

# “It Is Upon Him to Bring the Proof”: A Note on Historiography, Printing, and the Power of Hearsay in a Position of Rabad

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One of the most original but also controversial positions of the twelfth-century Talmudist Rabad (Rabbi Abraham ben David) of Posquières was his ruling that the prohibition that prohibits *kohanim* from incurring ritual defilement no longer applied.<sup>1</sup> Rabad’s ruling has been consistently challenged and called into question on both logical and historical-critical grounds. Historically, the analysis of Rabad’s opinion is a paradigmatic case of the power of hearsay, the role of “luck” in publishing the positions of the *rishonim*, and the impact of these positions on Jewish law, particularly in light of what the authors believed to be the Rabad’s true opinion on the matter.

Rabad’s position is formulated succinctly in his glosses to Maimonides’ *Mishneh Torah*. Rabad challenges Maimonides’ reading of a key Talmudic passage in Nazir 42b and concludes:

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<sup>1</sup> Rabad uses the words *ba-zeman ha-zeh*, “in our days,” over the course of his presentation—implying that the law is entirely inapplicable in our day and that even infant *kohanim* who had never come into contact with impurity could be lenient. *Responsa Hatam Sofer* no. 340 takes the phrase literally, but still argues that Rabad did not mean to say the prohibition did not categorically apply today. A nonliteral reading seems to be the most accurate, though, when the words are viewed in the context of Rabad’s and the Talmudic discussions, as will be discussed below.

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Since we say [that] the law follows Rabbah whenever he disagrees with Rav Yosef, then a *kohen* who contacts a second [source of] impurity is exempt from punishment, even if he has separated himself [and is no longer in contact with] the first [source of] impurity. And [since] today all *kohanim* are considered to be ritually impure [anyway], there is no further *hiyyuv* of contracting *tum'ah*, and whoever says there is such a *hiyyuv*—it is upon him to bring the proof (Hilkhot Nezirut 5:16).

The Rabad's novel view, in which he appears to stand alone,<sup>2</sup> is consistently regarded as marginal and certainly not normative.

The nature of the debate about this ruling turned in a historical-critical direction following a series of rulings issued by Rabbi Moshe Sofer in a responsum dated 1837. In one of his most famous responsa,<sup>3</sup> R. Sofer notes, without much fanfare, that Rabad himself retracted his lenient opinion in *Temim De'im*, no. 336 and adopted a more conventional, stricter posture.

From then on, any citation of Rabad's position as support for leniency in matters of *tum'at kohanim* included one of two caveats: either that Rabad's comments in his glosses to *Mishneh Torah* are to be understood as merely providing an exemption from lashes, with-

<sup>2</sup> *Sefer Mizvot Katan* of R. Yitzhak of Corbeil also disagrees with Rabad, insofar as he codifies the laws of priestly defilement (89) and never mentions Rabad's leniency. The phrase "*tum'at kohanim* in our days," used earlier in the work (48), does not mean to imply that the laws of priestly defilement are different in our day from the days of the Temple, but rather to say that the laws of defilement are different from the laws of Temple service which no longer apply in our day. Hatam Sofer suggests in the aforementioned responsum that *Semak* concurs with Rabad, but even he later questions this comparison.

<sup>3</sup> This responsum was famously written to R. Zevi Hirsch Chajes, regarding the question of delaying burial for verification of death. It also relates directly to Hatam Sofer's general approach toward Moses Mendelssohn, the great defender of the waiting practice. See, Meir Hildesheimer, "The Attitude of the Hatam Sofer Toward Moses Mendelssohn," *Proceedings of the American Academy for Jewish Research* 60 (1994): 141–87.

out carrying a real exemption, in light of *Temim De'im*, no. 336; or that Rabad recanted his earlier lenient position and later adopted a more stringent approach in *Temim De'im* that should be taken to be his final decision on the matter.

We can make four claims about the historical context of this position of Rabad, as explained below.

1. A close reading of much of the subsequent discussion of Rabad's opinion yields a fascinating revelation: The reference to Rabad's stringent position, as described in *Temim De'im*, is consistently referred to by proxy via *Hatam Sofer's* responsum, and not by direct reference, citation, or quotation of *Temim De'im* itself. Thus, it appears that very few, if any, of these post-*Hatam Sofer* authorities actually read *Temim De'im* no. 336.

And perhaps for good reason. *Temim De'im* was first independently published in Lemberg in 1811, around the time that *Hatam Sofer* first notes the rereading of Rabad's opinion in the glosses to *Mishneh Torah*.<sup>4</sup> Few before *Hatam Sofer* make reference to this passage of *Temim De'im* simply because the book was harder to come by before the 1811 printing. This is most likely the text of *Temim De'im* to which *Hatam Sofer* refers.

The second printing of *Temim De'im*, in Warsaw in 1897, was substantially shorter than its predecessor, including only 226 of the 248 entries printed in the first edition. The 1897 edition only contained those parts of *Temim De'im* that were not printed elsewhere. Entry no. 336 was deleted from the reprinting, erased from the records of history, and unavailable to later authorities.

The initial 226 sections of *Temim De'im* include original responsa by major Provençal *rishonim* of the twelfth century (with a clear majority by Rabad himself). These responsa were preserved in the 1897 edition because they were not printed in any other late-

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<sup>4</sup> *Temim De'im* was first named and published in 1622 as part of the larger work *Tumat Yesharim*, collected by Tam ibn Yahya. *Tumat Yesharim* has not been published since.

nineteenth-century work. In contrast, the latter twenty-two sections consist of Rabad's glosses to *Hilkhot ha-Rif* and his short responses/glosses to *Ba'al ha-Ma'or*'s critical comments to the same were left out of the 1897 edition.

The exclusion of these sections was the result of the Romm family's 1884 publication of the complete Babylonian Talmud in Vilna, which marked a historical milestone in Jewish learning. The "complete" Talmud now included many early and late commentators, including *Hilkhot ha-Rif*. The publishers also included super-commentaries where appropriate, culling from various manuscripts and earlier printings. One new inclusion was Rabad's glosses to *Rif's Halakhot*, first published in *Temim De'im* in 1622 and 1811. Unfortunately, many of these glosses were not presented on the same printed page as the *Hilkhot ha-Rif* and were instead included in the supplementary pages of commentary after the *Rif*.

*Temim De'im* no. 336, to which *Hatam Sofer* refers, was initially part of this larger collection of glosses to *Hilkhot ha-Rif* in tractate *Makkot*, which was incorporated in the *Vilna Shas* of 1884. These glosses were tucked away on page 5a of the standard 1884 Vilna edition of the *Tosefta* to *Shevu'ot* and *Makkot*, which was printed at the end of the volume of those tractates. The glosses were now visible and accessible to everyone who had a copy of the Romm *Shas*, albeit slightly hidden from the eye. As all of Rabad's glosses to *Hilkhot ha-Rif* were now publicly and popularly available (as they are today in the standard reprinting of the *Vilna Shas*), the publishers of the 1897 second edition of *Temim De'im* felt that they could print a shorter work, omitting these recently published pieces. Authorities who opened the 1897 *Temim De'im* were thus unable to find the statement of Rabad to which *Hatam Sofer* referred. There was similarly no reference directing their attention to Rabad's comments to *Hilkhot ha-Rif Makkot* which were easily available, if they only knew where to look.

The third edition of *Temim De'im*, printed in New York, 1958, was a direct reprint of its 1897 predecessor, and still lacked entries past number 226. Only in Jerusalem in 1973 was a reconstruction of

the complete *Temim De'im* undertaken, seeking to restore the sections omitted from the 1811 edition. Most *poskim* who referred to Rabad's position only as quoted by *Hatam Sofer* had neither the 1811 nor 1973 edition of *Temim De'im*. As such, they could never be certain as to its exact formulation and similarly, could not have known that they most likely owned the text of *Temim De'im*, no. 336, as printed in the *Vilna Shas*.<sup>5</sup>

One responsum of *Avnei Nezer* (YD, no. 466) raises an even more striking issue concerning the challenge to uncover the true words of Rabad. Written in 1895, this responsum appeared before the 1897 edition of *Temim De'im*, but indicates that R. Abraham Borenstein had access to the earlier 1811 edition that contains Rabad's position intact. Still, *Avnei Nezer* doubts whether he had the correct text of Rabad on account of his lack of access to the original 1622 Venice printing. Inspection of the 1622 edition found in the library at the Jewish Theological Seminary reflects that the wording of the 1811 edition is no different from that of the 1622 edition.

2. In identifying the actual source-text of Rabad, it is important to note that it is part of his glosses to *Hilkhot ha-Rif*. By all accounts, these glosses were completed by 1185—eight years before Rabad even began working on his glosses to Maimonides' *Mishneh Torah*.<sup>6</sup> Presumably it would therefore be untenable to maintain that Rabad recanted his (later) lenient position as articulated in his glosses to *Mishneh Torah* in favor of his (earlier) stringent approach published earlier in *Temim De'im* no. 336. If Rabad changed his mind at all, his conclusion was almost certainly the lenient one, the opinion expressed in his later work.<sup>7</sup> Moreover, some argue that Rabad's lan-

<sup>5</sup> See *Shu"t Yabi'a Omer*, YD 10:52, as well as other responsa cited in the following notes.

<sup>6</sup> On Rabad's glosses to *Hilkhot ha-Rif*, see Isadore Twersky, *Rabad of Posquièreres* (Philadelphia: Jewish Publication Society, 1980), 117–19; on Rabad's glosses to *Mishneh Torah*, see *ibid.*, 125.

<sup>7</sup> See *Iggerot Moshe*, YD 1:230, sec. 2, who wonders which was the initial and which the final position of Rabad. R. Feinstein allows for either possibility as he

guage in his glosses to *Mishneh Torah* is clearly intended to reflect normative halakhah, whereas his comments to *Hilkhot ha-Rif* seem to be more like critical commentary. Perhaps one could therefore conclude that Rabad ultimately decided in favor of the lenient position, the opposite conclusion of *Hatam Sofer*.

3. A further clarification comes to light upon considering the genre of Rabad's position. Several authorities categorized Rabad's position as formulated in *Temim De'im* as a responsum; apparently they had never seen the actual text but were merely relying on *Hatam Sofer's* testimony.<sup>8</sup> They would therefore be referencing the classic Sephardic debate as to how to ascertain a writer's true position when his novellae or glosses contradict his position as expressed in a responsum.<sup>9</sup> However, since Rabad's position as articulated in *Temim De'im* is in actuality part of his general glosses to *Hilkhot ha-Rif*, and not a responsum, it should not be considered to be categorically distinct from his glosses to *Mishneh Torah*. In fact, the opposite argument could be easily put forth. In his glosses to *Hilkhot ha-Rif*, Rabad comments as a student probing his master's work, analyzing and questioning in an attempt to clarify and understand. Rabad's tone in his glosses to *Mishneh Torah* takes on another character entirely. Written in his older years, they appear to be a visceral response to what Rabad saw as Maimonides' innovative spirit; Rabad challenged Maimonides' positions and chose to state his opinion clearly and openly. As such, it would be fair to argue that the glosses to *Mishneh Torah* more accurately reflect Rabad's

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admits that he was unaware of the history behind the penning of these works. It is also clear from R. Feinstein's discussion that he was also unaware that *Temim De'im* no. 336 was part of Rabad's glosses to *Hilkhot ha-Rif*, as he suggests that it was possibly a responsum. It is likely that R. Feinstein never saw Rabad's actual text and relied on the second-hand, abridged testimony of Hatam Sofer.

<sup>8</sup> *Shu"t Ateret Paz* 2, YD 3.

<sup>9</sup> See R. Ovadiah Yosef, *Shu"t Yab'a Omer*, OH 2:30:11, EH 3:20:30; idem, *Shu"t Yehaveh Da'at* 1:45; idem, *Taharat ha-Bayit* 1, p. 375, and the numerous sources cited therein.

true opinion, more so than his comments to *Hilkhot ha-Rif*. In light of this understanding, this entire construct of Sephardic sophistry falls by the wayside.

4. An analysis of both of Rabad's pieces reveals that each offers a completely opposite reading of Nazir 42b. The Talmud first cites the position of Rabbah, who maintains that *kohanim* are not prohibited from contracting *tum'ah* after having previously done so (*tum'ah ve-tum'ah*) and then cites Rav Yosef, who argues that *kohanim* are indeed prohibited from defiling themselves in such a manner. In attempting to clarify the disagreement more sharply, the Gemara posits two different possible situations: when contact with the first *tum'ah* is maintained when coming into contact with the second *tum'ah* (*tum'ah be-hibburin*), and when contact with the first *tum'ah* has been lost prior to contacting the second *tum'ah*; the first would be permitted, the second prohibited.

The Gemara is unclear as to which of the *amoraim* holds to this distinction. Were Rav Yosef to differentiate between these two cases, it would mean that Rabbah maintains that a *kohen* who contacts a second *tum'ah* has not violated any prohibition even if he no longer maintains contact with the first *tum'ah*. Once the *kohen* has become defiled, contracting a second *tum'ah* does not and cannot change his status and therefore cannot incur a violation. Conversely, were Rabbah to differentiate between these two situations, he would hold that the only case in which a *kohen* does not violate a second prohibition is when he remains in contact with the first *tum'ah* at the time he contacts the second. Once his connection to the first *tum'ah* is lost, he is prohibited from contracting a second *tum'ah*. According to this second reading, Rav Yosef would be stringent in both situations.<sup>10</sup>

<sup>10</sup> Even though his personal status remains unaffected by this second contact, the Torah prohibits him from coming into contact with *tum'ah*, regardless of the possible consequences or lack thereof. See R. Hershel Schachter, *Be-Ikvei ha-Tzon* (New York: Beit ha-Midrash de-Flatbush, 1997), no. 35, and R. Yitzchak Elhanan Spektor, *Kovetz Shi'urim* 2, no. 41.

Most commentaries, such as the Tosafists and Maimonides (according to one interpretation), adopt the second reading. Provençal commentaries, such as Menachem Me'iri (*Beit ha-Behirah*, Nazir 42b, s.v. *zeh she-bi' arnu*) and Rabad in his glosses to Hilkhot Nezirut, offer the former approach.

*Rif* cites the Mishnah Makkot 3:8, which rules that if a *kohen* was repeatedly admonished not to contract *tum'ah*, he would receive a separate set of lashes for each *tum'ah* that he encounters. *Rif* does not elaborate upon this Mishnah nor add any other details. It is against this backdrop that Rabad issues his critique. Rabad notes that the Gemara Nazir (42b) explains that this ruling is only applicable when the *kohen* has relinquished contact with the first *tum'ah*; when the *kohen* retains contact with the initial *tum'ah*, contracting a second *tum'ah* does not incur lashes. In other words, Rabad criticizes *Rif* for failing to reproduce the Talmud's caveat regarding *tum'ah be-hibburin*. A casual reader might err in his halakhic decision-making were he to base his rulings on this Mishnah as presented by *Rif* and, as such, Rabad referred the reader to the appropriate discussion in Gemara Nazir.

Recalling the Provençal interpretation of the discussion in Nazir, Rabad understood that *Rif* adopted the position of Rav Yosef in the Gemara. To Rabbah, the Mishnah Makkot as it stands cannot reflect correct practice; *Rif*'s citation of the Mishnah without comment is therefore tacit acceptance of Rav Yosef's position. Rabad's critique, then, is that *Rif* has misrepresented the position of Rav Yosef, as it was understood in Provence.<sup>11</sup> In essence, Rabad offers the same reading of the pivotal Talmudic passage in both his glosses to *Rif* and Maimonides—with the only difference being that in the former he presents the position of Rav Yosef and in the latter the position of Rabbah.

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<sup>11</sup> Meiri also understands that Maimonides rules in accordance with Rav Yosef as understood by the Provençal scholars. However, it is more likely that Maimonides really means to adopt the position of Rabbah as understood by the Tosafists (see *Lehem Mishneh*, ad loc.).



Rabad is firm in his glosses to *Mishneh Torah* in accepting the halakhah as formulated by Rabbah. B.T. Bava Batra 114b posits that in all disputes with Rav Yosef the halakhah follows Rabbah, save for three unique cases. With this in mind, it seems that Rabad's glosses to *Rif* do not reflect his normative halakhic position, but rather only a critique of *Rif*, on *Rif's* own terms, i.e., following the opinion of Rav Yosef. Rabad himself is content to adopt an entirely distinct approach and an entirely different set of facts.

It is important to note that even Rabad's final, authoritative position as articulated in his glosses to *Mishneh Torah* is not without ambiguity. Rabad's suggestion that modern-day *kohanim* no longer have any *hiyyuv tum'ah* can be read in two different ways. The simplest reading argues for absolutely no prohibition for modern-day *kohanim* to contract *tum'ah*.<sup>12</sup> Later authorities, however, argued for a more limited explanation of Rabad—indicating that while a modern-day *kohen* who contacts *tum'ah* would not incur the Torah prohibition of lashes, he nonetheless violates a rabbinic enactment. These *poskim* read the word *hiyyuv*, not as a general prohibition, but strictly of one incurring corporal punishment. R. Nattan Adler adopted this approach and convinced R. Yechezkel Landau of its veracity.<sup>13</sup> As such, R. Landau amended his previously held position and henceforth understood Rabad's opinion that contracting *tum'ah*, even for modern-day *kohanim* entailed a rabbinic violation.<sup>14</sup> In this context, *Hatam Sofer* remarks that some thirty years after R. Adler's meeting with R. Landau, he found textual support for his revered teacher's explanation of Rabad's opinion. Yet, as we have noted, such support seems to be grounded in a less complete analysis of the relationship of the two statements of Rabad. The aforementioned responsum of *Avnei Nezer* similarly challenges

<sup>12</sup> *Mishneh le-Melekh*, Hilkhot Avel 3:1; *Shu"t Rabbi Akiva Eiger*, Tinyana, no. 18.

<sup>13</sup> See *Shu"t Hatam Sofer*, YD 338, who describes this rabbinic consultation in Prague of 1783.

<sup>14</sup> *Dagul me-Revavah*, YD 372.

*Hatam Sofer* on these grounds. Rabad never spoke of a rabbinic prohibition in *Temim De'im*. There is room to conclude that *Temim De'im* spoke of a Biblical prohibition within Rav Yosef's opinion, while the glosses to *Mishneh Torah* referred to a complete exoneration and leniency.<sup>15</sup>

The final words of the Rabad's gloss are meant as a clear challenge to Maimonides' ruling, in demanding proof for the latter's incriminating assertion. Moreover, it is difficult to contend that Rabad was referring to a hypothetical scenario of corporal punishment that is not in effect today, while explicitly referring to the situation of modern-day *kohanim*.<sup>16</sup>

“Whoever says there is such a *hiyyuv*—it is upon him to bring the proof.”

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<sup>15</sup> *Avnei Nezer* also discussed which of Rabad's two opinions should be considered more halakhically valid and what the Talmudic basis is for each. See his lengthy discussion in responsa YD, nos. 466, 468, and 470.

<sup>16</sup> See *Shu"t Yehaveh Da'at* 4, no. 58, who cites a possible reason for discussing the hypothetical case of lashes as pertaining only to the fact that one who has incurred a punishment of lashes, even today when this punishment is not practiced, is disqualified from acting as a witness.