

Animal “Rights” and the Halakhah

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Do animals possess rights, that is, “powers, privileges, immunities, or capacities the enjoyment of which is secured to a person by law”?¹ The prepositional phrase “by law” suggests the problem. As a strictly *legal* matter the idea has long been considered a non-starter. Law is made by and for human beings; animals, because they are not members of the legal community, cannot make demands that the law is compelled to recognize.² Animals are property and, as such, have no rights: “That which is done to the hurt of a beast may be a wrong to its owner or to the society of mankind, but it is no wrong to the beast.”³ Against this, the modern movement for “animal rights” urges a fundamental change in our way of thinking. As the philosopher Peter Singer, perhaps the leading thinker associated with that movement, expresses its fundamental tenets:

(D)espite obvious differences between humans and nonhuman animals, we share with them a capacity to suffer, and this means that they, like us, have interests. If we ignore or discount their interests, simply on the grounds that they are not members of our species, the logic of our position is similar to that of the most blatant racists or sexists who think that those who belong to their race or sex have superior moral status, simply in virtue of their race or sex, and irrespective of other characteristics or qualities.⁴

Both these tendencies were on display in a recent court battle over the status of an elephant named Happy who as of this writing resides at the Bronx Zoo.⁵ An animal rights organization sued for a writ of habeas corpus, which would have allowed Happy to be transferred to a more natural environment. The five-member majority of the New York Court of Appeals rejected the suit, on the grounds that “Habeas corpus is a procedural vehicle intended to secure the liberty rights of human beings who are unlawfully restrained, not nonhuman animals” – that is, the classic legal principle that the law is for and pertains to human beings and *not* animals, even intelligent ones. Meanwhile, one of the two dissenting judges wrote that the court must “recognize Happy’s right to petition for her liberty not just because she is a wild animal who is not meant to be caged and displayed, but because the rights we confer on others define who we are as a society,” while the other declared that the elephant deserves “to live her life as she was meant to: as a self-determinative, autonomous elephant in the wild.” Both dissenters, in other words, were open to accepting the idea that animals do have rights that legal institutions are duty bound to respect.

A similar dispute (מחלוקת, *mahloket*) takes place in Rabbinic legal thought. We say “similar” - and *not* “identical” – advisedly, because the *halakhah* does not include the concept of “rights” as understood in other legal traditions. The Torah speaks in terms of *mitzvot* (מצוות) and obligations (חיובים, *hiyuvim*) rather than of rights (which explains the quotation marks around that word in the title of this essay). True, it is possible to infer the existence of a right from the existence of a corresponding duty.⁶ For example, if the Torah forbids me to steal your property, that might suggest that you have a right or an entitlement to that property. In the same way, a positive

obligation to give *tz'dakah* to the poor can imply that they have a right to receive it. But language makes a difference. The absence of the word “rights” in classical halakhic literature⁷ means that rights-talk, even human rights, let alone animal rights, is absent from halakhic discourse. On the other hand, the *halakhah* does address the question of our *duties* toward animals, and that is the question we will explore here, at least on an introductory level.

Mishum Tza`ar Ba`alei Hayyim.

We should say a word about the well-known principle *mishum tza`ar ba`alei hayyim*, “on account of the suffering of animals.” Although the phrase has become symbolic of efforts to secure animal rights and to safeguard animal welfare,⁸ as a principle of *halakhah* its scope is limited to a few rules that modify existing prohibitions when observing those prohibitions would cause undue suffering to animals. For example, the *poskim* (traditional halakhic decisors) generally hold that the principle gives way in the face of any legitimate human purpose, with the definition of “legitimate” left to the interpreter. This essentially empties the principle of any substantive legal content other than the specific conclusions drawn in the halakhic literature. By itself, therefore, it cannot serve as the basis for any wide-ranging theory of our ethical duties toward animals.⁹ A sufficient understanding of that duty must be based upon other sources.

The Bird's Nest.

Accordingly, we begin our discussion with Deuteronomy 22:6-7.

כִּי יִקְרָא קוֹרְצָפוֹר לְפָנָיו בְּדָרֶךְ בְּכַלְעָץ אֹרְעָה אֶרְצוֹ אֶפְרָחִים אֹרְעָה עֲלֵהּ אֶפְרָחִים אֹרְעָה
הַבְּיָצִים לֹא תִקַּח הָאֵם עִלְהֶבְנִים :
שְׁלַח תְּשַׁלַּח אֶת־הָאֵם וְאֶת־הַבְּנִים תִּקַּח־לָךְ לְמַעַן יֵיטֵב לָךְ וְהָאֶרֶץ יִמָּיֵם :

If you chance upon a bird's nest, in any tree or on the ground, with young ones or eggs and the mother sitting upon the young or upon the eggs, you shall not take the mother with the young. You shall let the mother go, but the young you may take to yourself; that it may go well with you, and that you may live long.

The *p'shat* or literal sense of this verse would seem to involve the instruction to avoid treating animals with cruelty.¹⁰ This, in turn, might imply a message of divine compassion toward animals. The Rabbis were aware of this implication, but as we read in *B. B'rakhot* 33b, they were troubled by it.

משנה. האומר "על קן צפור יגיעו רחמיך", "ועל טוב יזכר שמך", "מודים מודים" - משתקין אותו.

Mishnah. One who recites in one's prayer "Your mercies extend to the bird's nest," or "May Your name be mentioned for good," or "We give thanks, we give thanks" [that is, twice] is silenced.

“One who recites” – in what context? The phrase משתקין אותו, “he is silenced,” suggests that we are talking about a *shaliah tzibur*, a leader of communal prayer, reflecting the historical reality that the text of the *t’filah* was not entirely fixed during the Tanaitic period. Rambam, as we’ll see, thinks that the offending worshipper is reciting *taḥanunim*, individual prayer and supplication, presumably because he thought that the text of the *t’filah* had been fixed by the time of the Mishnah¹¹ and that consequently a *shaliah tzibur* would have no reason to recite these phrases aloud. The Talmud Yerushalmi supports the notion that the *mishnah* refers to a *shaliah tzibur*.¹² At any rate, it’s evident that the text finds these three phrases objectionable, and the Talmud asks why.

(Rashi’s comments are rendered in [Rashi font]).

גמרא. בשלמא "מודים מודים" משתקין אותו - משום דמיחזי כשתי רשויות, "ועל טוב יזכר שמך" - נמי משמע על הטובה ולא על הרעה, ותנן: חייב אדם לברך על הרעה כשם שמברך על הטובה. אלא, "על קן צפור יגיעו רחמך" מאי טעמא? פליגי בה תרי אמוראי במערבא, רבי יוסי בר אבין ורבי יוסי בר זבדא; חד אמר: מפני שמטיל קנאה במעשה בראשית, [רש"י: לומר: על אלה חס, ולא על שאר צריותיו] וחד אמר: מפני שעושה מדותיו [מלכותיו] של הקדוש ברוך הוא רחמים, ואינן אלא גזרות. [והוא לא לרחמים עשה, אלא להטיל על ישראל חקי גזרותיו; להודיע שהם עבדיו ושומרי מלכותיו וגזרות חוקותיו, אף בצדדים שיש לשטן ולנכרים להשיב עליהם, ולומר מה לורך במלכות זו]

(Rashi’s comments are indicated in [italics]).

Gemara. It’s clear why one is silenced for saying “We give thanks, we give thanks” – because that looks as though one is acknowledging two divine powers. It’s also clear why one is silenced if one says “May Your name be mentioned for good,” for that makes it seem that (God’s Name is not mentioned) in connection with bad things that happen, and we learn in a *mishnah* (*B’rakhot* 9:5): “One is obligated to bless God for the evil (that occurs) just as one blesses God for the good.”

But why is one silenced for saying “Your mercies extend to the bird’s nest”?

Two Amoraim in the west [Eretz Yisrael] disagree over the answer. They are R. Yose bar Avin and R. Yose bar Z’veida.

One says: because it sows jealousy among the works of Creation [*by saying that God has compassion upon the birds but not upon other creatures*].

The other says: because it declares that the *mitzvot* of the Holy One are intended for mercy, when they are in fact simply decrees.

[*God did not issue the mitzvot in order to do mercy but rather to impose God’s decrees upon Israel, so that they may demonstrate that they are God’s servants and that they keep God’s mitzvot and decrees, even those over which Satan and the nations of the world can criticize us, asking “what purpose/rationale can this mitzvah have?”*]

The Bavli quotes two alternative reasons for the *mishnah*’s objection to the prayer language “Your mercies extend to the bird’s nest,” an obvious reference to Deuteronomy 22:6-7. Our

focus is upon the second reason – “because it declares that the *mitzvot* of the Holy One are intended for mercy, when they are in fact simply decrees.” As Rashi explains it, the objection concerns the intellectual enterprise of *ta`amei hamitzvot* (טעמי המצות), the inquiry into the reasons for or rationale behind the commandments. The *mitzvot*, in fact, have *no* rationale other than their existence as *g`zeirot* (גזירות), decrees that God has imposed upon us. We obey them *because* they are decrees and not to achieve any useful purpose. As Rashi explains the Talmud’s language,¹³ then, one is not to attribute in prayer *any* rationale or *ta`am*, including “mercy,” to any of God’s commandments.

Rambam the Halakhist

Rambam (d. 1204), in his *Mishneh Torah, Hilkhot T`filah 9:7*, codifies the *halakhah* in accordance with his reading of the Talmud’s second reason for the *mishnah*’s objection. Perhaps he ignores the first explanation because, as a rationalist, he simply doesn’t buy the notion that animal species might be jealous of each other. At any rate, here’s what he says:

מי שאמר בתחנונים מי שריחם על קן ציפור שלא ליקח האם על הבנים או שלא לשחוט אותו ואת בנו ביום אחד ירחם עלינו וכיוצא בענין זה משתקין אותו, מפני שמצות אלו גזרת הכתוב הן ואינן רחמים, שאילו היו מפני רחמים לא היה מתיר לנו שחיטה כל עיקר.

If one recites as a supplication “May the One who showed mercy to the bird’s nest, that we should not seize the mother bird along with her young,” or “who forbade us from slaughtering the mother animal and her offspring on the same day” (Leviticus 22:28) – that person is silenced. The reason is because these *mitzvot* are decrees and not about mercy. For had God intended them as mercy, God would not have permitted us to slaughter animals at all.

Notice the adjustment that Rambam makes to the Talmud’s language. The objection is not to the act of imputing reasons for the commandments in general (as we know, Rambam was a famous practitioner of the inquiry into *ta`amei hamitzvot*) but rather with imputing *this* reason to *these* commandments. Given that we are permitted to eat animals (and presumably to use them for other purposes even though that usage causes them pain), we cannot declare that these particular commandments (or *any* commandments, for that matter) come to establish a duty of mercy or compassion (*rahamim*) toward animal species.¹⁴ And if we cannot make that declaration with certainty, it would be an affront to truth to pronounce it in God’s presence during prayer.

Rambam the Philosopher

While the explanations offered by Rashi and Rambam are different in some significant ways, they agree that this Talmud passage rejects any association between Deuteronomy 22:6-7, the *mitzvah* to send away the mother bird when seizing her eggs, with an obligation of mercy or compassion towards animals. A very different understanding comes forth from Rambam’s philosophical treatise *Moreh Han`vukhim / Guide of the Perplexed*. The third section of that work is heavily devoted to searching out the reasons (*ta`amim*) for the commandments, as a way of bridging the gap between revelation and human reason. Here is how Rambam, in chapter 48 of that third section, explains the rationale behind our *mitzvah*.

וכן אסר לשחוט אותו ואת בנו ביום אחד, להשמר ולהרחיק לשחוט משניהם הבן לעיני האם, כי צער בעלי חיים בזה גדול מאד, אין הפרש בין צער האדם עליו וצער שאר ב"ח, כי אהבת האם ורחמיה על הולד אינו נמשך אחר השכל רק אחר פעל הכח המדמה הנמצא ברוב בעלי חיים ... וזהו הטעם ג"כ בשלוח הקן... וכשישלח האם ותלך לה לא תצטער בראות לקיחת הבנים... ואם אלו הצערים הנפשיים חסה תורה עליהם בבהמות ובעופות כל שכן בבני אדם

God prohibited us from slaughtering the mother animal and its offspring on the same day so that we take care not to slaughter the offspring as its mother looks on. For animals feel great distress (*tz`ar ba`alei hayyim*) over this. In this respect there is no difference between the distress felt by humans and that felt by animals, for a mother's love for her young is not a property of the rational faculty but of the imaginative faculty, which is present in most species of animals...

This is similarly the rationale behind the *mitzvah* of *shiluah haken* (to send away the mother bird)... for when she has flown away she will not feel sadness when seeing her children taken... The Torah shows compassion for the emotional distress (*hatza`arim hanafshi'im*) of animals and birds, and how much the more so of human beings.

Rambam openly declares that both Deuteronomy 22:6-7 and Leviticus 22:28 legislate a duty of compassion toward animals. He justifies this on the philosophical (= scientific) basis that the higher animals, although lacking the capacity of reason (שכל, *sekhel*) that distinguishes the human species, share with humans the capacity for imagination (כח המדמה) that is the basis for such emotions as love. Animals therefore deserve compassion, because they and we share in common the capacity to feel love and sorrow. This comes very close to asserting that animals, though not equal in status to us, have "rights" that we are bound to respect.

This passage obviously contradicts the thrust of the Talmudic discussion in *B. B'rakhot* 33b as explained by Rashi. For that matter, it also contradicts Rambam's own explanation of that *halakhah* in the *Mishneh Torah*. Traditionalists will want to resolve this contradiction, if possible. For our part, the key to understanding the differences lies in Rambam's own words in this chapter of *Moreh Han'vukhim*:

ולא תקשה עלי באמרם על קן צפור יגיעו רחמיך וגו', כי הוא לפי אחת משתי הדעות אשר זכרנום, ר"ל דעת מי שחושב שאין טעם לתורה אלא הרצון לבד, ואנחנו נמשכנו אחר הדעת השני.

Do not imagine that you can contradict me with the *mishnah* (in *B. B'rakhot* 33b) "Your mercies extend to the bird's nest, etc." That text follows one of the two opinions that I have discussed, namely the opinion of those who think that the *mitzvot* of the Torah have no discernible rationale (*ta'am*) and simply express the will (of God). For my part, I subscribe to the other opinion.

That is to say, Rambam holds that the Talmud's discussion is based upon one of two legitimate approaches to the subject of *ta'amei hamitzvot*. ("Legitimate" here means that they are the two sides to an ongoing *mahloket* in the Rabbinic literature.) He holds the other opinion, namely that the *mitzvot* do come to serve a discernible rationale. Therefore, while in his *Mishneh Torah* he recognizes the halakhic authority of the *mishnah* (one should not recite the phrase "Your mercies

extend to the bird's nest" in prayer), he does so on the basis of an explanation other than the one supplied in the Talmud.¹⁵ While this doesn't resolve every difficulty,¹⁶ we do see that Rambam the halakhist codifies the *mishnah* as *halakhah* while Rambam the philosopher insists that these *mitzvot* do have the rationale of establishing a duty of compassion toward animals.

Ramban (Nachmanides)

R. Moshe ben Nachman (d. 1270) had the benefit of seeing both of Rambam's statements on our subject (i.e., his *p'sak* [ruling] in the *Mishneh Torah* and his remarks in *Moreh Han'vukhim* 3:48). His contribution to our discussion is found in his commentary to Deuteronomy 22:6, the *mitzvah* to send away the mother bird.

וכן מה שאמרו (ברכות לג ב) לפי שעושה מדותיו של הקדוש ברוך הוא רחמים ואינן אלא גזרות, לומר שלא חס האל על קן צפור ולא הגיעו רחמיו על אותו ואת בנו, שאין רחמיו מגיעין בבעלי הנפש הבהמית למנוע אותנו מלעשות בהם צרכנו, שאם כן היה אוסר השחיטה. אבל טעם המניעה ללמד אותנו מדת הרחמנות ושלא נתאכזר. כי האכזריות תתפשט בנפש האדם, כידוע בטבחים שוחטי השורים הגדולים והחמורים שהם אנשי דמים זובחי אדם אכזרים מאד, ומפני זה אמרו (קידושין פב א) טוב שבטבחים שותפו של עמלק. והנה המצות האלה בבהמה ובעוף אינן רחמנות עליהם, אלא גזירות בנו להדריכנו וללמד אותנו המדות הטובות.

We learn in *B, B'rakhot* 33b: "because it declares that the *mitzvot* of the Holy One are intended for mercy, when they are in fact simply decrees." This means that God in fact does not show compassion to a mother animal and her young. God's mercy does not extend to animals to prevent us from using them for our purposes; if it did, the Torah would have prohibited *sh'hitah*.

The rationale (*ta'am*) for the prohibition (the bird's-nest *mitzvah*) is to teach us the quality of mercifulness, so that we will not act with cruelty. For cruelty is contagious among humans ["in the human soul"]. It's well known that butchers who slaughter cattle and donkeys are cruel, bloodthirsty, and murderous (*zovhei adam*). This is why the Talmud says (*Kiddushin* 82a): "the best among butchers is the partner of Amalek." These *mitzvot* concerning animals and birds are not motivated by mercy towards them. They are rather decrees (*g'zeirot*) meant to guide and teach us good qualities.

Nachmanides repeats Rambam's language and reasoning in the *Mishneh Torah* to prove that mercy toward animals is *not* the rationale behind Deuteronomy 22:6-7. But he goes one step farther: that we are permitted to slaughter animals and use them for our purposes demonstrates that "God's mercy does not extend to animals" *at all*. Nowhere does the Torah impose an ethical duty upon humans to treat animals with compassion. Although Rashi and Rambam (in the *Mishneh Torah*) read the Talmud's language as meaning that the *mitzvot*, as "decrees," are nothing but expressions of the divine will, Nachmanides holds that the purpose behind this *mitzvah* is to teach humans the quality of mercy and compassion so that we will avoid treating each other with cruelty. The *mitzvah*, in other words, is not about animals, who in any case have no rights or claims that we are bound to respect. (This position resembles the traditional legal theory that holds that law is made exclusively for human beings and that it is impossible, legally

speaking, to “wrong” an animal.) It is rather about us, about instructing human beings in the “good qualities.”

But doesn't this conflict with the Talmudic assertion that “the *mitzvot* of the Holy One... are in fact simply decrees (*g'zeirot*),” with no *ta'am* other than their pedigree? Perhaps, but Nachmanides deftly avoids this trap by redefining the concept.

וכן יקראו הם כל המצות שבתורה עשה ולא תעשה גזירות, כמו שאמרו (מכילתא בחדש ו) במשל המלך שנכנס למדינה אמרו לו עבדיו גזור עליהם גזירות, אמר להם כשיקבלו מלכותי אגזור עליהם גזירות, כך אמר הקדוש ברוך הוא קבלתם מלכותי אנכי ה' אלהיך (שמות כ ב), קבלו גזירותי לא יהיה לך וכי (שם פסוק ג).

Indeed, *all* the Torah's *mitzvot*, both positive and negative, are called *g'zeirot*, as the Rabbis tell us (*M'khilta*): The analogy (*mashal*) is of a king who comes to a city. His servants urge him to issue decrees (*g'zeirot*) upon its inhabitants. He replies: once they accept my kingdom, then I will issue decrees. Likewise the Holy One: He says “You have accepted My sovereignty (“I am Adonai your God,” Exodus 20:2); now accept my decrees (“You shall have no other gods in My presence,” Exodus 20:3).

If all *mitzvot*, even those which have a *ta'am*, are called “decrees,” then there's no objection to inquiring after the rationale behind any of them. This contradicts Rashi, who understands the Talmud's second explanation as an objection to asserting a *ta'am* for any of the commandments. According to Nachmanides, the Talmud's objection is to the assertion that *this mitzvah*, the commandment to send away the mother bird, is motivated by compassion toward animals. The Torah never shows mercy to animals; it simply wants to teach us the value of compassion as a quality of human behavior.

Summary and Conclusions

We have looked at several interpretations of the Talmudic passage *B. B'rakhot* 33b. And we've seen that each one takes a different approach to the question of animal “rights” or, more correctly, the question of our ethical duty towards animals under Jewish law.

- *Rashi* – the Talmud explains the *mishnah*'s objection to the prayer language “Your mercies extend to the bird's nest” on the grounds that the *mitzvot* are decrees, expressions of the divine will with no discernible rationale. Thus, we cannot learn a duty of compassion towards animals from the commandment in Deuteronomy 22:6-7.
- *Rambam / Mishneh Torah* – the prayer language is objectionable because mercy to animals is not the *ta'am* for this (or any other) *mitzvah*.
- *Rambam / Moreh Han'vukhim* – Deuteronomy 22:6 does come to establish an ethical duty towards animals. The duty is based in the fact that the higher animal species share with us the “imaginative” faculty and therefore can feel pain and love.
- *Ramban* – the Torah never imposes a duty of compassion to animals. The *mitzvah* to send away the mother bird comes to teach us the value of compassion as a quality of human behavior.

Again, none of these interpretations serves as a basis for deriving a theory of animal “rights” under *halakhah*. But Rambam’s position in the *Moreh* comes the closest. No, he doesn’t posit even a rough legal equality between the species; humans may still slaughter animals and make use of them for legitimate human purposes. Yet the fact that animals, like humans, are able to experience emotional distress suggests to him a common bond - a sort of community, perhaps - between the species. And out of that community comes a duty of compassion towards them. Note that we say “duty,” obligation. While Nachmanides speaks of the quality of mercy and the avoidance of cruelty, he pointedly rejects any notion of a human obligation to mitigate the pain and suffering of animals. Rambam does recognize such a *hiyuv*, and if we adopt his understanding of this issue as our own, we should act accordingly.

What does that mean in practice? It isn’t the goal of this essay to establish or suggest new rules. But to say and to act as though we have an *obligation* to treat animals with compassion will undoubtedly direct our thinking in significant ways, particularly as we address issues of diet, dress, scientific experimentation, agriculture and the like. It is morally insufficient to draw conclusions simply on the basis that animals constitute a “lower” life form. To say that we have a *duty* of compassion means that, from now on, the lives, the interests, and the suffering of animals are matters that demand our respect.

1. See <https://www.merriam-webster.com/dictionary/right#legalDictionary> , accessed July 25, 2022.

2. “The only natural persons are human beings. Beasts are not persons. They are merely things – often the objects of legal rights and duties, but never the subjects of them... A beast is as incapable of legal rights as of legal duties, for its interests receive no recognition from the law. *Hominum causa omne jus constitutum*, the law is made for men, and allows no fellowship or bonds of obligation between them and the lower animals”; J. W. Salmond, *Jurisprudence, or, The Theory of the Law* (London: Stevens and Haynes, 1907), p. 277.

3. Salmond, *loc. cit.*

4. Peter Singer, “Animal Liberation,” *New York Review of Books*, April 5, 1973, <https://www.nybooks.com/articles/1973/04/05/animal-liberation>. Singer’s monograph *Animal Liberation: A New Ethics for the Treatment of Animals* (New York: New York Review Books, 1975) has been revised several times, remains a leading tract of the movement.

5. “Happy the Elephant Isn’t Legally a Person, Top New York Court Rules,” *New York Times*, June 15, 2022, section A, p. 16, <https://www.nytimes.com/2022/06/14/nyregion/happy-elephant-animal-rights.html>.

6. This is the approach taken by Haim H. Cohn in his *Human Rights in Jewish Law* (New York: Ktav, 1984).

7. In modern Israeli law, of course, the concept *and* the language exist. But in Talmudic law, the modern word for that concept - זכות/זכויות – doesn't mean "right/rights" but signifies rather that one has acquired legal title to something.

8. The major animal welfare organization in Israel is called [Agudat Tz`ar Ba`alei Hayyim](#). Note that it describes its mission as working "in the field animal welfare and rights" (בתחום רווחת בעלי חיים וזכויותיהם).

9. See Avraham Steinberg, "Tza`ar ba`alei hayyim l'or hahalakhah," *Sefer Asya* 1 (Jerusalem, 1979), pp. 263-269. An extensive survey of the sources is found in R. Eliezer Yehudah Waldenberg, *Resp. Tzitz Eliezer* 14:68. The analysis is built upon R. Yisrael Isserlein (15th-century Germany), *Resp. T'rumat Hadeshen, P'sakim*, no. 105: צער משום אסור נראין הדברים דאין אסור משום צער. "The conclusion is that the prohibition against causing undue suffering to animals does not apply when one uses (animals) for one's needs and purposes, since the animals were created solely in order to serve humankind." R. Moshe Isserles inserts this principle into the *Shulhan Arukh (Even Ha'ezer* 5:14): לית ביה משום איסור צער בעלי חיים, "The prohibition of *tza`ar ba`alei hayyim* does not apply to anything action taken for the purpose of medicine *or for other reasons* (emphasis added)."

10. The theme is expressed by several medieval commentators, notably Rashbam, ibn Ezra, Abravanel (see as well his comment to Leviticus 22:28, and above all Nahmanides, whom we discuss below.

11. See his historical narrative in *Mishneh Torah, Hilkhot T'filah*, ch. 1.

12. *Y. B'rakhot* 5:3 (40a): הדיא דאמר בציבורא אבל ביחיד תחנונים הן.

13. This is crucial: Rashi here is acting as a *parshan*, a commentator explaining the language of the Talmud's second reason for the *mishnah's* objection ("when they are in fact simply decrees"). He is not necessarily expressing his own opinion. Elsewhere, indeed, he accepts the traditional distinction between *mishpatim* (משפטים), those commandments that make rational sense, so that we would have deduced them ourselves had they not been written in the Torah, and the *hukkim* (חוקים), the *mitzvot* that lack a discernible rationale and must be accepted simply as decrees of the King. See Rashi to Leviticus 18:4.

14. Compare Rambam's Commentary to *M. B'rakhot* 5:3: ענין אמרו על קן צפור רחמיק, הוא שיאמר כשם שחסת על קן צפור ואמרת לא תקח האם על הבנים כך חוס עלינו, שהאומר כן משתקין אותו, לפי שהוא אומר שטעם מצוה זו בגלל רחמי הקדוש ברוך הוא על העוף, ואינו כן, לפי שאלו היה דרך רחמים לא היה מתיר השחיטה כלל, אלא היא מצוה שמעית שאין לה טעם. This is identical to what he says in the *Mishneh Torah*, with the exception of his final remark: "rather, this is a *mitzvah* totally dependent upon revelation (מצוה שמעית) that has no rationale." In the *Mishneh Torah*, he says that "mercy" is not the rationale for *this* commandment, leaving open the possibility that it has another *ta'am*.

15. This is a tendency of Rambam's method: he follows the Talmudic sources in determining the rule (*p'sak halakhah*), but he will depart from the Talmud's explanation or argument for that rule when reason supplies a better one. See Yaakov Levinger, *Darkhei hamah'shavah hahilkhatit shel harambam* (Jerusalem: Magnes, 1965), especially chapter 1.

16. For example, the explanation that Rambam supplies for the *halakhah* in the *Mishneh Torah* ("The reason is because these *mitzvot* are decrees and not about mercy... God would not have permitted us to slaughter animals at all") also stands at odds with his words in the *Moreh*, where he says that "these" *mitzvot* are definitely about mercy. The guess here is that Rambam wished to preserve something of the spirit of the Talmud's explanation but not at the cost of denying the legitimacy of inquiring after *ta'amei hamitzvot* at all. But that's just speculation.