

Two Concepts of *Gezerat ha-Katuv*: A Chapter in Maimonides's Legal and Halakhic Thought, Part I

Yair Lorberbaum*

I. Introduction; II. *Gezerat ha-Katuv*: The Theological Sense 1. Two Versions of the Theological Sense 2. *Gezerat ha-Katuv* and the Socio-Historical Study of Law 3. *Gezeret ha-Katuv* and Legal Minutiae; **III. *Gezerat ha-Katuv*: The Jurisprudential Sense** 1. *Gezerat ha-Katuv* and *Gezerat Melekh* (Royal Decree) 2. Secondary Meanings; **IV. Maimonides on the Theological Sense of *Gezerat ha-Katuv*** 1. *Gezerat ha-Katuv*, God-as-Will, and the Rationales for the Commandments 2. *Gezerat ha-Katuv*, the Naturalistic Understanding of Prophecy, and the Socio-Historical Method in the *Guide of the Perplexed*; **V. Maimonides on the Jurisprudential Sense of *Gezerat ha-Katuv*** 1. On the Term *Gezera* (Decree) 2. "These are Things that Have a Reason (*Devarim Shel Ta'am Hem*) and are Not *Gezerat ha-Katuv*" 3. *Gezerat ha-Katuv*, Judicial Discretion, and Legal Formalism.

I. Introduction

Gezerat ha-katuv ("Scriptural decree") is a key concept in the halakhic tradition. This is so, not because its occurrence in halakhic literature is particularly

* The author wishes to acknowledge the Tikvah Center for Law and Jewish Civilization at New York University Law School, and its directors, Prof. J. H. H. Weiler and Prof. M. Halbertal, whose hospitality and support enabled the writing of this study.

widespread – its appearance in talmudic literature and in Maimonidean writings is in fact relatively limited – but because of the theological and halakhic significance associated with it. Indeed, *gezerat ha-katuv* constitutes a kind of crux, at which basic philosophical and jurisprudential concepts and issues encounter one another. Hence, examination of its meaning and purpose may well reveal the underlying patterns of theological thinking and legal philosophy underlying the halakha. Moreover, the changes in meaning of this term in halakhic works during various periods may be indicative of the changes which took place in the deep structures of halakhic discourse throughout the generations.

The central goal of the present study is to analyze the meaning and manner of functioning of the term *gezerat ha-katuv* in Maimonides's *Mishneh Torah*. The discussion of its occurrences in the Code will be presented against the background of its meaning and purpose in talmudic literature, on the one hand, and in light of the manner in which it was understood both by Maimonides's commentators and by other halakhists, on the other.

Underlying the interpretation to be proposed below is a distinction between two basic senses of *gezerat ha-katuv*. The first will be referred to as the theological meaning, the second as the jurisprudential and/or halakhic sense. In its theological sense, *gezerat ha-katuv* indicates a mitzvah or halakha for which there is no rationale or whose rationale is unknown. I refer to this sense as “theological” because it is rooted in the view that the source of those commandments that are understood as *gezerat ha-katuv* lies in the absolute free will of the Divine or in His transcendent wisdom. The jurisprudential or halakhic meaning of the term is rooted in the basic lexical or philological meaning of the term, i.e., the commanding and coercive power of “Scripture” (*ha-katuv*). In the jurisprudential sense, there is no obstacle to *gezerat ha-katuv* having a rationale; typically, in fact, it has a reason and purpose. The characterization of a given commandment (or halakha) as *gezerat ha-katuv* in this sense is independent of its rationale. Rather, it is concerned with stating that the mitzvah is imperative, an unconditional commandment of God that is rooted in His authority and power to impose obligations and prohibitions.

As has been alluded to above, there are various versions of *gezerat ha-katuv* in the theological sense, based upon different theological outlooks, while *gezerat ha-katuv* in the jurisprudential sense has a number of secondary meanings rooted in different expressions of the concept of authority. Unlike the basic jurisprudential meaning of *gezerat ha-katuv*, which applies to all the commandments, or at least to most of them, its secondary meanings, as shall

be made clear throughout the length of this study, may be unique to certain specific commandments or halakhot.

In Section I of this study, I will describe these two senses of *gezerat ha-katuv*, in their various versions and the secondary meanings derived therefrom. Within this framework I will discuss conceptual, theological, political, jurisprudential, and hermeneutical questions raised by the term, in both of its senses. The conceptual-theological and jurisprudential-halakhic discussion of these senses will be presented in two contexts. The first context will be general and abstract, while the second one will be Maimonidean.

In Section II below, I will distinguish between two versions of the theological meaning of *gezerat ha-katuv*: that of God's hidden wisdom, according to which the rationales for the commandments, or at least a portion of them, are beyond the powers of human comprehension; and that of God as a pure and absolute free will, according to which the commandments are without any rationale whatsoever. Further on in this Part, I will distinguish between the assumptions underlying the theological meaning of *gezerat ha-katuv*, in both its versions, and the assumptions that guide critical-historical scholarship of legal corpora and systems, according to which *gezerat ha-katuv*-without-a-reason is inexplicable. In the final part of Section II, I will distinguish between laws lacking in rationale for theological reasons, and laws without rationale for other reasons, such as "arbitrary" details of the law which were fixed in a particular way but could have been fixed differently; and between "laws lacking in rationale" and those laws whose "reasons" are irrational.

In Section III, I will present a general conceptual discussion of the jurisprudential sense of *gezerat ha-katuv*. I will begin with its relation to the term *gezerat melekh*, "royal decree," which is widespread in halakhic literature, and the differences between them. Further on, I will present the secondary meanings of *gezerat ha-katuv* in the jurisprudential sense, and explain that it is possible for them to apply to certain halakhot, but not necessarily to all of them.

In Section IV, I will describe the Maimonidean analysis of *gezerat ha-katuv* in the theological sense. In *Guide of the Perplexed*, Maimonides suggests a unique and elaborated version of this sense, rooted in the view that the essence of the divine is absolute free will, from which are derived all of his actions. God's will is free of any exigencies, including those of the intellect, and therefore the commandments have no rationale whatsoever. This view, whose source is found in the Muslim Kalaam and was adopted by "men of speculation among the adherents of the Law," is one of the foci of the discussion of rationales of the commandments in the *Guide*. Maimonides describes it only to

reject it contemptuously. The view that the commandments are “Scriptural decrees without any purpose” reflects, in his opinion, intellectual frailty, and is even a symptom of “mental illness.” The essence of God, according to Maimonides, is intellect, from which there also derive the commandments, and they all have reason and purpose.

Further on in Section IV, I shall note the relationship between Maimonides’s assertion that the commandments are “drawn after wisdom” and his naturalistic view of prophecy as an intellectual abundance that flows from the Active Intellect to the prophet-philosopher, who is the perfect legislator. In the end of this Section, I shall draw a connection between these two views and the socio-historical method which he utilizes in the *Guide* to explain the commandments. This is the Maimonidean version of the subjects which were discussed in a more general way at the end of Section II.

In Section V, I will propose a preliminary conceptual discussion of the jurisprudential-halakhic meaning attributed by Maimonides to *gezerat ha-katuv*. I will begin by presenting his words regarding the term *gezerat* – “decree.” Thereafter, I will analyze one occurrence of the term *gezerat ha-katuv* in the *Mishneh Torah*, *Hil. Ishut* 22:2. In this halakha Maimonides juxtaposes *gezerat ha-katuv* with the words: “things that have a reason” (*devarim shel ta’am*), a connection for which I will suggest a jurisprudential conceptualization. In certain respects, this example is unique in the Code. However, as we shall see, precisely because of its exceptional character, it serves as a kind of prototype for the jurisprudential sense of *gezerat ha-katuv* throughout the work as a whole.

The conceptual and jurisprudential discussions of *gezerat ha-katuv*, in both its contexts – the general one in Sections II-III and the Maimonidean in Sections IV-V – stand on their own. Nevertheless, they are intended to lay the groundwork for the exegesis of its occurrences in the *Mishneh Torah*, and philosophical, jurisprudential, and historical arguments which I will attempt to derive from them. These examples will be discussed in Part II of this study.¹

* * *

¹ Part II of this study (hereafter: ‘Part II’) will appear in the 2012 volume of *Diné Israel*. Both parts of this study are early versions of a forthcoming (Hebrew) book on the same topic (hereafter: my forthcoming book). Some of the discussions in the footnotes have been omitted in this version of the study.

To the best of my knowledge, the distinction between these two senses of *gezerat ha-katuv* has escaped the attention of interpreters. Among both halakhists and academic-critical scholars, the term *gezerat ha-katuv* has been understood according to its theological sense alone.² Hence, they have suggested a series of convoluted and forced interpretations to explain its appearances in the Talmud, and particularly in the *Mishneh Torah*.

Furthermore, the view that the term *gezerat ha-katuv* always refers to a halakha for which there is no (known) reason is not merely an exegetical error. The fixation with the theological sense of *gezerat ha-katuv*, and the unawareness of its jurisprudential-halakhic sense, coincided with the rise of an “irrational” element in halakhic discourse. The strengthening of this element is already recognizable from the generations following Maimonides, and particularly in recent generations. In Part II of this study I shall demonstrate that this tendency emerged, or was at least reinforced, under the influence of Maimonides because of his complex jurisprudential-political approach and because of his esoteric technique of writing, even in the *Mishneh Torah*.

II. *Gezerat ha-Katuv* – The Theological Sense

The term *gezerat ha-katuv*, or “Scriptural decree,” has two distinct senses – theological and jurisprudential-political – each one of which, in turn, divides into several secondary meanings. According to this sense, the phrase *gezerat ha-katuv* relates to a commandment of the Torah or a halakha whose reason is not known. One version of the theological sense is that a given commandment (hereafter also: mitzvah) is considered a *gezerat ha-katuv* when it has no rationale and is without purpose. According to another version, a commandment labeled as a *gezerat ha-katuv* has a reason or rationale, but that reason or rationale is not known (and cannot be known) to human beings.

1. Two Versions of the Theological Sense

The first version of the theological sense of *gezerat ha-katuv* is rooted in a kind of Kallamic theology, according to which the essence of God, the Creator and Lawgiver, is absolute will. This will is free of all constraints, including the constraints of reason. Thus, the source of all of God’s actions, including His

2 For the studies that discuss the concept of *gezerat ha-katuv* in *Mishneh Torah* (and to some extent in talmudic literature), see nn. 24 and 25 below.

commands to human beings, is not wisdom, but rather His absolutely free will (hereafter: the version of “God-as-will”). This theology is presented, from a critical perspective, in part III of the *Guide of the Perplexed*, within the framework of the introductory, theoretical-conceptual chapters to the discussion of the rationales for the commandments (to be discussed below).

According to the second version of the theological sense of *gezerat ha-katuv*, wisdom is the essence of God, and from it all of His acts derive. In Aristotelian terms, one might say that all of His actions, including His commandments to human beings, are done for the sake of a purpose. However, as God’s perfect wisdom is beyond human apprehension, human beings are unable to truly understand God’s actions, including the reasons for His commands. All that a human being can do is to obey blindly and to rely upon God that His commandments will achieve their hidden purpose (hereafter: the Hidden Wisdom version).³

According to the first version, that of God-as-will, all the commandments are, as mentioned, *gezerat ha-katuv*. According to this view, the rationality which we attribute to many of the *commandments* – like the rationality (i.e., regularity) which we identify within nature – is nothing but an illusion. As against that, according to the second version, that of “Hidden Wisdom,” it is possible that it is only the rationale for certain specific mitzvot or halakhot that cannot be apprehended, and these alone are beyond the limits of human understanding, whereas the reason for other commandments or halakhot are known. In the wake of R. Sa’adya Gaon, commandments of the first type are referred to as *shim’iyot* [lit., “heard”: i.e., traditional or received by hearing through revelation], while those of the second type are *sikhliyot* [i.e., “intellective” or apprehended by the human intellect or reason]. According to the Hidden Wisdom version, one may also distinguish between a halakhic institution whose reason is coherent, such as the law of the rebellious son, and a particular detail thereof which is beyond our understanding, such as the rule that this law applies only to a son and not to a daughter.⁴

3 For philosophical distinctions between these two versions, see Josef Stern, “The Idea of a *Hoq* in Maimonides’ Explanation of the Law,” in *Maimonides and Philosophy: Papers Presented at the Sixth Jerusalem Philosophical Encounter, May, 1985*, ed. Shlomo Pines and Yirmiyahu Yovel (Dordrecht: M. Nijhoff Publishers, 1986), 92-130.

4 This example is discussed in Part II (*Mishneh Torah*) and in my forthcoming book (Talmud).

The Hidden Wisdom version of the theological sense of *gezerat ha-katuv* can also lead to the opposite tendency, according to which the reasons attributed to the commandments, including the “intellective” ones, are not the entire story: there are additional, underlying reasons, deep and hidden, which cannot be known to us. This holds true, not only for the “religious” commandments relating to the relations between man and his God, such as the laws of Shabbat, sacrifices, purity and impurity, and the like, but also to “legal” or “juridical” commandments governing the relations between men, such as the laws of murder, theft, transactions, and the rules of legal documents. The quest to discover the rationales for the commandments is thus performed with the constant awareness that their known reasons are merely the “tip of the iceberg,” and that what we apprehend of them is only “in accordance with human capability.” This line of thought in relation to the commandments is an almost inevitable consequence of the concept of God as a sublime and transcendent Being, before Whom – and before Whose commandments – man is seen as having only partial apprehension (if any at all).⁵

In the coming section, I will suggest a number of distinctions that will assist in explicating more precisely the theological sense of *gezerat ha-katuv* in its various versions, which will in turn serve to elucidate the discussion that follows.

2. *Gezerat ha-Katuv* and the Socio-Historical Study of Law

It would seem that those laws that are perceived as *gezerat ha-katuv* in the theological sense of God-as-will are unique to religious systems of law; these adopt, with various levels of theological sophistication, a more moderate or radical version of Kalaam theology. This theology is rooted in a law whose source is in revelation, and the God who reveals Himself therein is, as mentioned, the embodiment of pure will. In the Jewish tradition, this view is sometimes formulated in a “thin” version, namely, that the fulfillment of the commandments is “obedience to the will of God.” This line of thought, according to which legal rules and legal institutions have no reason or purpose,

5 This version of *gezerat ha-katuv*, and this attitude to the rationales for the commandments generally, is very widespread in the halakhic literature and, as we shall see in my forthcoming book, this has dramatic implications for several halakhic thinkers. At the same time, there are those who express this outlook in relation to the commandments merely in order to exalt them in the eyes of their readers, as a mostly rhetorical move. Thus, for example, see Maimonides, *Guide* III.49 (Pines, 605).

does not typically develop in secular legal systems. Such systems are based upon the assumption that all law is the work of human hands, and, as Aristotle has taught: “Man is he who speaks and does that which leads to some purpose, be it good or bad, rational or irrational.”⁶ An act that is completely arbitrary (i.e., the fruit of pure will) is opposed to human nature. This is the case regarding recent acts of legislation, and so too in relation to laws from ancient times.

In a secular legal system it will also be difficult to find laws that are *gezerat ha-katuv* in the sense of the “Hidden Wisdom” approach, as human beings acting within such a framework do not generally attribute to the human legislator sublime wisdom beyond understanding. Nevertheless, it is possible that a secular system of law might develop a quasi-religious attitude toward the “wisdom of the ancients” or the “insight of the founding fathers,” which later generations are supposedly unable to comprehend.⁷

Similarly, the theoretical-critical (“scientific”) approach taken in various research disciplines rejects outright the possibility that laws are created in totally arbitrary fashion or as the result of transcendent wisdom. The historian, the sociologist, and the anthropologist who study the laws of societies, both ancient and modern, assume that the objects of their study are human creations and, as such, were created with some particular purpose which is not beyond the ken of their understanding. It is superfluous to add that these disciplines reject theologies of revelation as an adequate explanation for the creation or formation of legal norms and bodies of law. The critical researcher assumes that even those laws of religion, whose source is attributed by its believers to God, are in fact a human creation. The same applies regarding situations in which the scholar-historian finds it difficult to find reasons for the given law being studied. But one must not confuse research difficulties stemming from lack of information, background, methodological tools, and the like with “explanations” of the type of *gezerat ha-katuv* in the theological sense. “Scriptural decree” is not a reason or explanation for the behavior of human beings. From the critical-scientific viewpoint it is seen as an explanation *post factum*, a kind of *deus ex machina* almost in the literal sense.

6 The formulation of Maimonides in *Guide* III.31 (following Aristotle).

7 At times it seems that such an attitude, based upon a secular, or quasi-religious version of the “decline of the generations,” is widespread among certain circles toward the founding fathers of the American Constitution or toward its founding moment. See Paul W. Kahn, “Political Time: Sovereignty and the Transtemporal Community,” *Cardozo Law Review* 28 (2006): 259-76, at 270-71.

For our purposes, it is important to draw an additional distinction (one already alluded to earlier) between laws lacking any explanation or purpose and those laws whose reasons, in the eyes of the scholar examining them, are bad or irrational. The reasons for the law may be rooted in myths. However, these laws are never created in an arbitrary fashion, as the result of “pure will,” without any purpose or as the result of hidden wisdom.

3. *Gezeret ha-Katuv* and Legal Minutiae

Gezeret ha-katuv, in both versions of the theological sense, is also different from what Aristotle referred to as “the political justice that is derived from law.” In a famous passage in the *Nicomachean Ethics*, Aristotle draws a distinction between “political justice” (i.e., laws) whose source is in “nature,” that is to say, in reason, and “political justice that derives from law.” “Political justice derived from nature,” writes Aristotle, “is that same portion which is valid in every place to the same degree, and does not depend upon the positive or negative view of human beings.” Such laws are intrinsically rational and include, for example, the prohibitions against violence and against causing harm to others. “Political justice that derives from the law” includes “everything which could have been fixed in a different way, without this making a significant difference. However, once it has been fixed, there is significance to its fulfillment as it is.” Such regulations and laws have no inherent rational justification; they are “just” thanks to political-jurisprudential reasons of a “second order.” Such laws include, for example: “Regulations as to the amount of penalty paid by a prisoner, whether it be one *maneh*, or whether one ought to sacrifice one sheep or two.”⁸ Under the inspiration of these words of Aristotle, Maimonides comments (in his discussion of the rationales for the commandments in *Guide of the Perplexed*) on the absence of principled reasons for various details of the law. The examples he provides are identical to those of Aristotle. “The offering of sacrifices has in itself a great and manifest utility,” he writes. “... But no cause will ever be found for the fact that one particular sacrifice consists in a lamb and another in a ram and that the number of the victims should be one particular number – for this one can never give any reason.” Maimonides continues:

Know that wisdom rendered it necessary – or, if you will, say that necessity required – that there should be particulars for which no cause

8 *Nicomachean Ethics* V.7 (15b, 1134).

can be found; it was, as it were, impossible in regard to the Law that there should be nothing of this class in it.... When you ask why a lamb should be prescribed and not a ram, the same question would have to be asked if a ram had been prescribed instead of a lamb. But one particular species had necessarily to be chosen. The same holds for your asking why seven lambs and not eight have been prescribed. For a similar question would have been put if eight or ten or twenty had been prescribed ... This resembles the nature of the possible, for it is certain that one of the possibilities will come to pass. And no question should be put why one particular possibility and not another comes to pass, for a similar question would become necessary if another possibility instead of this particular one had come to pass.⁹

Examples of “particulars” (i.e., legal rules) which have no inherent reason (i.e., which fall under the category of the possible) but which it was necessary to legislate are also found in modern law. This is the case in the banal example of the rules governing the side of the road on which one drives. In some countries, law requires that one drive on the right-hand side of the road, while in other countries (England, for example) the law requires that one drive on the left-hand side. The determination of the side on which one drives is necessary and rational; however, the decision on which specific side one ought to travel could be arbitrary.¹⁰

- 9 *Guide* III.26. In that same context, Maimonides comments: “In my opinion, all those who occupy themselves with finding causes for something of these particulars are stricken with a prolonged madness in the course of which they do not put an end to an incongruity, but rather increase the number of incongruities. Those who imagine that a cause may be found for suchlike things are as far from truth as those who imagine that the generalities of a commandment are not designed with a view to some rule utility” (ibid.). For an analysis of Maimonides’s stand on the issue of details of the commandments, see my paper, “Parables and Commandments” (in preparation). Translations from the *Guide* are based on Shlomo Pines, *The Guide of the Perplexed* (Chicago: University of Chicago Press, 1963) unless otherwise noted.
- 10 Maimonides in fact comments on this in the aforementioned chapter (III.26), when he interprets the midrash: “What does it matter to the Holy One blessed be He whether one slaughters an animal from the throat or from the neck” (*Gen. Rab.* 44; ed. Theodor-Albeck, 424-25). He attributes to the Sages the view that the law of slaughtering from the throat is among those details that are arbitrary, and immediately criticizes this: “However, if one studies the truth of the matter, one finds it to be as follows: As necessity occasions the eating of animals, the commandment was intended to bring about the easiest death in an easy manner...”

Gezerat ha-katuv in the theological sense does not refer to those details of the law which by their very nature have no reason. *Gezerat ha-katuv*, according to both the approach of God-as-will and that of Hidden Wisdom, are laws which we would typically expect to contain some rationale. Their arbitrary or hidden nature thus cannot be explained by appealing to the category of the “possible.” As opposed to those details of the law which have no inherent reason but which are necessary to legislate (such as the direction of travel on the road), those laws which are “Scriptural edicts” in the theological sense generally have no reason of a secondary order either (such as coordination, or the hyper-regulation characteristic of ceremonies and rituals, etc.). Indeed, at times *gezerat ha-katuv* involves a halakha in which logic would dictate the opposite. Thus, for example, the talmudic rule mentioned earlier, that the law of the “rebellious son” applies only to a son and not to a daughter. Indeed, the *baraita* in the Talmud asks this very question: “By rights (*be-din*, i.e., from a logical point of view) ought not the daughter also be considered a rebellious son, for all are found with her in transgression?”¹¹ In Maimonides’s words, this law does not belong to the category of “the possible, for it is certain that one of the possibilities will come to pass.” It is not the case here that the same question would follow of necessity if it said ‘daughter’ rather than [or in addition to] ‘son.’

Moreover, there is nothing preventing an entire halakhic institution being described as a commandment lacking in any rationale. This is the case, for example, in the law of mixed fibers (*sha’atnez*), or possibly the law against mixtures in general (*kila’im*), the scapegoat of the Day of Atonement, the red heifer, purification of the leper, and possibly the entire complex of laws of ritual purity.¹² The category of legal minutiae cannot explain the lack of rationale for entire categories of commandments such as these.

From there, he turns to what he considers an example of “the true reality of particulars of the commandments... the sacrifices” – e.g., whether it is a lamb or a ram, seven or eight, and the like.

11 In *t. Sanh.* 11:6 (Zuckerman, 431), the question is formulated more sharply: “By rights it ought to have been the daughter and not the son.”

12 According to sayings found in talmudic (and later) literature, these are commandments whose rationales are for various reasons not known (*huqqim*). See, for example, *Sifra, Aharei Mot* 9 (concerning mixed seeds, ritual purity, and the scapegoat); *Pesiq. Rav Kah.* 4 (ed. Mandelbaum, 72) (concerning the red heifer).

III. *Gezerat ha-Katuv*: The Jurisprudential Sense

The phrase *gezerat ha-katuv* has another meaning, which I will refer to as the “jurisprudential” (or more simply: halakhic) sense. According to the jurisprudential sense, *gezerat ha-katuv* denotes the authority of Scripture – that is, its commanding, obligatory, and coercive power – in isolation from the contents, rationales, and purposes that underlie it. The jurisprudential sense of *gezerat ha-katuv* is rooted in one of the etymologies of the verb *g.z.r.* in biblical and rabbinic Hebrew, namely, “to command (to act or refrain from acting), to obligate, to make into a law”; and of the noun *gezera*, meaning “command, obligation, law.”¹³ It is possible that in the rabbinic lexicon the semantic field of *gezera* also includes the sense of a clear-cut decision, a well-defined law whose implementation is mechanical and does not require any judgment or weighing.¹⁴ If the word *gezera* signifies the obligatory and coercive power of the various types of court and other authorities, then *gezerat ha-katuv* signifies the obligatory power and authority of the Torah (and of the other Holy Scriptures).

1. *Gezerat ha-Katuv* and *Gezerat Melekh* (Royal Decree)

Gezerat ha-katuv in the jurisprudential sense is similar in meaning to the term *gezerat melekh*, “the decree of the king,” widely found in talmudic and other rabbinic sources. In the Greco-Roman socio-political framework, where “decree of the king” signifies the commandments of the sovereign, typically the king or emperor, the term refers to the “absolute” and obligatory rules of behavior (i.e., “decrees”) incumbent upon people; here, the term “decree” embodies the

13 Eliezer Ben-Yehuda, *Complete Dictionary of Ancient and Modern Hebrew* (New York: T. Yoselof, 1960), s.v. גזר, 2:740-42. See also Saul Lieberman, *Greek and Hellenism in Jewish Palestine* (Jerusalem: Bialik, 1962) (Hebrew), 183; and cf. W. Bacher, *ערכי מדרש* (Tel Aviv, 1923), s.v. גזירה. On another sense of the term *gezera* in the rabbinic lexicon, see E. E. Urbach, *ההלכה מקורותיה והתפתחותה* (Ramat-Gan: Masadah, 1984), 11. Compare *Talmudic Encyclopedia* (Jerusalem: Hotsa’at Entsiqlopedya Talmudit, 1947-), s.v. גזר, 5:564-66 (Hebrew). Numerous new meanings were given to the term *gezera* in the Middle Ages; see Ben-Yehuda, *Complete Dictionary*, 741-42.

14 Ben-Yehudah, *Complete Dictionary*, 740, meaning 1; and cf. Urbach, *ההלכה*, 239 n. 1; *Lev. Rab.* 4:1 (ed. Margaliot, 75). Indeed, the semantic field of *g.z.r.* also includes the action of chopping an object (Ben Yehuda, *Complete Dictionary*, 740), and cf. H. Albeck, *Shishah Sidrei Mishnah* (Jerusalem: Bialik, 1989), *Seder Qodashim*, Additions and Supplements, 403-404.

unchallenged political-legal authority of the ruler. Generally speaking, royal decrees are not the result of caprice; rather, they have reasons, be they good or bad. In talmudic literature the phrase *gezerat melekh* is often a metaphor for the commandments of God, as embodied in halakha. It does not necessarily indicate pointless behavior or norms without reason, but typically emphasizes the coercive power of the monarch and, in the metaphorical sense, God's commanding power.¹⁵

Like the *gezerat melekh*, so too the jurisprudential sense of the term *gezerat ha-katuv* does not imply that the command is arbitrary (i.e., the result of the free will of God) or that its reason is hidden (the fruit of His sublime wisdom). In its jurisprudential sense, *gezerat ha-katuv*, like *gezerat melekh* and decrees generally, typically has a reason and purpose. However, the idiom emphasizes that the force of the decree lies not only in its rationale but also (and primarily) in the political power of "Scripture," which is able to obligate and to compel. The need for political power and authority are not because the decree of the "king" or of "Scripture" (i.e., of the one who is commanding) is without rationale. Rather, it is rooted in the awareness that the rationale for the decree is not enough to motivate a person to obey it. Due to the weakness of human will and mind – in Kantian terms, they do not live in the "kingdom of ends" – there is a need for a coercive socio-political or even "divine" authority. This is an important rationale for political authority in general, and it is the rationale underlying the political-jurisprudential sense of *gezerat ha-katuv*.¹⁶ In order to sharpen the distinction between the two senses of *gezerat ha-katuv*, it might be instructive to think about their contrast: the counterpart of the theological sense (in both its versions) would be a commandment which has a known reason, whereas the counterpart of the jurisprudential-political sense would be a recommendation or request of "Scripture" (i.e., the sovereign), or, in the terms of John Austin, an expression of will, to which no sanction is attached.

It may be that a "decree of the king" has no inherent rationale and is only intended to train people in obedience, namely to discipline them. According to

15 See the chapter on talmudic literature in my forthcoming book.

16 On the rationale for political authority, see *Authority*, ed. J. Raz (New York: New York University Press, 1990). On authority in the sense of submission of the individual's judgment to a political authority, see R. B. Friedman, "On the Concept of Authority in Political Philosophy," in *Authority*, 56-91. Regarding our subject here, there is no need to discuss the source of the authority of Scripture for the halakhists and those they addressed. For sources and discussion of this subject, see *The Jewish Political Tradition, Vol. 1: Authority*, ed. M. Walzer et al. (New Haven: Yale University Press, 2000).

a certain kind of conservative political viewpoint, “decrees” of this type are a necessary tool to overcome and contain the irrationality of the multitude. In contrast to the liberal political viewpoint, which is optimistic regarding human nature, the conservative outlook assumes that the impulses of man’s heart are “evil from his youth.” His impulses, lusts, and urges are stronger than his intellect and constantly threaten the social order. Unlike the liberal approach, according to which every limitation of freedom (i.e., any duty-imposing decree) requires justification, the conservative approach posits that disciplinary decrees are essential for restraining human urges and for imposing law and order. A conservative regime may even legislate arbitrary laws as they demand obedience as an end in itself.

There is nothing to prevent certain laws or commandments which are regarded as *gezerat ha-katuv* from being interpreted as “edicts of the king,” without any rationale, their sole purpose being to implant obedience, discipline, and to restrain one’s impulses. While such a law will have no inherent reason, halakhic theorists, who characterize it as *gezerat ha-katuv*, may attribute to it general political-jurisprudential rationales of a “second order.” These general rationales, which do not explain the commandment *per se*, and may even imply that they have no inherent reason, are incorporated within the jurisprudential sense of *gezerat ha-katuv*.¹⁷ Nevertheless, as we shall see below, even though *gezerat ha-katuv* in talmudic and medieval halakha generally has a jurisprudential sense, it is difficult to isolate cases in which it is lacking in any inherent reason – that is, that it is read as an “edict of the king” for the sake of discipline alone.¹⁸

Gezerat ha-katuv for the sake of discipline differs from both versions of the theological sense of *gezerat ha-katuv*. It can be distinguished from the version of “God-as-will” because, while *gezerat ha-katuv* for the sake of discipline is, as we stated, a “general” political reason, *gezerat ha-katuv* according to the idea of God-as-will has no reason whatsoever, not even of a “second order.” Moreover, *gezerat ha-katuv* in this theological sense embodies a spiritual-religious

17 It seems to me that for this reason the terms “royal decree” and “Scriptural decree” are used in talmudic literature, albeit in only a few places, to indicate halakhot without any (known) reason; see the chapter on talmudic literature in my forthcoming book.

18 See the words of Rav in *Gen. Rab.* 44 and the saying of R. Hanina in *m. Mak.* 3.16. Cf. also one of Saadya Gaon’s explanations to *mitsvot shimiyyot* in *ספר הנבחר באמונות* in *ספר הבריעות*, trans. J. Kafah (Jerusalem: Sura, 1969), III:1-2, pp. 119-22. To the best of my knowledge, *gezerat ha-katuv* is not interpreted in talmudic and medieval halakhic literature as a decree for the sake of discipline alone.

disposition which cannot be based simply upon social-political assumptions related to discipline and the need to instill habits of obedience.¹⁹

Gezerat ha-katuv for the sake of discipline can also be distinguished from *gezerat ha-katuv* as Hidden Wisdom because, while the former emphasizes the coercive power of the ruler, what makes the latter obligatory is not only God's command but primarily His hidden wisdom. Like in classical natural law theories, it is the ultimate rationality intrinsic to each and every commandment, though not known to us, that motivates us to subscribe to them. Here too one can recognize a fundamental difference in the spiritual disposition: whereas one who fulfills *gezerat ha-katuv* as Hidden Wisdom is "impressed" by God's transcendent wisdom, one who obeys "the edict of the king" [i.e., Scripture, without any rationale], is "overwhelmed" by His strength.

2. Secondary Meanings

The political-jurisprudential sense of *gezerat ha-katuv* may carry, as mentioned, a number of secondary meanings. These meanings are derived from several different aspects of the political-jurisprudential concept of authority and its manner of operation. In this sense, *gezerat ha-katuv* may, for example, express various kinds of legal formalism. One of them, already alluded to above, involves the demand for a mechanical-literal reading of the language of Scripture, as against interpretation based upon the rationale of the commandment (or halakha) and its purpose.²⁰ Such a demand may be interpreted as a derivative of the "rule of law" (=Scripture), as its concern is, *inter alia*, suppression of the discretion of the one commanded (or of the *poseq*) with respect to the dry letter of the law ("Scripture"). I shall discuss below this jurisprudential sense of *gezerat ha-katuv*, and other secondary meanings thereof.

The basic political-jurisprudential sense of *gezerat ha-katuv* applies to all the commandments, or at least to all those commandments and laws whose source is in the language of Scripture.²¹ In the final analysis, almost all the

19 In H. G. Frankfurt's terms, God, according to this theology, does not have second-order wills, only first-order wills, and, as such, is not a personality; see H. G. Frankfurt, "Freedom of the Will and the Concept of a Person," *The Journal of Philosophy* 68 (1971): 5-20; and cf. Y. Lorberbaum, "על אישיות – נראתה הקשת בימינו?" *האל במדרש*, *Reshit* 2 (2010), 5-21.

20 Thus already Nahmanides on the term *gezera* in *b. Ber.* 33b; and cf. his commentary on the Torah to Deut 22:6, and, in his wake, Albeck, *Shishah Sidrei Mishnah, Seder Qodashim*, Additions and Supplements, 403-404.

21 On the dispute concerning the status of such halakhot, see, e.g., M. Halbertal,

commandments of the Torah are obligatory and unconditional “decrees.”²² This is not the case regarding its secondary senses. Thus, for example, *gezerat ha-katuv* as legal formalism may be applied to certain laws, but not to others. I shall elaborate upon this distinction later as well.

* * *

The distinction proposed here between the theological sense of the term *gezerat ha-katuv* and its political-jurisprudential sense is a specific case of a more general and principled distinction regarding the rationales for the commandments (*ta'amei ha-mitsvot*) in general. This distinction (several of whose manifestations I have noted above) may shed light upon further concepts and sources in halakhic literature, and is likely to be helpful for understanding the structure of discourse and methods of halakhic justification throughout the generations.²³

As I noted in my introductory remarks, traditional commentators and modern scholars have not noted the difference between these two senses of the term *gezerat ha-katuv*. The conventional wisdom continues to be that *gezerat ha-katuv* always signifies a halakha without any reason. Thus, for example, the *Talmudic Encyclopedia* gives the following definition for the phrase *gezerat ha-katuv*: “Law of the Torah which is against reason (סברא). There are commands (ציוויים) in the Torah that have no rationale, that from a logical

“Maimonides’ Book of Commandments: The Architecture of the Halakhah and Its Theory of Interpretation,” *Tarbiz* 59 (1990): 457-80 (Hebrew).

22 In this context, I should mention that even the conditional commandments are not *gezerat ha-katuv* in the basic jurisprudential sense of that term. Such is, for example, the case with the commandment requiring an impure person to immerse himself in water and to be purified. See *Sefer ha-Mitsvot, Aseh* 109, ed. Chaim Heller (Jerusalem: Mosad ha-Rav Kuk, 1979).

23 See the source cited in n. 18, above, and see, e.g., *Sifra, Qedoshim* 10:22. In this context it is interesting to note the famous passage in *Sifra, Aharei Mot* [*Mek. de-Millu'im*], §9, 13:10. Another passage deserving of discussion in this context is the well-known aggada concerning the dialogue between a gentile and Rabban Yohanan ben Zakkai (in the presence of his students) on the subject of the red heifer; see *Pesiq. Rav Kah.* 4:7 (ed. Mandelbaum, 74; and *ibid.*, 4:1, p. 54), which may be interpreted in a number of ways. Cf. E. E. Urbach, *The Sages: Their Concepts and Beliefs* (Jerusalem: Magnes, 1975), 83-84 (Hebrew); and recently V. Noam, “Is it true that ‘a Corpse does not Defile’? On Ritual Contamination in Tannaitic Literature,” *Tarbiz* 78 (2009): 162-63 (Hebrew), and in the bibliography there, cf. *Mek. de-Rabbi Shimon bar Yohai*, 15:26 (ed. Epstein-Melamed, 11), and many similar passages (see, e.g., *ibid.*, 18:15; 18:20).

perspective would yield the opposite [law], but it is so because it is a decree of Scripture (אלא מגזירת הכתוב כך הוא).²⁴ In this article, all the occurrences of *gezerat ha-katuv* in the Talmud (and most of its appearances in *Mishneh Torah*) are interpreted according to its theological sense. The *Talmudic Encyclopedia* reflects the manner in which *gezerat ha-katuv* is understood in the traditional yeshiva world and among halakhic sages in the last generations. This understanding is common among many critical scholars, who have interpreted the attestations of the phrase in the same way. They offer far-fetched and convoluted interpretations of the language of the rabbis (and the *rishonim*) and particularly of the words of Maimonides.²⁵

IV. Maimonides on the Theological Sense of *Gezerat ha-Katuv*

A close and careful look into Maimonides's writings reveals that he distinguished between these two senses of *gezerat ha-katuv*. As we shall see presently, he related to them both, with regard to both philosophical and halakhic issues.

We shall begin with the theological sense of *gezerat ha-katuv*. Maimonides would appear to have been the first thinker to propose a definition for it and to clarify its underlying philosophical-theological assumptions, which no one before him had ever done. In the course of his discussion of the rationales for the commandments, in *Guide of the Perplexed* III.38, Maimonides comments on the theological sense of *gezerat ha-katuv*:

The commandments comprised in the third class are those that we have enumerated in Laws Concerning Opinions. The utility of all of them is clear and evident, for all concern moral qualities in virtue of which the

24 *Talmudic Encyclopedia*, s.v. "גזירת הכתוב," 5:564 (Hebrew).

25 See J. Stern, "On an Alleged Contradiction Between Maimonides' Guide and Mishneh Torah," *Shenaton ha-Mishpat ha-Ivri* 14-15 (1988-89): 283-98 (Hebrew); H. Rappaport, "On the Reason for the Commandment of Shofar and the Sense of the Term *Gezerat ha-Katuv* in *Mishneh Torah*," *Or ha-Mizrah* 51:1-2 (2006): 78-101 (Hebrew); M. Halbertal, *Interpretative Revolutions in the Making* (Jerusalem: Magnes, 1997), 57-58 n. 24 (Hebrew); compare M. Kahana, *Two Mekhilot on the Amalek Portion: The Originality of the Version of the Mekhilta de'Rabbi Ishma'el with Respect to Parallels to the Mekhilta of Rabbi Shim'on Ben Yohay* (Jerusalem: Magnes, 1999), 286 (Hebrew).

association among people is in good condition. This is so manifest that I need not expatiate upon it. Know that certain commandments also contain prescriptions that are intended to lead to the acquisition of a useful moral quality, even if they prescribe certain actions that are deemed to be merely decreed by Scripture and not to have a purpose. We will explain them one by one in their proper places.²⁶

The concept, *gezerat ha-katuv*, “laws decreed by Scripture,” is defined here as those commandments which involve “actions that are deemed... not to have a purpose.” This is the Aristotelian-Maimonidean terminology for an action which has no reason.²⁷ Maimonides’s words here about the commandments, which some interpret as indicating “*gezerat ha-katuv* without any purpose,” are derived from what he wrote at the beginning of his discussion of the rationales for the commandments, regarding the opinion of those who think that all of them are “consequent upon the will.” This view is based upon the Kalaam theology, according to which God’s essence is will, rather than wisdom. Maimonides is thus not referring here only to those commandments which are “without any [inherent] reason”; *gezerat ha-katuv* refers here to a commandment without any reason whatsoever, not even one of the “second order.”

1. *Gezerat ha-Katuv*, God-as-Will, and the Rationales for the Commandments

Concerning the nature of will, Maimonides writes (*Guide* II.18):

If, however, the act has no purpose whatever except to be consequent upon will, that will has no need of incentives. And the one who wills is not obliged, even if there are no impediments, to act always. For there is no external end for the sake of which he acts and that would render it

26 *Guide* III.38 (Pines, 550) (my emphasis, as are all other emphases below, unless otherwise noted), and further on.

27 See *ibid.*, III.25. The theological sense of *gezerat ha-katuv* appears in a number of other places in Maimonides’s writings, including in the Epistle to the Sages of Provence, where the term appears in order to refute it, in the manner of *Guide* III.25. See A. Marx, “The Correspondence Between the Rabbis of Southern France and Maimonides about Astrology,” *HUCA* 3 (1926): 349-58, at 351; and cf. *Hil. Mikva’ot* 11:12, *Hil. Teshuva* 3:4, *Hil. Tefilla* 9:7, and cf. his early work, *Commentary on the Mishnah*, *Ber.* 5:3. By the term *mitsva shim’it*, Maimonides refers, among other things, to those commandments which are *gezerat ha-katuv* in the theological sense; see *ibid.*, on *m. Meg.* 4:7. For discussion of all these texts, see Part II.

necessary to act whenever there are no impediments preventing the attainment of the end. (Pines, 301)

But, regarding the difference between human will and the divine will, he immediately adds:

No, for the true reality and the quiddity of will means: to will and not to will. If the will in question belongs to a material being, so that some external end is sought thereby, then the will is subject to change because of impediments and supervening accidents. But as for a being separate from matter, its will, which does not exist in any respect for the sake of some other thing, is not subject to change. The fact that it may wish one thing now and another thing tomorrow does not constitute a change in its essence and does call for another cause; just as the fact that it acts at one time and does not act at another does not constitute a change, as we have explained.²⁸

The Muslim Kalaam, and in its wake the “men of speculation among the adherents of the Law,” identify this concept of will with the essence of God. A will of that kind cannot exist among human beings, who are conditioned by “impulses” and “motivations.” Indeed, Maimonides postulated an opposition between the God of religion (Kalaam), who is characterized by His free will, and in whose implementation He is not required to act according to the laws of nature (or the rules of logic), and the God of the philosophers (Aristotelianism), who is subject to the necessity of this order.²⁹ This theology also has direct implications for the nature of the commandments of religion. At the beginning of his discussion of the rationales of commandments in the *Guide*, Maimonides writes:

Just as there is disagreement among the men of speculation among the adherents of the Law whether His works, may He be exalted, are consequent upon wisdom or upon the will alone without being intended toward any end at all, there is also the same disagreement

28 *Guide* II.18 (Pines, 301), and cf. *Guide* II.22.

29 See S. Pines, “The Philosophic Sources of *The Guide of the Perplexed*,” in his translation of the *Guide*, lvii-xccciv. On the Kalaam see H. A. Wolfson, *The Philosophy of the Kalam* (Cambridge, Mass.: Harvard University Press, 1976). On Maimonides’s ambivalent approach toward the Kalaam, see W. Z. Harvey, “Why Maimonides was Not a Mutakallim,” in *Perspectives on Maimonides, Philosophical and Historical Studies*, ed. J. Kraemer (Oxford: Oxford University Press, 1991), 105-14.

among them regarding our Laws, which He has given to us. Thus there are people who do not seek for them any cause at all, saying that all Laws are consequent upon the will alone.³⁰

The above characterization of *gezerat ha-katuv* as an act commanded “without being intended toward any end at all” is inextricably connected to that theology which sees the essence of God-as-will, and that therefore “all Laws are consequent upon the will alone” – that is, without any reason or purpose. Support for this may be found in the fact that Maimonides preferred to mention the concept of *gezerat ha-katuv* specifically within the framework of his discussion of the “third group,” which is concerned with those commandments that “concern moral qualities” (*Guide* III.31) – namely, “those that we have enumerated in Laws Concerning Opinions,”³¹ and not, for example, those in the twelfth group, which includes “the commandments concerned with things unclean and clean.” To such an extent is the third group rational in his eyes that he does not even take the trouble in the *Guide* to enumerate its commandments, devoting to it only a few lines (“This is so manifest that I need not expatiate upon it”). All this, in order to emphasize that “those who think that the commandments are the decree of Scripture without any purpose” do not distinguish between “laws” and “statutes,” as “all of them are consequent upon the will alone.”

Throughout the *Guide of the Perplexed*, particularly in those chapters dealing with the rationale for the commandments, Maimonides sharply rejects this theology and the understanding of the commandments that follows from it. In the *Guide*, Maimonides does not identify his opponents on the issue of the rationale for the commandments as “the multitude of the Sages,” who attribute to the commandments irrational reasons (mythic, magical, or theurgical).³² His opponents are specifically “men of speculation among the adherents of the Law” (presumably some of the Geonim) who are influenced by the Muslim theology known as Kalaam (the Muʿtazili or Ashʿari). According to

30 *Guide* III.26 (Pines, 506).

31 See the introduction to *MT, Hil. Deʿot*. In *Guide* III.35, Maimonides writes: “The third class comprises the commandments concerned with improvement of the moral qualities. They are those that we have enumerated in Laws Concerning Opinions (*Hilkhot Deʿot*). 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” (Pines, 535-36).

32 This refers to his opponents in interpreting the prophecies (and the words of the Sages) – that is, regarding the Work of Creation and the Work of the Chariot.

Muslim theologians of that persuasion, all of the commandments are “decrees of Scripture” in the theological sense, according to the version of God-as-will.³³ This view and its underlying theological assumptions are described extensively by Maimonides in order to criticize it and to undermine its foundations.³⁴ Maimonides directs the arrows of his criticism not only against the theoretical principles underlying this view, but also against the religious mood implied therein, writing as follows:

There is a group of human beings, who consider it a grievous thing that causes should be given for any law; what would please them most is that the intellect would not find a meaning for the commandments and prohibitions. What compels them to feel thus is a sickness that they find in their souls, a sickness to which they are unable to give utterance and of which they cannot furnish a satisfactory account. For they think that if those laws were useful in this existence and had been given to us for this or that reason, it would be as if they derived from the reflection and understanding of some intelligent being. If, however, there is a thing for which the intellect could not find any meaning at all and that does not lead to something useful, it indubitably derives from God; for the reflection of man would not lead to such a thing. It is as if, according to these people of weak intellects, man is more perfect than his Maker; for man speaks and acts in a manner that leads to some intended end, whereas the deity does not act thus, but commands us to do things that are not useful to us and forbids us to do things that are not harmful to us.³⁵

According to Maimonides, the assertion that the commandments have no meaning or benefit is not only a theoretical-philosophical position, it is primarily the platform of a certain religious disposition, of a way of life, according to which blind obedience to the incomprehensible decrees of a transcendent and sublime God is the essence and very pinnacle of religiosity.³⁶

33 This approach to the commandments differs from that of Rav Saadya Gaon. See his famous discussion in Part Three (1-2) of *Sefer ha-Nivhar be-Emunot ve-De'ot*, 119. Cf. also at the end of his discussion (*ibid.*, 122).

34 *Guide* III.26-31. Maimonides chose the theology of “God-as-will” rather than “Hidden Wisdom” as his philosophical opponent because from a philosophic viewpoint the former is a much more systematic approach, and because he thought that it had negative spiritual influence on his readers; see immediately below.

35 *Ibid.*, III.31 (Pines, 523-24).

36 See, e.g., R. David b. Shmuel ha-Kokhabi (d. 1340) on the approach of the

The people who adhere to this view (referred to earlier in Chapter 26 as “men of speculation among the adherents of the Law”) are not only in error, but suffer from “a sickness that they find in their souls.” One of the signs of this sickness is that “they are unable to give utterance and ... cannot furnish a satisfactory account.” Maimonides makes a concentrated effort to clarify their own outlook to them, and in doing so to uncover the theoretical assumptions of this religious disposition. By doing so he may also hope to bring about their healing.³⁷ His argument is that, because in their eyes God’s acts are even lower than “vain acts,” then “according to these people of weak intellects, man is more perfect than his Maker.”³⁸ Religiosity of this type is characterized by Maimonides as that of one who is “turning his back on it [reason], moving away from it while at the same time perceiving that he had brought loss to himself and harm to his religion [...] [he] would not cease to suffer from heartache and great perplexity.”³⁹

Maimonides’s perception of the commandments is diametrically opposed to this view. According to him, “Also the desire [i.e., will] of God is conducted according to wisdom, and all is one thing, that is, the essence [of God] and His wisdom.”⁴⁰ Such is the case in matters of physics and metaphysics, and so is it as well in the realm of the commandments. Against all those who think that “the commandments all come in the wake of will alone,” Maimonides emphasizes

“talmudists” of his day to the commandments in his *Sefer ha-Batim, Migdal David* – *Sefer Mitzvah* II (ed M. Herschler; Jerusalem: Bet Midrash la-Torah, Makhon Gavo’ah la-Halakhah ve-Hora’ah, 1983), 285; and cf. M Halbertal, *Between Torah and Wisdom: R. Menachem Ha-Meiri and the Maimonidean Halakhists in Provence* (Jerusalem: Magnes, 1999), 181 (Hebrew).

37 See, e.g., Maimonides’s words regarding those who attempt to provide a reason for the details of the commandments in *Guide* III.26; and cf. his Introduction to Book I of the *Guide* (Pines, 16).

38 *Ibid.*, III.25 (Pines, 504). His characterization of those adhering to this view applies not only to his contemporaries, but is also an apt description of contemporary Orthodoxy. Thus, for example, it fits the thought of Yeshayahu Leibowitz (and in a certain sense also that of J. B. Soloveitchik), though his theological worldview is different from the one Maimonides attributes to his interlocutors.

39 *Ibid.*, Introduction (Pines, 6).

40 *Ibid.*, II.18 (Pines, 299). Cf. also III.25. On Divine will in the *Guide*, see A. Nuriel, “Divine Will in the Guide of the Perplexed,” *Tarbiz* 39 (1970): 372-87 (Hebrew); and recently B. Manekin, “The Limitations of Human Knowledge According to Maimonides: Earlier vs. Later Writings,” in *Maimonides – Conservatism, Originality, Revolution*, ed. A. Ravitzky (Jerusalem: Merkaz Zalman Shazar, 2009), 2: 297-316 (Hebrew).

that “every command and prohibition from them come in the wake of His wisdom and there is intended thereby some purpose. And all the commandments have rationales, and we were commanded regarding them because of some benefit.”⁴¹ Maimonides distinguishes, as is known, between those commandments referred to as *mishpatim*, i.e., “laws” – “whose benefit is understood clearly even to the multitude” – and those known as *huqqim*, “statutes” – “whose benefit is not known or explained to the vulgar.” It is only in the popular or vulgar sense that *huqqim* are understood as *gezerat ha-katuv* without any reason. For the enlightened person, both the *huqqim* and the *mishpatim* have a reason and purpose. In the *Guide*, Maimonides suggests such reasons, one by one.⁴²

In Maimonides’s eyes, the quest to understand the reasons for the commandments is an inseparable part of intellectual perfection, which is the ultimate end of man. Unlike those people with “a sickness that they find in their souls” for whom “what would please them most is that the intellect would not find a meaning for the commands and prohibitions,” he encourages his readers, both in the *Guide* and in the *Mishneh Torah*, “to reflect upon them, so that wherever you are able to give a rationale, give it a reason” (*Hil. Temura* 4:13).⁴³

It is important to emphasize in this context that, according to Maimonides, there is an esoteric element within the reasons for the commandments, and particularly in the rationales for the *huqqim* (“statutes”). The distinction, mentioned earlier, between *mishpatim* (“laws”), whose reasons are known to the multitude, and *huqqim*, whose reasons are hidden to them, is not mere lip

41 *Guide* III.26 (Pines, 673).

42 Maimonides implies here a criticism of the Sages, who emphasized the above distinction. See sources cited above in n. 36. After the introductory chapters, which are intended to provide a conceptual infrastructure for his basic position on the rationale of the commandments and the general arguments involved therein (Chs. 25-34), Maimonides devotes his main discussion to a comprehensive explanation of the details of the commandments (Chs. 35-49). J. Stern raises the possibility that, in the *Mishneh Torah* and the *Guide of the Perplexed*, Maimonides changed his opinion regarding the rationales for the commandments from that which he held in his youth (in the *Commentary on the Mishnah*, see especially *Shemona Perakim*, Ch. 6, and his comments on *m. Ber.* 5:3 and *Meg.* 4:7), when he adopted the view of R. Sa’adya Gaon that those commandments which are *huqqim* “do not have any reason apart from being the will of God.” But in the *Mishneh Torah* he rejects this view (see, e.g., *Me’ilah* 8:8, and my discussion below), and even more so in the *Guide* (see below). See Stern, “Alleged Contradiction,” 287, and see my discussion in my forthcoming book.

43 Cf. *Hil. Me’ila* 8:8.

service to its well-known talmudic antecedent. Maimonides does see a genuine and important difference here. The reasons for the commandments, and particularly those for the *huqqim*, are among the “secrets of the Torah,” which ought to be hidden from the multitude. Even though Maimonides encourages his readers, as mentioned, to reflect upon the commandments and to provide them with rationales in accordance with their ability, he strongly emphasizes the danger therein. As is well known, the socio-political danger involved in uncovering matters of philosophy “that are deep and obscure” troubled (and even frightened) Maimonides his entire life. He warns against its various aspects throughout the course of the *Guide*, as elsewhere in his writings. This anxiety dictated, as is well known, the style of the *Guide of the Perplexed* and the manner of its writing and, as we shall see below, even that of philosophical, meta-halakhic passages within the *Mishneh Torah*.

However, according to Maimonides, the danger involved in the rationales for the commandments is not merely an offshoot of premature involvement in the “secrets of the Torah.” Speculating upon them, particularly in public, carries with it special dangers, both in the social-educational realm, as well as in that of halakhic discourse. Regarding the educational realm, in the final passage of *Sefer ha-Mitsvot*, when dealing with *lo ta'aseh* (negative commandment) 365, he writes, “That it proscribed the king against increasing wealth for himself, saying ‘He should not multiply silver and gold for himself greatly.’” He alludes here to a famous talmudic saying concerning King Solomon⁴⁴ and says:

This alludes [to the idea] and is a notice to people, that if they knew the rationales for all the mitzvot they might find themselves subject towards an inclination [to disregard them]. For if this person, who was perfect in wisdom, one of great rank, already imagined and thought concerning this that this activity would not necessarily be a cause for that transgression, what will happen regarding the intelligence of the multitude of the people with its weakness. They will think concerning them and say: It was not prohibited thus or commanded thus, except for such-and-such a reason. But I shall be careful concerning the matter for which this mitzvah was commanded and not turn my heart to it. Thus the integrity of the law will be lost. Hence God, may He be exalted, concealed their rationales.⁴⁵

44 *b. Sanh.* 21b.

45 On other dangers inherent in rationales for the commandments – e.g., lack of

But here too Maimonides hastens to emphasize:

But there is not a single one among them [the commandments] for which there is not a rationale and a reason, albeit most of these reasons were such that it was necessary that they not be attained or comprehended by the intellect of the vulgar, but all of them are as the prophet testified: “The statutes of the Lord are upright, rejoicing the heart” (Ps 19:9).⁴⁶

Maimonides’s contradictory statements concerning the reasons for the commandments exemplify the structural tension built into his entire literary oeuvre: his declared purpose to foster a cultural revolution among the broad public and “the multitude of the rabbis” on the one hand, and his fear and suspicion regarding public involvement in science and philosophy (including the rationales for the commandments) on the other. An explicit expression of the former tendency may be found in the Laws of the Foundations of the Torah and in his comments throughout his *Mishneh Torah* regarding the central place of intellectual perfection, including knowledge of the rationales for the commandments (which is the ultimate end of halakha).⁴⁷ An explicit expression of the latter tendency is found in the sophisticated methods of concealment and deception which he uses in his philosophical work, including its chapters dealing with the rationales of the commandments.

2. *Gezerat ha-Katuv*, the Naturalistic Understanding of Prophecy, and the Socio-Historical Method in the *Guide of the Perplexed*

Maimonides’s rationalism, as expressed in the chapters on the rationales for the commandments, is consistent with his naturalistic approach to the subject of prophecy, including the prophecy of Moses.⁴⁸ Unlike the viewpoint emphasized in his halakhic writings that “the Torah ... as a whole was given to Moses word by word from the Omnipotent (*mi-pi ha-gevura*),”⁴⁹ in the *Guide of the Perplexed* he hints at the idea that Moses was the creator of the Law. Through his sublime, albeit natural, intellectual apprehension and through means of his imaginative

understanding, allegorical reasons, socio-historical reasons, and so forth – see Part II.

46 See Maimonides, *Sefer ha-Mitsvot, lo ta’aseh* 365 (ed. Heller, 189). But compare *Hil. Temura* 4:13.

47 For a discussion of the final halakha in *Hil. Mikva’ot*, see Part II.

48 *Guide* II.32 ff. (Pines, 360).

49 See the *Introduction to Perek Heleq* (the eighth principle) in הקדמות הרמב"ם למשנה, ed. Y. Shailat (Jerusalem: Ma’aliyot, 1992), 144, and cf. *Hil. Teshuva* 3:8.

power, Moses articulated the system of the commandments, which became “the Divine [code of] law.”⁵⁰ As a human deed, the act of “Divine” legislation (in the sense of the laws directing towards the Divine) could not be arbitrary, but must of necessity serve a certain goal and purpose.⁵¹

Maimonides’s socio-historical approach to the rationales for the commandments of the Torah and for the study of law in general, as found in the *Guide*, is rooted upon a historical-anthropological methodology and a naturalistic worldview that underlies it. As noted, this methodology rejects explanations of the type of *gezerat ha-katuv* in the theological sense, attributing a goal and purpose to the laws as a whole. As is known, Maimonides was among those who laid the foundations for the methodology of historical-anthropological study of religion and law.⁵² For the historian of law and religion, arbitrary laws (i.e., which are the consequences of will) or laws whose reason is concealed (i.e., the consequence of the hidden Divine wisdom) – as opposed to those laws which are based upon an erroneous worldview (physics and metaphysics) – are inconceivable.

It is also important to emphasize that Maimonides did not see his arguments in those chapters of the *Guide* dealing with the commandments as “homilies for the moment.” He describes his discussion of the details of the commandments as scientific, systematic, and comprehensive: “I will make known to you the reasons for each class and show their benefit, which is without doubt, and without any place for rejection.”⁵³ Unlike the claim that *huqqim* “such as the prohibition against *sha’atnez* (mixed fibers in garments), *kil’ayim* (mixed seeds), and meat and milk... and the like have no reason” – that is to say, that they have no “influence upon the perfection of the soul... nor upon the well-being of the body” – Maimonides writes that “you shall hear my explanation of them all, and I shall give their correct reasons proven with demonstrative arguments.”⁵⁴ Maimonides’s certainty concerning the issue of

50 See *Guide* I.65, and compare Maimonides’s words there concerning “the created voice.” Cf. also Y. Levinger, “Moses Our Teacher’s Prophecy in Maimonides’ Teachings,” in *Maimonides as Philosopher and Codifier* (Jerusalem: Mosad Bialik, 1990), 29-38, 52-54 (Hebrew).

51 See also Y. Lorberbaum, “Maimonides on Aggadah: Halakhah and Divine Law,” *Diné Israel* 26-27 (2009-10): 268-76 (Hebrew), and the bibliography there.

52 Thus, for example, his methodological note in *Guide* III.29 (Pines, 516), and cf. Lorberbaum, “Maimonides on Aggadah,” 264 n. 37, and the bibliography there.

53 *Guide* III.26 (Pines, 509).

54 See *Guide* III.49 (Pines, 612). The language and the context indicate that these were simply rhetorical gestures.

the rationales for the commandments is noteworthy as a contrast to his skepticism throughout the *Guide* regarding matters of physics and metaphysics. This ought not to be surprising, as the rationales for the commandments belong to the realm of political philosophy and ethics, which according to Maimonides are subjects in which our knowledge is certain and far better proven.⁵⁵

To summarize, the theological meaning of *gezerat ha-katuv* (like the “popular” understanding of the term *huqqim*) is inconsistent with the rationalism and naturalism of Maimonides and with his view that one may reconstruct the rationales for all the commandments, and that it is fitting (for the educated person) to do so. From a theoretical viewpoint, *gezerat ha-katuv* in the theological sense is, in his eyes, complete nonsense; one who adheres to this view (particularly according to the version of God-as-will) is “weak of mind” and “ill in a sickness of the soul.” This viewpoint serves as part of the background in the following discussion concerning the appearances of *gezerat ha-katuv* in Maimonides’s halakhic works, particularly in the *Mishneh Torah*.

V. Maimonides on the Jurisprudential Sense of *Gezerat ha-Katuv*

In Maimonides’s writings, particularly in his halakhic works, the term *gezerat ha-katuv* often bears a jurisprudential – halakhic meaning. Yet whereas the theological sense of this term is articulated explicitly in the *Guide* and is given a detailed theoretical – conceptual platform, its jurisprudential sense can only be inferred from the context – that is, from the manner in which it functions in the halakhic discourse of the *Mishneh Torah*. And indeed, the manner in which Maimonides uses the phrase *gezerat ha-katuv* in the *Mishneh Torah* unmistakably indicates its political – jurisprudential meaning.

1. On the Term *Gezera* (“Decree”)

Before explicating the meaning and function of this term in the halakhic discourse of the *Mishneh Torah*, I shall dwell briefly upon the way in which Maimonides defines the term *gezera* (“decree”) as such. The term *gezera* is used

⁵⁵ On this subject, see S. Pines, “The Limitation of Human Knowledge According to Al-Farabi, ibn Bajja and Maimonides,” in *Studies in Medieval Jewish History and Literature I*, ed. I. Twersky (Cambridge, Mass.: Harvard University Press, 1979), 83-109.

in many different ways in Maimonides's writings; I shall mention two of them here, and then describe that which is common to all of them. In *Sefer ha-Mitsvot*, Root 8, Maimonides writes:

The eighth root is that it is not fitting to count the negation of an obligation together with its proscription: for you should know that the proscription is one of the two types of imperative. That is, one is commanded through a mitzvah [either] to do a certain thing or not to do a certain thing: for example, one is either commanded to eat and thus told "eat," or commanded to refrain from eating and one is told, "Do not eat." But the Hebrew language does not have a noun that includes both these things, as has already been noted by those who engage in the discipline of logic, saying: However, the imperative and the proscription do not have in the Hebrew a noun which encompasses them both, and we need to call the two of them by one word, and that is – *ha-tzivvuy* (the command). Thus, it is already clear to you that the proscription is part of the command. And the well-known word for proscription in the Hebrew language is the word *lo* (no). And this matter is itself doubtless to be found in every language: that is, that one commands one who is commanded either to do a particular thing or not to do it. It is thus clear that the positive command and the negative command are both a *tsivvuy gamur* (absolute imperative): things that we are commanded to do and things which we are proscribed against doing. And the name of that we are commanded to do is *mitsvat 'aseh* (a positive commandment), and that which we are proscribed from doing is *mitsvat lo ta'aseh* (a negative commandment). And the term in the Hebrew language which encompasses both of them is *gezera* (decree). Hence the Sages called every commandment, whether positive or negative, *gezerat melek* (decree of a king).⁵⁶

The eighth root is concerned with those terms that signify the imperative force of the Torah/halakha. That which underlies those terms defined here by Maimonides – warning, command, positive and negative commandments – is the power and authority of the Torah to issue a "categorical command" – that is, an unconditional imperative. The word in the Hebrew language which embraces all of these terms of authority and of legal-halakhic power, according to Maimonides, is *gezera* – "decree." The term *gezera* thus signifies the authority

⁵⁶ Ed. Heller, 15.

of Scripture to command in a “complete” or “categorical” manner. In Kantian terms, the instructions (i.e., “decrees”) of Scripture are not only suggestions, recommendations, or rules of prudence; they are categorical imperatives (albeit heteronomous ones). Or, in legal language, they are mandatory, not conditional, laws.⁵⁷ This is the sense attributed by Maimonides to the phrase that is widespread in the language of the Sages in relation to the totality of the commandments – *gezerat melekh*.

The term “decree,” as defined in the eighth root, is distinct from its reason and rationale. It is possible that all of the decrees/*gezerot* – i.e., the 248 positive commandments and 365 negative commandments – have reasons. After all, if all of the commandments are “decrees,” it is inconceivable that, according to Maimonides, all of them should be without any reason or purpose. As I noted above, the obligatory reason and normative force (i.e. “the one decreeing”) are different sides of the commandment, and are not dependent upon one another.⁵⁸

The word *gezera* appears in a narrower sense in Maimonides’s introduction to his *Commentary on the Mishnah*, where he classifies the “laws legislated in the Torah of Moses” into five groups. “The fourth group,” writes Maimonides, “are those laws made by the prophets and the Sages in each generation by way of limitation and fence to the Torah. ... And they are those things called by the Sages *gezerot* (edicts).”⁵⁹ The term *gezera* here indicates the power of the Sages to command. Their power is derived from the commanding authority of Scripture, as their “edicts” are a kind of limitation and fence to (i.e., extension of) the Torah. For our purposes, the “edicts” of the Sages here cannot be arbitrary, but must necessarily have a reason and end. After all, “Man [including the sages] speaks and does that which leads to some purpose.”⁶⁰

These examples should suffice to indicate that the term *gezera* in Maimonides signifies political-halakhic authority and the power to legislate a

57 On the difference between mandatory and conditional commandments, see, e.g., *Sefer ha-Mitsvot, Aseh* 109 (ed. Heller, 63). And cf. *Sifra, Aḥarei Mot*, §5.

58 Compare Rappaport, “Reason for the Commandment of Shofar,” 91; and see *Hil. Temura* 4:13, *Hil. Me’ila* 8:8, and Y. Twersky, “Concerning Maimonides’ Rationalization of the Commandments; An Explication of Hilkhot Me’ilah 8:8,” in *Studies in the History of Jewish Society*, ed. I. Etkes and Y. Salmon (Jerusalem: Magnes, 1980), 24-33 (Hebrew). Cf. *Guide* III.48 (Pines, 598); *b. Ber.* 33b, and see Part II and my forthcoming book.

59 *Haqdamot ha-Rambam la-Mishnah* (ed. Shailat), 41.

60 The wording of Maimonides in *Guide* III.31 (Pines, 524), following Aristotle.

“complete commandment.” In this context it is important to note that the concept of authority, in its various aspects, is, in Maimonides’s view, the basis for the political order itself.⁶¹ This term needs to be discussed in isolation from the reason for the edict or its purpose.

2. “That These are Things that Have a Reason (*Devarim Shel Ta’am Hem*) and are Not *Gezerat ha-Katuv*”

We now turn to the term *gezerat ha-katuv*. An explicit example of the jurisprudential – halakhic sense of *gezerat ha-katuv* appears in *Hil. Ishut* (Laws of Marriage) 25:2:

(1) Similarly, one who marries a woman without any particular conditions, and found in her one of the blemishes of women, as we have explained, and the husband did not know of the existence of this blemish and did not hear of it; if he wished [to divorce her] she goes out [i.e., is divorced] without her *ketubba* – neither the statutory nor the supplementary amount.

(2) How so? If there was a bathhouse in the city, and he had relatives, he cannot say: “I did not know of these blemishes,” even if they were hidden blemishes, for he examines [i.e., questions] his female relatives, and we may presume that he heard [of it] and wanted [i.e., to marry her, notwithstanding].

But if there was no bathhouse there, or he did not have any relatives, he is allowed to claim hidden blemishes. Epilepsy recurring at definite times is classed as a hidden blemish.

(3) But he cannot bring a claim regarding visible blemishes, for everyone sees them and tells him, and there is a presumption that he has heard and accepted it.

(4) It is a well known thing that this law only applies in those places where it is the custom of women to go about in the marketplace with their faces uncovered, and everyone knows them and says: This one is the daughter of so-and-so, that one is the sister of so-and-so, as is done in the cities of *Edom* [i.e., in Christian Europe] in these days.

(5) But in those places where it is not the practice of the young women to go out to the marketplace at all, and if the women do go to the

61 On the rationale for political power and order, see *Guide* II.40 (Pines, 381), and see my forthcoming book.

public bathhouse, they do so at night, concealing themselves, and nobody sees her apart from her relatives, he may bring a claim even concerning visible blemishes – and this, if there was no bathhouse and he did not have any female relatives to examine her.

(6) If, however, there was a public bathhouse in this city, but it is not the practice of women to go there with their faces uncovered – if he has a female relative he is unable to make a claim, for everyone sees her naked in the bathhouse.

(7) But if it was their custom to go about disguised and to seek privacy even in the bathhouse, so that a woman would bathe only at night, or alone in a little compartment in the bathhouse, thus, neither seen nor recognized, then he may bring a claim even regarding visible blemishes.

(8) For these are matters for which there is a rationale (*devarim shel ta'am hem*) and not a decree of Scripture (*ve-lo gezerat ha-katuv*).⁶²

This halakha is fascinating from a number of angles: ethical, social, halakhic, historical, cultural, its approach to gender, and also its style and language.⁶³ But what interests us here primarily is the final sentence (§8), which sheds light upon the jurisprudential usage of *gezerat ha-katuv*.

Maimonides discusses the case of a man who married a woman, brought her into his house, and was then shocked to discover some sort of blemish (“of the blemishes of women”) on her body⁶⁴ which she had not disclosed to him, that was otherwise unknown to him, and which he could not have known about prior to the marriage. In such a case, he is allowed to divorce her without paying her *ketubba* (“neither the statutory nor the supplementary amount”).⁶⁵ If, however, he knew about the blemish, even if he did not express his explicit acceptance thereof, “we may presume that he heard [of it] and wanted [to marry her].” Moreover, if he did not know of the blemish, but in

62 The dividing and numbering of the sections here are mine.

63 For a discussion of several historical aspects of this halakha, see M. A. Friedman, “Halacha as Evidence for the Study of Sexual Mores Among Jews in Medieval Islamic Countries: Face Coverings and Mut'ah Marriages,” *Pe'amim* 45 (1991): 89-107, at 95-96 (Hebrew).

64 See *Hil. Ishut* 7:7.

65 As opposed to the case discussed in *m. Ketub. 7:8*, in which a man betrothed a woman and she was still “living in her father's house,” in which case: “The father must bring proof that the blemish came about after she was betrothed, and that it was ‘his field that was flooded.’”

light of the circumstances he *could* have known about it, “we do not listen to him: the presumption is that a person does not drink from a cup unless he examines it well; so our presumption is that he knew and accepted it.”⁶⁶ These are the basic elements of this halakha.

In its first part, in §§1-3, Maimonides summarize the rules as they appear in the Mishnah and Talmud. He rules like the Sages (against R. Meir), stating that the husband may only bring a claim regarding those blemishes which were in concealed places, and even then on condition that the circumstances indicate that he could not have known about them previously.⁶⁷ Maimonides uses the Mishnah’s example of a bathhouse (“If there was a bathhouse in the city, and he had relatives”), in which case “he cannot say: ‘I did not know of these blemishes,’ even if they were hidden blemishes, for he questions his female relatives.”⁶⁸ If, however, one of these conditions was not fulfilled – “there was no bathhouse there, or he did not have any relatives” – he may claim secret blemishes.⁶⁹ Further on, he quotes a halakha brought by Rav Nahman in *b. Ketub. 77a* regarding one who periodically had epilepsy (end of §2), concluding this section of the halakha by saying: “But he cannot make a claim regarding visible blemishes, for everyone sees them and tells him, and there is a presumption that he has heard and accepted it” (§3).

The second part of this halakha (§§4-8) appears neither in the talmudic literature nor in the Geonic literature that preceded Maimonides. This is an original ruling on the part of Maimonides, which involves a certain departure from talmudic law, or at least from the distinctions which it draws. This point is already alluded to by the *Maggid Mishneh* (R. Vidal de Tolosa, d. 1360), who commented: “These are the words of our teacher, which are based on correct reasons, as he has explained at length.”⁷⁰

By means of the wording, “It is a known thing...” (*davar yadu’a hu*), with which he opens this group of halakhot, Maimonides implies that his words involve an innovation. This formula appears numerous times in the *Mishneh Torah* and has a broad semantic field. Most frequently, it indicates a halakhic principle or a basic logical conclusion that has direct implications for the

66 See *Hil. Ishut* 7:6.

67 *M. Ketub. 7:7-8*; *y. Ketub. 1:6* (25c); *7:7* (31a); *b. Ketub. 75b-76a*.

68 On the issue, “he examines her female relatives,” see *Hil. Ishut* 25:3.

69 See the language used by the Sages in *m. Ketub. 7:8*.

70 S.v. *davar yadu’a hu*, and cf. *Kesef Mishneh* (R. Joseph Caro) ad loc., and see Friedman, “Halacha as Evidence for the Study of Sexual Mores,” 95-96.

subject of the halakha, which, although lacking a source in the written halakhic tradition, is nevertheless not (that is: need not be) subject to dispute.⁷¹ As we shall see, in *Hil. Ishut* 25:2 this refers to a law which has no source in the obligatory (i.e., talmudic) halakhic tradition and even seems to deviate from it, but that in Maimonides's view is a basic conclusion which there is no reason to challenge or question.

The halakhot summarized in §§1-3 (i.e., the talmudic law) apply, according to Maimonides, only in “those places where it is the custom of the women to go about in the marketplace with their faces uncovered.” These include, for example, “the cities of *Edom* in these days” – that is, the European Christian countries, where “everybody knows them and says: ‘This one is the daughter of so-and-so, that one is the sister of so-and-so’” (§4). That is: in those places the husband cannot bring a claim regarding visible blemishes at all; the same holds true regarding hidden blemishes, if there is a bathhouse there and he has female relatives. Such is not the case in “places where it is not the practice of the young women to go out to the marketplace at all,” as in the Muslim countries, including Maimonides's Egypt. In such places, “if the woman does go to the public bathhouse” – that is, if it is necessary for her to momentarily pass through public space – “she does so at night, estranging herself, and nobody sees her apart from her relatives.” In such a case, the husband “may bring a claim even concerning visible blemishes” (§5). The conditions for this, according to Maimonides, are that “there is no bathhouse, and he does not have any female relatives to examine her ... for everyone sees her naked in the public bathhouse” (§6).⁷² But Maimonides hastens to place restrictions and to qualify this “talmudic halakha,” for even if there was a bathhouse in the city, but “if it was their custom to go about disguised and to seek privacy even in the bathhouse, so that a woman would bathe only at night, or alone in a little

71 This is similar to the commonly used contemporary expression: “It is well-known that...” To the term *davar yadu'a* (“it is a well-known thing”) in the *Mishneh Torah* there are attributed, among others, the following meanings: a matter required by logic (*Hil. Shabbat* 1:6); a philosophic idea known to philosophers (*Hil. Teshuva* 10:6); a practical matter (*Hil. Tefillin Mezuza ve-Sefer Torah* 9:5); a matter of common sense (*Hil. Ishut* 6:7); and possibly also a basic halakhic rule or principle (*Hil. Ishut* 17:6).

72 On women in the bathhouse (*hamam*) in Muslim countries and on bathhouses as a place of social meeting, see B. R. Wilson, “Glimpses of Urban Women in Classical Islam,” in *Women and the Structure of Society: Selected Research from the Fifth Berkshire Conference on the History of Women*, ed. B. J. Harris and J. A. McNamara (Durham, N.C.: Duke University Press, 1984), 5-11.

compartment in the bathhouse, thus, neither seen nor recognized, then he may bring a claim even regarding visible blemishes” (§7), i.e., whether or not the husband had female relatives in the city. Maimonides clearly alludes here to a social reality which was common in his own place, and in Muslim countries generally.⁷³

Maimonides deviates here from the explicit law of the Mishnah. Whereas, according to the Sages, the husband is unable to bring a claim regarding visible blemishes at all, according to Maimonides, in those places where the women always “estrangle themselves,” that is, cover their faces, the husband may even bring a claim regarding visible blemishes.⁷⁴ In other words, under these circumstances the talmudic distinction between hidden blemishes and visible blemishes becomes blurred. What enables Maimonides to distinguish the talmudic law is the difference (in his opinion) between the manner in which women conduct themselves in Muslim countries as opposed to those norms that were accepted during the period of the Mishnah and the Talmud. This change was certainly praiseworthy in his eyes.⁷⁵

Maimonides concludes this halakha with the comment that, as mentioned, is our main concern here: “For these are matters for which there is a rationale (*devarim shel ta’am hem*) and not a decree of Scripture (*ve-lo gezerat ha-katuv*).” By means of this wording, which is unique in the entire *Mishneh Torah*, he juxtaposes two basic jurisprudential concepts – in order to justify his deviation from talmudic law.

73 Historians of the last generation disagreed on the question as to whether Jewish women in the Muslim countries covered their faces during the period of the golden age of Muslim culture, yet see Friedman, “Halacha as Evidence for the Study of Sexual Mores,” 91-99, and the sources he quotes, and, in his wake, A. Grossman, *Pious and Rebellious: Jewish Women in Medieval Europe*, trans. Jonathan Chapman (Waltham, Mass.: Brandeis University Press, 2004), 105-108.

74 Friedman, “Halacha as Evidence for the Study of Sexual Mores,” 97, found in the Genizah a hitherto unknown Judeo-Arabic halakhic work that corresponds to *Hil. Ishut* 25:2, but, as Friedman notes, it is doubtful whether Maimonides was influenced by it.

75 For evidence in talmudic literature that Jewish women covered their faces, see *m. Shabbat* 6:6, and cf. A. Goldberg, *Commentary to the Mishna Shabbat* (Jerusalem: Bet he-Midrash le-Rabbanim shebe-Amerika, 1976), 114-15. For further sources on this subject, see S. Lieberman, “On Sins and Their Punishment,” in *Louis Ginzberg Jubilee Volume: On the Occasion of His Seventieth Birthday* (New York: American Academy for Jewish Research, 1946), Hebrew Section, 269-70 (Hebrew). Cf. Friedman, “Halacha as Evidence for the Study of Sexual Mores,” 91-92, 97-99.

The decision as to the question of whether or not the husband knew or could have known of his wife's blemishes – and hence whether he is exempt from the obligation of paying her *ketubba* if he divorces her – are “matters for which there is a rationale,” that is to say, matters regarding which the judge may implement his discretion. In other words, the judge must take into consideration the “rationale” for the halakha as well as general considerations of justice, and apply them to the unique circumstances of the case at hand. Regarding these halakhot, one needs to decide on the basis of their reason (*devarim shel ta'am*), and one should not relate to them as *gezerat ha-katuv*. By the term “*gezerat ha-katuv*,” Maimonides refers to the technical-mechanical application of a halakhic rule. In those cases in which the judge needs to relate to the rule of a “Scriptural decree,” he needs to apply it mechanically and not distinguish it or test it by means of the underlying rationale and in light of overall considerations of justice and equity that underlie the halakha in general. This meaning of the idiom emphasizes the decisive weight attributed to the language of a halakha – i.e., “Scripture” – as opposed to its rationale and overarching purpose.

If Maimonides were to relate to the talmudic law in this case as *gezerat ha-katuv* – that is, if he were to apply it in a literal-mechanical way – he would have ruled, for example, that even in those places where “it is not the practice of the young women to go out to the marketplace at all,” and that even when they do go out they cover their bodies and faces etc., the husband still cannot bring a claim related to visible blemishes. The same holds true for those places where there is a public bathhouse, but the young women bathe at night, or alone in a small compartment within the bathhouse. This is the result that would be received were we to assume that the law of the Mishnah and the Talmud was a matter of “Scriptural decree” – that is, its application is based [solely] upon its language, and not according to its reason.⁷⁶

In other words, Maimonides emphasizes that the halakhic issue at hand is not of the type that may be decided simply by technical application of the halakha. The cases which fall within this framework should not be understood by means of a series of hard and fast rules applied by the judge in an emphatic, literal manner. Due to the gap in this matter between (relevant) considerations of justice, on the one hand, and the variety of possibilities likely to present themselves to the judge, on the other hand (i.e., the changing places and times,

⁷⁶ See the words of the *Kesef Mishneh*, ad loc. It is not clear whether Caro attributed a theological sense to the term *gezerat ha-katuv*; see Part II.

and the difficulty entailed in anticipating them), a technical application of fixed rules that are formulated and determined in advance – which according to Maimonides are, generally speaking, necessary and desirable (see below) – is likely to lead to a large number of miscarriages of justice.

Hil. Ishut 25.2 is an example of “things which have a rationale” also in terms of its style and the manner of its formulation. Maimonides writes there at length, a fact that is particularly striking in comparison to the concise and tight language of most other halakhot in *Mishneh Torah*. The formulation here is serpentine and casuistic, unusual against the clarity and codificatory structure of the *Yad ha-Hazaqa* generally. This is particularly true of the second part of this halakha, which, as mentioned, is an original halakhic discussion (particularly in §§5-7). Maimonides begins by drawing a distinction between those places where it is the custom of women to go out to the marketplace with their faces uncovered (§4) and those places where “it is not the practice of the women to go out to the marketplace at all” (§5). He then continues: “And if the women do go to the public bathhouse, they do so at night, concealing themselves...” In that case, he rules, the husband “may bring a claim even regarding visible blemishes.” But Maimonides immediately qualifies this, almost to the point of reversing his previous words: “And this, if there was no bathhouse [there]” etc. “But,” he continues – and here comes another reservation, which nearly negates the previous one – “if there was a public bathhouse in the city, but it is not the practice of women... he cannot bring a claim.” He then once again performs a 180-degree turn: “But if it was their custom to go about disguised and to seek privacy even in the bathhouse... he may bring a claim even regarding visible blemishes.” This convoluted manner of formulation, not at all characteristic of the well-ordered and systematic style of Maimonides in the *Mishneh Torah*, is undoubtedly intentional. This is an “open structured” discussion, intended to guide the judge in implementing his own judicial discretion. As is the way of casuistic discussions, he draws a distinction here between one situation and another. He acknowledges that even the various cases and circumstances mentioned therein may be distinguished from one another in a manner that will change the halakha, and that he is far from exhausting the full range of possibilities that may present themselves to the judge. In the language with which he concludes – or, better, truncates – this halakha, in which he says “For these are matters for which there is a rationale, and not *gezerat ha-katuv*,” Maimonides refers not only to the talmudic discussion from which he “departs,” but also to his own halakhic “ruling.” It is not his intention, in his own casuistic discussion, to formulate fixed halakhot which the judge is meant to apply in the technical-literal manner of “Scriptural decree.” It is more by way of guidance to the judge,

as to how he ought to exercise discretion in these matters which fall under the rubric of “things which have a reason.” Maimonides’s own words likewise fall under this category.

The use of the phrase *devarim shel ta’am*, in this and similar halakhic contexts, is unique to Maimonides.⁷⁷ It appears in other places in the *Mishneh Torah*, but not in explicit contrast to *gezerat ha-katuv*. In all of its occurrences, this phrase indicates the need to relate to the reason for the law along with general considerations of justice. The opposite of *devarim shel ta’am*, which is usually only stated by implication, is the technical-literal application of written halakhot, typically from the talmudic literature (which leads in turn to opposite halakhic results, most often undesirable and unjust). Thus, for example, in *Hil. She’ela u-Fiqqadon* (Laws of Borrowing and Pledges) 7:12:

One who left a pledge with his neighbor, and the owner of the pledge went overseas, and the one charged with watching over the pledge wished to set out from the land to the sea, or to go out in a caravan – there are those who have taught that if the bailiff [i.e., charged with taking care of the pledge] brought the pledge to the court, he is exempt from responsibility for watching it. And these are matters for which there is a reason (*u-devarim shel ta’am hem*), for we do not keep this one a prisoner in this place because of the pledge of the other person who went away; and it is impossible for him to take it with him, lest some contingency occur and he will be held responsible for it. And the court leaves it with a reliable trustee with them, because of the [commandment of] returning a lost article to its owners.

This ruling is not the consequence of the technical application of some halakhic rule, but rather relates to an innate principle of justice (“One does not make this one a prisoner” etc.), which needs to be weighed against the obligation to watch over this item under the circumstances of this specific case. Here, too, we find an original ruling of Maimonides, which does not appear in the Talmud.⁷⁸ Application of talmudic law literally (*gezerat ha-katuv*) would have ignored the bailiff’s right to “freedom of movement” and forced him to keep the object in his home and to refrain from going to sea or going away with a caravan.⁷⁹

⁷⁷ It may be that the inspiration for this appears in *b. Avod. Zar.* 18a.

⁷⁸ See the *Hagahot Maimoniot* and *Maggid Mishneh* ad loc.

⁷⁹ On *devarim shel ta’am*, see *Hil. To’en ve-Niṭ’an* 8:1, and cf. *Hil. Malveh ve-Loveh* 21:1.

3. *Gezerat ha-Katuv*, Judicial Discretion, and Legal Formalism

The term, “matters for which there is a rationale” (*devarim shel ta’am*) is similar to the modern concept of “judicial discretion,” even if the range of discretion granted here to the halakhic authority or judge is limited in comparison to that given to judges by modern authors.⁸⁰ As opposed to that, Maimonides here applies to the term *gezerat ha-katuv* one of the meanings of “legal formalism,” according to which law is a system of rules, well-fixed and well-formulated, which the judge, generally speaking, must apply in a literal-mechanical manner to those cases that come before him. This sense of legal formalism is defined by Frederick Schauer as follows:

Formalism in this sense is therefore indistinguishable from “rulism,” for what makes a regulative rule a rule, and what distinguishes it from a reason, is precisely the unwillingness to pierce the generalization even in cases in which the generalization appears to the decision maker to be inapposite. A rule’s acontextual rigidity is what makes it a rule.⁸¹

As I already noted earlier, the meaning of *gezerat ha-katuv* as legal formalism or “rulism” is a component of the jurisprudential meaning of this term. *Gezerat ha-katuv* as halakhic formalism or “rulism” is based upon the commanding power of Scripture – “decree” understood in the sense of “unconditional command” – one of whose meanings is the subjugation of the (rational) discretion of the one commanded – in this case, the judge – to the authority of the legislator (*ha-katuv* – i.e., the halakha). Legal (and halakhic) formalism is, among other things, a “decree” to refrain from applying judgment and a command to obey “that which is written” in accordance with its language as given. From the viewpoint of Maimonidean rationalism, which is guided by rationales and purposes, there is no greater act of submission than this.

80 See, e.g., R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), ch. 2, and on judicial discretion cf. A. Barak, *Purposive Interpretation in Law* (Sarigim-Lion: Nevo, 2003), 155-64 (Hebrew).

81 F. Schauer, “Formalism,” *Yale Law Journal* 97 (1988): 509-48, at 535. The term “legal formalism” has numerous meanings. For a survey of the various meanings given to it, see *ibid.*, 510 n. 1. For other definitions of “legal formalism” and its usages – which are not mutually exclusive – cf. D. Lyons, “Legal Formalism and Instrumentalism – A Pathological Study,” *Cornell Law Review* 66 (1988): 949-72; E. J. Weinrib, “Legal Formalism: On the Immanent Rationality of Law,” *Yale Law Journal* 97 (1988): 949-1016. In the following discussion I am not committed to other elements that various authors have attributed to legal formalism, for example, the notion that the law is unequivocal and complete (i.e., gives an answer to every legal question or problem), and more.

The use of the term *gezerat ha-katuv* in *Hil. Ishut* 25:2 has nothing in common with a commandment or halakha for which there is no reason. The reasons for this halakha are clear. The same would be true were Maimonides to apply talmudic halakha to the circumstances of his own time and place in a “formalistic” manner, as “Scriptural decree.” Moreover, the word “Scripture” (*katuv*) in the occurrences of this idiom here does not refer to the Torah of Moses (the “Written Torah”) – that is to say, to a law whose source lies in revelation. Rather, it is concerned with a halakha that appears in a canonical and binding halakhic text – typically speaking, one found in the Talmud – which may be applied in a mechanical manner. As I noted earlier, the word *ha-katuv* (lit. “that which is written”) here indicates adherence to the language of the halakha as opposed to relating to its rationale. Moreover, *halakhot* that are *gezerat ha-katuv* in the sense of halakhic formalism – both here and, as we shall see, in the majority of its other occurrences in the *Mishneh Torah* – have a rationale that explains both their normative contents and the demand to apply them literally. The rationale of the halakha is rooted in considerations pertaining to the specific rule which, at least in the case of “one who marries a woman and finds in her a blemish,” do not raise any particular difficulty; the demand to apply it literally is rooted in jurisprudential (meta-halakhic) considerations, combined, at times, with considerations relating to the issue at hand.

The use of the term *gezerat ha-katuv* in the case discussed above from *Hil. Ishut* 25:2 is original. It does not appear in this *sugya*, in either talmudic or Geonic literature. Likewise original is the jurisprudential meaning which Maimonides attributed to it and which he placed in contrast to the phrase *devarim shel ta'am* (which is also, as mentioned, unique to him). Even though *Hil. Ishut* 25:2 is unusual in *Mishneh Torah* in terms of the degree of discretion it grants to the judge, the jurisprudential-halakhic meaning that it attributes to the term *gezerat ha-katuv* as legal formalism is not at all singular. As we shall see in part II of this study, this jurisprudential-halakhic sense is the paradigm for understanding the majority of its occurrences in Maimonides’s code.