

Two Concepts of *Gezerat Ha-Katuv*  
A Chapter in Maimonides' Legal and  
Halakhic Thought  
Part II: The Jurisprudential Sense

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VI. *Gezerat ha-Katuv* in the *Mishneh Torah*:  
The Jurisprudential Sense

The phrase *gezerat ha-katuv* appears nine times in Maimonides' *Mishneh Torah*. We have already discussed its appearance in *Hilkhot Ishut* (Laws of Marriage) 25.2. In the present article, I shall discuss five additional appearances: *Hilkhot Mamrim* 6.7, 7.11; *Hilkhot Sanhedrin* 18.6; and *Hilkhot Eduṭ* 13.15, 18.3.<sup>1</sup>

1. “It is *gezerat ha-katuv* that the rebellious son is to be stoned, but the daughter is not subject to this law”

*Hilkhot Mamrim* (Laws of Rebels) 7.11:

It is a scriptural decree that the rebellious son is to be stoned. But the daughter is not subject to this law, for it is not her manner

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1 In Part III of this study we shall examine three halakhot in *Mishneh Torah* that are “scriptural decrees” in the theological sense: *Mikva'ot* 11.12; *Teshuvah* 3.4; and *Tefillah* 9.7.

to be drawn after [exaggerated] eating and drinking like a man;  
as it is said 'son,' and not daughter.

In the wake of the Talmud, Maimonides writes that the law of the rebellious son is to be considered a *gezerat ha-katuv* because it applies to the son but not to the daughter.<sup>2</sup> He initially offers an explanation for this law—"it is not her manner to be drawn after [exaggerated] eating and drinking like a man"—and only thereafter returns to the scriptural text, "as it is said, 'son' and not daughter."

Maimonides' words here are based upon talmudic sources, but the explanation he gives is actually opposed to them. The language of the *baraita* in *b. Sanh.* 71a reads as follows:

Rabbi Shimon said: By rights the daughter ought to be subject to being considered a rebellious son, for all are found with her in transgression, but it is a scriptural decree (*ela gezerat ha-katuv hi*): "son"—and not daughter.<sup>3</sup>

According to Rabbi Shimon, "'a son' and not a daughter" is *gezerat ha-katuv*. Maimonides follows in his wake, but, whereas the *tanna* explains why this law is contrary to logic, Maimonides explains its own inherent logic. Maimonides' turnabout may be seen in his style as well. Maimonides' language (as is his usual practice) paraphrases the language of the Talmud, but here in reverse. The *baraita* opens with a question, "By rights (*be-din*) the daughter ought to be subject to . . .," then explains, "for all are found with her. . .," and finally resolves the difficulty by saying, "but it is a scriptural decree" (*ela gezerat ha-katuv hi*), bringing as proof the (unnecessarily) literal reading, "'son'—and

2 Compare M. Halbertal, *Interpretative Revolutions in the Making* (Jerusalem: Magnes, 1997), 57-58 n. 24 (Hebrew), who thinks that *gezerat ha-katuv* in this context refers to the law of the rebellious son in general, and that the use of the term here indicates that it is a halakhah without any rationale (several of the classical Maimonidean commentators think likewise; see below, n. 38). This approach is consistent with his interpretation of *t. Sanh.* 11.6. However, Maimonides writes clearly "it is a scriptural edict that **the son** is to be stoned... but the daughter is not subject to this law, as it is not her way..." Thus, in the Bavli (see immediately below), whose view is adopted here by Maimonides, the version of the *Tosefta* is: "But it is the decree of the king (*gezerat melekh*)..."

3 Compare the wording of *t. Sanh.* 11.6: "R. Shimon b. Eleazar says: 'the daughter and not the son'; but rather this is the scriptural decree."

not daughter.” In contrast, Maimonides begins with the statement that “it is a scriptural decree that the rebellious son [alone] is to be stoned” and continues, “but the daughter is not subject to this law,” and then explains, “for it is not her manner.” The appeal to Scripture (“as it is said, ‘a son’ and not a daughter”) is brought only after the reason and not prior to it, as might be expected, and, thus, emphasizes the contrast between his reading and the talmudic *baraita*.<sup>4</sup>

The argument that “it is not her way to be drawn after eating and drinking like a man” is rooted in the basic definition of the transgression in question. Namely, the rebellious son “is only killed for the gross eating in which he engaged, as is said, ‘a glutton and a drunkard.’ As we have learned from the [oral] tradition, that ‘glutton’ refers to one who ate meat in a gluttonous manner, and ‘drunkard’ refers to one who drank wine in a gluttonous manner” (*Hilkhot Mamrim* 7.1).<sup>5</sup> Thus, the use of the phrase “to be drawn (*le-himmashekh*) [after eating and drinking like a man]” indicates that a son, being male, has a tendency towards voracious eating and drinking whereas a daughter does not. The word **להמשך** comes from *b. Sanhedrin*, where it means, “to be addicted.” According to the discussion in the Bavli, the meat and wine eaten by the rebellious son must be of an addictive type.<sup>6</sup> Moreover, the circumstances must be such as to suggest that the eating and drinking reflect an addiction. Hence:

If he ate [it] in a circle engaged in a commandment, he is not considered a rebellious son . . . as he was engaged in a commandment, he is not drawn after it . . . If he ate at the intercalation of the [added] month . . . as he was engaged in a commandment, he is not drawn after it. If he partook of the second tithe in Jerusalem, since that is in the normal manner of eating—he is not drawn.<sup>7</sup>

Maimonides, following the Talmud, states: “If he ate raw meat and drank fresh wine—he is exempt, for this just happened, and a person cannot be drawn after this. Likewise, if he ate salted meat on the third day after it was salted, or drank wine from the winepress—he is exempt, for a person is not drawn after this.”

4 At the same time, this wording is intended to facilitate the continuation of this halakhah (in *b. Sanh.* 71a): “[a son’—and not a daughter], nor a *ṭumtum* or an androgynous.” Similar to this *baraita* is *m. Sanh.* 8.1.

5 Deut 21:20; *m. Sanh.* 8.2.

6 See the saying of Rav Hanan bar Molda in the name of Rav Huna in *b. Sanh.* 70a.

7 *Ibid.*, 70b.

Maimonides goes into even more detail by explaining, “If he ate insects and crawling things, or unkosher carcasses, or ate on a public fast day, in order to transgress—he is exempt,”<sup>8</sup> for this is eating in defiance of the halakhah and not out of appetite.

The laws in *Mishneh Torah* regarding the tendency towards addiction (“being drawn after”) are closely connected to the rationale given for the law of the rebellious son according to Maimonides in *Guide for the Perplexed*. *Guide* III.33 opens with the following argument:

To the totality of purposes of the perfect Law there belong the abandonment, depreciation, and restraint of desires in so far as possible, so that these should be satisfied only in so far as this is necessary. You know already that most of the lusts and licentiousness of the multitude consist in an appetite for eating, drinking, and sexual intercourse. This is what destroys man’s last perfection, what harms him also in his first perfection, and what corrects most of the circumstances of the citizens and of the people engaged in domestic governance. For when only the desires are followed, as is done by the ignorant, the longing for speculation is abolished, the body is corrupted, and the man to whom this happens perishes before this is required by his natural term of life; thus cares and sorrows multiply, mutual envy, hatred, and strife aimed at taking away what the other has, multiply. All this is brought about by the fact that the ignoramus regards pleasure alone as the end to be sought for its own sake.<sup>9</sup>

This claim serves as an introduction to the rationale for the law of the rebellious son:

Therefore God, may His name be held sublime, employed a gracious ruse through giving us certain laws that destroy this end and turn thought away from it in every way. He forbids everything that leads to lusts and to mere pleasure. This is an important purpose of this Law. Do you not see how the texts of the Torah

8 *Hilkhot Mamrim* 7.2, 4-6.

9 Shlomo Pines, *The Guide of the Perplexed* (Chicago: University of Chicago Press, 1963), 532.

command to kill him who manifestly has an excessive longing for the pleasure of eating and drinking? For he is the “stubborn and rebellious son,” to whom the following dictum applies: “He is a glutton and a drunkard” (Deut 21:20). He commands stoning and cutting him off speedily before the matter becomes serious and before he brings about the destruction of many and ruins by the violence of his lust the circumstances of righteous men.<sup>10</sup>

According to the explanation proposed here, the rebellious and stubborn son is “judged according to his end” (*niddon al shem sofo*).<sup>11</sup> This reason appears in the talmudic sources as well, but Maimonides emphasizes that his end will “bring about the destruction of many.”<sup>12</sup>

Maimonides says much the same in *Hilkhot Mamrim* 7.1:

The Torah stipulates [death by] stoning for the stubborn and rebellious son, and Scripture does not punish unless it first warns [i.e., explicitly prohibits a given act]. And where does it warn against this? “You shall not eat on the blood” [Lev 19:26]—Do not engage in eating that leads to bloodshed: this refers to the eating of the stubborn and rebellious son, who is only killed because of the gross eating in which he engaged, as is said “a glutton and a drunk.” From the [oral] tradition we learn that a glutton is one who eats meat in gluttonous fashion, and the drunkard is one who drinks wine in gluttonous fashion.

Maimonides begins the laws of the rebellious son in the *Mishneh Torah* by stating his punishment (“his end”)—namely, execution by stoning. Before giving the

10 Ibid.

11 *m. Sanh.* 8.5; *Sifre Devarim* §218; *b. Sanh.* 68b and 72a. For a discussion of the various reasons given in talmudic literature for the law of the rebellious son, see Halbertal, *Interpretative Revolutions*, 57-58.

12 On the phrase in the talmudic sources, “he is judged according to his end,” two reasons are given: “Let him die innocent and let him not die guilty” (i.e., “the death of the wicked is of benefit to them”), and “In the end he exhausts his father’s resources and seeks [money] for learning and does not find any, and he goes out to the crossroads and robs people” (i.e., “the death of the wicked is of benefit”). See *m. Sanh.* 8.5 and the *baraita* in *b. Sanh.* 72a. Maimonides only cites the latter reason, particularly the anticipated murderous violence.

details of this law, he articulates its prohibition—the homily of R. Yohanan in *b. Sanh.* 63a, which he also sees as the reason for the law. R. Yohanan’s homily implies that the rebellious son is executed because otherwise he would end up shedding blood—that is, a kind of preemptive measure for measure.<sup>13</sup> The “gluttonous” eating of the youth, which indicates its “addictive” aspect, ends with murderousness (“on the blood”), and his execution serves as a kind of prophylactic measure.<sup>14</sup> The emphasis on the addictive element in the youth’s behavior is intended to answer a question that is inherent in the rebellious son: “[Is it reasonable that] because this one ate a *ṭarṭemar* [triens] of meat and drank half a *log* of Italian wine the Torah commanded that he be stoned?”<sup>15</sup> The element of “addiction” is intended to soften the deterministic causality inherent in this law. In §11 Maimonides explains that it is not the manner of women “to be drawn after...”—that is to say, even if she ate and drank wine in the quantities stipulated, this is not indicative of addiction, which will ultimately lead to destructiveness and murder, and hence the law of the rebellious son does not apply to her.

The *nos’ei kelim*<sup>16</sup> questioned his remarks in *Hilkhot Mamrim* 7.11. R. David ben Zimra (=Radbaz, d. 1573, Safed) quotes the “source” of this halakhah in the Talmud (“by rights the daughter ought to be subject to the law of the rebellious son... rather, it is a scriptural decree...”), and asks the question: “I am surprised at our teacher. Given that he wrote here, ‘It is *gezerat ha-katuv*,’ why does he give a reason, ‘that it is not her way to be drawn after...’? Moreover, Rabbi Shimon said that it is her way to be drawn after it.” Radbaz raises two questions. First, if the law that it only applies to a son and not to a daughter is *gezerat ha-katuv*, why does he bother to give a rationale for it? And, second, how do we account for the fact that the reason given here contradicts the position of one of the *tanna’im* in the Talmud?<sup>17</sup> Radbaz clearly thinks that the term *gezerat ha-katuv* is synonymous with a halakhah for which there is no reason. He is forced to

13 Compare the words of R. Yossi the Galilean at *b. Sanh.* 72a.

14 Compare Halbertal, *Interpretative Revolutions*, 58.

15 *b. Sanh.* 72a. Cf. *Sifrei Devarim* §218 [18].

16 Literally, “arms-bearers,” the traditional commentators on and defenders of Maimonides.

17 Radbaz, on *Mishneh Torah*, ad loc. However, Maimonides does not oppose the opinion of R. Shimon, for the latter does not claim that “it is her way to be drawn towards...” but rather that “everyone is found sinning with her”; his intention may be like the words of the *Lehem Mishneh*, ad loc.

propound a speculative solution, far-fetched and remote from Maimonides' language and intention (which, moreover, fails to explain his use of the phrase *gezerat ha-katuv*). It would appear that Radbaz was not fully convinced of his own solution, as he concludes: "And the matter requires further reflection."<sup>18</sup>

Similar difficulties are raised by the *Lehem Mishneh* (R. Moshe de Boton, d. 1588, Salonica). De Boton asks, "Moreover, he himself [i.e., Maimonides] said that it is *gezerat ha-katuv*; if so, how could he give a rationale?"<sup>19</sup> He proposes a series of far-fetched "learned" and convoluted solutions, bearing no connection to the words of Maimonides and his line of thought.<sup>20</sup> Other solutions offered by exegetes and scholars, all of them based upon the assumption that the term *gezerat ha-katuv* (both here and in general) bears a theological meaning, are even less convincing.<sup>21</sup>

18 This is his solution:

"It is possible that our Teacher thinks that the Sages disagreed with R. Shimon and thought: 'It is not her way to be drawn towards this, for which reason she is completely exempt.' For one might think that when Scripture said 'a son' and not 'a daughter'—[the sense was] to exempt her from [death by] stoning, but that she might be subject to some other punishment. Rather, it is to teach us: as it is not her way to be drawn towards this, she is completely exempt from all punishment. And the matter requires further reflection."

19 *Lehem Mishneh*, ad loc. The first difficulty is as follows:

There is a difficulty, for in Chapter *Ben Sorer u-Moreh* they said: "It has been taught: R. Shimon said: 'By rights the daughter should also be subject to the law of the rebellious son...' And Rashi of blessed memory interpreted thus: 'That all are found sinning with her, for when she guzzles food and drinks much wine in her childhood, in the end she does not find money [for her needs], and she stands at the crossroads and becomes accustomed to sinning with people in exchange for a harlot's-fee.' This implies that there is no distinction at all between a son and a daughter, but only because the scriptural decree is thus; if so, how could our Teacher give as the reason for [the exclusion of] the daughter that it is not her way to be drawn after excessive eating and drinking?"

20 The *Lehem Mishneh's* solution is based on, among other things, the argument that both Maimonides and R. Shimon in the Bavli think that the law of the rebellious son is constructed entirely upon "scriptural decree" without any rationale.

21 See, for example, 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). Rappaport thinks that the reason brought for "scriptural decree" in *Mamrim* 7.11 (and for every other use of *gezerat ha-katuv* in the *Yad*), is not the "real" reason for the halakhah (according to Maimonides) and that

The term *gezerat ha-katuv* in *Hilkhot Mamrim* 7.11 does not have a theological meaning, but a jurisprudential one. The phrase, “It is a scriptural decree that the rebellious son is stoned” indicates a literal reading of the halakhah: “son’ and not daughter.” The practical meaning is that one may not deviate from this rule even in exceptional cases. Thus, for example, if we are confronted with an unusual daughter, who is in fact “drawn after eating and drinking like a man,” we do not apply the law of the rebellious son to her and do not execute her by stoning. The rule, “‘son’ and not daughter,” must be applied literally—i.e., as “scriptural decree.” The term *gezerat ha-katuv* in *Mamrim* 7.11 does not indicate that this halakhah has no reason (or that its reason is unknown). To the contrary, Maimonides begins by using this term specifically because he immediately proposes a reason for it. The designation of the “scriptural decree” instead indicates that the rationale for this law has no halakhic implications. Rather, its rationale is cited only in order to explain the halakhah “from the outside.” If the rationale had been within the parameters of the halakhah, the law of the rebellious son would have applied to an exceptional daughter just as it does to a son.<sup>22</sup>

The meaning of the term *gezerat ha-katuv* in *Hilkhot Mamrim* 7.11 is thus identical in meaning to that in *Hilkhot Ishut* 25.2, which we discussed elsewhere.<sup>23</sup> At the end of that halakhah, which is concerned with one who marries a woman and discovers that she has a blemish, Maimonides wrote: “For these things are matters for which there is a reason, and are not scriptural decree.” In other words, he counterpoises two basic jurisprudential concepts: *devarim shel ʿam*

everything is only “according to human capability” (93). For other solutions, all of them based on the assumption that *gezerat ha-katuv* here (and elsewhere) has a theological meaning, see Halbertal, *Interpretative Revolutions*, 58 n. 24. Cf. J. Stern, “On Alleged Contradictions Between *Guide for the Perplexed* and *Mishneh Torah*,” *Shenaton ha-Mishpat ha-ʿIvri* 14-15 (1988-89): 283-98 (Hebrew), who writes on *Mamrim* 7.11 that, according to Maimonides, “Scriptural decree means that a certain reason, which pertains particularly to his interpretation and its application to the mitzvot, is an arbitrary exception, because there is no mention thereof in Scripture” (290).

22 Compare Rappaport, “On the Reason,” 99. Cf. S. Ettinger, “On the Role of Legal Logic in Maimonides’ *Mishneh Torah*,” *Shenaton ha-Mishpat ha-ʿIvri* 14-15 (1988-89): 1-30 (Hebrew), where he distinguishes between an “internal reason” and an “external reason,” albeit in a different sense from that proposed here. Cf. S. Ettinger, *Evidence in Jewish Law* (Jerusalem: The Institute for Legislative Research, 2011), 153-58 (Hebrew).

23 See Part I, 149\*-61\*.

("things which have a reason")—that is, matters in which the judge implements his own judicial discretion, taking into account the "rationale" for the halakhah and adjusting it to the specific circumstances of the case at hand—and *gezerat ha-katuv* (scriptural decree), implying a technical-mechanical application of the language of the halakhah without a consideration of its overall purpose. In *Hilkhot Ishut*, Maimonides wishes to justify his deviation from the talmudic law by arguing that one may not apply *gezerat ha-katuv* except in accordance with its rationale. In contrast, in *Hilkhot Mamrim* he states that the law, "'a son' and not a daughter," is applied because it is a scriptural decree, not because of the rationale that he immediately proposes for it. But, notwithstanding the difference in the overall tendency of these two halakhot, the meaning of the term *gezerat ha-katuv* is identical in both of them. Here, too, the term *gezerah* indicates not only a command, but a law that is sharply defined and clear-cut (from the literal sense of the root *g.z.r.*, "to cut").

Therefore, the most striking (if not the only) appearance in the Talmud of *gezerat ha-katuv* as halakhah without any reason is transformed in the *Mishneh Torah* to a law with a reason. Why? It would appear that Maimonides' turnaround is rooted in his rationalistic approach that there is a reason for every commandment and for every halakhah.<sup>24</sup> This tendency, emphasized both in the *Guide of the Perplexed* and in the *Mishneh Torah*, is an inseparable part of Maimonidean rationalism in the realms of science and philosophy, and moves him to propose a reason even for those laws that the talmudic sources declare to be opposed to reason. In order to remain loyal to the talmudic halakhah, he declares that, even though the rule, "the 'son' and not the daughter" has a rationale and a purpose, it must be implemented as a scriptural decree—that is, in literal fashion and not on the basis of its reason. Thus, here Maimonides has taken a unique case of a talmudic law, in which a scriptural decree is understood in the theological sense, and has understood it in the jurisprudential sense, albeit without changing the manner of its application. However, this is not simply the typical conservatism of a halakhist. This halakhah exemplifies Maimonides' meta-halakhic view that the law "is directed only towards the things that occur in the majority of cases" (*Guide* III.34).<sup>25</sup>

24 With the exception of those *halakhot* that fall under the category of "details"; see Part I, 131\*–33\*.

25 See Y. Lorberbaum, "Maimonides on the Institution of Law, Legal Formalism and *Gezerat ha-Katuv*," forthcoming in *Mehkerei Mishpat* 29 (2012) (Hebrew).

## 2. “It is *gezerat ha-katuv* that the Court may not execute nor flagellate a person on his own admission”

*Hilkhot Sanhedrin* (Laws of Sanhedrin) 18.6:

It is a scriptural decree (*gezerat ha-katuv hi*) that the Court may not execute nor flagellate a person on the basis of his own admission, but only by the testimony of two witnesses.

And [the fact that] Joshua killed Achan and David the Amalekite convert on the basis of their own statement was a temporary ruling or a matter of royal prerogative—but the Sanhedrin is not allowed to put to death or to administer corporal punishment to one who confesses to a transgression, lest his mind was confused regarding this matter. Perhaps he is among those who toil and are bitter of soul, who are waiting for death, or one of those that stick swords into their own belly or throw themselves off the roofs—so too, perhaps this one comes and admits to a thing which he has not done in order to be killed.

The general rule is (*u-khlalo shel davar*) that this matter is a royal decree (*gezerat melekh hi*).

Maimonides begins this halakhah with the statement: “It is a scriptural decree that the Court may not execute nor flagellate a person on the basis of his own admission,” and immediately thereafter removes the difficulty relating to the fact that “Joshua killed Achan...”<sup>26</sup> He then suggests a rationale for the halakhah: “Perhaps his mind was confused regarding this matter, or perhaps he was among those who toil and are bitter of soul, who await death...” This “modern” reason gives uncharacteristic preference to the “right of the individual” over and above the social interest. It is not insignificant that there were exegetes who gave to this reason a theological–religious formulation.<sup>27</sup>

26 On the use of *hora'at sha'ah* (“emergency ruling”) and *din malkhut* (“the law of the king”) in Maimonides’ halakhah, see Yaakov Blidstein, *Political Concepts in Maimonidean Halakha*, 2<sup>nd</sup> ed. (Ramat Gan: Bar Ilan University Press, 2001), 137–42, 161–66 (Hebrew).

27 See Radbaz’s remarks, ad loc.: “And one may perhaps give something of an explanation, in that a person’s soul is not his own property, but that of the Holy

The structure of this halakhah is similar to that of “‘the son’ and not the daughter” in *Hilkhot Mamrim* 7.11, which also began, as mentioned, with the words, “It is a scriptural decree that...” followed by the rationale. However, the same scriptural decree statement here is not based upon a talmudic source, but is a Maimonidean innovation.<sup>28</sup> The reason given is also original, for which there is no hint in the Talmud or other rabbinic sources.

Here, too, Maimonides’ commentators struggle with a number of difficulties. Maimonides opens by stating that it is a *gezerat ha-katuv* whose reason is not known, continues with a suggested rationale, and concludes by saying that “it is *gezerat melekh*,” which the commentators take as indicating that it is a halakhah without any rationale.<sup>29</sup> As in the previous case, they also suggest forced and unconvincing solutions.<sup>30</sup> The shortcoming in all of these interpretations lies in their point of departure, which is rooted in a theological bias—namely, that *gezerat ha-katuv* has a solely theological meaning.

In this case as well, the phrase *gezerat ha-katuv* is in fact used in the jurisprudential sense, embodying a version of legal formalism, or “rulism,”

One blessed be He.” These remarks are surprising on several grounds. First, it is not clear what their relation is to the rationale proposed by Maimonides. Second, they remove the basis, not only for convicting a person on account of his own confession, but also on the testimony of two witnesses, for neither do they have any ownership over the suspect. Why then should he be put to death on the basis of their testimony? It is not for naught that Radbaz concludes: “Nevertheless, I concur that this is the edict of the Ruler of the World, and one may not question it.”

28 The source of this law is in Rabba’s statement, “A person does not make himself out to be an evildoer,” in *b. Sanh.* 9b; 25a.

29 See Radbaz ad loc. See also Rappaport, “On the Reason,” 93, and the bibliography in n. 56.

30 Radbaz suggests: “The reason written by our Teacher does not apply to stripes (corporal punishment). Therefore he wrote: ‘And to summarize: It is the edict of the king, and we do not know the reason.’” According to the Radbaz, this also explains the introductory phrase: “It is a scriptural edict.” Following this reasoning, see Y. Levinger, *Maimonides’ Techniques of Codification: A Study in the Method of Mishneh Torah* (Jerusalem: Magnes, 1965), 30-31 (Hebrew). However, stripes do not raise any real difficulty, for according to talmudic halakhah they are a substitute for death at the hands of Heaven. Cf. Y. Lorberbaum, *The Image of God: Halakhah and Aggadah* (Jerusalem-Tel Aviv: Schocken, 2004), 372-74 (Hebrew), and the bibliography there. Further along, Radbaz comments, “stripes are half a death.” Cf. Levinger, *Maimonides’ Techniques*, 30-31; for a different solution, see Stern, “On Alleged Contradictions,” 290; Rappaport, “On the Reason”; and Ettinger, *Evidence*, 157.

as discussed above. The phrase, “It is a scriptural decree that...,” with which this halakhah opens, is an instruction to read the law that “the Court may not execute...” literally. That is, it requires one to adhere to the language of the halakhah even in exceptional cases in which the rationale does not seem applicable. Hence, for example, this halakhah would apply even in the case of a person who confessed, but who did not appear to have any suicidal tendencies; even in such a case, the accused may not be put to death (or flogged) on the basis of his own confession. This rule has dramatic consequences for the numerous cases in which it is clear that the person’s confession has nothing to do with “mental confusion,” “bitterness of soul,” or the desire for death.

Maimonides’ intention in beginning with the *gezerat ha-katuv* statement is not in order to say that this law has no reason, but, on the contrary, this wording is used specifically because he wishes to explain its reason. The significance of the phrase *gezerat ha-katuv* is in fact to state that its rationale is outside of the limits of halakhah.

It should be noted that in *Hilkhot Sanhedrin* 18.6, as in *Hilkhot Ishut* 25.2 (and unlike *Mamrim* 7.11), the phrase *gezerat ha-katuv* should not be understood by its plain meaning, as it does not relate to any passage “written” in the Torah, but rather to a talmudic halakhah that (at least in this case) has no basis in Scripture. “Scriptural decree” (like “royal decree,” which appears at the end of the halakhah) is transformed in the *Mishneh Torah* into a kind of linguistic shorthand requiring a *literal* reading of the halakhah. Here too, *gezerah* indicates a halakhah that is “clear-cut,” or well-defined.

What makes this halakhah unique is the summary that appears at its conclusion: “The general rule is (*u-khlalo shel davar*) that this matter is a royal decree (*gezerat melekh*),”<sup>31</sup> thereby alluding to the phrase *gezerat ha-katuv* that appears at its beginning. As should be remembered, *gezerat ha-katuv* is the talmudic devolution of the tannaitic phrase *gezerat melekh*. In the talmudic sources both these phrases generally have a jurisprudential meaning, being invoked to indicate a literal reading of the language of Scripture.<sup>32</sup> This is likewise the case in *Hilkhot Sanhedrin* 18.6. Following the rationale, Maimonides wishes to emphasize that, in any event (“to summarize”), “it is an edict of the king”—not

31 Compare the end of *Hilkhot Mikva’ot*, where Maimonides repeats the phrase *gezerat ha-katuv*; see Lorberbaum, Part III, viii.1.

32 Albeit with different emphases than in Maimonides. See Lorberbaum, “*Gezerat Melekh* and *Gezerat ha-Katuv* in Talmudic Literature” (Hebrew, in preparation). I will mention the differences between them below.

because there is no substantive rationale, but because one may not apply the halakhah on its basis. Rather, it is to be applied in a mechanical-specific way, as a “scriptural/royal decree.” In the “competition” between the rationale for the halakhah and the “simple” or “conclusive” halakhah itself, Maimonides rules, as he does in *Hilkhot Sanhedrin* 18.6, in favor of the latter.

### 3. “How far does the honor of one’s father and mother go?”

*Hilkhot Mamrim* (Laws of Rebels) 6.7:

How far does [the obligation of] honoring one’s father and mother go? Even if they took his purse of gold coins and cast it into the sea in his presence, he shall not embarrass them nor exhibit sorrow in their presence nor be angry at them. Rather, he shall accept *gezerat ha-katuv* (decree of Scripture) and keep silent.

And how far does their fear go (*mora’an*)? Even if he is wearing beautiful garments and sitting at the head [of a gathering] before the public, and his father and mother came and tore his clothing and hit him on his head and spit in his face, he may not embarrass them but must remain silent.

And he shall fear and be in awe of the King, the King of Kings, who has commanded him regarding this. For if a king of flesh and blood were to decree something that pains him more than this, he would be unable to struggle against this thing; all the more so He who spoke and the world was at His will.

The description of the incidents and most of the motifs that appear in this striking halakhah are taken from talmudic sources.<sup>33</sup> Brief aggadic sayings, educational in nature, are expanded here with rationales and explanations to become a definitive and obligatory halakhah.<sup>34</sup> In this halakhah too the term

33 *b. Qidd.* 31a-b.

34 See Y. Blidstein, “Parents and Children in Maimonides’ Teaching,” *Da’at* 37 (1996): 29 (Hebrew). Most of the sources mentioned in the notes to the present section are gathered in that article. Cf. idem, *Honor Thy Father and Mother: Filial Responsibility in Jewish Law and Ethics* (Jersey City, NJ: Ktav Publishing House, 2005), 27–53.

*gezerat ha-katuv* is original. In the first section Maimonides fixes the “limits” of the obligation to honor one’s parents. The son is required to honor his parents even if they behave in an irrational manner and cause him great loss. In Maimonides’ words, “rather, he shall accept (as if it is) the decree of Scripture and keep silent,” a phrase which does not appear in talmudic sources. It is likewise clear that the obligation not to “embarrass them,” to “cause them pain,” or to “show anger in their presence” are to be applied as written—and, if this is so in this extreme example, how much more so does it apply in lighter cases! In other words, the obligation to honor one’s parents is to be applied in literal fashion even in such circumstances, without any distinction and, to quote the language used by Maimonides further on in the halakhah, without “struggling with the matter” (see below).

The same holds true regarding the answer to the question, “How far does their fear go?” Following the Talmud (*b. Qidd.* 31b), Maimonides depicts an extreme case, a kind of public scandal caused by the parents, in order to concretize the extent of the obligation. Furthermore, in order to emphasize this dramatic obligation, he invokes the fear of the “King, the King of Kings,” who “has commanded him regarding this”—based, in his view, on an inference *a minori ad majus* from the “fear of flesh and blood.” As in *Hilkhot Sanhedrin* 18.6, here too there is a relationship, both earthly and heavenly, drawn between *gezerat ha-katuv* and *gezerat melek*h. The nature of the “royal decree” is such that one may not “struggle” against it—that is, to resist or to disagree with it.<sup>35</sup> The king denies his subjects any [personal] judgment or discretion and demands that they execute his edicts literally. Such is the case, according to Maimonides, regarding the commandment of honoring and fearing one’s parents.

Exegetes and scholars also understood *gezerat ha-katuv* in this halakhah, *Mamrim* 6.7, in the theological sense.<sup>36</sup> But this demanding halakhah, according to Maimonides (as well as according to the talmudic aggadah/advice), is not without its rationale. Indeed, the obligation to honor and fear one’s parents is, in his opinion, at the very core of the category of *mishpaṭim*—those commandments whose reason is evident to all, even to the multitude. Maimonides presents

35 See, e.g., *t. Zevah* 6.5; *m. Hul* 9.1. Cf. s.v. “*Pirkes*,” in M. Moreshet, *A Lexicon of the New Verbs in Tannaitic Hebrew* (Ramat Gan: Bar Ilan University Press, 1981), 292 (Hebrew).

36 See Rappaport, “On the Reason,” 93; I. Twersky, *Introduction to the Code of Maimonides* (New Haven: Yale University Press, 1982), 472 n. 288; Stern, “On Alleged Contradictions,” 289; and compare Blidstein, *Honor Thy Father and Mother*, 29.

this view both in his philosophical writings and in his halakhic writings. In *Hilkhot Me'ilah* 8.8 he writes, "The *mishpa'ot* are those commandments whose rationale is evident, and the benefit of whose performance in this world are known, such as... honoring one's father and mother."<sup>37</sup> The "evident" rationales also apply to the broad parameters of this commandment, which are an integral part thereof.<sup>38</sup>

In Maimonides' view, the commandment to honor one's father (and mother) is a foundation of the social order. The rationale for awe of one's father, upon which the family unit is based, is an inseparable part of the rationale underlying political authority and power.<sup>39</sup> Strong authority, not only that of the ruler (and of God above him), but also that of the heads of each clan and family, is necessary in order to instill within the people habits of obedience and in order to impose law and order. According to Maimonides' authority-oriented political approach, the authority of the father over his children and the members of his household, in its broad parameters, is derived from the extensive and wide-ranging political power of the sovereign. The father, for his part, helps sustain the authority of the sovereign; in his words, "good order of the household... is the first part [i.e., a fundamental] of the city [i.e., the state]."<sup>40</sup> The argument at the end of this halakhah, that fear of the father is based upon obedience to the commandment of "the King, the King of Kings,"

37 Cf. Maimonides' *Commentary to the Mishnah, Introduction to Avot (Shemonah Pera'im)*, Ch. 6.

38 The "extreme" demand in *Hilkhot Mamrim* 6.7 is modified by Maimonides in §10: "One whose father or mother was insane... and he was unable to bear it because they were excessively crazy, may leave them and go away, and ask others care for them in proper fashion"; and in §8: "A person is not allowed to impose an excessively heavy burden on his children and to be overly particular with them regarding his respect, so as not to bring them to a stumbling block..." Both of these are original rulings (see *Hasagot ha-Rabad*, ad loc.; and cf. Blidstein, "Parents and Children in Maimonides' Teaching," 30) and they support the claim that §7 is not without rationale. For a discussion of Maimonides' understanding of the commandment of honoring and fearing parents, see Blidstein, *Honor Thy Father and Mother*, 27-53.

39 This follows from *Mamrim* 6.1: "Awe of the father and mother is deemed equivalent by Scripture to His respect and awe... As He commanded concerning reverence for his great Name and His awe, so did He command regarding their reverence and awe."

40 *Guide* 3.41 (Pines, 562); cf. *Sefer ha-Mitzvot*, Aseh 211: "The commandment by which we are commanded to fear one's parents and that we consider them as being on the level of those whom one fears lest one be punished, such as the king..." And cf. *Millot ha-Higayon*, ed. Israel Efrat (New York: The American Academy for the

cannot only indicate that God is the source of authority of this commandment, since His authority is the source of every halakhah. Moreover, it is important for Maimonides to emphasize the power of the heavenly King in comparison to the political power of the earthly sovereign (“king of flesh and blood”). Both parts of this argument imply that the authority of the father is derived from the authority of God, and indirectly from that of the political ruler.<sup>41</sup> A certain analogy is also implied here: just as one cannot “struggle against” the decrees of the king, all the more so can one not struggle against the decrees of “He who spoke and the world was, at His will.”<sup>42</sup> Even though it may be painful “beyond measure,” one may not disagree with the commandment to honor and fear one’s parents. The emphasis on the divine component of this commandment implies that this honor and fear is intended to support the authority of the sovereign and eventually of God Himself. This approach has a long tradition, going back to Plato (*Laws*, 790b) and Aristotle (*Politics*, 1259b), and continuing through Alfarabi and other Arab philosophers.<sup>43</sup>

The phrase *gezerat ha-katuv* in this halakhah thus has an explicitly jurisprudential meaning, and is identical in meaning to its use in the *halakhot* discussed so far. Here too it indicates a specifically literal reading of the commandment and, as in most of the examples cited above, it too is a verbal idiom which has no direct relation to “Scripture” or even to that which is written. Again, the “edict” indicates a conclusive, fixed halakhah from which one may not deviate. What is unique about the wording in this example, “but he shall accept *gezerat ha-katuv* and keep silent,” is that it does not contradict the rationale of the commandment, but is actually derived from it.

Study of Judaism, 1938), 60 (Hebrew). This argument is further strengthened by the inclusion of the laws of honoring one’s parents in the *Laws of Rebels*.

41 See *Hilkhot Mamrim* 6.1 (above, n. 36).

42 The addition of the word “at his will” (*kirsono*) is intended to emphasize the specific, literal application at the expense of discretion, as if to say: “The source of everything, including the commandment to honor one’s parents, is in God’s will.” Of course, one ought not to conclude from this wording that the source of the mitzvah is specifically in God’s will and not in His wisdom. See Part I, 127–29.

43 See the bibliography in *Maimonides’ Guide of the Perplexed*, trans. and ed. M. Schwarz (Tel Aviv: Tel Aviv University, 1996), 584 n. 48 (Hebrew). Elsewhere, Maimonides notes an additional reason for this commandment rooted in “deeds of kindness.” See Blidstein, *Honor Thy Father and Mother*, 33.

#### 4. Conspiring Witnesses: “That the Torah believes the testimony of the latter witnesses rather than that of the former is *gezerat ha-katuv*”

*Hilkhot Edut* (Laws of Witnesses) 18.3:

That the Torah believes the testimony of the latter witnesses rather than that of the former is a scriptural decree. Even if the former witnesses were a hundred, and two people came and exposed their falsehood and said: “We testify that all hundred of you were with us on such-and-such a day in such-and-such a place,” they are punished on the basis of their words, for two are like a hundred and a hundred are like two. Likewise, [if there are] two groups of witnesses who contradict one another—we do not follow the majority, but rather we reject both of them.

Chapter 18 of *Hilkhot Edut* deals with the law of *edim zomemim*—witnesses who conspire to cause an innocent party to be punished through means of false testimony. The term *gezerat ha-katuv* does not appear in the talmudic sources dealing with this subject; rather, again, its appearance in this halakhah is original. Commentators and halakhists agree that in this context, as in the others we have seen, *gezerat ha-katuv* indicates that this is a law “impossible to understand and contrary to common sense.”<sup>44</sup> However, this halakhah in *Mishneh Torah* is not without rationale, as Maimonides exhibits his characteristic penchant for explanation. The chapter opens with the following definition:

44 See Rappaport, “On the Reason,” 100, and the bibliography in n. 68. See also his references to other commentators, 92; Y. Blidstein, “The Judge’s Own ‘Truth’ as a Judicial Instrument: Maimonides’ *Laws of Sanhedrin* 24:1–3,” *Diné Israel* 24 (2007): 127 n. 21 (Hebrew); Ettinger, *Evidence in Jewish Law*, 32–33; and cf. Josef Stern, “The Idea of *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), 291; D. Henshke, “Conspiring Witnesses: Towards the Solution to an Ancient Riddle (in Wake of *Sifrei Zuta Devarim*),” *Tarbiz* 72 (2003): 351 (Hebrew). Henshke quotes Maimonides’ formulation and comments: “The fact that the Torah believed the latter [pair of] witnesses... is a ‘scriptural edict’—without any rationale; this, notwithstanding his well-known tendency to explain the laws of the Torah in accordance with reason.” And cf. D. Henshke, “On the Question of the Unity of Maimonides’ Thought,” *Da’at* 37 (1996): 43–44 n. 23 (Hebrew).

One who testified falsely, and it is known by means of witnesses that he testified falsely, is called a “conspiring witness” (*ed zomem*). And it is a positive commandment to do to him that which he wished to do to his fellow by means of his testimony. If they testified regarding a transgression for which the punishment is death by stoning, and their testimony was confuted, they are all executed by stoning... (18.1).<sup>45</sup>

Immediately thereafter, in halakhah 2, Maimonides qualifies this law:

To what does this refer? To witnesses [whose testimony] was confuted. But [if there were] two groups [whose testimony] contradict one another, such that there is no testimony here, neither one is punished, because we do not know which one is the lying group.

And he then proposes the following distinction:

And what is the difference between confuting [*hakhhashah*, false testimony] and [making them to be] conspiring [witnesses] (*hazamah*)? Confuting pertains to the testimony itself; this one says, “This thing happened,” and that one says, “It did not happen,” or it is implied by his words that it did not happen. And making them to be conspiring witnesses relates to the witnesses themselves, and the witnesses who showed them to be conspirers because they do not know whether the thing happened or not.

In order to clarify the matter, he illustrates it through the following example:

How so? If witnesses came and said, “We saw this one who killed a certain person or loaned a *maneh* to such-and-such on such-and-such a date in such-and-such a place,” and after they testified and were [cross-]examined two others came and said, “On such-and-such a day and in such-and-such a place we were with you and with those people the entire day, and these things

45 On the reason for this commandment according to Maimonides, see *Guide* III.41 (Schwarz, 379).

never happened—this one did not kill that one, and this one did not loan to that one”—this is confuting [of the testimony].

And if they said to them, “How can you testify thus? This person who killed or was killed, or who loaned or borrowed, was with us on that day in a different city”—this testimony is [also] confuted, for it is as if he said, “This one did not kill that one, and this one did not loan to that one, for they were with us and this thing did not occur”—and so for all similar things.

But if they said to them, “We do not know whether this one killed that one on such-and-such a day in Jerusalem as you say, or did not kill him. But we testify that you were yourselves with us on that day in Babylonia”—these are made to be conspiring witnesses, and they are executed or required to pay.

At the end of this lengthy halakhah, Maimonides adds an explanation, “Since the witnesses who were proved to be conspiring *did not take care regarding their own testimony*, whether it was true or false.”

Maimonides already suggested this explanation for the law of conspiring witnesses in his *Commentary on the Mishnah* at *m. Mak.* 1.4, in almost identical language:

The witnesses are executed on the basis of the testimony of those who confuted them, even though they are two against two, because the [latter] testimony pertains to the witnesses themselves and does not pertain to the substance of the testimony, to support it or nullify it. For they say, “We do not know if that person killed as you say or if he did not kill, and we are not responsible for the testimony. But we testify that you were with us in such-and-such a city on such-and-such a day.” Hence we accept their words, and the witnesses are executed.<sup>46</sup>

Maimonides distinguishes between conspiring witnesses, whose convicting witnesses are testifying against the conspiring witnesses themselves (*gufam shel edim*; “you were with us, hence you are lying”), and their testimony is decisive and “lethal,” and confuting witnesses, whose words relate to “the substance of

46 Maimonides, *Commentary to the Mishnah*, ed. and trans. Y. Kapah (Jerusalem: Mosad Ha-Rav Kook, 1967), 152.

the testimony,” and whose testimony thus merely neutralizes or nullifies the testimony of the opposing group, for “we do not know which one is the lying group.” The difference between them is rooted in a more general distinction in the talmudic rules of evidence and testimony—namely, the difference between the status of the accused and that of the witness in legal procedures. In talmudic law, the accused is not a witness; he does not testify either to his own benefit or to his detriment (“a person does not make himself out to be wicked”).<sup>47</sup> In a procedure conducted against him, his own testimony is inadmissible. Only other witnesses can testify to his deeds.<sup>48</sup> A conspiring witness, whose testimony pertains to himself and not to the substance of another’s testimony, loses his status as a witness and becomes an accused. Therefore, his own denial, whether explicit or implied (“I was not with you on such-and-such a day in Babylonia”), is not accepted by the Court.<sup>49</sup> This principled distinction between

47 See above, section 2. The same holds true also regarding the litigant in civil law (see the following note).

48 See the Introduction to *Laws of Witnesses* in the *Mishneh Torah*: “Laws of Testimony, which include eight commandments.... [the fifth commandment being] that a transgressor shall not give testimony”; and *ibid.*, 3.4 and 9.1: “Every testimony from which the one testifying may gain benefit, he may not testify, for this is like one who testifies concerning himself.” And cf. H. S. Hafetz, “The Role of Testimony in Jewish Law,” *Diné Israel* 9 (1978–80): 59–60 (Hebrew); Ettinger, *Evidence in Jewish Law*, 88–91.

49 This strict approach is contrary to the claim made in *b. Sanh.* 27a, “What reason did you see to rely on these? Rely rather on those!,” according to which there is no cogent reason for rejecting the testimony of the conspiring witnesses concerning themselves (as opposed to that of the witnesses who prove them to be conspiring witnesses); hence, this is a halakhah without any rationale. This argument is brought in the context of the talmudic discussion of the dispute of Abbaye and Rava: “[The case of] a conspiring witness... Abbaye said: He is ruled unfit retroactively—from the moment that he testified he is an evildoer, and the Torah says, ‘Do not join hands with a wicked man [to be a malicious witness]’ [Exod 23:1]—do not make an evildoer into a witness. Rava said: From this point on he is unfit; [the law of] the conspiring witness is an innovation. What reason did you say to rely on those? Rely on those! You have not anything concerning him but from the time of his innovation.” Rashi (ad loc.) comments: “It is an innovation—that two are ruled unfit because of two others who say: ‘You were with us.’ What reason did you see to rely on them? Rely rather on those! Rather, it is a scriptural edict; therefore, you may only apply it from the time of the innovation and thereafter—i.e., from the moment that they were found to be conspiring.” It may be that, under Rashi’s influence, the commentators erroneously taught that the term *gezerat ha-katuv* in *Hilkhot Eduv* 18.3 refers to a halakhah without any rationale. It is important to note that this is an exceptional example of the use of *gezerat ha-katuv* by Rashi in the theological

the status of the witness and that of the accused (who is not a witness) appears in Nahmanides' *Commentary* concerning conspiring witnesses in Deuteronomy 19:18, where he adopts Maimonides' explanation:

Therefore, there comes the reliable tradition, which explained that the witnesses are shown to be conspiring when the convicting witnesses say: "Were you not with us on such-and-such a day" [*m. Mak.* 5.1], the reason being that this testimony regards the [conspiring-YL] witnesses themselves, but they [the conspiring witnesses-YL] are not trustworthy regarding themselves to say [in other, similar, cases, when they are accused by convicting witnesses-YL] "We did not do thus," for these [the convicting witnesses-YL] could have said concerning them [the conspiring witnesses-YL] that they killed somebody or violated the Sabbath [and the accused witnesses cannot give a counter testimony-YL].<sup>50</sup>

This formalistic explanation, which is not characteristic of Maimonides (who generally speaking avoids explanations of this type), is consistent with the formalism predominant in the talmudic laws of evidence and testimony, which impose strict limitations on judicial discretion. The degree to which this explanation is convincing to the contemporary reader, who is accustomed to more flexible rules of evidence and testimony, is of secondary interest to us here. It is sufficient for our purposes to know that the use of the term *gezerat ha-katuv* in *Hilkhot Edut* 18.3 does not indicate an arbitrary halakhah or one lacking in underlying rationale.<sup>51</sup>

The argument in *Hilkhot Edut* 18.3, "the Torah believed the testimony of the latter witnesses above that of the former is *gezerat ha-katuv*," is thus not a theological one. This is a jurisprudential-halakhic assertion. The meaning of the term *gezerat ha-katuv* in this halakhah is that the removal of the status of

sense. He uses this term dozens of times in his commentary on the Talmud, and insofar as I examined it the majority of cases use it in a jurisprudential-halakhic sense. Nevertheless, this point requires a more thorough and separate study.

50 Nahmanides, *Commentary on the Torah*, ed. C. Chavel (Jerusalem: Mosad Ha-Rav Kook, 1976), 433 (Hebrew).

51 Commentators and halakhists have offered reasons for this law in a less formalistic direction, and have not seen it as a halakhah without rationale. See, e.g., R. Nissim of Gerona, *Derashot ha-Ran*, Eleventh Sermon, ed. L. A. Feldman (Jerusalem: Mekhon Shalem Yerushalayim, 1977), 197.

witness from the “former witnesses,” as explained in the previous halakhah, is not subject to discretion, but must be applied in a literal manner.<sup>52</sup> *Gezerat ha-katuv* in this halakhah refers, not to the presumption of “reliability” or “trustworthiness” of the “latter witnesses,” but rather makes it a categorical presumption from which one may not depart. This clearly follows from the stipulation that “even if the former witnesses were one hundred, and two people came and exposed their falsehood... for the two are like one hundred and the one hundred are like two.” The instruction to read this halakhah literally as a “scriptural decree” applies even when two witnesses confute one hundred. Even in this extreme case the latter have no standing as witnesses and “they are punished on the basis of their testimony.” In the same breath, Maimonides draws a parallel between making witnesses into “conspiring witnesses” and “confuting” them. There too, “one does not follow the majority,” and he applies *gezerat ha-katuv* (“that the two are like one hundred,” etc.). But, unlike the case of conspiring witnesses, here the “two groups of witnesses contradict one another” and, owing to doubt about the facts, “both of them are rejected.”

It is easy to see why Maimonides felt the need in this halakhah to stress that the presumption of reliability of the conspiring witnesses is a “scriptural decree” from which one may not deviate. And, conversely, we can see that he did not feel the need to stress the scriptural decree regarding the basic halakhah that “it is the law of the Torah that one does not accept testimony, either in matters of civil law or in matters of capital law, except from witnesses” (*Hilkhot Eduṭ* 3.4)—and not from the litigants— which is the basis for this rule. Unlike the typical accused, such as one who has violated the Shabbat or committed murder, a “conspiring witness” originally possessed the status of a witness. When the witnesses who confute his testimony appear, his status suddenly changes to that of a “litigant,” who is only the subject of testimony of others. The crime for which he is accused is the (false) testimony that had been heard in court, which implies contradicting the confuting testimony—but only his own testimony becomes inadmissible.<sup>53</sup> Moreover, the distinction between confuted testimony and conspired testimony, as suggested in the previous halakhah, is subtle and formalistic. As we may remember, confuted testimony is: “We

52 See Blidstein, *Political Concepts*, 134 n. 17, who noted the formalistic nature of this halakhah, albeit without relating to the use of the term *gezerat ha-katuv*.

53 The change in the status of the conspiring witness, from witness to accused, is already implied in Deut 19:15–18; however, it does not follow from these verses that the testimony of the accused is not admissible.

were with you on such-and-such a day and in such-and-such a place together with those (i.e., the accused murderers) the entire day, and these things never happened.” In contrast, the form of conspired testimony is: “We do not know whether this one killed that one on such-and-such a day in Jerusalem, as you say, but we testify that you were yourselves with us on that day in Babylonia.” Does the seemingly fine difference between these two forms of testimony justify the normative difference between them? These considerations strengthen the talmudic question: “What did you see that you relied upon these? Rely upon those!” Maimonides was well aware of these difficulties (which do not pertain to the halakhah that lies at the root basis of the presumption mentioned) that invite distinctions, explanations, and “deviations.” Therefore, he specifically began here with the words: “And that the Torah believed... is a scriptural decree.”<sup>54</sup>

## 5. “That the Torah disqualifies the testimony of relatives... is *gezerat ha-katuw*”

*Hilkhot Edut* (Laws of Testimony) 13.15:

That the Torah disqualifies the testimony of relatives, is not because there is a presumption that they love one another, for he does not testify either to his benefit or to his detriment; rather, it is *gezerat ha-katuw*. Therefore, one who loves or hates another person is qualified for testimony, even though he is disqualified to serve as judge [in a case involving him], for the Torah only decreed regarding relations.

54 Maimonides also alludes to the formalistic aspect of the laws of witnesses in *Hilkhot Yesodei ha-Torah* 7.7. He distinguishes between a false prophet and a true prophet: “It is possible that [a person] may perform a sign or wonder and, though he is not a prophet, there is substance to this sign. Nevertheless, there is a mitzvah to listen to him for, as [he] is a great man and a sage and fit for prophecy, we rely upon his presumption [of prophecy], just as we are commanded to rule on matters of law on the basis of two kosher witnesses, even though it is possible that they testified falsely for, given that they are presumed by us to be fit, we keep them in their presumption of being fit. And regarding such matters and the like it is said, ‘The secret things are for the Lord our God, and the revealed ones to us and our children’ [Deut 29:28], and it is said, ‘For man sees to the eyes, and the Lord sees to the heart’ [1 Sam 16:7].”

Here too the commentators and halakhists think that *gezerat ha-katuv* alludes to a halakhah lacking in rationale. Apart from the fact that, to their mind, this term always has a theological meaning, this view is reinforced by two factors. First, by the seeming rejection of the reason for their disqualification; since they are not allowed to testify against a relative even to his detriment, then the rule is not “because there is a presumption that they love one another.” In fact, the term *gezerat ha-katuv* is situated uniquely in the argumentative structure. Whereas in all of its appearances thus far (five in number) the rationale for the halakhah, whether explicit or implicit, appears alongside it, here, in *Edut* 13.15, Maimonides seems to reject the accepted reason in order to declare in its place, “rather, it is a scriptural decree.”<sup>55</sup> The second factor reinforcing this theory is the language used in *Sefer ha-Mitzvot*: “The 287<sup>th</sup> mitzvah is that the judge is admonished not to accept the testimony by relatives concerning one another... and this is a scriptural decree (*ve-zeh gezerat ha-katuv*), which has no reason under any circumstances (*ein lah ta'am be-shum panim*), and you should know this (*ve-da' zeh*).”<sup>56</sup>

55 The only *halakhot* similar to these are *Hilkhot Tefillah* 9.7; *Hilkhot Mikva'ot* 11.12; and *Hilkhot Teshuvah* 3.4. See Part III, Chapter 4, sections 1–3, respectively.

56 Maimonides, *Sefer ha-Mitzvot*, ed. H. Heller (Jerusalem: Mosad Ha-Rav Kook, 1995), 171. Nearly all commentators and researchers interpret the phrase “scriptural decree” in *Hilkhot Edut* 13.15 as a halakhah for which there is no rationale. See, for example, Rappaport, “On the Reason,” 90, who writes, “A major source for this rule (i.e., that the phrase *gezerat ha-katuv* refers to something which does not have any known rationale) may be found in Maimonides’ words regarding the unfitness of blood relatives [for testimony]. He writes as follows in *Sefer Shoftim*: ‘that the Torah ruled them unfit,’ etc.” Cf. *ibid.*, 99–100; and Blidstein, *Political Concepts*, 127 n. 21. Compare Stern, “On Alleged Contradictions,” 290–91: “The term *gezerat ha-katuv* is used to emphasize that the law [i.e., that testimony of those who love or hate a given person is admissible–YL] is opposed to logical reasoning [in contradistinction to the rule that relatives are inadmissible–YL], but we may not conclude from this that this mitzvah has no rationale at all.” Cf. *Encyclopaedia Talmudica*, s.v. “*Gezerat ha-katuv*,” which, based upon Maimonides’ words, explains:

There are places which speak of *gezerat ha-katuv* not only with reference to a law, but also regarding a certain reality, namely, that we assume that a certain thing is thus in reality, even though in terms of reason the reality may be different, such as relatives being disqualified for testimony. And the reason is not that we suspect that they are lying because of the presumption that they love one another, for even Moses and Aaron are not considered reliable [with regard to one another]. Moreover, relatives may not testify either to the benefit of the other or to his detriment; rather, it is a scriptural edict (Maimonides, *ibid.*). And the *aharonim* wrote that neither is it the intention to say that it is a scriptural

But *Hilkhot Edut* 13.16 in fact has a rationale. The point of departure for the conceptual and textual discussion that follows is the recognition that the halakhic principle that a relative is disqualified from testifying is self-evident. After all, he is an interested party. It simply makes no sense to conclude that the reason for the disqualification of a relative is unknown. Rather, because the reason is self-evident, this halakhic principle, which similarly applies to a wide range of laws that also overlap the boundaries of consanguinity, is far removed from the category of *huqqim*.

Indeed, as we shall see below, in a number of places in *Hilkhot Edut* Maimonides emphasizes that having an ulterior interest in a specific matter, the very reason for the disqualification of relatives, affects the validity of testimony even of a person who is not a relative (in the formal sense), to the extent that the judge ought to ignore it.<sup>57</sup> This subject appears in several talmudic sources, and is repeated among commentators and other halakhic authorities.<sup>58</sup> In the final analysis, relatives typically “love one another,” and, regardless, are not apathetic to one another.

Before explicating the language used by Maimonides in *Hilkhot Edut* 13.15, I wish to suggest a fundamental distinction concerning laws of testimony and evidence. In discussing laws of testimony, it is useful to draw a distinction

ordinance that they are unfit for testimony, even though we presume that they are speaking the truth, for in monetary law, whenever it is known to us that this one owes money to that one, there is no need for testimony. Rather, it is a scriptural edict that we presume them to be lying (5:565).

Similarly, S. Ettinger, “Law and Equity in Maimonides and Aristotle,” in *On Law and Equity in Maimonidean Jurisprudence: Reading the Guide for the Perplexed III:34*, ed. H. Ben-Menahem and B. Lifschitz (Jerusalem: Hebrew University, 2004), 242–43 (Hebrew), also attributes the theological sense to *gezerat hamelekh* in *b. B. Bat.* 159a (see below).

57 It is possible to think of various reasons for disqualifying close relatives—e.g., so as to avoid intra-familial tension—but it would seem that the main concern is the possibility of ulterior motives.

58 See, e.g., *m. Sanh.* 3.1; *b. Sanh.* 23a. Among the commentators, see, e.g., *Sefer ha-Hinnukh* §589, ed. C. D. Chavel (Jerusalem: Mosad Ha-Rav Kook, 1990), 717: “The Omnipresent wished to keep us far from engaging in judgment between people, except on the basis of a strong and truthful testimony, clean of any suspicion. To strengthen this matter He removed any testimony of relatives, even to hold them culpable, lest the habit of accepting such testimony be extended to accept it to acquit as well.” Cf. *Teshuvot ha-Ribash*, §168, and Hafetz, “The Role of Testimony,” 59, 63. It would appear that this principle was so self-evident that many people found it unnecessary to even mention it.

between those kinds of testimony that are discussed in terms of *admissibility*, and those discussed in terms of *weight*; or, for our purposes, between the testimony of a relative, which is inadmissible, and that of a kind of [emotional] closeness that affects the weight of the testimony. While there is no conceptual and terminological distinction between admissibility and weight with regard to testimony and evidence in halakhic literature, this distinction may shed light on many of the laws of testimony in the *Mishneh Torah* (and their parallels in the Talmud), including the one discussed here.<sup>59</sup>

Our halakhah appears at the end of Chapter 13 of “Laws of Testimony,” which summarizes the laws concerning testimony of relatives.<sup>60</sup> The chapter opens with a general statement of principle: “Relatives are disqualified for testimony according to Torah law (*min ha-torah*).”<sup>61</sup> Immediately thereafter Maimonides defines who is considered a “relative” under Torah law (“relatives from the paternal family alone”),<sup>62</sup> who is considered such “according to their [i.e., the Sages’] words” (i.e., “relatives through the mother or by marriage”),<sup>63</sup> and those who are not considered as relatives for purposes of testimony.<sup>64</sup> Throughout the length of the chapter, with characteristic order and system (from

59 At first glance, talmudic halakhah regarding matters of testimony seems to be based primarily upon rigid laws of admissibility and inadmissibility. However, it would be an error to think that it does not contain laws pertaining to the weight of the testimony as well (see below). In this context I shall note that, while one may easily cite an entire body of halakhot regarding testimony that does not relate to the category of admissibility (even though a developed system of law could hardly function without it), it is difficult to imagine a system of law regarding testimony and evidence that does not have a category of weight. In the final analysis, a judge cannot avoid the need to apply his own judgment regarding the contents of testimony.

60 For the talmudic sources, see *b. Sanh. 27b* and the Maimonidean commentators.

61 Immediately thereafter, Maimonides cites the source of this law: “As is said: ‘The sons shall not die for the fathers’ [Ezek 18:20]. From tradition we learn that this prohibition includes the rule that fathers should not be put to death on account of their sons’ [testimony], nor sons on account of that of the fathers, and this is also the law regarding other relatives.”

62 “And these are the father with the son, and with the son’s son,” etc. (§1).

63 §1. Therefore, for example, “husbands of sisters are unfit [to testify] with one another” (§8); and: “He may not testify regarding the son of his wife’s sister, nor regarding the husband of the daughter of his wife’s sister” (§9).

64 For example: “He may testify regarding the son of his wife’s sister’s husband” (*ibid.*) or: “The father of his daughter-in-law and the father of his son-in-law may testify regarding one another” (§11).

general rules to specific details), Maimonides explicates who is disqualified for testimony by reason of consanguinity. All of these *halakhot* specify those witnesses whose testimony, because of their relation to the litigant, may not be heard in court at all. Or, to use somewhat anachronistic terminology, the testimony of those who are considered relatives is inadmissible; the judge has no discretion regarding them—that is, he is not allowed to relate to it in terms of weight at all.

However, the laws of testimony in the *Mishneh Torah* are not restricted to rules of admissibility. In another series of laws Maimonides does guide the judge regarding the weight of testimony. Thus, for example, in *Hilkhot Eduv* 16.4, which is concerned with civil law, he writes:

And these matters depend upon the judgment of the judge and the power of his understanding, that he understand the essence of the laws, and how one thing causes another thing, and that he examine deeply: *if he finds that this witness has an aspect of benefit from this testimony, even in a distant and far-fetched manner, he should not give testimony concerning it.*<sup>65</sup>

These words instruct the judge to relate to the testimonies that come before him, not only in a mechanical way based on “disqualification” (*paslut*) and “fitness” (*kashrut*) (i.e., “admissibility”), but, rather, with discretion. To use modern terminology, he is called upon to understand the testimonies that have been presented to him and to examine them thoroughly in order to determine their weight or reliability. In the final analysis, the judge will be able to know if “this witness has an aspect of benefit from this testimony” only after he evaluates him. But even if it becomes clear to him that the witness has some ulterior interest, it would be a conceptual error to say that his testimony is disqualified. It would be more accurate to describe it as testimony lacking in weight, which the judge ought to ignore. The phrase, “he should not give

65 And further along in the same halakhah: “And in the same way that he may not testify regarding this matter, lest he have an [ulterior] interest regarding his testimony, so too he may not judge regarding that matter; and likewise regarding other categories of disqualification: just as we disqualify witnesses, so do we disqualify judges.” It should be noted that the term *pasul* (“unfit” or “disqualified”) is used by Maimonides (as it is also in the talmudic literature) to indicate not only testimony that is inadmissible, but also testimony whose weight is negligible, if not null.

testimony concerning it," does not indicate only lack of admissibility, but also includes, of necessity, lack of weight.<sup>66</sup>

The directives concerning the weight of testimony, and the broad discretion given to the judge concerning these matters, also appear in *Hilkhot Sanhedrin*, Chapter 24. This chapter opens with the statement:

The judge must judge civil matters in accordance with those things which his mind tends to accept as being true, and if it is clear in his heart that the matter is so, even though there is no clear proof. And one need not add, if it was certain that the matter is thus, that he must judge according to what he knows" (halakhah 1).<sup>67</sup>

This general instruction is exemplified and applied further in the halakhah regarding the words of the witnesses:

How so? If a person was required to take an oath in the Court, and the judge was told by a person whom he sees as reliable and upon whose words he relies that this [first] person is suspected of [taking a false] oath, the judge must turn the oath around to the opposing party [i.e., who will swear that the money is rightfully his] and he takes an oath and takes [the money], since the judge relied upon [him] in this matter. Even if there was a woman or a slave whom he trusted, since he found the matter strong and correct in his heart—he relies upon it and judges [accordingly].<sup>68</sup>

66 Regarding our subject, it does not matter whether rabbinic halakhah recognizes testimony that has reduced weight or not, for the very need to weigh the contents of the testimony assumes the category of weight. See also *Edut* 15.1: "Every testimony from which a person may derive benefit, he may not testify therein, for it is as if he testifies regarding himself." It seems to me that this rule also refers, not only to lack of admissibility, but also (of necessity) to lack of weight; but see the continuation of this halakhah, *ibid.*

67 For the talmudic background, see *b. Ketub.* 85a.

68 For the talmudic background, see *b. Ševu.* 30b (these laws deal with various aspects of laws of testimony that are not related to our present concern).

This instruction doubtless pertains to the weight of testimony (“a person whom he sees as reliable” etc.), which has the power, for example, to transfer the burden of taking an oath.<sup>69</sup>

In Chapter 24 of *Hilkhot Sanhedrin* we read general guidelines instructing the judge to implement discretion regarding the witnesses that appear before him, while in Chapter 16 of *Hilkhot Eduot* he is instructed to investigate whether

- 69 Further along in this chapter, in §2, Maimonides expresses certain reservations: All these things are the basic law. But once there multiplied courts which were not honest, or even if they were honest in their actions they were not sufficiently wise or understanding, most of the courts in Israel agreed that they would not overturn [something said under] an oath except with clear proof... And that the judge will not judge relying upon his own opinion nor upon his own knowledge, lest each layman would say to himself: “My heart believes this thing, and my opinion relies on this...” Nevertheless, if a trustworthy person gave testimony regarding any matter, and the judge tended to believe that he spoke the truth, he postpones judgment and does not reject his testimony, and deliberates with the litigants until they agree with the words of the witness, or they make a compromise, or they withdraw their suit.

The vacillation in this law between attributing sound judgment to the judge and denying it to him reflects the tension found within the *Laws of Testimony* (and the *Laws of Sanhedrin*) between the category of weight, based upon broad judicial discretion, and the category of admissibility, where the tendency is to decide the case in a mechanical fashion on the basis of [formally] “kosher” testimonies. An explicit expression of this tension appears further along in the chapter, in §3:

And from whence [do we know] that a judge who knows that the judgment is based on falsehood may not say, ‘I shall rule [by the evidence; i.e., “go by the book”], and the guilt shall be on the heads of the witnesses’? Scripture says, ‘Keep far from a false matter.’ How then should he act? He should examine it and search it thoroughly through questioning and examining, as in capital cases. If it seems to him, according to his understanding, that there is no deceit, then he shall decide the law case on the basis of the testimony, but if his heart troubles him...”

This halakhah portrays the tension between the category of admissibility and that of the weight of testimony, giving preference to the category of weight (“it is forbidden for him to decide that case”). However, the primacy of this category is only partial, as the judge does not have the power to [formally] “disqualify” kosher witnesses (whose testimony seems to him of negligible weight) and to decide the case on the basis of his own judgment. He can only recuse himself from judgment (“and it is judged by one whose heart is at peace with the matter”). On these laws, see Blidstein, *Political Concepts*; S. Rosenberg, “On ‘The Majority Way’,” *Shenaton ha-Mishpat ha-‘Ivri* 14–15 (1988–89): 194–95 (Hebrew).

the witnesses are impartial.<sup>70</sup> The relationship of these *halakhot* to the disqualification of relatives is self-evident. Hence, it is hard to accept that, according to Maimonides, disqualification because of consanguinity is a *gezerat ha-katuv* without rationale.<sup>71</sup>

To return to *Hilkhot Edut* 13.15, this halakhah, as mentioned, appears at the end of Chapter 13 in which the laws concerning the disqualification of relatives for testimony are summarized in categorical fashion, using language that describes it as inadmissible. In this context, the phrase *gezerat ha-katuv* signifies that the rules disqualifying relatives for testimony are to be applied in a mechanical, literal way; regarding this matter the judge has no discretion and cannot relate to it in terms of weight, only in terms of admissibility. There is, of course, a rationale for the disqualification of relatives according to Maimonides. This rationale is so strong that it turns the assumption of unreliability of a relative-witness to an absolute fact. In other words, the power of the rationale transforms the words of the relative from testimony whose weight is limited (or even nonexistent) to inadmissible testimony. The practical consequence of this is that the judge must act according to the language of the halakhah and not according to its rationale.

This point is indicated by the wording, “not because they are presumed to love one another”—that is, the judge is instructed not to act according to the reason of such a presumption. It is not within his authority to determine whether a given witness is apathetic towards the litigant/relative, or whether his testimony is unaffected by his love for him, and hence ought to be admissible. In a similar fashion, the continuation of this argument—“for he does not testify either to his benefit or to his detriment”—does not tell us that the presumption of his being unfit lacks a rationale; on the contrary, it implies that the presumption of his being unfit is, once again, categorical. Given that a relative’s testimony

70 As is known, the tendency of talmudic halakhah regarding rules of testimony is to use the “objective” categories of “qualification” or “disqualification” of witnesses (*kasher* or *pasul*), which are the talmudic equivalents of “admissibility.” Talmudic halakhah tends to limit the category of weight, which provides the judge with extensive discretion. In *Hilkhot Edut* in the *Yad*, Maimonides tends to expand the category of weight, albeit without stating so explicitly, in comparison to its more anecdotal and limited character in talmudic halakhah. This expansion is, among other things, a result of the tendency towards systematization and codification in the *Mishneh Torah*.

71 The laws in *Hilkhot Sanhedrin*, Ch. 24, also bear a deep relationship to the disqualification of close relatives, a point that we cannot elaborate on here.

is inadmissible, he cannot testify even to the detriment of the litigant, as the judge has no discretion to differentiate between different testimonies.<sup>72</sup> Where the judge does have discretion is in regards to whether the “one who loves or hates [a given person] is fit to give testimony”; this person, unlike one who is related, has admissible testimony. The judge is not exempt from evaluating its weight (i.e., contents). If he discovers that “this witness has some element of benefit derived from this testimony ... he should not give testimony concerning it,” – that is, he should not give it any weight. The distinction in *Hilkhot Eduṭ* 13.15 between a witness who is a relative (and hence disqualified) and one who “loves him or hates him” (and hence admissible) is not paradoxical or arbitrary. Rather, it is a distinction between testimony that is strictly inadmissible and testimony that is evaluated on the basis of its weight.<sup>73</sup>

Support for this reading may be found in a *sugya* in *b. B. Bat.* 159a, which is the basis for this halakhah:

And what is the question? Perhaps it is a decree of the King that he is not credible and others are credible, and not because he is presumed to lie! For if one does not say thus, Moses and Aaron may not give testimony because they are not credible! Rather, it is the decree of the King (*gezerat melekḥ*) that they should not give testimony to their father in law [concerning his handwriting on a document]; here too it is the decree of the King (*gezerat melekḥ*) that they not give testimony to their father-in-law concerning his handwriting.

72 It would seem that this is also the case in *Ṭur Shullḥan Arukh*, *Ḥoshen Mishpaṭ* 33.10, which quotes Maimonides’ language in this halakhah while deleting the phrase *gezerat ha-katuv*. R. Ya‘aqov, son of the Rosh, “negates” the reason given for disqualifying the testimony of a relative in order to indicate that it is of no halakhic consequence.

73 In the final analysis, if all those who “love” or “hate” another person were to be disqualified for testimony, it would be almost impossible to conduct any judicial process. This is also the basis for the distinction drawn in *Hilkhot Eduṭ* 13.15 between the fitness for testimony of one who “loves” or “hates” and his being considered unfit to judge; whereas the judge is able to weigh the credibility of the testimonies offered, there is nobody to review the rulings of the judge.

I have discussed the context of this *sugya* elsewhere.<sup>74</sup> As I observed, the phrase *gezerat melekh* does not indicate here a halakhah without any rationale. Rather, this language must be understood against the background of the distinction drawn between admissibility and weight. The statement that the rule that a relative may not testify is a “decree of the King” means that such testimony is inadmissible. This “decree” is based upon the presumption that, typically, a relative has some interest in the matter. While this is not necessarily the case regarding every relative, inadmissibility by dint of consanguinity has been fixed by the categorical presumption of *gezerat melekh*. This means that, because of the power of the underlying reason, as well as because of “second order” considerations, even Moses and Aaron cannot testify in favor of their father-in-law. The idiom, *gezerat melekh* in *b. B. Bat.* 159b—like the alternative phrase, *gezerat ha-katuv* in *Edut* 13.15—is indicative of the “rulism” that is characteristic of laws of testimony generally, and of matters of admissibility specifically.

In like fashion, in *Hilkhot Edut* 13.15 the term *gezerat ha-katuv* has a jurisprudential-halakhic sense. As in all of its appearances in the *Mishneh Torah* discussed thus far, this halakhah is not indicative of a commandment lacking in rationale. Rather, it indicates that one ought to read the halakhah regarding the disqualification of relatives as a “categorical” law that cannot be challenged.

This would also seem to be the meaning of the language used by Maimonides in *Sefer ha-Mitzvot*. In *Mitzvat Lo Ta'aseh* (negative commandment) 287, he writes as follows:

And the 287<sup>th</sup> commandment is that the judge is admonished not to accept the testimony of close relatives concerning one another or with one another. And He said, may He be exalted, “The fathers shall not be put to death on account of the sons, and the sons shall not be put to death for the fathers” [Deut 24: 16]. And the interpretation received [through tradition] is brought in *Sifre*, that the fathers should not be put to death on the testimony of the sons, nor the sons on the testimony of the fathers.<sup>75</sup> And this is likewise the law regarding civil matters. But these matters are mentioned in the context of capital law by way of hyperbole, so that one may not say: “Since this one [i.e., the accused] has lost

74 See my article, “*Gezerat Melekh* and *Gezerat ha-Katuv* in Talmudic Literature” (Hebrew, forthcoming).

75 *Sifre Devarim* 280 (ed. Finkelstein, 297).

his life, we should not cast suspicion on his relative [whom, as witness, convicted him]. Instead, we should act on his [i.e., the relative's] testimony, since his testimony would cause the loss of life of his relative [i.e., the accused], and this is not a situation [that invites] suspicion." Therefore, it gave as an example "the closest relation and the greatest of loves"; namely, the love of a father for his son or of a son for his father. And we say: since one does not accept the testimony of the father regarding the son even to hold him culpable of the death penalty, all the more so the testimony of other relatives is inadmissible.<sup>76</sup> And this is *gezerat ha-katuv*, and it has no rationale in any way, and you should know this. And the laws of this mitzvah have already been explained in the third chapter of Sanhedrin (27b).<sup>77</sup>

Just as in the beginning of Chapter 13 of *Hilkhot Edut*, Maimonides begins *Lo Ta'aseh* 287 by suggesting the source of the law, namely, the *Sifre's* homily on Deut 24:16. In his exegesis of this midrash halakhah, Maimonides emphasizes the scope of this "admonition [i.e., proscription]." Not only does it apply to civil law as well, but the midrash chose the most extreme case possible ("by way of hyperbole")—that of the "testimony of the father concerning his son, to hold him culpable of death." All of this is clarified, so that "one should not say: since this one has lost his life, we should not cast suspicion on his relative, but we should act on his testimony, since his testimony is to cause the loss of life of his relative, and this is not a situation [that invites] suspicion." If such is the case regarding "the closest relation and the greatest love," then "all the more so that testimony of other relatives should not be admissible." This argument is not intended to emphasize the arbitrariness of disqualifying a relative's testimony; rather, it is intended to emphasize its mechanical applicability—that is, the testimony of a relative is disqualified, i.e., inadmissible, without any possibility of distinguishing its validity. The phrase, "and this is a scriptural decree," which appears only here in the entire *Sefer ha-Mitzvot*, does not mean

76 The words, "all the more so the testimony of other relatives is inadmissible," are omitted in several manuscripts; see the editor's note in Heller, *Sefer ha-Mitzvot*, 171.

77 Heller, *Sefer ha-Mitzvot*, 171; Kapah translates there: אין לה טעם כלל ("it has no reason whatsoever").

that this is a proscription without any rationale.<sup>78</sup> Rather, as is the case in the *Laws of Testimony* (and in its other appearances in *Mishneh Torah*), this language is used to indicate a “categorical” law—i.e., one that is to be applied according to its literal meaning.

Therefore, the sense of the phrase, “It has no rationale in any way,” does not mean that the rule that makes testimony of a relative inadmissible is arbitrary. Rather, it means that the rationale does not “under any circumstance” have halakhic consequences, and that it is to be applied as a “scriptural decree”—that is, in a mechanical–literal way. Therefore, “We may not say: as this one stands to lose his life, we do not suspect his relative [of false testimony], but we may act on the basis of his testimony.” In other words, a relative’s testimony is inadmissible, and the judges have no discretion regarding whether or not to accept it. The contrast drawn in *Lo Ta’aseh* 287 between “scriptural decree” and “rationale” is similar to the contrast drawn in *Hilkhot Ishut* 25.2 between “scriptural decree” and “matters that have a rationale.”<sup>79</sup> Whereas in the latter Maimonides preferred (in an exceptional way) the rationale for the halakhah, here the actual wording of the halakhah, the *gezerat ha-katuv*, is dominant.

\* \* \* \* \*

Not a single one of the usages of the term *gezerat ha-katuv* in the *Mishneh Torah* that we have discussed thus far—five in this article and one in “Part I,” published previously—bears a theological sense. All of those *halakhot* to which Maimonides refers as *gezerat ha-katuv* have a reason—at times explicit (e.g., the case of a man who discovers a blemish in his wife after marriage; the rebellious son; self-incrimination; conspiring witnesses) and at times implicit (honoring parents; disqualification of a relative’s testimony). None of these *halakhot* belong to the category of *huqyim*—that is, those *halakhot* whose rationale, according

78 Indeed, if *gezerat ha-katuv* indicates here a mitzvah without any rationale, it is surprising that, of all the 613 commandments, Maimonides specifically designates this “legal” commandment as being an arbitrary one. It would seem that the appearance of the term *gezerat ha-katuv* in *Lo Ta’aseh* §287 is influenced by the use of the term *gezerat ha-melekh* (“the edict of the king”) in *b. B. Bat.* 159a. Again, what is the concern there with the literal application of the laws disqualifying family members? In this negative commandment too its application is mechanical–structural. Compare Henshke, “On the Unity of Maimonides’ Thought,” 43–44 n. 23.

79 See Part I, 149\*–61\*. But cf. *Perush ha-Mishnah* to *m. Ber.* 5.3 (Kapah, 42).

to Maimonides, is concealed from the masses. None of them have an esoteric aspect, and there is no danger involved in public knowledge of their reason; they are all clear and readily understood. In all these cases, *gezerat ha-katuv* signifies one or another variation of legal formalism—meaning, the demand for a specific, literal reading of the language of the law or the verse in question—as opposed to highlighting the spirit and rationale of the halakhah. It is no accident that three of the six appearances of *gezerat ha-katuv* in *Mishneh Torah* discussed thus far relate to laws pertaining to testimony (self-incrimination; conspiring witnesses; inadmissibility of testimony of a relative). As mentioned above, this body of law was known for its formalistic structural rigidity.

Nearly all the appearances of the phrase *gezerat ha-katuv* in *Mishneh Torah* are original and do not appear in the parallel sources in talmudic literature. The two exceptions to this rule are in fact exceptions that prove the rule. Whereas the talmudic *baraita* regarding the rebellious son in *Sanhedrin* states that the “scriptural decree, ‘a son and not a daughter’... is a halakhah without any rationale,” in *Hilkhot Mamrim* Maimonides provides a rationale for it. The only case in which Maimonides follows the Talmud is that of the inadmissibility of a relative’s testimony. While the language used by the Talmud is “a decree of the King,” this is the only place in the Talmud in which this term functions in the same manner as the *gezerat ha-katuv* used by Maimonides in the *Mishneh Torah*.<sup>80</sup>

80 It is worth noting that the use of *gezerat ha-katuv* in the jurisprudential-halakhic sense is not unique to *Mishneh Torah*, but already appears in Maimonides’ *Commentary on the Mishnah*. *M. Mo’ed Qat.* 3.1 states: “These shave during [Hol] *ha-Mo’ed*: ... the Nazirite and the leper...” Maimonides comments: “And you already know that it is a scriptural decree (*gezerat ha-katuv*) that the Nazirite and the Leper shave (during *Hol ha-Mo’ed*)” (*The Mishnah with Maimonides’ Commentary, Seder Mo’ed*, ed. Y. Kafah [Jerusalem: Mosad Ha-Rav Kook, 1964], 248). In Lev 14:8-9 it states concerning the leper, “He who is to be cleansed shall ... shave off all his hair... But on the seventh day he shall shave all the hair off his head and his beard and his eyebrows—all his hair he shall shave off.” In Num 6:18 it is said about the Nazirite, “Then the Nazirite shall shave his consecrated head at the door of the tabernacle of meeting, and shall take the hair from his consecrated head and put it on the fire which is under the sacrifice of the peace offering.” Hence, Maimonides’ language in his *Commentary* (“it is a scriptural decree that the Nazirite and the Leper shave”) means that these verses should be read literally—that is, in due time the Nazirite and the Leper should shave, even during the festival (*Hol ha-Mo’ed*) when everybody else is forbidden to do so. The term *gezerat ha-katuv* does not bear a theological sense here—i.e., it does not indicate here a halakhah without a (known) reason. Rather, it clearly holds a jurisprudential-halakhic sense. This is likewise the meaning of *gezerat ha-katuv* in Maimonides’ *Commentary* at *m. Neg.* 3.1 (Kafah, 212). These are

The rationales given for the “scriptural decrees” in the *Mishneh Torah* are likewise original to Maimonides, as the majority did not previously appear in the Talmud. Thus, the reasons given for the laws about self-incrimination and honoring one’s parents are both original to Maimonides. The reason given for the law, “a [rebellious] son... and not daughter” is likewise opposed to the talmudic rationale. The reason implied in the rules of conspiring witnesses’ testimony is not explicitly stated in the Talmud, but it seems to me that Maimonides saw it as illuminating the talmudic law. The same holds true, evidently, for the disqualifying of relatives for testimony.

Thus, even though there is a certain relationship between the jurisprudential sense of the term “royal/scriptural decree” in the *Mishneh Torah* and its meaning in talmudic literature, there are also significant differences between them. In the Talmud the phrase “royal/scriptural decree” usually indicates a specific, literal reading of the written language of Scripture (i.e., the Torah) as opposed to a specific halakhic principle, a contextual interpretation of the verse, or even general halakhic considerations.<sup>81</sup> In contrast, in the *Mishneh Torah* the term *gezerat melekh/ha-katuv* is always used in opposition to the rationale of the halakhah, its concern being to indicate that one ought to implement the halakhah in accordance with its literal language and not according to its reason.

Moreover, whereas in talmudic literature it is not clear whether the term “royal/scriptural decree” reflects a principled meta-halakhic position, the meaning and manner of functioning of this term in *Mishneh Torah*, as I shall argue elsewhere, exemplify a principled jurisprudential position. This position is derived from political-jurisprudential and philosophical approaches that Maimonides proposes in his theoretical writings, particularly in the *Guide for the Perplexed*.<sup>82</sup>

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the only occurrences in Maimonides’ *Commentary on the Mishnah* in which *gezerat ha-katuv* bears a jurisprudential sense. In both cases the term indicates the literal reading of Scripture, which is its common and regular meaning and function in talmudic literature (see above n. 32). It should be remembered that in the *Code*, [*gezerat*] *ha-katuv* holds a much wider sense—there it refers to the language of the halakhah.

81 See Lorberbaum, “*Gezerat Melekh and Gezerat ha-Katuv* in Talmudic Literature.”

82 See Y. Lorberbaum, “Maimonides on the Institution of Law, Legal Formalism and *Gezerat ha-Katuv*,” forthcoming in *Mehkerei Mishpat* 29 (2012) (Hebrew).

In the third part of this study, to be published in *Diné Israel* 31 (2014), we shall discuss three additional, final appearances of the term *gezerat ha-katuv* in the *Mishneh Torah*: *Hilkhot Mikva'ot* 11.12; *Teshuvah* 3.4; and *Tefillah* 9.7. In all of these cases “scriptural decree” carries a theological meaning and, in all of them, it indicates – at least offhand – a halakhah or mitzvah for which there is no rationale.

