

Maimonides on "Shilluah Ha-Qen"

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## MAIMONIDES ON *SHILLUAḤ HA-QEN*

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### ABSTRACT

*The biblical commandment to release the mother bird before taking her young is regarded by Maimonides in the Mishneh Torah as a “scriptural decree”; furthermore, he vigorously denies the most plausible reason for it, namely, to spare the mother bird pain. Yet in the Guide of the Perplexed Maimonides, by contrast, insists upon assigning a reason to this commandment; indeed, in this philosophic work he endorses the very reason which he had rejected in his earlier halakhic work.*

*It is argued that Maimonides in the Mishneh Torah deliberately concealed—more accurately, denied—the true reason for shilluaḥ ha-qen lest it engender an antinomian response. It is further argued that in the Guide Maimonides’ insight into the relationship between divine mercy and God’s commandments with respect to animals enabled him to repel the feared antinomianism; for this reason he was able in the later work to state boldly the reason for the commandment of shilluaḥ ha-qen: its purpose is indeed to spare the mother bird the grief which she would no doubt suffer over the removal of her young from the nest.*

The contradiction, or apparent contradiction, between Maimonides’ view in the *Mishneh Torah* and his view in the *Guide of the Perplexed* on *shilluaḥ ha-qen* (i.e., the commandment to release the mother bird before taking her young), and on the mishnaic prohibition of the prayer formula *על קן צפור יגיעו רחמך* (“As thy mercy extendeth to a bird’s nest”),<sup>1</sup> has been noted and discussed from Maimonides’ time to the present.<sup>2</sup> There are, however, several startling features of the Maimonidean view

<sup>1</sup> A variant of this prayer formula is *עד קן צפור יגיעו רחמך* (yBer 5.3; yMeg 4.10). See below, n. 21, for a discussion of this variant.

<sup>2</sup> See the commentaries of Shem-Tov and Narboni on the *Guide of the Perplexed*, 3.48; Maharal of Prague, *Sefer tiferet yiśra’el* (Bene-Brak, 1980), chapter 6; Isadore Twersky, *Introduction to the Code of Maimonides* (New Haven, 1980), pp. 356–514; Jacob Levinger, “Abstinence from Alcohol in the *Guide of the Perplexed*,” [Hebrew] *Bar Ilan University Annual: Decennial Volume* (1955–65): 299–305.

which, I believe, have not been given their due in earlier discussions. It is my intent in this paper to focus on these features and to reveal through them a hitherto unnoticed Maimonidean concern. I shall argue that this concern troubled Maimonides only in his earlier work, the *Mishneh Torah*, and was resolved to his satisfaction in the *Guide*.

The following are the features whose ramifications we shall be exploring in due course:

(a) Maimonides in the *Mishneh Torah* (*hilkhot tefillah* 9.7) refers to the commandment of *shilluah ha-qen* as a *gezerat ha-katuv*, i.e., a scriptural decree. While it is true that Maimonides does not confine his use of this expression to this commandment alone, and that he does not use this expression univocally to indicate that the commandment to which it applies has no reason, the expression does seem to imply—in this case as in just two others (see below, p. 351)—that the commandment has no reason. Can it possibly be Maimonides' view that *shilluah ha-qen* has no reason?

(b) Not only does Maimonides consider *shilluah ha-qen* a *gezerat ha-katuv* but he also denies an initially plausible reason for it, i.e., that the commandment reflects God's mercy toward animals. His denial of this initially plausible reason is supported in the *Mishneh Torah* and elsewhere by a novel argument related to the Mishnah's insistence that we must silence him who prays *על קן צפור יגיעו רחמך*.<sup>3</sup> The argument warns against attributing *shilluah ha-qen* to God's mercy, since "if it were [commanded]

<sup>3</sup> *Mishneh Torah*, *hilkhot tefillah* 9.7; *Commentary on the Mishnah*, Ber 5.3. Cf. Nahmanides' commentary on Deut 22:6, where we find precisely the same argument.

It is surely a concern of Maimonides, as it is a concern of the rabbis in the Gemara (bBer 33b, bMeg 25a), that those who are praying should not multiply encomiums of God beyond the ones specified in standard rabbinic formulations. Indeed, immediately after his discussion of *shilluah ha-qen* as a *gezerat ha-katuv* Maimonides, following the Gemara, proceeds to forbid forms of praising God other than those uttered by Moses. Yet Maimonides' objection to *על קן צפור יגיעו רחמך* cannot simply be assimilated to his objection to nonstandard forms of praise. For although there is a superficial similarity between (a) affirming God's mercifulness by praying *על קן צפור יגיעו רחמך* and (b) calling him God, the great, the brave, the awe-inspiring, the strong, the mighty, and the powerful, the two cases in fact diverge. First, *על קן צפור יגיעו רחמך*, though it speaks of God's mercy, does not directly apply to God the adjective "merciful" and is thus not objectionable in precisely the same way as is the list of adjectives which Maimonides and the rabbis of the Talmud proscribe. Second, only in the case of

because of mercy, God would not have permitted animal slaughter at all.” Are we to understand by this that in Maimonides’ view, permitting animal slaughter is ultimately inconsistent with God’s mercy?

(c) The *Guide* (3.48) not only divests *shilluaḥ ha-qen* of its earlier status as a *gezerat ha-katuv* but also supplies as the reason for this commandment precisely the reason repudiated by Maimonides in the *Mishneh Torah*. The reason for *shilluaḥ ha-qen* stated in the *Guide* is the Torah’s compassion toward animals whose feelings for their young are comparable to corresponding human feelings—the very reason that is categorically rejected in the *Mishneh Torah*.

(d) In the *Guide* (3.48) Maimonides distances himself from the Mishnah which requires the silencing of one who prays על קן צפור יגיעו רחמך,<sup>4</sup> by here regarding as unacceptable the

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על קן צפור יגיעו רחמך does Maimonides construct a special argument of his own, one not found in the Mishnah or the Talmud, an argument furthermore not relevant to the issue of addressing God as great, brave, awe-inspiring, etc., in order to combat the notion that *shilluaḥ ha-qen* is a result of divine mercy. That Maimonides marshals an argument of his own making against mercy as the reason for *shilluaḥ ha-qen* signifies that for Maimonides it is particularly inappropriate to imply in prayer—or indeed to believe—that God has mercy on animals.

Maimonides, let us note, would clearly object to any literal understanding of God’s mercy—whether it be mercy on animals or on human beings; God is, according to Maimonides, not subject to emotion of any kind. Thus, although I speak throughout this paper of God (or alternatively of the Torah, which is, of course, also clearly devoid of emotion) as having mercy, I too do not intend that this expression be understood literally. I intend only that the expression be understood with respect to animals precisely as it would be understood in other contexts. Later on I will consider whether the law of *shilluaḥ ha-qen* might be meant to protect animals as well as to perfect human beings. The question there should be understood as asking not whether or not God feels pity—he does not—but whether or not the object of the commandment is the welfare of the animal (or just the moral improvement of man, to which the animal’s welfare is then solely a means).

<sup>4</sup> The mishnah itself is otherwise uncontested. In bBer 33b we do find Rabba saying of one who prayed this way: “How well this scholar knows how to placate his Master!” However, the Gemara goes on to say that when Abaye challenged Rabba on his approval of the prayer, Rabba claimed that he was merely testing Abaye! There are other occurrences of לחדר, here rendered “testing,” where it has a different meaning. In both b<sup>c</sup>Er 13a and bNid 45a the term signifies praise. Yet in most contexts (see Tosafot on b<sup>c</sup>Er 13a) the term suggests a test or challenge; see bMeg 25a, bNaz 59b, bZeb 13a, bḤul 43b.

amoraic assertion that the commandment is a *gezerah* without rational justification. The Maimonidean view asserted in the *Guide* concerning this mishnah, a view explicitly presented by Maimonides as a break with certain sages with whom Maimonides himself was clearly aligned in the *Mishneh Torah*, must be regarded as a critical shift in his point of view.

I shall discuss each of these features in turn, in Sections I, II, III, and IV, and shall draw and defend my conclusions in the final section, Section V.

#### I. *The commandment of shilluah ha-qen as a gezerat ha-katuv*

In order to appreciate the extent to which Maimonides' assignment of the status of *gezerat ha-katuv* to any commandment in the *Mishneh Torah* is unusual and perhaps anti-Maimonidean in spirit, it is necessary to probe first Maimonides' general approach to the issue of *ta'ame ha-miṣwot*, i.e., (searching for) reasons for the commandments.

The main objection from rabbinic times onward to the enterprise of seeking *ta'ame ha-miṣwot* seems to be that it runs the risk of fostering antinomianism. Indeed, R. Isaac (bSanh 21b) expressed two fears, the first that the commandments might be trifled with if their reasons are not known, and the second that they might be trifled with if their reasons are known!<sup>5</sup> With regard to R. Isaac's second fear, the classic case in point is King Solomon. Maimonides cites at the end of his *Sefer ha-miṣwot* the case of King Solomon who, though a man outstanding in both wisdom and closeness to God, was led to sin because the Torah supplied explicit reasons for its commandment forbidding kings to have too many wives and horses, and too much gold and silver (Deut 17:16–17). Solomon, believing that he could maintain the spirit of the law without adhering to its letter, was led astray and ended up violating both. Maimonides concludes that although all the commandments have reasons, God realized the necessity of concealing most reasons lest people far inferior to Solomon become similarly sinful.

It is possible to infer from this Maimonidean passage that he himself had grave reservations about pursuing *ta'ame ha-miṣwot*,

<sup>5</sup> For a discussion of the controversy regarding *ta'ame ha-miṣwot* in the Talmud see Ephraim Urbach, *The Sages: Their Concepts and Beliefs*, tr. Israel Abrahams (Jerusalem, 1975), 1:382–385.

and that he chose, at least in the *Mishneh Torah* if not in the *Guide*, to refrain from supplying reasons.<sup>6</sup> Yet it is interesting to note that even in the *Guide*, where assigning reasons to the commandments is of paramount importance, Maimonides cites the example of Solomon as well (3.26). Perhaps this reference to Solomon constitutes Maimonides' subtle hint that despite the very real danger of antinomianism posed by the enterprise of seeking *ta'ame ha-miṣwot*—a danger to which even the wise and righteous are vulnerable—the enterprise must be engaged in, for the danger of antinomianism resulting from its restriction is far greater: to ask people of intelligence to accept the commandments but not to seek to understand their purpose and benefit is surely to invite even more significant noncompliance (note R. Isaac's first fear).

Furthermore, it is nearly impossible to maintain that the *Mishneh Torah* does not engage in supplying *ta'ame ha-miṣwot*. First, in the *Mishneh Torah* (*hilkhot me'illah* 8.8) Maimonides explicitly advocates seeking reasons for the commandments; he declares: "It is proper for man to inquire into the ordinances of the holy Torah and to know their purpose as far as he is able." Again in the *Mishneh Torah* (*hilkhot temurah* 4.13) Maimonides endorses assigning reasons to the commandments whenever possible, "even though the commandments are all *gezerot*."<sup>7</sup> Although Maimonides immediately warns against disregarding those commandments for which one finds no rational purpose, as well as against positing foolish or incorrect reasons, preferring silence to this, he never encourages passive unreasoned obedience to divine will. Such observance is for him clearly inferior to observance grounded in an appreciation of the wisdom of the commandments.<sup>8</sup>

<sup>6</sup> This is Levinger's view. That Maimonides in the *Guide* engages in the pursuit of *ta'ame ha-miṣwot* is, however, beyond question; see *Guide* 3.26 and 3.31. In *Guide* 3.31 Maimonides advocates rationalizing even the *huqqim* (statutes), quoting Deut 4:6, where the *huqqim* are said to establish the Jews in the eyes of all the nations as a wise and understanding people. See also Twersky, *Introduction*, pp. 356–514; David Hartman, *Maimonides: Torah and Philosophic Quest* (Philadelphia, 1976), pp. 171–174.

<sup>7</sup> This quotation seems to imply that for Maimonides there is no necessary contradiction between being a *gezerah* and having a reason. See the discussion of *gezerat ha-katuv* in the *Mishneh Torah*, below in this section.

<sup>8</sup> One difficulty inherent in unreasoned observance is automatism in the performance of the commandments. See Twersky, *Introduction*, pp. 395–396.

Secondly, and more significantly, the *Mishneh Torah* abounds with reasons for the commandments. Although the *Mishneh Torah*'s reasons may differ in kind from those in the *Guide*, they are reasons nonetheless. Whether the *Mishneh Torah*'s reasons are best described as (a) spiritual and ethical—as opposed to historical and psychological, abstract and theoretical;<sup>9</sup> (b) symbolic, rather than causal or teleological, and hence truer to the phenomenological experience of the halakhic Jew;<sup>10</sup> or (c) the means to spiritual completeness, “and not just to improve us socially and morally,”<sup>11</sup> the *Mishneh Torah* is as staunch an advocate of discerning purpose and benefit in the commandments as is the *Guide*.

Maimonides, then, is generally undaunted, whether in the *Mishneh Torah* or in the *Guide*, by the worry that his pursuit of *ta'ame ha-miṣwot* might generate antinomianism. Yet individual cases can be found in which Maimonides exercises a measure of restraint in providing reasons: if a particular reason is likely to weaken the observance of the commandment, that particular reason will be suppressed.<sup>12</sup> For example, while Maimonides in the *Guide* (3.32) explains the Torah's commandments regarding the sacrificial cult historically (i.e., as a means by which to wean the Jews away from the Sabeian idolatrous practices in which they were steeped and bring them to the worship of the one true God), in the *Mishneh Torah* he provides no reason for the sacrifices, offering instead an encomium to them (*hilkhot me'illah* 8.8).<sup>13</sup> The divergence between the *Guide*'s approach to sacrifices, on the one hand, and the *Mishneh Torah*'s approach, on the other, is best explained by Maimonides' fear that those who read the

<sup>9</sup> Twersky, *Introduction*, pp. 431–432; 437–438.

<sup>10</sup> Joseph B. Soloveitchik, *The Halakhic Mind: An Essay on Jewish Tradition and Modern Thought* (New York, 1986), pp. 92–98.

<sup>11</sup> Isaac Heinemann, *Ta'ame ha-miṣwot be-sifrut yiśra'el* [Hebrew], 3d ed. (Jerusalem, 1954), 1:96–97.

<sup>12</sup> Levinger maintains that the difference in the intended audience of the *Mishneh Torah* and the *Guide* accounts for Maimonides' general reluctance to supply reasons for the commandments in the *Mishneh Torah*. My view, however, is that it is only when Maimonides believes that a specific reason poses a threat to the observance of a commandment that he suppresses the reason in the *Mishneh Torah*.

<sup>13</sup> Maimonides quotes the sages who declare that the world stands because of the merit of the sacrificial cult. Cf. Avot 1.2, where it is said that the world stands because of three things: Torah, sacrificial worship, and deeds of kindness.

*Mishneh Torah* would reject the historical reasons proposed in the *Guide* as no longer relevant, and would consequently reject the sacrifices themselves as well.

Is our own case of *shilluaḥ ha-qen* comparable to that of sacrifices? Does Maimonides here too discern a specific danger which he feels obliged to prevent? Could the reason for the commandment of *shilluaḥ ha-qen* contribute to antinomianism on the part of the readers of the *Mishneh Torah*? Is this why Maimonides terms *shilluaḥ ha-qen* a *gezerat ha-katuv*?

Let us take a moment to consider the phrase *gezerat ha-katuv* and its use in the *Mishneh Torah*. First, the phrase appears only nine times in the *Mishneh Torah*. In his paper “On an Alleged Contradiction between Maimonides’ *Guide* and *Mishneh Torah*,” Josef Stern meticulously explores each of these cases, arguing convincingly that *gezerat ha-katuv* need not imply an arbitrary commandment with no reason behind it.<sup>14</sup> He demonstrates that (a) in two cases the phrase does not address the issue of whether or not there is a reason;<sup>15</sup> (b) in four cases the phrase suggests that although the commandment has a reason, the halakhah conflicts with what reasoning would otherwise seem to dictate;<sup>16</sup> and (c) in the final three cases, of which one is *shilluaḥ ha-qen*, the phrase’s popular connotation of a law with no reason is exploited by Maimonides in order to conceal some implication of what he takes to be the true reason.<sup>17</sup> Thus, according to Stern, although Maimonides believes that *shilluaḥ ha-qen* does have a reason, he chooses to call it a *gezerat ha-katuv*, lest the reader discern the true reason and be led astray as a result of this

<sup>14</sup> Stern, in his forthcoming article, “Alleged Contradiction,” in *Hebrew Law Annual* [Hebrew] (Jerusalem: Hebrew University Faculty of Law).

<sup>15</sup> *Hilkhot ʿishut* 25.2: if a woman is discovered to have a blemish, she may be released with no dowry, provided that the husband could not be expected to have known about it; *hilkhot mamrim* 6.7: one must give one’s parents unlimited honor.

<sup>16</sup> *Hilkhot mamrim* 7.11: a recalcitrant son is stoned, but a recalcitrant daughter is not; *hilkhot sanhedrin* 18.6: self-incrimination may not result in lashes or death; *hilkhot ʿedut* 13.15: only relatives, and not friends or enemies, are disqualified from testifying; *hilkhot ʿedut* 18.3: the second set of witnesses who challenge the qualification of the first set of witnesses to testify is the set to be believed.

<sup>17</sup> *Hilkhot teshuvah* 3.4, concerning the blowing of the shofar; *hilkhot miqwaʿot*, concerning purification through immersion in a ritual bath; *hilkhot tefillah* 60.7, concerning *shilluaḥ ha-qen*.



discovery.<sup>18</sup> If Stern is correct, we cannot help but wonder: what is the true reason for *shilluah ha-gen*, and why does Maimonides consider this reason too dangerous to mention?

## II. *Maimonides' denial that mercy is the reason for shilluah ha-gen and his argument in support of this denial*

We have seen in Section I that Maimonides (a) rarely uses the expression *gezerat ha-katuv* in the *Mishneh Torah*, and (b) even more rarely uses it in order to conceal the true reason for the commandment. Yet since *shilluah ha-gen* is (a) not the only case in which Maimonides uses this expression, and (b) not the only case in which he uses it in order to conceal the true reason for the commandment, *shilluah ha-gen*'s claim to uniqueness in the *Mishneh Torah* cannot be grounded solely in its *gezerah*-status. The feature that does legitimize this claim to uniqueness is Maimonides' vigorous denial of what would seem to be a reasonable and innocuous rationale for the commandment, i.e., that God has mercy on the mother bird.

In no other case of *gezerat ha-katuv* is there as vehement a denial of a putative reason as we find in the case of *shilluah ha-gen*. Furthermore, the denial of the reason in this case is, as we shall see, not simply an attempt to conceal the true reason; it is rather an outright attack on the reason of mercy. As Maharal of Prague pointed out in the sixteenth century, it is one thing to say that a commandment is a *gezerat ha-katuv*; it is quite another to imply that God has no mercy on the bird.<sup>19</sup> Although Maimonides does not go quite so far as to deny that God is concerned about the welfare of animals, nevertheless both his assertion that *shilluah ha-gen* was not commanded out of mercy and his argument in support of this assertion accomplish nothing less than the severing of all ties between God's commandments regarding animals and divine compassion.

<sup>18</sup> One might easily draw a parallel between Maimonides' phrase for *shilluah ha-gen* in the *Mishneh Torah*, i.e., *gezerat ha-katuv*, and his phrase in the *Commentary* on Berakhot 5.3: מצוה מקובלת אין לה טעם, "a received commandment has no reason."

<sup>19</sup> Interestingly enough Maharal makes this point with regard to Nahmanides, who uses precisely the same argument as Maimonides in support of his view that *shilluah ha-gen* was not commanded out of sheer divine mercy. See Nahmanides' commentary on Deut 22:6; Maharal, *Sefer tiferet*, p. 22.

In considering the mishnaic prohibition of the prayer formula *על קן צפור יגיעו רחמך*, Maimonides sides firmly with R. Yose bar Zabida, who locates the difficulty of the prayer formula in its incorrect implication that the commandment of *shilluah ha-qen* stems from God's mercy when in fact his commandments are simply *gezerot*. In both the Babylonian Talmud and the Palestinian Talmud several other possible reasons are proffered for the mishnaic insistence that we silence one who prays in this manner: (a) R. Yose bar Abin's view that the prayer formula suggests that God's mercy extends to some species but not to others;<sup>20</sup> (b) R. Isaac's view that one who prays in this way is in effect lodging a complaint against God, whose mercies, he believes, extend to the bird but not to him; and (c) R. Yose's (in the name of R. Simeon) view that the prayer formula limits God's compassion only to birds, implying that God's mercy extends no further than the nest.<sup>21</sup> Although these reasons differ in nuance, what is common to them—but not to R. Yose bar Zabida's reason—is the assumption that the commandment of *shilluah ha-qen* expresses God's mercy (at least) to the bird. Maimonides makes it clear by his unequivocal subscription to R. Yose bar Zabida's point of view that he will not tolerate any suggestion that God's commandment of *shilluah ha-qen* is a manifestation of divine mercy.

If we turn to Maimonides' argument in support of his denial of mercy as the reason for the commandment, we find evidence that Maimonides not only rejects mercy as the reason for *shilluah ha-qen* but also rejects the very notion that God's mercy for animals

<sup>20</sup> Maharaq collapses this reason and R. Yose bar Zabida's reason into one, but there is an unbridgeable gap between them. See below, end of this paragraph.

<sup>21</sup> Both (b) and (c) lend themselves to the variant prayer formula mentioned in n. 1, where instead of *על* there is the word *עד*, 'until.' God's compassion, according to this variant, extends only until the bird's nest, and no further. Urbach discusses what was probably the main reason for the mishnaic silencing of one who prays *על קן צפור יגיעו רחמך*, i.e., that it was a formula used by a sect, possibly the "translators." There may be a reference to this sect in yBer 5.3, where in the discussion of *shilluah ha-qen* there is a warning not to translate a certain verse in Leviticus (perhaps 22:28) to imply that God's mercy gave rise to the commandment not to slaughter a cow or sheep and its young on the same day, and that therefore one who obeys this commandment engages in *imitatio Dei*. Cf., however, *LevR* 27.11, where we find the view of R. Berechiah in the name of R. Levi, interpreting the verse "The Righteous One regardeth the life of his beast" (Prov 12:10) to refer to God's commandments of *shilluah ha-qen* and of not slaughtering parent and offspring on the same day.

can motivate his commandments. Maimonides' argument—novel, rather extreme, and furthermore arguably unsound—is presented as a *reductio ad absurdum* of the notion that the commandment of *shilluah ha-qen* was enacted as an expression of divine mercy. It runs as follows:

- a. If *shilluah ha-qen* were an expression of God's mercy, he would not have permitted animal slaughter;
- b. God does permit animal slaughter;
- c. Ergo, *shilluah ha-qen* is not an expression of God's mercy.

Underlying premise (a) are two implications, both of which are doubtful: (1) God's mercy is incompatible with his permitting animal slaughter; (2) one need not be as merciful to forbid animal slaughter as to require the dispatch of the mother bird.<sup>22</sup> Is it truly inconceivable, however, that a compassionate God would permit animal slaughter? And is it really impossible for a merciful God to permit animal slaughter yet also enjoin the sending away of the mother bird? Only if it were clear that animals endure greater suffering in being slaughtered themselves than in witnessing the departure (and likely subsequent death) of their young would the *a fortiori* reasoning implicit in premise (a) be convincing. Yet this is *not* clear. Perhaps the only evidence that we might bring to bear on this question is the human response, a response which we are in a somewhat better position to gauge than we are the animal's response.<sup>23</sup> It is, I think, incorrect to say that people suffer less at the sight of the slaying of their children than at their own death.

Premise (a) of Maimonides' argument is thus uncertain at best, and consequently the soundness of the argument is called into question. The argument is extreme in its insistence not only that mercy is not the reason for *shilluah ha-qen* but also that God is not merciful toward animals insofar as he permits their slaughter. Why would Maimonides wish to insist not only that divine mercy

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<sup>22</sup> Another commandment that anyone endorsing premise (a) would probably see as requiring greater compassion than is required for forbidding animal slaughter is the commandment to refrain from killing a cow or sheep and its young on the same day.

<sup>23</sup> Note the parallel drawn between human and animal suffering in *Guide* 3.48, to be discussed below, Section III.

is not the reason for *shilluah ha-qen* but also that insofar as God permits animal slaughter, he cannot be considered merciful toward animals at all? It is apparently so important for Maimonides to insist that mercy is not the reason for *shilluah ha-qen* that he is willing to assert categorically that the permissibility of animal slaughter cannot be reconciled with God's mercy. Yet is it not somewhat premature for him to give up all hope of reconciling animal slaughter with divine mercy?

### III. *The attitude toward shilluah ha-qen in the Guide*

What renders Maimonides' position in the *Mishneh Torah* all the more baffling is that he holds precisely the opposite position in the *Guide*. Indeed, not only with regard to *shilluah ha-qen* does Maimonides in the *Guide* demonstrate the concern of the commandments for the welfare of nonhuman creatures, drawing a parallel between the feelings of animals and those of human beings (3.48), but he also does so even with regard to animal slaughter (3.26). Minimizing animal suffering, *צער בעלי חיים*, seems to hold a prominent place in the *Guide*, as does the theme of God's mercy generally (*Guide* 1.54; 3.54; cf. *Mishneh Torah*, *hilkhot megillah* 2.17). The *Guide* is so exacting with regard to the commandment of *shilluah ha-qen* that it requires us to send away the mother bird despite the probability that her chicks are inedible. Does the God whose commandment of *shilluah ha-qen* was seen in the *Mishneh Torah* to reflect absolutely no mercy suddenly display an enormous amount of mercy in the *Guide*?

One possible approach to reconciling the contradictory positions in the *Mishneh Torah* and the *Guide* is to maintain that in the *Guide* it is not God who has mercy on the animals but rather we ourselves who are commanded to be merciful: God wants us to have mercy on the animals in order that we develop the character-traits of kindness and compassion and excise all traces of cruelty in ourselves.<sup>24</sup> This approach, it may be thought,

<sup>24</sup> Nahmanides in his commentary on Deut 22:6 (cf. Maharal, *Sefer tiferet*, p. 22) characterizes the distinction between his own view and that of Maimonides in the *Guide* as the difference between regarding the commandment of *shilluah ha-qen* as a way of insuring that human beings become compassionate (שלא נתאכזר), as opposed to an expression of God's compassion for his nonhuman creatures.

garners some support from Maimonides' explicit assertion in his discussion of providence (3.17) that providence does not extend to the individual nonhuman animal (though it does extend to the individual human being).<sup>25</sup>

There are two major considerations that militate against this view. First, it is difficult to see why Maimonides could not have been more explicit in *Guide* 3.48 if his intent was to reinforce his view in 3.17 regarding divine providence in relation to nonhuman animals. Why could he not have said that (a) providence does not extend to individual nonhuman animals; (b) therefore God has no concern of his own for the birds and other animals; and (c) God nevertheless wishes us to behave compassionately toward them for the sake of our own moral excellence? Indeed, this is in effect what Maimonides concludes at the end of 3.17:

As for their dictum: [*To avoid causing*] *suffering to animals is [an injunction to be found] in the Torah*—in which they refer to its dictum: *Wherefore hast thou smitten thine she-ass*—it is set down with a view to perfecting us so that we should not acquire moral habits of cruelty and should not inflict pain gratuitously without any utility, but that we should intend to be kind and merciful even with a chance animal individual, except in case of need—*Because thy soul desireth to eat flesh*—for we may not kill out of cruelty or for sport.<sup>26</sup>

Yet Maimonides neither repeats this claim nor makes one similar to it in 3.48, where there is a marked shift of emphasis away from the Torah's interest in perfecting man by insisting that he must be kind to animals to its direct interest in the welfare of the animals. In 3.48 he affirms that "the Law takes into consideration these pains in the souls of beasts and birds." Similarly, earlier in the same chapter Maimonides says regarding *²oto we-²et beno*, i.e., the prohibition of slaughtering "it and its young on the same day" (Lev 22:28), that it is "a precautionary measure in order to avoid slaughtering the young animal in front of its mother. For in these cases animals feel great pain." In Chapter 26 as well, where animal slaughter is discussed, Maimonides says: "... the com-

<sup>25</sup> This is Stern's view in "Alleged Contradiction" (see above, n. 14).

<sup>26</sup> All quotes from the *Guide* are from *The Guide of the Perplexed*, tr. Shlomo Pines, 2 vols. (Chicago, 1963).

mandment was intended to bring about the easiest death in an easy manner.” All of these expressions suggest that the object of the Torah’s concern is the animals themselves and not, as 3.17 maintains, human beings exclusively.<sup>27</sup>

Secondly, providence and mercy are not the same thing and do not necessarily imply one another. The *Guide* deals with the issue of divine providence in 3.17 as well as in the discussion of Job (3.22–23) and in 3.51. Although it is by no means simple to make these discussions cohere and to set out the definitive Maimonidean position on divine providence,<sup>28</sup> it is fair to say that all three discussions emphasize the direct relationship between degree of intellect, on the one hand, and degree of providence, on the other. The intellectual deficiency of nonhuman animals precludes the possibility of individual divine providence for them; indeed, even if providence were a simple matter of reward and punishment, animals who lack free will would again be excluded. Yet neither paucity of intellect nor absence of free will need affect the possibility of divine mercy. For unlike providence as Maimonides understands it, mercy is appropriate to beings who neither think nor will but do suffer. Twice in 3.48 Maimonides, in discussing the Law’s exhortation to be merciful to animals, compares animals to human beings in respect of their common ability to experience pain. The first occasion concerns the prohibition of *ʔoto we-ʔet beno*: “. . . there being no difference regarding this pain between man and the other animals. For the love and tenderness of a mother for her child is not consequent upon reason but upon the activity of the imaginative faculty, which is found in most animals just as it is found in man.” The second occasion follows the discussion of *shilluah ha-qen*: “If the Law takes into consideration these pains of the soul in the case of beasts and birds, what will be the case with regard to the individuals of the human species as a whole?” Had Maimonides been thinking here of God’s providence, he clearly would have

<sup>27</sup> There is no reason to regard God’s concern for the animal and his desire that we be compassionate as mutually exclusive. In fact the conjunction of the two constitutes the sufficient condition for *imitatio Dei*, a notion whose importance is underscored both in the *Guide* (especially, 3.54) and in the *Mishneh Torah*, *Megillah* 2.17.

<sup>28</sup> See Charles M. Raffel, “Providence as Consequent upon the Intellect: Maimonides’ Theory of Providence,” *AJS Review* 12 (1987): 25–71.

distinguished between human and nonhuman animals. One can only conclude that when Maimonides in the *Guide* considers the precepts of *ʔoto we-ʔet beno* and *shilluah ha-qen*—as well as of animal slaughter—he believes, contrary to his view in the *Mishneh Torah*, that God does indeed have mercy on bird and beast as evidenced by his ordinances concerning them.

It is interesting to note that *Guide* 3.26, where Maimonides insists that the commandments regulating animal slaughter are designed to insure the easiest (i.e., least painful) death possible, contains a discussion of a rabbinic dictum in *GenR* 44 asserting God's indifference to the method of animal slaughter:

What does it matter to the Holy One, blessed be he, that animals are slaughtered by cutting their neck in front or in back? Say therefore that the commandments were only given in order to purify the people. For it is said: "The word of the Lord is purified."

Maimonides had at least three options open to him with regard to this dictum: (a) he could simply have chosen not to quote it; it is, as Maimonides himself points out, distinctly a minority opinion; (b) he could have stated flatly that he disagrees with it;<sup>29</sup> or (c) he could have interpreted it as it is usually interpreted, i.e., as making the point that the commandments are for us, not for God. Yet he chooses none of these options. Instead, he interprets the dictum as signifying that God is indifferent only to the necessarily arbitrary details of the commandments,<sup>30</sup> but not to the general precepts themselves which certainly have reasons. This interpretation ostensibly enables Maimonides to agree with the midrash.

It is important to see, however, that no sooner does Maimonides effect this happy resolution of the apparent contradiction

<sup>29</sup> Maimonides takes this approach in *Guide* 3.48 with regard to the mishnah that requires silencing him who prays *גייעו רחמך על קן צפור*. See below, Section 4.

<sup>30</sup> See Arthur Hyman, "A Note on Maimonides' Classification of Law," *PAAJR* 46–47 (1980): 323–343. Hyman explores the philosophical question of how one makes a choice between two alternatives when there is between them no differentiating feature to render one alternative preferable to the other (this puzzle is sometimes referred to as "Buridan's ass"). Hyman argues that for Maimonides, "in such a situation, even God must make an arbitrary choice" (p. 343). Hyman goes on to show that for Nahmanides, by contrast, no divine choice is arbitrary.

between his own view that the commandments have reasons and that of the rabbis in the quoted midrash who might at first be thought to deny this view, than he proceeds to disagree with them. He challenges as inappropriate the rabbis' example of slaughtering at the neck or the back, and argues that God's choice in this case is rational, since one method of slaughter is less painful to the animal than the other. The details that Maimonides concedes to be arbitrary are those concerning sacrifices, e.g., how many animals to sacrifice, whether the sacrificial animal should be a lamb or a ram, etc.<sup>31</sup>

Clearly, then, Maimonides does defy the rabbis. He deliberately quotes a midrash in order to dispute it, thereby focusing greater attention on his own view which now stands in opposition to a rabbinic one. The Maimonidean view thus highlighted is his firm conviction that *צער בעלי חיים* is a primary concern of Torah law. As we shall see in the next section, Maimonides also disputes the rabbis in the Mishnah who forbid the prayer formula *על קן צפור רחמך יגינו*. There too what Maimonides insists upon is that the Torah is greatly concerned with shielding animals from pain.

<sup>31</sup> For an interesting discussion of this issue see Josef Stern, "The Idea of a *Hoq* in Maimonides' Explanation of the Law," in Shlomo Pines, Yirmiyahu Yovel, et. al., eds., *Maimonides and His Philosophy* (Dordrecht, Holland, 1986), pp. 92–130. Stern argues convincingly that in fact for Maimonides all the details of the commandments have reasons, yet he seeks in *Guide* 3.26 to conceal this truth from his readers, despite his proceeding to offer reasons later on in the *Guide* even for the details of the sacrifices. Stern contends that since the reasons for the details are historical and have to do with now defunct Sabeian practices, revealing these reasons could lead to antinomianism. In holding this view, Stern differs with both Hyman ("A Note") and Michael Nehorai ("Maimonides' System of the Commandments" [Hebrew], *Da'at* [1984]: 29–42). Hyman maintains (see preceding note) that for Maimonides there are commandments whose details have no reason; they were chosen arbitrarily by God. Nehorai believes as well that in the case of some of them, for example, animal slaughter, even the details are meaningful, whereas in the case of others, for example, animal sacrifices, the details are meaningless. In anticipation of the objection that in fact Maimonides in the *Guide* does provide reasons for the details of animal sacrifices, Nehorai has recourse to the concept of an "anti-reason" (*anti-ṭa'am*). Nehorai claims that the reasons Maimonides assigns to the so-called "meaningless" details are different in kind from those he assigns to both the general commandments and the "meaningful" details, so that the two kinds of reasons can only be called "reasons" equivocally. For further discussion of the value of historical reasons see Warren Zev Harvey, "Political Philosophy and Halakhah in Maimonides" [Hebrew], *Iyyun* 29 (1980): 198–212, especially p. 204.



Maimonides' insistence in the *Guide*, contra the rabbis in the midrash, that God deliberately chose that method of slaughter that is least painful for the animal, underscores the undeniable dissonance between the *Guide*'s position on God's relationship to animals and the *Mishneh Torah*'s view. Although there are several other instances in which the *Guide*'s reason for a commandment differs from the *Mishneh Torah*'s reason, or in which the *Guide* offers a reason while the *Mishneh Torah* is silent, there is no instance but that of *shilluah ha-qen* where the very reason flatly denied in the *Mishneh Torah* is affirmed in the *Guide*. For example, in the case of the shofar, one of the commandments that the *Mishneh Torah* calls a *gezerat ha-katuv*, the reason that is given in *Guide* 3.43, to awaken us to repentance, appears as a *remez* ("hint") in the *Mishneh Torah*.<sup>32</sup> Similarly, if we look at the issue of sacrifices, the *Mishneh Torah* offers no reason at all, preferring simply to extol the practice, whereas the *Guide* offers historical reasons.<sup>33</sup> In neither of these cases, nor in any other, do the philosophic and halakhic works so blatantly contradict one another as they do in the case of *shilluah ha-qen*.

If Maimonides' position in the *Guide* on animal slaughter, on *oto we-et beno*, and on *shilluah ha-qen* indeed represents, as I have argued, a complete reversal of his earlier position in the *Mishneh Torah*, the intriguing question remains, why?

#### IV. The Guide's break with the Mishnah

In *Guide* 3.48 after discussing the reason for *oto we-et beno* and *shilluah ha-qen*, Maimonides says:

You must not allege as an objection against me the dictum of [the Sages], may their memory be blessed: *He who says: Thy mercy extendeth to young birds*, and so on. For this is one of

<sup>32</sup> See Levinger ("Abstinence," above, n. 2), who attributes Maimonides' use of the term *remez* in the *Mishneh Torah* to his general reluctance to give reasons to his nonphilosophic audience. Cf. Heinemann (*Ta'ame*, p. 89), who attributes the use of *remez* in connection with the blowing of the shofar to Maimonides' disdain for a certain type of reason found even in the Talmud, e.g., "to confuse Satan" (bRH 17.2).

<sup>33</sup> Twersky (*Introduction*, p. 415) sees a contradiction between the high status accorded to sacrifices in the *Mishneh Torah* and what he terms their "secondary-ancillary worth" in the *Guide*; but even so, this contradiction is nowhere near as blatant as the contradiction in the case of *shilluah ha-qen*.

the two opinions mentioned by us<sup>34</sup>—I mean the opinion of those who think that there is no reason for the Law except only the will [of God]—but as for us, we follow the second opinion.

With these words Maimonides breaks not only with those who endorse the view that *shilluah ha-qen* (as well as other commandments) is without reason, but with himself, who in the *Mishneh Torah* declared both that (a) *shilluah ha-qen* is a *gezerat ha-katuv* and (b) it is not due to mercy. If there was previously any doubt that Maimonides in the *Guide* reverses his earlier position in the *Mishneh Torah*, surely the doubt must now dissipate.<sup>35</sup> That he is willing to stand up against the Mishnah shows just how strongly he is committed to the *Guide*'s reason for *shilluah ha-qen*, the Torah's compassion for the mother bird.

Had he so wished, Maimonides could have here affirmed his acceptance of the mishnah itself, merely offering an alternative reason for it. He could have preserved thereby his claim that the mishnah has a reason, without relinquishing his position in 3.48 that the Torah indeed has mercy on the bird. Yet he offers no alternative reason. On the contrary, he hints that he no longer sympathizes with the mishnaic prohibition itself. For the sentence immediately preceding his dissociation of himself from the mishnah employs precisely that *a fortiori* argument implicit in the prayer formula to which the Mishnah objects. It reads, "If the Law takes into consideration these pains of the soul in the case of beasts and birds, what must be the case with regard to individuals of the human species as a whole?" Does not this sentence accurately reflect the thinking of the man who prays על קן צפור יגיעו רחמך? How indeed could Maimonides assent to a mishnah that would silence this man?

## V. Conclusions

The preceding discussion has raised several disturbing questions about Maimonides' view of *shilluah ha-qen* in the *Mishneh*

<sup>34</sup> See *Guide* 3.26; 3.31.

<sup>35</sup> Stern ("Alleged Contradiction") seems to be alone in believing that Maimonides does not here actually abandon the mishnah but disagrees only with the explanation for it. For the contrary view, see, e.g., Shem-Ṭov Narboni, Maharal, Levinger. I respond to Stern in the next paragraph.

*Torah* and in the *Guide*, questions to which we shall now seek to offer a solution:

1. Why does Maimonides in the *Mishneh Torah* term *shilluah ha-qen* a *gezerat ha-katuv*?

2. Why is Maimonides in the *Mishneh Torah* not content to state simply that *shilluah ha-qen* is a *gezerat ha-katuv*, but rather insists on denying that divine mercy is the reason?

3. Why is Maimonides in the *Mishneh Torah* apparently so determined to deny that God ever shows mercy to animals through his commandments?

4. Why does Maimonides in the *Mishneh Torah* offer an argument whose first premise is open to doubt, in order to bolster his denial of mercy as the reason for *shilluah ha-qen*, an argument that prematurely commits him further to the incompatibility of divine mercy and animal slaughter?

5. Why does Maimonides in the *Guide* reverse the position he held in the *Mishneh Torah* with regard to (a) *shilluah ha-qen*'s being a *gezerat ha-katuv*; (b) mercy being the reason for *shilluah ha-qen*; and (c) mercy's compatibility with animal slaughter?

6. Why is Maimonides in the *Guide* willing to depart from the mishnaic prohibition of the recitation of *על קן צפור יגיעו רחמן*?

The solution of these questions lies, I believe, in (a) understanding the danger of antinomianism which Maimonides in the *Mishneh Torah* saw lurking in the notion that divine mercy motivated the commandment of *shilluah ha-qen*, and (b) discovering the insight in the *Guide* that enabled him to quell his earlier fear of antinomianism.

(a) How can the belief that God commanded *shilluah ha-qen* because of his concern for animals possibly lead to antinomianism? In order to understand the source of Maimonides' fear that it indeed can, let us return to his argument in the *Mishneh Torah* against divine mercy as the reason for *shilluah ha-qen*. Maimonides contends that since God permits animal slaughter, it follows that he does not issue commandments out of concern for animals. Maimonides' leap to this claim reveals, I believe, the somewhat unusual form of antinomianism which he feared would result from a belief in divine mercy for animals.

What Maimonides reveals in this argument is what he saw—and feared—as the dangerous logical extension of the attribution of *shilluah ha-qen* to divine mercy: if God shows so high a degree

of mercy to the mother bird, why does he permit animal slaughter? For anyone who does not consider abandoning all the commandments because of this perceived lapse in God's mercy, there remains still one clearly antinomian response: one can decide to uphold the "spirit of the Law" by refraining altogether from the killing of animals. That such a decision is antinomian is indubitable: it threatens the positive commandment of *qorbanot* (animal sacrifices), which, though it cannot at present be fulfilled, has by no means been abrogated. Furthermore, a decision to desist from killing animals would mean the violation of the positive commandment to eat meat on festivals—in fulfillment of *ושמחת בחגך*, the commandment to rejoice on the festivals.<sup>36</sup> Such a decision would in addition involve forbidding to oneself that which the Torah permits. I wish to suggest that Maimonides sought to impede such deviations from the Torah by denying any relationship between God's mercy and his commandments: *shilluah ha-qen*, Maimonides says, is a *gezerat ha-katuv*, and furthermore, since God permits animal slaughter, God's mercy is not the reason for it.

(b) If Maimonides in the *Mishneh Torah* could not allow mercy to be the reason for *shilluah ha-qen* lest people wonder how a merciful God can permit animal slaughter, what enabled him to speak so openly about divine mercy in later chapters of Part 3 of the *Guide*? That the *Guide*'s intended audience was different from the *Mishneh Torah*'s is certainly true, but the boldness with which Maimonides reverses his earlier position, going so far as to cite a mishnah which he had earlier endorsed in order to break with it now, suggests that he is now willing to proclaim that God in his mercy commanded *shilluah ha-qen*. Was there something in particular that spurred Maimonides' transition from his view in the *Mishneh Torah* to his new position in the *Guide*?

I would argue that in the *Guide* Maimonides discovered a way to block what he formerly feared to be the logical extension of

<sup>36</sup> Among halakhic authorities Maimonides (*hilkhot yom tov* 6.18) stands out as particularly stringent in requiring the eating of animal flesh in fulfillment of the duty to rejoice on festivals. Other authorities believe that drinking wine is sufficient or that eating meat is desirable but not required. See J. David Bleich, "Vegetarianism and Judaism," *Tradition* 23 (1987): 82–90. Bleich shows that adopting vegetarianism for moral reasons raises serious halakhic questions.

regarding *shilluah ha-qen* as stemming from divine compassion. As was pointed out above, he feared that one would ask, if God in his mercy commanded *shilluah ha-qen*, how could God in his mercy permit animal slaughter? Maimonides' initial response to this line of reasoning was simply to deny its basic assumption: since animal slaughter is permitted, divine mercy is not the reason for *shilluah ha-qen*. In the *Guide*, I believe, Maimonides found another way in which to respond, by coming to regard animal slaughter as consistent with, and even as a manifestation of, divine mercy.

Maimonides' discovery in the *Guide* was that the very importance of consumption of meat to the health of human beings<sup>37</sup> enables divine mercy to be preserved in the face of the permissibility of animal slaughter. In *Guide* 3.26 in his consideration of the midrash in *GenR* discussed above in Section 3, Maimonides regards animal-killing as "useful" because of the critical importance of meat in the human diet: "For instance, the killing of animals because of the necessity of having good food is manifestly useful, as we shall make clear." In 3.48 it is the animal slaughter itself that has become "necessary":

The commandment concerning the slaughtering of animals is necessary. For the natural food of man consists only of the plants deriving from the seeds growing in the earth and of the flesh of animals, the most excellent kinds of meat being those that are permitted to us. No physician is ignorant of this.

This being the case, even a merciful God would permit animal slaughter as well indeed as the taking and eating of baby birds, but would insist that these activities be conducted with as much sensitivity to the animals as possible. Thus we find in both 3.26 and 3.48 a juxtaposition of the notions that (a) meat-eating is necessary for human well-being, and (b) we must nevertheless treat animals compassionately. In 3.26 Maimonides says: "As necessity occasions the eating of animals, the commandment was intended to bring about the easiest death in the easiest manner." In 3.48 we read: "Now since the necessity to have good food requires that animals be killed, the aim was to kill them in the easiest manner, and it was forbidden to torment them through killing them in a reprehensible manner."

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<sup>37</sup> See *Mishneh Torah*, *hilkhot de'ot* 4.

What we see here is that God's mercy toward human beings, i.e., his concern that they be properly nourished, leads to his permitting the consumption of meat so long as the animals are in turn treated compassionately. The practice of meat-eating emerges then as compatible with God's mercy and indeed as a demonstration of it, as it extends to both men and animals.

Similarly, God's commandment regarding animal sacrifices—in particular those not involving meat-consumption and hence not justifiable in terms of human nutritional needs—is regarded by Maimonides as a concession to human needs of another sort.<sup>38</sup> Significantly, Maimonides in 3.32 regards sacrifices as a “gracious ruse” on God's part, a kindness to human beings who are incapable of worshipping God in a way to which they are completely unaccustomed. God bends to human nature here, much as he bent to the facts of human physiology earlier in 3.26 and again later in 3.48, permitting animal-killing as a merciful act towards people. Referring back to 3.32, Maimonides in 3.35 notes the “utility” of the laws concerning sacrifices and their “necessity,” connecting through these terms the reason why God permits sacrifices with the reason why he permits animal slaughter generally. Since “God does not change the nature of human individuals by means of miracles” (3.32), he, in his goodness, formulates laws that make allowances for the limitations of human nature.

We thus see that the one who prays *על קן צפור יגיעו רחמך* actually understands correctly the reason for the commandment of *shilluah ha-qen*. In the *Mishneh Torah* Maimonides was unfortunately compelled to deny outright what he knew to be the true reason for the commandment in order to minimize the risk of antinomianism. He could not simply call *shilluah ha-qen* a *gezerat ha-katuv* since there were people who already on their own grasped the commandment's real and somewhat obvious reason—divine mercy. He had instead to come down firmly against divine mercy as the reason for this commandment. In the *Guide*, however, he discovered that he could actually acknowledge divine mercy without thereby running the risk of antinomianism, since God's mercy is manifest in animal slaughter

<sup>38</sup> Maimonides compares this divine concession to psychic human needs to God's having led the Jewish people out of Egypt not by way of the land of the Philistines but by way of the wilderness of the Sea of Reeds in recognition of their bodily limitations (3.32).

itself, as his laws address both human and animal needs: while God permits human beings what is necessary for their physical and psychic well-being, he also demands care and regard for the feelings of the animals.

One final note: Maimonides in the *Guide* (3.48) unabashedly proclaims that in the case of both *shilluah ha-qen* and *ʔoto we-ʔet beno* “precautionary measures” are built into biblical injunctions. Whereas normally precautionary measures (*seyagim*) are confined to the Oral Law, in the case of *צער בעלי חיים* such measures are actually part and parcel of biblical law. In the case of *ʔoto we-ʔet beno* Maimonides declares: “It is likewise forbidden to slaughter ‘it and its young on the same day,’ this being a precautionary measure in order to avoid slaughtering the young animal in front of its mother.” In the case of *shilluah ha-qen*, Maimonides acknowledges that “in most cases this [i.e., *shilluah ha-qen*] will lead to people leaving everything alone, for what may be taken is in most cases not fit to be eaten.” Thus the commandment of *shilluah ha-qen* amounts to a precautionary measure as well. The Torah is then, according to Maimonides in the *Guide*, so greatly concerned with the feelings of birds and beasts that it itself enjoins precautionary measures with regard to them, and it is not content, where there is potential animal suffering, to leave such measures to the Oral Law.<sup>39</sup>

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<sup>39</sup> I wish to thank Josef Stern as well as the anonymous referees of the *Jewish Quarterly Review* for their most valuable comments on an earlier draft of this paper.