Justice, Mercy and a Bird's Nest

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The pursuit of reasons for the laws (*ṭa'amei ha-miṣvot*) was normally viewed by Rabbinic Judaism as falling within the domain of Aggadah, which by its nature does not strive for definitive dogmas, but rather encourages an imaginative freedom of ideas. The practical outcome of this approach is that Jewish law frequently appears to be made up of an open-ended set of symbols, to which the individual may attach whatever meanings he feels appropriate. This openness, while constituting a source of strength and adaptability for a historical tradition, can also lead to some awkward theological consequences: if the precepts were revealed with specific purposes in mind, then are we justified in interpreting their purposes so freely and subjectively? Furthermore, is the concrete application of a law not ultimately determined by a conception of the aim or function of that law? Can the Halakhic and Aggadic aspects of Jewish legal theory truly be subjected to this sort of rigid polarization between the meaning and application of the laws?

The present study begins with a problem in Scriptural exegesis, which became associated in the Talmud with basic questions about the scope of God's mercy and the rationality of the Jewish legal system. Owing to the unsystematic character of the Talmudic sources, the questions raised by them left a heritage of thorny theological problems that would be defined anew by the more systematic Jewish thinkers of the Middle Ages and subjected by them to their more rigid standards of analysis. The study of this question offers a unique example of the complex interrelationships that existed between divergent strands of Jewish religious expression—exegetical, philosophical, legalistic and others—as they strove to grapple with questions that cut to the heart of Jewish religious values.

We begin our investigation with the following law, as set down in Deuteronomy 22:6–7:[1]

> *If, along the road, you chance upon a bird's nest, in any tree or on the ground, with fledglings or eggs and the mother sitting over the fledglings or on the eggs, do not take the mother together with her young. Let the mother go and take only the young, in order that you may fare well and have a long life.*

The reasons underlying this law have been subjected by modern Biblical scholars to a variety of interpretations. Some view it as embodying considerations of compassion for the maternal feelings of the mother bird,

[1] According to the American Jewish Publication Society translation: *The Torah—The Five Books of Moses* (Philadelphia, 1962).

associating this law with the similar prohibition of slaughtering a beast and its young on the same day (Lev. 22:28), and with the obligation of parental honour as laid down in the Decalogue.[2] This view has been criticized on the grounds that true compassion should logically have forbidden the bird's slaughter altogether.[3] Consequently, alternative rationales have been proposed, notably a utilitarian, 'conservationist' approach, which regards the precept as being aimed at preserving the supply of birds,[4] and a 'military morality' thesis, which perceives the law as a pedagogic or symbolic lesson against extending hostility to innocent creatures, human or otherwise.[5] There is scarcely a single one of these 'critical' explanations that has not been anticipated by midrashic commentaries or traditional medieval Jewish exegetes.[6]

[2] Thus G. Von Rad, *Deuteronomy—A Commentary* (Philadelphia, 1966), p. 141; A. B. Ehrlich, *Mikra Ki-Pheshuto* (*The Bible According to Its Literal Meaning*) (New York, 1969), vol. 1, p. 349. Ehrlich, Driver, Carmichael (see next note) and others note that the sensitivity to maternal instincts is suggested by the language of the promise of long life in verse 7, which echoes the rewards attached to parental honour in the Decalogue (Ex. 20:12; Dt. 5:16).

[3] P. C. Craigie, *The Book of Deuteronomy* (Grand Rapids, Michigan and London, 1976), pp. 288–9; C. M. Carmichael, *The Laws of Deuteronomy* (Ithaca, 1974), pp. 151–6; and his more elaborate discussion in *Law and Narrative in the Bible* (Ithaca and London, 1985), p. 166.

[4] Such a view, involving a communal 'right of user' in the bird, is cited in the name of Fenton (*Early Hebrew Life*, p. 48) by Driver, in the ICC commentary to Deuteronomy (Edinburgh, 1902), p. 251; see also Craigie, op. cit.; A. Phillips in the *Cambridge Bible Commentary* (Cambridge, 1973), p. 146; Ehrlich (note 2 above) uses this consideration to justify the attaching of greater stringency to birds than to cattle (in Lev. 22:28).

[5] This approach is argued by C. Carmichael (note 3 above).

[6] The humanitarian purpose of the law seems to have been presumed by Philo, *De Virtutibus* 137–144, and by Rashbam (in his remarks here and to Lev. 22:28), as well as S. D. Luzzatto. That the promise of the reward of lengthened days is an intentional allusion to the Decalogic honouring of human parents was noted by a number of Talmudic and Midrashic sources, e.g. *TP Pe'ah* 1:1, 15d (cited in J. Blidstein, *Honor Your Father and Your Mother* (New York, 1975), pp. 28–9). Cf. *TB Ḥullin* 142a (leading to a pointed discussion of theodicy in instances where the earthly reward is not evident). Among the medievals, Ibn Ezra also sees a fundamental cruelty in killing the mother with her chicks; but see below. On Maimonides and Naḥmanides, see below. The uneasiness felt by modern commentators regarding the 'mercy' that allows killing the fledglings was felt by the traditional Jewish exegetes, as we shall see. See R. Ezekiel Landau, *Noda' bi-Yehudah* (3rd edition *Yo.D* #10, cited by C. Chavel in the notes to his Hebrew edition of Baḥya's commentary (Jerusalem, 1968), vol. 3, p. 386).

The 'conservationist' view is found in several traditional Jewish commentators, including Ibn Ezra, Naḥmanides (trans. C. Chavel (New York, 1976), pp. 265 ff.), Baḥya, Abravanel (see below), Sforno.

An interesting synthesis of the 'compassion' and 'conservationist' approaches may be found in the medieval *Sefer ha-Ḥinnukh* Commandment #537 (ed. C. Chavel (Jerusalem, 1977), pp. 654 ff.), and Abravanel's commentary to Deuteronomy (see below).

The similarities in phraseology between the expression 'mother and children' as used here and in the warlike contexts of Gen. 32:11 and Ḥosea 10:14 (and perhaps Esther 3:13) were typically seized upon for homiletical purposes by the Rabbis of the Midrash, e.g. *Genesis Rabbah* 76:6, *Leviticus Rabbah* 27:10, and parallels in *Tanḥuma 'Emor* 13, *Tanḥ.* Buber 18, *Pesikta De Rab Kahana* 9:11, *Midrash on Psalms* 22:17, *Lamentations Rabbah* 1:37, etc. See also *Pitron Torah* (ed. E. Urbach, Jerusalem, 1978), p. 273, and cf. *Ba'al ha-Ṭurim* to Pentateuch; Temple Scroll (note 9 below).

Talmudic Riddles

The character of the Rabbinic discourse on the topic has been decisively coloured by a curious statement that appears in two places in the Mishnah: *Mishnah Berakhot* 5:3; *Megillah* 4:9 (Ch. 3 in Babylonian Talmud):

> One who says 'Your mercies extend unto a bird's nest' ... is to be silenced.[7]

In *Berakhot*, this ruling is brought in the context of a miscellaneous collection of rules relating to proper conduct and attitude during the *Tefillah*. The passage immediately preceding prescribes the correct places for some seasonal insertions into the fixed liturgy. The subsequent mishnah describes the procedure for replacing a prayer-leader who has made mistakes.

In *Megillah*, however, the context is different (and evidently original). It appears as part of a list of ritual and liturgical practices which the Mishnah brands as forbidden, identifying some of them as 'the way of sectarianism' (*minut*) or 'of the outsiders' (*hiṣonim*). The reasons for several of these prohibitions, especially the passage under discussion, were already unclear to the Talmudic Rabbis, and modern scholarship has had its own suggestions to offer.

S. Lieberman[8] has dealt with Talmudic references to 'the way of the outsiders', noting that a number of the practices so designated can be identified with those of the Qumran sectarians. Thus it would seem desirable to seek appropriate sources from the Dead Sea Scrolls or ancient descriptions of the Essenes. Unfortunately, in spite of the fact that some of the other liturgical formulae mentioned in the Mishnah do appear to have distinct similarities to Qumran practices, no clearly relevant material has come to our attention.[9]

Another attempt at finding a historical context for the Mishnaic rule is

[7] J. N. Epstein, *Mavo' Le-Nusaḥ Ha-Mishnah* (Jerusalem and Tel-Aviv, 1964), pp. 90–1, discusses the textual readings and their relationships to some Talmudic interpretations. See also L. Tetzner's German edition of the Mishnah *Megillah* (Berlin, 1968); Urbach, *The Sages—Their Concepts and Beliefs* (Jerusalem, 1979), p. 384, n. 44. On the liturgical context in which these formulae were recited, see I. Elbogen, *Der jüdische Gottesdienst in seiner geschichtlichen Entwicklung* (Hildesheim, 1962), p. 57; Urbach, *The Sages*, p. 384, n. 53; see the literature cited there and in note 11 below.

[8] In *PAAJR* 22 (1951), pp. 395 ff.; 'The Discipline of the So-Called Dead Sea Manual of Discipline', *JBL* 71 (1952), pp. 199–205; *Tosefta Ki-fshutah Zera'im* (New York, 1955), p. 122. Cf. J. Lehmann, 'Les sectes juives mentionnées dans la Mischna de Berakhot et de Meguilla', *REJ* 30 (1895), pp. 182–203; A. Segal, *The Two Powers in Heaven* (Leiden, 1977), p. 105, n. 14.

[9] The dualistic tone of the formulae fits well with the Qumran theology, especially 'Let the righteous bless You'. See also J. Licht, *The Thanksgiving Scroll* (Jerusalem, 1957), p. 161 (in Hebrew), and Segal, op. cit., p. 101; F. D. Weinert, '4Q 159 and Essene Origins', *Revue de Qumran* 9 (1977–78), p. 225, n. 15; Y. Yadin's Hebrew commentary to the Temple Scroll 52:5 (Jerusalem, 1977), p. 242 (but cf. 65:4).

that of R. T. Herford,[10] who tried to interpret it as aimed at Jewish Christians. According to Herford,

> the heresy consists in saying that God acts towards his creatures not as one who commands, but as one who loves. When we remember the Pauline antithesis of Law and Grace or, indeed, the general N.T. doctrine that God is love, it is easy to understand why such an innocent and beautiful phrase should be deemed heretical.

As presented here, Herford's suggestion lacks concrete proof. Moreover, his own analysis of the Mishnah's full context raises an implied objection, namely, that of all the other 'heretical' practices proscribed by the neighbouring clauses of the Mishnah in *Megillah*, he is unable to point to a single other instance that could plausibly be interpreted as a reference to Christianity. Subsequent studies[11] have suggested some other possible Christian allusions, though not for all the clauses.[12]

Given the degree of guesswork involved in identifying the hypothetical heresy, a number of scholars have elected to explain the Mishnah's concerns from within the Pharisaic-Rabbinic world itself. The starting point for the investigation is the discussion of the respective Mishnah texts as embodied in the Palestinian and Babylonian Talmuds. The two Talmuds have substantially similar pericopes to these mishnahs. The Palestinian version reads as follows (*Ber.* 9c; *Meg.* 75c):

> R. Phineas[13] in the name of R. Simon: Like one who is challenging the standards [*middotav*] of the Holy One Blessed be He: It is upon a bird's nest that your mercies extend, but upon this man [euphemism: i.e. me] your mercies have not extended.
> R. Yose in the name of R. Simon: Like one who is assigning a limit to the qualities of the Holy One Blessed be He. As far as a bird's nest have your mercies extended ...

[10] *Christianity in Talmud and Midrash* (London, 1903), pp. 199–204. Cf. A. Marmorstein, *The Old Rabbinic Doctrine of God* (London, 1927), pp. 205 ff.; notes to Tetzner, *Megillah* (note 7 above), p. 131.

[11] The most exhaustive study of the whole problem is that of A. Segal, op. cit., though he cites almost exclusively from the Babylonian Talmud, mentioning the Palestinian Talmud only incidentally (in our case, not at all). Segal explores a number of possible Christian allusions in the liturgical formulae cited by the Mishnah; cf. A. Z. Idelsohn, *Jewish Liturgy* (New York, 1967), pp. 102–3; S. W. Baron, *Social and Religious History of the Jews* (New York and London, 1962), 2:135, 381; N. G. Cohen, 'The Nature of Shim'on Hapekuli's Act etc.', *Tarbiẓ* 52 (1982), pp. 547–55.

[12] Segal, pp. 103 ff., offers an unconvincing Gnostic interpretation of 'May the good praise you'. See also the possibilities (Gnostic, Qumran, Zoroastrian) which he raises with respect to 'May your name be remembered for the good' (pp. 105–6).

[13] The *editio princeps* in *Berakhot* (following MS Leiden) mistakenly reads 'Isaac', though 'Phineas' is referred to in the subsequent discussion, and in the Genizah and Vatican manuscripts cited by L. Ginzberg, *Yerushalmi Fragments from the Genizah* (New York, 1909), p. 20, p. 350 (Hebrew), and Sirilio. See B. Ratner, *Ahawath Zion We-Jeruscholaim* (Wilna, 1901).

> Says R. Yose be R. Bun: They do not act properly who make the standards of the Holy One Blessed be He into mercy, and those who render 'My people the Children of Israel, even as I am merciful in the Heavens, so shall you be merciful on Earth—A cow and a ewe, you shall not slaughter it and its child both on the same day.' They are not acting properly, since they are making the standards of the Holy One Blessed be He into mercy.

According to the first view, the Mishnah is referring to a sort of abbreviated complaint against God for having more compassion upon dumb animals than upon the complainer. The consensus among scholars seems to be that this interpretation is less than satisfactory, and demands taking great liberties with the Mishnah.[14]

R. Yose's explanation[15] also seems to require some stretching of the possibilities of interpretation. If there is some historical basis to it, then it might in fact refer to a Gnostic-like belief according to which the higher spiritual God does not extend his interest to the material domain of the Demiurge.[16]

As it turns out, it was the interpretation of R. Yose be R. Bun which became the focal point for the traditional Jewish discussions of both the Deuteronomic precept and the Mishnah. R. Yose's statement consists of an observation concerning a liturgical practice; it may not have been formulated originally with reference to our Mishnah. Nonetheless, the Babylonian Talmud (*Ber.* 33b; *Meg.* 25a) cites the tradition, presenting it as an explicit response to the question of why the 'bird's nest' formula is considered objectionable by the Mishnah:

> Two *Amora'im* in the West dispute the point—R. Yose bar 'Abin and R. Yose bar Zebida. One says: Because he is introducing jealousy within the order of Creation; while the other says: Because he is making the qualities [*middotav*] of the Holy One Blessed be He into mercy, though they are but decrees [*gezerot*].

The first explanation (which we learn from the *Yerushalmi* to identify, by elimination, as that of R. Yose bar Zebida) is rather strange, and has elicited

[14] It is not clear whether the second clause is understood to have been appended explicitly to the Mishnaic formula, or if it is merely implied. See commentators (including Sirilio). The Babylonian Talmud (*Berakhot* 33b) records an incident in which someone actually used the formula 'You have shown compassion upon a bird's nest—Also show compassion and mercy upon us', and Rabbah expresses his approval of this benediction. Though the Talmud explains that Rabbah was merely testing Abaye, it is possible that he did not regard the cases as identical. At any rate, the wording employed by the Babylonian prayer-leader lacks the cynical tone that characterizes R. Simon's interpretation in the Palestinian Talmud. Urbach, p. 384, also accepts Rabbah's original statement as sincere, attributing it to the different circumstances in Babylonia. Cf. *Tosefot 'Anshei Shem* to *Berakhot* (on grammatical difficulties); *Nimmuqei Yosef* (ed. M. Blau, New York, 1960), p. 97; *Tif'eret Yisra'el*; Segal, pp. 104–5.

[15] The Talmud correlates this view with textual variants in the Mishnah; see Epstein (note 7 above).

[16] E.g. H. Jonas, *The Gnostic Religion*[2] (Boston, 1963), p. 42; J. Doresse, *The Secret Books of the Egyptian Gnostics* (New York, 1960), p. 111.

little interest from among the commentators.[17] It is the second interpretation that has proven very problematic to subsequent discussions. It seems to go against the grain of much of Biblical and Rabbinic religiosity, denying the mercy of God, or at least denying that mercy is a factor relevant to explaining Biblical commandments. Rashi offers an explanation which tries to interpret the dictum entirely within the conceptual vocabulary of Talmudic sources:

> **'His qualities'**—i.e., his *commandments*. Whereas He did not make them for the sake of mercy, but rather to impose upon Israel His statutory decrees [*ḥuqqei gezerotav*], in order to instruct them that they are his servants and the observers of his commands and statutory decrees, even in matters regarding which Satan and the nations of the world can object, arguing to them: What need can there be for this commandment!

To understand properly what Rashi is getting at, we must identify an allusion to a *baraita* which appears in *TB Yoma* 67b and parallels,[18] which builds upon the use of the terms 'judgements' (*mishpaṭim*) and 'statutes' (*ḥuqqim*), mentioned together in Lev. 18:4. The source draws a distinction between the former, which refers to laws that 'ought to have been written' even had they not been revealed in Scripture (e.g. criminal and social legislation), as against the latter group, which consists of a set of ritual laws whose meanings are considered incomprehensible, and hence matters regarding which Satan and the nations of the world raise objections, such as the prohibition against consuming swine, the wearing of 'mixed fabrics', etc. '... And lest you should say: These are meaningless matters—therefore Scripture states: *"I am the Lord"*—I have decreed it, and you have no right to cast doubts upon them.'

From this Talmudic text itself it is evident that the discouragement of seeking reasons for the commands is being applied only to the small class of laws whose reasons the Rabbinic tradition regarded as essentially mysterious or humanly unknowable—not as a blanket prohibition, certainly not to the extent of invalidating any attempt to see all Biblical precepts as anything other than tests of our obedience. Rashi rarely indulges in explicit conceptualization about such theoretical issues, and we are compelled to speculate about his intentions here. He might be saying simply that the law of the sending away of the mother bird is to be classified among the 'irrational' *ḥuqqim*; however, his formulation does not readily support such a reading. The idea that emerges from his comment is that the Talmud opposes all attempts to seek out reasons for Jewish religious laws, a position which has produced understandable discomfort among commentators and

[17] See Rashi; the Rabbinic distaste for disharmony is reflected in some other Talmudic sources, e.g. *TB Megillah* 12a: 'If so, then you are introducing jealousy into the feast!' (cf. *Tosafot*).

[18] Also cited by Rashi to Numbers 19:2. Cf. S. R. Hirsch, *Ḥoreb* (New York, London and Jerusalem, 1962), p. 579.

scholars through the ages. Rashi demonstrates the limitations that inhere in any attempt to explain the Talmudic passage purely on its own terms, without approaching it from a historical or theological vantage point.

As with many such extreme or over-stated positions, the possibility must be considered that the Talmud was reacting to an external challenge or speaking in a polemical context. This approach has been taken by a number of modern scholars, notably H. Albeck[19] and E. Urbach.[20] According to this view, the tradition of R. Yose be R. Bun represents one of a number of viewpoints current in the Rabbinic world, a position which looked askance at attempts to find reasons for the commandments. According to Urbach, such extreme statements

> were inspired by the fear that the quest for the reasons of the commandments was liable to undermine not only the observance of the precepts whose motives were not known, but also, in particular, the fulfillment of those for which reasons were found. The very question regarding the purpose of a thing attributes, to a certain extent, more importance to the reason than to the thing itself, and there is the danger that the reason will become the primary consideration and the actual matter subsidiary. Especially when the enquirer succeeds in finding a profound reason for a precept that appears to be of little significance, or of a strange and dubious nature, there is the danger that the observance of the precept will fall into desuetude and the reason itself will be regarded as sufficient.[21]

As we have already noted, R. Yose be R. Bun's original statement was not an explanation of the Mishnah, but a condemnation of a liturgical practice current in his time, to precede the Aramaic Targum of Lev. 22:28 with a prologue stating 'My people the Children of Israel, even as I am merciful in the Heavens, so shall you be merciful on Earth', a version which has been preserved in the tradition of the 'orthodox' Pseudo-Jonathan Targum to the Pentateuch.[22] It is difficult to surmise whether R. Yose would really have been ready to condemn all attempts to view the Torah's laws as rational, or to do away with the ideal of *imitatio dei* that is so well

[19] *Shishah Sidrei Mishnah* (Jerusalem and Tel-Aviv, 1959), vol. 5, p. 403 (to *'Arakhin* 4:4). According to him, what is being criticized is the attaching of *primary* importance to the reasons for the commandments, not the quest for reasons *per se*.

[20] *The Sages*, pp. 380 ff. He does not cite Albeck.

[21] Ibid., pp. 382–3.

[22] Urbach, ibid., pp. 383–4; E. G. Clarke *et al.*, *Targum Pseudo-Jonathan of the Pentateuch: Text and Condordance* (Hoboken), p. 145. Martin McNamara, *The New Testament and the Palestinian Targum to the Pentateuch*[2] (Rome, 1978), pp. 133–8, discusses the passage with reference to Jesus' dictum in Luke 6:36 (Mt. 5:48). See also A. T. Olmstead, 'Could an Aramaic Gospel be Written?', *JNES* 1 (1942), p. 64; M. Black, *An Aramaic Approach to the Gospel and Acts* (Oxford, 1954), pp. 138 ff.; and other literature cited in McNamara's notes. Cf. *Ma'aseh Roqeah* to Maimonides (*Hil. Tefillah* 9:7; cited in I. Eisenstein's *'Amudei Yerushalayim* to *TP Berakhot*).

attested in Talmudic literature.[23] It would seem that the dangers would have been felt most strongly in allegorical interpretations such as those of Philo, and of the sort that were popular among Christians or Gnostics, that would tend to emphasize the hidden and symbolic teachings represented by various commandments, and could frequently lead to the abandonment of their physical observance. However, neither the law of the bird's nest nor that prohibiting slaughtering parent and offspring on the same day (Lev. 22:28) belong to the class of symbolic rituals.

The original reason for the Mishnah's prohibition of the formula 'Your mercies extend unto a bird's nest' remains an emigma. The Talmuds suggested a number of mutually contradictory explanations for the Tannaitic ruling, but we have not yet identified a normative position on that question. It should at any rate be noted that much of the Aggadic treatment of the verse clearly does approach it as an instance either of God's mercy or of humanity's being trained to act with compassion.[24]

It is when we enter into the domain of *Halakhah* that we may begin to speak with some justification of normative or official positions. If our investigation of the liturgical side of the problem failed to yield conclusive results, let us attack the question from another direction: perhaps we shall be able to reach some understanding of how the *Halakhah* interpreted this law through an examination of the Talmudic sources that regulate the performance of the law of sending away the mother bird. Working backwards from the manner in which the commandment is applied, we may succeed in reconstructing the ideological context which the Talmudic Rabbis deemed it to occupy.

Most of Chapter Twelve of the Mishnaic tractate *Ḥullin* (alongside the parallel chapters in the *Tosefta* and Babylonian Talmud and the Halakhic *midrashim* to Deut. 22) is devoted to the laws regulating the treatment of the mother bird and fledglings. As we examine the rules set down in the Tannaitic sources we immediately become aware of a consistent tendency in the Mishnaic legislation to treat the Biblical verses in as literalistic a manner as possible, focusing always upon the minutiae of technical observance without concern for larger questions of rationales, emotions or moral issues. Thus we encounter a number of laws which would make no sense if we were to view the precept as founded upon humanitarian motives.

To cite some examples: Mishnah 12:1 rules that the law does not apply to sacred birds (belonging to the Temple) or to domestically raised fowl. Mishnah 2 excludes unclean birds from the scope of the precept. Mishnah 3 restricts it to a mother whose wings are actually touching the nest and rules

[23] See S. Schechter, *Some Aspects of Rabbinic Theology* (New York, 1961), pp. 199–205; Urbach, pp. 383–4; D. S. Shapiro, 'The Doctrine of the Image of God and Imitatio Dei', *Judaism* 13 (1963).

[24] E.g. *Pitron Torah* 90–1; *Leviticus Rabbah* 27:10 and parallels (noted above, end of note 6); *Deut. Rabbah* 6.

that, if the fledglings were returned to the nest and the mother subsequently returned, then the mother need not be sent away again.

Virtually all of these interpretations are derived in *baraitot* from midrashic readings of the Biblical text. The exclusion of sacred birds follows logically from the fact that these are not to be 'chased away' but to be returned to the Temple treasury.[25] The Scriptural context of 'chancing upon the way' is seen as ruling out its application to birds that are being raised domestically.[26] According to the Rabbis, the Hebrew word used here for 'bird' (as opposed to the more general 'fowl') specifically designates clean creatures.[27] The description of the mother 'sitting upon the fledglings' leads them to the exclusion of a mother who is not actually in physical connection with the nest, whether or not she is able to see her offspring being taken away.[28] Similarly, the legal logic of the situation argues for the fact that, once the finder has acquired the right to the fledglings or eggs by fulfilling the condition of chasing away the mother, then henceforth they belong to him completely, even if the mother has meanwhile returned and will still have to undergo maternal anguish.[29]

The legal reasoning behind all these rules is no doubt sound, but remains just that: legal reasoning, concerned with the mechanics of juristic concepts and exegetical method. Clearly, the exemptions allowed by the Tannaitic authorities with respect to the performance of the Biblical precept did not emerge from a concern for the feelings of the mother bird. Had that been the case, it would be hard to explain why dedicated, unclean or privately owned birds would suffer less from seeing their children carried off, or how it makes any significant difference to her whether she is physically touching the nest or had returned before the predatory human had completed a

[25] See the commentaries to the Mishnah; *Midrasch Tannaim zum Deuteronomium*, ed. D. Hoffman (Berlin, 1909), p. 135; *TB Ḥullin* 138b. The Talmud explores the question of how it is possible to sanctify an unowned bird.

[26] See *Sifre* Deut. 227; *TB Ḥullin* 139b and parallels; *Midrash Tannaim*, p. 135. Indeed, it would be difficult to imagine that the Bible itself had such a situation in mind, which would entail some awkward innovations in agricultural procedures. Cf. Abravanel to Deuteronomy 22:6 (discussed below) on the distinction between domestic and wild birds.

[27] *Tosefta Ḥullin* 10:10; *Sifre* 98, p. 159; 228, p. 260; *Midrash Tanna'im*, p. 135; *TB Ḥullin* 138b. Abravanel also discusses the ethical implications of this exception.

[28] *Sifre* 227 (see Finkelstein's notes); *Tosefta Ḥullin* 10:10; *TB Ḥullin* 140b; see also *TB Ḥullin* 141b, where the distance which the bird must be sent is defined as 'so that she should go out from beneath his hand'.

[29] Bertinoro; Rashi to *Ḥullin* 141a. Much of this material is assembled in medieval Midrashic anthologies such as *Midrash Hagadol* to Deuteronomy (ed. S. Fish, Jerusalem, 1975), pp. 484–93; and the lost *She'ilta* cited in *Pitron Torah* (ed. Urbach, Jerusalem, 1978), pp. 271–3.

Several laws introduced in the Babylonian Talmud stem from a similar approach, e.g. (140a) the question of applicability of law to a clean bird sitting on *terefah* or unclean chicks; (140b) whether the commandment is applicable when the chicks have been partially slaughtered; what if a mat, feathers, etc. separate mother from chicks, so that she is not technically crouching.

The *Zohar* (*'Emor* 92a) offers some incisive criticism of the 'compassion' rationale for Lev. 22:28.

second attempt at taking the chicks. It is manifest that the law of the bird's nest, as codified in the Talmudic sources, was not viewed as an extension of God's compassion for His creatures. On the contrary, there is a consistent divorcing of the issue from all value-considerations, as the Rabbis insist on perceiving the law as operating according to an autonomous logic of its own.

Defined in these terms, there might be a more solid justification for perceiving an anti-Christian tone in the Mishnaic prohibition of the liturgical formula 'Your mercies extend unto a bird's nest'. It is probably this issue, more than any other, that underlies the Halakhic disputes between Jesus and the Jewish Scribes and Pharisees, as depicted in the synoptic gospels. The common denominator uniting the various encounters is that Pharisaic law was suggesting legal solutions to religious problems, whereas Jesus would argue back that, in restricting their concerns to the mechanics of the *Halakhah*, they were losing sight of its overriding religious value.[30] The opposition expressed in the Talmudic sources to attributing this law to Divine mercy might justly be viewed as part of a polemic against a Christian approach to the law.

We find, then, that by the end of the Talmudic era the law of the bird's nest has become the source of considerable confusion. The main direction of Aggadic tradition is typified by an emphasis, to the point of hypostasization, on God's quality of mercy,[31] as well as on a homiletic propensity towards expounding the reasons behind the Divine precepts. On the other hand, the Mishnah, as interpreted in the Talmudic tradition (the Mishnah's original intention remains a mystery), seems to be establishing a norm that would deny the importance of mercy as a factor governing God's interactions with the world. If R. Yose bar 'Abin's interpretation were to be taken as normative, it might constitute an official denial of any rational basis for Jewish law, other than to serve as an arbitrary indication of one's religious devotion.

[30] I.e. the Pharisees preferred solutions reached from within the legal system, whereas Jesus saw the entire structure of Biblical law as subservient to spiritual and moral principles. He was especially critical of such areas where the implementation of the particulars of the law seems to contradict its higher purpose. See T. W. Manson, *The Teachings of Jesus* (Cambridge, 1951), pp. 295–304; see also S. Sandmel's and S. Zeitlin's contributions to Weiss-Rosmarin's anthology *Jewish Expressions on Jesus* (New York, 1977).

A further connection to Christianity may be discerned in *Tanḥuma Ki Teṣe* 2 (cited by Baḥya; *Pitron Torah*, p. 272), etc., which cites a variant of the parable of the 'labourers in the vineyard' in order to illustrate the reward promised for observing this simple precept. See S. T. Lachs, *A Rabbinic Commentary on the New Testament* (Hoboken and New York, 1987), pp. 332–4, and literature cited in the notes.

[31] Urbach, *The Sages*, pp. 448–61.

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It was left to the medievals to try to sort out the contradictions. For them the problem of the bird's-nest rule was not merely an issue of Talmudic commentary or Halakhic decision. It was to converge with some central preoccupations of medieval Jewish religious thought: (1) the problem of Divine Attributes, (2) the nature of Divine providence over the created world, and (3) the question of the rationality of the commandments.

The first question, one which reached Jewish theologians in the formulations it had received at the hands of their Islamic predecessors, was concerned with refining the conceptions of God by removing all suggestion that God has either physical substance or human-like personality traits. At a more abstract level, it was concerned with preserving God's absolute unity by denying the reality of multiple attributes.[32] The second question involved the degree to which God can be said to be actively concerned with the fates of various types of creatures—human or otherwise. The third question involved the quest for a philosophically acceptable rationale for Jewish religious law, or—if this should not prove attainable—at least a resignation to the fact that some or all of the laws were beyond the capacity of human comprehension.[33]

The issues raised by the Talmudic interpretations of the law of the bird's nest had an understandable bearing on the debates concerning the reality of God's Attribute of Mercy (though not on the general theories of Divine Attributes), and on the question of the legitimacy of the search for the meaning of the commandments. We will focus here on some of the more important protagonists in the debate.

Not surprisingly, the central place in the discussion came to be occupied by Moses Maimonides, who dominated much of medieval Jewish scholarship, both philosophical and Talmudic. Maimonides addressed the law of the mother bird in a number of different contexts. Of importance to our discussion is his Commentary on the Mishnah *Berakhot* 5:3:

> In mentioning the formula, 'Your mercies extend to a bird's nest', they are referring to one who says, 'As you have shown compassion upon a bird's nest and commanded, *"You shall not take the mother with the fledglings"*, so too show mercy upon us.' Whoever says this in his prayer is to be silenced, since he is making the reason for this command dependent upon God's compassion for the bird. This is not really true, for if it were actually an expression of mercy, then He would not have commanded to slaughter beasts or birds at all. Rather, this is a traditional law, for which there is no reason.

[32] I. Husik, *A History of Medieval Jewish Philosophy* (New York, 1966), pp. 22 ff.; J. Guttmann, *Philosophies of Judaism* (New York, 1973), pp. 77 ff. (and index, s.v. God, attributes of).

[33] See I. Heinemann, *Ta'amei Ha-Miṣvot Be-Sifrut Yisra'el* (Jerusalem, 1966), as well as Husik and Guttmann (previous note), by indices. Additional references can be found in I. Twersky, *Introduction to the Code of Maimonides* (New Haven and London, 1980), p. 373, n. 47.

Maimonides' provocative remarks inspire several questions. From among the various interpretations suggested in the Talmud, he has based his own explanation on that of R. Yose bar 'Abin, that the fault in the designated liturgical formula lies in its erroneously ascribing God's decrees to considerations of mercy.[34] Maimonides claims that God is not in fact showing compassion upon the bird, since true compassion would preclude the granting of any permission for killing it (and Biblical law not only permits, but even *demands*, the slaughter of birds and beasts for sacrificial and other purposes). The problem is, then, that a prayer, no matter how touching it may sound in other respects, should not be based on erroneous theological foundations. He concludes that this precept is not based on any reason at all, but is to be counted among the 'traditional' laws (i.e. the *ḥuqqim*), which are accepted on Divine authority without delving into their reasons. The implication would seem to be that there are commandments that do have reasons, but this one does not happen to be one of them.[35]

Having understood something of what Maimonides is asserting, some questions should be posed about what he might be denying. In particular, is Maimonides arguing that mercy is not an attribute that can ever properly be ascribed to God's workings in our world? Or is the scope of his statement limited to the particular precept under discussion? Taken by themselves (without interpreting them on the basis of his later writings), his remarks seem to tend more towards the latter view.[36]

The next place where Maimonides confronts the question is in his legal code, the *Mishneh Torah, Hilkhot Tefillah* 9:7, among the rules concerning the recitation of the *Tefillah*:[37]

> If someone said by way of supplication [*taḥanunim*]: 'He Who showed compassion upon a bird's nest, [commanding] not to take the dam with the fledglings, or not to slaughter the beast with its child on the same day, may He

[34] The placing of the Mishnaic formula within the context of a prayer might be regarded as echoing the explanation of R. Phineas in the name of R. Simon in the Palestinian Talmud, which he condemns as an impious challenge to God. However, Maimonides' own discussion clearly demonstrates that this is not the point of the criticism, and in fact Maimonides example bears more of a resemblance to the incident involving Rabbah and Abaye in the Babylonian Talmud, where the prayer consisted of an appeal on behalf of the community (phrased in the plural) that would evidently have been deemed acceptable but for the bad theology it contained. In his commentary to Megillah 4:9 he offers an abbreviated version of the same idea.

[35] The Talmudic distinction between *mishpaṭim* and *ḥuqqim* became a basis for rationalistic expositions of Jewish law with Saadyah Ga'on, *The Book of Doctrines and Beliefs* 3:2; see A. Altmann, 'Saadya's Conception of the Law', *Bulletin of the John Rylands Library* 28 (1944), pp. 320–39; M. Fox, 'On the Rational Commandments in Saadia's Philosophy: A Reexamination', in M. Fox (ed.), *Modern Jewish Ethics* (Columbus, 1975), pp. 174–87. Maimonides in his *Eight Chapters*, Ch. 6, criticizes Saadyah's classifications, but accepts the basic distinction (citing *Yoma* 67b); cf. Twersky, op. cit., pp. 374–430.

[36] Several commentators emphasize that R. Yose b. 'Abin does not view *all* commands as *gezerot*.

[37] In *Hil. Sheḥitah*, Ch. 13, he merely summarizes the laws that emerge from the Talmudic discussion.

> also show compassion upon us' or similar formulas—he is to be silenced, because these precepts are Scriptural decrees [*gezerot ha-katuv*] and not instances of mercy. For if they were on account of mercy, then He would not have permitted us any slaughtering at all.

The argument is substantially the same as in his Mishnah commentary. Two additions should be noted, however. (1) The forbidden prayer is described as a 'supplication'. The significance of this word is not clear. It may be merely a more graphic description of the probable context and motivations which would cause someone to use the formula, but it probably relates to certain halakhic distinctions found in the Palestinian Talmud.[38] (2) The additional reference to Lev. 22:28: this is clearly an echo of R. Yose be R. Bun's criticism of the Targumic rendering, as recorded in the *Yerushalmi*.

The issue becomes increasingly problematic when we compare these earlier versions of Maimonides' position with the extensive discussion of the topic incorporated into his last work, the *Guide of the Perplexed* (3:48).[39] Maimonides treats the subject in the context of a broader review of Biblical legislation that comes to demonstrate that, though some specific laws might in fact be arbitrarily chosen, the system as a whole is actually a rational implementation of basic general principles that are understandable to the human intellect. Noting that the laws regulating slaughter of food for human consumption are intended primarily to achieve as humane as possible a treatment of animals within the structure of a non-vegetarian ethic, the command to send away the mother bird before partaking of the eggs is explained in this spirit: the maternal instinct exists among beasts and birds, and hence the mother would suffer at seeing her young snatched away.[40] Maimonides adds that, however seriously one regards the consideration for the feelings of the birds, the observance of this precept also serves an educational aim that will hopefully influence our treatment of fellow humans.

After presenting this rationale for the observance of the precept, Maimonides writes:

[38] The *Yerushalmi* contains the comment: 'This applies in public, but if in private it is considered supplication.' As is common in that Talmud, it is not clear to which clause in the Mishnah this comment is to be appended. An exhaustive discussion of the question is found in S. Lieberman, *Hilkhoth Ha-Yerushalmi (The Laws of the Palestinian Talmud) of Rabbi Moses ben Maimon*, etc. (New York, 1947), pp. 36–7. According to the sources adduced by Lieberman, Maimonides applied the limitation of the *Yerushalmi* to the 'bird's nest' clause, though in his *Hilkhot Ha-Yerushalmi* he attaches it to the *'modim modim'* passage. R. Isaac Alfasi indeed used the *Yerushalmi* to permit the 'bird's nest' formula in private prayer, and (as suggested in *Ṭur Ḥo. M.* 113) Maimonides might be reacting to that position by emphasizing that *even* when inserted as a private supplication the phrase is still unacceptable.

[39] Following the translation of S. Pines (Chicago, 1963), p. 600.

[40] Maimonides adds that neither the eggs nor the young are likely to be fit for consumption at this stage, and hence by placing a small obstacle in the way of the finder he is likely to be deterred entirely from his intention.

> You must not allege as an objection against me the dictum of [the Sages] ...: He who says: Thy mercy extendeth to young birds, and so on. For this is one of the two opinions mentioned by us—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 only the second opinion.

Maimonides is alluding here to an earlier discussion in the *Guide* (3:26), in which he takes issue with theologians who ascribe all of Jewish law to God's Will alone and refrain from seeking causes or purposes for them. His own view is that all of the Torah is a reflection of Divine wisdom, and nothing in it is irrational. Referring to the Talmudic characterization of *ḥuqqim*, Maimonides argues that even these are not being described as irrational but merely as beyond the limited capacity of the human intellect. The only other concession which Maimonides is willing to allow for 'irrationality' in the law involves the specific implementation of general principles, i.e. there might be more than one correct way of applying a given legal principle, though by its nature the legal system must select one or else the law will not be implemented at all.

Maimonides' position raises a number of questions, with respect both to comparisons with his earlier statements on the subject and to the need to clarify the ideas in their own right.

As regards the comparison with his statements in his Mishnah Commentary and the *Mishneh Torah*, there seems little doubt—in spite of imaginative attempts by commentators to harmonize them[41]—that Maimonides has in fact changed his mind. His earlier decisions accept R. Yose b. 'Abin's interpretation of the Mishnah as normative. In the *Guide* he argues that it represents a minority view that is to be rejected in the face of the overwhelming weight of Rabbinic opinion. But for his explicit retraction, it might have been possible for the statements to co-exist: the earlier rulings do not deny the rationality of the law in general, but merely assert that it is mistaken to characterize this particular precept as an instance of Divine mercy.[42]

Maimonides' position as it emerges from the *Guide* is surprisingly

[41] Rabbi Yom-Tov Lipmann Heller, *Tosefot Yom Tov* to *Berakhot*, comments: 'it would appear from this that the Mishnah has been rejected as obligatory law'. Cf. S. T. Rubinstein, in his commentary to the *Mishneh Torah* (in the *Rambam La'am* edition, Jerusalem, 1958), who tries unconvincingly to harmonize the two decisions (cf. Y. T. Heller's *Divrei Hamudot* on *Berakhot*). As we have stated, Maimonides' remarks in the *Guide* do not tolerate this attempt at harmonization. Twersky (op. cit., note 33 above) includes our example among 'classical instances of contradiction' (p. 301, n. 153), without explaining it. Nor does he discuss it in his study of contradictions between *Mishneh Torah* and the *Guide* on pp. 430–73 (but note also p. 359).

[42] Had it not been for the inclusion of the law in his code, it might conceivably have been argued that in the Mishnah commentary he is merely explaining the text without necessarily agreeing with it. Maimonides has observed that discrepancies between his earlier and later rulings can be attributed to his youthful dependence on Alfasi. In our case, Alfasi does indeed cite the Mishnah as law.

traditional, in its acceptance of the reality of Divine mercy.[43] There is in fact a certain irony in the way that Maimonides seems to take a more classical rationalistic stance in his halakhic writings than in his philosophical treatise. The irony is largely illusory, since what he is doing in the *Guide* is taking a consistently rational approach to Jewish law.

Maimonides accepts the characterizing of the precept as an example of God's mercy. In his use of traditional religious vocabulary he is sidestepping certain fundamental theological questions. In view of his doctrines as outlined elsewhere, it would be unimaginable to suppose that Maimonides conceives God's mercy as an emotional quality analogous to human compassion.[44] At most he could be referring to what he terms an 'attribute of action', i.e. an effect of God's activity that bears an external semblance to manifestations of human compassion. As he presents it here, the reference seems not to be to a divine attribute at all, but to matters entirely within the realm of human behaviour. Maimonides does not attempt here to relate the issue at hand to the broader issue of Divine providence (on this, see below).

Maimonides' Successors

In subsequent generations, a number of gifted scholars built upon Maimonides' foundations to iron out some problems in his presentations, as well as to extend his ideas to some areas that he himself had not dealt with explicitly.

Foremost among Maimonides' earliest critics is R. Moses b. Naḥman, Naḥmanides, who devotes a lengthy discussion in his Commentary on the Pentateuch to a clarification of Maimonides' views.[45] He is in essential agreement with Maimonides on the basic premise that all commandments have reasons and benefits, aside from their 'generic' religious value as indications of the believer's devotion, and that the apparent Talmudic references to irrational commands relate only to Man's inability to comprehend them. He is however ready to go one step further than his predecessor: whereas Maimonides had been prepared to concede that at least a minority stream in Rabbinic thought (represented by R. Yose bar 'Abin's interpretation of our Mishnah) would have denied the reasonableness of the commandments, Naḥmanides proposes that this issue was never really disputed. In order to fit our Mishnah into this scheme, he presents a more precise analysis of the concept of divine mercy than that offered by Maimonides. In the *Guide*, as we have seen, no clear distinction is drawn between God's having compassion on His creatures and His commanding *humans* to exercise such charity. Naḥmanides insists on a sharp separation

[43] *Guide* 1:58; Husik, pp. 265 ff.; Guttmann, pp. 180 ff.

[44] See *Guide* 1:59, 61, etc.

[45] C. Chavel (transl.), *Ramban, Commentary on the Torah, Deuteronomy* (New York, 1976), pp. 265–72.

between these two different ideas, which he subsequently utilizes as the cornerstone for a new interpretation of the prohibited liturgical formula in the Mishnah.

The nucleus of Naḥmanides' interpretation is the premise that observance of precepts does not confer any benefit upon God, but only to humanity. The benefit usually takes the form of instilling moral or religious values. The Rabbinic treatment of the bird's-nest law is consistent with the thesis that we ought not to imagine that, in obeying the precept of sending away the mother bird, we are gratifying some emotional need of God's. Rather, we ourselves are being educated in the ways of mercy and humane conduct. The Talmudic concept of 'decrees' has thus been given a new and rather unusual meaning: a precept which is designed to serve man's interests rather than God's. Thus he concludes:[46]

> So, too, what the Rabbis have stated, 'Because he treats the ordinances of God like expressions of mercy, whereas they are decrees', means to say—that it was not a matter of God's mercy extending to the bird's nest or the dam and its young, since His mercy did not extend so far into animal life as to prevent us from accomplishing our needs with them, for, if so, He would have forbidden slaughter altogether. But the reason for the prohibition ... is to teach us the trait of compassion and that we should not be cruel .... Thus the commandments with respect to cattle and fowl are not a result of compassion upon them, but they are decrees upon us to guide us and teach us traits of good character ....

Naḥmanides is hardly in disagreement with Maimonides.[47] He is in fact strengthening his position by equating it with the consensus of Rabbinic tradition,[48] and one gets the impression that Maimonides would have accepted this clarification of ideas which succeeds at once in both removing anthropomorphic conceptions and explaining away a theologically troublesome Talmudic passage.

Both Maimonides and Naḥmanides approached the question from the perspective of 'philosophy of law', impelled by an urge to maintain the rational foundation of Jewish law. Neither dealt more than incidentally with the more specifically theological implications, such as the thorny issue of

[46] Chavel, p. 271.

[47] Note how he builds upon the phraseology of Maimonides' earlier expositions about how the permissibility of slaughter disproves the operation of Divine Mercy here.

[48] This was perceived by Abravanel to Deut. 22:6. Cf. N. Leibowitz, *Studies in Deuteronomy* (Jerusalem), pp. 217–22, who posits a more significant disagreement. In view of Maimonides' general theological positions, this characterization seems unlikely.

Naḥmanides' Kabbalistic explanation of the passage consists only of a citation of the *Sefer Ha-Bahir* (104–5). Cf. *Zohar* (*Vayeẓe* 158a); Baḥya, *Zohar Ḥadash* (*Midrash Ruth*; cf. Recanati); Chavel's notes to his Hebrew edition of Baḥya's commentary (pp. 387–8), citing R. Jair Bachrach, as to how such an eschatological interpretation (cf. *Zohar Shemot* 8b–9a) would affect the whole status of the commandment. *Zohar Balak* 204b invokes the precept in a prayer for mercy, in apparent violation of the Talmudic regulations.

Divine providence, particularly whether God can be thought of as being actively concerned with the fates of individual creatures.[49]

The task of incorporating this idea into the traditional interpretations of the bird's-nest law was accomplished with astonishing success by the author of the thirteenth-century *Sefer ha-Ḥinnukh*[50] in an original *tour de force* that succeeds in integrating many of the different exegetical strands that had been developed by earlier commentators and adding new insights to help clarify the concepts of providence and divine mercy.

The *Sefer ha-Ḥinnukh*'s starting point is Maimonides' theory of individual providence, as expressed in the *Guide* 3:17, to the effect that:

> in the lowly world ... divine providence watches only over the individuals belonging to the human species and ... in this species alone all the circumstances of the individuals and the good and evil that befall them are consequent upon the deserts .... But regarding all the other animals and, all the more, the plants and other things, my opinion is that of Aristotle. For I do not by any means believe that this particular leaf has fallen because of a providence watching over it ....[51]

This theory rests on the premise that providence is proportional to intelligence; hence, even within the human race, the more one perfects one's intellect the greater the claim one has on God's guidance. Faced with a body of Biblical and Talmudic quotes that indicate God's care for lower creatures, Maimonides retorts that lesser species are subject to a 'general' providence that promotes their survival *as a species*, but not as individuals.[52]

Maimonides asserts that the Jewish requirement of humane treatment of animals has primarily an educational purpose: so that people should not become habituated to cruelty. Basing himself on Maimonides' theory of providence,[53] the author of the *Sefer ha-Ḥinnukh* concludes that the purpose of the precept is to teach us that God's providence over lesser creatures is expressed through the ensuring of each species' perpetuation. By contrast, we are to recognize the distinctly human sort of providence that

[49] Maimonides' exposition on Providence is found primarily in the *Guide* 3:8–24, 51–54. For brief overviews, see S. T. Katz, *Jewish Ideas and Concepts* (New York, 1977), pp. 57–68; L. Jacobs, *A Jewish Theology* (New York, 1973), p. 114; Guttmann, pp. 193 ff. and through index; Twersky, op. cit., pp. 422–3, n. 169.

[50] On its author, see I. Ta-Shma, 'The Author of Sefer "Ha-Ḥinnukh"', *Kiryat Sefer* 55 (1980), pp. 287–90.

[51] Pines, pp. 441–2.

[52] His proof: 'For this reason killing them and employing them usefully, as we wish, has been permitted and even enjoined.'

[53] The *Sefer ha-Ḥinnukh* intellectualizes the significance of the command, as interpreted by Maimonides and Naḥmanides. The purpose of the precept is also to instruct us in correct theological doctrine. The bird's-nest law accordingly occupies a crucial place in the *Ḥinnukh*'s philosophy of Jewish law, as he emphasizes, since the premise of his work would be challenged by any prohibition of the search for reasons for commandments (see Ta-Shma, op. cit.).

can be strengthened through the conduct of a proper religious life.[54] Following from this approach, he finds that the reason for the Mishnah's disqualifying the formula 'Your mercies extend to a bird's nest' lies in its misrepresenting the nature of providence The Talmudic Rabbis were not denying the fact of God's mercy, which is amply attested in traditional sources as an object of human emulation. On the contrary, their intention is to say that the quality of mercy, when applied to Him, is not like its counterpart in human beings, for whom compassion is an involuntary natural faculty instilled in them by the Creator. Rather, His mercy is produced by His simple Will, as His Wisdom required Him to show compassion because it is a good quality.

As understood by the *Ḥinnukh*, the Talmudic emphasis on the precept's being a Divine decree is taken as a reference to the autonomy of God's Will. Unlike humans, who have no control over their emotions, God is the complete master of His decisions. Thus unqualified references to God's mercy in this instance could lead to theologically misleading ideas.

The *Ḥinnukh* introduces a further clarification with respect to the manner in which we may properly speak of God's mercy over non-human creatures: the perpetuation of natural species is not an end in itself. Ultimately God has created His universe for the sake of Mankind, hence we are permitted to make full use of animals for our needs.[55] Accordingly, true mercy—which is apparently equated here with individual providence—is the exclusive property of the human race, and it would be erroneous to employ the same terminology with reference to birds or animals. This insight into the nature of divine mercy is elaborated by subsequent Jewish exegetes. In particular, Don Isaac Abravanel made use of this idea to justify the Halakhic distinctions between clean and unclean fowl, viable and non-viable eggs, etc., as regards the applicability of the law of sending away the dam (see above): 'The obligation to perpetuate their existence applies only to clean birds, whereas the unclean ones are like trees that do not bear edible fruit, and which may be cut down[56]—*because mercy does not apply to animals or trees, but only to Man,* for whose use the whole world was created.'

If we follow the reasoning of the *Ḥinnukh* and Abravanel, divine mercy on lower creatures becomes equated with a human self-interest that finds expression in the need to perpetuate those species which we can use or consume.[57]

[54] Hence the appropriateness of the promised reward of long life in this world and the next.

[55] Yet again, this argument of Maimonides is being employed in a considerably different context.

[56] Referring to Deut. 20:19–20.

[57] The implications of the bird's-nest precept as regards Man's place in the natural order were dealt with in a more balanced way by several commentators, e.g. R. Joseph Ibn Kaspi, *'Adnei Kesef* (cited in Leibowitz, note 48 above); S. R. Hirsch (*Ḥoreb* par. 412).

By way of summary of the various views described in this last section, it might help to shift our focus from the theological plane to the exegetical. Much more than they differ on philosophical issues—virtually all accept the positions of Maimonides with respect to the rationality of the law, the scope of individual and general providence, the denial of anthropomorphism, etc.—their disagreements tend to revolve around the meanings which they give to key terms in the dictum of R. Yose b. 'Abin, disqualifying the Mishnah's formula 'because he is making the qualities [*middotav*] of the Holy One Blessed be He into mercy, though they are but decrees [*gezerot*]'. Each of the medieval views we have discussed offers its own interpretation of the tradition.

Rashi: God's precepts are all (apparently) tests of faith, to be observed even when no observable reason can be discerned. Hence such reasons should not be sought.

Early Maimonides: The precept is not a reflection of God's mercy on the bird (which would logically forbid any slaughter), but rather a 'traditional' (incomprehensible) decree.

Maimonides in the *Guide*: The author of the Mishnah believes that all precepts are irrational, designed to discipline us. This is not correct, since the law is an instance of divine mercy, intended to minimize the bird's maternal suffering and train us in humane conduct (in fact, *gezerot* are rational, though we do not understand them).

Naḥmanides: 'Mercy' implies that God gets some gratification. This is incorrect. Rather, the precept should be viewed as a 'decree', a vehicle for educating, improving or benefiting us.

Ḥinnukh (a): Unlike human mercy, which is an emotion we cannot control, God's mercy (i.e. general providence over nature) is completely governed by His Will.

Ḥinnukh (b) and Abravanel: 'Mercy' means individual providence, and would imply that their perpetuation is an end in itself. This cannot be applied correctly to birds (who are governed by the 'decrees' of general providence, and were created for Man's exploitation), but only to human beings.

Common to most of these interpretations is a strong conviction that Judaism cannot tolerate a purely mechanistic view of religious observance, even if such a view is perceived strictly from the perspective of human understanding. Typically, when faced with a source that seemed to be in conflict with this assumption, the commentators tried to resolve the problem through re-interpretation of the source. Only Maimonides was ready to go so far as simply to reject the Mishnah; his successors restricted themselves to ingenious exegetical solutions which forced them to inject some far-fetched and anachronistic meanings into the Talmudic concepts of mercy and

decree. As in many instances in the history of Jewish exegesis, this confrontation between the commentators and their texts served to bring to the surface, and inspire a clarification of, several sensitive and vital problems in the Jewish religious consciousness.[58]

[58] For current debate on the rationality of Jewish law, see the *oeuvre* of Professor Isaiah Leibowitz; J. D. Soloveitchik's *Halakhic Man* (Philadelphia, 1983), p. 87, and elsewhere; L. Jacobs, 'The Relationship Between Religion and Ethics in Jewish Thought', and S. Z. Leiman, 'Critique of Louis Jacobs', both in M. M. Kellner (ed.), *Contemporary Jewish Ethics* (New York, 1987), pp. 50–1, 59.