

***“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 most controversial positions of the 12th century Talmudist Rabad of Posquieres, is his ruling that the prohibition forbidding *Kobanim* from ritual defilement is inapplicable in modern days.¹ Rabad’s ruling has been consistently challenged and called into question on both logical as well as historical-critical grounds. The history of analyzing 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 those positions on Jewish law.

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:

¹ Rabad uses the words “*ba-zeman ha-zeh*,” in our days, throughout the course of his presentation—implying that the law is entirely inapplicable in our day. This would mean that even infant *Kobanim*, who had never come into contact with impurity, could be lenient with regard to subsequent defilement. In his responsum, *Hatam Sofer* (YD no. 340) takes the phrase literally, but still argues that Rabad did not mean to say the prohibition is **categorically** defunct. A non-literal reading seems to be the most accurate, though, when the words are viewed in the context of Rabad’s and the Talmudic discussions, as discussed below.

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וכיון דקי"ל רבה ורב יוסף הלכתא כרבה, מעתה טומאה וטומאה אפילו פירש וחזר ונגע פטור. והכהנים בזמן הזה טמאי מת הן ועוד אין עליהן חיוב טומאה, והמחייב אותם עליו להביא ראיה.

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

This position is novel, inasmuch as Rabad stands alone in this view.² Future discussions of Rabad's opinion consistently treated it as marginal and certainly non-normative.

The nature of the debate surrounding this ruling turned to a historical-critical direction following a series of rulings issued by Rabbi Moshe Sofer. In one of his most famous responsa, dated 1837 (YD no. 338), R. Sofer notes, without much fanfare, that Rabad himself, in *Temim De'im* no. 236, retracts his lenient opinion and adopts a more conventional, stricter posture.³

² *Sefer Mizvot Katan* of R. Yitzhak of Corbeil also disagrees with Rabad, insofar as he codifies the laws of priestly defilement (no. 89) [when in the introduction to this work he specifies his intent to include only those laws applicable in modern times], and never mentions Rabad's leniency. The phrase "*tum'at Kobanim* in our days," used earlier in the work (*Sefer Mizvot Katan*, no. 48), does not mean to imply that the laws of priestly defilement are different in our days from the laws in the days of the Temple, but only 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 identification.

³ 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.

ואני בעניי אה"ז כמו שלשים שנים מצאתי שכ"כ הראב"ד בתמים דעים
ס"י רל"ו דאסורים מן התורה.

From then on, all citations of Rabad's position as support for leniency in matters of *tum'at Kobanim* included one of two caveats:

1. Either that Rabad's comments in his glosses to *Mishneh Torah* are to be understood as merely providing an exemption from lashes, without carrying a real exemption, in light of *Temim De'im* no. 236;
2. 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.

The text of *Temim De'im* no. 236 reads:

מיהו אע"פ שאינו לוקה שתיים בחיבורין, איסורא מיהא אית ביה, ואסור
לאטמויי למת אחר. אבל כהן הדיוט שהוא מטמא לקרוביו עד שהוא
מתעסק במתו מותר להתעסק במת אחר. פירש הרי זה בלא יטמא, והכי
איתא באבל רבתי.

Even though [a Kohen] does not incur a second punishment of lashes [when touching a second source of impurity] while maintaining contact [with a first source of impurity], this is nonetheless prohibited, and [he is forbidden] from defiling himself [by contacting] a second corpse. However, a common Kohen who defiles himself in dealing with the burial of one of his relatives [which is permitted] may deal with the burial of other corpses. Once he relinquishes [contact from his dead relative], then [contacting a second corpse] is a violation of "*lo yitama*," and so it is [written] in *Avel Rabbati*.

We can make four observations about the historiography of this position of Rabad.

1. A close read of much of the subsequent discussion of Rabad's opinion yields a fascinating revelation: Rabad's stringent position, as described in *Temim De'im*, is consistently referred to by proxy—namely, to *Hatam Sofer's* responsum, and not by reference, citation, or direct quotation from *Temim De'im*. Thus, it appears that very few, if any, of these post-*Hatam Sofer poskim* actually saw the text of *Temim De'im* no. 236.

There is good reason for this assumption. *Temim De'im* was first independently published in Lemberg in 1811, around the time that

Hatam Sofer first notes the re-reading of Rabad's opinion in the glosses to *Mishneh Torah*.⁴ 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 1897, was substantially shorter than its predecessor, including only 226 of the 248 entries printed in the first edition. This 1897 edition contained only those parts of *Temim De'im* that were not printed elsewhere. As such, entry no. 236 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 12th century (with a clear majority by Rabad himself). These responsa were preserved in the 1897 edition, as they were not printed in any other late nineteenth century work. In contrast, the latter 22 sections consist of Rabad's glosses to *Hilkebot ha-Rif* and his short responses / glosses to *Ba'al ha-Ma'or*'s critical comments to the same; they were left out of the 1897 edition.

The exclusion of those sections was the ultimate result of the publication of the complete *Sbas* in Vilna of 1884, by the Romm family, marking a historical milestone in Jewish learning. The 'complete' Talmud now included many early and late commentators, printed after the text of the Talmud proper, including *Hilkebot 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, each in its appropriate location. Unfortunately, many of these glosses were not printed on the pages of *Hilkebot ha-Rif* and were instead included in the supplementary commentary, in the pages following the Rif's *Halakhot*.

Temim De'im no. 236, to which *Hatam Sofer* refers, was initially part of this larger collection of glosses to *Hilkebot ha-Rif* Tractate *Makkot*, which was incorporated in the Vilna *Sbas* of 1884. However, these glosses were not printed directly on the pages of *Hilkebot ha-Rif*, but

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

were rather tucked away on page 5a of the standard 1884 Vilna edition of *Tosefta Shevu'ot* and *Makkot*, included at the end of the volume containing *Hilkebot ha-Rif* to those tractates. The glosses were now visible and accessible to all who had a copy of the Romm *Sbas*, albeit slightly hidden from the eye. As all of Rabad's glosses to *Hilkebot ha-Rif* were now publicly and popularly available (as they are today in the standard reprinting of the Vilna *Sbas*), the publishers of the 1897 edition of *Temim De'im* felt that they could print a shorter work, omitting these just-recently published pieces. Authorities who quickly 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 *Hilkebot 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 more recent reprint of its 1897 predecessor, still lacking entries past no. 226. Only in Jerusalem 1973 was a reconstruction of the complete *Temim De'im* undertaken, seeking to restore the previously omitted sections from the 1811 edition. Most *poskim* who referred to Rabad's position only as quoted by *Hatam Sofer*, had neither the 1811 or 1973 editions 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. 236 as printed in the Vilna *Sbas*.⁵

One responsum of *Arnei Nezer* (YD no. 466) raises an even more striking issue concerning the challenge to uncover the true meaning of Rabad's words. Written in 1895, this responsum appeared before the 1897 edition of *Temim De'im* and reflects access to the earlier 1811 edition that contains Rabad's position intact. Still, *Arnei Nezer* doubts that he had the correct verbiage of Rabad on account of his lack of access to the original 1622 Venice printing.⁶

2. In identifying the actual source text of Rabad, it is important to note that it is part of his glosses to *Hilkebot ha-Rif*. By all accounts,

⁵ See *Shu"t Yabi'a Omer* YD 10:52, as well as other responsa cited therein.

⁶ הנה החת"ס סימן של"ח כתב על דברי הדגמ"ר ההם שמצא כן מפורש בתמים דעים ס"ס רל"ו שאסורים מה"ת ושם בת"ד אפי' בעודו מחובר במת ראשון. [באמת שבס' ת"ד שלי לא כתוב תיבת מה"ת. אולי כך הי' כתוב בת"ד ישן דפוס ווינצ'יא]

these glosses were completed by 1185—eight years before Rabad even began working on his glosses to Maimonides' *Mishneh Torah*.⁷ It is therefore clear that it is simply untenable to maintain that Rabad recanted his lenient position as articulated in his glosses to *Mishneh Torah* in favor of his stringent approach in *Temim De'im* no. 236. If Rabad changed his mind at all, he almost certainly concluded leniently as expressed in his later work.⁸ Moreover, Rabad's language in his glosses to *Mishneh Torah* is clearly intended to reflect normative *Halakhab*, whereas his comments to *Hilkhot ha-Rif* appear to be more like critical commentary. Perhaps it is therefore fair to 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 *poskim* have categorized Rabad's position as formulated in *Temim De'im* as a responsum; clearly, they had never seen the actual text and were merely relying on *Hatam Sofer's* testimony.⁹ Therefore, in classic Sephardic style, they have referenced the classic debate as to how to ascertain a writer's true position when his novella or glosses contradict his position as expressed in a responsum.¹⁰ Since Rabad's position as articulated in *Temim De'im* forms part of his general glosses to *Hilkhot ha-Rif*, it should not be considered as categorically distinct from his glosses to *Mishneh Torah*.

⁷ On Rabad's glosses to *Hilkhot ha-Rif*, see Isadore Twersky, *Rabad of Posquieres* (Philadelphia: Jewish Publication Society, 1980), 117-19; on Rabad's glosses to *Mishneh Torah*, see *ibid.*, 125.

⁸ See *Shu"t 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 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. 236 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 secondhand, abridged testimony of *Hatam Sofer*.

⁹ *Shu"t Ateret Paz* 2, YD 3.

¹⁰ 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*, *Tabarat ha-Bayit* 1, p. 375, and the numerous sources cited therein.

In fact, the opposite argument could be easily put forth. In his glosses to *Hilkhoh ba-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. On this basis alone, it would be fair to argue that the glosses to *Mishneh Torah* more accurately reflect Rabad's true opinion, more so than his comments to *Hilkhoh ba-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. That Gemara first cites the position of Rabbah, who maintains that *Kobanim* are not prohibited from contracting *tum'ab* after having previously done so (*tum'ab ve-tum'ab*). The Gemara then cites the contrary position of Rav Yosef, who argues that *Kobanim* 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: (1) Those in which contact with the first *tum'ab* is maintained when coming into contact with the second *tum'ab* (*tum'ab be-hibburin*); and (2) When contact with the first *tum'ab* has been lost prior to contacting the second *tum'ab*. The Gemara explains that (1) would be permitted, while (2) prohibited.

The Gemara is unclear as to which of the Ammoraim holds of this distinction.

(A) Were Rav Yosef to differentiate between these two cases, it would mean that Rabbah maintains that a *Kohen* who contacts a second *tum'ab* has not violated any prohibition even if he no longer maintains contact with the first *tum'ab*. Once the *Kohen* has become defiled, contacting a second *tum'ab* does not and cannot change his status and therefore cannot be considered a violation. Rav Yosef would then prohibit contact with a second source of *tum'ab* only when contact with the first source has been lost. However, even Rav Yosef would permit contacting a second source of *tum'ab* when contact with a first source of *tum'ab* is maintained.

(B) 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'ab* while contacting the second. Once his connection to the first *tum'ab* is lost, he is prohibited from contacting a second *tum'ab*. According to this second reading, Rav Yosef would be stringent in all situations.¹¹

Many commentators, such as the Tosafists (*ad loc.*) and Maimonides (*ibid.*) according to one interpretation, adopt the second reading (B). Provençal commentaries however, such as R. 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 (A).

Rif cites the Mishnah *Makkot* (3:8) that rules that were a *Kohen* repeatedly admonished not to contact *tum'ab*, he would receive a separate set of lashes for each *tum'ab* 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 applicable only when the *Kohen* has relinquished contact with the first *tum'ab*; when the *Kohen* retains contact with the initial *tum'ab*, contacting a second *tum'ab* does not incur lashes. In other words, Rabad criticizes Rif for failing to reproduce the Talmud's caveat regarding *tum'ab be-ḥibburin*. According to Rabad, a casual reader may err in his halakhic decision-making if he bases 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.¹² According to the Provençal reading,

¹¹ Even though his personal status remains unaffected by this second contact, the Torah prohibits him from coming into contact with *tum'ab*, regardless of 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.

¹² *Meiri* also understands that Maimonides rules in accordance with Rav Yosef as understood by the Provençal scholars. However, it is more

even according to Rav Yosef, there is no blanket prohibition, as would be inferred from Rif's citation. Rather, R. Yosef would argue that contact with a second source of *tum'ab* is prohibited only when contact with the first source has been relinquished—a fact that a reader of the Rif's *Halakhot* might have misunderstood, if not for Rabad's comment.

Rif, however, understood Rav Yosef in the manner of the Tosafists and Maimonides, namely that contact with a second source of *tum'ab* is forbidden in all circumstances. Rif understood the Gemara's distinction between these two cases as relevant only for Rabbah's position.

In essence then, Rabad offers the same [Provençal] reading of the pivotal Talmudic passage in both his glosses to Rif and Maimonides [that even Rav Yosef differentiates between the two cases]—with the only difference being that in the former he presents the position of Rav Yosef and in the latter the position of Rabbah.

Rabad is firm in his glosses to *Mishneh Torah* in accepting the *Halakhab* as formulated by Rabbah. *Bava Batra* 114b posits that in all disputes with Rav Yosef the *Halakhab* 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—that is, following Rav Yosef. Rabad himself is content adopting an entirely distinct approach and an entirely different set of givens.

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'ab*" can be read in two different ways. The simplest reading argues for absolutely no prohibition for modern day *Kohanim* to contract *tum'ab*, reading the term *hiyyuv* as encompassing all types of prohibitions.¹³ However, later authorities argued for a more limited explanation of Rabad—indicating that while a modern day *Kohen* who contacts *tum'ab* would not incur the Torah prohibition of lashes, he

likely that Maimonides really means to adopt the position of Rabbah as understood by the Tosafists (see *Lehem Mishneh*, ad loc.).

¹³ *Mishneh le-Melekh, Hilkehot Avel* 3:1; *Shu"t Rabbi Akiva Eiger, Tinyana*, no. 18.

nonetheless violates a rabbinic enactment. These *poskim* read the word *biyyuv* not as a general prohibition, but strictly as one incurring corporal punishment. R. Natan Adler adopted this approach and convinced R. Yechezkel Landau of its veracity.¹⁴ 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.¹⁵ In this context, *Hatam Sofer* remarks that some 30 years after R. Adler's meeting with R. Landau he found textual support, in the 'recently' published *Temim De'im*, 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 *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.¹⁶

While some have argued that Rabad was simply referring to an exemption from the hypothetical scenario of corporal punishment that is not in effect today, this assertion is highly unlikely, as Rabad explicitly referred to "modern-day *Kohanim*."¹⁷ The final words of this gloss are meant as a clear challenge to Maimonides' ruling, demanding proof for the latter's incriminating assertion. Rabad felt that modern-day *Kohanim* were entirely justified in becoming defiled,

¹⁴ See *Shu"t Hatam Sofer*, YD 338, who describes this rabbinic consultation in Prague of 1783.

¹⁵ *Dagul me-Revaah*, YD 372.

אבל עכשיו נתתי אל לבי שאולי לא אמרה הראב"ד אלא לענין חיוב מלקות, אבל לענין איסור אולי אפילו איסור תורה מודה. ויש בשטות הללו כמה עקולי ופשוטי וגם הסוגיות סתרי אהדדי ויש בזה דברים עמוקים לא יכילם הגליון. לכן הדרנא בי מלהתיר לכהן לילך על קברי עובדי כוכבים...

¹⁶ *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 responsum YD, nos. 466, 468, and 470.

¹⁷ See *Shu"t Yehaveh Da'at* 4, no. 58, who cites a possible reason for discussing the hypothetical case of lashes as only one who has incurred a punishment of lashes, even today in which they are not practiced, is disqualified from acting as a witness.

contrary to Maimonides' assertion. He understood his position as the natural outgrowth of the Gemara's discussion. Therefore, "Whoever says there is such a *biyyun*—it is upon him to bring the proof." ❧