of the text!

\(^{46}\) So at least it was understood by Amatsiah king of Judah, as we find in a rare piece of inter-textual interpretation (2 Kgs 14:5-6). Amatsiah put to death the courtiers who had assassinated his father, but he did not put to death the children of the assassins, in accordance with what is written in the Book of Teaching of Moses, where the Lord commanded, *Parents shall not be put to death for children nor children be put to death for parents; a person shall be put to death only for his own crime.*
I return to the main focus of this section. These traditional readings bring to the text an understanding that is not obvious and may not be its “plainest” sense. One might further say that tradition pushes the understanding of these texts to the limits of what M. may consider plain sense; notably, M. makes an effort to keep those traditions within sensible bounds. This is true with respect to commandments although less so with respect to details and particulars of commandments where tradition can sometimes offer an interpretation that is contrary to plain sense.\textsuperscript{47}

Needless to say, M. considers that only an uncontroverted tradition can provide an authentic interpretation and act as a substitute for \textit{peshateyh di-qra}. The consensus surrounding this type of tradition, he argues in the introduction to his commentary to the Mishnah,\textsuperscript{48} guarantees its Sinaitic origin.

\textsuperscript{47} Among the most egregious examples of the latter are the following: \textit{Hilkhot Yibbum} 2:6, “If a man dies and is survived by several brothers, it is the eldest brother’s religious duty to marry the widow….the oral tradition taught that here first-born signifies the first-born of the brothers….,” contrary to the plain sense of the verse, as discussed earlier at 7:3; \textit{Hilkhot Naarah Betulah} 3:6, where tradition reads the claims and counter-claims being made about a maiden’s virginity as being proffered by witnesses rather than standing on physical evidence (i.e., blood stains), contra the sense of the text; \textit{Hilkhot Isure Biah} 16:10,

\begin{quote}
Even though it is said, \textit{Neither shall ye do thus in your land} [Leviticus 22:24], the oral tradition taught that this prohibition applies everywhere, the purport of Scripture here being, ‘This shall not be done in Israel whether upon their own bodies or upon the body of others.’
\end{quote}

Note M.’s (weak) attempt to reconcile tradition with plain sense. In \textit{Hilkhot Sanhedrin} 3:3 and 3:8, M. allows tradition to read the texts totally out of context.

\textsuperscript{48} \textit{Perush ha-Mishnah}, ed. and trans. Joseph Kafih, 3 vols. (Jerusalem: Mosad ha-Rav Kook, 1984) P.9, “and, lo, this principle must be known, that is, that the explanations received [\textit{perushim h-mequbbalim}] from Moses are without controversy whatsoever….\textsuperscript{ federal anci
M. uses many terms to denote the presence of an oral tradition, but only one term to indicate its use in support of a scriptural commandment claim. The term is *mi-pi ha-shemu´ah lamdu*, which can loosely be rendered as “they learned it from the oral tradition.” It is only found in the *SE* and in the *Halakhot*. Since, as we saw earlier, the oral tradition enjoys a Sinaitic status and is therefore considered an authentic interpretation of the text, the interpretation that is given by this oral tradition enjoys scriptural authority. Because the *SE* deals only with commandments, the term “they learned it from the oral tradition,” when it appears there, is intimately and exclusively associated with a commandment claim. In the *Halakhot*, on the other hand,

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See also p. 11, where M. discusses the five epistemological bases for the oral law, in particular the first two. The *perushim ha-mequbbalim* include the famous textually ungrounded traditions called *halakhot le-Moshe mi-Sinai*. M. goes on to prove this by providing some examples. The principle has been found to be wanting, especially with respect to his assertions about the consensual nature of *halakhah le-Moshe mi-Sinai*. See Bacharach, Yair, *Sheelot u-Teshuvot Havvot Yair* (1987), #192. We also found some exceptions to this principle in our work on the commandments; see for example P5, where M. makes little out the fact that a rabbinic source that he cites give two mutually exclusive definitions for ‘worship of the heart’, one as prayer *and* one as study. At times, we find that not only is the tradition under dispute, but M. presents the tradition as if it is consensual! See for example P173, P198, P199 and N198 and 199, none of which represents unanimous views. The best that we can say is that, with respect to commandments, M. resorts to this principle very few times, as we show below. M. appears to have enunciated this principle more with a polemic against the Karaites in sight than as an authentic epistemological principle. M. was presumably also taking issue with Saadia, “one who thought that even laws that are disputed are part of the tradition from Moses” because Saadia had left the Rabbanite side exposed to the Karaite attack on tradition. On Saadia’s view, see Zucker, Moshe, *Perush Rav Saadia Gaon le-Bereshit* (New York: Jewish Theological Seminary of America, 1980), pp. 187-88. The principle of consensus (*ijma*) — in its many forms — as an authoritative source of the law, was a well-known principle of Islamic (and even pre-Islamic) jurisprudence. See Schacht, Joseph, *The Origins of Muslim Jurisprudence* (Oxford: Oxford University Press, 1950), pp. 82-97, and more recently Wael B. Hallaq, *History of Islamic Legal Theories*, especially pp. 75-81.

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49 In the *PhM* and *ShM* M. refers to this notion in a less precise and less consistent fashion, using expressions such as “it came via tradition” and “the received interpretation.” Of course, these works were written in Arabic.
the term is also associated with particulars of the law.\footnote{As, for example, Hilkhot Talmud Torah 1:2, Hilkhot Qiddush ha-Hodesh 8:1, Hilkhot Hovel u-Maziq 1:2, Hilkhot Sanhedrin 3:3, 3:8.} In such cases one might say with reasonable though not absolute confidence that M. intended to signal that these particulars, too, have scriptural authority (\textit{de-oraita}).

Matters become confusing when M. uses this special term without an accompanying scriptural proof-text. In such cases, the term may simply be referring to a hoary tradition; most likely, no scriptural authority is ascribed to it.\footnote{See, for example, Hilkhot Sotah 2:12, Isure Biah 4:1, Maakhalot Asurot 1:10, and passim. Hilkhot Yibbum 2:6 could present a problem. While the rule that we just postulated, namely, a verse accompanied by a \textit{mi-pi ha-shemu`ah} exegesis points to a scriptural law, it seems difficult to reconcile the exegesis on Deuteronomy 25:5 adduced in 2:6 with anything approaching the plain sense of the verse. Later on, at Hilkhot Yibbum 6:8, M. adduces the very same verse to tell us that it teaches that a barren woman (\textit{aylonit}) is exempt from falling to the levir. The two exegeses reflect diametrically opposed conceptions of the verse –it either refers to the mother or to the wife but not to both. Therefore the two exegeses cannot co-exist side-by-side. Which, then, did M. think is the scriptural law and which was merely a \textit{divre sofrin}? Horowitz, Y., "Le-Mishneh Torah u-le-Perush ha-Mishnayot shel ha-RaMBaM," Sinai 15, pp. 279-288, thinks that the former exegesis is an \textit{asmakhta} (thus \textit{divre sofrin}) and the latter a genuine scriptural reading (thus a scriptural law). I am not convinced, even though the former exegesis seems so stretched. M.’s philological attempt to justify the exegesis, here, and in particular in the \textit{PhM} (\textit{mYevamot} 2:6), shows that he considered this way out exegesis to be within the range of acceptable contextual readings. I am therefore inclined to follow the implications of the above stated rule.} The situation is further confused by the fact that M. uses in the \textit{Halakhot} other terms associated with the oral law, such as \textit{mi-pi ha-qabbalah}, \textit{halakhat mi-pi ha-qabbalah}, \textit{halakhat mi-pi ha-shemu`ah} and a few other variants of these expressions. Systematic terminological investigations into these terms have been conducted and theories have been propounded for at least a century, starting with (Der Mischneh Thorah:Ein System der Mosaisch-Talmuchischen Gesetzeslehre. Zur Erinnerung an den Siebenhundertjährigen Todestag Maimuni’s 1905), and continuing to this
day. Recently, Y. Kafih surveyed all the instances where these terms appeared in the MT (end of Volume 21, Sefer Mishpatim) but never came to a consistent conclusion.\textsuperscript{52}

While \textit{mi-pi ha-shemu´ah} can signify particulars of laws that are not of scriptural authority, and while M. uses a number of difficult-to-identify terms to convey the manner and form of diverse oral traditions, this much is

\textsuperscript{52} Kafih mentions that Nachum Rabinovitch had just dealt with this issue; but lest one come to think that he was preceded in this important investigation by Rabinovitch, Kafih informs us that he had actually dealt with this issue 13 years earlier (though he had had no opportunity until now to publish it). On the surface, his attempt appears to be systematic but in fact it is far from being so. Kafih offers individual, \textit{ad hoc} explanations for each entry but never summarizes his findings. His reasoning is at times confusing, as when he justifies scriptural lashes on a \textit{mi-pi ha-shemu´ah} interpretation because it is an explanation of the text rather than the norm itself (\textit{etsem din}), at #19. Many of his explanations undermine M.’s claims. For example, Kafih asserts that M. uses the term \textit{mi-pi ha-shemu´ah} when he refers to an ancient tradition, one however that does not come from Moses at Sinai, and in that respect it differs from \textit{mi-pi ha-qabbalah} (e.g. #18, p. 277). This is problematic. See, for example, #17 (p. 256), the use of \textit{mi-pi ha-shemu´ah} with regard to fasting on the Day of Atonement; yet we know that this is a scriptural commandment, so according to M. it must come from Sinai. He does the same at #12, with regard to prayer, yet we know that M. held that prayer is a positive commandment. Kafih does, however, make a few interesting comments, as in #140 and #144, where he indicates that while \textit{mi-pi ha-shemu´ah} is not necessarily the best interpretation, it has the merit of not contradicting the text. Even more recently, D. Henshke published an article in which he revisited this issue and, in my opinion, convincingly demonstrated that the expression \textit{mi-pi ha-shemu´ah} is a marker of Sinaitic authority but if, and only if, it is accompanied by a proof-text. Cf. Henshke, "Le-Yesode Tefisat ha-Halakhah," , in particular his appendix \textit{Mi-pi ha-Shemu´ah be-Mishneh Torah}, pp. 138-144. See also the systematic and careful analysis of these special terms by Shohetman, Eliav, "'Halakhah mi-Pi ha-Qabbalah' ve-'Halakhah le-Moshe mi-Sinai': 'Iyyun bi-Leshonot ha-RaMBaM," Shenaton ha-Mishpat ha-Ivry 22 (1961-63), Shohetman notes that when citing a proof-text, M. uses the term “as it says” to signify that the plain reading supports the claim, and uses \textit{mi-pi ha-shemu´ah or hen mi-pi ha-qabbalah} to signify an interpretation, offered by the rabbis, that is not in accordance with the plain meaning. I would add only that M. “tolerates” such an interpretation because the scriptural text is ambiguous and the rabbinic interpretation does not conflict with the context.
certain: *mi-pi ha-shemu´ah* is the only expression of the oral tradition that is associated with the hermeneutics of scriptural commandments.

All told, the number of positive commandment claims that draw their authority from a traditional interpretation is very small — five in the *SE* and 10 in the *Halakhot* — out of a total of 248 commandments. The *MT* confirms the *SE*’s hermeneutic in four places: P85 is paralleled at *Hilkhot Ma´aseh ha-Qorbanot* 18:1, P86 at *Hilkhot Isure Mizbeah* 1:10, P109 at *Hilkhot Miqvaot* 1:2 and P198 at *Hilkhot Malveh ve-Loveh* 5:1. We find no parallel in the *Halakhot* for the reliance on tradition as the source for the commandment claim to set aside the second tithe (P128); we will have more to say later on about the implications of this apparent reversal. The *MT* adduces tradition as the source for six additional commandment claims, at *Hilkhot Tefillah* 1:1, *Hilkhot Hamets u-Matsah* 2:1, *Hilkhot Shofar* 1:1, *Hilkhot Shevitat ´Asor* 1:4, *Hilkhot Malveh ve-Loveh* 1:2 and *Hilkhot Melakhim* 5:5.

Let us examine the 10 instances from the *Halakhot* in more detail:

1) *Hilkhot Tefillah* 1:1:

It is a positive commandment to pray every day, as it is said, *Ye shall serve the lord your God* [Exodus 23:25]. They learned from the oral tradition [*mi-pi ha-shemu´ah lamdu*] that this ‘service’ is prayer. It is written, *serving Him with all your heart and soul* [Deuteronomy 11:13], about which the Sages said, ‘What is service of the heart? Prayer’.

M. clearly struggles with this commandment claim; this is the first and only time in the *Halakhot* that he adduces one warrant to support another one. In the *ShM*, M.’s argument turns confusing after he cites a second opinion of the Sifre that equates service with the study of the law. Be that as
it may, by citing a secondary proof-text and a rabbinic suggestion, M. attempts to bring the traditional interpretation in line with ordinary sense.

2) *Hilkhot Hamets u-Matsah* 2:1:

It is a positive commandment from Scripture\(^ {53} \) to put away leaven before the time when one is forbidden to eat it, as it says, *Howbeit the first day ye shall put away leaven out of your houses* [Exodus 12:15]; they learned from the oral tradition [u- *mi-pi ha-shemu´ah lamdu*] that this first day is the fourteenth of Nisan. This is corroborated by the verse, *Thou shalt not offer the blood of My sacrifice with leavened bread* [Exodus 23:18; 34:25], which means: ‘Thou shalt not slaughter the Paschal lamb while leavened bread is still in existence,’ and the time for slaughtering the Paschal lamb is after midday on the fourteenth of Nisan.

Note M.’s attempt to “corroborate” the traditional interpretation.

3) *Hilkhot Shofar* 1:1:

It is a positive commandment from Scripture\(^ {54} \) to hear the blast of a horn [shofar] at New Year, as it is said: *It is a day of blowing unto you* [Numbers 29:1]. . . . Although Scripture does not expressly stipulate the blast of a horn in the case of New Year, it does say of the Jubilee year: *Then shalt thou make proclamation with the blast of the horn on the tenth*

\(^{53}\) Did M. purposefully add here “from Scripture” (*min ha-torah*), a rare addition, to polemicize with his Karaite adversaries who held that leaven could be kept until the beginning of the first day of the festival? For the Karaite interpretation, see, for example, the commentary of Aaron ben Elijah of Nicomedia, *Sefer Keter Torah* (Eupatoria: 1867), p. 62, writing in the first half of the 14\(^{th}\) century.

\(^{54}\) See our previous footnote. Here too the Karaites rejected the rabbinic *halakhah* and taught that *teruah* should be rendered as shouting, not as blowing a horn. See Miller, Philip E., "Karaite Perspectives in Yom Teruʿah," *Ki Baruch Hu: Ancient Near Eastern, Biblical, and Judaic Studies in Honor of Baruch A. Levine*, eds. Robert Chazan, William W. Hallo and Lawrence H. Schiffman (Winona Lake: Eisenbrauns, 1999).
day of the seventh month; in the Day of Atonement shall ye make proclamation with the horn [Leviticus 25:9], and they learned from the oral tradition [u- mi-pi ha-shemu´ah lamdu] that just as the blast of a Jubilee year must be blown on a horn, so must the blast of New Year be blown on a horn.

M. appears to adopt the analogy (heqesh) offered by a baraita cited in bRosh ha-Shanah 33b-34a, though he does not spell it out. The heqesh plays on the phrase on the tenth day of the month, a way for Scripture to intimate that all blowings of the seventh month — including those of the New Year — must be on a horn.⁵⁵ Be that as it may, by adding the analogous phrase “just as…so must” M. attempts to bring the traditional interpretation closer to a plain reading of the text.⁵⁶

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⁵⁵ The baraita’s exegesis is contradictory. First it resorts to a heqesh and later to a gezerah shavah, a different form of analogy. The Talmud notes the contradiction and concludes that the ruling could have been derived from the heqesh but now that a gezerah shavah has been found, the baraita prefers to use the latter method of interpretation. Kesef Mishneh (ad loc.) argues that M. adopted the gezerah shavah and this is the reason M. used the term mi-pi ha-shemu´ah, since according to Karo’s understanding of M.’s position, a gezerah shavah is a Sinaitic tradition and not a hermeneutic rule. But this is contrary to what M. says in Rule 2, where he lumps together all 13 hermeneutic rules, a group that of course includes the gezerah shavah. Had M. believed that the underpinning of this tradition is a gezerah shavah, he would have considered blowing a horn part of divre sofrim and so labeled it, instead of using the term mi-pi ha-shemu´ah. More likely, the very ambiguity (and insufficiency) of the baraita’s complex hermeneutic led M. to believe that an authentic Sinaitic tradition rather than a full-fledged scribal derivation lay behind the idea that teruah is to be effected by way of shofar. For the unusual way the term heqesh is used in the baraita, see Ayyash, Yehudah, “Lehem Yehudah” A collection of important commentaries on the code of Maimonides [Mefarshe Yad ha-Hazaqah] (Jerusalem: Otzreinu Toronto, 2006-7), ad loc.

⁵⁶ Unlike the gezerah shavah, the heqesh or analogy is not included in the 13 hermeneutic rules. Therefore an exegesis based on a heqesh could be considered a plain reading and need not represent divre sofrim. I recognize that this is the exact opposite of Kesef Mishneh’s argument laid out in the previous footnote. See also above, section 4.1, footnote 18.
4) *Hilkhot Ma`aseh ha-Qorbanot* 18:1:

Likewise, it is a positive commandment that every person take care of and bring from outside the Land [of Israel] to the Holy Temple the animal sacrifices that he was obliged to offer. For it is said: *Only thy holy things which thou hast, and thy vows, thou shalt take and go unto the place which the Lord shall choose* [Deuteronomy 12:26]; they learned from the oral tradition [*mi-pi ha-shemu´ah lamdu*] that this verse speaks only with reference to the hallowed offerings of outside the Land; that they were to be taken care of until they were brought up to the Holy Temple.

5) *Hilkhot Miqvaot* 1:2:

Wherever ‘washing of the flesh’ or ‘cleansing of the garments’ from uncleanness is spoken of in Scripture, it means nothing else but the immersion of the whole person or object in an immersion pool….And although all these things are learned only from the oral tradition [*she-hem mi-pi ha-shemu´ah*], it is nevertheless said, *It must be put into water and it shall be unclean until the even; then shall it be clean* [Leviticus 11:32] — a basic principle applying to all that are unclean, that they should enter into water.

Here again M. draws on textual support for the oral tradition.

6) *Hilkhot Isure Mizbeah* 1:10:

It is a positive commandment to redeem an offering which had incurred a blemish, so that it would become profane and be eaten. For it is said: *Notwithstanding thou mayest kill and eat flesh after all the desire of thy soul* [Deuteronomy 12:15]; they learned from the oral tradition [*mi-pi ha-shemu´ah lamdu*] that Scripture speaks here of hallowed offerings that became unfit and were redeemed.
For once, M. makes no attempt to justify the oral tradition.57,58

7) Hilkhot Malveh ve-Loveh 1:2:

…it is a positive commandment to exact payment from a heathen debtor. For it is written Of the heathen thou shalt exact payment [Deuteronomy 15:3]. They have learned from the oral tradition [mi-pi ha-shemu’ah lamdu] that this is a positive commandment.

No attempt is made here to justify this reading, which, at any rate, is plausible.59

8) Hilkhot Malveh ve-Loveh 5:1:

It is a positive commandment to lend money at interest to a heathen. For it is written Unto the heathen thou shalt lend upon interest [Deuteronomy 23:21]. They learned from the oral tradition [mi-pi ha-shemu’ah lamdu] that this is to be construed as a positive commandment and this is scriptural law.

57 The scriptural context suggests the possibility that this passage deals with offerings, in contrast to the immediately following section (vv. 20-22), which appears to speak about non-sacrificial meat. (Cf. RaSHi ad loc.) The word notwithstanding implies that some event had just taken place, e.g. it became impure, that blocks the animal from being offered on the altar. The notwithstanding clause therefore comes to offer a remedy, namely, that the animal be redeemed. Once it is redeemed it can then be consumed.

58 What is equally odd is that M. designates the redemption of offerings that have incurred a blemish a positive commandment, meaning an obligation. Perla raises serious and important objections to this view. Perla, Sefer ha-Mitsvot le-RaSaG, vol.1, Ps 131, s.v. ve-nirah, pp. 380-3.

59 See our comments to P142 in section 5.1.1.
A more plausible reading is that while one may lend money at interest to a heathen one may not do so to an Israelite. In effect, we are dealing with what amounts to an implicit prohibition. This prohibition is explicitly stated at the end of the verse.\(^{60}\) Still, the text can easily accommodate the oral tradition, and no justification is necessary.

9) *Hilkhot Melakhim* 5:5:

It is a positive commandment always to bear in mind his evil deeds, the waylaying [he resorted to], so that we keep fresh in others [*kede le-orer evato*] the memory of the hatred manifested by him, as it is said: *Remember what ´Amaleq did unto thee* Deuteronomy 25:17. They learned from the oral tradition [*mi-pi ha-shemu´ah*], *Remember*, by way of mouth; *do not forget*, out of mind, because it is forbidden to forget his hatred and enmity.\(^{61}\)

The traditional interpretation is plausible and requires little justification.

10) *Hilkhot Shevitat ´Asor* 1:4:

Another positive commandment concerning the Day of Atonement requires abstention from eating and drinking on that day. For Scripture says, *Ye shall afflict your souls* [Leviticus 16:29]. They learned from the oral tradition [*mi-pi ha-shemu´ah lamdu*] that the term ‘affliction’ when applied to the soul means ‘fasting’.

\(^{60}\) See our comments to P198 in section 5.1.1.

\(^{61}\) I read the claim as follows: “Remember for the purpose of keeping fresh in the minds of other members of the nation ´Amaleq’s hatred.” “Remember” here is used in the sense of “remind,” which is why *remember* is “by way of mouth.” See our earlier comments to P189, chapter 5.
I find no dissenters among a wide range of exegetes to the notion that affliction of the soul stands for fasting. On the other hand, the term may have enjoyed a broader meaning and M. may have resorted to tradition to restrict the punishment of excision exclusively to someone who does not fast.  

To sum up what has been said thus far. In order to identify and frame commandment claims, M. makes use of *peshateyh di-qra*, a common sense reading of Scripture that places phrases and clauses in their grammatical, linguistic and historical context. This is true for the overwhelming number of cases. In as few as five and as many as ten cases (out of 248), M. relies on certain rabbinic interpretations that on the face of it appear to reflect unanimous opinions, though, admittedly, do not always represent the best *peshateyh di-qra* readings. These traditions are grouped under the rubric *mi-pi ha-shemu´ah lamdu*. We noted that M. considers consensus and unanimity the hallmarks of authoritative readings, that is, Sinaitic origins. Nevertheless, M. attempts in almost each of these special cases to bring the rabbinic interpretations into alignment with good common sense (*peshateyh di-qra*).

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The next *halakhah*, 5, states that “it is similarly known by tradition [*mi-pi ha-shemu´ah*] that one is forbidden to wash, anoint himself, wear shoes, or have sexual intercourse on that day.” Then M. adds, “Nevertheless, one becomes liable to excision or a Sin Offering only for eating or drinking; if one washes, anoints himself, wears shoes, or has sexual intercourse, he is liable to a disciplinary flogging [makkat mardut].” Here, then, only fasting is scripturally enjoined and eating and drinking are scripturally prohibited, not the broader activities possibly implied by the term affliction of the soul. As we saw earlier, *mi-pi ha-shemu´ah* not accompanied by a proof-text may simply represent a hoary tradition and as such it is of rabbinic authority; thus, the *halakhah* prescribes “disciplinary flogging,” a rabbinic punishment, rather than the scriptural flogging.
7.5 The Presentation of a Positive Commandment in the Halakhot

We have already commented on one aspect of M.’s literary/rhetorical presentation of commandments in the Halakhot. Specifically, we noted that M. uses a simple and basic sentence to designate, forcefully and unequivocally, the commandment that he is about to discuss: “it is a positive commandment to such-and-such.” We called these introductory presentations declaratory statements. In addition to the declaration, M. will cite the relevant scriptural proof-text. In effect, the proof-text “proves” the claim. We had already become familiar with this pattern in the previous works, the ShM and the SE. By citing a proof-text, M. was only following the basic tenets of good argument. As well, and I am indebted to Prof. T. Meacham for this insight, M. was also adhering to the format of the midreshe halakhah, works that he considered fundamental cornerstones of the Oral Law.

For the overwhelming majority of commandments, the scriptural proof-text, by itself, is sufficient evidence of the claim’s validity. For one thing, M. had already demonstrated in the ShM that the evidence was well-warranted. Second, even a casual reader who had not studied the ShM would recognize the natural relation of the claim to the scriptural verse being cited. The peshateyh di-qra, the contextual, plain, reading of the verse, would assure this recognition. In the few cases where M. allows tradition to override the plain sense, he cites the verse and follows it with the traditional interpretation, as we discussed earlier. It is critical that the proof-text be an integral part of the initial presentation of the commandment.
Where neither a designation nor a proof-text is found in the presentation of what the *ShM/SE* had already identified as a positive commandment, we must seriously wonder whether M. had changed his mind. I will argue that he had, that ultimately the *peshateyh di-qra* did not convince him that such a claim could be made and that, furthermore, he found no rabbinic warrant that would convincingly tie the verse to the claim. The commandment thus passed from the category of *de-oraita* to *divre sofrim*, revealing the unsuspected significance and ramifications of Rule 2.

In the next section, we discuss the literary artifice that M. used to convey this changed perception.
Chapter 8. Correct Practices

As we shall see, where M. in the *Halakhot* fails to make the usual declaratory statement or to produce a scriptural proof-text, he will often make use of the participle. The participle is a common mishnaic grammatical form, yet one that is not particularly well suited to articulate imperatives.\(^1\) What is the meaning of this participle and why does M. use it?

David Daube studied this part of speech and found that “in the earlier part of talmudic literature, in Mishnah, Tosefta and Baraita, it is more frequent than any other form: a counting might well show four-fifths of Tannaitic Law, religious or secular, to be given in this form.” Daube posited that use of the participle “reflects the rabbinic view of the secondary, less absolute nature of post-biblical rules,” in a setting where it was well accepted that one could no longer count on authoritative revelation. Daube noted that the Hebrew participle “stands for our present tense as referring to a habitual event, action or omission,” and that “it is in this function, as an expression of the course to be taken in accordance with proper interpretation and custom, that the participle became the typically rabbinic form of legislation.” He concluded that “[i]f we want to give it a name, we should call it, not imperatival participle or participial imperative, but rather

\(^1\) The standard imperative form that M. uses to indicate commandments is the infinitive of the various conjugations, preceded by the preposition *lamed*. See, e.g., *Hilkhot Hametz u-Matsah* 2:1, 6:1, 7:1, and *passim*. 

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advisory, didactic participle or perhaps best, participle stating the correct practice.”²

We began by noting that on a few occasions M. fails to make the usual declaratory statement where we had been led to expect such a declaration by the enumerative works. We further noted that in some of those occasions, M. uses a participle. I now suggest that M. uses these participles to state correct practices. The participle is a coded, or very subtle, way of telling the reader that, in his opinion, the practice does not quite follow the canons of *peshateyh di-qra*, the true meaning of Scripture. This is confirmed by his failure to support the practice via a proof-text, effectively disconnecting the practice from the verse. The practices are ancient and well accepted and should probably be designated as either *divre sofrim* or as rabbinic enactments. I surmise, however, that M. sees little good in publicizing such a radical opinion. I proceed in the continuation to review these occurrences.

The Recitation of the *Shema* (P10)

M. opens discussion of this commandment in the *Halakhot* thus:

The *Shema* is recited [*qorin*] twice every day, once in the evening and once in the morning, as it is said: when thou sittest in thy house, and when thou walkest by the way, and when thou liest down, and when thou

risest up [Deuteronomy 6:7]. The time when people customarily lie down is evening and the time when people customarily get up is morning (Hilkhot Qeriyat Shema 1:1).

Note, first and foremost, that M. does not designate the command to recite the Shema a positive commandment, neither here, nor, for that matter, anywhere else in this section. Second, while M. does cite a verse — and this, as we know, is a crucial part of the presentation — he leaves out the most critical words: and thou shalt talk of them (when thou sittest in thy house, and when thou walkest by the way, and when thou liest down, and when thou risest up). These words were cited in the SE/ShM precisely as evidence that one needs to recite the Shema. The part of the text that he does cite merely supports the idea that one should engage in this activity (meditate? recite?) morning and night. Note the use of the participle, qorin, literally, “they recite,” instead of the usual and much bolder “[it is a positive commandment] to read the Shema” of the SE.

The only conclusion I can draw from this subtle formulation is that M. is letting us know that the commandment to recite the Shema is not scriptural but simply a correct practice, a matter that could only be made known to the sophisticated, philosophically inclined, reader. In fact, the true form of the commandment had already been codified as the obligation to acknowledge His unity, Hilkhوت Yesode ha-Torah 1:6, and P2 in the SE/ShM. For M., the Unity of God is not something that is recited but rather something that is known, and again, it is not something that is said twice a day but rather something of which one must be aware at all times. The passage and thou shalt talk of them when thou sittest in thy house, and when thou walkest by the way, and when thou liest down, and when thou risest up when read
through the lenses of *peshateyh di-qra* is no more than a metaphor, comparable to what we find in *Proverbs* 6:21-23. In the words of Tigay, a modern commentator, “these pairs of contrasting phrases are merisms. Accordingly, our verse means speak of these words wherever you are, and at all times.”³ The transformation of this verse into an obligation to recite the *Shema* twice a day is, on this approach, no more than a rabbinic creation, a part of *divre sofrim*.

M. exhibits some ambivalence already in the *ShM* with respect to this commandment. The argument, which I review immediately below, proceeds confusedly along the lines of times rather than recitation and digresses unnecessarily and excessively beyond *qeriyat shema*.

M.’s direct evidence for the obligation to recite the *Shema* twice a day comes from the verse *and thou shalt talk of them when thou sittest in thy house, and when thou walkest by the way, and when thou liest down, and when thou risest up*. In the *ShM*, M. adduces two rabbinic warrants, the first one from *bBerakhot* 21a “where it is shown that the reading of the *Shema* is ordained by the Torah” and the second one from *tBerakhot* 3:1. The talmudic passage is not as convincing as M. makes it out to be for we also find there an amoraic opinion that maintains that the recitation of *Shema* is rabbinic. Moreover, the *sugyah* reaches no firm conclusion on this topic.

The Tosefta reads: “Just as the Torah has ordained an appointed time [*qeva*]⁴ for the reading of *Shema*, even so have the Sages appointed a time

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⁴ Tosefta, ed. Zuckermandel, has here “just as an appointed time has been ordained”, omitting “as the Torah.” This omission weighs in the question of whether the daily
[**zeman**] for prayer.” The ostensible value of the Tosefta is to show, by inference, that appointing times for reading Shema is a scriptural matter while appointing times for prayers is a rabbinic ordinance. Oddly, M. makes no such inference and instead, goes on to talk about prayer. In effect, M. makes no use of this warrant other than to show that it is the rabbis who appointed times for prayers, superimposing it on an activity that was scripturally prescribed. This appears unnecessary since M. has already told us at P5 that prayers are scripturally prescribed. The fact that M. does not use this Tosefta to emphasize the scriptural character of the recitation of Shema is suspect and leads me to believe that M. accepted the second half of the dictum, corroborating the weak case he had made at P5, but was not convinced of the probatory merits of the first half of the dictum. If, as I believe, M. was not absolutely convinced that Scripture ordained the twice daily recitation of the Shema, he could have reinterpreted the Tosefta as follows: whereas the Torah gave the rabbis a clue on ways to fix appointed times when it came to the Shema — and the verse would then serve as an asmakhta — it left them to their own ingenuity when it came to prayers. This reading dovetails well with what appears to be another redundant statement immediately following M.’s interpretation of the second half of the dictum. He says:

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**reading of Shema** is a scriptural or a rabbinic precept. **Qeva** also has the meaning of ‘fixed form’. Note that in this text, **qeva** is set in apposition to **zeman** (time) and thus could possibly bear the meaning of ‘fixed form’ rather than ‘appointed time’, the sense being that just as the Torah has set a fixed form, the Shema, for the affirmation of His unity, so have the Sages appointed a time for prayer. But see following note.

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5 *Zeman*, so too Tosefta, ed. Zuckerman. However, the Tosefta affixed to the standard editions of the Babylonian Talmud reads here **qeva** instead of **zeman**. See **Sefer ha-Mitsvot**, ed. Heller, note 22.
This is what the Sages mean when they say: ‘[The Men of the Great Assembly] appointed prayers to correspond with the daily burnt offerings’; that is to say, they fixed the times of prayer to correspond with the times at which [the daily burnt offerings] were brought.

Behind this rambling presentation, one senses a purposeful lack of clarity. Nevertheless, M. may have wished to preserve this commandment in the ShM because it was widely accepted and because it provided a valuable heading for a separate treatise in his forthcoming Halakhot, which deals in extenso with the details of the recitation of the Shema.

To learn Torah and to teach it (P11)

Even the most casual reader of the MT would be struck by the peculiar and indirect manner in which M. introduces this obligation:

Women and slaves are exempt from the obligation of studying Torah. But a father is obligated \( \text{aviv hayav le-lamdo} \) to teach his young son Torah, as it is said, \text{And ye shall teach them to your children, talking of them} [Deuteronomy 6:7]….

M. begins with the obligation to teach first to one’s own sons (Deuteronomy 6:7) then to one’s own grandsons (Deuteronomy 4:9, \text{but make them known unto thy children and thy children’s children}) and, finally, to all disciples who seek instruction (Deuteronomy 6:7, \text{and thou shalt teach them diligently unto thy children}), the latter on the basis of a traditional interpretation (\text{mi-pi ha-shemu´ah}) that includes disciples in the term \text{thy}
children. The obligation to study/learn only comes at Halakhah 8 and it is supported by a non-Torah passage, *But thou shalt meditate therein day and night* (*Josh* 1:8). By definition, prophetic passages cannot validly serve as proof-texts for scriptural commandments.

It is critical to note that neither teaching nor studying Torah is ever designated a positive commandment. The failure to make a declaratory statement and the peculiar and absolutely atypical opening⁶ prompts a commentator to offer a justification — namely, the ostensible need to highlight the fact that women and slaves are exempt from the obligation even though, under existing rules, they are subject to all positive commandments that have a fixed time.⁷ Clearly, M. succeeds in diverting attention from the critical issue, that of not designating teaching Torah as a positive commandment.

The evidence presented in the *ShM* for this commandment claim to study and teach the Torah is the words *and thou shalt teach them diligently unto thy children* (*Deuteronomy* 6:7). When read contextually, this phrase, however, appears to refer to the proclamation of God’s Unity and the command to love Him (vv. 5-6). I suggest that this is indeed the way M. reads the verse in the Halakhot. I come to this conclusion indirectly, from a statement that M. makes in *Hilkhot Qeriyyat Shema*. After ruling that one must recite the *Shema* twice every day, M. proceeds to explain why one recites the section beginning *Hear O Israel* (*Deuteronomy* 6:4-9) before those commencing with *And it shall come to pass* (*Deuteronomy* 11:13-21).

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⁶ The only other such formulation occurs in relation to the commandment to sit in a succah. I shall return to this later on.

⁷ RaDBaZ, *Sheelot u-Teshuvot ha-RaDBaZ*, *Orah Hayyim*, siman alef. (See Excursus 4)
and The Lord spoke (Numbers 15:37-41). He says: “The section beginning Hear O Israel is recited first, because it contains the Unity of God, the [duty to] love Him [ve-ahavato] and [the duty to teach about] Him [ve-talmudo], because this is the great principle on which everything depends.” As M. has already told us, Scripture commands one to intellectualize the Unity of God (P2; Hilkhot Yesode ha-Torah 1:6); and thou shalt teach them diligently unto thy children would then appear to urge one to impart this knowledge to others. I conjecture that, for M., the transformation of this command into a duty to study and teach all of Torah is likely to have been a scribal creation (divre sofrim), prompted by practical considerations such as the desirability of fostering study for the sake of knowing how to fulfill commandments and, on a more basic level, by the inability of the multitudes to grasp philosophical concepts. 

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8 My translation. I take ahavato and talmudo as referring to His Unity since it is followed by the words “because this is the great principle” (ki hu ha-igar ha-gadol), which obviously must be referring back to Unity. Hyamson translates here “studying His words,” but this is interpretative, following the approach of most rabbinic commentators. M. would have had to use a plural pronoun if he wished to refer to Unity, love for Him and His words/teachings.

9 In halakhah 2, M. states that “on traditional authority (mi-pi ha-shemu´ah lamdu), the term ‘thy children’ includes disciples….” Note, however, that this tradition does not say that one ought to teach children Torah. It merely says that Scripture uses the word “children” to include disciples; thus whatever one teaches, it must be directed to disciples as well as children.

10 Alternatively, to ground a person’s mind (meyashvim da´atam shel adam tehilla) before he embarks on metaphysical speculations. See Hilkhot Yesode ha-Torah 4:13.
In sum, an understanding of M.’s exegetical method — in particular, his emphasis on textual and contextual reading — helps us understand a subtle feature of M.’s ultimate categorization of laws and their sources.11

To bind phylacteries on the head and on the arm (P12, P13)

M. opens *Hilkhot Tefillin* in the following manner:

The following four passages … are the ones that are written by themselves [or, individually, *bi-fne ‘atsmam*]; they are wrapped in leather and are called *tefillin*. They are to be placed [*u-manihin otam*] on the head and they are tied [*ve-qoshrin otam*] on the arm.12

Opening the *halakhah* with a definition rather than with a statement of what one is enjoined to do is justifiable where the object used in the commandment is not explicitly spelled out in Scripture. This is clearly the case here, where all we find in Scripture are the words *And thou shalt bind them for a sign upon thy hand, and they shall be for frontlets between thy eyes*. It is, however, the very next line that is troubling and should trouble

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11 I am tempted to go one step further and argue that M.’s use of the participle *petturin* to indicate that women and slaves are exempt from this command is to note that this too is merely a correct practice, at least with respect to teaching and studying Torah. In contrast, everyone is obligated to fulfill the essential commandment, i.e., recognizing His unity.

12 In the continuation, M. states further that “according to the Torah a mistake in the tip of only one of the letters in the four passages renders the whole unfit; they must be written perfectly as they are supposed to be.” In the next *halakhah* M. rules that the same is true for the passages written for the *mezuzah* and for the Torah scroll. These are laws that pertain to writing passages or sections of the Torah, regardless of what they are written for, and should not be confused with the commandments of placing *tefillin* on the head and arm and *mezuzot* on doorposts.
every sensitive reader of the MT: “They are to be placed [u-manihin otam] on the head and they are tied [ve-qoshrin otam] on the arm.” Why not declare clearly and unequivocally that it is a positive commandment to place these tefillin on the head and tie them on the arm? Why does M. use instead the participial form, which, as we have seen, tends to denote correct practice? Why does M. fail to back up this practice with the appropriate scriptural citation And thou shalt bind them for a sign upon thy hand, and they shall be for frontlets between thy eyes as he did in the SE/ShM and as he is wont to do in the presentation of every commandment?

Similarly, in 4:1-2 M. discusses the exact spot on which these tefillin should be placed. Yet he not only omits the verse but adds, “We learned the positioning of the tefillin on the arm and on the head from the oral tradition [mi-pi ha-shemu’ah lamdu].” As discussed earlier, mi-pi ha-shemu’ah without a proof-text likely signals that we are in the presence of an ancient tradition, not a scriptural law. And, finally, why would M. not cite the word totafot, the very basis for the notion that the phylacteries contain four passages?13

I submit that M. sensed the extraordinary usefulness of the participial form when dealing with traditional practices that came from time immemorial and were somehow linked to, but not grounded in, scriptural passages, but which, at the same time, could not be exposed publicly as being non-scriptural. Since the putting-on of phylacteries does not reflect the peshateyh di-qra of Scripture, M. did not wish to designate it as a positive commandment to do so. On the other hand, the idea of labeling this practice

13 Cf. RaSHi on Deuteronomy 6:8, based on bSanhedrin 4b.
a commandment of the scribes (mi-divre sofrim), would have been too disconcerting and too controversial to a public that, by that time, had been conditioned to think of putting on tefillin as a scriptural commandment and as a cornerstone of Jewish practice. Thus M. opted for a compromise and used the “soft” language of the participle.\textsuperscript{14}

It is worth noting that more than one interpreter since antiquity has suggested that the text should be understood in a metaphoric sense. Aqila, Theodotion and some manuscripts of the Septuagint took the verses to mean that we should be constantly aware of God’s teachings. In the Middle Ages, the Karaites, too, stressed the metaphoric view. Ibn Ezra rejected their views because a literal interpretation can be effortlessly entertained. This eliminated the need for a metaphoric interpretation (in Ibn Ezra’s long commentary at Exodus 13:9). In his short commentary at Exodus 13:9, Ibn Ezra first offers the metaphoric interpretation –without ascribing it to the Karaites– but then rejects it, on the basis that the literal interpretation is faithfully attested by the Sages. This was not the case with the metaphoric one. Yet there seems little doubt that by citing and engaging such a view in both commentaries, Ibn Ezra revealed some sympathy for the figurative interpretation. No less a talmudist than RaSHBaM makes no secret that, according to the “depth of the plain interpretation” (omeq peshuto), these words should be taken metaphorically (commentary on 13:9).\textsuperscript{15}

\textsuperscript{14} The force of this practice would depend, of course, on the interpretation we give to M.’s category of divre sofrim, as noted earlier. At least on the account of some jurists, the putting on of tefillin would have the force of a de-oraita even for M.

\textsuperscript{15} See The JPS Torah Commentary. Deuteronomy, Excursus 11.
To affix a mezuzah (P15)

Much of what was said about phylacteries can be said about the commandment to affix a mezuzah. M. opens Hilkhot Mezuzah (Hilkhot Tefillin u-Mezuzah ve-Sefer Torah 5:1) as follows: “How is the mezuzah to be written? [ketsad kotvin, lit., how do they write the mezuzah?] One writes two passages …in a single column on a piece of parchment.” M. then spends most of that first chapter explaining how the mezuzah is to be written. In 5:10, M. rules that “all are obligated [ha-kol hayavin] to affix mezuzot, even women and slaves,” yet he fails to designate this obligation a positive commandment. Finally, in 6:12, M. explains: “Where is the mezuzah to be affixed [ve-hekhan qovin et ha-mezuzah]?” M. misses the last opportunity to designate the writing/placing of a mezuzah a positive commandment. One notes further that only part of the relevant scriptural proof-text is cited and it is in connection with a detail of the law: “Granaries, barns, lumber rooms, and storehouses are exempt from mezuzah, since it says, of thy house [Deuteronomy 6:9]…. ” Nowhere in Hilkhot Mezuzah does M. cite what would appear to be the strongest evidence for this commandment claim, the words And thou shalt write them upon the doorposts of thy house, and upon thy gates (Deuteronomy 6:9). Evidently, as we saw earlier in connection with recitation of the Shema, the teaching of Torah and the putting-on of phylacteries, M. takes the Shema pericope in a non-

16 Note that the verse speaks about writing the words upon the doorposts of thy house and that it is only via an inference from similarity in words (gezerah shavah) that the rabbis interpreted the passage to say that the pentateuchal sections be written on a parchment. See bMenahot 34a. As we saw earlier, M. deems derivations using hermeneutic rules like the gezerah shavah to be mi-divre sofrim.
literal, figurative sense. The context favors such a reading. The subject of the pericope is clearly God’s unity. Therefore, it is metaphysics that must be the subject of one’s assiduous study, not the law. This notion must saturate one’s entire being, not surround him via physical objects. True notions of unity cannot be simply recited or proclaimed, they must be apprehended intellectually.

The twin failures, namely, M.’s failure to make a proper declaratory statement\(^\text{17}\) and his failure to cite scriptural evidence for the claim, as well as the pointed use he makes of the participle at key junctures, suggest that M. viewed the commandment to affix a mezuzah on doors as no more than a correct practice. This practice, as well as some of those discussed above, may have originated among the people, later to be sanctioned by the rabbis, or may have been directly the product of a rabbinic ordinance. Either way, these laws belonged, according to M., to the category of divre sofrim, and not to the scriptural category of de-oraita. M. was successful in hiding this opinion from the masses, but yet left enough clues for the informed reader to discover the precise status of these laws.\(^\text{18}\)

\(^{17}\) M. also fails to designate the commandment as a positive commandment in the balance of Hilkhon Mezuzah, even when he points out how one is liable if one fails to fulfill the command. we must note that at 5:4, he uses the expression bittlu ha-Mitsvah instead of the expected bittlu mitsvat ‘aseh. See the next footnote.

\(^{18}\) M. does not look kindly on the objectification of the “great duty” to affirm His unity, love and worship. The mitsvah is being condensed into an object that, in the hands of fools, runs the risk of becoming an amulet for personal interests. Writing about those who inscribe in the parchment of the mezuzah the names of angels, holy names or other such protective texts, M. says: “For these fools not only fail to fulfill the duty [bittlu ha-mitsvah] but made a great duty [mitsvah gedolah], namely the unity of the Name of God, His love and His worship, as it were an amulet to promote their own personal interests…” (Hilkhon Mezuzah 5:4). Note the expression bittlu ha-Mitsvah instead of the more correct – if in fact we are dealing with a positive commandment - bittlu mitsvat ‘aseh.
That the king shall write a scroll of the Torah for himself (P18 in the SE and P17 in ShM enumeration)

The command that the king shall write a scroll of Law for himself is scriptural and, yet, M. does not designate it as a positive commandment. Unlike the above-discussed cases, M. does not use the participle here and the commandment does not fall in the category of correct practices. Nevertheless, I discuss this case here because the peshateyh di-qra hermeneutic allows us to explain M.’s omission of the declaratory statement.

M. deals with this commandment in Hilkhoteh Sefer Torah (7:2) and in Hilkhoteh Melakhim (3:1). Notwithstanding this unusual arrangement, M. “assigns” this commandment to the treatise dealing with the laws concerning the writing of a scroll of Law (Hilkhoteh Sefer Torah) as attested by fact that the commandment is listed in the heading to Hilkhoteh Sefer Torah and not in the headings to the Laws of Kings (Hilkhoteh Melakhim).

The two formulations are substantively similar but for one exception: in Hilkhoteh Sefer Torah, M. says, “The king is obligated [metsuveh]¹⁹ to write one scroll of Law for himself, for the sake of the king, an additional scroll to the one he had while still a commoner” (my emphasis). M. is alluding to the commandment that everyone is obligated to write a scroll of Law (P17). In Hilkhoteh Melakhim, on the other hand, M. writes that “the king writes for himself a scroll of Law in addition to the scroll that his forefathers had left him.” M. is alluding here to a baraita quoted in the bSanhedrin 21b that

¹⁹ See RaMBaM Meduyaq, ed. I. Shailat (Ma´aleh Addumim: Hotsaat Shailat, 2004), note 7.
says: “And he must not take credit [literally, adorn himself] for the one belonging to his ancestors.” It is only a few lines later that M. acknowledges the general obligation, when he says that “one [of the sifre torah], the writing of which is obligatory upon every Jew, he places in his treasure-house.” M. fails to designate this special obligation a positive commandment on both occasions, despite the fact that it is explicitly enjoined: And it shall be when he sitteth upon the throne of his kingdom, that he shall write him a copy of this law [mishneh ha-torah ha-zot, lit., a repetition of this law] in a book. (Deuteronomy 17:18).

I will argue that M.’s failure to declare a positive commandment here is supported by a plain-sense reading of the scriptural passage. This again demonstrates M.’s keen attachment to peshateyh di-qra. I base the argument on the following premises: (1) that the king must write two scrolls of law is a rabbinic play on the words mishneh torah, mishneh understood in the sense of two; instead, M. understands mishneh as the targumic interpreter did, a “copy” (lit., “a double”) of this law-book. Thus the king is only obligated to write one scroll of the Law, which obligation is no different than the obligation incumbent on every Jew. The idea that the king puts one scroll of Law in his treasure-house is rabbinic; Scripture refers only to the one he


21 The talmudic exegesis (bSanhedrin 21b), “he writes for his own sake [lishmo] two torot” likely means that he writes two scrolls of Law when he accedes to the throne, not that he writes only one on accession to complement a previously inherited scroll of Law. See PhM, mSanhedrin 2:5.

22 See Onqelos, ad loc.
must write and, regarding this one, says and it shall be with him, and he shall read therein all the days of his life (Deuteronomy 17:19). Yet, to uphold an ancient tradition that the king places a scroll in his treasure-house, M. has the king write an extra scroll of law while placing the one that he wrote as a commoner in the treasure-house (“one, the writing of which is obligatory upon every Jew, he places in his treasure-house…”). 23

To repeat, the Halakhot adopt the plain sense of the verse, that the king must write a copy of the Torah for himself. This copy was none other than the one every commoner had to write. Therefore, scripturally, there would be no need for a special designation; the commandment that every Jew write for himself a scroll of law (P17; Hilkhot Sefer Torah 7:1) is the one and only positive commandment. This also explains why M. “officially” positioned this law in Hilkhot Sefer Torah and not in Hilkhot Melakhim, as noted earlier. 24

In sum, from a hermeneutic point of view, the commandment that the king shall write a scroll of Torah for himself provides the basis for the general commandment that every Jew write a scroll of Law for himself. This was the reason, as we explained (section 5.1.2.d, P17, and note 30), that the

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23 Karo, Kesef Mishneh sensed, correctly, that M. obligates the king to write only one scroll of Law and noted that it contradicts the plain sense of the sugyah in bSanhedrin 21b. Karo acknowledged that his attempt to reconcile M.’s ruling with the sugyah is forced (Hilkhot Melakhim 3:1). On my interpretation, M.’s philological determination of the term mishneh does indeed leave the sugyah in bSanhedrin behind; even this one “extra” scroll of Law is a concession to a rabbinic ordinance.

24 One might well ask, what, then, according to M., is the novelty of the king’s command? I would suggest that the novelty lies in the fact that the king must carry the scroll of Law with him, wherever he goes, and he must read from it all the days of his life, for it says, And it shall be with him, and he shall read therein all the days of his life (Deuteronomy 17:19), something that is not required of a commoner.
ShM enumerated the king’s commandment before the general one. This commandment has all the trappings of a scriptural commandment, and for this reason M. does not resort to the language of correct practice. Nevertheless, from a classificatory point of view the commandment to the king is only a detail of the general commandment. Thus, quite correctly, M. labeled the latter commandment a mitsvat ‘aseh and omitted the positive commandment designation from the more subsidiary commandment to the king.

To set aside various tithes (P127-130)

M. fails to designate any of these tithes a positive commandment. It is disconcerting that M. uses the participial form heavily — in this case mafrish, mafrishin — throughout his discussion of the tithes, both in Hilkhot Matnot Aniyim and Hilkhot Ma´aser.

The first tithe (ma´aser rishon) is introduced in the following manner: “After one has set aside the great heave offering (terumah gedolah), he sets aside (mafrish) one-tenth of what is left. This is what is called first tithe…” (Hilkhot Ma´aser 1:1). Contrast this with the way M. presents the commandment (P126) to set aside the great heave offering (terumah gedolah): “All human food that is watched over and that grows out of the soil is subject to heave offering. It is a positive commandment to separate from it the first fruits for the priest….” (Hilkh Terumot 2:1).

The second tithe (ma´aser sheni) follows the form of the first:

After the first tithe has been set aside each year, one must set aside [mafrishin] also the second tithe …In the third and sixth years of each septennate the poor man’s tithe [ma´aser ani] must be set aside [mafrishin]
instead of the second tithe as we have explained
(Hilkhot Ma´aser Sheni 1:1).

This is explained a little earlier, in the sixth chapter of Hilkhot Matnot Aniyim, following the discussion of the gifts that one is required to make to the poor out of the produce of the land, peah (lit., corner of the field), gleanings, the forgotten sheaf and the defective grape clusters. Ma´aser ani is introduced there as “a sixth gift.” Finally, the Levites’ tithe for the priest (terumat ma´aser) is discussed in Hilkhot Terumot (3:12) because of its obvious affinity to the great heave offering. Since this tithe is particular to Levites, it does not form part of the ordinary order of tithes. M. refers to this requirement as mitsvat terumat ma´aser, though he still fails to designate it a mitsvat ´aseh.25

I have as yet failed to find a fully satisfactory solution to this unusual presentation. A promising approach is suggested by Perla, who observes that the scriptural evidence for the obligatory nature of the tithe commandments is ambiguous. Perla suggests that the exegeses underpinning the tithe of cattle (not considered here), the first tithe and the poor man’s tithe are merely asmakhta be-alma and derashot be-alma, meaning rabbinic ordinances that “support” themselves on scriptural verses. As a result, Perla

25 The expression mitsvat terumat maaser should be rendered as “the proper way to perform terumat maaser” and it is used deliberately, to contrast it with a second and less desirable way to fulfill this requirement. The halakhah reads as follows:
The commandment of heave offering of the tithe applies to the Levite, who must set it aside out of his tithe….An Israelite, however, may set it aside and give it to the priest, and then give the balance of the tithe to the Levite, after he has set aside the latter’s heave offering, which is the tithe from the tithe (Hilkhot Terumot 3:12).
argues that Saadia was correct to list these three tithings in the indicative rather than the imperative mode.\textsuperscript{26} If Perla’s observation is correct, at least with respect to the first tithe and the poor man’s tithe, then we can find some justification for M.’s unexpected formulations. At least part of the septennial system, with its various types of tithes as conceived by the mishnaic Rabbis, does not flow from the \textit{peshateyh di-qra}. It appears instead to be the product of rabbinic interpretation (\textit{divre sofrim}). The participial language of correct practices may well reflect this origin.

The textual indeterminacy may even extend to the second tithe. In the \textit{ShM}, M. resorts to Sifre Deuteronomy, \textit{Reeh pisqa} 105 (p. 164) to explain that the words \textit{Thou shalt surely tithe all the increase of thy seed, and so on} [Deuteronomy 14:22] refer to the second tithe — “I would only know this about the second tithe, \textit{regarding which Scripture speaks}” (my emphasis).\textsuperscript{27} M.’s reliance on the oral tradition, in this case the aforementioned Sifre, is confirmed in the \textit{SE}: “To set apart the second tithe to be eaten by its owner in Jerusalem, as it is said, \textit{Thou shalt surely tithe} [Deuteronomy 14:22]. It has been learned by the oral tradition [\textit{mi-pi ha-shemu´ah lamdu}] that this refers to the second tithe.” This is one of the five instances noted earlier in which M. in the \textit{SE} resorts to the oral tradition to substantiate a reading. M.

\textsuperscript{26} Perla, \textit{Sefer ha-Mitsvot le-RaSaG}, vol. 1, p. 612b and c. I should note that, with respect to at least one of these three tithes, the tithe of cattle, we find that M. upholds the scriptural basis of the commandment and designates it as such.

\textsuperscript{27} For an explanation of the rabbinic exegesis that underpins this “tradition,” see Epstein, Baruch, \textit{Torah Temimah} (New York: Hotsaat Otzer ha-Sefarim, 1962), Deuteronomy 14:22, n. 38. Abraham ibn Ezra, Deuteronomy 14:28, s.v. \textit{Yotsim}, cites an opinion of the “heretics,” i.e., Karaites, to the effect that the passage commencing with \textit{Thou shalt surely tithe} deals with the first, not the second, tithe. With this comment Ibn Ezra allows that the plain sense of the text need not bear the meaning ascribed to it by tradition, namely, that the text deals with the second tithe.
surely must have harbored second thoughts about this exegesis because it does not appear in the *Halakhot*. While reversals from previously held opinions are not rare in M.’s works, I could find no instance in the *Halakhot* in which M. fails to mention in conjunction with the adduced scriptural proof-text a traditional reading that he had previously adopted.\(^{28}\) Setting aside the second tithe is the only exception. It is possible that by the time he wrote the *Halakhot* M. had abandoned this opinion, perhaps because he thought that it did not reflect a consensual tradition.

There is some evidence that M. equivocated with respect to the exegetical basis for the first and second tithes. In the *ShM* discussion of the first tithe (P127), one finds two versions of the demonstration, each with its own proof-text. In the Arabic Mss (and in the *Halakhot*), we find that M. adduces the verse *for it is the tithes set aside by the Israelites as a gift to the Lord [that I give to the Levites as their share] [Numbers 18:24]* to indicate “that this tithe belongs to the Levites.” On the other hand, in Nahmanides’ version of the *ShM*, Ibn Ayub’s translation and the *SE* we find M. adducing instead the verse *And all the tithe of the land, whether of the seed of the land or of the fruit of the tree [shall be the Lord’s] (Leviticus 27:30)*. *MnT*’s translation presents both proof-texts, appearing to be a simple conflation of the two versions. It is reasonable to posit that the Numbers 18:24 proof-text is part of the later version since it is the proof-text ultimately adduced in the *Halakhot*. Contrary to M.’s assertion, the first proof-text (Leviticus 27:30) was understood by the Sages to refer to the second, and not to the first, tithe (see RaSHi’s commentary on Pentateuch, *ad loc.*, Nahmanides, *Hasagot* to

\(^{28}\) See above, section 7:4.
rule 12, 190), which may have led M. to revise the proof in the latter version. At the same time, however, the Numbers proof-text does not, by itself, point to the existence of an obligation nor can it easily be identified with the first tithe (ma´aser rishon) of the tithing cycle. \(^{29}\) M.’s exegetical equivocations about the specifics of Scripture’s tithing intentions may explain his failure to designate the second tithe as a positive commandment.

To dwell in booths seven days (P168)

The presentation of this commandment in the Halakhot exhibits a number of peculiar elements: (1) The chapter that deals with the duty to dwell in a booth (sukkah), namely chapter 6 of Hilkhot Sukkah, begins by listing those who are exempted from dwelling in the booth: “women, slaves and minors are exempt from [the duty of dwelling in the] sukkah,” instead of those on whom the obligation is incumbent; (2) M. fails to state boldly and unequivocally that dwelling in a sukkah is a positive commandment. Note that the formulation employed here is an almost exact replica of the one employed in Hilkhot Talmud Torah for the duty to study and teach Torah, which, as we saw, was found to be a non-scriptural commandment. (3) The proof-text comes only in halakhah 5 and then only to inform about the manner in which the duty should be performed — not to substantiate the basic obligation to dwell in booths during those seven days:

How is the commandment to dwell in a booth (mitsvat ha-yeshivah ba-sukkah) to be observed? One should eat, drink, and reside in the booth day and night throughout the whole of the seven days of the festival, exactly as one resides in his house during the rest of the year. During these seven days one should regard his house as a temporary home and the booth as his permanent home, in accordance with the verse, *Ye shall dwell* [teshvu, lit., sit] *in booths seven days* [Leviticus 23:42].

(4) The imperative form is notably absent in halakhah 6. In its stead, the participle is heavily used: “Both by day and by night, one eats, drinks and sleeps [okhlin ve-shotin ve-yeshenim, lit., they are eating, drinking and sleeping] in the booth throughout the whole of the seven days….” (5) In halakhah 7, M. finally tells us that there is an obligation to eat in the sukkah on the first night of the festival. He states:

> It is obligatory [hovah] to eat in the booth on the first night of the festival. Even if one eats as little as an olive’s bulk of bread, he has fulfilled his duty. Thereafter the matter is optional: If one wishes to eat a regular meal, he must eat it in the booth, but if he prefers to eat only fruit or parched ears outside of the booth during the remainder of the seven days he may do so. This is thus analogous to the law concerning the eating of unleavened bread during Passover.

Note that for obligation M. uses the rabbinic term *hovah*, not *mitsvat ʿaseh*, as one would expect. Compare this formulation with the way M. describes the Passover festival obligation to which he draws an analogy: “It is a positive commandment from the Torah to eat unleavened bread on the night of the fifteenth of Nisan, as it says, *At even ye shall eat unleavened*
bread [Exodus 12:18]….” The contrast could not be clearer nor more instructive.

These literary considerations suggest that M. viewed the commandment to dwell in a sukkah as simply a correct practice, a mitsvah mi-divre sofrim. I will try to demonstrate below that this is indeed the case, that sukkot has no basis in written law — it appears to be purely a construct of oral law. My demonstration rests on three separate but complementary arguments: 1. the historical analogue; 2. the hovah or obligation to eat in the sukkah the first night of the festival; 3. the laws of the sukkah.

1. The historical analogue.

Scripture says, Ye shall dwell in sukkot seven days…(43) that your generation may know that I made the children of Israel to dwell in sukkot, when I brought them out of the land of Egypt (Leviticus 23:42-43).

There is no mention in Scripture of the Israelites dwelling in sukkot anytime throughout their journey in the wilderness. What then were these sukkot in which the children of Israel dwelt when they were brought out of Egypt? Tannaim are divided on this question. R. Eliezer\(^{30}\) thinks that sukkot were booths. He assumes that this must have been the type of dwelling used by the sojourners to protect them from the inhospitable desert climate. R. Akiva, perhaps the greatest tannaitic authority of all times, maintains that sukkot represented the “clouds of the Glory” (anane ha-kavod) that surrounded the Israelites on their march through the desert, providing them with all sorts of protection, not the least of it shade against the searing sun. If, as is the norm in halakhic matters, one follows R. Akiva’s opinion,

\(^{30}\) Based on Sifra Emor, pereq 17:11 (p.103b). The printed editions of the Bavli, at Sukkah 11a, reverse the attributions.
namely, that *sukkot* refers to a mystical construct, the scriptural injunction to dwell in *sukkot* for seven days as the Israelites did in the wilderness is totally devoid of practical meaning. As a result, we would still be left with the question, what is it that the Israelites must do for seven days?

2. The *hovah* or obligation to eat in a *sukkah* for seven days.

The practice of eating in a *sukkah* an olive’s bulk of bread on the night of the fifteenth of *Tishre* is not a scriptural commandment but a *mitsvah mi-divre sofrim*. The explanation is as follows. While eating unleavened bread on the night of the fifteenth of Nisan is scripturally prescribed, the Torah is silent with respect to dwelling (at a minimum, eating) in the *sukkah* on the night of the fifteenth day of Tishre. The talmudic Sages (*bSukkah* 27a) derived this obligation via a *gezerah shavah*, a hermeneutic method based on linguistic analogies. The common term that connects the two festivals is *fifteenth*. On this basis the Sages reasoned that just as one is obligated to eat an olive’s bulk of (unleavened) bread on the fifteenth day of Nisan, so must one eat an olive’s bulk of bread on the fifteenth of Tishre. Since the *gezerah shavah* is one of the thirteen hermeneutic rules, the resultant obligation is *mi-divre sofrim*, not scriptural. This explains M.’s use of the rabbinic term *hovah* to convey obligation.

3. The laws of *sukkah*.

The details of who must dwell in a *sukkah* and who is exempted from it, as well as all the details of the physical *sukkah*, its roof and walls, and even its materials, are dictated by tradition. When M., in his introduction to the *PhM*, wanted to provide a single and dramatic illustration of the authoritative role of oral law in the interpretation of written law and the inextricable relationship between the two, he turned to the commandment of
sukkah. This, I submit, is sufficient testimony to the fact that M. considered the scriptural sukkah commandment a textual riddle. Here is what he said:

An example. God said to him [Moses] Ye shall dwell in sukkot seven days. He, the exalted one, also informed him that the sukkah obligation is incumbent on males and not on females, and that the sick and the traveler are exempted from this obligation. One must roof the sukkah only with material that grows from the land; one may not roof it with wool, silk or utensils [kelim], even those that grow from the land, like mats and clothes. Eating, drinking and sleeping must take place in it all seven days. Its living space must not be smaller than seven by seven tefahim, and it must not be lower than ten tefahim.

The sukkah commandment is totally and thoroughly a construct of oral law. At best, the scriptural sukkot is an asmakhta for what turns out to be an immensely complex set of rules that define everything from the sukkah’s material construction to the persons who are obligated to dwell in it to what dwelling (teshvu) might mean.

I conclude that M. had sufficient evidence to treat sukkah and its halakhot as mitsvot mi-divre sofrim. M. hinted at this radical notion in a number of ways, the most important of which are the odd literary structure that he employed to present the commandment — discussing the exemptions rather than the obligation per se — and the intensive use of the participle of correct practice.
Chapter 9. Mitsvah

In chapter 8 we studied a group of claims that had been enumerated in the *SE* and *ShM* and yet were not designated positive commandments in the *Halakhot*. We noted that they lacked supporting proof-texts, and that they were formulated, exceptionally, with the participle rather than with the standard *lamed*-infinitive. This led us to characterize them as correct practices. We concluded with regard to these claims that M. had reversed his earlier stand and now considered them *divre sofrim*.

We now look at another group of claims that also do not follow the characteristic declarative formula. They differ from the first group, however, in that M. calls their performance a *mitsvah*. To complicate matters, M. addsuces in these special instances the proof-texts that had supported the original claims. In this chapter we attempt to explain the meaning and use of the term *mitsvah* in connection with this special group of commandments. We begin by investigating how the term *mitsvah* is used throughout the *Halakhot* outside of the small number of instances in which it is used in connection with commandments proper.

9.1 The Term Mitsvah in the Halakhot

It is worth noting that in the introduction to the *MT*, M. calls *mitsvah* a *perush* or explanation of the written law. He says:

All the precepts which Moses received on Sinai, were given together with their interpretation, as it is said *And I will give unto thee the tables of stone, and the law, and the commandment* [Exodus 24:12]. *The law*
refers to the written law; *and the commandment* to its interpretation.

M. refers to this explanation in *Hilkhot Shehitah* (1:4), when discussing the laws of ritual slaughter. The numerous and complex details that regulate ritual slaughter are not spelled out in Scripture. Instead, Scripture states *as then shalt thou kill of thy herd and thy flock as I have commanded thee* (Deuteronomy 12:21), which M. takes as an allusion to Oral Law ("which means that Moses was commanded concerning all these matters orally, as in the case of the rest of the Oral Law, which is referred as commandment, as we have explained in the introduction to this work." This is based on *bHullin* 28a.)

There can be little doubt that M. intends to make here a theological statement rather than formulate a juristic definition. This is because the term *mitsvah*, as used in the *Halakhot*, is also used in connection with purely rabbinic ordinances that have nothing to do with explanations of the Torah. The distinctive statement in the introduction to the *MT* leads us to understand that the written law — which of course includes the commandments — must be understood and parsed in light of the oral tradition. Against this, we must investigate the particular use of the term *mitsvah* in a clearly juristic context.

We find that the term *mitsvah* in the *Halakhot* appears to be highly nuanced, its meaning converging on “recommended,” “commendable.” Certainly it lacks the force of obligation. Recall that in section 2.1 we discussed the terminological subtleties of the word *mitsvah* and observed that, in talmudic literature, *mitsvah* could loosely stand for “preferred,” “commendable,” “praiseworthy” or simply “a good deed.” These usages
were not systematized; for the most part, a reader would recognize the specific meaning by its context. Nevertheless, as we noted on that occasion, *hovah* and *mitsvah* were clearly differentiated. It is interesting to note that Islamic legal theory after Shāfi’ī (d. 820), itself under the likely influence of rabbinic law, recognized five values or categories with which all legal acts must be designated. These were: the obligatory (*wajib*), the recommended (*mandub*), the permissible (*mubah*), the prohibited (*haram*) and the reprehensible or repugnant (*makrub*). They correspond to the rabbinic designations *hovah*, *mitsvah*, *reshut*, *asur* and *meguneh*. M. appears to be under the influence of this neat classification in some areas of halakhah, as one gathers from his comments to *mAvot* 1:16. On that occasion, M. uses four terms, namely, *ha-metsuveh bo*, *u-muzhar ‘alav*, *u-meruhaq*, *ve-ratsui*, *u-reshut*, with terms #3 and #4 clearly standing for softer forms of prohibitions and obligations. ¹

The term *mitsvah* in the Halakhot is often used in connection with rabbinic advisories, as in *Hilkhot Sefer Torah* 10:10, discussing the advisability of singling out a place to keep a scroll of law; or in *Hilkhot Milah* 1:8, discussing the advisability of performing circumcision early in the day in line with the rabbinic maxim that the zealous fulfill their religious

¹ Note that these terms are translations from the Arabic and while they do not quite match the rabbinic designations given earlier, they are practically synonymous. I have given Kafih’s translation at *mAvot* 1:16. Kafih changes slightly the rendition of these terms when translating M.’s commentary to *mSanhedrin* 7:4. There M. uses only four legal categories, this time with respect to sexual behavior. They are: *asur*, *meguneh*, *ratsui/ahuv*, and *mutar*, the exact equivalents of the last four terms given in *mAvot*. For rabbinic influence, see Romney-Wegner, Judith, "Islamic and Talmudic Jurisprudence: The Four Roots of Islamic Law and their Talmudic Counterparts," *The American Journal of Legal History* 26.1 (1982). On the halakhic categories, see DeVreis, Binyamin, "Ha-Categoriyot ha-Halakhiytot," *Bar-Ilan Annual, Dedicated to the Memory of Professor Shmuel Bialobilotsky* (1964).
obligations at the earliest possible time; or again, in *Hilkhot Ishut* 3:19, the advisability of betrothing a woman in person (instead of via an agent), also in line with a rabbinic maxim that personal effort is to be commended. For the most part, these *mitsvot* are rabbinic duties and, at any rate, they denote a preference rather than an absolute obligation.

Closely related are usages of the term *mitsvah* in the sense of a worthy deed, such as attending a rabbinic sermon, teaching a profession to a son (*Hilkhot Shabbat* 24:5), or welcoming a teacher or friend who has just come from a journey (*Hilkhot Eruvin* 6:6). See too *Hilkhot Melakhim* 2:5, where M. stipulates that the High Priest need not come to the king nor does he need to rise for him. Yet it is a *mitsvah* for the High Priest to show respect to the king, to sit him down and to stand in front of him when the king comes to him. *Mitsvah* here is understood as something desirable but clearly beyond the call of duty. While we also find *mitsvah* used in connection with absolute rabbinic obligations, as *megillah* and the lighting of *hanukkah* candles (*Hilkhot Berakhot* 11:9), we should keep in mind that rabbinic ordinances are, relative to scriptural laws, recommended courses of action (even if scripturally authorized).

In *Hilkhot Rotsheah* 13:7, M. contrasts *mitsvah min ha-torah* with simply *mitsvah*: “The scriptural commandment [*mitsvah min ha-torah*] requires one to help another unload without payment, but loading is [merely] a good deed [*mitsvah*], and one is entitled to be paid.” The apposition of unloading and loading, clearly signaled by the conjunction “but,” makes it clear that the obligation to load is of a lesser status — presumably because not scripturally explicit — than the obligation to unload.

*Mitsvah* is found even with respect to details of positive commandments, as in *Hilkhot Yibbum* 2:6, the obligation of the oldest
brother to perform levirate marriage — based on an interpretation that does some violence to the plain sense of the text, as we saw earlier (see 7.2, n.19). Here I conjecture that it is designated a *mitsvah* and not *mitsvat ´aseh* because it is a detail of the commandment or, alternatively, because it does not seem to reflect the intention of the text. Either way, *mitsvah* is seen as distinct from *mitsvat ´aseh*. On occasion, *mitsvah* refers to a positive commandment, but only after the commandment has been identified as such, as in *Hilkhot De´ot* 6:2, *Hilkhot Hamets u-Matsah* 6:1 and 7:2, or where the context makes its identity obvious, as in *Hilkhot Berakhot* 11:2. Finally, as we have seen a number of times, *mitsvah* in the construct form, as in *mitsvat terumat ma´aser* (*Hilkhot Terumot* 3:12), simply stands for a correct or proper form of performing a duty, presumably, at least in this case, in accordance with the dictates of oral law.

I conclude that, terminologically, *mitsvah* stands in categoric apposition to *mitsvat ´aseh* and that its use throughout the *Halakhot* is deliberate if not always identical. It can mean “advisable,” “commendable,” “preferred,” “praiseworthy,” “correct” and “proper.” It can also mean “obligatory,” as with ordinances of rabbinic authority, but, these too, in relation to scriptural law are no more than commendable. Thus we find, “it is commendable to listen to the words of the Sages” (*mitsvah li-shmo´a divre hakhamim, b*Yevamot 20a.)

**9.1.1 Mitsvah versus mitsvat ´aseh**

The reader may wonder at this point whether the difference between a recommended course of action and an obligation is merely a matter of casuistry, that is, whether we are splitting hairs by differentiating M.’s use of
“mitsvot ‘aseh” from his use of “mitsvah.” I believe that the answer must clearly be no.

Common sense says, and many legal opinions agree, that there is, in fact, a difference between the two: failure to perform an obligation is a legal offense, while failure to go along with good counsel or fulfill a moral obligation constitutes, at most, a moral failure. In practical terms, legal obligations can incur a penalty for lack of fulfillment while counsels cannot. As we stated above, Islamic jurisprudence, with which M. appears to have been well-acquainted, clearly distinguishes between obligations (wajib) and recommendations (mandub).

More interestingly and more to the point, talmudic halakhah recognizes an even more salient characteristic of mitsvot ‘aseh, namely, the principle that the courts can whip a person to force him to fulfill an obligation.² M. finds this principle important enough to mention it in the ShM. He does so towards the end of Rule 14, after noting that he will mention, along with the explanation of each commandment, the pertinent punishment for violating it. With only a few exceptions, these punishments are associated with violations of negative commandments,

but, as regards all positive commandments, if the time of the performance is still applicable, we are to whip with a strap he who refuses to do it until he dies or performs [the commandment], or until such time as the obligation (mitsvah) passes, for he who violates the

² “But in the case of positive commandments, as for instance, if a man is told ‘Make a sukkah’ and he does not make it [or, ‘Perform the commandment of] lulab, and he does not perform it, he is whipped until his soul leaves him (aval be-mitsvat ‘aseh …makin oto ad she-tetse nafsho).” (bKetubbot 86b and bHullin 132b). In the post-talmudic literature, the principle is referred to as kofin al ha-mitsvah, literally, “they coerce one to perform a mitsvah”.

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positive commandment of dwelling in a tabernacle is not to be whipped for his sin after [the passing of the festival of] Tabernacles. Know this principle.

While the principle has a number of qualifications — for example, it is not applicable where the Torah provides for an explicit reward — its import is clear: the law means to enforce obligations. Nothing of this sort is said with respect to counsels or recommendations.

9.2 Hypothesis

I now propose that M. uses the term mitsvah in place of the previously designated (i.e. ShM) mitsvot ´aseh where a scriptural statement is not sufficiently explicit with respect to an action to be taken but appears instead to hint to or imply a course of action. Similarly, M. uses the term mitsvah where a scriptural statement lacks specificity. (Note that where no action is called for, M. may also use the term mitsvah (e.g., GP III:33) but this time with the meaning of “goal.” M. specifically eliminated goals from the TaRYaG count, as per Rule 4, as discussed in chapter 4). M. works within

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3 See bHullin 110b. See also Hilkhot Matnot Aniyim 7:10 and the extensive bibliography cited by Sefer ha-Mafteah ad loc. Note that in this passage M. betrays the looseness with which he characterized positive commandments in the ShM. The reason is simple: the courts cannot force someone to perform any of the procedure-commandments, such as “to decide in cases of annulment of vows according to the rules set forth by the Torah” (P95), or more problematically, any of the descriptive positive commandments, such as “that anyone who touches the carcass of a beast that died of itself shall be unclean” (P96). It is clear that the Sages were only referring to the class of positive commandments that are obligatory, such as the ones they gave as examples. Note too that M. changed the example given in the Talmud, instead of the positive commandment to make a sukkah, which he did not enumerate in the ShM and which would have raised some eyebrows, M. offered the positive commandment of dwelling in a sukkah. The latter commandment (P168) is one of the 60 unconditional obligations.
the confines of tradition to craft out of these statements a directive, but these claims are entirely of his own making. As a result, these interpretations only merit the label of commendable, *mitsvah*, rather than *mitsvat ̲âseh*, obligation. In a related but more general way, M. uses the term *mitsvah* rather than *mitsvat ̲âseh* where the *peshateyh di-qra* indicates one thing but the Sages have understood it otherwise (though there is no evidence that they wished to uproot the *peshateyh di-qra*). Based on contextual reading, M. makes claims that compete with the traditional one. Here, too, reasons of juristic conservatism, lead him to consider the competing claims counsels rather than obligations.

9.3 Actions that Lack Specificity

To love God (P3)

The scriptural source of this commandment in all the compositions is the verse *And thou shalt love the Lord thy God* (Deuteronomy 6:5). Although the verse makes it clear that one is to love God, it is not unreasonable to suppose that this is no more than a pious exhortation, one with undefined terms and devoid of any specificity. As such, it can hardly qualify as a commandment. While some have attempted to infuse the exhortation with specificity, they nonetheless fail to deal with love in its most basic meaning, that of a strong affection towards another. The verse continues, *with all thy heart, and with all thy soul, and with all thy might*. Taken in context, the verse might appear to be demanding one to sacrifice one’s life and possessions for God — what the rabbis call *qiddush ha-Shem* — if, for example, one is asked to transgress one of the stringent
commandments, such as for example the prohibition to worship other gods. In this track, love is being defined not as an emotion but as an absolute and unconditional dedication and loyalty to the Deity. It would appear that to M. the verse intends for one to literally love God. Still, because the verse is not specific, the exhortation must remain just that, an exhortation and not a commandment. Nevertheless, even an exhortation must make sense for it to be meaningful. Since love of God cannot be created spontaneously, a way must be prescribed by which one can attain it. M. finds this pathway in a cryptic rabbinic midrash, which precisely wonders, how does one love God? The answer to this midrash, which M. adduces in the presentation of this commandment in the ShM and in the Halakhot, and which M. magisterially interprets, will take us far afield into M.’s metaphysics.

In the ShM, he says that

we are commanded to love God; that is to say, to dwell upon and contemplate His commandments, His decrees and His works, so that we may obtain a conception of Him, and in conceiving Him attain absolute joy. This is the love that is commanded.

4 Perla speculates that Saadia must have understood it thus. See Perla, Sefer ha-Mitsvot le-RaSaG, vol. 1, pp.32-33.

5 Maamarav, lit., “sayings.” These words are found in Ibn Ayu’s and in the Arabic MS. in Heller’s possession. MnT has “His commandments and His works (mitsotav u-pe’ulotav).” See Heller, ad loc., note 16. Chavel: “His injunctions,” based on Kafih’s tsivuyav.

6 So MnT, and so too, Bloch’s Arabic MS. On the other hand, Kafih has “This is the ultimate [Ar. ghaya; Heb. tahlit] love that is commanded.” Chavel incorrectly translates “This is the goal of the love that is commanded,” taking tahlit to mean “goal” instead of “ultimate” and seriously distorting the meaning. I am indebted to Haggai ben Shammai for his kind help in showing me the various nuances of the Arabic term ghaya.
That absolute joy leads to love is explained a little further on:

“…through this act of contemplation you will attain a conception of God and reach that stage of joy in which love of Him will follow of necessity (my emphasis).”\(^7\) In contrast to other exegetes who draw upon the same midrashic source for this “method,”\(^8\) M. offers a purely naturalistic explanation: knowledge of the divine leads to supreme joy which in turn leads to love of the divine. I will later return to discuss the specific kind of knowledge to which M. is referring.

As we alluded to earlier, M. draws support for this unusual interpretation from Sifre Deuteronomy (Va-ethanan pisqa 33, p. 59) that says:

Since it is said, And thou shalt love the Lord thy God, the question arises, how does one love the Omnipresent? \(^9\) Scripture therefore says: And these words that I command thee this day, shall be upon thy heart [Deuteronomy 6:6]; for through this [the contemplation of God’s words] you will learn to discern He who spoke\(^10\) and the Universe came into existence.

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\(^7\) The result, though not the linkage, is modified somewhat in the Halakhot, as we discuss later in the text.

\(^8\) See, for example, RaSHi’s terse commentary on And these words that I command thee (Deuteronomy 6:6): “Through this, you recognize the Holy One and attach to His ways.” That is, by listening to His commandments, you recognize His sovereignty and can follow Him faithfully. See note 11, below.

\(^9\) Ketzad ohev et ha-maqom? Chavel: “how is one to manifest his love for the Lord?” may be misleading.

\(^10\) Amar, “said.” See mAnot 5:1, “By ten Sayings was the world created.” There are ten instances of “and God said”: Genesis 1:3, 6, 9, 11, 14, 20, 24, 26, 29 and 2:18.
On the surface, the midrash appears to be saying that by meditating upon “these words that I command thee this day,” i.e., the commandments, one will come to apprehend the Creator. By making reference to “He who spoke and the Universe came into existence,” however, the midrash also hints at the kind of words upon which one must contemplate, namely, the mechanics of creation, or natural science.\(^{11}\) This is then the midrashic support for M.’s statement that one must “dwell upon and contemplate His commandments, His decrees and His works.”

This understanding of the midrash takes a dramatic turn in the Halakhot, where M. ignores the possibility that And these words that I command thee this day, shall be upon thy heart may be referring to commandments, as first suggested in the ShM.\(^{12}\) In Hilkhhot Yesode ha-Torah 2:2, he says:

And what is the way that will lead to the love of Him and the fear of Him? When a person contemplates His great and wondrous works [ma’asav] and creatures [beruav] and from them obtains a glimpse of His wisdom which is incomparable and infinite, he will straightaway love Him, praise Him, glorify Him, and long with an exceeding longing to know His great name…. In harmony with these sentiments, I shall explain some large, general aspects of the Works of the Sovereign of the Universe,\(^{13}\) that they may serve

\(^{11}\) It is worth noting that RaSHi’s ad loc. paraphrase, “you will recognize the Holy One Blessed be He (ha-qadosh barukh hu),” entirely misses this potential allusion.

\(^{12}\) Note that the Sefer ha-Hinukh, siman 411, which elaborates on the ShM, goes so far as to say that the words “with this act of contemplation” really stand for “upon reflecting on the Torah.” (!)

\(^{13}\) The first four chapters of Hilkhot Yesode ha-Torah offer a brief survey of the science and metaphysics of the day, the “Works of the Sovereign of the Universe.”
the intelligent individual as a door to the love of God, even as our Sages have remarked in connection with the theme of love of God ‘For through this [she-mitokh kakh] you will realize He who spoke and the Universe came into existence.’

The last quote leaves no doubt that M. was leaning on the earlier adduced Sifre. It is worth noting that M. cites what appears to be another rabbinic proof-text in his Responsa, where it is said in the name of Rabbi Meir, “Look at His works, because through this you will learn to discern He who spoke and the Universe came into existence.” Blau (note 2) points out that the source of this dictum, in particular the words “look at His works,” has not been located. The responsum seems to have been signed off in the year 1177, at least 10 years after M. completed the ShM (Shailat, Iggerot, p.189, p.218) and close to the time he was finishing the Halakhot. The significance of this is that M. may have found a version of the Sifre that indeed made clear the object of the contemplation. However, there is always a possibility that M. was merely paraphrasing the midrash in the way he had come to interpret it.

While it is not absolutely certain that the midrash did not intend the contemplation of the science of creation (ma´aseh be-reshit), it is reasonably certain that it did intend the faithful to gaze upon these words, the words of the Torah, i.e. the commandments, perhaps because the commandments themselves evidence wisdom. There is little doubt that M. radically transforms the midrash by emptying it of this last meaning. In the new

14 Responsa, Blau, #150,
understanding, natural sciences and not the legal sciences are the source of one’s wonderment and the path to the love of God.  

We now turn to the Halakhot and focus our attention on a line of the halakhah that we cited earlier:

When a person contemplates His great and wondrous works [ma’asav] and creations [beruav] and from them obtains a glimpse of His wisdom which is incomparable and infinite, he will straightaway love Him, praise Him, glorify Him, and long with an exceeding longing to know His great name (my emphasis).

Though this may be argued, I detect a slight shift of emphasis: contemplation does not quite enable the faithful to conceive Him, nor is joy the result of this contemplation, which in turn, leads to love, as M. had at first suggested. The contemplator still longs to know His name, that is, he

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15 Cases, Hananiah, "Qinat Sofrim," Sefer ha-Mitsvot, ed. S. Frankel (Jerusalem: 1995), ad loc., quoting another authority, attempted to read the ShM’s definition sequentially. He suggested that the faithful are brought to contemplate nature and God’s wondrous acts by the performance of the commandments. The reading is stretched and of course this sequence is totally lacking in the Halakhot, which mentions only works and creatures. More recently, in an attempt to reconcile the ShM and the Halakhot, Feintuch, A., Sefer ha-Mitsvot im Perush Pequde Yesharim (Jerusalem: Hotsaat Maaliyot, 2000), pp. 126-8 has argued that in the Halakhot the two types of contemplations are treated in two separate sections: in Hilkhot Yesode ha-Torah 2:2, M. deals with the contemplation of His works. In Hilkhot Talmud Torah, M. deals with the study of Torah, which includes pardes (natural and divine sciences, covered in the first four chapters of Hilkhot Yesode ha-Torah, as per id. 4:13) as he states in Hilkhot Talmud Torah 1:12. Moreover, in Hilkhot Yesode ha-Torah 4:3, M. makes it clear that pardes must be preceded by the study of the commandments. Thus, argues Feintuch, the two aspects covered by the ShM are also covered by the Halakhot. In a second attempt to reconcile the ShM and the Halakhot, Feintuch argues that by “His commandments” the ShM refers only to the first two commandments, His existence and His oneness, part of Divine science, while by “His works” the ShM means natural science. Thus, in his opinion, the ShM covers essentially the same ground as the Halakhot. I believe that these attempts do not capture the true philosophical spirit of M.’s appropriation of the midrash.
may still not be able to conceive of Him. Love here is defined as a powerful desire to know His essence, a thirst for more knowledge, not a consequence of apprehending Him. The natural sciences can at best make one aware of His actions and thus His attributes since His essence cannot be grasped. Therefore there is no place for joy that leads to love. Instead, there can be a longing to know more about Him, even as we realize, as we must, that He cannot be apprehended.\textsuperscript{16}

It seems reasonable to conclude that the contemplation of “his great and wondrous works and creations” refers to the study of the natural sciences. This is confirmed in the final halakhah of Hilkhot Teshuvah:

It is known and certain that the love of God does not become closely knit in a man’s heart till he is continuously and thoroughly possessed by it and gives up everything else in the world for it; as God commanded us with all thy heart and with all thy soul [Deuteronomy 6:5].\textsuperscript{17} One only loves God with the knowledge with which one knows Him….A person ought therefore to devote himself to the understanding and comprehension of those sciences (hokhmot) and

\begin{quote}
\textsuperscript{16} Even Moses was unable to know His essence:
Know that …Moses…made two requests and received an answer to both of them. One request consisted in his asking Him, may He be exalted, to let him know His essence and true reality. The second request, which he put first, was that He should let him know His attributes. The answer to the two requests that He, may He be exalted, gave him consisted in His promising him to let him know all His attributes, making it known to him that they are His actions, and teaching him that His essence cannot be grasped as it really is. (\textit{GP}:I:54)
\end{quote}

\begin{quote}
\textsuperscript{17} Note the interpretation of these words. It is not sacrifice of one’s life and possessions that is being demanded, as Saadia may have understood, but a total immersion in and exclusive attention to God, so that one becomes possessed by love. See footnote 4 above.
\end{quote}
wisdom (tevunot)\textsuperscript{18} which will inform him concerning his Master, as far as it lies in human faculties to understand and comprehend…

In the famous parable of the palace, M. gradates these “sciences and wisdom” even more finely. M. says that those who are engaged in studying the mathematical sciences and the art of logic, you are one of those who walk around the house searching for its gate…. If, however, you have understood the natural sciences, you have entered the habitation and are walking in the ante-chambers. If, however, you have achieved perfection in the natural things and have understood divine science, you have entered in the ruler’s palace into the inner court and are with him in one habitation.\textsuperscript{19}

As M. understands it, \textit{And thou shalt love the Lord thy God} is simply a call to engage in the study of the natural sciences. This is confirmed in \textit{GP III: 28:512}:

[You should know that in regard to the correct opinions through which the ultimate perfection may be obtained, the Law has communicated only their end and made a call to believe in them in a summary way — that is to believe in the existence of the deity, may He be exalted, His unity, His knowledge, His Power, His will and His eternity. All these points are ultimate ends, which can be made clear in detail and through definitions only after one knows many opinions….With regard to all the other correct

\textsuperscript{18} Note here again that M. makes no mention of Torah or commandments that appear to be part of the earlier cited Sifre.

\textsuperscript{19} \textit{GP III:51:619}.
opinions concerning the whole of being — opinions that constitute the numerous kinds of all the theoretical sciences\(^\text{20}\) through which the opinions forming the ultimate end are validated [i.e., His existence, unity, etc.] — the Law, albeit it does not make a call to direct attention towards them explicitly\(^\text{21}\) as it does with regard to [the opinions forming ultimate ends], does do this in a general way\(^\text{22}\) by saying: *To love the Lord* [Deuteronomy 22:7]. You know how this is confirmed in the dictum regarding love: *With all thy heart, and with all thy soul, and with all thy might* [Deuteronomy 6:5]. We have already explained in the *Mishneh Torah* that this love becomes valid only through the apprehension of the whole of being as it is and through the consideration of His wisdom as it is manifested in it.

The sense of what M. says is that the scriptural statement is a general call to study those instrumental opinions, i.e., the sciences, which will lead one to the love of God. This point is not stated explicitly, but it is implied. Joseph ibn Kaspi aptly sums up the argument, “For the commandment to love, when He says *And thou shalt love the Lord thy God,*

\(^{20}\) This suggests that M. now thinks that all the theoretical sciences, not just the natural sciences, are included in the call to love God.

\(^{21}\) *be-ferush, be-mefurash,* so Tibbon, Kafih and M. Schwartz. M. Friedlander has “distinctly,” while Munk reads “clairement.” I believe that the sense of the paragraph rests more comfortably with these translators, rather than “in details” as translated by Pines. Hence I have amended the above translation to reflect this.

\(^{22}\) So Tibbon, Kafih, M. Schwartz, or “it has summarized them” (Munk), rather than “in a summary fashion” (Pines). Friedlander intriguingly has “it is implied in the commandment, *To love the Lord* [Deuteronomy 22:7].” See note 21, above.
it is as if He said that you should study the natural sciences)” (my emphasis.)

In sum, “the correct opinions through which the ultimate perfection may be obtained,” such as the belief in the existence of the deity and His unity, are to be classified as commandments. Hence they are part of the Law. With respect to the other class of opinions, namely “all the other correct opinions concerning the whole of being,” the law merely “arouses” the faithful to know all of being; it does not command him. Miriam Galston expressed it in the following manner:

The law conveys correct opinions of the first class in a summary way, but is explicit in summoning people to believe them. The opinions of the third class [“all the other correct opinions concerning the whole of being”], on the other hand, are not conveyed by the law at all, and it only summons people to believe in them implicitly or summarily.

We are now in a position to understand M.’s puzzling presentation of this commandment in the Halakhot: “This God, honoured and reverenced, it is a mitsvah to love Him and to fear Him, as it says And thou shalt love the Lord thy God [Deuteronomy 6:5] and it says Thou shalt fear the Lord, thy God [Deut 10:20].” M. cites the proper proof-text but fails to

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24 On the importance of “arousing,” “arouse” (Ar. Tanbih) among the Islamic philosophers who interpreted the Quran, see Kraemer, Joel, "Naturalism and Universalism in Maimonides' Political and Religious Thought," Meah She’arim: Studies in Medieval Jewish Spiritual Life in Memory of Isodore Twersky, ed. G. Blidstein et al. (Jerusalem: Hebrew University Magnes Press, 2001), p. 66.

designate the command a positive commandment, a failure that incredibly went unnoticed by all the many commentators of the \textit{MT} who, for centuries, almost literally pored over the Master’s text with a magnifying glass and subjected it to the most rigorous of strictures.\footnote{With the exception, as far as I was able to tell, of Shapira, Tsvi Elimelekh, \textit{Sifre me-HaRSTSa mi-Dinov}, vol. 2 (Devarim Nehmadim) (Jerusalem: 1987), p. 52. Unfortunately, Shapira’s failure to systematically investigate M.’s use of the term \textit{mitsvat \textquoteleft aseh} led him to the wrong conclusion. He starts by asking why M. calls the love of God (and the fear of Him) a \textit{ Mitsvah}, and not a \textit{ Mitsvat \textquoteleft aseh}, as he does with the commandments of His existence (\textit{Hilkhot Yesode ha-Torah}, 1:6) and His unity (\textit{ibid}, 1:7). His answer attempts to justify the use of the term \textit{ Mitsvat \textquoteleft aseh} with respect to these last two commandments, rather than the use of the term \textit{Mitsvah} for the former. His explanation, namely that M. was prompted to write \textit{ Mitsvat \textquoteleft aseh} with respect to the commandments of His existence and unity because Scripture does not formulate them in the imperative (unlike \textit{And thou shalt love the Lord thy God}) misses the scores of commandments that M. designates as \textit{ Mitsvat \textquoteleft aseh} even though they are formulated in the imperative.} In keeping with our earlier discussion, we can now posit that M. does not designate the obligation to love God a positive commandment because there is no scriptural text that enjoins a specific action. The call to love God is merely a profitable suggestion or advice to study the natural sciences. Through the natural sciences one will acquire an intense love for Him, which shall be expressed by an unquenching thirst to know Him. This step, in turn, will lead the lover to the divine sciences, i.e. metaphysics, through which he or she one will come to a very partial, if ever imperfect, glimpse of God. As M. phrases it in the parable of the palace, the lover will have then entered the “inner court” and be able to share with Him “one habitation”.

In sum, M.’s usage of the term \textit{Mitsvah} here can be seen to be quite deliberate: to love God is a commendable pursuit, not a legal obligation.

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It is worth noting that the Halakhot omit entirely an aspect of this commandment that is given considerable space and thought in the ShM. After explaining that intellectual contemplation brings joy which, in turn, brings love of God, the ShM continues,

The Sages say that this commandment also includes an obligation to call upon all mankind to serve Him, and to have faith in Him. For just as you praise and extol anybody whom you love, and call upon others also to love him, so, if you love the Lord to the extent of the conception of His true nature to which you have attained, you will undoubtedly call upon the foolish and ignorant to seek knowledge of the Truth which you have already acquired.

M. bases this understanding on Sifre, Va-ethanan pisqa 32 (p. 54): “And thou shalt love the Lord thy God, this means that you should make Him beloved of man as Abraham your father did, as it is said, And the souls they had gotten in Haran [Gen 12:5].”

M. does not deal here with love and how one goes about attaining this feeling of affection but rather with the outcome of this love. To “call upon mankind to serve Him and to have faith in Him” is the natural result of loving Him, in much the same way as one would “extol and praise” anybody whom one loves.27

27 Kreisel, Maimonides' Political Thought: p. 229-230, unfelicitously I believe, calls this second love an “external dimension” or “external activity,” in contrast to the internal, intellectual dimension of love described earlier. This is as if to say that the external dimension is a substitute for the internal one, when in reality it is only an outcome of the internal one, as explained.
M. appears to be of two minds with respect to what is sought. On the one hand, he says that the commandment is to call upon mankind “to serve Him and to have faith in Him.” On the other, he says that one must call upon the ignorant “to seek knowledge of the truth that you have already acquired.” It seems to me that it is only the latter sense that agrees with the above Sifre exposition, namely that “you should make Him beloved of man,” given that love of God, as we have seen, can only be attained through seeking knowledge of the truth, if we understand that to mean the study of the natural and theoretical sciences. Simply to have man “serve Him and to have faith in Him” does not bring him to love God. I believe that this ambiguity prepares us for the all-too-noticeable absence of this notion in the Halakhot. It is evident that M. struggles with the meaning of the midrash and permits himself a certain ambivalence. This may be attributed to the less precise and more popular nature of the ShM. By the time he wrote the more cautious Halakhot, however, M. had decided otherwise. Well aware of the practical difficulties that would be faced in arousing the foolish and the ignorant to study the sciences and attain contemplative bliss, M. omitted the “call upon all mankind.”

At the same time, if, as we argued, the call upon all mankind is only a natural outcome of love and not a command, there is little need to stipulate such an act in a code of law. On the other hand, the mention of this call is perfectly in keeping with the spirit of the ShM, a rhetorical composition in every sense of the word, one that uses every opportunity to offer noble didactic messages and bold political views.  

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28 Howard Kreisel, Maimonides’ Political Thought, p. 230, has argued that the absence of this public aspect from the Halakhot stems from “pedagogical concerns. There he
To fear Him (P4)

Here, too, the verse *Thou shalt fear the Lord thy God* (Deuteronomy 6:13) appears to be a non-specific injunction, simply an exhortation to perform all His commandments. As M. stated in Rule 4, the words *Ye shall be holy* (Leviticus 19:2) and other similar expressions cannot constitute a separate commandment “since there is nothing specific in them outside of what we know already.” Compare, for example, Ibn Ezra’s comment on this same verse:

And I found one verse that embodies all the commandments, namely, *Thou shalt fear the Lord thy God, and Him thou shalt serve* [Deuteronomy 6:13]. Now, *Thou shalt fear* includes all negative commandments, carried out with the heart, lips and deeds. It is the first step that one takes in the ascent to the service of the Glorious God.²⁹

Notwithstanding this, M. finds a rabbinic indication that provides specific content to the verse. With this indication at hand, M. fleshes out a commandment claim that is ostensibly grounded on this verse. Interestingly, in view of his reticence with these types of texts, M. draws the indication

²⁹ Abraham ibn Ezra, *Yesod Mora*, *Shaar ha-Shevii*, p. 144.
from a talmudic passage that he designates as “dialectic” (Kafih: *al derekh massa u-matan*; MnT: *al derekh ha-vikuah*). The proof that is offered in the *ShM* is more important for what it does not establish than for what it does, as we now discuss.

Proceeding in dialectic fashion, *bSanhedrin 56a* hypothesizes that the verse *he that blasphemeth the name of the Lord, he shall surely be put to death* (Leviticus 24:16) does not refer to a blasphemer but simply a person who pronounces the name of the Lord — since *noqeṭ* may also mean pronounce — and that for such a crime he is to be put to death. Because of the well-known Talmudic maxim that one does not punish unless one first admonishes, the Sages seek to find an explicit admonition for this crime. The talmudic redactor of the *sugyah* first suggests and then rejects a number of potential scriptural proof-texts; finally, the redactor suggests the verse *Thou shalt fear the Lord thy God*, but that too, as we soon see, is rejected. The argument goes that he who pronounces the name of the Lord has abandoned the fear of the Lord, for which he must then be put to death. The redactor’s argument for rejecting this possibility gives *M.* the proof for which he is looking. The argument goes as follows:

The admonition that you cite is in the form of a positive admonition (*azharat ʿaseḥ*) and it is a principle that positive admonitions are not valid admonitions. That is to say, your suggestion that a prohibition against the mere pronouncing of the name of God can be derived from the verse *Thou shalt fear the Lord thy God*, is inadmissible because the verse is a positive commandment, and a prohibition cannot be based upon a positive commandment.

Note that the Talmud does not say that *Thou shalt fear the Lord thy God* is a positive commandment; all it says is that the verse is an *azharat*
\'aseh, i.e., an admonition derived from a positive statement. Since rabbinic convention is that admonitions follow the form “do not so and so” or “you shall not,” this positively phrased statement cannot be used as an admonition. M. takes this simple understanding further and treats the talmudic statement as saying that *Thou shalt fear the Lord thy God* is an admonition derived from a positive *commandment*, but this is clearly an unwarranted conclusion.

We find a similar leap with the expression *lav ha-ba mikhlal \'aseh, \'aseh* which M. uses in the *ShM* to substantiate a number of commandment claims but which may simply be stating that a prohibition that is derived from a positive *statement* is a positive commandment. That is, the prohibition is to be *treated* as a positive commandment — a transgressor is not subject to lashes. There is no need to say that the positive statement itself is a positive commandment, because if it truly were a positive commandment, no negative inference could be drawn.\(^{30}\)

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\(^{30}\) Note that to draw a prohibition from a positive statement one needs to read the positive statement as saying “you do so and so” and then infer something else that one must not do. But see Cases, "Qinat Sofrim," comments to P38, p. 231, who argues implausibly that inferred prohibitions are details of existing obligatory affirmations and not inferences from permissible commands (*dibbur reshuti*). So too Bacher, Yitshaq, *Divre Emet* (Halberstat: 1861), sixth *quntrus*, who concludes with respect to P60 that waiting until the eighth day before sacrificing an animal is an obligatory affirmation, while sacrificing the animal before the eighth day would violate a prohibition derived from an affirmation. He suggests further that M. considered only the former aspect. Perla found Bacher’s reasoning faulty: if the scriptural statement is to be understood as obligating one to bring his offering from the eighth day on, then not waiting the eight days before one brings an offering must simply be permitted, that is, one could bring an offering if he so wished. In effect, one cannot move from the obligatory to the prohibited without first passing the permissible category. If M. indeed considered only the obligatory affirmation aspect, asked Perla, how did he also infer from it a prohibition? And conversely, if M. acknowledged the inferred prohibition, how did he arrive at the obligatory precept? Perla, *Sefer ha-Mitsvot le-RaSaG*, vol. 1, p. 700. As pointed out on a number of occasions, M. abandoned this hermeneutic in the *Halakhot* for the purpose of substantiating positive
Equally problematic is the relationship between the actual connotation of the admonition that M. adduces and the meaning that he wishes to extract from it. The reasonable conclusion is that the positively worded verse admonishes one not to mention His name in vain because doing so would be showing a lack of reverence for God, not because one must fear God’s punishment. For why, we may ask, should one fear God when one pronounces His name in vain? It is true that one should fear retribution from God when committing a sin, but, specifically, what wrong has one committed to expect retribution when pronouncing His name in vain? In proposing this verse, the talmudic redactor must have assumed that the word yirah, normally understood as fear, here stands for reverence.\(^{31}\) It is then out of reverence that one ought not to pronounce His exalted name in vain. Yet M. in the ShM derives an altogether different commandment claim from the verse *Thou shalt fear the Lord thy God*, one that enjoins fear, not reverence. He states, “We are commanded to believe\(^{32}\) in the fear and awe of God, and not to be at ease and self-confident but to anticipate His punishment at all times.”

\(^{31}\) And it is, in fact, how at least one modern translation renders this verse. See, for example, *JPS: Revere only the Lord your God*…. It is interesting that reverence is much closer than fear (of punishment) to the rabbinic expression yirat ha-romemut, literally “fear of His exalted presence” or “fear of His Majesty.” Many commentators believe yirat ha-romemut is the concept that lies behind the Halakhot’s description of fear of God, as we shall see.

\(^{32}\) Ar., *Itikad*. Kafih translates “to establish in our mind.” See section 5.3.1, note 95.
Though the sentence is awkward (how does one believe in fear?) the sense is clear enough: one must believe in the inevitability of divine punishment as retribution for transgressing His commandments; the fear of Him follows from this belief.

In sum, I submit that M. in the *ShM* was neither able to prove that *Thou shalt fear the Lord thy God* is a positive commandment nor did he postulate a claim that is entirely consistent with the adduced warrant.

M. appears to have used the occasion to offer a politically expeditious theological view, directed to the masses and consonant with the popular character of the *ShM*. M.’s true views regarding divine anger and punishment are spelled out in *GP* III:28: 512:

…the Law also makes a call to adopt certain beliefs, belief in which is necessary for the sake of political welfare. Such, for instance, is our belief that He, may He be exalted, is violently angry with those who disobey Him and that it is therefore necessary to fear Him and to dread Him and to take care not to disobey.

On this account, the fear of divine punishment that is expressed in the *ShM* can only be characterized as a necessary belief. An example of its manifest utility is offered in *Hilkhot Teshuvah* 10:1:

Let not a man say, ‘I…will abstain from transgressions against which the Torah warns, so that I may be saved from the curses written in the Torah, or that I may not be cut off from life in the world to come.’ It is not right to serve God after this fashion for whoever does so, serves Him out of fear. This is not the standard set by the prophets and Sages. Only those who are illiterate, women or children whom one trains to serve out of fear serve God in this way, till their knowledge shall have increased when they will serve out of love.
M.’s pedagogic approach notwithstanding, he makes it quite clear that “this is not the standard set by the prophets and Sages.” We have now discovered one other reason why M. could not uphold the initial claim he had made in the ShM with respect to *Thou shalt fear the Lord thy God.* The Torah may have encouraged the belief in divine punishment but, at least according to M., it is unlikely that such a ‘necessary’ belief, as opposed to a true opinion, would have been enshrined as a commandment.

As we move on to *Hilkhot Yesode ha-Torah*, we note a significant change. No longer does *Thou shalt fear the Lord, thy God* express a belief in the expectation and inevitability of divine punishment. M. says in *halakhah* 2,

> And what is the way that will lead to the love of Him and the fear of Him? When a person contemplates His great and wondrous works and creatures and from them obtains a glimpse of His wisdom which is incomparable and infinite, he will straightaway love Him, praise Him, glorify Him, and long with an exceeding longing to know His great Name….And when he ponders these matters, he will recoil affrighted, and realize that he is a small creature, lowly and obscure, endowed with slight and slender intelligence, standing in the presence of Him who is perfect in knowledge (*Hilkhot Yesode ha-Torah* 2:1-2; my emphasis).

In place of fear of divine punishment, we find a feeling of worthlessness and insignificance in front of the awesomeness of God. Some commentators\(^ {33}\) have noticed this change and suggested that the

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\(^{33}\) This is a relatively popular view. See, among others, Qarqovsky, M., *´Avodat ha-Melekh* (Jerusalem: Mosad ha-Rav Kook, 2002), on *Hilkhot Yesode ha-Torah* 2:2; Babad, *Minhat Hinnukh*, mitsvah 432; Cases, "Qinat Sofrim," on P4. Insisting that M.
commandment is now being redefined as *yirat ha-romemut*, fear of His exalted presence or fear of His majesty, as distinguished from *yirat ha-onesh*, the fear of punishment.

I believe, however, that these commentators, too, miss the point, unaware of the technique that M. is alluding to, as we now explain. Fear of God in the *Halakhot* is a self-imposed act of restraint on moving headlong to discover God’s essence; it is a form of cognitive humility. I follow here Kreisel, who delicately notes that

…the fear that M. describes in [*Hilkhot Yesode ha-Torah*] designates a type of humbleness of spirit that belongs to the intellect….Despite the fact that M. treats love and fear of God as two sides of the same coin, it is important to note the essential distinction between these commands. The former focuses directly on God. The latter command too focuses on God, but involves self-focus. Love always seeks union. The ultimate desire of the lover is to unite with the beloved, to become one. Love of God, if left unchecked, leads to the pursuit of *unio mystica*, which is an impossibility for M. Fear serves to preserve the gap between the individual and the object of fear.  

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*did not change from the *ShM* and held that fear of God was nothing other than fear of punishment, see Kafih, *Hilkhot Yesode ha-Torah*, chapter 2, note 2, and *Hilkhot Teshuvah*, chapter 10, note 5, in his edition of *MT*. Nagar, Eliyahu, "Fear of God in Maimonides' Teaching [Hebrew]," *Da'at* 39 (1997), sees in the *ShM* two definitions of fear, the popular one, which is simply fear of punishment, and the philosophic one, which has the enlightened individual fearing the loss of divine providence and his consequent exposure to the vagaries of chance as a result of the “estrangement” of sin. I fail to see, however, how one can read this into the *ShM*. Nagar cannot find *yirat h-romemut* in the *ShM* (which I believe is correct) but then derives from this that M. never meant to describe this type of fear/reverence *even in the MT*. This is, of course, methodologically flawed; the *MT* reversed and changed from the *ShM* on scores of occasions.

34 Kreisel, *Maimonides' Political Thought*; 265-6. Kreisel acknowledges Dr. Alan Flashman for this “perceptive interpretation.”
M.’s words, “endowed with slight and slender intelligence, standing in the presence of Him who is perfect in knowledge,” leave little room to doubt that he is referring to an intellectual humility, rather than an existential one.

In *GP* I:5:29, M. ascribes to “the chief of the philosophers”, Aristotle, the idea that man should not hasten to reach conclusions in “great and sublime” matters without first, among other things, undergoing great training in the sciences. After he has achieved the requisite knowledge, he should be sure not to make categoric affirmations in favor of the first opinion that occurs to him and should not, from the outset, strain and impel his thoughts towards the apprehension of the deity; he rather should feel awe and refrain and hold back until he gradually elevates himself. It is in this sense that it is said, *And Moses hid his face, for he was afraid to look upon God* [Exodus 3:6]…Moses was commended for this; and God, may He be exalted, let overflow upon him so much of His goodness that it became necessary to say of him: *And the figure of the Lord shall he look upon* [Numbers 12:8]. The Sages, may their memory be blessed, have stated that this is a reward for his having at first hidden his face so as not to look upon God.

It is precisely to this type of humility that M. is alluding when he says,

And when he ponders these matters, he will recoil affrighted, and realize that he is a small creature, lowly and obscure, endowed with slight and slender intelligence, standing in the presence of Him who is perfect in knowledge.

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35 Pines identifies the Aristotelian observation with a passage from De Caelo ii.12.291b24. ff.. See *GP* I:5:29 n.1.
Fear of God has been transformed in the Halakhot from a commandment to be mindful at all times of the inevitability of divine retribution for transgressions into a counsel on how to advance in the acquisition of metaphysical knowledge. Fear must accompany the love of God, the great longing to know His name, lest one come to erroneous conclusions.

To summarize, then, *Thou shalt fear the Lord thy God* is one of those verses that is non-specific and that M., in his Rules, carefully and methodically disqualifies as articulating a positive commandment. Since in the Halakhot M. abandons the idea of designating *Thou shalt fear the Lord thy God* a mitzvat `aseh, we can reasonably presume that M. was not able to sustain the attempt that he made in the ShM to find specificity. Instead, M. treats the verse very much as an exhortation, allowing it to express philosophic desiderata that go beyond the strict confines of the law. This is indicated by his use of the term mitzvah: “This God, honoured and revered, it is a mitzvah to love Him and to fear Him, as it says *And thou shalt love the Lord thy God* [Deuteronomy 6:5] and it says *Thou shalt fear the Lord, thy God* [Deuteronomy 10:20].” As with the love of God, fear of God is designated as simply a mitzvah, a commendable act. The mitzvah, to repeat,

36 The anonymous commentary (perush) interprets M.’s remarks in light of the pedagogic remarks M. makes in Hilkhot Teshuwha 10:1, cited above, arguing that “…love can only come after fear.” Yet, by putting love ahead of fear in his formulation, M. clearly rejects this type of interpretation. The curious but meaningful syntax has already been noted by a number of aharonim. See Sefer ha-Mafteah on Yesode ha-Torah 2:2. Quite correctly, Kreisel notes, “It is clear from M.’s approach in the Mishneh Torah that he posits different types of fear…For the most part he treats fear as antithetical to love. At best it serves as a means to attain love.” Kreisel, Maimonides' Political Thought; , p. 259.
is to restrain our intense desire to rush to conclusions in metaphysical studies by allowing ourselves to be overcome by a feeling of cosmic worthlessness.

To imitate His good and upright ways (P8)

M. draws scriptural support for this claim from the words *And thou shalt walk in His ways* (Deuteronomy 28:9). Yet this directive, like many similar ones, appears to lack specific content, for exactly what does one do to walk in His ways but obey His commandments? This question was asked of Abraham Maimonides by a reader who was familiar with the Rules of the *ShM*. He called *And thou shalt walk in His ways* “a commandment that included the entire Torah,” and referred to the strictures of Rule 4. In his reply, Maimuni insisted that tradition, manifested in the rabbinic warrant cited in the *ShM*, infused the verse with specific content.  

This, as we shall see, is not at all clear.

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37 “*Teshubot Rabbenu Abraham ben ha-RaMBaM*”, p. 218. Maimuni’s second answer is as interesting as it is original. He argued that the phrase that immediately precedes *and walk in His ways*, namely, *if thou shalt keep the commandments of the Lord* (Deuteronomy 28:9), is indeed a general, non-specific command, one that encompasses all of the commandments. However, the subsequent phrase, *and walk in His ways*, came to focus exclusively on the improvement of traits, and as such, was quite specific. Maimuni argued that the Torah felt it necessary to spell this out since it would be possible to think that it [this command] is not obligatory like the obligatoriness of the commandments, because commandments are action-laden [*maasiyot*] and the going in His ways are things that depend on moral virtues, as explained by the tradition ‘just as the Holy One, blessed be He, is called Merciful, etc.,’ even though the goal of these moral virtues is also actions.

Maimuni was addressing an issue that was still exercising the minds of Jewish theologians, namely, can (or did) the Torah command virtues, correct notions and correct
The commandment claim, as formulated in the ShM, is simply that we are “to be like God (praised be He) as far as it is in our power.” In his argument, M. notes that in addition to And thou shalt walk in His ways (Deuteronomy 28:9), the commandment is repeated in two other ways: to walk in all His ways (Deuteronomy 10:12 and 11:22) and After the Lord your God shall ye walk (Deuteronomy 13:5).

M. cites the following midrash on the verse to walk in all His ways:

Just as the Holy One, blessed be He, is called Merciful (rahum), so shouldst thou be merciful; just as He is called Gracious (hanun), so shouldst thou be gracious; just as He is called Righteous (tsadiq), so shouldst thou be righteous; just as He is called Saintly (hasid) so shouldst thou be saintly.  

M. also alludes to a second midrash (bSotah 14a), this one on the verse After the Lord your God shall ye walk, which he sums up as saying that

we are to imitate the good deeds and honourable (nikhbadot, or, others, hashuvot, “distinguished”) attributes (middot) by which the Lord (exalted be He) is described in a figurative way — He being indeed immeasurably exalted above all such descriptions.

To better understand M.’s summation, I quote the entire midrash:

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character dispositions, as it commands physical actions? Recall that M. proved that the Torah did command correct notions, i.e., the existence of God, because he had found an explicit rabbinic warrant. See our discussion in section 5.3.1.

38 Sifre Deuteronomy, ‘Egev pisqa 49 (p. 114), with only minor variants. Some printed editions lack ‘just as He is called Righteous, so shouldst thou be righteous’ See Sefer ha-Mitsvot, ed. Heller, ad loc., n.18. In Hilkhot De’ot 1:6, when quoting this dictum, M. omits any reference to righteous and to saintly and substitutes them for holy (qadosh).
R. Hama son of R. Hanina further said: What does this text mean: *Ye shall walk after the Lord your God?* Is it, then, possible for a human being to walk after the Shekhinah; for has it not been said: *For the Lord thy God is a devouring fire?* But [the meaning is] to walk after the attributes of the Holy One, blessed be He. As He clothes the naked, for it is written: *And the Lord God made for Adam and for his wife coats of skin, and clothed them* [Gen 3:21], so do thou also clothe the naked. The Holy One, blessed be He, visited the sick, for it is written: *And the Lord appeared unto him by the oaks of Mamre* [Gen 18:1], so do thou also visit the sick. The Holy One, blessed be He, comforted mourners, for it is written: *And it came to pass after the death of Abraham, that God blessed Isaac his son* [Gen 25:11], so do thou also comfort mourners. The Holy one, blessed be He, buried the dead, for it is written: *And He buried him in the valley* [Deuteronomy 34:6], so do thou also bury the dead.\(^{39}\)

In short, following a strictly literal reading, the *midrash* attributes to God a number of acts of kindness and offers them up as examples for man to imitate.

The view of the *ShM*, then, is that to be like Him is “to imitate the good deeds and honourable attributes by which the Lord is described.” While “good deeds” clearly refer to the benevolent acts described in the talmudic *midrash*, “honourable attributes” have no specific referent and leave the full meaning imprecise. Those looking for some allusion to the

\(^{39}\) Qayyara’s entry Pq32 reads “to go in His ways” and it is immediately followed by “to clothe the naked, to bury the dead, to console the mourner and to visit the sick.” It is not clear if Qayyara intended these special acts of benevolence to represent separate commandments, as M. thought, or if, as is more likely, these attributes explained the general command to “go in His ways,” exactly as the above *midrash* does. For a useful survey of the issues, see Hildesheimer, *Haqdamat*, notes 329 and 330.
doctrine of the middle way are unlikely to find it here. In the words of
Schwarzchild, “Maimonides, conspicuously…makes no reference at all to
the doctrine of the mean in defining the commandment of imitation. On the
contrary, he places heavy emphasis on the infinite, unattainable, radical
character of imitatio dei.” ⁴⁰ Still, there are those who read M.’s words in the
ShM in the light of the Halakhot and came to the conclusion that M. was
indeed foreshadowing here the doctrine of the middle ways.⁴¹ I believe that
this reading is more eisegetical than exegetical. It is a reading that robs the
student of the richness that comes from observing M.’s intellectual journey
through one of the most difficult and fundamental issues with which he had
to grapple.

Either way, an important change takes place in the Halakhot. M.
abandons the notion that to imitate Him consists of doing good deeds as
described in the talmudic midrash. In fact, these benevolent deeds are now

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⁴¹ This is the view of Würzburger, who correctly noted that the Halakhot, as we shall see, abandoned the idea of imitating God’s deeds proposed in the ShM and “felt constrained to limit the scope of the commandment Thou shalt walk in His ways exclusively to the cultivation of virtues.” That is, Würzburger understood that the expression “honourable attributes” of the ShM is identical with the concept of the mean between the extremes of all character dispositions. Würzburger, Walter, "Imitatio Dei in Maimonides' Sefer ha-Mitsvot and the Mishneh Torah," Tradition and Transition: Essays Presented to Chief Rabbi Sir Immanuel Jakobovits, ed. Jonathan Sacks (London: Jews College, 1986). Raymond L. Weiss noted that M., in the Halakhot, did not call any of the middle character traits “beautiful” or “noble,” but in the GP (III:38:550), when referring to the morality set forth in Hilkhot De’ot, called these traits “noble” (karim in the Arabic, translated as nikhbadot, “honourable,” by Samuel ibn Tibbon, the classical Hebrew translator of the GP). Weiss, Raymond L., "Language and Ethics: Reflections on Maimonides' Ethics,” Journal of the History of Philosophy 9 (1971).
described as positive commandments ordained by the rabbis (*mitsvat ´aseh shel divrehem*) and the discussion of these rabbinic commandments is moved to *Hilkhot Avel* (14:1). More important, M. infuses *imitatio dei* with a novel ethico-philosophical meaning, one that, as we saw, was not likely to have been intimated in the *ShM*.

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42 That is, three out of the four acts mentioned in the *midrash* above, namely, to visit the sick, to comfort the mourners and to bury the dead. M. specifies that the fourth benevolent act, to clothe the naked, is part of the positive commandment of charity (*Hilkhot Aniyim* 7:3) and is directly covered by the verse [and thou shalt surely lend him] *sufficient for his need* [in that which he wanteth] (Deuteronomy 15:8). M. had already suggested in the *ShM*, Rule 1, that to clothe the naked falls under the category of *sufficient for his need* and attacked Qayyara for listing the obligation to clothe the naked as a separate commandment when in fact it was part of the broader obligation of charity. Strangely, M. was not willing to view Qayyara’s claims “to clothe the naked, to bury the dead, to console the mourner and to visit the sick” — which follow in Qayyara’s list immediately after “to go in His ways” — as simply details of this scriptural command, just as the *midrash* of R. Hama son of R. Hanina had suggested. See note 39 above. M.’s criticism reveals a certain incongruity in his own work. To explicate the commandment of *to go in His ways*, M., in P8, makes reference to a *midrash* that, as we saw, lists a number of good deeds. One of these good deeds is to clothe the naked. Yet in Rule 1, besides castigating Qayyara for listing this deed as as separate entry, he wonders what might have been Qayyara’s source for this claim. He says, “it is [this point] which has eluded someone [i.e. Qayyara], and for that reason he counted the clothing of the naked [among the commandments] because he found in Isaiah: *When thou seest the naked, thou shalt cover him* (Isaiah, 58:7).” He appears to shows no awareness of the *midrash* referred to in P8! Of course, the Rules, or at least Rule 1, may have been written quite a bit earlier and it is only at a later date, when he was writing the short glosses on each commandment, that he first became aware of this *midrash*. An alternative explanation is that he may have been aware of the *midrash* at the time he criticized Qayyara but temporarily forgot it in the heat of the polemic. A more interesting possibility is that M. wrote the Rules after he wrote the glosses on each commandment, by which time he no longer thought that the *midrash* represented a valid source for these obligations since his understanding of *imitatio dei* had taken a dramatic turn away from the idea of imitating God’s good deeds. Thus, judging Qayyara generously, M. suggested that Qayyara leaned on a prophetic passage rather than on a homiletic *midrash*. Until we know more about the order of writing of the various sections and compositions of M.’s works, we will not follow his train of thought with more certainty. I want to thank my dear son-in-law, Avi Horowitz, for not only helping me clarify some of these issues but also for making some very insightful and helpful observations throughout the discussion of this commandment.
After a thorough discussion of human traits and dispositions at the beginning of *Hilkhot De’ot (HD)*, M. states,

The right way [in moral dispositions] is the mean in each group of dispositions common to humanity; namely that disposition which is equally distant from the two extremes in its class, not being nearer to the one than to the other. Hence, our ancient Sages (*hakhamim ha-rishonim*) exhorted us that a person should always evaluate his dispositions and so adjust them that they shall be as the mean between the extremes...whoever observes in his disposition the mean is termed wise...\(^{43}\)

Following a long introduction, spanning five halakhot, M. finally cites the scriptural text that governs this commandment. He says that “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* (Deuteronomy 28:9)” There is no possibility nor I believe there is any presumption that the verse intimates an ethical theory and much less the doctrine of the mean. Rather, as Marvin Fox notes, M. treats this theory “as an established truth to which one need only refer but which does not require any evidence to support it.” \(^{44}\) This presupposition is also noted by Herbert Davidson, who says

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\(^{43}\) *HD* 1:4. Hyamson rendered *hakhamim ha-rishonim* as “our ancient Sages” The correct translation is of course “the ancient Sages,” which raises the question as to who M. was referring to. One possibility may be Aristotle and the Islamic philosophers who followed Aristotle. But see following note

\(^{44}\) Fox, Marvin, "The Doctrine of the Mean in Aristotle and Maimonides: A Comparative Study," *Interpreting Maimonides: Studies in Methodology, Metaphysics and Moral Philosophy* (Chicago: University of Chicago Press, 1990), p. 93-123. He further notes that if one accepts that M.’s reference to the ancient Sages is a reference to the Sages of Israel, a view that he considers plausible enough in the context, then we have the remarkable situation of Maimonides telling us that the principle that the middle way is good is known as an
God’s ways are mercy, graciousness and the like. Mercy, graciousness, and the like, are plainly ethical virtues, and in fact, the Rabbis called them middot, which means precisely psychological or moral qualities. The philosophers, notably Aristotle and al-Farabi, clarified what ethical virtues are. They are intermediate psychological characteristics. By directing man to walk in God’s ways, Scripture must accordingly be instructing man to cultivate intermediate psychological characteristics.\textsuperscript{45}

The idea that we are dealing with an established truth that needs no proof gains further strength from what M. says in the next few lines,

In explanation of this directive [mitsvah], the Sages taught, ‘even as God is called gracious, so be thou gracious; even as He is called merciful, so be thou merciful; even as He is called Holy, so be thou holy.’ Similarly [ve-al derekh zu], the prophets described the Almighty by all the various attributes [kinuyim] ‘long-suffering and abounding in kindness, righteous and upright, perfect, mighty and powerful,’ and so forth to teach us that these qualities are good and right and that a human being should cultivate them, and to imitate\textsuperscript{46} [God], as far as he can (HD 1:6).

It is difficult to read into the attributes gracious, merciful and holy anything else than what these terms connote, virtuous (in a non-Aristotelian, non-

\textsuperscript{45} Davidson, Herbert, "The Middle Way in Maimonides’ Ethic," PAAJR 54 (1987), p.64.
\textsuperscript{46} U-le-hidamot. So the principal MSS., especially Huntington 80. See RaMBaM Meduyaq, ed. Shailat, \textit{ad loc.}, note 4. Hyamson’s “thus imitate God” is interpretive.
philosophic sense), honorable behavior. This is very much the way M. described these attributes in the *ShM*. There is absolutely no indication in the rabbinic dictum that the Sages were referring to the way of the mean. And yet M. posits that the Sages bid one “to walk in the middle paths which are the right and proper ways”. In light of this, we are forced to believe that for M. the middle path is the “established truth”, a truth so self-evident that it requires no proof. Lest the reader make a mistake and think that these attributes ought to be understood for what they are, M. repeats, in *HD* 1:7: “And as the Creator is called by these attributes, which constitute the middle path in which we are to walk…” (1:7). It is therefore surprising that a scholar like Raymond L. Weiss should state,

It is questionable whether such qualities, [referring to gracious, merciful, and holy] are strictly in accordance with the middle way. The qualities of holiness and mercy certainly do not lie in the middle…Being gracious, like being abundant in loving-kindness, which is also among the ways of God that a Jew must imitate, supplements the essentially self-centered orientation of philosophic ethics. Whereas the middle way aims at man’s own perfection (*HD* 1:4), Jewish law directs the sage to act graciously and with *hesed* in his conduct with other people.47

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47 Weiss, Raymond L., *Maimonides’ Ethics: The Encounter of Philosophic and Religious Morality* (Chicago: University of Chicago Press, 1991), p.134. A derivative of this reading is that M. vacillates and/or conflates the philosophic and the moral demands. Weiss believes that M. distinguishes between philosophic ethics, i.e., wisdom and Jewish piety but then moves
Weiss is stating the obvious but his reading runs counter to what M. unequivocally states in halakhot 5 through 7 because he fails to take into account the powerful and assumed ‘facts’ of Aristotelian ethics.

In sum, while M. uses the same Sifre that he cited in the ShM, now he effectively voids God’s attributes of their simple meaning and instead infuses them with an ethico-philosophical one that appears to have no root or echo in rabbinic writings. Concretely, the idea of imitating God that is expressed in the Halakhot is not about emulating His lofty attributes, i.e., cultivating good moral traits, but rather about evaluating one’s dispositions and adjusting them so “that they shall be as the mean between the extremes.” M. has skillfully and naturally woven Aristotelian ethics into the rabbinic exposition.

While M.’s writings throughout enjoin the goal of attaining the middle path and the manner in which to do so, it is only the ShM and the Halakhot that provide a scriptural proof-text for the pursuit of the middle path. Consider how M. concludes Chapter 4 of Eight Chapters (EC), a chapter dedicated to describing the goodness of the way of the mean and to demonstrating that instilling these ethical qualities is the goal of most commandments of the Torah. He says:

If a man will always carefully discriminate as regards his actions, directing them to the middle course, he

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to soften the sharp distinction in an attempt to reconcile contradictions in HD between both approaches (pp. 93-128, in particular 114 and 115). Weiss may be right in stating, that “The more pressing problem that M. had to confront — and which he resolves — is how to adapt both the philosophic and the Jewish precepts to the specific needs of jurisprudence required by a code of Jewish law,” But this is not true of the M. of HD chapter 1, as we discuss below.
will reach the highest degree of perfection possible to a human being, thereby approaching God and attaining what is by Him.\footnote{I adopted here Shailat’s reading, a literal translation of the Arabic (v-yndl ma ‘ndl). Ethical Writings of Maimonides, eds. Raymond L. Weiss and Charles E. Butterworth (New York: Dover Publishing Inc., 1975), p.74 has “what belongs to Him.” Gorfinkle has “sharing in His happiness”, a close approximation to Tibbon’s “sharing in His goodness”, while Kafih reads “attaining His will”. The exact meaning of this phrase is uncertain, see Sahilat’s discussion, Haqdamot, p.290.} This is the most acceptable way of serving God which the Sages, too, had in mind when they wrote the words, ‘He who ordereth his course aright is worthy of seeing the salvation of God, as it is said, to him that ordereth his course aright will I show the salvation of God! [Ps 50:23]. Do not read ve-sam but ve-sham derekh [bSotah 5b; bMoed Qatan 5a]. Shumah means ‘weighing’ and ‘valuation.’ This is exactly the idea which we have explained in this chapter. (EC, p.68)

No mention is made here, or anywhere in the chapter, of And thou shalt walk in His ways. It was inevitable that such a fundamental notion be given some sort of scriptural basis. As we saw, M. finally did this in the ShM and in the Halakhot.

But perhaps one can make a further, more subtle, observation regarding this evolution, one that goes beyond the simple exegetical explanation that we have noted. In EC, M. puts the full weight of the presumed directive of attaining the middle path on the commandments. It is worth quoting here the passage at length:

The Law did not lay down its prohibitions, or enjoin its commandments, except for just this purpose, namely, that by its disciplinary effects we may persistently maintain the proper distance from either extreme. For, the restrictions regarding all the
forbidden foods, the prohibitions of illicit intercourse, the fore-warning against prostitution, the duty of performing the legal marriage-rites — which, nevertheless, does not permit intercourse at all times, as, for instance, during the period of menstruation, and after child-birth, besides its being otherwise restricted by our Sages, and entirely interdicted during the daytime, as we have explained in the Tractate Sanhedrin — all of these God commanded in order that we should keep entirely distant from the extreme of the inordinate indulgence of the passions, and, even departing from the exact medium, should incline somewhat towards self-denial, so that there may be firmly rooted in our souls the disposition for moderation.

Likewise, all that is contained in the Law concerning the giving of tithes, the gleaning of the harvest, the forgotten sheaves, the single grapes, and the small bunches in the vineyards for the poor, the law of the Sabbatical year, and of the Jubilee, the giving of charity according to the wants of the needy one, all these approach the extreme of lavishness to be practised in order that we may depart far from its opposite, stinginess, and thus, nearing the extreme of excessive prodigality, there may become instilled in us the quality of generosity. If you should test most of the commandments from this point of view, you would find that they are all for the discipline and guidance of the faculties of the soul. Thus, the Law forbids revenge, the bearing of a grudge, and blood-revenge by saying, “Thou shalt not avenge nor bear any grudge”; “thou shalt surely unload with him” (the ass of he who hates you); “thou shalt surely help him to lift them up again” (thy brother's ass or ox which has fallen by the way). These commandments are intended to weaken the force of wrath or anger. Likewise the command, “Thou shalt surely bring them back” (thy brother's ox or lamb which has gone astray), is meant to remove the disposition of avarice. Similarly, “Before the hoary head shalt thou rise up, and honour
the face of the old man,” “Honour thy father and thy mother. etc.,” “thou shalt not depart from the sentence which they may tell thee. etc.,” are intended to do away with boldness, and to produce modesty. Then, in order to keep away from the other extreme, i.e. of excessive bashfulness, we are told, “Thou shalt indeed rebuke thy neighbor, etc.,” “thou shalt not fear him” (the false prophet) etc., so that excessive bashfulness, too, should disappear, in order that we pursue the medium course. Should, however, anyone — who would without doubt be foolish if he did so — try to enforce these commands with additional rigor, as, for instance, by prohibiting eating and drinking more than does the Law, or by restricting connubial intercourse to a greater degree, or by distributing all of his money among the poor, or using it for sacred purposes more freely than the Law requires, or by spending it entirely upon sacred objects and upon the sanctuary, he would indeed be performing improper acts, and would be unconsciously going to either one or the other extreme, thus forsaking completely the proper mean. (EC, pp. 64-66)

One might say that this extremely broad rationalization of the commandments takes its cue from M.’s desire to see in Scripture an endorsement of the ethical *summum bonum*. As M. discovers a direct scriptural proof-text for this ethical counsel, he is able to relax somewhat the sweeping ethics-shaping rationalization that he makes for the majority of commandments in *EC*. A cursory look at the sections of the *GP* dealing with *ta´ame ha-mitsvot* will confirm that other rationalizations are advanced in the *GP*, many of them of a strictly political rather than ethical nature. That is not to say that M. abandons the ethical rationalization altogether; it simply means that he has now found a scriptural basis for advocating focused
“exercises” with which to address the ethical objectives. This is how he puts it in *HD* 1:7:

> How shall a man train himself in these dispositions, so that they become ingrained? Let him practice again and again the actions prompted by those dispositions which are the mean between the extremes, and repeat them continually till they become easy and are no longer irksome to him, and so the corresponding dispositions will become a fixed part of his character.

Fox⁴⁹ argues correctly in my opinion that despite the fact that M. follows the Aristotelian tradition faithfully,

when we move away from the general theoretical foundations to his specific way of understanding and applying the doctrine of the mean, the differences emerge sharply and clearly…while Aristotle construes moral virtue as a case of art imitating nature, M. teaches that the model of human virtue is the standard provided by the ideal of the imitation of God.

Again,

As in the case of Aristotle’s prescription for the imitation of nature, this general rule is insufficient as a guide to man. It must be made specific and concrete. For M. this is achieved simply enough. According to his view the commandments of the Torah are, in fact, the specification of ideal behavior in conformity with the rule of the mean, and this is what is meant when we are commanded to imitate the ways of God.

Then he adds that “M. is absolutely consistent in his adherence to this principle that the rule of the Torah is, in actual fact, the rule of the mean ….”

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Fox adduces proof from what M. says in *EC*, which is summarized in the following: “The Law did not lay down its prohibitions, or enjoin its commandments except for just this purpose, namely that by its disciplinary effect we may persistently maintain the proper distance from either extreme.” Fox then adds a critical observation:

There is, however, more to be considered. We recall that the main interest in ethics is the development of virtuous states of character, not merely the performance of virtuous actions. The latter are derived from the former and are significant especially as outer evidence of a stable moral character. The passages we cited make the Torah the standard of the mean in action, but it is obvious that M. must also provide for the Torah as the standard of the mean with respect to states of character. This is, in fact, precisely what he does in *Hilkhot De´ot*.

I suppose that with this distinction Fox is trying to anticipate the absence in *HD* of any discussion concerning the usefulness of commandments in helping one attain the middle path. I am not so certain, however, that Fox is right. In the passage of *EC* that we cited, M. makes it clear that these actions are designed to mould our character, to “train” us. In *HD*, on the other hand, M. suggests instead direct exercises, as we have noted. In both instances, M. makes it clear that the Torah’s main interest is the development of character, the only difference being the means of attaining this goal. In *HD*, M. is totally and tellingly silent on the matter of the commandments shaping our character because, I argue, having located a scriptural basis directing one to attain the way of the mean, he now feels freer to recommend special practices that are directly focused on attaining specific goals. There are then two tracks that one can follow to achieve the
way of the mean: specific commandments that shape one’s character, as posited in *EC*\(^50\) and direct exercises that build virtuous behavior, as in the *Halakhot*.

At this point, we should note M.’s failure to designate *And thou shalt walk in His ways* a positive commandment. In 1:5 he states merely that “we are bidden (*u-metsuvin*, a participle of the root *ts.v.h*, whence the noun *mitsvah*) to walk in the middle paths. In 1:6, he says “*In explanation of this mitsvah, the Sages taught…*”, and again avoids the term *mitsvat ‘aseh*. This suggests, as I have posited, that we are in the presence of a counsel or useful advice rather than a full-fledged obligation. The somewhat less forceful character of this command can also be picked up in other remarks that M. makes in the first chapter of *HD*. For example, “to cultivate either extreme in any class of dispositions is not the proper course for any person (*ein raui lo le-adam*) to follow or to teach to oneself…” (1:3). Rather than “not the proper course,” one would have expected to read “it is forbidden” if in fact the middle way is an obligation. Even when M. uses the strong term *hayav* (he is obliged), as in 1:6, he tempers it with the qualifier “as far as he can.”

\(^{50}\) I might add that this is also the position of M. in the Rules. Through the performance of certain commandments, a person can acquire desirable traits. M. begins Rule 9 as follows:

You are to know that all charges and admonitions of the Torah relate to four things: opinions, deeds, traits of character, and speech…In a similar way, 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 neighbor as thyself*, or it admonishes against certain other traits of character, such as the admonition against bearing a grudge, recompensing evil, or taking vengeance, and other qualities of character…
A short diversion. As we follow the development of M.’s thinking we should note that the view expressed in P8 to the effect that one is to imitate His ways and the way to do so is to imitate his good deeds and honorable attributes, is already superseded in the Rules. In effect, in Rule 9 M. states that “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 neighbor as thyself” the prooftext for these obligations no longer being the verse And thou shalt walk in His ways. Rule 9 already foreshadows the manner in which M. treats these obligations in the *Halakhot*.51

In sum, *imitatio dei* is characterized as a *mitsvah* in the *Halakhot*, a commendable goal, a good counsel and perhaps a wise advice. It is certainly not a positive commandment. Therefore it is not an obligation. Just as in P3 and P4, M. in the *Halakhot* provides the means for attaining these goals. It is in connection with these three counsels that we permit ourselves to take issue with Ben-Menahem, whom we quoted earlier (chapter 3) as arguing that

the thesis advanced by Hart, that the law should be individuated so as to reflect the fact that it directs and guides, not only through commands and prohibitions, but also by outlining the means for achieving desired ends, is *not upheld* by M.. (Emphasis added).

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51 See note 42, above. Again, this raises questions with regard to the chronological sequence in which M. wrote the *SE*, *ShM* and the Rules. See also note 51 above and notes 24 and 30 in chapter 5.
On our reading of the way in which the Halakhot presents these ‘commandments’, the Law does indeed outline “the means for achieving desired ends.”

* *

The extra-scriptural bit of wisdom is first ascribed to the “early Sages” (hakhamim ha-rishonim) at HD 1:4, an allusion to the Sages of Israel but just as likely an allusion to the ancient philosophers. It is only at the end of 1:5 that M. suggests that “we are bidden to walk in middle paths which are the good and right ways, as it is said, And thou shalt walk in His ways.” The juxtaposition of these two halakhot and the secondary place given to the scriptural verse strongly suggest that the latter should be taken only as an intimation (remez) rather than a proof-text, as we had argued in the preceding section.

As M. tells it (HD 1:7), this ethical norm can be traced at least as far back as the patriarch Abraham:

This path is called the way of God and this is what the patriarch Abraham taught his children as it says For I love him, because he will charge his children and his household after him, that they may keep the way of the Lord [Gen 18:19].52

The way of the mean is the path to earthly happiness, as he says in HD 1:7 immediately after his assertion that Abraham taught the way of the mean to his children: “Whoever walks in this way secures for himself happiness

52 This dichotomy between the Abrahamic and Mosaic approaches in Maimonidean writings has been intriguingly explored in Diamond, James, Maimonides and the Hermeneutics of Concealment: Deciphering Scripture and Midrash in the Guide of the Perplexed (Albany: State University of New York Press, 2002).
and blessing, as the text continues *In order that the Lord might bring upon Abraham that which He spoke concerning him.*” Note, not happiness and blessings in the world to come, as one would expect if the way of the mean were a commandment, but plain happiness and blessings, implying happiness and blessings in the here and now. This is as would befit a wise counsel.

The way of the mean is a tenet of wisdom rather than a stipulation of the law. M. identifies it with the “way of God,” traces it back to the patriarch Abraham and promises that whoever practices it “secures for himself happiness and blessings.”

* * *

Curiously, M. abandons the doctrine of the mean in the *Halakhot* almost as soon as he enunciates it. To appreciate this unusual phenomenon, we first need to examine the beginning of *HD*. *HD* 1 and 2:1-2 constitute a close re-statement of the doctrine of the middle ways as described in *EC*. M. recommends that one should order all of one’s character traits, without exception, toward the mean. The two extremes, indicating too much or too little of one trait, constitute vices; only the mean is a virtue. One’s disposition can be altered by performing actions that express the mean. As these virtuous actions become habitual, they will then flow naturally, without effort, from one’s character. One who sets his ways toward the middle is a wise man (*hakham*). The crucial factor here is that the attainment

53 See *Hilkhot Teshuvah* 9:1.
of moral virtue is a goal to be sought for its own sake. *HD* 1:7 leaves no doubt about this: “Whoever walks in this way secures for himself happiness and blessing, as the text continues *In order that the Lord might bring upon Abraham that which He spoke concerning him.*” Here, too, M. merely restates what he has already indicated in *EC*:

This is the most perfect of the ways of worship. If a man will always carefully discriminate as regards his actions, directing them to the middle course, he will reach the highest degree of perfection possible to a human being, thereby approaching God and attaining what is by Him. This is the most acceptable way of serving God. (*EC*, p. 68)

Here, M. adheres closely to Aristotle, to whom the moral life is an end in itself. Noble and moral deeds are, like happiness, “self-sufficient.” The direct source for M.’s statement that the virtuous man “will reach the highest degree of perfection possible to a human being, thereby approaching God” is probably al-Farabi, who stated,

When at any time there exists someone who is by nature completely disposed towards all the virtues and they become established in him by habit, this man is superior in virtue to the virtues found in the most of mankind, so that he almost passes beyond the human virtues to what is a higher class than man. The ancients named this man divine….  

54 See note 48.

55 *Nichomachean Ethics* X.6 (1176b8-9); VI.5 (1140b6-7).

One whose character deviates from the mean is the pious man 
(*hasid*); he is said to act more generously than the law requires (*li-fnim meshurat ha-din*, lit., “within the limits of the law”). M.’s description of the *hasid* is brief, lacks in value judgment and fails to explain the reason(s) why one should or would order his character traits away from the mean.\(^{57}\) In the fourth chapter of EC, M. argues that one may order his dispositions away from the mean for preventative reasons, that is, to avoid slipping towards the more repulsive of the two extremes:

…The saintly ones were not accustomed to cause their dispositions to maintain an exact balance between the two extremes but deviated somewhat by way of [caution and] restraint, now to the side of exaggeration, now to the side of deficiency. Thus, for instance, abstinence would incline to some degree towards excessive denial of all pleasures; valor would approach somewhat towards temerity; generosity to lavishness; modesty to extreme humility, and so forth. This is what the rabbis hinted at in their saying, ‘Do more than the strict letter of the law demands.’ (*EC*, pp. 60-62)

\(^{57}\) Nevertheless, Schwarzchild purports to see in the Code a “pull in the radical moral direction. In *The Laws of Beliefs* [*HD*] the practitioners of the ethics of the mean are called ‘sages’ while the higher religious level of moral life is called that of the ‘righteous/gracious/saintly’ ones (*Hassidim*) (1:5).” Steven S. Schwarzchild, "Moral Radicalism," p. 69. An interesting observation, particularly if we take into account that *hasid* is a derivative of *hesed* and *hesed* becomes one of the cornerstones of Maimonides’ new ethics, as we discuss below. See what we said earlier in this connection, in particular note 40. A problem that 1:5 presents is that to describe one who “deviates somewhat from the exact mean” M. gives the example of one who avoids haughtiness “to the utmost extent and is exceedingly humble.” The contradiction is much too blatant to be resolved satisfactorily, unless one posits, here too, that the example is a late interpolation. See our discussion of *HD* 1-2:1-2 below.
Though it appears that this deviation from the mean is a commendable goal, one would not know it from the way M. describes the hasid in the HD. The reason why one should undertake actions that deviate from the mean is given in the EC and is repeated in HD 2:2: “If in any of them [character traits] he is at one extreme, he should move to the opposite extreme, and keep it there for a long time till he has regained the right path which is the normal mean in every class of dispositions.”

The first sign that this section of HD is not of a piece with the rest of the Halakhot and that the balance of the Halakhot may not share the EC’s high regard for the moral mean is the absence of any discussion of prophecy in HD 1 to 2:1-2. In EC 7, M. proposes that the acquisition of moral virtues is integral to the making of a prophet, along with the acquisition of intellectual virtues. He says:

In accordance with what we have made clear in chapter 2, virtues are either intellectual or moral. Similarly, vices are intellectual, as ignorance, stupidity, and want of understanding; or they are moral, as inordinate lust, pride, irascibility, anger, impudence, avarice, and many other similar defects…Each of these defects is a partition separating man from God, the Most High. (EC, p.80)

He then goes on to interpret a rabbinic dictum to support this idea of the importance of possessing the two kinds of virtues:

Know then that no prophet received the gift of prophecy unless he possessed all the mental virtues and a great majority of the most important intellectual ones. So, the Rabbis said, ‘Prophecy rests only upon the wise (hakham), the brave (gibbor), and the rich (‘ashir).’ By the word ‘wise,’ they undoubtedly refer to all the mental perfections. By ‘rich,’ they designate the moral perfection of contentment, for they call the
contented man rich, their definition of ‘rich’ being, ‘Who is rich? He who is contented with his lot,’ that is, one who is satisfied with what fortune brings him, and who does not grieve on account of things which he does not possess. Likewise, ‘brave’ stands for a moral perfection; that is, one who is brave guides his faculties in accordance with intelligence and reason….The Rabbis say, ‘Who is brave? He who subdues his passions.’ (EC, p.80)

M. refers to this very same dictum in *Hilkhot Yesode ha-Torah*, the treatise that precedes *HD*. There, he says:

…the spirit of prophecy only rests upon the wise man who is distinguished by great wisdom; commanding over his moral traits (*gibbor be-middotav*, lit., strong in his traits) whose passions never overcome him in anything whatsoever, but who by his rational faculty always has his passions under control, the possessor of a broad and exceptionally correct mind (*bal de’ah rehovah nekhonah ad meod*) (*Hilkhot Yesode ha-Torah* 7:1).

In *Hilkhot Yesode ha-Torah* the prophet is described as one who exercises great restraint over his passions, a continent man. In *EC*, on the other hand, the prophet is the epitome of a temperate man. The contrast with *EC* is subtle but real. Note that M. is content using the rabbinic term *middot* rather than his own term *de’ot*. In fact, *Hilkhot Yesode ha-Torah* knows nothing about *de’ot*, a term that has as yet to be defined.

Note too that the *Halakhot* fail to define “rich,” the trait that the *EC* identifies as “contentment, for they call the contented man rich.” It would seem that according to *Hilkhot Yesode ha-Torah*, the prophet need not possess this specific moral virtue, contentment. In other words, the prophet
need not be an all-round virtuous man. The Halakhot appears to represent a clear departure from the EC.

To round up this discussion we should note that M. struggles with the question of who is a superior individual, a continent man or a temperate one already in EC (chapter 6). He notes there that, on the one hand, philosophers praise the temperate man because he does not possess the urge to perform a vicious act. On the other he shows that the Sages lauded the continent man. In the EC M. ends up reconciling Rabbinic ethics with Greek ethics by arguing that the rabbis, too, would agree that the temperate man is superior but that their various dicta praising restraint only related to the traditional laws (shimʿiyot). With regards to the moral laws, laws that are eminently rational (sikhliyyot), the rabbis would have to agree that temperance was superior to continence.58

The Maimonidean exposition of Aristotelian ethics in HD is firmly bound by the beginning of chapter 1 and the end of halakhah 2 of the second chapter. Though al-Farabi, his most direct source, never contemplated the standard of the pious individual (hasid), one can well excuse M.’s insipid and very brief excursus by ascribing it to his desire to acknowledge the

58 Davidson has correctly noted that “Maimonides, having found a philosophic view in apparent opposition with a view of the rabbis, endeavored to preserve the philosophic view fully intact.” Davidson, "Maimonides' Shemonah Peraqim," p. 128. I would note only that, in line with the thesis developed here, M. ends up preserving the rabbinic view. The change may have something to do with the fact that M. ultimately rejected the Kalamite distinction between rational (sikhliyyot) and traditional (shimʿiyot) commandments and was therefore left with no grounds on which to harmonize the philosophic and the rabbinic views. In effect, if traditional commandments are also ‘rational’, as M. argues in the GP, then no distinction can be made between rational and traditional commandments, as M. did in the EC. Therefore, the Sages’ praises of the continent man prove that the rabbis held continence to be superior in every respect to temperance.
rabbis’ position without necessarily endorsing it. In chapter 1 and the first two halakhot of chapter 2, M.’s exposition is relatively formal, twice punctured with some vague and general scriptural references (e.g., 1:4), which at best provide homiletic support for the thesis. No rabbinic support is offered.

The demarcation line of this aberrant section lies between HD 2:2 and 2:3 and it is marked by a blatant contradiction that can be explained, in my opinion, only by a late correction to an early stratum. I first quote the relevant portions of 2:1 and 2:2 and then quote 2:3, to illustrate the sharp divide between them. In 2:1, M. advises “human beings whose souls are sick” to go to the wise, who are “physicians of the soul” and “they will heal their maladies by instructing them in the dispositions which they should acquire till they are restored to the right path.” In 2:2, he says:

What is the method for affecting their cure? If one is irascible, he is directed so to govern himself that even if he is assaulted or reviled, he should not feel affronted. And in this course he is to persevere for a

59 The order and sequence in which M. wrote the MT is not known, although it is possible to reconstruct parts of it on the basis of inter-treatise references. It is possible that Sefer ha-Madd’a, though the first book of the MT, was written, or was heavily edited, towards the end of the massive enterprise, an enterprise that spanned more than ten years. Thus, the writing of parts of HD, now the second treatise of Sefer ha-Madd’a, may have preceded all or part of Hilkhot Yesode ha-Torah while other parts may have followed it. HD itself could have been written at different times, the first section for example at an early stage, the balance at a much later time, etc. When introducing corrections, M. was generally careful to correct previous passages that clearly contradicted the new material. At times, however, one finds residues of the early literary strata that for one reason or another were left uncorrected. See Henshke, D., "Le-Darkhe Pitronan shel Setirot ba-Mishneh Torah le-RaMBaM," Sinai 112 (1993). The piecemeal composition of the work, the possibility that M. made late interpolations from memory and without the full text in front of him and the difficulty of recalling written drafts from the public or semi-public domain may help explain many of the earlier literary strata texts that were left uncorrected.
long time till the choleric temperament has been eradicated. If one is arrogant, he should accustom himself to endure much contumely, sit below everyone, and wear old and ragged garments that bring the wearer into contempt, and so forth, till arrogance is eradicated from his heart and *he has regained the middle path, which is the right way*. And when he has returned to this path, *he should walk in it the rest of his days*. On similar lines, he should treat all his dispositions. (My emphasis).

This is in line with everything that he has said earlier. The middle way is the only right way and once one has reached it, he should stay on it *the rest of his days*. Note that, out of all the character dispositions featured in, for example, *HD* 1:4, M. chooses irascibility and pride or arrogance as the paradigms of vice, and the eradication of these extreme traits as the paradigms of what is desirable and to be maintained for the rest of one’s days.

Immediately thereafter, in 2:3, M. reverses course:

There are some dispositions in regard to which it is *forbidden merely to keep to the middle path*. They must be shunned to the extreme. Such a disposition is pride. The right way is not to be merely meek, but to be humble-minded and lowly of spirit to the utmost. (My emphasis)

After adducing a number of rabbinic dicta to support this dramatic reversal, he continues, “Anger too, is an exceedingly bad passion, *and one should avoid it to the last extreme*. One should train oneself not to be angry even for something that would justify anger” (my emphasis). Again here, he adduces a number of supporting rabbinic dicta.
Herein lies the contradiction: If M. thought that the proper way is to move to the extreme when it came to irascibility and arrogance and that it is forbidden in such cases to merely keep to the middle path, why did he use these traits as examples in halakhah 2, telling us that their middle path is the right way and one should walk in it the rest of his days? The contradiction is so blatant that I find it difficult to believe that M. wrote halakhah 3 at the time of writing, and in the presence, of halakhah 2. More likely, halakhah 3 comes from a later period, a time when M. had already abandoned the formality and the spirit of the doctrine of the middle way.

In HD 2:4 through 2:7, M. returns to a discussion of the mean qualities that one should strive for. This section is almost a repetition of HD 1, but with a crucial distinction. The tenor of the discussion is informal and the discussion is suffused with rabbinic dicta (see in particular 2:7). In the following chapters of HD, M. continues to move away from the Aristotelian concepts represented by HD 1, 2:1-2 and EC. For example, while 3:2-3 parallels for the most part the beginning of EC 5, it differs from it in a very subtle matter. Both the EC and the HD agree that bodily health is important and both works agree that the goal of the soul is to come to know God. EC, however, maintains that

...his only design in eating drinking, cohabiting, sleeping, waking, moving about, and resting, should be the preservation of bodily health, while in turn, the reason for the latter is that the soul and its agencies may be in sound and perfect condition, so that he may readily acquire wisdom, and gain moral and intellectual virtues, all to the end that man may reach the highest goal of his endeavors. (EC, p.69)
The *HD*, on the other hand, skips over the acquisition of moral virtues and simply says that “a man should aim to maintain physical health and vigor, in order that his soul may be upright, in a condition to know God.” M. confirms here what we had intuited earlier, with respect to prophecy: the acquisition of moral virtues in the Aristotelian sense is no longer a necessary condition for apprehending God.

I now move to adduce more explicit evidence of M.’s turn away from his near-total embrace of the Aristotelian ethics (haughtiness and anger had been the only exceptions) of *HD* 1 to *HD* 2:1-2. M. begins to introduce exceptions to the ‘established truth’ of the goodness of the way of the middle. On closer look, God’s ways — more precisely, God’s actions — do not reflect the Aristotelian moral virtues at all. Rather, God is portrayed in Scripture as exhibiting traits that in human beings are considered extreme.\(^{60}\)

Two examples will suffice. In *Hilkhot ʿAvadim* 9:8, M. says:

> 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 (*middat hasidut ve-darkhe hokhmah*) 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.…Cruelty and effrontery are not frequent except with heathens who worship idols. The children of our father Abraham, however, i.e. the Israelites, upon whom the Holy One, blessed be Him, bestowed the

\(^{60}\) It is only at this point that we can begin to agree with Weiss’ statement that “The more pressing problem that M. had to confront — and which he resolves — is how to adapt both the philosophic and the Jewish precepts to the specific needs of jurisprudence required by a code of Jewish law.” See note 47 above. One point of difference. It is not “the needs of jurisprudence of Jewish Law” as Weiss posits but rather the radical aspect of God’s *hesed* that drives this change, as I discuss below.
favor of the Law and laid upon them statutes and judgments, are merciful [people] (rahmanim hem) 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 mercies are over all His works (Ps 145:9)…. (my emphasis).

Here, mercy is not a middle disposition, but an extreme one. In HD 1:1, where M. lists extreme character traits, “merciful” is paired with “cruel,” its extreme opposite. Note that M. fuses here middat hasidut with darkhe hokhmah, two terms (hakham, hasid) that HD 1 considered absolutely distinct. In other words, M. has blurred the carefully constructed distinction of HD 1:5. The wise man now comports himself like a hasid by moving away from the mean.

The second example, showing the kind of divine attributes that one must imitate, is given in Hilkhot Megillah 2:17:

It is preferable to spend more on gifts to the poor than on the Purim meal or on presents to friends. For no joy is greater or more glorious than the joy of gladdening the hearts of the poor, the orphans, the widows, and the strangers. Indeed, he who causes the hearts of these unfortunates to rejoice emulates the Divine presence (dome la-Shekhinah), of whom Scripture says, To revive the spirit if the humble, and to revive the heart of the contrite ones [Isaiah 57:15].

Compassion does not appear to be an Aristotelian virtue, and yet, according to Scripture, acts of compassion issue from God. A Jewish-driven virtue, grounded in Scripture and rabbinic thought, has clearly left behind the Aristotelian ethics of HD 1 to 2:1-2.
When we move to *GP*, we find that with the exception of two brief exceptions,\(^{61}\) *GP* “consistently and unambiguously rejects the ideal of the middle way.”\(^{62}\) The idea that Aristotelian ethics are a goal to be sought for their own sake is nowhere to be seen in *GP*. Instead, moral virtues have a political end rather than an ethical one. In *GP* II:40:383, where M. makes a distinction between religious law and secular law or *nomos*, he says, “…if you find a law the whole end of which … [is] directed exclusively toward the ordering of the city and of its circumstances and the abolition in it of injustice and oppression,” the law is a *nomos* because it is not directed toward speculative matters and perfecting the rational faculty, as religious law is.

It is clear, though, that both laws, the secular and the religious law, share a political objective. Neither regime is directed towards the self, towards attaining the happiness and bliss that presumably comes from moral perfection. In another instance, after stating that the Mosaic law aims at the perfection of the body and the perfection of the soul, M. says,

> The first perfection consists in being healthy and in the very best bodily state, and this is only possible through his finding the things necessary for him whenever he seeks them. These are his food and all the other things needed for the governance of the body, such as a shelter, bathing and so forth. This cannot be achieved in any way by one isolated individual. For an individual can only attain all this through a political association, it being already known that man is political by nature. (*GP* III:27:511)

\(^{61}\) II:39:380, which deals only with acts and not characteristics, and III:49:605.

\(^{62}\) Davidson, "The Middle Way," p. 47.
And a little later:

For a man cannot represent to himself an intelligible even when taught to understand it and all the more cannot become aware of it of his own accord, if he is in pain or is very hungry or is thirsty or is hot or is very cold. (GP III:27:511)

There is no mention here of attaining moral virtue; rather, bodily health is seen as the perfect prelude to the second perfection, intellectual virtue.

In GP III:35:535, M. summarizes the fourteen classes of commandments that comprise the law, each of which he discusses at some length in later chapters. Regarding the commandments that were subsumed in the MT under HD, he says: “It is well known that through fine moral qualities human association and society are perfected, which is necessary for the good order of human circumstances.”

A little later on, M. deals with this class in greater detail and yet dedicates only a few lines to it, representing by far the shortest exposition of any of the classes of commandments. He says,

The utility of them is clear and evident, for all concern moral qualities in virtue of which the association among people is in good condition…they are all explicitly stated to have as their purpose the acquisition of the noble (karim) qualities in question. (GP III:38:550)

Gone, as we can see, is the unequivocal endorsement of the middle paths as “the right and proper ways,” and gone as well is the sentiment that moral virtues are worth attaining for their own sake. In fact, the purpose of virtuous behavior — or at least of fine moral qualities — is not the
ennobling of man as such but its salutary effect on society and its “good order.” That is, moral virtues have a political aim, not an ethical one.

These conclusions are fully confirmed at the end of GP, where M. discusses what the ancient and modern philosophers63 have chosen to constitute the human perfections. Before arriving at what he considers the true human perfection, which consists of the acquisition of the rational virtues, M. discards the perfection of possessions, the perfection of bodily constitution and shape and the perfection of the moral virtues. The latter, M. acknowledges, is a perfection that “to a greater extent than the second species [bodily health] subsists in the individual self.” This perfection, M. states,

consists in the individual’s moral habits having attained their ultimate excellence….But this species of perfection is likewise a preparation for something else and not an end in itself. For all moral habits are concerned with what occurs between a human individual and someone else. The perfection regarding moral habits is, as it were, only the disposition to be useful to people; consequently it is an instrument for someone else. For if you suppose a human individual is alone, acting on no one, you will find that all his moral virtues are in vain and without employment and unneeded, and that they do not perfect the individual in anything; for he only needs them and they again become useful to him in regard to someone else. (GP III:54:635)

In no uncertain terms M. rejects here the Aristotelian idea that the moral life is an end in itself and that the virtuous man, as he says in EC, “will reach the highest degree of perfection possible to a human being, thereby approaching God.” The moral virtues have a political aim; their excellence is only “the disposition to be useful to people.”

M. goes on to say that “the fourth species is the true human perfection; it consists in the acquisition of the rational virtues — I refer to the conception of intelligibles, which teach true opinions concerning the divine things.” For M., however, the contemplative life has limits, for man is unable to apprehend God’s true essence. At best, he can come to know only the attributes of his actions. M. holds up a passage in the prophet Jeremiah as providing the key to the purpose of man:

_Thus saith the Lord: Let not the wise man glory in his wisdom, neither let the mighty man glory in his might, let not the rich man glory in his riches; but let him that glorieth glory in this, that he understandeth and knoweth Me. That I am the Lord who exercises loving-kindness, righteousness and judgment in the earth_ (Jer 9:22-3).

Based on this verse M. then comes to a remarkable conclusion:

It is clear that the perfection of man that may truly be gloried in is the one acquired by him who has achieved, in a measure corresponding to his capacity, apprehension of Him, may He be exalted, and who knows His providence extending over His creatures as manifested in the act of bringing them into being and in their governance as it is. The way of life of such an individual, after he has achieved such an apprehension, will always have in view _loving kindness, righteousness and judgement_, through assimilation to His actions, may He be exalted, just as we have
explained several times in this Treatise. \( GP:III:54: 635-6 \)

Commentators have been baffled by this statement. Though M. had by all accounts discarded the moral virtues, he seems to bring them back as part of the fourth and true human perfection. A number of solutions have been proposed, none of them entirely satisfactory. The three briefly discussed below do not by any means pretend to be exhaustive. For example, Altmann has noted that

M. obviously distinguishes between the moral virtues (the acquisition of which is aided by fulfilling the Divinely revealed Law, as he had pointed out before) on the one hand and the imitation of the Divine attributes, which, unlike the moral virtues, is not the result of practical reasoning, but follows from theoretical, metaphysical considerations. *Imitatio Dei* is therefore, but the practical consequence of the intellectual love of God and is part and parcel of the ultimate perfection. \(^{64}\)

Along similar lines, Davidson has suggested that M. advocates a metaphysically-discovered ethics, one that leads to dispassionate actions. M. dismisses as extrinsic to man the perfection of moral qualities, “the perfection consisting in intermediate psychological characteristics.” God’s ways, he says, are “the acts emanating from Him,” not characteristics of His soul. The man that walks in His ways “will not…be merciful, gracious or vengeful, in the sense that he fosters mercy, graciousness, and anger, in his soul. As far as humanly possible, he will perform merciful or vengeful acts

\(^{64}\) Altmann, *ibid.*, p. 73.
dispassionately, as God does.” (Davidson, The Middle Way, p.66) But, we should ask, in what manner are man’s dispassionate acts qualitatively different from those acts arising out of balanced traits? Moreover, could anyone think of a practical difference between moral virtues that result from practical reason aided by the commandments and moral virtues that are consequent on theoretical, metaphysical knowledge?

Pines opined that M. distinguished the final ethic from the third ethic by suggesting that the lawgiver must remove sentiment from the final ethic:

A man engaged in the highest form of practical activity, that of the legislator and the statesman, should in his imitation of God, be, according to the circumstances, either beneficent or cruel, not because he has the corresponding sentiments, but because these modes of action are necessary for his purpose, which consists in the creation and preservation of the highest possible type of community. In 1:54 M. adds the rider that, in point of fact, the ruler of a country should indulge more frequently in beneficent than in punitive action.

Pines appears to be saying that the ultimate human perfection is the political life, the life of the statesman and legislator. But it is not to the legislator that M. is addressing himself at the end of III:54. On the contrary, Jeremiah is made to address each and every member of the nation, the individual, to the effect that “this should be our way of life.”

M. in fact is quite clear that he is not referring to the assimilation of the thirteen attributes as a guideline for achieving the ultimate perfection. He says,

He [Jeremiah] means that it is My purpose that there should come from you *loving-kindness, righteousness,* and *judgement in the earth* in the way we have explained with regards to the thirteen attributes: namely that the purpose should be assimilation to them and that this should be our way of life. (*GP* III:54: 637)

Pines notes that the words “in the way we have explained with regards to the thirteen attributes” refers back to I:54. This is true. A lawgiver and a statesman (like Moses) must imitate God’s governance by fashioning his governance along the lines of the thirteen attributes. And M. stated in I:54 that, on account of the fact that God has no passions, “it behooves the governor of a city…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.” (*GP* I:54: 126). As Pines explains “these modes of action are necessary for his purpose, which consists in the creation and preservation of the highest possible type of community.” There is little question that I:54 is directed to the lawgiver/prophet or governor. In III:54, however, M. speaks to the individual seeking ultimate perfection, saying “there should come from you *loving-kindness, righteousness,* and *judgement in the earth* in the way we have explained with regards to the thirteen attributes: namely that the purpose should be assimilation to them.” The reference to the thirteen attributes is simply to repeat what he has already stated in I:54:128: “the attributes ascribed to Him are attributes of His actions and …they do not mean that He possesses qualities.”
The ultimate perfection is the ethical life, but not the ethical life of the third perfection, the attainment of those moral habits that are put at the service of society, “the disposition to be useful to people.” Instead, the ethical perfection is made up of loving-kindness, righteousness, and judgement in the earth, terms that M. had already carefully defined in III:53. While a full exposition of M.’s new ethics would require more space than would be justified in this study of the mitsvot, this much can be said: the term loving kindness embodies a moral ethic that goes well beyond the cultivation of the middle path.

Loving kindness, M. says,

is applied to excess of beneficence … the exercise of beneficence toward one who deserves it, but in a greater measure than he deserves it… In most cases the prophetic books use the word hesed in the sense of practicing beneficence toward one who has no right at all to claim this from you. (GP III:53:631)

Next, M. re-defines the term righteousness (tsedaqah), derived from tsedeq, or justice. Justice is no longer “granting to everyone who has the right to something, that which he has a right to and giving to every being that which corresponds to his merits.” Instead, justice is to be interpreted as doing justice to one’s intellectual faculty, “a good action performed by you because of a moral virtue with which you perfect your soul.” M. explains that if one pays a hired man his wages or repays a debt, he is merely fulfilling a debt. But if one heals the wounds of a suffering person, he is fulfilling the duty of his moral conscience, he is in effect doing justice to his soul. M. transcends the purely utilitarian notion of acquiring good habits for the sake of an ordered and well functioning society, “an instrument for
someone else”, and advocating the perfection of one’s moral habits for their own sake.

Most of the commandments, the subject of the third book of the GP, belong to the third perfection. Here and there the MT follows this utilitarian rationale, though moves beyond it when it advocates, as I have shown, an attitude of *li-fnim meshurat ha-din*. In the final chapters of the GP, M. returns to moral excellence as a goal to be sought for its own sake, the position he first advanced in EC and in HD 1:1-2:1. The commandments have refined the person and have stabilized, so to speak, society. Now the individual must move towards the fourth and ultimate perfection: he/she must practice beneficence towards the Other in measures that go well beyond the Other’s claims or rights. This is *loving kindness*. The individual must also strive to improve his moral qualities for their own sake, as part of his effort to perfect his or her soul. This is *righteousness*.

In both instances M. has redefined the terms according to the prophetic books, signaling that he has gone beyond the strict confines of the law and beyond an ethic that merely serves the needs of an ordered society. The ethics of *imitatio dei*, as M. describes in III:54, are the ethics of the *hasid* (a word derived from *hesed*), the radical ethics of *li-fnim meshurat ha-din*. The ethic of the *hasid*, *imitatio dei* par excellence, is precisely the same ethic that animated *Hilkhot ‘Avadim* 9:8 and *Hilkhot Megillah* 2:17.

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66 Schwarzchild, too, comes to this conclusion:

…Using an essentially Platonizing approach, Maimonides teaches an ethic of Aristotelian moderateness only as an initial and lower stage of ethics. This is still an ethic derived from and thus bound to existing society. From this he goes on to a higher and ultimate stage of moral radicalism, which is determined by *imitatio Dei* (Schwarzchild, "Moral Radicalism," p. 82).
9.4 *Mitsvah as a Commendable Deed*: More on the hermeneutic drivers for the choice of *mitsvah* as a legal category (or where positive scriptural statements do not appear to be sufficiently unambiguous to declare them obligations)

As I indicated in section 9.1, the term *mitsvah* as used by M. in the *Halakhot* enjoyed a relatively wide semantic range. It stood variously for “advisable,” “commendable,” “preferred,” “praiseworthy,” “correct,” and “proper”. In the following halakhot, therefore, I will not render *mitsvah* uniformly. Instead, I will use the nuance that appears to me most appropriate for the circumstance.

That when the Ark is carried, it should be carried on the shoulder (P34 in the *SE* and the *ShM* enumeration)

He further states that traveling through M.’s works can convey the impression that his ethical views developed throughout his life from a more simplistic Aristotelian to a more sophisticated Platonizing *imitatio* theory. The facts tend to rebut such an impression…just about everything in M.’s *EC*, Commentary to the Mishneh, and Code can be shown to be entirely compatible with the mature reasoning of the Guide that we have now arrived at…. (71).

Schwarzchild finds allusions to ethical radicalism “strewn through and only fragmentarily discernible in the earlier writings” in the form of “apparently unintegrated, unsystematized theoretical theses.” But I believe that I have convincingly shown that certainly the earlier writings fully embrace the Aristotelian paradigm. Surprisingly, while Schwarzchild also overlooked the definitions that M. offered in III:53, he arrived, to his great credit, at what I believe is the correct interpretation of the final and true human perfection. I owe my conclusions to his insight.
The claim advanced in the *ShM*, that it is incumbent on the priestly clan to carry the ark of God on their shoulder, is abandoned in the *Halakhot*. This change is foreshadowed in the *SE*, which simply states “that when the ark is carried, it should be carried on the shoulder.”

Hilkhot Kele ha-Miqdash 2:12 reads:

When the ark is being transported [be-et she-molikhin] from one place to another, it is not transported (ein molikhin) on a beast and not on a wagon but it is proper [mitsvah] to carry it on the shoulder. And because David forgot [the halakhah] and carried it on wagons, a bursting out burst out on Uzza [based on 1 Chr. 13:11.]. It is therefore proper [mitsvah] to carry it on one’s shoulder, as it says because the service of holy things belonged unto them: they bore them upon their shoulders.

It is immediately apparent that M. has dropped any reference to a definite or particular subject. The new formulation most likely reflects a reassessment of the source material and a conclusion that possibly follows the one proposed by Nahmanides. While there is no unconditional obligation on anyone in particular to carry the ark on his shoulder, the ark should nonetheless be carried on the carriers’ shoulders when it is being transported. Note that with the change of emphasis comes a change in purpose. Instead of a commandment designed to exalt the priest, carrying the

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67 The direction of change has diachronic implications with respect to questions of composition and redaction of the *SE* and the *ShM*. This is not the place, however, to discuss this complex issue.

68 See P34, chapter 5.
ark on shoulders rather than on wagons is “clearly due to the intention to exalt it,” that is, the ark.⁶⁹

What is also of interest is that M.’s formulation is relatively soft — he does not say that one must carry the ark on his shoulders. Instead, he uses the term mitzvah, which we translated here as “proper,” but which could also stand for “commendable,” “advisable.” One might describe the tenor of the halakhah as, “not only should you not transport the ark on a beast or wagon but it is proper, and perhaps even commendable, to transport it on your shoulders.” While the scriptural verse they bore them upon their shoulder (Numbers 7:9) hints to the propriety of carrying the ark on one’s shoulder,⁷⁰ M. resorts to an historical incident to prove that indeed it is advisable to do so. Still, the very fact that M. conveys the gravity of the sin by means of a passage lying outside of the Mosaic books implies that there is not enough clarity in the Pentateuchal text to convey a scriptural obligation.

To heed the call of every prophet in each generation, provided that he neither adds to, nor takes away from the Torah (P172)

See our earlier comments (6.1.1). The Sages treat the verse Unto him ye shall hearken (Deuteronomy 18:15) as an inferred prohibition. The sense would simply be that one may not disobey a prophet. We showed that in the ShM, M. uses this hermeneutic device to prove that the commandment in

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⁶⁹ GP, III:45, 580.

⁷⁰ The objective case of the plural pronoun “them” refers to all kinds of holy utensils. Still, M. restricts the mitzvah to the ark, as per the Uzza incident.
question is a positive commandment. Once the criteria for positive commandment changed to those of an unconditional obligation — as we argue they did in the *Halakhot* — inferred prohibitions could no longer stand for positive commandments. It is obvious that one is not obligated to search for a prophet for the purpose of obeying his message. Yet the prohibition against disobeying the prophet and the punishment associated with this disobedience imply that it is indeed commendable to listen to him. Therefore, the use of the term *mitsvah* throughout these *Halakhot*, in the sense of advisable or commendable, is well justified.

To appoint a king (P173)

In the *ShM*, M. tells us that “we are commanded to appoint a king over ourselves that is an Israelite (*me-yisrael*, lit., from Israel)…,” implying that the commandment is to appoint an Israelite as king, *if and when the Israelites chose to appoint a king.*

Interestingly, this too is the way the commandment is formulated in the Heading to *Hilkhot Melakhim*, prompting a number of commentators to conclude that there is no particular obligation (*mitsvat ‘aseh*) to appoint a king. To complicate matters, the *SE* reads, “to

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71 The term “that is an Israelite” (*mi-yisrael*) is missing in some printed versions. See Sefer ha-Mitsvot im Hasagot ha-RaMBaN, ed. C. D. Chavel (Jerusalem: Mosad ha-Rav kook, 1981), based on the first printing in Constantinople, 1516; and see Sefer ha-Mitsvot, ed. Heller, where an asterisk informs the reader that his MSS. supplied the term.

72 See the commentary of Abarbanel on Deuteronomy 17:14. Abarbanel, Yitshaq ben Yehudah, *Commentary on the Torah [Perush al ha-Torah]* (Jerusalem: 1994). There can be little doubt that the correct formula in the heading is “from Israel,” as reflected in all the good MSS., and not “in Israel,” as some printed editions have it, though it is not
appoint a king,” leaving little doubt that M. intended to convey that there is in fact a commandment/obligation to appoint a king. Since the SE is probably sandwiched chronologically\textsuperscript{73} between the ShM and the Headings, it is difficult to believe that M. started out with an idea that there is no obligation to appoint a king but just an obligation to make sure he is Jewish, moved to the notion that there is an obligation to appoint a king, as per the SE, and reversed course again when he composed the Headings. It is more likely that the ShM was corrected by later hands on the basis of the Headings or by M. himself, after he had concluded that there was no obligation, that is, \textit{mitsvat `aseh}, to appoint a king. This thesis can be substantiated by a simple fact: the argument in the ShM moves unequivocally in the direction of proving that there is an obligation to appoint a king.

If this thesis is correct, we can establish that, originally, M. held that there was an obligation to appoint a king. This is attested by the SE and some versions of the ShM. By the time M. wrote the Headings, he had reversed course and no longer maintained that position. By adding “that is an Israelite” (\textit{mi-yisrael}), M. effected a radical change in the claim: the only obligation was now to make certain that the king that was to be chosen was an Israelite. We shall see that, in the Halakhot, M. treats the appointment of a king as merely a desirable act (\textit{mitsvah}).

I now proceed to show evidence of the reversal and the possible reasons behind it. The scriptural source for the commandment of the king is impossible that M. himself was responsible for the change in formulation. For the variants, see “Yalqut Shinuye Nushaot,” Mishneh Torah, ed. S. Frankel (1975-2006), “Hilkhot Melakhim,” Perate ha-Mitsvot. For an understanding of the issues involved, see our continuing discussion.

\textsuperscript{73} A matter to which I have alluded a number of times throughout this work but, admittedly, have not demonstrated. I hope to do so in the near future.
found in Deuteronomy 17:14-15: *When thou art come unto the land which the Lord thy God giveth thee, and shall possess it, and shalt dwell therein; and shalt say: ‘I will set a king over me, like all the nations that are round about me’; (15) thou shalt in any wise set him king over thee, whom the Lord thy God shall choose; one from among thy brethren shalt thou set king over thee; thou mayest not put a foreigner over thee, who is not thy brother.*

The interpretation of these verses was the subject of a tannaitic dispute. While there are very significant variants in the sources (*b*Sanhedrin 20b, *t*Sanhedrin 4:3 and Sifre Deuteronomy, *Shoftim pisqa* 156, p. 208), the gist of the dispute is clear. R. Nehorai argues that these verses do not mandate the appointment of a king. Rather, these verses were “spoken only in anticipation of their future murmurings” (*b*Sanhedrin 20b). In other words, they represent a prophecy. The incident to which these verses allude is found in 1Sam 8:5, where it is recounted that the Israelites demanded from the prophet Samuel a king “to govern us like all other nations.” In response to this demand God tells Samuel to heed the demands of the people. Sensing his displeasure and hurt, God says to Samuel, *For it is not you that they have rejected; it is Me that they have rejected as their king.* R. Nehorai adds that this section conveyed “a disgrace for Israel” (*Sifre*, *ibid*.). R. Judah instead viewed this section as commanding the appointment of a king, in accordance with what he had already stated earlier (Sifre Deuteronomy, *Reeh pisqa* 67, p. 132): “Three commandments were given to Israel when they entered the land: [i] to appoint a king, [ii] to cut off the seed of ´Amaleq, and [iii] to build themselves the chosen house.” Why then, if R. Judah is correct, was God displeased at their demands? To which apparently R. Judah answers that it was because they rushed the events (*she-hiqdimo al yadam*). An unattributed source suggests that the masses of the people did not make the
request in the proper manner (ka-hogen). In sum, one tanna believes that the Deuteronomic passage does not mandate the appointment of a king but instead reflects a concession to an unlawful demand that would occur many centuries later. A second tanna believes that the passage commands the Israelites to appoint a king, in fulfillment of one of three national goals.

We should note that later plain-sense exegetes, too, saw these passages as permitting the appointment of a king rather than as an obligation to do so. This sense flows naturally from the fact that verse 15 does not stand by itself but comes as a response to a request.

M. in the ShM cites R. Judah’s dictum (but without attributing it to him!) as proof for the claim that there is an obligation to appoint a king. He further cites another unattributed exposition found in the same Sifre Deuteronomy, Shoftim pisqa 157, (p. 209) that, commenting on the verse Thou shalt in any wise set him king over thee, says, “This is one of the positive commandments (mitsvat ‘aseh).” M. goes on to say that the Sifre explains this statement “as meaning that he must be held in awe.…”

If M.’s text of the Sifre is the same as ours, this last interpretive twist is not entirely persuasive. The comment that to appoint a king is a positive commandment is the second of two opinions and is introduced by the well-known “another interpretation” (davar aher) formula. The midrashic concern turns on the unusually strong infinitive-imperative (som tasim) language used by Scripture and translated here as thou shalt at any wise set him king over thee. Was this language meant to allude to a special quality of his rule (“that his fear should lord over you”) — as in the first interpretation

\footnote{74 See the commentaries of Ibn Ezra and Saadia Gaon on Deuteronomy 17:15.}
— or was it meant to convey the obligatory nature of appointing a king (“this is one of the positive commandments”)?

There seems to be little doubt that these two meanings are mutually exclusive, with the davar aher coming to offer an alternative interpretation. M.’s move is presumably forced by the fact that the author of the exposition “that his fear should lord over you” is no other than R. Judah (according to a baraita cited in the Talmud) and it is he who stated that the appointment of a king is a commandment. Therefore, the first and second expositions of the Sifre on the verse thou shalt at any wise set him king over thee were harmonized as representing one view. This, of course, need not be so.

In sum, M. offers rabbinic evidence in the ShM for the claim that appointing a king is a positive commandment. The claim suffers from a number of hermeneutic weaknesses. For one thing, there is no reliable way to adjudicate in disputes involving R. Judah and other tannaim; there are reasonable arguments for deciding in favor of R. Nehorai (and some have R. Nehemiah) instead of R. Judah.75 Second, although it is quite probable that R. Judah in fact believed that there was an obligation to appoint a king just as there was an unconditional obligation to destroy the seed of ´Amaleq and to build a Temple, he confused matters for us by calling these obligations mitsvot. As we saw above in section 2.1, this term tends to have in the Talmud a much softer connotation, mostly standing either for a good deed or commendable act.76 Third, we saw that the opinion in the Sifre that thou

75 See Perla’s extensive discussion in this respect, Sefer ha-Mitsvot le-RaSaG, vol. 3, pages 230-1.

76 In his own commentary on this section, Abarbanel argued, in the alternative, that R. Judah himself may have meant to say only that there is an obligation to appoint an
shall at any wise set him king over thee signifies that the appointment of a king is a positive commandment is offered as an alternative (davar aher) to the exposition that “his fear should lord over you.” R. Judah may have felt that the appointment of a king is commendable (mitsvah) but not quite a mitsvat ´aseh, and the anonymous tanna articulating the davar aher may in fact represent a third possibility, that there is an obligation to appoint a king. And finally there is the matter of the plain sense of the text, which, as we have shown, plays such an important role in M.’s hermeneutics. The command to appoint a king appears almost beyond doubt to represent a Divine concession to the popular clamor for appointing a king. It is unlikely to have represented an unconditional obligation. I believe that these difficulties weighed heavily in M.’s final decision.

M. opens Hilkhot Melakhim with R. Judah’s opinion:

Three commandments [mitsvot] to be carried out on entering [the land of] Israel were enjoined upon the Israelite nation: to appoint a king as it is said: Thou shalt in any wise set him king over thee…to destroy the seed of ´Amaleq…and to build the sanctuary…

In halakhah 2, M. continues:

The appointment of a king was to precede the war with ´Amaleq, as it is written: The Lord sent me to anoint thee to be king over His people…Now go and smite ´Amaleq [1 Sam 15:1, 3]. The destruction of the seed of ´Amaleq was to precede the erection of a sanctuary, as it is written: And it came to pass, when the king dwelt in his home…. [2 Sam 7:1-2]. Seeing that the setting up of a king was a commandment [mitsvah], why did the Holy One, blessed be He, look with Israelite king and that he will be chosen by God, as the verses go on to describe, but not that there was an obligation to actually appoint a king.
disfavor upon the request [made by the people] of Samuel for a king? Because they asked in a querulous spirit. Their request was prompted not by a desire to fulfill the commandment [ha-mitsvah] but by a desire to rid themselves of Samuel the prophet, as it is written: for they have not rejected thee, but they have rejected Me [1 Sam 8:7].

For the by-now sensitized reader, M.’s introductory remarks should stand out clearly. Not only does M. use the term mitsvah three times in these two halakhot, but he also fails to inform the reader that to appoint a king is a mitsvat ‘aseh, as he had done on previous occasions. The historiographic note — the fact that M. felt impelled to state right at the outset that these commandments were given immediately upon the Israelites entering the Land and that he mentioned two commandments that are discussed under separate cover — raises the suspicion that the appointment of a king is not a typical commandment, one like all others.

I submit that it is the very ambiguity that we noted in the sources that did not permit M. to state boldly and unequivocally that the appointment of a king is a positive commandment. Instead, M. took a constructively ambivalent stance, limiting himself to quoting R. Judah’s dictum verbatim and continuing to refer to the commandment as a mitsvah. It is likely that, in accordance with common usage, R. Judah was simply referring to the commendability — and not to the obligation — of carrying out the three commandments in the proper sequence: king-‘Amaleq-sanctuary. This may be what M. means when he states that their request had to be prompted “by a desire to fulfill the commandment (ha-mitsvah).” The entire sequence, king-the destruction of ‘Amaleq-the building of the sanctuary, constitutes, then, “the” mitsvah.
It is interesting to note that M. grounds this sequence-\textit{mitsvah} in the prophetic writings rather than in the Torah. It would then appear that we are in the presence of a \textit{halakhah mi-divre qabbalah}, i.e., a law derived from prophetic writings, rather than a scriptural law, a good reason why this \textit{mitsvah} should not be called a positive commandment. Note that in contrast to M.’s exegesis, both the Sifre and \textit{bSanhedrin} offer scriptural proof-texts, a fact that does not escape the attention of Joseph Karo and Abraham di Boton.\footnote{Kesef Mishneh on 1:1 and Lehem Mishneh on 2:1. The latter argues that M. chose the prophetic texts because they were more compelling than the scriptural ones and notes that this practice is common in the \textit{Halakhot} whenever the new exegesis does not contain halakhic implications.} I would consider that M. probably used the prophetic texts deliberately to remove any possible doubt about the non-scriptural status of the advisable sequence.

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It is interesting to note M.’s changing conception of the role of the king over time. In the \textit{ShM}, M. tells us that the king will “unite our words and lead us all.” That is, the king will speak for the nation with one voice.\footnote{See Kafih, \textit{Sefer ha-Mitsvot}, n. 55. In \textit{MnT}, “who will unite our nation and lead us.”} My guess is that M. intended that this single voice or opinion would cover all matters, legal, political and theological. The king would become the true representative of the nation.

While M. does not in the \textit{Halakhot} endow the king with the role of national spokesman, he does allude to two other, very specific roles, a
military and a religious one. These can be deduced from the introductory comments quoted earlier and may be one of the reasons M. presented R. Judah’s dictum at the very outset of his presentation. The appointment of the king precedes the commandment to destroy ‘Amaleq and the commandment to build the sanctuary. In other words, the king is encharged with carrying out these two commandments. By centralizing power in the hands of the king and uniting the Israelites, the monarchy allowed the Israelites to fulfill what R. Judah considered the two principal national missions. This then appears to be the role of the king in the Halakhot.

Surprisingly, in the GP the king’s role is reduced to that of enforcing the law:

It is clear that as there must be punishments, it is indispensable to have judges distributed in every town. There must be testimony of witnesses, and a ruler who is feared and held in awe and who uses all sorts of deterrents and fortifies the authority of the judges and in his turn draws strength from them. (GP III:41: 562)

Gone are the sublime attributes of national spokesman, unifier of the nation, warrior nonpareil, builder of the divine residence, and even extrabiblical judge if and when he required it to gain authority (Hilkhot Melakhim 3:10). In M.’s City, the king rules over his subjects to enforce the law. The law is supreme.

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Traces of M.’s politico-philosophical outlook can be found in a gloss that explains the commandment in question, though the allusion is, admittedly, subtle.
M. says in the ShM gloss to this commandment, that the king must not only be held in awe but our unique respect for him and estimation of his greatness and pre-eminence must be such as to place him on a higher level of honour than any of the prophets of his generation. The Talmud says explicitly: ‘The king takes precedence over the prophet’; and when this king gives an order which is not in conflict with a commandment of the Torah, we must obey his behest, and he has the right to put to death by the sword anyone who disobeys him….The life of anyone who rebels against the kingly authority, be he who he may, is forfeit to the king duly appointed in accordance with the Torah.

Recall that in his introduction to the ShM, M. offers that his intention in this treatise is by no means to delve into the details of the laws of any of the commandments; only to enumerate them. And if I shall explain some small part of it in the process of mentioning [the commandments] it will only be by way of explaining its name, so that the contents of that positive or negative commandment be understood, and the reason why that name has been attached to it. (ShM, ed. Frankel, p.12)

It would seem that these long remarks about the king contradict the character of the treatise and his programmatic statement. As with other similar expatiations, however, I suggest that M.’s remarks point to a polemic of sorts.

The king plays a central position in the political thought of Plato and the Islamic Platonists, from whom M. took his cue. The philosopher-king, as is well known, stands at the apex of the Platonic City. At the same time, the
prophet, according to the Islamic Platonists, is not only a philosopher but also a political figure. As Strauss pointed out, “the end of prophecy is political…the supreme role of the prophet is not mantics but political government.” 79 It follows that M.’s statement that “the king takes precedence over the prophet” is only another way of saying that the king is the supreme philosopher and the supreme political leader. Following this brief introduction, M. registers his dissent with al-Farabi when he adds that unlike the ideal Farabian philosopher-king the Israelite king cannot legislate nor can he contravene the already revealed law. The king must be obeyed only when he gives an order “which is not in conflict with a commandment of the Torah.”

In short, using rabbinic language but following in the tradition of the Islamic Platonists, M. is the first to draw a connection between prophecy and politics. Then, contra his Islamic colleagues, he goes on to diminish the role of the king vis-à-vis the law, putting him in an absolutely secondary position. 80 By the time he wrote the GP, M. had reduced the role of the king to one of merely enforcing the Law.

That one who possesses evidence shall testify in court (P178 in the SE and ShM enumeration)

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80 Here and there in his comments in the ShM, M. offers furtive glimpses of his political philosophy. See, for example, our comments to P191 in section 4.1.
This commandment was discussed at some length in section 5.2. Here I deal with M.’s formulation of the commandment in the Halakhot.

In Hilkhot Edut 1:1, M. says, “The witness is commanded (metsuveh)\(^{81}\) to provide in Court any testimony he may have… as it says, he being a witness, whether he hath seen or known, if he do not utter it, then he shall bear his iniquity.” Note that while M. cites the expected proof-text, he fails nonetheless to declare that providing testimony is a positive commandment.

The answer, as one may guess from the earlier discussion in chapter 5, lies in the fact that the verse does not explicitly command one to provide testimony. As a result, one is merely “advised” (metsuveh) to act in this manner. The good advice is derived from the implications of the scriptural pericope. This more nuanced characterization should therefore come as no surprise.\(^{82}\)

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\(^{81}\) This term is ambiguous. There is no way to know if M. meant scripturally obligated, as in a mitsvat ‘aseh, or rabbinically obligated by way of inference from the scriptural prohibition. What is certainly missing, and this is our issue, is a categorical statement to the effect that it is a mitsvat ‘aseh to testify in court for somebody who possesses evidence. There are instances where the term metsuveh stands clearly for a scriptural obligation. See for example Hilkhot Talmud Torah 5:1: “Just as a person is commanded [metsuveh] regarding the honor of his father and the fear of him, so is he obligated [hayav] with regards to the honour and fear of his teacher…” In this instance we can be certain that metsuveh stands for scripturally obligated because M. tells us in Hilkhot Mamrim 6:1 that to honor and to fear one’s parents is a mitsvat ‘aseh. Note the interesting terminological shift in this halakah: one is metsuveh with regard to one’s father but one is hayav with regard to one’s teacher. M. needed to draw a difference between both obligations, the former is scriptural, the latter is merely rabbinic. See infra our discussion on P209.

\(^{82}\) It is also possible that M. did not refer to this advise or command as a mitsvat ‘aseh because it is a contingent commandment. However, the more convincing reason is that there is no scriptural basis for the positive commandment. Surprisingly, the Halakhot do not include the prohibition to withhold evidence in the formulation of the negative
That the hired laborer eat [of the produce he is reaping] while he is employed (P201)

This commandment was also examined in some detail in 5.1.2.c.

This is how M. phrases the halakhah in Hilkhot Sekhirut 12:1:

…behold, it is proper [mitsvah] of the employer that he should allow them [the laborers] to eat from [the produce] with which they are working, as it says When thou comest into thy neighbor’s vineyard, etc. [Deuteronomy 23:25] and it says When thou comest into the standing corn of thy neighbor, etc. [Deuteronomy 23:26]…

Note M.’s deliberate avoidance of the term mitsvat ´aseh; instead, he calls the commandment a mitsvah.

M. had already used rabbinic sources to demonstrate in the ShM that Scripture permits the laborer to eat the produce on which he works (at a certain stage of production). As formulated in the SE/ShM, one could conclude, mistakenly as it turns out, that this permission is a right and that, moreover, the owner is obligated to let the laborer eat from the produce. In the Halakhot, in my opinion, M. corrects this impression: the laborer has no right to the produce; he is merely permitted to eat it. Moreover, there is no obligation on the part of the owner to allow the laborer to eat from the

commandment. In Hilkhot Rotsheah 1:14, M. lists a number of occasions on which one must come to the help of a person in trouble, covered under the admonition Neither shalt thou stand idly by the blood of any neighbor, but fails to list among them, as he did in his ShM comments to N297, the prohibition to withhold evidence.
produce; it is only proper, a special case of “exceeding kindness,” that he do so. This explains the halakhah’s peculiar use of the term mitsvah, conveying the sense of “proper, commendable” rather than mitsvat ‘aseh, which conveys obligation.

To rebuke the sinner (P205 in the SE and ShM enumeration)

This commandment claim is formulated in the ShM as follows:

to rebuke one who is sinning or is disposed to sin, to admonish him verbally against sinning and to reprove him... This injunction is contained in His words, exalted be He, Thou shalt surely rebuke thy neighbor [Leviticus 19:17].

Immediately thereafter, M. adds:

Included in this commandment is [the obligation] on anyone who is injured by another to rebuke him, and not to bear him a grudge or entertain any evil thought of him. We are commanded to rebuke [the offender] aloud, so that no [ill-feeling] against him shall be left in our heart.

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83 GP III:42: 569. See comments to P201 in the Appendix. Note that “exceeding kindness” could also cover the less formal category of mitsvah min ha-muvhar, a good deed that is beyond the call of duty.

84 Rabbinic sources do not support the idea that the owner is obligated to let the hired hand take from the produce. See Perla’s extensive discussion of this issue and the objections that he raises to M.’s position. It turns out that these objections emerge from his understanding that mitsvat ‘aseh in the ShM implies an obligation. Perla, Sefer ha-Mitsvot le-RaSaG, vol. 2, N267, pp. 653-5. The nuanced reading that I suggest could at least resolve this problem.

85 Or, following MnT, “to restrain him verbally.”
Though M. does not cite direct rabbinic evidence for either of these two interpretations, it is reasonably clear from the sources to which he alludes that he believes that the Sages understood the term rebuke \textit{(hokhahah)} as rebuking one who is sinning. This is indicated by the explanation that he gives:

that this commandment is binding upon every person, so that even an inferior is under obligation to rebuke a man of high rank, and even if he is met with curses and insults, he may not desist or cease rebuking him until he is beaten — as explained by those who handed down the tradition: they said ‘to the point of suffering blows.’

The apparent source for this comment is \textit{b’Arakhin} 16b. The talmudic passage states:

Whence do we know that if a man sees something unseemly in his neighbour, he is obliged to reprove him? Because it is said: \textit{Thou shalt surely rebuke}. If he rebuked him and he did not accept it, whence do we know that he must rebuke him again? The text states: \textit{surely rebuke} all ways. One might assume [this to be obligatory] even though his face blanched, therefore the text states: \textit{Thou shalt not bear sin because of him}.

That M. has this talmudic passage in mind is made evident when he says, “As explained by those who handed down the tradition: they said ‘to the point of suffering blows.’” M. is referring to the \textit{amora} Rav, quoted towards the end of the above passage, who in response to the question, “How far shall reproof be administered?” answered: “Until he [the reprover] be beaten.” Now, M. adduces further support for the idea that one must not desist from rebuking until the message is accepted from a \textit{midrash}:
How do we know that even if one has rebuked the offender four or five times, he must still rebuke him again and again? Because Scripture says *Thou shalt surely rebuke thy neighbor* [Leviticus 19:17] — even a thousand times. One might think that in rebuking him you may cause him shame [and should therefore refrain]: Scripture therefore says, *Thou shalt not bear sin because of him.*

(Sifra, Qedoshim pereq 4:8, 89a)

In rabbinic literature, the term *hokhahah* often has the connotation of admonishing for the sake of disciplining, changing wayward behavior, and it is in this sense that we see it used in *b`Arakhin* 16b. This too appears to be what the aforementioned Sifra has in mind when it speaks of admonishing repeatedly, presumably to change behavior. M.’s second interpretation, however, has a distinctly different flavor. Here, one informs his offender that he has been hurt so that he does not harbor further ill-will towards him. The rebuke in this case is of therapeutic benefit. This, I believe, is clearly the import of his words, “We are commanded to rebuke [the offender] aloud, so that no [ill-feeling] against him shall be left in our heart.” In the *Halakhot*, M. is even clearer: “But it is his duty to inform [*mitsvah ´alav le-hody´o*] the offender and say to him ‘Why did you do this to me? Why did you sin against me in this matter?’” Note that he *informs* the offender; he does not rebuke him. That M. believes this to be the plain sense of the verse is evident from his comment at N303. After explaining that the Sages indicated that

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86 Since one would bear sin by shaming the rebuked, one must not go that far. M. uses this passage to support the claim that it is prohibited to shame a person (N303), though, interestingly, in light of our further discussion, he rejects this fanciful reading: “The plain sense of the verse, however, is that we are forbidden to retain any thought of his sin or to remember it.” In other words, the purpose of rebuking someone is to put the offense out of one’s own mind, not to discipline the offender.
one must rebuke the sinner repeatedly but stop just before he suffers shame—hence the source for the prohibition to shame a person—he says: “The plain sense of the verse, however, is that we are forbidden to retain any thought of his sin or to remember it.” Rebutting a person for a sin does little to erase the thought of the sin. If the sin is simply an offense done against a person, however, rebuking the offender does help the aggrieved to dismiss the incident.

We allow ourselves two further observations. M.’s second interpretation is as psychologically valid and textually sensitive as it is original. He adduces no sources for this view, though, to be fair, commentators have put forth one possible rabbinic source.87 My assumption is that M. did not see this source, or he would have cited it. I base this on the fact that the ShM is an argumentative work. As such, it stands to reason that M. would use every opportunity and every source that could reasonably help him to substantiate his case. Second, it is interesting to note that M. considered the novel and original interpretation secondary, “included in this commandment.” This points to an ambiguity in the scriptural text that is difficult to countenance, one that expresses two totally unrelated thoughts. What precisely, we are entitled to ask, is the law?

In the Halakhot, M. changes direction. He presents both claims side by side, without indicating which of the claims is linked to the primary meaning of the verse and which to the secondary one. Just as important, he

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87 “R. Elazar ben Matia said: If there is a matter [davar] between him and yourself, tell him and do not be a sinner about it [bo]. This is the meaning of Thou shalt not hate thy brother in thy heart, etc. and not bear sin because of him.” Seder Eliyahu Rabah ve-Seder Eliyahu Zuta, ed. Meir Ish Shalom (Jerusalem: Sifre Wahrman, 1969), chap 18, p. 109. See also Yalqut Shimoni. (Saloniki: 1526-7(part I), 1521 (part II)), ad loc.
reverses the order of the *ShM*, insinuating that the interpretation that is closer to the plain sense is primary. In *HD* 6:5, M. rules that “[w]hoever entertains in his heart hatred of any Israelite, transgresses a prohibition, as it is said *Thou shalt not hate thy brother in thy heart*….” This is followed in *halakhah* 6 by its natural correlative:

When a man sins against another, the injured party should not hate the offender and keep silent, as it is said concerning the wicked *And Absalom spake to Amnon neither good nor evil, for Absalom hated Amnon* (2 Sam 13:22). But it is his duty [*mitsvah*] to inform the offender and say to him ‘Why did you do this to me? Why did you sin against me in this matter?’ And thus it is said *Thou shalt surely rebuke thy neighbor* [Leviticus 19:17].

M. sees this text as enjoining one to express displeasure to an offender for having injured him in some fashion, which, as we noted earlier, accords with the plain meaning of the words and with the context of the verse.

It is only in *halakhah* 7 that M. discusses the commandment in the manner that he had defined it in the *ShM*:

If one observes that a person committed a sin or walks in a way that is not good, it is proper [*mitsvah*] to bring the erring man back to the right path and point out to him that he is wronging himself by his evil courses, as it is said *Thou shalt surely rebuke thy neighbor*….

Both *halakhah* 6 and *halakhah* 7 are constructed as good counsels instead of obligations, since they use the term *mitsvah* and not *mitsvah* ´aseh. Moreover, the message of *halakhah* 6 is reinforced rhetorically by suggesting that it is “wicked” to hate an offender and keep silent and by illustrating the concept with a reference to the infamous Absalom. It appears
that the scriptural injunction by itself is not sufficiently persuasive to support the claim.

In sum, M. is torn between two interpretations of a verse, each offering an entirely different understanding of Scripture. Perhaps unhappy with the idea that a positive commandment — about which, recall, there was not supposed to be dissension — can express two such disparate notions at the same time, M. opts for the juridically more cautious option and characterizes both ideas as simply good counsels (*mitsvot*). Or perhaps this is simply a case of constructive ambivalence. 88

To honour the wise (P209)

M. supports this claim in the *SE* by citing the first half of Leviticus 19:32, *Thou shalt rise before the hoary head*. In the *ShM*, M. cites the entire verse to help him make an additional point: “to respect scholars and to rise before them in order to do them honour. It is contained in His words *Thou shalt rise up before the hoary head, and honour the face of the old man.*” In support of this reading, M. adduces a *midrash Sifra* (not found in our edition, but see *ShM* ed. Heller, note 10) that connects the two adjoining verbs in the proof-text to produce a meaning of “rising in the manner of manifesting honour.”

88 It is worth noting that M. did not list this commandment among the sixty unconditional obligations (*mitsvot hekhrehiyot*), a sign perhaps that already at an early stage he did not consider it as an obligation.
M. does not tell us in the ShM what prompted him to read “wise” into the verse rather than simply “old man.” Uncharacteristically, he does not adduce a single rabbinic warrant to support this interpretation. This is methodologically odd, especially since the literal sense of the terms hoary head and old man present no interpretative difficulties and should, by itself, support a claim to honour the aged. The gap is not due to a lack of rabbinic interpretative material, as we shall see, but rather suggests a certain degree of discomfort with the “authoritativeness” of the material.

A baraita cited in bQiddushin 32b reports the following three-way tannaitic controversy on the interpretation of our verse:

Our Rabbis taught: *Thou shalt rise up before the hoary head*; I might think, even before an aged sinner [*zaqen ashamai*]; therefore it is said, *and honour the face of a zaqen*, and *zaqen* can only refer to a sage, for it is said: *Gather unto me seventy men of the elders of Israel* [Numbers 11:16]. R. Yose the Galilean said: *Zaqen* means only he who has acquired wisdom, for it is said: *The Lord possessed me* [sc. wisdom personified] *as the beginning of his way* [Proverbs 8:22] ….Issi b. Judah said: *Thou shalt rise up before the hoary head* implies even any hoary head. [Even a gentile and a sinner!]

[Gemara:] But is not R.Yose the Galilean identical with the first *tanna*? — They differ in respect to a young sage: the first *tanna* holds that a young sage is

89 See the comments of Ibn Ezra and Saadia, *ad loc*. On the other hand, the Aramaic translator Onqelos, influenced by rabbinic exegesis as we shall see, translates hoary head as “someone who knows Torah.”

90 R. Yose the Galilean renders *zaqen* as “one who acquired wisdom” by means of a word play: *zaqen* = *Zeh she-ZaNaH hokhmah*. 
not [included in the precept], whereas R.Yose the Galilean holds that he is.

Issi b. Judah said: *Thou shalt rise up before the hoary head* implies even any hoary head. R.Yohanan said: The *halakhah* is as Issi b. Judah. R.Yohanan used to rise before the heathen aged, saying: ‘How many troubles have passed over these!’ Raba would not rise up, yet he showed them respect. Abaye used to give his hand to the aged. Raba sent his messengers.

The tannaitic material is discordant and, with the exception of Issi b. Judah, exhibits a strong leaning away from the literal sense. Even Issi b. Judah’s position is qualified by the later Amoraim, who refuse to grant the heathen aged a full measure of honour. One might reasonably conclude from the above passage that tradition rejected the literal sense but was seriously divided on the true meaning of the verse.

We can now gain a better appreciation of what M. does in the *Halakhot*. The tannaitic rejection of the *peshateyh di-qra*, in this case the literal sense, precludes M. from adopting it as the *mitsvat áseh*. At the same time, the lack of consensus on the matter militates against the possibility of any of these opinions being called a *halakhah mi-pi ha-shemu’ah*. This leaves M. with only one choice –that of calling the command to honour the wise/scholar a *mitsvah*. As used on this occasion, the term is constructively ambivalent, standing for a scriptural counsel or a rabbinic obligation. Thus we find (6:1): “It is commendable [*mitsvah*] to honour every scholar, even if he is not one’s teacher, as it is said *Thou shalt rise up before the hoary head*,...
and honour the face of the old man, he who acquired wisdom [zaqen, zeh she-QaNah hokhmah]....

A bit further on (6:9), M. adds:

One rises (omdin le-fanav) before an old man, advanced in years, even if he is not a sage. Even a learned man who is young rises up before an old man of advanced age. He is not obliged however to rise to his full height but need only raise himself sufficiently to indicate courtesy. Even a gentile who is aged should be shown courtesy in speech [mehadrin oto bidevarim]; and one should extend a hand to support him, as it is said Thou shalt rise up before the hoary head, and honour the face of the old man, without qualification.

While the term mitsvah used here is conceivably sufficient warrant for our claim that the commandment to honour the wise/scholar does not enjoy the force of a scriptural obligation, I believe to have found a subtle confirmation of this view in the peculiar arrangement of chapters 5 and 6 of the Halakhot. We begin with the ShM. In his lengthy comments on this commandment in the ShM, M. digresses from the original claim in order to include in it a more intense application of the commandment, the duty to honour one’s teacher. He says:

91 M. follows here the opinion of R. Yose the Galilean, who makes no distinction between a young and an aged scholar. See Karo, Joseph, Kesef Mishneh (Printed in standard editions of Mishneh Torah), ad loc.

92 M. follows here the opinions of R. Yohanan, Raba and Abaye, who qualify Issi b. Judah’s position. See Karo, Kesef Mishneh, ad loc. Qarqovsky, ‘Avodat ha-Melekh, citing an earlier authority, wonders why M. does not enumerate in TaRYaG the commandment to honour any old man, as per 6:9. See his discussion in comments to 6:1. As argued earlier, the watered-down version of Issi b. Judah cannot be made to denote the literal sense of the verse, which thereby precludes it from being enumerated.
…while this commandment to respect scholars is a duty incumbent on all alike …it is especially and in a large measure obligatory on a disciple, who owes much greater respect to his teacher than to any other scholar, and has the duty of fearing him as well, since the Sages state clearly that one’s duty to one’s teacher is greater than one’s duty to one’s father, whom one is enjoined to honour and to fear…

M. goes on to prove, in midrashic style, that contending against one’s teacher is like contending against God. M. concludes: “All the foregoing is deduced from the scriptural injunction to honour scholars and parents, as is clear from the language of the Talmud, not that this should be an independent commandment.”

It is clear from these comments that the special obligation to give honour to one’s teacher is subsumed under the general obligation to honour a scholar. Yet, in the Halakhot, M. places the laws relating to honouring one’s teacher in the chapter immediately preceding the one dealing with the commandment to honour the wise/scholar. Moreover, M. completely detaches the commandment to honour one’s teacher from the commandment to honour a scholar and instead makes it totally dependent on the commandment to honour and fear one’s father: “Just as a person is commanded [metsueh] regarding the honour of his father and the fear of him, so is he obligated [hayav] with regards to the honour and fear of his teacher…” (Hilkhot Talmud Torah 5:1).

93 Chavel adds here on his own and in brackets: “and the fear of one’s teacher” to indicate that M. was speaking about the command to fear the teacher. But this need not be so; M. could be referring to both fear and honour or perhaps just honour.
Why this change? I believe that this literary arrangement reveals M.’s new appreciation of the commandment under review. Seeing that no explicit references can be found in Scripture for the duty to honour and fear one’s teacher, M. attempts to anchor this important notion on a scriptural commandment. In the ShM, M. anchors the duty to fear one’s teacher on the commandment to fear one’s father and the duty to honour one’s teacher on the commandment to honour scholars in general. If, however, as we argued above, M. ended up relegating the duty to honour scholars to a non-scriptural status, then it stands to reason that he could no longer anchor the duty to honour one’s teacher on the duty to honour scholars. This would explain the strategic re-positioning of the duty to honour and fear one’s teacher in the Halakhot and its total dependence on the commandment to honour one’s father.

In sum, what may have been held out in the SE/ShM as an obligation with scriptural force to honour scholars becomes simply a mitsvah in the Halakhot, a commendable deed probably with the force of a rabbinic obligation.

9.5 Absolute Reversals

To give the Levites cities to dwell in (P183)

In the SE, M. states that these cities are to serve as cities of refuge. The ShM adds that the Levites are to receive these cities “because they received no portion in the Land.” This link, cities of refuge in compensation for a territorial portion in the Land, is made even more explicit in the
heading to *Hilkhot Shemitah ve-Yovel*: “That the entire tribe of Levites must not take possession in the Land of Israel; instead, they are granted cities that they may dwell in them in the form of gifts.”

Problematically, the directive *that they give unto the Levites of the inheritance of their possession cities to dwell in* appears to be binding only for the time of the Conquest, and, under Rule 3, commandments that are not binding for all time must not be enumerated. In the *Halakhot*, M. seems to have come to precisely this conclusion. In 13:1 of *Hilkhot Shemitah ve-Yovel*, he writes: “Even though the tribe of Levi has no portion in the Land, the Israelites were already commanded (*kvar nitstavu*) to give them cities to dwell...” (my emphasis). Note the narrative mode with its use of the past tense, and note, too, that no mention whatsoever is made of the possibility that this is a positive commandment. It is clear that the handover of these special cities of refuge was an historical event; it did not constitute a commandment binding for all time.

The appearance of this claim in the *ShM*, in contravention of Rule 3, may be due to M.’s desire to emphasize the landless status of the Levites and their (here unspoken) spiritual role in society. They were to be the servants of the Lord and the teachers of Israel. Similarly, in N169 and

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94 Note that Deuteronomy 18:1-3 prohibits the Levitical priests from owning territory in the Land of Israel but makes no mention of their being given cities of refuge. The compensatory aspect of the gift is original.

95 Horowitz, *Sefer ha-Mitsvot im Perush Yad ha-Levi*, *ad loc.*, in an attempt to get around this problem, speculates that other cities, which would not function as cities of refuge, would also be given to the Levites, especially as their population increased. I could find no indication of this in any of M.’s writings. Perla, in *Sefer ha-Mitsvot le-RaSaG*, vol. 3, 423, suggests that neither Gabirol nor Eliyahu ha-Zaqen counted this commandment because the commandment was not binding for all time.
170, M. goes to great efforts to prove that the prohibitions against the Levites acquiring a portion in the Land of Israel and sharing in the spoil of the conquest of the Land represent two prohibitions, not one as they may seem at first. Again here we find a tendency towards emphasizing the Levites’ special status. The Levites, as well as anyone who agrees to divest himself of earthly goods and dedicate himself to the service of the Lord, are to be supported financially by the rest of Israel.96

That the newly married husband shall give happiness to his wife (P214)

The claim in the ShM is “that a bridegroom is to devote himself to his wife for a full year, in the course of which he is not to go on a journey,97 or on a war abroad, or to undertake any obligation of a like nature.” The commandment claim undergoes a substantial revision in the heading to Hilkhot Melakhim, where it appears as follows: “That those who betroth a woman (meares, from erusim), or build a house or plant a vineyard be happy with their acquisition a full year and they are returned from the war [front].”

To appreciate this change, one needs to look more closely at two scriptural sections: Deuteronomy 20:1-9, which deals with the anointed priest pericope (P191), and Deuteronomy 24:5, a section dealing with a new husband’s deferral from military service. In the anointed priest section we


97 MnT reads here “not to go outside the city.”
are told that a man is returned from the battlefront under any of the following three circumstances: he has built a house but not yet dedicated it, he has planted a vineyard but not yet harvested it, or he has betrothed a woman but not yet married her. The text is silent with respect to being able to enjoy these acquisitions for any specific period of time. Deuteronomy 24:5, on the other hand, stipulates that a new husband is exempt from military service one full year and shall give happiness [instead of cheer; Hebrew ve-simah] to his wife whom he hath taken.

In the SE/ShM, M. treats these two sections separately. The commandment to return certain individuals from the battlefront is subsumed under P191, and the commandment to exempt a new husband from military service and to (or so that he can) give happiness to his wife for one year becomes P214.

By way of contrast, in the Heading to Hilkhot Melakhim, M. conflates these two sections. He extends on the basis of tradition the one-year reprieve in which one is “to be happy” with his acquisition to those who have built a house and/or have planted a vineyard and he confirms the three types of returnees from the battlefront. This formulation is not entirely precise and can probably be attributed to considerations of brevity and the strains of the conflation. The Heading is non-committal with respect to actively entertaining the new wife; it is content with stating that those who

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98 mSotah 8:3 parses Deuteronomy 24:5 and expounds it to include the acquisitions discussed in the section on the returnees from the battlefront.

99 While it is true that the bridegroom (arus) is returned from the battlefront, only married men are enjoined to make their wives happy for the first year (hanose et arusato) according to mSotah 8:3. The Halakhot corrects this imprecision.
betroth a woman, or build a house or plant a vineyard “be happy with their acquisition a full year.”

In the *Halakhot*, M. introduces two corrections to the heading’s formula and omits any reference to a positive commandment to give happiness to the new wife. *Hilkhot Melakhim* 7:3 discusses the return from the battlefield of men who find themselves in the three above-noted situations. This is done in the context of the speech that the anointed priest makes prior to entering battle, making this stipulation clearly part of the law of the anointed priest (P191). M. repeats verbatim the speech that Scripture puts in the mouth of the specially anointed priest: a house that has as yet “not been dedicated,” a vineyard that has as yet “not been eaten” (lit., “not been treated as non-sacred”), a woman whom he has betrothed “but not married.” The halakhah is silent about these men taking one year off upon their return home, as claimed in the heading. On the contrary, when they leave the battlefield, they return to logistical support, providing water and food for the troops and repairing the roads (*ibid*, 7:9).

*Halakhah* 10 prescribes with respect to men who do not go out to the battlefield “at all [kol iqar] and are not inconvenienced (matrihin) for anything in the world,” namely, a man who has built a house and “dedicated it,” one who has “married the woman whom he had betrothed,” and one who “has eaten from his vineyard.” Note that the one-year reprieve is not for him who has betrothed a woman, as stated in the heading, but for “one who married the woman whom he had betrothed.” *Halakhah* 11 fleshes out this exemption, which runs for an entire year:

He neither provides water and food (to the troops), nor does he repair the roads, guard the walls of the city or contribute to the pillars of the city, as it says, *He shall not go out in the host, neither shall he be charged with*
any business [Deuteronomy 24:5], [this teaches that he may] transgress on two prohibitions, regarding the needs of the city and regarding the needs of the troops [lit., “not the needs of the city and not the needs of the troops”].

This law, or rather this exemption, is stated in the negative, “and these men don’t go out…they are not inconvenienced…he neither provides water, etc.,” in keeping with the adduced proof-text. It is clear that in 7:10-11, M. conveys only prohibitions — those that were formulated in N311 in the ShM (N310 in the SE). Crucially, the positive commandment of shall give happiness to his wife is never articulated. Moreover, there is an interesting difference between the ShM and the Halakhot. While the former claims, as part of the positive commandment, that the new husband is not to go on a journey or go outside the city, the Halakhot are silent on this point, even as they spell out the prohibitions, namely, that he is not to repair roads, nor watch the city gates nor join the army. There are no traces of the legal obligation stipulated in P214 of the ShM. The new reading simply takes shall give happiness to his wife as a volitional activity.\(^{100}\)

To sum up, the commandments concerning the returnees from the battlefront and the obligation of the newly married man to give happiness to his wife during the first year underwent a complex development and were subjected to substantial revisions throughout M.’s various compositions. With respect to what concerns us, we demonstrated that the Halakhot omit

\(^{100}\) True, the proof-text he shall be free at home one year and shall give happiness to his wife is adduced in 7:10. Nevertheless, it is cited only to present the text underlying the traditional exposition, which parses this text in a way to show that the one-year exemption also applies to one who has bought a house and one who has eaten from a new vineyard.
any reference or allusion to a presumed obligation to make a newly married wife happy or to the impropriety of the new husband’s going on a journey or out of the city. I should note that M. did not adduce support of any sort for his claim in the ShM other than the scriptural proof-text itself, which, as we saw, could be read as merely stating a fact — husbands make their new wives happy in their first year of marriage. Alternatively, and shall give happiness to his wife could be read as granting the husband the opportunity to gratify his wife rather than obligating him to do so. Whatever the reason for M.’s reversal, the fact is that P214 finds no echo in the Halakhot, not as a mitsvat ´aseh, not even as a correct practice nor as a commendable activity.101

101 In a very recent article, D. Henshke, too, concludes that the Halakhot omit the supposed commandment. Henshke ascribes the reason for this change of heart to a number of technical factors, among them, Alfasi’s silence on the matter and the municipal tax exemptions stipulated in Tosefta and Talmud Yerushalmi, which imply that the one-year holiday is not for the purpose of giving happiness to the wife since these taxes do not force the new husband to absent himself from the home. As an aside Henshke notes that the ShM follows Qayyara’s lead in claiming that there is positive commandment to give happiness to a new wife. In effect, Qayyara’s entry reads “to cheer a bride” (le-sameah kallah; Pq149). In footnote 26, Henshke explains that this interpretation of Qayyara’s entry is not all that certain and refers the reader to Perla and to Hildesheimer, Haqdamat, note 387. Although Henshke acknowledges those who disagree with his interpretation of Pq149, he does not appear to be swayed by their argument. And yet, it is quite plausible that le-sameah kallah stands for the rabbinic obligation imposed on the public at large to entertain a bride on her wedding day, based on Qayyara’s use of the word “bride” (kallah) instead of “his wife” (ishto). Henshke, D., "Ve-Simah et Ishto: Le-Toldot Shitat ha-RaMBaM," Qovetz ha-RaMBaM (Sinai), ed. Yosef E. Mobshobitz, vol. 135-136 (Jerusalem: Mosad ha-Rav Kook, 2005).
Summary and Conclusion

In chapter 6 we identified an unusual phenomenon in the Halakhot, namely, M.’s failure to designate as positive commandments 109 claims that he had previously made in the SE and ShM. More precisely, these designations are notably absent from the statement(s) M. makes as he introduces these commandments. For reasons given, I argued that these failures were deliberate omissions and suggested that they reflected a more cautious and more detailed reassessment of the sources. For the balance of chapter 6 and in chapters 7 through 9, I developed a framework by which we might come to explain the reason or reasons for which M. withheld the said designation in each instance.

Explanations came under three broad categories: 1) alternative individuations, mostly of a more inclusive nature; 2) a failure to meet the new criteria of what constitutes a positive commandment (in contrast to what we saw in the SE/ShM, positive commandments in the Halakhot equate to unconditional obligations and obligations that are contingent on the ordinary life of an ordinary person, as spelled out by M. in his appendix to the positive commandments in the ShM [mitsvot hekhrehiyot]); 3) reversals, that is, a change of opinion with respect to the original commandment claim. Reversals, in turn, took the following forms: a. some commandments were reformulated as correct practices rather than as scriptural obligations, evincing the use of a very common mishnaic linguistic feature, the participle. I conjectured that these practices had their origin in scribal activity and were meant for the most part to concretize/ objectify scriptural metaphors; b. other commandments were denoted simply “mitsvah” to better
reflect their more subtle standing of counsel rather than obligation. We noted that behind each of these designations stood one or more hermeneutic difficulties that would not permit M. to designate the commandment a mitsvat ‘aseh; c. finally, the balance, representing just two commandments, disappear entirely from the count of obligations, recommendations or practices. They represent, so to speak, absolute reversals vis à vis the TaRYaG count of the SE/ShM.

Table 2, below, summarizes our findings (notations for the column “Reason for the Omission” correspond to the description given in the paragraph above):

<table>
<thead>
<tr>
<th>Reason for the omission</th>
<th>Positive commandment</th>
<th>Section</th>
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<tbody>
<tr>
<td>where dealt with</td>
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<tr>
<td>1</td>
<td>P18</td>
<td>8</td>
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<tr>
<td>1</td>
<td>P41-51</td>
<td>6.4</td>
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<tr>
<td>1</td>
<td>P68</td>
<td>6.4</td>
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<tr>
<td>1</td>
<td>P113</td>
<td>6.4</td>
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<tr>
<td>1</td>
<td>P114-117</td>
<td>6.4</td>
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<tr>
<td>1</td>
<td>P149-152</td>
<td>6.4</td>
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<td>1</td>
<td>P159-160</td>
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<td>1</td>
<td>P162-163</td>
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<tr>
<td>1</td>
<td>P166-167</td>
<td>6.4</td>
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<tr>
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<td>6.4</td>
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<tr>
<td>1</td>
<td>P191</td>
<td>6.4, 4.1</td>
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<td>1</td>
<td>P226-229</td>
<td>6.4</td>
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<td>2</td>
<td>P9</td>
<td>6.3.1</td>
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<td>2</td>
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<td>P109</td>
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<td>P119</td>
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<td>P145</td>
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<td>2</td>
<td>P148</td>
<td>6.3</td>
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<td>2</td>
<td>P172</td>
<td>6.1.1, 9.4</td>
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<td>2</td>
<td>P181</td>
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<td>P199</td>
<td>6.3</td>
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<tr>
<td>2</td>
<td>P221</td>
<td>6.3</td>
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</table>
In light of this, one can safely state that M. in the *Halakhot* had abandoned his original project of identifying and listing precisely 248
positive commandments. Moreover, there is no indication whatever in the body of the work that M. attempted to replace the missing commandment claims. I found only one instance in which M. identifies a new positive commandment, that at Hilkhot Rotsheah 11:4, where he says:

Similarly, regarding any obstacle which is dangerous to life, there is a positive commandment (mitsvat ‘aseh) to remove it and to be beware of it, and to be particularly careful in this matter, for Scripture says, Take heed unto thyself and take care of thy life [Deuteronomy 4:9]….

Arguably, changes in the manner that M. individuated certain commandments do not constitute a fundamental revision to the original conception of what a commandment is, even as these changes clearly impacted the count. Similarly, while the more conventional use of the term mitsvat ‘aseh in the Halakhot eliminated quite a number of commandments from the original TaRYaG count, such as commandments and procedures contingent on extra-ordinary conditions, these same commandments and procedures became obligatory nonetheless under a new set of circumstances. It should be remembered that M.’s assumption – explicitly spelled out in the list of sixty compulsory commandments – that contingencies in the course of

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1 This commandment is clearly independent of Then thou shalt make a parapet for thy roof (Deuteronomy 22:8), enumerated in the SE/ShM as P184. I suggest quite hesitatingly that the language of the ShM at P184 could accommodate this injunction, under what initially may have been a broader and more figurative understanding of Then thou shalt make a parapet for thy roof but what is now narrowly defined as an injunction related only to physical structures. Babad, Minhat Hinnukh, mitsvah #546, paragraph 11, struggles to find M.’s source but nonetheless agrees with our assessment, namely that Take heed, etc. is an independent commandment. For another possible exception, see Hilkhot Avel 2:6 and what we have to say with regard to it in comments to P37, section 5:2, above.
“normal conditions” are to be enumerated as obligations is quite arbitrary since widely different results would be obtained under slightly different personal, social and political circumstances. Nevertheless, it seems clear that the sum total of all these factors makes the list of commandments highly malleable and the task of arriving at a precise and single number impractical and even futile. In short, the need to create an outline did not justify the enormously complex task of compiling an enumeration of scriptural commandments that would total exactly 613 entries. This, I believe, was tacitly acknowledged in the Halakhot.

Of special interest and perhaps of more fundamental import, however, is that in the process of tracking M.’s commitment to TaRYaG we discovered that he had made significant changes in the Halakhot in the way he presented a number of particular commandments. We deemed these changes to be deliberate and worth exploring. After examining all such occasions, we concluded that M. had indeed reclassified and/or redefined certain previously enumerated commandments, and that he had studiously and methodically indicated such changes by means of subtle linguistic and literary devices. As we understood them, these commandments no longer were held to be scriptural obligations, either because they did not convey the true sense of Scripture or because they lacked the force of obligation. For example, while M. the authoritative decisor, or poseq, rules that the recitation of the Shema is an obligation, M. the legal philosopher and scriptural exegete posits that the obligation to recite the Shema is merely a “correct practice” and that the true scriptural commandment entails a cognitive act. We see much the same in a number of other instances. M. the poseq rules that one is obligated to learn Torah, to put on phylacteries, and to affix a mezuzah to one’s doorpost, while M. the legal philosopher reduces
these obligations to correct practices, rabbinic expressions of scriptural intentions and therefore *mitsvot mi-divre sofrim*, rather than genuine scriptural obligations. By the same token, M., the *poseq*, rules that one *must* love God, fear Him and imitate Him. M., the legal philosopher, on the other hand, finds that while Scripture recommends and encourages these acts, it certainly does not obligate one to do so.

At the risk of too facile a generalization, one might say that in the ShM/SE and in their derivative, the Headings, M. offers little more than halakhic conclusions, the praxis of Judaism. He is the classic *poseq*. In the Halakhot, on the other hand, M. examines rabbinic sources with a view to differentiate man-made interpretation from the true intent of Scripture. In consequence of the above, it is important to maintain a firm distinction between the Headings and the Halakhot. *Not only do the Headings not fill in ‘gaps’ in the Halakhot, but, often, they stand in flagrant contradiction to later formulations*, as we have seen on many occasions. Here again M. demonstrates an extraordinary capacity to address two audiences simultaneously, as Kellner has already shown: the multitudes and the Talmudists interested in praxis, the jurisprudential and exegetical community interested in the whys, the whererefores and the intentions of the Law. If the Headings serve a purpose, it is that they serve as a faithful outline to the contents of the Halakhot, much as M. had planned at the outset of his ShM project.

If M. had not intended to conceal this lack of interest in *TaRYaG* by providing Headings to the 89 treatises of the *MT* that totaled in fact 613 commandments –and I certainly believe he did not—he certainly succeeded in diverting scholarly attention from this issue. To the unsuspecting reader of the text of the *Halakhot*, it seemed that M. merely followed the original
plan and that he was dealing with the commandments in the same way he had dealt with them in the SE, ShM and the Headings. Perhaps as a result of this presentation, little or no attention was paid to the way M. formulated the commandments in the text of the Halakhot themselves. Slight differences in the way the commandment claims were formulated in the SE/ShM and the Headings, or the Headings and the legal text, were occasionally noted and (for the most part) widely accepted, being ascribed to the inevitable product of a fertile and maturing mind. That M. had changed his mind with respect to certain commandments, that he no longer considered some of them obligatory nor scripturally ordained, was never suspected. Surely, it was assumed, M. remained wedded to the tradition of the TaRYaG.

***

We began our inquiry with a simple question. Why would M. base a table of contents for the contemplated Code of Law on a midrash that suggested a set number of commandments for which absolutely no criteria existed and which therefore could never be reconstructed? The question gained additional force, in our opinion, when we observed that this very number, TaRYaG (613), which claimed to represent the totality of the Torah’s commandments, was homiletically derived. This suggested that the midrash was of an aggadic rather than of a halakhic nature, a less-than-compelling precedent on which to base a juridical work. We noted that, perhaps for this reason, some of M.’s predecessors declared themselves not bound to this tradition. What is more, they dismissed the mathematically precise pretensions of the midrash, well aware of its dependence on some set of criteria for which no rabbinic precedent existed.
The problems multiplied. To arrive at the desired numerical target, M. was forced to change the meaning of a well established term. The term *mitsvat ´aseh*, used in rabbinic literature to represent an unconditional obligation was implicitly redefined to include procedures and legal concepts, rubrics which lack even a minimal trace of obligatoriness. The proposed typology of *mitsvot* went well beyond the rabbinic understanding of the term and well beyond the description given in the homiletic *midrash* itself.

According to the *midrash*, the number 613 was assigned to represent every limb in the body and every day of the year, and these figures urged the person to constantly perform the commandments. This suggests that the *midrash* did not have in its purview legal concepts and laws. Moving even further away from the implications of the term *mitsvah*, M. claimed an important number of *mitsvot* that were related to the ways uncleanness is imparted. These were no more than legal concepts. Sensing the difficulty, M. explained that he did not mean “commandment” in the conventional sense of the word, since “if a man wants to become unclean, he does, and if he does not, he does not.” Still, he did not explain why he thought these claims should be counted, prompting his most thorough and thoughtful critic, Nahmanides, to exclaim in exasperation that these commandments “are optional [*reshut*] from all angles. They have no connection to *mitsvah* (*ein ba-hem inyan mitsvah*) that they should deserve to be counted.”

I hope to have demonstrated that the general thesis, that M.’s enumerative project was logically and hermeneutically untenable, and that it was eventually not confirmed, rests on firm ground. Yet this thesis prompts a number of urgent questions. For instance, was M. already aware of the fatal flaws of the count at the time he wrote the *ShM*? And if he was, as is quite likely, why did he go to such great lengths to compile such a list? Why
not, instead, create a comprehensive outline for the *Code of Law*, one that would indeed follow most or much of the methodological insights presented in the Rules, but that would be free of the constraints imposed by the tradition of 613 commandments? We identified this problem as the central question of our inquiry at the beginning of this study.

Certainty with regard to solving this problem would demand the impossible task of penetrating the inner recesses of M.’s mind. The historical context and what we know of M.’s mode of thinking suggest a way of resolving some of the above questions. The geonic *azharot*, written in the form of a poem, had become extremely popular among the masses of Jews, particularly in Spain, in the centuries preceding M. M. was witness to this phenomenon:

Similarly, whenever I heard the many *azharot* which have been composed among us in the land of Spain ‘*My pangs have come writhing upon me*’ [Dan 10:16], because I saw how popular and disseminated they were.

Some *azharot*, like Saadia’s, had entered the Siddur; others circulated orally. Different communities recited different *azharot* on the festival of *Shavu’ot*, but all the *azharot* shared a common ancestry, as M. was aware. It is quite likely that the common people treasured these poems, especially at a time when codes of law had as yet not made their appearance. They offered a synthesis of the Torah that was easy to remember; it is not difficult to imagine that some *azharot* even attained creedal status, a sort of Jewish catechism.

For M., who was about to commence a systematic book of rulings that encompassed all areas of *halakhah*, these enumerations were very troubling:
none of the *azharot*, or at least those that broadly followed Qayyara’s enumeration, listed the commandments to know God and to unify Him. As we discussed in chapter 5, these commandments represented for M. the foundations of Jewish beliefs. It was these two commandments that differentiated the *nomos* of the early societies from the perfect Law of Moses, the former concerned only with dispensing order, the latter with helping the faithful attain eternal happiness. In a world suffused with the Torah of *azharot*, the claims that to know God and to unify Him were positive commandments would likely have met with resistance among the masses. In his own words, referring to the possible reaction of some people to the undocumented enumeration that he had contemplated at first, “the first person that will chance to read it will suppose that this is a mistake.” Proof had to be submitted to overcome the skepticism of the masses.

It was at this point that M. invoked Rav Hamnuna’s exegetical explication of R. Simlai’s dictum. The relevant passage says: “The two commandments *I am the Lord thy God* and *Thou shalt have no other God before Me* we heard from the Almighty Himself.” “Thus,” M. notes, “it has been made clear to you that the verse *I am the Lord thy God* is one of the 613 commandments, and is that whereby we are commanded to believe in God, as we have explained.” M. had succeeded in demonstrating that the affirmation *I am the Lord thy God* was a positive commandment. It matters not that, as we saw in our analysis of the commandment, the affirmation had been infused with a content that was not congruent with the message of the verse. The point had been made; knowing God’s existence and understanding His unity were positive commandments. I cannot fail to emphasize here that M. was not merely engaged in a rhetorical project. As
we showed in chapter 5, M. believed that Rav Hamnuna’s explication also contained a great esoteric truth about the revelation at Sinai.

The midrashic proof that to acknowledge the existence of God and His unity was to be reckoned among the positive commandments constituted a brilliant argumentative move but also imposed a heavy rhetorical and literary burden. Having accepted the TaRYaG tradition — though for no other reason than to demonstrate that I am the Lord thy God is a positive commandment — M. had to further demonstrate that he was able to construct a list of 613 commandments. To start with, and at the very minimum, M. had to eliminate two commandments from the geonic list to accommodate his two new claims. But the cut-and-replace exercise went much further. M. had counterpoised R. Simlai’s midrash to the rabbinic tradition used by the geonim. Recall that while both traditions agreed that the total number of commandments reached 613, each tradition categorized the commandments differently. Qayyara and the other geonim divided the commandments into four categories, namely, punishments (71), negative commandments (277), positive commandments (200) and parashiyyot (65). M., on the other hand, following the midrash of R. Simlai, divided the commandments into only two categories, positive commandments (248) and negative commandments (365). In defense of his way of counting, M. had to do away with the four-part division. And so he set out to do. M. thought it absurd that one would count punishments as commandments; after demonstrating its nullity, he dismissed the idea, saying that “God knows and is witness that all this in my opinion, is sheer confusion….” This dismissal implied, of course, that M. had to replace an additional 71 commandments. M. argued further that, while counting sections had something to commend it, Qayyara did not fully apprehend their categoric significance and ended up
counting among the sections “matters he had already enumerated before, without being aware of [the repetition].” Once again, M. was led to replace a significant number of “redundancies.” When all was said and done, the adoption of R. Simlai’s midrash forced M. to begin the enumerative project anew. This should explain the great effort that M. expended on a project which, on close inspection, was not likely to readily yield 613 compellingly individuated commandments. Still, from a popular point of view, M. had managed to prove that his enumeration was more consistent, more logical and better documented than the geonic lists.

M. proceeded as best he could to turn the enumeration into an organizing list of laws, regardless of whether they constituted unconditional obligations. This is why we find procedures, contingent obligations and legal concepts among the so-called commandments, most of them finely broken down and ready to be “unpacked” in the soon-to-be-written Code of Law. The list was as comprehensive as could be achieved given the constraints of working with a set number and with scripturally explicit laws.

In short, I submit that M. sought to achieve two simultaneous goals. First and foremost, though he never spelled it out, M. set out to present a well documented TaRYaG list that would persuasively displace the enumerations proposed by the popular azharot so that the dogmas of God’s existence and His unity could decisively and authoritatively enter the world of halakhah. I believe that the evidence points in this direction, as I tried to show. Secondly, M. sought to construct an outline based on logical rules, as spelled out in the Shorashim. In truth, M.’s enumeration is no more than a list of all the legal themes found in Scripture, a concept that bears little or no affinity to the idea of mitsvat’aseh, individuated and arranged according to classificatory criteria that, for the most part, have no counterpart in traditional sources.
Before concluding, I wish to elaborate on a point mentioned just briefly a few paragraphs earlier. I do not want to leave the impression that M. had necessarily pre-determined that understanding correct metaphysical notions was a matter that belonged to the corpus of *commandments*. This need not be, even as we appreciate M.’s attachment to the idea that a perfect law includes the acquisition of correct metaphysical notions. The reason is that the law could have simply guided or aroused the faithful to seek such knowledge without having to be commanded to do so. With other Muslim philosophers, M. could have been satisfied with the idea that the Law “arouses and directs attention as a propaedeutic to philosophical understanding.”² It is quite possible that Rav Hamnuna’s explication persuaded M. that the acquisition of the two correct notions, God’s existence and His unity, constituted formal commandments rather than simple, advisory, ‘arousals’. To M., as he explains in *GP* II:33, a message lay hidden in Rav Hamnuna’s exegesis, and that was that the knowledge of God and His unity, unlike the balance of commandments, represented philosophical truths, capable of being understood without prophetic mediation. It so happens that this distinction between the first two commandments and the rest of the commandments coincide neatly with M.’s politico-philosophical views. I conclude that, in the end, M. upheld the halakhic consequences and the theological implications of the *midrash* but

² Kraemer, "Naturalism and Universalism.", p. 66. This is what the law does with respect to correct moral dispositions, as we saw in our analysis of the commandment to imitate God and to go in His ways. The law could have simply aroused the faithful to seek philosophic truths rather than having to command them to do. After drawing our attention to the term *tanbih* (“arousal,” “stimulus”), and calling it a pivotal term throughout the Guide, Kramer states that, for M., “the Law does not contain knowledge of being in its true form. It arouses and directs attention as a propaedeutic to philosophical understanding,” and this was also the belief of other Muslim philosophers.
abandoned the TaRYaG tradition. Despite his initial claims, M. viewed the number 613 as representing no more than the product of a pious homily.
**Excursus 1:** An estimate of the number of entries that M. omitted from Qayyara’s list of positive commandments and possible reasons for these omissions

This is a speculative exercise. In the methodological section (Rules), M. provides a number of examples of the erroneous enumerations proposed by Qayyara and his followers. Summing up these examples yields only a partial list of disqualifications. To get a more complete picture, one could compare Qayyara’s list to M.’s and note the omissions. Unfortunately, matters are not so simple. As explained in the text, Qayyara’s entries are terse and often vaguely worded. The entries require careful interpretation. As in most subjective exercises, the range of meanings is quite wide: Qayyara’s interpreters, often driven by no more than intuition and a great deal of imagination, differed a great deal in their readings. As one can imagine, these differing perceptions, in turn, have a meaningful impact on our conclusions. Matters are further complicated by the existence of a number of recensions of this list, each containing important variants. These variants bear significantly on Qayyara’s enumerations. (Associated with this problem is our inability to identify the version that M. would have seen.) Finally, all the lists suffer from the crucial inconvenience of lacking punctuation; where one commandment ends and a new one begins is itself a matter of interpretation. Most of these problems have been highlighted by Naftali Tsvi Hildesheimer, Haqdamat, pp. 18-24.

In the list below I have identified entries in Qayyara’s list of Positive Commandments (Pq) that the Rules appear to discount. Where relevant, I have noted M.’s reason for the disqualification.
For simplicity’s sake, I have adopted N.T. Hildesheimer’s version,¹ his division of commandments and most of his interpretive conclusions. This is not to say his list is not open to emendations and corrections on the basis of manuscript evidence and general critique. Nonetheless, it would serve little purpose in identifying M.’s original Qayyara’s text. Hildesheimer’s notes on the individual commandments provide a brief but informative survey of commentators’ interpretations and are helpful in choosing the meaning that comes closest to the plain sense of the entry.

In all, the exercise can be said to be highly conjectural, though I believe that, regardless of the text, interpretation and application of Rules to be used, the conclusion would not vary greatly: M. reduced Qayyara’s count of positive commandments by approximately 60 and the total count (not dealt with here) by as many as 100.

<table>
<thead>
<tr>
<th>Pq #</th>
<th>Description</th>
<th>Eliminated by Rule</th>
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<tbody>
<tr>
<td>20²</td>
<td>“the hides of the most consecrated offerings”</td>
<td>12</td>
</tr>
<tr>
<td>21³</td>
<td>“that which is raised from thanksgiving offering”</td>
<td>12</td>
</tr>
<tr>
<td>22³</td>
<td>“the breast and thigh (of the thanksgiving offering)”</td>
<td>12</td>
</tr>
<tr>
<td>27</td>
<td>“one-hundred blessings each day”</td>
<td>1</td>
</tr>
<tr>
<td>33⁴</td>
<td>“to clothe the naked”</td>
<td>1</td>
</tr>
</tbody>
</table>

¹ Hildesheimer, Haqdamat, Based on ms. Oxford Genizah, c18. In Hildesheimer’s opinion, this version is similar in many respects to the B version and to ms. Ambrosiano (Milan) # Sup. C116.

² P20. In V, but missing in B. M. makes it part of the commandment outlining the procedure of the burnt offering (P63).

³ P21-22. M. would make it part of the commandment outlining the procedure of the burnt offering (P63).
34. “to bury the dead” 1
35. “to console the mourner” 1
36. “to visit the sick” 1
37. “the love of peace” 1
38. “righteousness” 1
39. “faith” 1
49. “joy of Sabbath” 1
50. “its pleasure” 1
80. “to keep it [Passover] seven days” Redundant

83-90 (eliminates 7) “qiddush eight days” 1

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4 P33-36. These entries follow P32 “to walk in His ways.” M. understood that each of these entries represented a separate commandment (Cf. Rule 1). Arguably, these four entries could represent details of P32, in accordance with the Talmudic tradition, and not separate commandments. See chapter 9, note 39.

5 P37. My explanation is conjectural and is based on understanding this entry as enjoining peace with other members of society. See the baraita cited in bShabbat 127a. It appears to me that M. excluded this entry because, like other rabbinic mitsvot, it lacked an explicit scriptural proof-text. It is not clear, however, what Qayyara meant here; moreover, we find a number of significant variants in the various recensions. See Hildesheimer, Haqdamat, note 333.

6 P38. Rabbinic? See previous note. Alternatively, Rule 4, for being nonspecific. See also Hildesheimer, Haqdamat’s note 334.

7 P39. “Faith,” as in dealing with honesty (nasata be-emunah), a rabbinic precept. See section 5.3.1. V has here “truth.” Hildesheimer, Haqdamat equates this entry with religious faith and finds its correlate in M.’s P1 and P2.

8 P50. To delight in Sabbath is a mitsvah mi-divre sofrim (Hilkhot Shabbat 30:1).

9 P80. This entry has puzzled commentators, who offer a variety of interpretations. According to Eliezer ben Shmuel me-Mitz, Sefer Yereim (Vilna: 1904), it is a general commandment that covers all the injunctions of the Passover, in accordance with Thou shalt therefore keep this ordinance in its season from year to year (Exodus 13:10). As such, it can be considered redundant. For other possibilities, see Hildesheimer, Haqdamat, n. 361.
103-121  “18 days and one night to recite the full Hallel”  1
134-811 (eliminates 2)  “the five [restitutions of] one fifth”  7
139  “the Sabbath candle”  1
140  “the Hanukah candle”  1
14112  “to give the carcass of an animal (nevelah) to a ger toshav”  7
14313  “to uphold [the righteousness of] judgement”  1
14514  “to be whole”  4
14715  “to pursue justice”  7
14816  “to do (or repay) kindness”  2

10  P83-90. Refers here to the recitation of the qiddush that introduces the Sabbath and the seven festival days (A.S.Traub). According to M., only the Sabbath qiddush is scriptural. M. would therefore be eliminating here seven entries out of eight. For other interpretations, see Hildesheimer, Haqdamat, n. 364.

11  P134-138. Five commandments, following A.S.Traub, see Hildesheimer, Haqdamat, p. 84, n. 376. M. enumerates three of these under P118 (see Horowitz, Yad ha-Levi ad loc.); the other two should not be enumerated since they would constitute details of “holy things,” thus Rule 7.

12  P141. Detail of P175, the obligation to give charity (so Nahmanides’ additions to the positive commandments, #16). Ibn Ezra (Abraham ibn Ezra, Yesod Mora, Second Gate, p.105) and Simeon Duran (Duran, Zohar ha-Raqia, positives, siman 77) consider the verse reshut and not a hovah. This rationale, however, cannot be adduced in favor of M.’s omission in view of the broad typology of commandments claimed in the SE/ShM enumerations.

13  P143. A number of commentators have understood it as the rabbinic precept urging one to accept divine judgement (tsiddug ha-din). If taken instead in a juridical context, Pq 143 would be subsumed under P177. See Hildesheimer, Haqdamat, note 382.

14  P145. Not specific. This probably refers to various forms of witchcraft (so Megillat Esther, on Nahmanides’ additions to the positive commandments, #8).

15  P147. Meaning uncertain. Possibly subsumed under P177.

16  P148. Mi-divre sofrim. At any rate, M. notes (Rule 2) that this obligation is subsumed under the scriptural commandment to love one’s neighbor as oneself (P206). See Hildesheimer, Haqdamat, n. 329.
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The above deletions total 64.

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17 P164. Based on Leviticus 11:44. In his discussion of Rule 4, M. criticizes those who counted a similar injunction, one based on a slightly different verse (Leviticus 19:22).

18 P165. mAvot 4:4. This is possibly subsumed under P8, to imitate God.

19 P181-188. This lists various steps in the preparation of the meal offerings. M. refers to these in his discussion of Rule 12 and points out the error in enumerating them as separate commandments rather than as parts of bringing a meal offering. I have omitted “saltings (melihot)” from this list because M. also enumerates “salting,” though in connection with all offerings (P62).

20 P189. M. would make this procedure a part of bringing the various offerings (P63-66).

21 P190. M. would make this procedure a part of bringing various bird offerings included in P63 and P64.

22 P191. See note on P189, above.

23 P192. See note on P189, above.

24 P200. A rabbinic precept (Rule 1).
Excurus 2: Cross Cultural Influences and the Possible Role of Competition in the Selection of Some Commandments

M. opens the Introduction to the Code of Law with a verse from Ps (119:7): *Then I would not be ashamed when I regard all Your commandments*. What was the source of his putative embarrassment? In a letter to his close disciple, Joseph ben R. Judah, M. explains that he had undertaken to write the Code for two reasons. First, for himself, as a reference book to consult when he faced pressing legal matters, particularly as he grew older. Second, in his zeal for the glory of God, “in seeing a nation bereft of a truly comprehensive book [diwan] of law, and bereft of correct and clear [theological] notions. Therefore I have done what I did, only for the sake of Heaven.” M. was not reacting to the impiety of his coreligionists; there is no good reason to believe that the Jews of Cairo and its environs were less punctilious in the observance of the commandments and the study of the Torah than any other Jewish community at the time or in the recent past. Nor does M. appear to complain about the people being so ignorant of the law that he felt impelled to write a Code of Law. What M. does complain about is that the “nation is bereft of a comprehensive book of law, and bereft of correct and clear [theological] notions.” M. is embarrassed for and about his people and he wants to act “for the sake of Heaven.” What is it all about?

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I submit that just possibly M. may have felt a strong sense of embarrassment in front of his royal court colleagues, judges, medics and state administrators. Systematic and comprehensive works of jurisprudence as well as elaborate theological disquisitions circulated widely among the upper strata of Muslim society. By contrast, God’s “chosen people” appeared to be intellectually barren. In M.’s mind the lack of a diwan constituted a hillul ha-shem, a profanation of the Name, because the world was likely to ridicule a god that was worshipped by such an intellectually impoverished nation.

M. finds no better way to describe the extraordinary zeal that drove him to undertake the writing of the Code of Law than to quote verbatim the prophet Elijah (Kings I:19:10). The latter, in a fit of zealousness, had exclaimed, I am moved by zeal for the Lord, the God of Hosts, in response to the Israelites having forsaken God’s covenant, torn down His altars and killed His prophets. The Israelites of Elijah’s time, too, had caused God’s name to be profaned among the nations. Then and now, God’s honour was at stake.

As Kramer has pointed out, M. was immersed in the cultural and intellectual life of Cairo, maintaining close relations with some of the city’s most prominent men. He notes, for example, that Abu Imran Musa ibn Maymun al-Qurtubi (as M. was called in Cairo) became a friend and protégé of al-Qadi al-Fadil al-Baysani, Saladin’s adviser, chancellor and chief administrator, and perhaps the most powerful political figure in Cairo. In gratitude, M. wrote a treatise On Poisons and Antidotes and dedicated it to
the Qadi with an extremely generous and laudatory encomium. Through him, M. no doubt became familiar with the workings of the Muslim courts.²

M. was not only part of this vibrant cultural milieu, but went so far as to assimilate many linguistic elements of the surrounding milieu into his rulings.³ Cross-cultural influence can be detected, for instance, in M.’s use of Islamic legal terminology, especially in the area of procedural law. Writing with respect to M.’s use of the technical terminology of Islamic law in the realm of procedure, Bloomberg says:

M’s writings are replete with this vocabulary, although, to be sure, he does not always employ Muslim technical terms in precisely the same manner as do the Muslim legal writers. Thus, the parties to a lawsuit are called khasmān, as in Muslim law, and the action at law itself is called by the Muslim term dawā. In addition, witnesses are called shuhūd (singular: shāhid), the plaintiff is called al-muddāī, the defendant is referred to as al-muddāā alayhi, and the object claimed in the action is referred to as al-muddāā bihī.

In regard to evidence in particular, the presence of Muslim terminology is striking. Virtually the entire technical vocabulary of Islamic law’s system of proof


appears in M. The oral testimony of witnesses — the proof *par excellence* — is termed *bayyina*. An acknowledgement is termed *iqrār*, while a denial is termed *inkār*.

The judicial oath is called *yamān*, and its refusal is called *nukūl*. A formal legal document, in addition, is termed *wathīqa*.

… In addition to the very presence of so much of the Muslim technical terminology in M., that which is most significant is the fact that, in virtually all cases, it can be demonstrated that M. is working with an established usage of Judeo-Arabic legal writing as reflected both in theoretical legal writings and responsa and in court documents from the Genizah.

Given his proximity to the Egyptian administrative and judicial authorities, it would not surprise if M. was anxious to demonstrate that, at the very least, Mosaic laws held their own against Islamic laws. Procedural law was one area where M. may have felt the particular sting of his colleagues, especially given the emergent sophistication of the Islamic courts. M.’s appreciation for the progressive aspects of procedural law in

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5 Twersky noted, but perhaps not emphatically enough, this competitive aspect: “Codes of law were common in the Islamic world, and inasmuch as M. was generally aware of the surrounding tendencies, this could have provided stimulus.” Twersky, *Introduction to the Code of Maimonides*, p. 77. Cf. Fox, "Maimonides on Aging," 352, who asks whether the impetus to write the Guide came from the Islamic court philosophers who challenged Maimonides “to a demonstration of the inherent logic and theosophical rigor of the Judaic faith.”

the Islamic courts and the embarrassment that these may have caused him if they were found not to be part of the essence of the Mosaic law may have led him to individuate, consciously or unconsciously, the unwarranted claims of abiding by majority opinion (P175), the duty to testify in court when in possession of evidence (P178) and the duty to thoroughly examine the testimony of witnesses (P179).

This thesis may also explain a longer-than-usual and seemingly out-of-place discourse that M. makes in connection with N290. As M. notes in his introduction, the *ShM*’s glosses on the individual commandments are intended to be concise and to convey only some of the most basic information, such as proof of the claim and a description of the commandment. Deviations from this programmatic statement, as when they contain a rationale, are extremely unusual and tend to reveal in my opinion a heightened sensitivity to the particular subject matter. This is clearly the case with N290 — the claim that the Torah forbade the court from carrying out a sentence in a capital case on the basis of a strong presumption — and it may have been directed as much to his coreligionists as to his colleagues. The discourse reflects the best tradition of courtroom justice. The lengthy passage, only part of which we quote here, parallels some of the concerns expressed in P179:

> If we do not give judgement even on the basis of a very strong presumption, the worst that can happen is that the sinner will be acquitted; but if we punish on the strength of presumptions and suppositions, it may be that once we shall put to death an innocent person; and it is better and more satisfactory to acquit a

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thousand guilty persons than to put once a single innocent man to death.
**Excursus 3: Peshateyh di-qra and Scripture’s Original Intent**

In an important article, first published in 1979 and only slightly revised in 1989,¹ Jacob Levinger proposed the existence of a dual esoteric/exoteric track in M.’s understanding of the development of oral law. Levinger argued that for M. the masses needed to believe in a static theological history, one in which the law was handed down to Moses in Sinai and remained in its pristine and immutable form for all generations. *GP* II:39 provided, in Levinger’s opinion, the rationale for this belief. Moses was a unique and perfect prophet, no other prophet before or after could compare to him. Consequently, the law that Moses handed down was unique and perfect, and not subject to change.

Another aspect of this dogmatic position, propounded for the benefit of the masses, could be seen, according to Levinger, in a particular claim made by M. concerning oral law. In the categorization of oral law presented in the introduction to the Mishnah, M. averred that the first two categories of oral law consisted of interpretations of written law that had come down uncontroverted through the ages. M. labeled these categories “accepted traditions from Moses” because of the alleged consensus and unanimity that had been built around them. Yet, Levinger noted, this claim was not consistent with the fact that one finds controversies in the details of the

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¹ Levinger, Jacob, "Ma’amadah shel ha-Torah she-bi-Ketav be-Mahshavat ha-RaMBaM ke-Tsiyyun Derekh Didakti bi-sh-Vilenu," *Ha-Miqra ve-Anahnu*, ed. Uriel Simon (Tel Aviv: Hotsaat Devir, 1979), revised version can be found in Levinger, *Ha-RaMBaM ke-Filosof*, pp. 56-66.
scriptural commandments.\(^2\) Levinger thought that M. adduced such a view as a way to ward off Karaite attacks and followed for this purpose the widely circulating juridical notions among Muslim legists, which treated consensus (\textit{ijma}) as one of the epistemological pillars of the true faith.

By contrast, Levinger noted, M.’s true — but, in his view, esoteric — position was expressed in \textit{GP} III:41. Whereas in II:39 M. had argued that a perfect law implied no change, in III:41 he argued that the ideal law is one that is able to accommodate changing conditions. Levinger cited the following passage:

Inasmuch as God may He be exalted, knew that the commandments of this Law will need in every time and place — as far as some of them are concerned — to be added to or subtracted from according to the diversity of places, happenings and conjunctures of circumstances, He forbade adding to them or subtracting from them, saying: \textit{Thou shalt not add thereto, nor diminish from it} [Deuteronomy 13:1]. For this may have led to the corruption of the rules of the Law and to the belief that the latter did not come from God.

Levinger astutely noted that M.’s rationale for the prohibition to add to or subtract from the law did not say that the law is perfect and therefore one ought not to add to or subtract from it. Instead, he argued that the law warned against adding or subtracting precisely because changing conditions would tempt the courts to do so. Notwithstanding this, M. suggested that the law provided a solution:

\(^2\) See our comments in section 7:4, where we highlight a number of such difficulties, especially note 47.
Withal He permitted the men of knowledge of every period, I refer to the Great Court of Law, to take precautions with a view to consolidating the ordinances of the Law by means of regulations in which they innovate with a view to repairing fissures, and to perpetuate these precautionary measures according to what has been said by [the Sages]: *Build a hedge for the Torah* [mAvot 1:1]. Similarly, they were permitted in certain circumstances or with a view to certain events to abolish certain actions prescribed by the Law or to permit some of the things forbidden by it; but these measures may not be perpetuated, as we have explained in the Introduction to the Commentary on the Mishnah in speaking of temporary decisions. Through this kind of governance the law remains one, and one is governed in every time and with a view to every happening in accordance with that happening.

In other words, the ideal law contained within itself a mechanism to cope with changing conditions. This built-in mechanism consisted of the power of the Great Court to make necessary changes, either by suspending Torah law for a definite period of time or by means of innovative regulations. True theological history is dynamic, as it reflects a continuous accommodation of the law to changing conditions. Of course, this conception of the law had to be kept perhaps hidden from the masses lest they come to think less of the law and surrender to the appeals of new religions.

With this insight, Levinger set out to explain a passage in *GP* III:41: 558 that baffled Maimonidean students for centuries. The chapter begins with a discussion of court-mandated punishments. After stating that “the punishment meted out to anyone who has done wrong to somebody else
consists in general in his being given exactly the same treatment that he has given to someone else,” M. says:

And he who has deprived someone of a member, shall be deprived of a similar member: \textit{As he hath maimed a man, so shall it be rendered unto him} [Exodus 21:19].

You should not engage in cogitation concerning the fact that in such a case we punish by imposing a fine. For at present my purpose is to give reasons for the [biblical] texts and not for the pronouncements of the legal science. Withal I have an opinion concerning this provision of the legal science, which should only be expressed by word of mouth. A fine was imposed in the case of wounds in requital of which exactly similar wounds could not be inflicted: \textit{Only he shall pay for the loss of his time, and shall cause him to be thoroughly healed} [Exodus 21:19].

It was widely assumed that M. was hinting at a secret position, for, it was argued, why else would he say that he has “an opinion concerning this provision of the legal science, which should only be expressed by word of mouth”? If so, what might this secret position have been?

Narboni, a fourteenth century philosopher and commentator on \textit{GP}, suggested in the name of “philosophers and those who philosophize” that M. was espousing a literal view and that he was in fact hinting at a disagreement with the talmudic opinion. Narboni immediately rejected this suggestion as being antithetical to M.’s overall approach to rabbinic interpretation. Instead, Narboni interpreted M.’s remark to mean just the opposite, namely, that he had a way to reconcile the talmudic position with the scriptural text, but that he would not care, for whatever reason, to expatiate on it at this time.\footnote{\textit{She-af be-divre ha-talmud yesh li da’at al she-lo yahloqu al mah she-amro ha-pasuq.} I believe that Levinger misread Narboni’s own suggestion, thinking that Narboni was...}
Narboni notwithstanding, the impression that M.’s veiled remark hid an antinomian view persisted. Taking issue with M.’s statement that he was only trying “to give reasons for the [biblical] texts and not for the pronouncements of the legal science,” R. Shem Tov b. Yosef b. Shem Tov, a fifteenth century commentator on GP, painfully noted:

and this our teacher [M.] taught us, that if the Messiah would come and say that the verse should be taken literally, an ‘eye for an eye,’ he would be liable to death for contradicting the Talmud. I do not know to which direction our teacher and our master has turned, for this is not what he taught us. God should atone for him and for us!

Levinger rejected Narboni’s critique of the opinion of the “philosophers and those who philosophize,” and argued that M.’s true position was indeed antithetical to that of the Talmud. Accordingly, Scripture’s intention could be gauged and analyzed at only one point in time, the moment of Revelation — before the jurists of the successive Great Courts moved to adapt the words of the Torah to changing conditions. Since M. sought to discover Scripture’s original intent — “to give reasons for the [biblical] texts” — he had no choice but to discard the pronouncements of the legal science. M.’s “opinion concerning this provision of legal science” was none other than the idea that the courts could “innovate to repair fissures,” what Levinger came to call the dynamic conception of the law.

suggesting that M. was trying to hide from the masses what Levinger had described as a dichotomy of the ideal (written) law vs. the practical (oral) law. It is not surprising, therefore, that Levinger could not find a good reason for M. to hide such an elegant but inoffensive opinion. On our reading, M. was not trying to hide an opinion but simply to postpone discussion of a possible reconciliation, much as we would say today, “space does not allow such a discussion.”
Because this dangerous notion had to be kept away from the masses, it was imperative that it be expressed only by word of mouth.

Levinger never explained what M. thought was the intent of the scriptural pronouncement and how it might have differed from the “pronouncement of the legal science.” We surmise that Levinger thought that M. subscribed to the view that Scripture should be read literally, an eye for an eye and a limb for a limb, and that it is for this reason that M. did not wish to express this view publicly since it disagreed with the rabbinic interpretation which demanded monetary compensation. Is this the best explanation of M.’s alleged disagreement with the talmudic interpretation? I submit that a comparison of the MT, where M. lays out the rabbinic/halakhic view, with GP, could yield a more meaningful difference and still stay within the framework of Levinger’s innovative interpretation of M.’s thesis of the theological history of the Law.

In chapter 1 of Hilkhot Hovel u-Maziq, M. writes:

1. If one wounds another, he must pay compensation to him for five effects of the injury, namely, damages, pain, medical treatment, enforced idleness, and humiliation.

2. How are the damages determined? If one cuts off another’s hand or foot, we determine — as if he were a slave being sold in the market — how much the injured man was worth previously and how much he is worth now. The offender must then pay the amount by which he has diminished the other’s value, for when

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4 One should note, however, that on this reading, Scripture would be seen as insensitive to equity considerations, the very same considerations that made the talmudic Sages change the meaning of an “eye for an eye” to “the monetary equivalent of an eye for an eye.”

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Scripture says, *An eye for (Heb. tahat, lit., under) an eye* [Exodus 21:24; Leviticus 24:20], it is known from tradition that the word translated *for* signifies payment of monetary compensation.

3. When Scripture says, *As he hath maimed a man so shall it be rendered unto him* [Leviticus 24:20], it does not mean that the injurer himself is to be wounded in the manner he wounded the other, but only that the injurer deserves to be deprived of a limb or to be wounded to the same extent, and consequently that he need only pay for the injury he inflicted. Moreover, Scripture says, *Ye shall take no ransom for the life of a murderer* [Numbers 25:31], meaning that it is for the slayer alone that ransom may not be taken, but ransom may be taken for causing the loss of limbs or for inflicting wounds...

5. How then do we know that when Scripture says, concerning limbs, *An eye for an eye*, etc. [Exodus. 21:24], it means compensation? It says in the context, *Stripe for (tahat) stripe* [Exodus. 21:25], and also says explicitly, *And if a man smite another with a stone or with his fist... he shall only pay for the loss of his time and shall cause him to be thoroughly healed* [Exodus. 21:18-19]. We thus learn that the word *for* [tahat] in the case of a *stripe* signifies compensation. The same conclusion applies to *for* (tahat) in the case of the eye and the other limbs.

6. Although these rules appear plausible from the context of the Written Law, and were all made clear by Moses, our Teacher, from Mount Sinai, they have all come down to us as practical rules of law. For thus did our forebears see the law administered in the court of Joshua and in the court of Samuel, the Ramatite, and in every court ever set up from the time of Moses, our Teacher, until the present day.
From the above set of rules it is clear that monetary compensation is the only punishment that can be exacted for injuring someone’s limb.⁵ There is no hint anywhere in these halakhot that the court is permitted to enforce the scriptural provisions of a limb for a limb — even if it were feasible to do so equitably. The Halakhot’s only interpretive concession when dealing with the verse as he hath maimed a man so shall it be rendered unto him is that “the injurer deserves to be deprived of a limb or to be wounded to the same extent.” This, we should recall, was not the way M. understood the scriptural text. In GP he says: “A fine was imposed in the case of wounds in requital of which exactly similar wounds could not be inflicted: Only he shall pay for the loss of his time, and shall cause him to be thoroughly healed [Exodus 21:19].” In other words, monetary compensation was a last resort.

Note that in GP, M. refers to the exact same midrash that he cites almost verbatim in the Halakhot,⁶ except that in GP he allows that monetary

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⁵ di-Boton, Lehem Mishneh, ad loc., wonders why M. needs to adduce the special exegesis of halakhah 5 showing that tahat connotes monetary compensation in view of the fact that halakhah 3 infers from the verse Ye shall take no ransom for the life of a murderer that ransom can be taken for the loss of a limb. Di Boton concludes that the inference was not a sufficient warrant, for it would allow, under certain circumstances, the taking of a limb for the loss of a limb. Accordingly, M. wished to indicate unequivocally that this was not an option available to the courts. The exegesis of tahat did precisely that, by mandating monetary compensation exclusively.

⁶ The midrash can be found in Mekhila de-RaSHBY on Exodus 21:24. See Kasher, Torah Shelemah, paragraph 436. In his notes, Kasher faults Epstein/Melamed, editors of an updated Mekhila de-RaSHBY, for omitting a few lines from this midrash in their reconstruction of the Mekhila on the assumption that the author of the Midrash ha-Gadol, from which Hoffman reconstructed Mekhila de-RaSHBY, obtained these lines from the Halakhot. Kasher argues that M.’s language is far from being an exact parallel of the midrash and that therefore these lines appeared to be original to the midrash. It should be noted that di-Boton, Lehem Mishneh, had intuited that M. based his argument on a midrash that was no longer extant.
compensation is possible “in the case of wounds in requital of which exactly
similar wounds could not be inflicted.” That is, this reading upholds what he
had already asserted at the beginning of GP III:41, namely, that a principle
of the Law is that if one has injured someone’s body the same shall be done
to him. An “eye for an eye” should be rendered literally unless an exactly
similar wound could not be inflicted on the offender. That is where the text
and legal science differ. By unconditionally requiring compensation, the
latter did not preserve the intent of the law. M.’s statement in halakhah 6
that “although these rules appear plausible from the context of the Written
Law… they all have come down to us as practical rules of law” suggests, as
Levinger argued, that this interpretation is part of the dynamic process of the
law and was not so mandated from day one. Practical considerations were
what drove the courts to impose monetary compensation. As an aside, I can
find no rabbinic source for the surprising assertion that “For thus did our
forebears see the law administered in the court of Joshua and in the court of
Samuel, the Ramatite, and in every court ever set up from the time of Moses,
our Teacher, until the present day.” The statement appears to be fed by
polemical considerations. Note, too, that M. does not include the court of
Moses in the list of courts, an odd omission unless M. believed that, for a
time at least, the stipulations of the lex talionis were fully operative!

We are now in a position to understand M.’s impatience with the
pronouncements of the legal science. By insisting on compensation and
eliminating the possibility of lex talionis, the Sages, in M.’s view, subverted
— permissibly I might add — the original intent of the law. The teleology of
the law could be comprehended only if we attune ourselves to the text, since
the text makes clear that the principle to be observed in all cases is a limb for
a limb. While no compensation could ever take the place of capital punishment — in accordance with *Ye shall take no ransom for the life of a murderer* — some flexibility was allowed in non-capital cases. Nevertheless, and for all practical purposes, the verse *As he hath maimed a man so shall it be rendered unto him* [Leviticus 24:20] continued to reflect Scripture’s operating principle and original intent.

I should also note that while Levinger discussed what M. may have thought regarding Scripture’s original intent, he made no explicit reference to the manner by which M. might have captured it in general. M.’s assertion in GP that he is interested in the reasons behind the biblical text suggest that M.’s conception of Scripture’s original intent may be grounded in *peshateyh di-qra*, a form of plain reading that captures Scripture’s original intent at a point in time prior to the time that the Rabbis — or the Great Court of Law as M. would have it — applied their adaptive interpretation.

In what follows I hope to show an example of how M. uses *peshateyh di-qra* to discover Scripture’s original intent. The example is drawn from the *ShM*, and it relates to the command to build an altar.

Following Rule 12 — the successive stages in the performance of a commandment are not to be counted separately — M. designates the building of the Sanctuary as the commandment to be enumerated (P20), and ignores the making of the various components — the candlestick, the table, the altar and so on — even though their making was commanded separately. M. then says:

> It is true that He has said with regard to the altar [*mizbeah*], *an altar of earth thou shalt make unto Me* [Exodus 20:21], so that one might suppose this to be an independent commandment, apart from the
commandment to build the Temple; but the true state of the case is as I will explain to you. The sense of the verse [peshateyh di-qra, so too in the Arabic version] refers to the time when high places were permitted to us, and we were allowed to make an altar of earth in any place, and to offer sacrifices on it; and the Sages already declared that the purpose of the verse (inyan ha-dibbur) was to command us to build an altar attached to the earth, which was not to be movable as it had been in the desert. This was said by them in the Mekhila of Rabbi Ishmael, where the verse is thus interpreted: ‘When you enter the land you are going to make Me an altar attached to the ground.’ This being so, the commandment [about the building of the altar] is one which is binding for all time, relating to one of the parts of the Temple — that is to say that [Chavel adds here: the verse in its entirety means] the altar to be built must be of stone.

The Sages struggled with this verse as it contradicted the accepted halakhah that the altar of the Sanctuary was to be made of uncut stones [Deuteronomy 27:6]. To reconcile these disparate commands, the Rabbis of the school of Rabbi Ishmael recast the verse and made it read “an altar [attached to the] earth,” that is, an altar made of stone that, being attached to the ground, would not be movable. This corresponds to the halakhah regarding the altar of the Sanctuary. One should note, however, that the context of the verse does not easily support the rabbinic interpretation since, a little further on, the verse adds in every place where I cause My name to be mentioned I will come unto thee and bless thee. This freedom to sacrifice anywhere can hardly be squared with the requirement that all offerings were

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7 One might think so because it precedes the instructions to build the Sanctuary given at Exodus 25:8ff.
to be brought to a centralized Sanctuary [Deuteronomy 12:13-14]. It is therefore unlikely that the passage discussed details of the eventual Sanctuary.

M.’s absolutely original peshateyh di-qra’s reading solves the apparent paradox: the Exodus passage does not deal with the time of the eventual centralization of the cult but rather with an historical contingency, the period of the conquest and settlement of the land, when the Israelites were permitted to bring sacrifices on high places (bamot) anywhere throughout the Land. Note that, on this reading, the commandment to build an earthen altar is simply a temporary commandment. As such, it would not qualify as a TaRYaG commandment (Rule 3). At the same time, the rabbinic interpretation, that the altar be attached to the ground, becomes a mere detail of the eternal commandment to build the Sanctuary. As such, it too should not be enumerated (Rules 7 and 12).

In M.’s hermeneutics, peshateyh di-qra and rabbinic exegesis (divre sofrim) do not co-exist in a sort of unresolved tension, as they would in the hands of exegetes like Ibn Ezra and RaSHBaM. Instead, M. historicizes the passage and offers a perfectly reasonable solution: while the text of the Law is read-able, perfectly comprehensible and applicable at the very instant of Revelation, subsequent events will force the Rabbis to adapt the text of the law to fit the changing conditions. In our case, the changing condition — though one need not posit that it was unanticipated — was the centralization of the cult.

In an attempt to provide a rationale for M.’s momentous Rule 2, one might say in accordance with what has just been discussed that only those laws that are intimately connected with the original intent can be
enumerated. These laws represent the roots (Heb. *shoresh*, Ar. *usul*) of the Torah. *Divre sofrim* legislation, on the other hand, and this applies to analytic derivations as well as reinterpretations, cannot be so enumerated because it forms part of the evolving and adaptive nature of the law. As M. explains in Rule 2,

> Everything that is derived is to be considered as branches from the roots that were explicitly commanded to Moses at Sinai, and these constitute 613 commandments; even if Moses himself was the exegete, they still cannot be enumerated.

And then again, “Everything that was not heard explicitly on Sinai is considered *divre sofrim*.”
שָׁלוֹת חַשּׁוֹבָה

ורב"י

חַלְקָא אָוֹת הָיוֹم

סַלֵּמָא

שָׁלוֹת: מַטָּחֵי יְהוּדָה, מַטָּחֵי צְוָא מַטָּחַת מַטָּחַת יְהוּדָה,
(לָצֶאת עִלָּת) קָנֵי לֹא קָנֵי מַטָּחַת מַטָּחַת
שָׁלוֹת פָּרָשִׁית קָנְיוּ בְּקָנְיוּ.

חַשּׁוֹבָה: זוֹ הֲשִׂגְּרָה נְפָשָׁתָם לָכֶם וְnant הָכֶם.
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וְּהָנָּמַשָּׁתָם הָנָּמַשָּׁתָם לָכֶם וְnant הָכֶם.
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הָנָּמַשָּׁתָם לָכֶם וְnant הָכֶם.

בוֹזְנוֹ לָכֶם וְnant הָכֶם.

וְּהָנָּמַשָּׁתָם הָנָּמַשָּׁתָם לָכֶם וְnant הָכֶם.

 hvor 플 AsyncStorage 포함 된 메모리

פלוס 됨

 før 플 AsyncStorage 포함 된 메모리

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 someday, if you would
שאלה והשעורה

הבלוטת כרכור [פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"ה פ"he
שאלה ותשובות

למרות שהمحكمة פסקה [اسمו של השופט], ו新娘 ומנת חיה נאום נתקל במחנה, מחדד שלא מזוהה, או מת#: [כותרת]

ובכן, הוא, ז supérieur קשוח[כותרת], שהגיע מחוץ לתחום החשיבות, הוחלט לовать[כותרת].

ולכן, בדיקתי את ההצעה [כותרת], בה נאמר שה <!#s:100>เทพך<!#s:180> זה במגבלות התיק, אך אני מענה ל��이[כותרת].

ולכן, בדיקתי את ההצעה [כותרת], בה נאמר שה <!#s:100>เทพך<!#s:180> זה במגבלות התיק, אך אני מענה ל��이[כותרת].

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ולכן, בדיקתי את ההצעה [כותרת], בה נאמר שה <!#s:100>เทพך<!#s:180> זה במגבלות התיק, אך אני מענה לד[כותרת].
שאלה ותשובות

הלכות מים נא [.든י: מ. ציון, תשנ"ז] 456

הלכות מימים

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hallucinations
שלחנו ומשיבנו
לאחר שלוחנו, נשב ראשונות עם חכם בישופ, והقيامו. הקופים
חיים, והם מתчуבשים הם חכם בישופ, והقيامו. הקופים
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Two major objections have been raised against this commandment claim, but both can reasonably be dealt with. One objection argues that Scripture should be read as simply forbidding the consumption of meat unless it is slaughtered ritually - in essence, an inferred prohibition (*issur ´aseh* or *lav ha-ba mikhlaš ´aseh*). But, as we saw earlier, M. drew support from Sifre that compared non-sacrificial animals to consecrated offerings. Just as the latter must be slaughtered in a prescribed manner — and it is considered a positive commandment — so too must the former. The second objection is that ritual slaughter is merely a contingent command — that is, when and if one wants to eat meat he must first ritually slaughter the animal. Since the command does not obligate one to go around and ritually slaughter animals, it should not be counted as a positive commandment. This

1 So suggested by RaBaD in his glosses on the *SE* found in the introduction to the *MT*. RaBaD’s view was probably informed by *mHullin* 2:3, which rejects as unfit for consumption an animal that was slaughtered by a falling knife, even though it was slaughtered according to the proper ritual manner. The reason given is that Scripture requires human force, “for it is written *And thou shalt slaughter...and thou shalt eat* [Deuteronomy 12:21], that is to say, ‘that which thou dost slaughter mayest thou eat.’” The proof-text is used to invalidate a type of slaughter, not to prescribe slaughter.

2 Note that RaBaD saw the *SE* but not the *ShM*.

3 Commenting on RaBaD’s gloss, Karo, *Kesef Mishneh*, says: His [RaBaD] objection appears to me to be based on the fact that this is not an obligatory *mitsvah* (*mitsvah mehuyevet*), for if he wants not to eat meat or if he wants not to personally slaughter the animal, he is permitted to do so. Rather, it is an inferred prohibition, [meaning that] you ought to eat neither a
objection can be dismissed because we have already seen that for M.
positive commandments need not be of the unconditional obligation type. As
we saw earlier, M. incorporates contingent commandments and even
procedural commandments in his enumeration.4

In sum, ritual slaughter is either a contingent commandment or a
procedural commandment (“in the prescribed manner”). In either case, the
rabbinic warrant appears to be adequate.

P34

Despite the ambiguity of numerous scriptural sources as to who was
in charge of carrying the ark, M. insists that the responsibility lay
exclusively with the priests.5 He concedes that the commandment was given

living limb (*ever min ha-hai*) nor a dead carcass (*nevelah*), but
[you may] eat a slaughtered animal.

Karo’s restatement of RaBaD’s objection is problematic but this is not the place to
discuss it.

4 Asked why M. phrased this law as “we are commanded to ritually slaughter animals”
instead of less obligingly and more suitably “we are commanded concerning the law with
regard to ritual slaughter,” Yehoshua ha-Nagid, M.’s grandson, replied, in the first
instance, that M. wanted to include the slaughter of sacrifices, which, he says, is
obligatory. Secondly, he suggested that it was indeed a *mitsvat ‘aseh* type commandment
because it is impossible to eat animals without first slaughtering them ritually. In other
words, ha-Nagid saw contingent commands as being essentially of the *mitsvat ‘aseh* type
under certain conditions. Yehoshua ha-Nagid, *Teshuvot*, p.50. In the *Halakhot*, M.
justifies the *mitsvat ‘aseh* status by spelling out the contingency clearly: “It is a positive
commandment for someone who wants to eat the meat of a domesticated animal
(*behemah*), wild animal (*hayyah*) or fowl, to slaughter it and then he can eat it” (my
emphasis). See 6.3, below.

5 But see Nahmanides’ categorical rebuttal, in his critique to Rule 3. In Nahmanides’
opinion, both priests and Levites were fit to carry the ark. The exclusive assignment of
this task to priests is by all accounts forced and does not resist Nahmanides’ devastating
criticism. As we shall see in a later section, M. himself abandoned his claim in the
*Halakhot*, where no trace is found of this presumed priestly obligation. As an aside, I
to the Levites at the time of the Israelites’ sojourn in the wilderness, but “this was only because of the limited number of priests then available, for Aaron was its founder.” M.’s creative bit of historiography is not only original but necessary in order to sustain this commandment claim.

The exclusive responsibility of the priestly clan to carry the ark on their shoulders was a distinguishing mark of honour for them. M. nestled this commandment between the obligation on every Israelite to show honour to priests (P32) and the commandments that the priests “shall array themselves in garments of special splendor and beauty before they minister in the sanctuary” (P33), that their High Priests shall be anointed with the special oil of anointment (P35), and that the priests must serve in divisions (mishmarot). The exaltation of the priests was commanded, however, for another, higher cause. As M. explains in GP, the law aggrandized the rank of the priests, the sole servants of the Temple, to “fortify the belief in the greatness of the sanctuary and the awe felt for it, so that on seeing it, man should be affected by a sentiment of submission and servitude.”

P175

The Halakhot, too, extend this principle to apply to “laws of the prohibited and the permitted, impurity and purity [dine issur ve-heter, ve-tumah ve-taharah]” (Hilkhot Sanhedrin 8:1).

The talmudic and midrashic sources support the idea that a court must render a decision according to the majority opinion in all but capital cases, in

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should note that the scriptural references are often equivocal and may contain traces of an intra-tribal polemic.

6 GP III:45, 577 and 579.
which case a majority of one is required for acquittal and a majority of two is required for conviction. This last feature, and in general the overall construction of the verse that includes our proof-text, are not grounded in a grammatically rigorous reading of a verse (Exodus 23:2) that happens to be syntactically complex and difficult to understand. The loose, asmakhta-like, character of the exegesis was recognized by a classical parshan like Ibn Ezra and by M. in the Halakhot.8

P201

This commandment claim is a Maimonidean innovation based on the verse When thou comest into thy neighbor’s vineyard, then thou mayest eat grapes…when thou comest into thy neighbor’s standing corn, then thou mayest pluck ears with thy hand (Deuteronomy 23:25-6). Neither Qayyara nor any of M.’s other predecessors enumerated this injunction. As we shall see, there is good basis for this omission.

While it is undeniable that Scripture grants the laborer a right to the produce, it is also true that nowhere does it impose on the owner an obligation to offer this produce. This is how Duran puts it:

7 Ve-zeh ha-pasuq samuhu le-zecher, which roughly translates as “this verse acts as a mnemonic device” (short commentary on Exodus 23:2).

8 M. opens the paragraph that explains the unusual feature of the two types of majorities in capital cases with the expression mi-pi ha-shemu’ah lamdu, a fixed formula commonly used to indicate a tradition not rooted in the plain reading of the text. He ends that same discussion with the statement ve-khol elu ha-devarim qabbalah hem, which translates as “all these things are a tradition,” that is, they cannot be easily read into the text (Hilkhot Sanhedrin 8:1). Perla, in Sefer ha-Mitsvot le-RaSaG, vol. 1, pp. 653-5 argues that it is linguistically inconsistent for M. to maintain that the first part of the verse signals a negative commandment (N282) and the second part a positive commandment, and accuses him of holding on “to the two ends of a rope.”
This [commandment claim] is problematic as the text only speaks about the laborer and the fact that he is permitted [to eat from the produce] and [to tell us] that there is no concern with respect [to the prohibition of] stealing from the employer.⁹

Since no obligation is put on the owner, Duran argues, this verse can only be construed as a license and a right, but not a mitsvat ´aseh. On the other hand, to characterize this verse as a mitsvat ´aseh for M. should not present a major difficulty in view of the typological variety of commandments that he entertains in the ShM. Laborers’ rights are not much different than procedural commandment (dinim); they are certainly more of a ‘commandment’ than P87, which states that a beast exchanged for one that has been set aside as an offering becomes sacred, or than commandments P95-108, which are mere descriptions of impurities.

The heading to Hilkhut Sekhirut follows the tenor of the SE/ShM: “That the hired hand may eat of that at which he works from that attached to the ground.” A subtle shift in emphasis, however, occurs in the Halakhot, where we now find that the owner is ‘enjoined’ (mitsvah, though see section 9.4) to facilitate the laborer’s taking from the produce:

…behold, it is incumbent [mitsvah] upon the employer that he should allow them [the laborers] to eat from [the produce] with which they are working, as it says When thou comest into thy neighbor’s vineyard, etc. [Deuteronomy 23:25] and it says When thou comest into the standing corn of thy neighbor, etc. [Deuteronomy 23:26]. Tradition taught [mi-pi ha-shemu´ah lamdu] that the text speaks about a hired worker. For if he [the employer] did not hire him, who allowed him to come into his neighbor’s vineyard or

⁹ Duran, Zohar ha-Raqia, siman 72, p. 84.
into the standing corn without his approval? Therefore, this is what it says: if you come to the domain of the employer to work, you may eat! (*Hilkhot Sekhirut* 12:1)

The essential difference between the way that the commandment is characterized in the *SE/ShM* and the way it is characterized in the *Halakhot* is this: in the former compositions, Scripture is seen as merely granting the laborer a legal weapon, in the form of a right to consume from the produce while he is working. Scripture makes no demand on the owner, other than to obey the law. In the *Halakhot* version, Scripture keeps this right but, critically, it directs the owner to allow the laborer to eat from the produce of his work. It is a *mitsvah*\(^{10}\) to allow the laborer to take from the produce; he should not have to fight for this right. In this manner, Scripture seeks to mold the owner’s character. In the words of *GP*, “exceeding kindness is shown to the hired man because of his poverty…it is a matter of pity for him that he or even a beast must not be prevented from eating some of the food on which they work….”\(^{11}\)

P17

This innovative claim presents a number of serious exegetical difficulties.\(^{12}\) For one thing, M.’s first argument, namely, that the divine

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\(^{10}\) Here we would translate it as “it is proper”, “it is correct”, or even “it is a good deed”. For rabbinic use of this term, see section 2.1 and in particular 2.1.d. For the way M. uses it in the Halakhot, see section 9.4.

\(^{11}\) *GP* III:42 (569).

\(^{12}\) Some of the arguments below are summaries of Perla’s objections found in his discussion on Saadia’s *parshah* “To write my Torah on stones,” Perla, *Sefer ha-Mitsvot le-RaSaG*, vol. 3, *Parashiyyot*, #60, pp. 425-6.
order *Now therefore write ye this song for you* could be carried out only by writing the entire Torah scroll is built on the premise that there is a scriptural prohibition against writing only fragments of it: “it is not permissible to write [a Scroll of the Law containing only] certain sections [parashiyot] of it.” There is, however, no indication that this is the case. Rather than a scriptural prohibition, it is more likely to be a hoary tradition. Problems with this argument persist even if we grant that a scriptural prohibition exists against writing individual sections of the Torah. For example, M. rules in *Hilkhot Sefer Torah* 7:14 that one can write individual books of the Torah (*Humashim*). It follows therefore that writing the song of *ha-Azinu* need not have required writing an entire scroll of law as M. argued; it could simply have been written as an individual book. Perhaps even more critically, just as Scripture enjoins one to write individual sections for the making of what

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13 That no scriptural prohibition exists is true even according to the view that the Torah was transmitted whole (*hatumah nitnah*). This is all the more so for the view that the Torah was written scroll by scroll (*megillah megillah*), and where the rabbis ruled that one ought not to write them in sections “now, since it has been joined together it must remain so.” Here is the relevant passage (*b*Gitin 60a):

Abaye asked Rabbah: Is it permitted to write out a scroll [containing a passage] for a child to learn from? This is a problem alike for one who holds that the Torah was transmitted [to Moses] scroll by scroll, and for one who holds that the Torah was transmitted whole. It is a problem for one who holds that the Torah was transmitted scroll by scroll: since it was transmitted scroll by scroll, may we also write separate scrolls, or do we say that since it has all been joined together it must remain so? It is equally a problem for one who holds that the Torah was transmitted whole: since it was transmitted whole, is it improper to write [separate scrolls], or do we say that since we cannot dispense with this we do write them? — He replied: We do not write. What is the reason? — Because we do not write.

That is, no reason is given, it is just tradition.
is affixed to doorposts (mezuzot), phylacteries (tefillin) and the ordeal of the suspected adulteress (sotah), without the necessity of writing an entire scroll of the Torah, so too Scripture could have enjoined one to write the Song of ha-Azinu separately, without having to write an entire scroll of the Torah. Finally, the full passage (v.19) cited by M. reads Therefore, write down this Song and teach it to the people of Israel. Moses promptly did so, as it says (v.22), That day Moses wrote down this Song and taught it to the Israelites. Why does it say that Moses wrote down this Song — shouldn’t every Israelite have done so? Would Moses not have been obligated to write down the song by the fact that he was, like every one else, an Israelite? Hence, it appears that in writing down the song Moses acted as an agent for all the Israelites. The halakhic implication of this observation is that by writing one scroll of law, one person can exempt an entire community and there is no need for every individual to do so.

As to M.’s second argument, here too the evidence is not clear-cut. We have no way to know whether Rabbah is referring to a precept with scriptural force, since the term mitsvah is often used in conjunction with rabbinic statutes. Rabbah could just as well have been referring to a rabbinic ordinance; the use of a scriptural biblical proof-text would merely constitute an asmakhta.

The talmudic passage adduced by M. contains a further difficulty. Abaye queried Rabbah from a baraita stating that a king must write for himself a scroll of the Torah, implying that a commoner need not do so. Yet

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14 See Sofer, Moses, Sheelot u-Teshuvot Hatam Sofer (Pressburg: 1841-1862), Yoreh De’ah, siman 254.

15 Perla, in Sefer ha-Mitsvot le-RaSaG provides a few such examples: mBerakhot 45b, 47b, bShabbat 21b, 25a,b. See the commentaries of RaSHi and Tosafot, ad loc.
Abaye could have queried Rabbah by drawing the same inference from the biblical passage (Deuteronomy 17:18) that commands a king to write a Torah for himself, in which case the inference would have been that a commoner, by dint of a scriptural rule, need not write a scroll. It follows that Abaye understood Rabbah to be enunciating a rabbinic, not a scriptural, obligation.

Admittedly, the exposition is stretched. The verse describes the Levites as coming from any of the cities of all Israel simply because the Levites owned no territory and were scattered among all the tribes; there is no indication that they came to just one gate. Yet M. leans on this midrash to make the point that any priest can come to participate in the service of the sanctuary “when all Israel is assembled in one gate [i.e. in one city — Jerusalem] during the three festivals.” Be that as it may, one may conclude from this interpretation that the incoming Levites had a right to participate

16 The Sifre must have read “in one of your gates” not “from one of your gates.” This is confirmed by some of the Sifre MSS, which read be-ahad she-arekhah (using the preposition b, “in”) instead of the me-ahad she-‘arekhah of the masoretic text. See the apparatus in Sifra, ed. L. Finkelstein, 5 vols. (Jerusalem/New York: Jewish Theological Seminary, 1989-91), ad loc. See also Kahana, Menahem, "Qit’e Midreshe Halakhah min ha-Genizah," (Jerusalem: Hebrew University, 2005), p. 278, fragment 62, line 6. For a fascinating discussion of non-masoretic readings in the midrash halakhah that often illuminate interpretive cruces, see Kahana, Menahem, "The Biblical Text as Reflected in Ms Vatican 32 of the Sifre [Hebrew]," Mehqere Talmud, ed. Y. Sussman and D. Rosenthal, vol. 1 (1990).

17 See however previous note.
on an equal footing with their Jerusalemite brethren at the time of the festivals.¹⁸

Nahmanides does point out that M. presented a revised formulation in the MT and that “this formulation is more precise than what he presented here, in the essay [the ShM].” Indeed, the emphasis in the heading to Hilkhot Kele ha-Miqdash (“That all the divisions (mishmarot) be equal on the festivals”) and in the Halakhot is on the equal sharing of the service on festivals, or, more specifically, that all priests be allowed to share equally in the offerings of the festivals. In 4:3 of the Halakhot, M. provides a brief historical survey of the institution of mishmarot, their founders — the prophets from Moses down — their structure, number, and frequency of rotation. The implication of the Halakhot is that while the institution of mishmarot appears to be Mosaic in origin, it is not scripturally ordained. In 4:4, M. informs the reader that

> it is a positive commandment for the mishmarot to share equally [lit., be equal] on the festivals. Any of the priests who comes and wants to serve, can serve and share with them. He is not told, ‘go away until your turn comes,’ for it says And if a Levite comes from any of thy gates, etc. [Deuteronomy 18:6-8].

As already noted, M. in the Halakhot retracted somewhat from his principal and very original claim that the priests were ordered by Scripture to serve in the sanctuary in mishmarot. We cannot be sure what went through M.’s mind, but certainly the exegetical logic behind Nahmanides’ critique must have been sufficient grounds for such a re-appraisal.

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¹⁸ This right is hard to reconcile with the Halakhot’s statement that there is a positive commandment (that is, an unconditional obligation), as we shall see later, to share the sacrifices equally. Who is obligated? On whom does this responsibility devolve?
In the *Halakhot*, the positive commandment refers now to the right enjoyed by the out-of-town Levites to share the festival sacrifices with their Jerusalemite brethren. This is denoted by the words *like portions to eat*, which M. interprets as referring to the communal offerings. Votive offerings and the daily burnt offerings were allocated among the pre-established *mishmarot*, as alluded to by the balance of the verse: *They shall have like portions to eat, beside that which cometh of the sale of his patrimony* (4:5). There is no indication in this *halakhah* that this institution of *mishmarot* was mandated by Scripture; the verse simply reflects an old and established practice.

With the change in emphasis, as in P34, comes a change in purpose. The teleologically constructed *ShM* saw this commandment as another of the group of commandments that set aside and aggrandized the priestly clan, for the ultimate glorification of the sanctuary, by promoting the virtues of neatness, tidiness, and orderliness. In the latest version, the legislation merely attempts to prevent the monopolization of the service at the hands of any one clan, at least during the festivals when a great number of offerings were brought to the Temple.

P37

In the *Halakhot*, M. takes a novel exegetical approach and adduces a new proof-text:

It is a positive commandment to mourn for relatives, as it says *Had I eaten Sin Offering today, would the Lord have approved* [Leviticus 10:19]. Mourning is scripturally ordered only on the first day, which is the day of death and the day of burial….
The proof-text describes part of an exchange that occurred between Moses and his brother and High Priest Aaron. The subject of the exchange is a goat of sin offering, the remains of which had been burned instead of eaten by Aaron’s sons. Moses is furious that his instructions have been disobeyed; Aaron defends their action. The talmudic reconstruction (bZevahim 101a) of the dialogue is of no concern here, except for the last, and winning argument: Aaron explains that his sons thought that they should not eat of the sacrifice because they were in mourning for their two brothers who had died that day. And when Moses heard this, he approved (Leviticus 10:20). Yet even this passage can hardly qualify as a command. At best, the verse presupposes the existence of such a commandment.19

A little later on, however, M. returns to the defilement-mourning connection and says:

[See] how grave [hamurah] is the duty of mourning [mitsvat avelut]!20 For [the laws of] defilement were set aside [nidhit] for the priest on account of his relatives so that he can care after their needs and so that he can mourn after them, as it says except for the relatives closest to him: his mother, his father...for her he may defile himself [Leviticus 21:2-3]. It is a positive commandment that he is compelled to defile himself if

19 Of course, Aaron may be pointing out that his sons could not bring themselves to offer the sacrifice, not because they were fulfilling a commandment to mourn but simply because of their grief. Alternatively, as RaDBaZ notes, the incident may only indicate that sanctified food (qodshim) cannot be consumed on the day one’s relatives die. RaDBaZ, Sheelot u-Teshuvot ha-RaDBaZ, vol. 5, #1495 (121).

20 This rare expression, mitsvat avelut, is actually found only once in rabbinic literature, Midrash Zuta al Shir ha-Shirim, Ruth, Eichah, ve-Qohelet. Yalqut Shimoni al Echah, ed. S. Buber (Berlin: 1894), parshah 7, s.v. (b) tov lalekhet, and then only as mitsvat avel. It is therefore unlikely that M. used this rare expression found in rabbinic sources to substantiate the existence of a positive commandment.
he does not want to do so (my emphasis). (Hilkhot Avel 2:6)

From Hilkhot Avel 1:1 and 2:6 it would appear that there are now two positive commandments, one to mourn for relatives and one that sees to it that priests defile themselves for relatives. While M. no longer considers the latter a direct source for the former, he retains the connection. He acknowledges that the laws of defilement are set aside for the priest whose relative has died so that he can look after the needs of the deceased — primarily, one supposes, burial. Yet he insists that the motivation for the commandment is also “so that he can mourn for them.” It is as if M. makes up for the lack of an explicit command by offering two speculative allusions, a narrative that supposes such a duty and a commandment that is partly motivated by such a duty.  

If in fact there was a scriptural commandment to mourn, one that tradition appears to have preserved, it can only be inferred from the various texts.

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21 RaDBaZ wonders why M. does not enumerate the positive commandment to compel a priest to defile himself. First he suggests that “he [M.] did not mean a scriptural positive commandment (mitsvat ‘aseh de-oraita) but, rather, a rabbinic positive commandment.” Positive commandments of rabbinic authority, however, were generally qualified as such; see for example the headings to Hilkhot Megillah ve-Hanukkah and Hilkhot Nahalah 11:10. On a separate occasion, RaDBaZ suggests that M. was describing one and the same positive commandment in line with what he explicated in the ShM. He argued, in effect, that the priest’s obligation to suffer defilement and the obligation to mourn were identical. See his comments on MT ad loc. See also his Responsa, RaDBaZ, Sheelot u-Teshuvot ha-RaDBaZ, vol. 5, #1495 (121).
GP omits this commandment entirely. Hartman points out,\(^\text{22}\) correctly I believe in light of the foregoing, that “the lack of any explicit biblical text dealing with the commandment of mourning may very well explain why M. in the context of GP does not mention the laws of mourning.” I shall argue in chapter 7 that the Halakhot, too, follow similar textual considerations, encapsulated in a peshateh di-qra hermeneutic. Yet the Halakhot, in contrast GP, do designate mourning as a positive commandment. Why the difference?

In an attempt to break out of this impasse I offer two approaches. In the first, I argue that at the time he wrote the Halakhot, M. was still of the opinion that the talmudic warrant was sufficient evidence of the scriptural status of mourning, despite the fact that no explicit reference to this commandment could be found in Scripture. Moreover, he may have been persuaded that the norm that required the priest to defile himself for the benefit of the dead relative revealed a deep and implicit scriptural concern for the dead and/or the mourner. The inference to a full-fledged commandment to mourn the dead would follow the spirit of an interpretive rule first enunciated in the ShM, namely, that, “if the Sages themselves clearly affirm that ‘it is of the essence of Torah’ or that ‘it is of scriptural authority,’ it is proper to count that particular law [among the commandments]”\(^\text{23}\) even if no explicit basis can be found in the text. By the


\(^{23}\) Rule 2. In a celebrated responsum, M. stated that there were no more than “three or four” such exceptions. Responsa, Blau, #355, Volume 2, pp. 631-632. Feintuch, Sefer ha-Mitsvot im Perush Pequde Yesharim, vol. 1, pp. 43-45 attempts to identify these exceptions, but concludes that M. did not intend to fix a definite number but rather to
time he wrote $GP$, however, M. no longer viewed the talmudic sugyah as evincing what had earlier been taken for granted, namely, that mourning was a scriptural obligation.\textsuperscript{24} Thus, he no longer had to deal with this commandment.\textsuperscript{25} In the alternative, I argue that M. was willing to be

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indicate that the number of exceptions is very small. The present suggestion assumes that mourning was one of those exceptions.
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\textsuperscript{24} It should be noted that not all medieval jurists believed that the Talmud supposed a scriptural positive commandment as Alfasi maintained. See, for example, Tosafot s.v. ‘\textit{aseh de-yahid} (cited by Karo, \textit{Kesef Mishneh}), and the early medieval jurists (\textit{rishonim}) cited in note 31 of the Entsiklopedyah Talmudit, s.v. \textit{avelut}, that the obligation to mourn, even on the first day, is rabbinic. There is some indication that M.’s agreement with Alfasi’s rulings was not as automatic as it may at first appear. In the Introduction to \textit{PhM}, M. writes that he was hard put to find as many as 10 errors in Alfasi’s \textit{Halakhot}. Yet, in a letter that he writes to a certain judge, Nehorai b. Hillel, M. indicates that he disagreed with the master as many as “30 or more” times. Either his recollections were hazy or, in the course of time, M. took a more independent course. See Blau, \textit{Teshuvot}, #251, vol. 2, p. 459, and note 7. In fact, M. disagrees with Alfasi in many more than 30 places. For a partial list and some bibliographical references, see Twersky, \textit{Introduction to the Code of Maimonides}, p. 169, n. 205. Could the scriptural status of mourning have been one the matters in which he eventually disagreed with the halakhic master?

\textsuperscript{25} In a stimulating article, Lawrence Kaplan counters that he found “the ‘missing’ cross-reference to the Laws of Mourning of the Mishneh Torah” in a section of the \textit{Guide} dealing with “the commandments concerned with the clean and unclean,” namely $GP$ III:47. In this passage, M. notes that
every priest in particular was forbidden to expose himself to being made unclean by a corpse unless it were a case of strong necessity in which it would be difficult for nature to avoid this; I refer to avoiding contact with one’s parents, children and brothers.

Kaplan notes:
The rites of mourning, on the biblical level, are not self-directed and commanded for the therapeutic benefit of the mourner, but rather are other-directed, and like the obligation incumbent upon the priest to defile himself for his deceased relatives, are rites performed on behalf of those relatives.

They are, he says, “forms of personal \textit{kevod ha-met}, of honoring one’s deceased relatives” (406). In other words, according to Kaplan, M. redefined the scriptural concept of mourning in the Guide and ceased seeking a scriptural reference for the traditional
hermeneutically accommodative to the talmudic evidence because of the normative character of the Code, particularly since the practice was widely accepted and deeply ingrained in the religious community. The hermeneutic stresses that we noted give testimony to the extent of this accommodation. Ultimately, no longer concerned with normative behavior, GP abandoned the attempt.

In the Halakhot, M. abandons the previously assumed telos, namely, that the various requirements, jointly, have for an objective making the leper recognizable as such. The halakhah is a simple list of specific tasks:

It is a positive commandment that the head of a confirmed leper be covered all the days of his certified impurity [haluto], that he covers his upper lip like a mourner, rends his clothes and informs passers-by that he is impure as it says…. Even a High Priest that acquires leprosy lets his hair loose and rends his clothes because a positive commandment overrides a negative commandment [aseh doheh lo ta’aseh] (Hilkhot Tumat Tsara´at 10:6.)

Nowhere does M. say that if the leper fails to carry out one of these actions, he “has accomplished nothing; his being distinguishable is.

concept of mourning. As attractive as this argument is, the passage at III:47 hardly points to a qualitatively different, so-called other-directed obligation to mourn; the words “unless it were a case of strong necessity in which it would be difficult for nature to avoid this” seem to imply, instead, some sort of unavoidable need to waive the laws of defilement. Kaplan, ”The Unity of Maimonides’ Thought”
not achieved until he has done all [the things mentioned],” as he had affirmed in the Rules.  

In halakhah 8, M. extends to all impure persons the requirement of identifying themselves and their impurities, a point that he already made in the ShM: “Not only the lepers but all those who defile people must inform everyone that they are unclean so that people keep away from them, as it says, and shall cry ‘unclean, unclean’ - the leper informs that he is unclean.”

It is not unreasonable to believe that the classificatory aim of the ShM forced M. to think teleologically. Much of this was understandably abandoned in the Halakhot given its purely practical orientation.

Despite the earlier noted difficulties, M. adopts the new exegesis in the Halakhot. He opens Hilkhot Maakhalot Asurot thus:

It is a positive commandment to search the tokens with which one sets apart those beasts, living creatures, birds, fish and grasshoppers that are permissible to eat from those that are not permissible to eat, as it says: Ye shall therefore separate [ve-hivdaltem] between the clean beast and the unclean and between the unclean fowl and the clean [Leviticus 20:25].

---

26 The alternative view is that the actions to be undertaken by the leper bear no relation to each other; some of the mandated actions may be designed simply to force the leper to feel and act like a mourner, others may be designed to keep people away, and so on.

27 Here, too, as in the ShM there are a number of variant readings, two of which parallel those of the ShM. These are, “to search” (livdq) and “[they] are the tokens” (hen ha-simanim). A third variant, found in Shem Tov ha-Sefardi’s Migdal Oz, Hai-Raqah, Masud, Ma’aseh Roqelah (Venice: Meir Da Zarah, Nella Stamparia Vendramina,
On noting the new exegesis and its departure from the ShM, a classic commentator of the Halakhot offers to reconcile matters but admits that he does so with “great difficulty”\textsuperscript{28}

The exegetical transformation is completed in the second chapter of Hilkhōt Maakhālot Aṣurot, where M. discusses the various prohibitions broken by one who eats non-kosher animals. In 2:1, M. stipulates that one who eats the meat of a prohibited animal has made two transgressions, of an explicit prohibition and of an inferred prohibition, calling the latter by its technical term, a “do” (\textit{aseh}) that is inferred from \textit{that ye may eat}, in line with the principle that an inferred prohibition from a positive statement is considered an \textit{´aseh}. Again in 2:4, M. lists the transgressions of one who eats a non-kosher bird or fish, first the explicit negative commandment and then the “do” (\textit{aseh}), that is, a prohibition that is inferred from a positive statement.\textsuperscript{29} In essence, the Halakhot do no more than to reconfirm the

\textsuperscript{28} \textit{Lehem Mishneh, halakhah} 2, s.v. \textit{ve-nirah le-yashev zeh be-doheq. Lehem Mishneh} seems to have been unaware of, or unwilling to give weight to, the subtle shift adumbrated in P152.

\textsuperscript{29} The summarizing statement at the end of halakhah 4 is problematic. M. states: “Here then you have learned that anyone who eats an unclean fish, or unclean cattle or an animal or an unclean bird, abrogates (\textit{bitel}) a positive commandment and transgresses (\textit{avar}) a negative commandment.” If M. was referring to the “do” prohibitions that he had just listed at the beginning of the halakhah, he should have used the expression “transgress” (\textit{avar}) rather than “abrogate” (\textit{bitel}), since the latter term is only applicable
innovative and original claim made in the *ShM*, this time free from the need to find a suitable rabbinic warrant and totally unburdened by the need to enumerate four independent commandments.\textsuperscript{30}

P172

It is extremely rare for a positive commandment to attract punishment in case of transgression.\textsuperscript{31} On the other hand, this is not the run-of-the-mill positive commandment; that is, there is no obligation, strictly speaking, to find a prophet so that one can obey him. Rather, the words *unto him ye shall hearken* should be read as inferring a prohibition: you must not disobey him and if you do you are liable to the punishment of death at the hand of Heaven.\textsuperscript{32} It is for this reason that the *Halakhot* do not designate this injunction a positive commandment.\textsuperscript{33}

\textsuperscript{30} With regard to this last point see section 6.4.

\textsuperscript{31} The exceptions are circumcision and the obligation to sacrifice the Passover lamb, both punishable by excision (*karet*), and the requirement for priests to wash their hands before commencing services, punishable by death at the hand of Heaven.

\textsuperscript{32} This is, in fact, the way M. describes this commandment in *Hilkhot Sanhedrin* 19:3.

\textsuperscript{33} See our discussion in 6.1.1.
The Halakhot omits the public appeal to wage war found in the ShM, which states that the commandment is “to speak of this [i.e., ‘Amaleq’s despicable acts] at all times, and to arouse the individual members of the nation [ha-nefashot] to make war upon him and bid the nation [ha-am] to hate them.” Instead, it is satisfied with merely stating that

It is a positive commandment always to bear in mind his evil deeds and the waylaying [he resorted to], so that we keep fresh the memory of the hatred manifested by him, 34 as it is said: Remember what ‘Amaleq did unto thee (Hilkhot Melakhim 5:5).

Be that as it may, the independent character of the commandment is preserved: Remember is not connected with the commandment to destroy ‘Amaleq, nor is it a declaration that formally precedes their annihilation.

34 The Hebrew kede le-orer evato is ambiguous; it could also mean “to stir [in us] or to keep fresh the memory of [our] hatred for him.” I have followed A. M. Hershman’s translation, with slight changes. If this reading is correct, its implications are significant: In the Halakhot, M. would be rejecting the idea that one must harbor hatred in one’s heart, in line, I would suggest, with the ethical conclusions arrived at in Hilkhot De’ot, hatred being an extreme character disposition. Instead, the commandment turns into a duty to remember ´Amaleq’s hatred towards oneself. The Code of Maimonides: Book 14, the Book of Judges, trans. Abraham M. Hershman, vol. 14, 14 vols. (New Haven: Yale University Press, 1949).
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Index of Texts from the Works of Maimonides

Wherever citations are discussed throughout a page, sometimes including notes, I have indicated only the page number for the discussion; specific citations appearing only in footnotes are noted.

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**SE - “Short Enumeration of the Commandments” (minyan haqatsar)**


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