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JUDAISM AND ANIMAL EXPERIMENTATION

While our teacher Moses was tending the sheep of Jethro in the wilderness a kid ran away from him. He ran after it until it reached Hasuah. Upon reaching Hasuah it came upon a pool of water [whereupon] the kid stopped to drink. When Moses reached it he said, "I did not know that you were running because [you were] thirsty. You must be tired." He placed it on his shoulder and began to walk. The Holy One, blessed be He, said, "You are compassionate in leading flocks belonging to mortals; I swear you will similarly shepherd my flock, Israel."

Midrash Rabbah, Shemot 2:2

I. CONCERN FOR WELFARE OF ANIMALS

In a provocative comment, the German philosopher Arthur Schopenhauer remarked that the denial of rights to animals is a doctrine peculiar to Western civilization and reflects a barbarianism which has its roots in Judaism: "Die vermeintliche Rechtlosigkeit der Tiere ist geradezu eine emporende Rohheit und Barberei des Okzidents, deren Quelle im Judentum liegt."¹

Whether denial of rights to animals is, or is not, barbaric is a value judgment regarding which reasonable men may differ. Whether or not Judaism actually denies such rights to animals is a factual matter which is readily discernible. The Bible abounds in passages which reflect concern for animal welfare. Concern for the welfare of animals is clearly regarded as the trait of a righteous person: "A righteous man regardeth the life of his beast; but the tender mercies of the wicked are cruel" (Proverbs 12:10). Divine concern for the welfare of animals is

reflected in numerous passages: “And His tender mercies are over all His works” (Psalms 145:9); “The eyes of all wait for Thee, and Thou givest them their food in due season. Thou openest Thy hand and satisfiest every living thing with favor” (Psalms 145:15–16); “He giveth to the beast his food, and to the young ravens which cry” (Psalms 147:9); “Who provides for the raven his prey, when his young ones cry unto God and wander for lack of food?” (Job 38:41); “. . . and should not I have pity on Nineveh, that great city, wherein are more than six score thousand persons . . . and also much cattle?” (Jonah 4:11); and “Man and beast thou preservest, O Lord” (Psalms 36:7). *De minimis*, these verses serve to establish the theological proposition that divine mercy extends, not only to man, but to members of the animal kingdom as well.

It further follows that, as a religion in which *imitatio Dei* serves as a governing moral principle,² Judaism must perforce view compassion towards animals as a moral imperative. It is told variously of one or another of the leading exponents of the *Musar* movement that he kept a cat as a pet and insisted upon feeding the cat personally. That individual is reported to have remarked to his disciples that his motivation was simply to emulate divine conduct. Since God extends “His tender mercies over all His works” (Psalms 145:9), man should eagerly seek opportunities to do likewise. The story is perhaps apocryphal in nature but remarkable nonetheless because of its wide currency in rabbinic circles.³

These sources, however, serve only to demonstrate that animal-directed conduct which is compassionate in nature constitutes a “good deed” but do not serve to establish a system of normative duties or responsibilities. Particularly in light of the strong nomistic element present in Judaism, the absence of normative regulations might well be regarded as indicative of the absence of serious ethical concern for the welfare of members of the animal kingdom. But this is demonstrably not the case, for, in Jewish teaching, there is no dearth of *nomoi* designed to protect and promote animal welfare. The most obvious example of a regulation having such an effect, and one which is clearly biblical in origin, is contained in the verse “If thou seest the ass of him that hateth thee lying under its burden, thou shalt forebear to pass by him; thou shalt surely release it with him” (Exodus 23:5). The selfsame concern is manifest in the prohibition against muzzling an ox while it threshes in order that the animal be free to eat of the produce while working (Deuteronomy 25:4). Similarly, Scripture provides that both domestic animals and wild beasts must be permitted to share in produce of the land which grows without cultivation during the sabbatical year.⁴ Although the literal meaning of the biblical text may be somewhat obscure, talmudic exegesis understands Genesis 9:4 and

Deuteronomy 12:23 as forbidding the eating of a limb severed from a living animal. Jewish law teaches that this prohibition, unlike most other commandments, is universally binding upon all peoples as one of the Seven Commandments of the Sons of Noah. Sabbath laws contained in both formulations of the Decalogue reflect a concern which goes beyond the mere elimination of pain and discomfort and serve to promote the welfare of animals in a positive manner by providing for their rest on the Sabbath day: "But the seventh day is a sabbath unto the Lord thy God, in it thou shalt not do any manner of work . . . nor thine ox, nor thine ass, nor any of thy cattle . . ." (Deuteronomy 5:14). Even more explicit in expressing concern for the welfare of animals is the verse ". . . but on the seventh day thou shalt rest; that thine ox and thine ass may have rest" (Exodus 23:12).⁵

Judaism posits yet another regulation regarding the welfare of animals which is regarded as biblical in nature even though the law is not reflected in a literal reading of Scripture. The biblical statement "I will give grass in thy fields for thy cattle, and thou shall eat and be satisfied" (Deuteronomy 11:15) is understood in rabbinic exegesis as forbidding a person to partake of any food unless he has first fed his animals.⁶ This regulation is derived from the order in which the two clauses comprising the verse are recorded. The passage speaks first of providing for animals and only subsequently of satisfying human needs.⁷ Amplifying this rule, the Palestinian Talmud, *Yevamot* 15:3 and *Ketubot* 4:8, declares that a person is forbidden to purchase an animal unless he can assure an adequate supply of food on its behalf.

Nevertheless, it does not necessarily follow that a general obligation to be kind to animals, or minimally, a duty to refrain from cruelty to animals, can be inferred from any of these biblical regulations or even from all of them collectively. These regulations have been understood by some Sages of the Talmud as establishing particular duties, not as expressions of a more general duty. Nor is it demonstrably certain that even these limited and particular duties are designed primarily for the purpose of promoting the welfare of animals. Even with regard to the particular duty concerning removing the burden borne by a beast, the commandment does not necessarily reflect concern for the welfare of the animal. The obligation to release the ass from its burden (Exodus 23:5), i.e., to assist the owner in unloading merchandise or materials carried by a beast of burden, and the similar obligation to come to the assistance of a fallen animal (Deuteronomy 22:4) are understood by many classical commentators as duties rooted in a concern for the financial loss which would be suffered by the animal's master were the animal to collapse under the weight of the burden. Thus, in formulating the rationale underlying this commandment, R. Aaron ha-Levi of Barcelona, *Sefer ha-Hinnukh*, no. 80, declares:

The root purpose of the precept is to educate our spirit in the trait of compassion, which is laudable. It is unnecessary to state that a duty lies on us to take pity on a person suffering physical pain;⁸ however, it is incumbent upon us to pity and rescue even a person who is in distress because of the loss of his money.

Yet, Judaism most certainly *does* posit an unequivocal prohibition against causing cruelty to animals. The Gemara, *Baba Metzi'a* 32b, carefully defines the limits of the obligation to assist in “unloading” the burden carried by an animal but hastens to add that assistance not encompassed within the ambit of the commandment concerning “unloading” (*perikah*) is required by virtue of a general biblical principle prohibiting cruelty to animals and requiring that measures be taken to alleviate “*tza'ar ba'alei hayyim*—the pain of living creatures.” Thus, for example, the commandment concerning “unloading” imposes no obligation in a situation in which an inordinate burden has been placed upon the animal. This exclusion may readily be understood in light of the earlier-cited analysis of *Sefer haHinnukh*. Since the master has brought the impending loss upon himself by reason of his own imprudence, there is no obligation to come to his aid. However, assistance is nevertheless required by virtue of the obligation owed to the animal. The Gemara proceeds to indicate that proper categorization of the nature of the obligation is not of mere theoretical interest but yields a practical distinction. No fee may be demanded for assisting in unloading an animal when such assistance is required by the commandment concerning “unloading,” i.e., when the concern is conservation of property; however, compensation may be required if the sole concern is for the welfare of the animal.⁹

The source of the obligation concerning *tza'ar ba'alei hayyim* which imposes a general concern for the welfare of animals is far from clear. Indeed, the Gemara, *Baba Metzi'a* 32b, cites a dispute with regard to whether the obligation with regard to *tza'ar ba'alei hayyim* is biblical or rabbinic in nature.¹⁰ As has been indicated, if biblical in nature,¹¹ according to most authorities, this duty is not directly derived from the obligation of “unloading.” One notable exception is Rashi, *Shabbat* 128b. Rashi states that, according to those Sages of the Talmud who maintain that binding regulations may be inferred from the rationale underlying precepts, obligations concerning *tza'ar ba'alei hayyim* are directly derived from the verse “thou shalt surely release it with him” (Exodus 23:5).¹² Rambam, *Guide of the Perplexed*, Book III, chapter 17, and R. Judah he-Hasid, *Sefer Hasidim* (ed. Reuben Margulies), no. 666, regard the biblical narrative concerning Balaam and his ass as the source of the biblical prohibition against cruelty toward animals. These authorities indicate that the verse “And the angel of the Lord said unto him: ‘Wherefore hast thou smitten thine ass these three times?’” (Numbers 22:32) serves to establish a prohibi-

tion against conduct of that nature.¹³ Me'iri, *Baba Metzi'a* 32b, is of the opinion that obligations concerning *tza'ar ba'alei hayyim* are derived from the prohibition against muzzling an ox while it is engaged in threshing (Deuteronomy 25:4). *Shitah Mekubbetzet, Baba Metzi'a* 32b, suggests that these obligations may either be derived from the prohibition against muzzling an ox engaged in threshing or, alternatively, *tza'ar ba'alei hayyim* may simply be the subject of *halakhah le-Mosheh mi-Sinai*, i.e., an oral teaching transmitted to Moses at Mount Sinai with no accompanying written record in the Pentateuch.¹⁴

Other scholars advance less obvious sources as constituting the scriptural basis for obligations concerning *tza'ar ba'alei hayyim*. R. Moses ibn Habib, *Yom Teru'ah, Rosh ha-Shanah* 27a, finds a source for such obligations in the verse “. . . and thou shalt bring forth to them water out of the rock; so thou shalt give the congregation and their cattle drink” (Numbers 20:8). Water was miraculously produced from the rock for the benefit of animals as well as of humans. Water was provided for the animals, states R. Moses ibn Habib, in order to obviate *tza'ar ba'alei hayyim*. In the opinion of this authority, Scripture specifically records that the miracle was performed on behalf of animals as an admonition to man directing him likewise to alleviate the suffering of brute creatures. R. Moses Sofer, *Hagahot Hatam Sofer, Baba Metzi'a* 32b, similarly regards obligations with regard to animal welfare as predicated upon emulation of divine conduct. Thus *Hatam Sofer* cites the verse “And His tender mercies are over all His works” (Psalms 145:9) as imposing an obligation upon man to exercise compassion toward animals. Earlier, *Sefer Haredim*, chapter 4, expressed the opinion that compassion toward animals is mandated by the commandment “and you shall walk in his ways” (Deuteronomy 28:9). Rambam, *Hilkhot De'ot* 1:6, apparently basing himself upon *Sifre*, Deuteronomy 11:22, renders the verse as meaning, “just as He is merciful so also shall you be merciful.”

It is nevertheless probably incorrect to conclude that concern for *tza'ar ba'alei hayyim* is predicated upon a legal or moral concept of animal “rights.” Certainly, in Jewish law no less than in other systems of law, neither the animal nor its guardian is granted *persona standi in iudicio*, i.e., the animal lacks capacity to institute judicial proceedings to prevent others from engaging in acts of cruelty of which it may be the victim. This is so despite the unique provision in Jewish law to the effect that an animal that has committed an act of manslaughter is subject to criminal penalty but is entitled to due process of law, including a right analogous to the Sixth Amendment right of confrontation, viz., the requirement that the proceedings take place only in the presence of the accused animal.

In all likelihood, the rationale governing strictures against *tza'ar*

ba'alei hayyim is concern for the moral welfare of the human agent rather than concern for the physical welfare of the animals, i.e., the underlying concern is the need to purge inclinations of cruelty and to develop compassion in human beings.¹⁵ This is certainly the position taken by many early authorities in their discussion of the rationale underlying specific commandments dealing with comportment vis-a-vis animals. Thus, in discussing the prohibition against muzzling an animal while it is engaged in threshing, *Sefer ha-Hinnukh*, no. 596, writes:

The root purpose of the precept is to teach ourselves that our souls be beautiful, choosing fairness and cleaving to it, and that [our soul] pursue lovingkindness and mercy. In habituating [our soul] to this even with regard to animals, which were not created other than to serve us, to be kindful of them in granting them a portion of the travail of their flesh, the soul acquires a propensity for this habit to do good to human beings and to watch over them lest he cross the boundary with regard to anything which is proper with regard to them and to compensate them for any good they perform and to satiate them with whatever they travail. This is the path which is proper for the holy, chosen people.

In a similar vein, Rambam, *Guide of the Perplexed*, Book III, chapter 48, declares, "The reason for the prohibition against eating a limb [cut off] a living animal is because this would make one acquire the habit of cruelty." Rambam, *Guide*, Book III, chapter 17, makes the same observation with regard to the general obligation with regard to *tza'ar ba'alei hayyim* in stating that that duty "is set down with a view to perfecting us that we should not acquire moral habits of cruelty and should not inflict pain gratuitously, but that we should intend to be kind and merciful even with a chance animal individual except in case of need."¹⁶

The concern expressed in these sources is that cruelty to animals consequentially engenders an indiscriminately cruel disposition. Acts of cruelty mold character in a manner which leads to spontaneously cruel behavior. *Tza'ar ba'alei hayyim* is forbidden because cruelty is a character trait which is to be eschewed. Practicing kindness vis-a-vis animals has the opposite effect and serves to instill character traits of kindness and compassion. Development of such traits results in spontaneous acts of kindness, compassion and mercy.

II. SLAUGHTER OF ANIMALS

Since the concern is for the moral and spiritual health of the human agent rather than for the protection of brute creatures, it is not at all surprising that concern for *tza'ar ba'alei hayyim* is less than absolute.

The most obvious exception is the slaughtering of animals for meat which is specifically permitted by Scripture to Noah and his

progeny: “Every moving thing that liveth shall be food for you” (Genesis 9:3). Rambam, followed by *Sefer ha-Hinnukh*, regards this exception as circumscribed by the provisions surrounding the requirement for ritual slaughter in order to eliminate pain.¹⁷ According to Rambam, those provisions are designed to limit the pain insofar as possible. Thus in the *Guide*, Book III, chapter 26, Rambam states:

As necessity occasions the eating of animals, the commandment was intended to bring about the easiest death in an easy manner. . . . In order that death should come about more easily, the condition was imposed that the knife should be sharp.

The same concept is reiterated by Rambam with even greater clarity in Book III, chapter 48, of the *Guide*:

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. . . . 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 by piercing the lower part of their throat or by cutting off one of their members, just as we have explained.

Sefer ha-Hinnukh, no. 451, similarly states:

It has also been said with regard to the reason for slaughter at the throat with an examined knife that it is in order that we not cause pain to animals more than is necessary, for the Torah has permitted them to man by virtue of his stature to sustain himself and for all his needs, but not to inflict pain upon them purposelessly.

Rambam, *Guide*, Book III, chapter 26, makes it clear that the concern evidenced in the prescription of the mode of slaughter is identical with the consideration underlying the admonition concerning *tza'ar ba'alei hayyim*. Both the prescriptions concerning ritual slaughter and the prohibition against *tza'ar ba'alei hayyim* are regarded by Rambam as having been imposed “with a view to purifying the people,” i.e., in order to prevent internalization of cruelty as a character trait and to promote the development of compassion.¹⁸

Although Jewish law permits consumption of meat only if the animal has been slaughtered in the prescribed manner, there is not to be found an explicit statement in the various codes or in the writings of early authorities prohibiting other forms of slaughter in situations in which the animal is killed for other purposes. If, as Rambam explicitly states, ritual slaughter is ordained to obviate *tza'ar ba'alei hayyim*, it might well be presumed that other forms of slaughter are entirely excluded. Yet, as is well known, the ramifications and appli-

cations of Jewish law in fulfilling any specific commandment frequently are not coextensive with the rationale underlying the precept.¹⁹ Thus it cannot be assumed that other modes of killing animals are proscribed by Jewish law, particularly if the method utilized is painless.²⁰

In point of fact, there is some controversy among latter-day rabbinic decisors with regard to the permissibility of putting animals to death other than by means of ritual slaughter. Some authorities maintain that the very act of killing an animal constitutes *tza'ar ba'alei hayyim*; others maintain that considerations of *tza'ar ba'alei hayyim* pertain only to the treatment of animals while they are yet alive, but do not preclude the killing of animals by any available method. Stated somewhat differently, the latter authorities maintain that the act of putting an animal to death is excluded from the prohibition against *tza'ar ba'alei hayyim*. The authorities who forbid putting an animal to death (other than for the satisfaction of a legitimate human need, as will be shown later) apparently forbid even "painless" methods since the act of killing the animal *ipso facto* constitutes *tza'ar ba'alei hayyim*. Thus, according to those authorities, the destruction of an unwanted pet, for example, would be forbidden.

The most prominent latter-day authority to address this question directly is the preeminent eighteenth-century rabbinic decisor, R. Ezekiel Landau, *Teshuvot Noda bi-Yehudah, Mahadura Kamma, Yoreh De'ah*, no. 83. *Noda bi-Yehudah* declares emphatically that the mere killing of an animal does not involve transgression of the prohibition against *tza'ar ba'alei hayyim*, a prohibition which he regards as applicable "only if he causes [the animal] pain while alive."²¹ In support of this ruling *Noda bi-Yehudah* cites a narrative reported in the *Gemara, Hullin 7b*. The narrative, in part, illustrates the Gemara's assumption that a wound inflicted by a certain type of mule may be particularly dangerous in nature. It is reported that R. Judah the Prince invited R. Phinehas to dine with him. The Gemara relates:

When R. Phinehas ben Yair arrived at the home of R. Judah he happened to enter by a gate near which were some mules. He [R. Phinehas] exclaimed, "The angel of death is in this house! Shall I dine with him?" Rabbi [Judah] heard and went out to meet him. He said to him [R. Phinehas], "I will sell them," He [R. Phinehas] said to him [R. Judah], "Thou shalt not put a stumbling block before the blind" (Leviticus 19:14). "I shall abandon them." "You would be spreading danger." "I shall hamstring them." "That would cause suffering to animals." "I shall kill them." "There is a prohibition against wanton destruction" (Deuteronomy 20:19).

Since R. Judah suggested killing the animals after already having been apprised that mutilating them is forbidden, argues *Noda bi-Yehudah*, it may be deduced that putting an animal to death does not constitute a proscribed form of *tza'ar ba'alei hayyim*. Moreover,

R. Phinehas objected to this proposal only because it would involve “wanton destruction,” but not on the basis of considerations of *tza’ar ba’alei hayyim*. An argument based upon the narrative recorded in *Hullin 7b* identical to that of *Noda bi-Yehudah* was earlier advanced by R. Gershon Ashkenazi, *Teshuvot Avodat ha-Gershuni*, no. 13.²²

It is nevertheless clear from the discussion of *Noda bi-Yehudah* that it is forbidden to put an animal to death in a manner which involves pain prior to its demise. For that reason *Noda bi-Yehudah* declines to sanction withholding of food and water from an animal in order to cause its death. The method employed must be relatively swift in order to avoid pain to the animal while it is yet alive.

The argument advanced by *Noda bi-Yehudah* in support of his contention that the killing of an animal is not a prohibited form of *tza’ar ba’alei hayyim* is, however, rebutted by the nineteenth-century scholar, R. Joseph Saul Nathanson, *Teshuvot Sho’el u-Meshiv, Mahadura Tinyana*, III, no. 65. *Sho’el u-Meshiv* notes that the white mules in the home of R. Judah the Prince were regarded as posing a threat to human life. Ostensibly, all prohibitions, including both the prohibition against *tza’ar ba’alei hayyim* as well as “thou shalt not wantonly destroy” may be ignored in order to eliminate danger to life. However, observes *Sho’el u-Meshiv*, the danger could not have been of a significant magnitude since Rabbi Judah had already kept the mules in his custody for a significant period of time without the animals having manifested any sign of aggressive behavior. Hence, since no actual danger threatened, “wanton destruction” could not be sanctioned. However, argues *Sho’el u-Meshiv*, pain may be inflicted upon animals in order to alleviate human suffering of a comparable magnitude. Therefore, the transitory pain attendant upon the swift death of an animal would have been justified in order to eliminate even an improbable threat to human life. Hamstringing the mules would, however, have resulted in ongoing suffering on the part of the animals and could not be sanctioned since the suffering caused to the animal would have been disproportionate to the human anguish alleviated thereby.²³ Accordingly, concludes *Sho’el u-Meshiv*, it may be inferred that causing the death of an animal is justifiable only if necessary to alleviate human pain, even if such pain is minor in nature, provided that no “wanton destruction” is involved. However, it cannot be inferred that causing the death of an animal is excluded from categorization as *tza’ar ba’alei hayyim*. According to *Sho’el u-Meshiv*, the exchange between R. Phinehas and R. Judah serves only to support the conclusion that animals may be killed when necessary for human welfare but does not yield the conclusion that killing animals is excluded from the prohibition against *tza’ar ba’alei hayyim*.

A twentieth-century scholar, R. Yechiel Ya'akov Weinberg, *Seridei Esh*, III, no. 7,²⁴ cites a statement of the Gemara, *Avodah Zarah* 13b, in support of the position that putting an animal to death does not constitute a forbidden form of *tza'ar ba'alei hayyim*. The Gemara's discussion centers upon the problem presented by an animal that has been sanctified during the period following the destruction of the Temple. Since the animal cannot be used for its intended purpose and it is also forbidden to derive benefit from such an animal or to make use of it in any way, the animal can only serve as a vehicle for transgression. Its elimination, if halakhically permitted, would clearly be desirable. The Gemara queries, "Why can it not be made a *gistera*?" i.e., why can it not simply be killed by cutting it in half? It is evident from the question, argues *Seridei Esh*, that destroying an animal does not involve the prohibition of *tza'ar ba'alei hayyim*. This argument, however, is not as compelling as it might appear. As will be shown, according to almost all authorities, *tza'ar ba'alei hayyim* is permitted when designed to serve a human need. *Noda bi-Yehudah, Mahadura Kamma, Yoreh De'ah*, nos. 82 and 83, contends that elimination of a potential source of transgression constitutes such a need. Hence rendering the animal a *gistera* might be sanctioned, not because causing the death of an animal is uniformly permitted as not involving an infraction of strictures against *tza'ar ba'alei hayyim*, but because even though it does involve a form of *tza'ar ba'alei hayyim*, causing pain to an animal is permitted when designed to serve a human need. The query "Why can it not be made a *gistera*?" serves to establish that one of two principles is correct: Either the killing of an animal is excluded from the prohibition against *tza'ar ba'alei hayyim* or *tza'ar ba'alei hayyim* is permitted when designed to serve a human need. Accordingly, this source does serve to establish the principle that killing an animal for a purpose designed to serve a human need does not entail transgression of strictures against *tza'ar ba'alei hayyim*.²⁵

Both *Seridei Esh* and R. Judah Leib Graubart, *Teshuvot Havalim ba-Ne'imim*, I, no. 43, sec. 4, demonstrate that *Tosafot* maintains that killing *per se* does not constitute an act of *tza'ar ba'alei hayyim*. The Gemara, *Baba Batra* 20a, indicates that considerations of *tza'ar ba'alei hayyim* prohibit the severing of a limb from a living animal in order that the limb may be used to feed dogs. Yet *Tosafot* states that the entire living animal may indeed be cast before dogs, which will then prey upon the animal. Thus, *Tosafot* apparently maintains that although a limb may not be torn from a living animal, nevertheless, causing the death of the animal in much the same manner does not involve transgression of the prohibition against *tza'ar ba'alei hayyim*.²⁶ *Teshuvot Avodat ha-Gershuni*, R. Meir Fischels, quoted by *Teshuvot Noda bi-Yehuda, Mahadura Kamma, Yoreh De'ah*, no. 82, and

