

Priestly Meat Portions in Exile: Popular Custom and Rabbinic Responses

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Jewish butchers are commanded to give the arm, innards, and cheeks of each slaughtered animal to a priest (Deuteronomy 18:3). The details of this commandment are revealed in one verse—they are simple and straightforward and require no further explanation. The Bible implies that this law is applicable in all places and times, and the Mishnah (*Hullin* 10:1) clearly rules that the command applies “בארץ ובחוצה לארץ, בפני הבית ושלח בפני הבית” Sifri (to Deuteronomy 18:4) even provides a possible scriptural derivation for why these laws should apply in the Diaspora: “אם שור אם שה” —בארץ ובחוצה לארץ.

Jewish authorities living in Islamic countries understood the Talmudic conclusion in this simple manner; they rule that the meat portions are given to the priest in all places, and at all times. Isaac Al-Fasi includes the laws of meat portions in his *Halakhot*, and cites the Mishnah to indicate that the laws apply even in the Diaspora (Al-Fasi, *Hullin* 44b–46b). Maimonides also rules that the priestly meat portions are given at all places and all times; he only limits the law of first shearing to Israel (*Sefer Ha-Mizvot* 143–144, *Mishneh Torah*, “Laws of Bikkurim and Other Gifts” 1:6–7, 9:1, 10:1; *Commentary to the Mishnah*, *Hullin* 11:1).¹ These authorities saw no reason to suppose that the meat gifts would be applicable only in Israel.

¹ Maimonides begins his discussion of the first shearing (in 11:1) by noting that they are customary only in Israel, but provides no such qualification in his discussion of the meat portions (10:1).

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This tradition ultimately finds its roots in the words of the Geonim. Rav Hai Gaon (as cited in Ravyah, 1125) gave meat portions to a priest though he lived outside Israel. *Shiltot* of Rabbi Aḥai Gaon (151) also indicate that the law is practiced even in exile, as do *Halakhot Gedolot*.²

We can be fairly certain that the leaders of these communities required that these gifts be given. However, there remains little evidence as to what the popular practice was. Rav Natrona'i Gaon was asked to respond to the practice of some communities that did not give these meat portions. Though we can deduce from the responsum that some people gave the gifts and others did not, it is impossible to know which practice dominated.³ Robert Brody is correct that “one does not find many discussions in the matter of the priestly portions in the writings of the Geonim,”⁴ but we cannot know if this is because the law was considered an obvious obligation that was followed by all, or if it was uniformly ignored so few even bothered to ask about it. Whatever common practice was, early authorities demanded that all Jews give these portions to the priests, in all places at all times.

One source provides a possible account for why some people may have chosen to ignore this law, out of a personal rejection of the Biblical principle. One fragment of a Bible commentary to Leviticus 22 from the Cairo Geniza, thought to be part of the Bible Commentary of the tenth century Karite Daniel Al-Qumisi, reads:

כי בתת יש[ראל] את קדשיהם לכהנים כחלה ותרומת ויתר מתנותיהם:
והן שכר הכהנים מישראל: על כן ישאו ישראל על הכהנים את עון
אשמה למען יעמדו הכהנים בתום לבב לכפר את עון ישראל ואת אשמתם
כי אכלו את קדשיהם: ועוד כ[תוב] והם ישאו את עונם על כן היום הזה כל
הנותן ולוקח חלה וראשית וכל מתנות הכהנים הוא כשד וגזל: כי אן

² In the laws of the firstborn animals, and in the laws of covering the blood.

³ *Teshuvot Rav Natrona'i Gaon*, Ed. Robert Brody (Jerusalem: Ofef, 1994), 356–358.

⁴ Footnote, loc. cit.

לקיחת שבר כי אם לעבודה אשר יעבד באהל מועד: כ[י] כ[תוב] "כי
שכר הוא לכם ח[לף] ע[בודתכם] ב[אוהל] מו[עד]:"⁵

The gifts should not be given after the temple was destroyed, because they were really remuneration to the priests for the work they did in the temple, so today if the priests were no different from any other Jew and did not engage in temple work, they did not deserve additional payments. Though the Talmud seems to have rejected this Karite interpretation, it is possible that some irreligious individuals had come to this interpretation themselves, and had thus decided not to give the gifts to the priests without a Talmudic source.

The story of the Jewish community in Provence in Southern France is similar. Rav Avraham, eleventh-century Av Beit-Din of Narbonne, seems oblivious to the idea that anyone would not give the gifts in the Diaspora, much as Al-Fasi and Maimonides were. Rav Avraham quotes the Mishnah which says that the gifts are given in the Diaspora, and leaves it untouched without any further discussion of the position. Only the first shearings are limited to Israel.⁶ Rabbi Avraham ben David, his son-in-law, dismisses a popular lenient custom as nothing more than a “מנהג רע שאסור.”⁷ His student, Rabbi Yonatan of Lunel, also fails to consider a limitation to Israel in his commentary to the code of Al-Fasi to *Hullin*.

Early German Practice

We do have more information about the practice that developed in Germany at the time of these late Geonim, miles away from the Persian Gulf. No German pre-1096 text remains that gives an exact

⁵ Printed in Louis Ginzberg, *Geniza Studies in Memory of Dr. Solomon Shechter* Volume 2 (New York: Hermon Press, 1929), 481. The last few words of the commentary are from Numbers 18:31.

⁶ Rabbi Avraham Bar Yizhak Av Beit-Din, *Sefer Ha-Eshkol* ed. Albech (Jerusalem: H. Vagshal, 1984) 130-131.

⁷ Cited in *Kaftor Va-Perah*, 16, and in the Responsa of Radvaz, 2:659. Not surprisingly, Ra'avad is unique among those who question the popular custom in that he does not respond to Rashi as his point of departure (see below); Ra'avad was probably not acquainted with Rashi's discussion of the topic at all.

account of what the old practice was, and most texts addressing the custom were written after the first crusade and merely recall what the earlier convention had been. Different sources capture different aspects of the old German custom, and taken together, they indicate that some individuals gave the meat portions to the priests but most did not.

Avraham Grossman draws our attention to a statement in *Haga'ot Mordekhai*, where a later writer recalls the earlier position of Rabbi Yehudah the priest (Bodleian Library, Neubauer's Catalogue, No. 678):

חסידים הראשונים היו נוהגן במלכות לותר לתת מתנות כהונה, הזרוע והלחיים והקיבה... ושמעתי על הגאון רבי יהודה כהן ובנו שמואל כהן שקשה היה בעיניהם שלא היו העם נוהגן לשלוח למו.⁸

Rabbi Yehudah clearly felt that the gifts ought to have been given. Though a few pious individuals are singled out for having given the gifts, most people did not.

A similar account is found in *Sefer Yihusei Tana'im Va-Amora'im* (Tavla):

ושמעתי כי לפני הרג רב שהיה בשנת תנות⁹ נהגו במגנציא ליתן, ויש שהיו להן מכירי כהונה והיו נותנין להם דבר קצוב כדי לפוטרן מן המתנות לכל השנה.

The key word in this account is the third person plural pronoun “they [gave],” “נהגו.” Though Rabbi Yehudah ben Klonimos clearly recalls that a plural group of people gave the meat portions to the priests, we cannot tell how large a group he refers to. The pronoun could indicate either that the entire German community gave the gifts or that only a few special men did. Avraham Grossman prefers the former reading.¹⁰ Yet, in light of the explicit state-

⁸ Avraham Grossman, *Hakbmei Ashkenaz Ha-Rishonim* (Jerusalem: Magnes Press, 1981), 194.

⁹ Concerning whether one can accept Yehudah ben Klonimos' presentation of pre-1096 Europe, see E.E. Urbach, *Ba'alei Ha-Tosafot: Toldoteyhem, Hibureyhem, Shitotam*, (Jerusalem, Bialik Institute, 1954), 375.

¹⁰ Israel Ta-Shma “Law, Custom, and Tradition in eleventh- and twelfth-century German Jewry,” [Hebrew] *Sidra* 3 (1987), 116; follows Grossman without discussing the various possible interpretations himself.

ment in *Haga'ot Mordekhai*, the better interpretation would be that this pre-1096 custom was held by only a few saintly individuals.¹¹ Even some of these pious individuals did not give the gifts in normal fashion; they only gave money to a priest at the start of the year in place of the official gifts. On a whole, German Jewry refrained from giving the gifts in the required matter, for a reason yet unknown to us.¹²

A final source both confirms that the general custom was lenient and attempts to explain why this lenient custom developed. Rashi's *Sefer Ha-Pardes* alludes to the custom of Rabbeinu Ha-Kadosh, Rav Yizhak ben Yehudah of Mainz.¹³ Rashi was told by Rabbi Natan ben Makhir,¹⁴ "באיגרתו על רבינו הקדוש שלא מיחה בידו", "מליתגן" that Rabbi Yizhak had the exceptional practice to give the meat portions. He is singled out because his practice was surely not the prevalent one, as most German Jews did not give these portions to the priests before the first crusade. Thus, three sources all indicate that only a small number of people gave the gifts in the Biblically specified manner.

Rashi also explains why the masses began this practice, arguing, "לפי שברוב המקומות כהנים אינם מצויין, ועוד דמתנות לא טבילין – החלו העם לנהוג בהם קל". Rashi, an eyewitness to the old custom, describes why this practice developed in early German communities. Living in small towns, many Jews did not have access to priests to give them gifts, so they just ate the entire animal and considered themselves

¹¹ We should also note that Yehudah ben Klonimus never even saw this practice himself, and had no firsthand information about it; he only "heard" from others.

¹² One should not argue that the German custom derives from a different, Palestinian tradition of Talmudic law, as the Palestinian Talmud (Berakhot 3:4) mirrors the Babylonian one, and provides no leniency regarding gifts in exile.

¹³ Shelomo Yitzchaki, *Sefer Ha-Pardes*, Ed. Haim Yehudah Ehrenreich, 1959 reprint (New York: Menorah), 95; also printed in Israel Elfenbein, *Tshuvot Rashi* (New York: Shulsinger Bros., 1943), 17. Grossman, 307, identifies Yizhak ben Yehudah as the subject of Rashi's discussion.

¹⁴ Elfenbein, XXII identifies him as the addressee of Rashi's response. Elfenbein also writes that this text of Rashi was probably written in 1070, in France.

unable to fulfill the requirement to give the gifts. They further justified their actions by arguing that there is no violation in eating meat before the gifts are separated.¹⁵ Rashi does not consider the possibility that the people did not see the purpose behind these gifts in a post-temple age (as the Karites had), or that people were just generally unwilling to part with their resources in order to fulfill the Torah law; he was too optimistic about the validity of the common practice to consider that possibility, and instead argues the non-performance of the mitzvah was the result of the realities of the times.¹⁶

Further evidence for Rashi's reconstruction of the roots of the practice can be deduced from a closer reading of the two other sources. Rabbi Yehudah said that those that gave gifts set aside money to give for a whole year, instead of giving the gifts regularly. This indicates that even the pious individuals who tried to keep the law could also not find priests throughout the year on account of the small communities they lived in. Even those that wanted to give the gifts were equally constricted by a lack of access to ready priests. A later hand also adds to the *Haga'ot Mordekhai* that

ואפשר לכל הבא ליטהר לקיים הדבר ולנהגו אפילו במקום שאין כהן,
יחשב דמיהם, ויצרפם כמו מה שיעלה לשנה, וישלחם אצל כהן.

Here another source confirms the historical narrative constructed by Rashi. Many communities sprouted up without priests, making it impossible to fulfill the practice. Most people responded by stopping the gift giving entirely, but some pious people responded by giving these gifts, albeit in a different way from the strict Biblical and Talmudic law. The lenient custom remained the practice even in later generations and in contexts where priests could readily be found.

This lenient custom remained prevalent in Germany even into the twelfth century. Rabbi Eliezer Ha-Levi (Ravyah 1125) begins his discussion of the topic with Rashi's defense of the custom. Then

¹⁵ Here these gifts differ from the tithes, from which one cannot eat even if there is no priest available.

¹⁶ For a brief discussion of the faith in common practice found in medieval Ashkenaz, see Haym Soloveitchik, "Religious Law and Change: The Medieval Ashkenazic Example" *AJS Review* 12 (1987) 205–223.

Sefer Ravvyah cites the differing opinion of Rav Hai Gaon, but replies that the custom is still to be lenient.

Sefer Ravvyah also adds an original suggestion to justify the custom. In most cases a slaughtered animal would not belong to a Jew at the time that it is slaughtered, so it would be exempt from the gifts. A business arrangement with gentiles grants them partial ownership at the time of the animal's death so it is not the definitive, exclusive possession of a Jew. Eliezer's argument is original, as the Talmud never rules that an animal must belong exclusively to a Jew at the time of slaughter to be required in the gifts. Furthermore, while it is true that Jews sold meat to gentiles from at least the eleventh century in Germany, and even earlier elsewhere,¹⁷ there is less evidence that the animals were actually judged by those communities to have been partially the possessions of gentiles at the time of the slaughter. Still, we can deduce from Ravya's argument that the general practice in his time was to be lenient. Ravya's contemporary, Elazar of Worms (in *Sefer Rokeah*), does not mention the giving of the gifts outside of Israel. His silence implies that he, too, felt the laws were not applicable in the Diaspora.¹⁸

Twelfth-Century France: The Leniency of Rashi

Rashi's commentary on the Talmud approaches this topic with a clear agenda. Rashi's commentary, usually focused on the local text, contains many unnecessary tangents provided to discuss our topic, and reaches conclusions that seem to exceed the simple reading of the text. It is safe to assume that Rashi's commentary is doing some-

¹⁷ The Speyer charter of 1084 gives this right to German Jews, while Agobard's seventh letter speaks of this practice in ninth-century Provence.

¹⁸ *Sefer Yihusei Tanaim Va-Amoraim* is unique among early German Tosafists, in that he feels that the gifts should even be given in the Diaspora, and in modern times.

The Bologna edition of *Sefer Hasidim* does reference the gifts on one occasion (43), but that selection is just a quote from Maimonides, and is not a normative statement for the community of German pietists. The absence of any major discussion may indicate that they were also lenient, refraining from giving the gifts.

thing besides explaining text in this case. It is likely that his commentary was designed to defend the old German practice from its detractors.

Rashi's commentary to the tenth chapter of *Hullin* fails to limit the law, just as Maimonides did. Yet Rashi justifies the common practice in a later occasion in *Hullin* (136b). The Talmud says:

אמר רב נחמן בר יצחק, העידנא נהוג עלמא כהני תלת סבי, כרבי אלעי
בראשית הגז, דתניא, רבי אלעי אומר, ראשית הגז אינו נוהג אלא
בארץ...

Rashi adds, "והוא הדון למתנות." Rashi's comment presents two difficulties. First, it is a digression that is entirely irrelevant to the discussion at hand. The Talmud is discussing the applicability of the first shearings in exile, but Rashi turns to discuss the meat portions. Second, the Talmudic text of 136b gives no indication that the leniency of Rav Nahman would also apply to meat portions; Rashi extends the Talmud on his own.

Rashi explains his position somewhat in a later off-topic statement (138b, s.v. *Le-Vad*). The Mishnah disagreed with Rav Nahman and Rabbi Ilai and held that the first shearings applied even in the Diaspora, but Rashi extends this debate to the priestly meat portions as well, much as he had two pages earlier:

והוא הדין נמי מתנות... דהא רבי אלעי יליף מתנות מראשית הגז. והא
דנקט ראשית הגז, משום דעלה אמר רבי אלעי בהדיא.¹⁹

¹⁹ Rashi engages in some equivocation as to the purpose of the Mishnah's choice of language. On the one hand he writes on 138b that Mishnah, *Hullin* 10:1 uses special language ("בארץ ובהוצה לארץ") to address the law of Rav Nahman and Rabbi Ilai; on the other hand Rashi writes on 130a (s.v. *Ba-Arez*) that the special language is used only so that *Hullin* 10:1 will follow the same form as other Mishnayot. In the earlier Mishnah, Rashi is unwilling to consider that Rav Nahman's law might apply to the meat portions, so he writes that the special language cannot be designed to disqualify Rav Nahman's law in regard to the meat portions. Rashi doesn't even say "this language will be explained later on in the Gemara," his usual reference for concepts that are too difficult to explain yet, but that will be explained later!

Shlomo Eliezer Eidles (Maharsha) explicitly asks this question in his super-commentary to Rashi in *Hullin*, and Akiva Eiger appears to have this

Rashi feels that Rav Nahman's law on 136b applies both to the meat portions and to the first shearings, because Rabbi Ilai said his law in both contexts, yet Rashi fails to explain where in the Talmud we find that Rabbi Ilai applied his law to the meat portions.

Rashi's equivocation can be understood by analyzing the responsum found in the *Sefer Ha-Pardes*, Rashi's only systematic discussion of the topic. Rashi's tone is much more conservative here. What follows is the text of the responsum in the *Sefer Ha-Pardes*, with notes about major differences in the other sources that cite this responsum:²⁰

וששאלתם על הזרוע והלחיים והקיבה, למה לא נהגו בהם²¹, והרי משנה שלמה היא "נוהגים בפני הבית ושלא בפני הבית", ונהגו בהם אמוראים אחרונים [והעידו באיגרתו על רבינו הקדוש שלא מיחה בידו מליתנן]²²? נאמנים עלי דבריו. מי ימחה ביד הנותנין, [אלא כל] הנותן תבוא עלי ברכה!²³

question in mind in his *Gilyon Ha-Shas* to 130a. Joseph Kurkos also asks this question on Rashi in the course of his analysis of Maimonides' position [as printed in Moses Maimonides, *Mishne Torah: Zeraim* (Jerusalem: Shabse Frankel, 1990), 459]. Kurkos's suggested resolution is inconsistent with Rashi's initial lemma, and with Rashi's parallel comments on 74a and 83b, though.

²⁰ *Ha-Pardes*, 95; Elfenbein, *Teshuvot*, 17; and *Or Zaru'a* 479 are the main sources.

²¹ *Or Zaru'a* 479 clarifies the point by adding "ליתנם לכהן." Mordekhai (*Hullin* 736) and Haghut Ashri (*Hullin* 7:10) are working off *Or Zaru'a*'s (missing the same larger chunks, and reflecting the same nuances of language), and often follow his corrections. Given that they are clearly secondhand sources, slight deviations in those sources will not be treated in these notes. Agur (152) is also clearly an abridgment of the original text.

²² This phrase is removed in *Or Zaru'a*, possibly because it would be less relevant and understandable to a later reader who did not know the identity of Rabbeinu Ha-Kodesh. The pronoun in the next line there is changed to plural from singular as a result of removing the singular referent in the previous line.

²³ This reconstruction follows *Or Zaru'a*. In *Pardes*, a final nun (a single stray mark that could easily be a scribal error) forces the first clause of this sentence to end one word earlier, and as a result forces the second clause to become clumsy and plural netting: "מי זה ימחה בידו, הנותנין תבא

אבל נהגו כרבי אלעיי דאמר עליהן ועל ראשית הגז שאינו נוהג אלא בארץ... ודקשיא לך למר, רב נחמן בר יצחק "בראשית הגז נהגו כרבי אלעיי," במתנות לא אמר? בימי רב נחמן אכתי לא נהוגי, השתא חזינן מה דנהוגי. וכי היכי דנהוג בראשית הגז לא מיחו בידם חכמים מלסמוך על רבי אלעיי, השתא נמי, כי הדור ונהוג במתנות, סמכינן עליה, ולא מחינן - מדתרווייהו חד טעמא, דגמרי נתינה מתרומה.

והנותן - נוטל שכר שלם, דכל היכי דאמרינן "נהגו," לא מיבעייה דלא דרשינן בפרקא, אלא אפילו נמי לא מורינן [כדאמר בשלשה פרקים, מאן דאמר הלכה דרשינן ליה בפירקא, מאן דאמר מנהג מדרש לא דרשינן אבל ארויי מורינן, ומאן דאמר נהוגי אפילו ארויי נמי לא מורינן],²⁴ ואי עביד לא מהדרינן להו. [יפה כיון חביבי לומר לפי שברב המקומות הכהנים אינם מצויין, ועוד מתנות לא טבילן – החלו העם לנהוג בהם קל].²⁵

This responsum demonstrates that Rashi felt the gifts should be given in exile. Rashi reiterates that view twice, once at the beginning of the responsum and once at the end. Rashi says only that he will not object to the common practice; he never says that he accepts or would actively teach that the common practice was correct. After all, nowhere did the Talmud provide a leniency; it was only the minority opinion of Rabbi Ilai that was lenient about giving the meat gifts in exile. However, the sages of the later generations should not object if the people choose to follow the leniency of Rabbi Ilai, even though that leniency is outside the pale of Talmudic law, because at least one sage accepted it.

It is no longer surprising that Rashi did not even hint at the idea that the gifts might not apply in the Diaspora in his commentary to the tenth chapter of *Hullin*: Rashi did not want to give the impression that Talmudic law held that the gifts were applicable only in Israel. Still, Rashi felt he had to justify the common practice, so he inserted his justification in the later portions of his commentary.

עליהם ברכת טוב” Elfenbein’s text interprets the single stray mark as a vav, netting: “ומה (!) זה ימחה בידו, הנותנין עליהם תבא ברכת טוב.”

²⁴ The bracketed phrase is missing in *Or Zarua*, probably on account of homeoteleuton.

²⁵ The bracketed phrase is removed by *Or Zarua*. Rashi’s reconstruction of the historical basis of the custom would hold no legal authority even if it were true, so *Or Zarua* omits it from his legal discussion.

Justification of the position was important—so Rashi included his legal conclusion even in his normally non-legal commentary on the Talmud. But it was not normative—so Rashi delayed in presenting it.

Israel Ta-Shma gives an entirely different account for Rashi's ambivalence. Rather than seeing a conflict between the common practice and the Talmud's conclusion, Ta-Shma feels there was a conflict between an old, pre-1096 custom in Germany, and a newer more lenient one.²⁶ However, Ta-Shma's account has two serious deficiencies. First, Ta-Shma's analysis of the pre-1096 custom is only based on Grossman's understanding of the hearsay recounted in *Yihusei Tanaim Va-Amoraim*. As we have demonstrated, a closer reading of all the sources about that time suggests that common practice had been to be lenient before 1096 anyway. Second, while Ta-Shma argues that Rashi's reluctance to be lenient is based less on the Talmud, and more on the old custom, Rashi himself writes that he is reluctant on account of contrary Talmudic passages. Surely, then, the simpler reading of Rashi's words should be preferred without any explicit evidence to the contrary.

The aforementioned sources provide a clear account of Rashi's three-part legal position:

- a) Rav Ilai said his rule in two contexts, one primary (shearings), one secondary (meat portions).²⁷

²⁶ Ta-Shma, 116.

²⁷ However, these sources do leave some confusion as to the Scriptural basis for Rav Ilai's legal position. Rashi's responsum says the law of Rabbi Ilai is applied to the meat portions using the comparison "Netinah-Netinah from the *tithe*." Yet Rashi's commentary (138b) says the law is applied to the meat portions by extension from the *shearings*. Rashi provides two different pathways for the same law, but fails to share the significance of the two different mechanisms.

[The "Netinah-Netinah" comparison is used in three ways on 136a to link first shearing and meat portions, tithes and first shearing, and meat portions and tithes. Rashi could be referring to any of the three comparisons, but his language implies he is referring to one of the latter two, and not the first.

The Tosafot to *Hullin* 136b seem to have understood Rashi as using the comparison "Netinah-Netinah" from the tithes.]

- b) Rav Nahman accepted Rav Ilai only in his primary context (shearings).
- c) Later authorities may choose to accept Rav Ilai even in the secondary context (meat portions).

Rabbi Ilai's leniency was not accepted in its secondary context, the meat portion until a later generation. It was accepted only at a time when the population had no choice but to rely on this hitherto unaccepted opinion.

Rashi makes one final statement on the matter in his commentary to *Shabbat* 10b (s.v. *Havah*).²⁸ This comment confirms our analysis of Rashi's position. The meat gifts were given to the priests in the time of the Talmud, but:

בימי רב חסדא אכתי לא נהוג כרבי אלעי, ובימי רב נחמן בר יצחק נהוג
 כוותיה בראשית הגז ולא במתנות. והשתא קא חזינא דנהוג כוותיה אף
 במתנות. וכי היכי דיאתחזוק במנהג בראשית הגז בימי ר"נ, ולא מיחו בהן
 ונהגא כולו כוותיה – השתא דנהוג אף במתנות לא משנינן מנהגא.

Rashi reiterates yet again that the normative law is for the meat gifts to be given even outside of Israel. However, since the masses chose to follow the minority opinion of Rabbi Ilai on this question, the rabbinic leadership would allow this more suspect custom to stand.

Returning to Southern France, we notice that as Rashi's commentaries began to gain greater influence in Provence, scholars had to address the lenient custom of their Northern brethren more directly. If Rashi was right, then the entire Provencal community could refrain to give the gifts. Any authority who disagreed would have to explain the flaws he found with Rashi's position. Zerahya

²⁸ It is intriguing that Rashi thought it necessary to address a practical point in the laws of forbidden foods in his commentary to *Shabbat*, but did not think it necessary to make this addition in *Hullin* 132b. This problem was formulated most succinctly in the glosses of Shmuel Shtrashon (Rashash) to *Shabbat*: "I do not know why he needs this; especially according to the note of Maharsha that Rav Hisda lived only at the time of Rav Nahman bar Yizhak," before the leniency was adopted even by the first shearing! The question in *Responsa of Rashba* (3:346) attempts to make a similar point about Rashi's reluctance, using Rashi's comments in *Megilah* 28a, though Rashba disagrees with his argument.

Ha-Levi is one of the earliest authorities who tackled Rashi's commentary. Using Rashi, but apparently without having seen Rashi's responsum,²⁹ Zerahya writes (*Ha-Ma'or Ha-Gadol* to *Hullin* 136b):

ראשית הגז—והוא הדין למתנות, דכי הדדי נינהו. ומכאן לא נהיגי העם בדורותינו להפריש מתנות בחו"ל... וכן כתב ה"ר שלמה ז"ל... ויש מחסידי הדורות מחמרין על עצמם להפריש אף בחו"ל, וסומכים לומר דלא נהוג עלמא במידי דאכילה כרבי אלעי... ורב נחמן קניס גלימא נראה שנהגו להפריש מתנות בחוצה לארץ דלא כרבי אלעי, שאם היה מנהג כרבי אלעי לא היו קונסין ומשמתיין. והמחמיר על עצמו גורם ברכה לעצמו.

The prevailing custom of “the masses” was to be lenient, and their practice could now be justified on account of Rashi's commentary. Yet, Zerahya is generally reluctant to accept Rashi, and concludes that though the people could justifiably refrain from giving the gifts based on Rashi's reading of the Talmud, Zerahya himself feels the gifts should still be given.

Without having read Rashi's responsum, Zerahya seems to have misunderstood Rashi slightly. We have seen that Rashi believes the leniency is post-Talmudic in nature. Yet, Zerahya misunderstood Rashi's leniency as being Talmudic, whereby all the Amoraim who gave the gifts must have been "מדת חסידות היה למפרישים," unaware that Rashi himself understood things differently.

In general, Provençal authorities were not as willing to develop new leniencies for the common practice when they felt it was non-Halakhic. Still, when the French leniencies began to travel south, they were willing to use the leniencies developed elsewhere to defend their customs. The latter twelfth century brought increased unity and communication between the two halves of France, and the people of Provence were surely exposed to the French and

²⁹ The thirteenth-century works *Sefer Ha-Mibtam* and *Sefer Ha-Hasblamah* are also both lenient, using Rashi's leniency to refrain from giving the meat gifts to the priests in the Diaspora. [Both are printed in *Ginzei Rishonim* (Jerusalem: Makhon Ha-Talmud Ha-Yisraeli Ha-Shaleim, 1967) to Berakhot 22a.] Neither has an extended treatment of the topic beyond the citation of Rashi.

German traditions,³⁰ and later generations of Provençal authorities engaged in Rashi's position in a more serious way.³¹

Ri and the Early French Tosafists: Rashi's Commentary without his Responsum

The early Tosafists followed Rashi's clear lenient statement in *Hullin* 136, and not Rashi's misgivings in the *Pardes*, and the commentary to *Shabbat* 10b. The early Tosafists felt there was a clear leniency and that this leniency was in effect even centuries before the close of the Talmud. Rashi's explicit statement in the Talmudic commentary used throughout France became the basis for a very lenient common practice despite Rashi's reservations found in a buried, unknown responsum.

³⁰ Regarding the increased communication between the different Jewish communities that opened for the first time in the mid-thirteenth century, see Robert Chazan, *Medieval Jewry in Northern France: A Political and Social History* (Baltimore: Johns Hopkins University Press, 1973) 96-7.

³¹ This phenomenon reaches its apex in the words of Menaḥem Ha-Meiri (*Magen Avot* 15), writing after the full exposition of the French leniency. Meiri is clear that "אנו נוהגין להקל בכך," and he readily adopts the Northern reading that Rabbi Ilai's principle applies to the meat shearings. Meiri knows that this argument for leniency was developed only in Northern France; he notes that "מכל מקום אנו נמשכים בה אחר רבותינו הצרפתים שפסקו שאין "נוהג בחוצה לארץ כלל" "יש נוהגין ליחנם" over the ages. (The presentation is more one-sided in Meiri's *Beit Ha-Beḥira* to *Hullin* (130a) "They have relied on this in these generations not to give the gifts at all.")

Other later Provençal authorities were reluctant to apply Rashi's leniency. Thirteenth-century Rabbi Yizhak of Narbonne cites the French authorities, but concludes that people must be stringent. Rabbi Yizhak cites Ma'or Ha-Gadol, but concludes, "ולי הכותב נראה דרב נחמן לא פסיק הלכתא כרבי "אלעי דנימא כיון דבראשית הגז הלכתא כוותיה, במתנות נמי הלכתא כוותיה דחד טעמה הוא, ולא אמר רב נחמן אלא נהוג עלמא, והיכא דנהוג נהוג, והיכא דלא נהוג לא נהוג, הילכך, מתנות נהיגי בזמן הזה." Fourteenth-century Provençal emigrant Rabbeinu Yeruham (20:3) also follows the opinion of Maimonides to forgo the first shearing but still give the gifts. Finally, the treatment in the *Orḥot Ḥayim* further reflects the heavy ambivalence of the time (32): מתנות אלו אינם נוהגות: (32) אלא בארץ ישראל...ויש מחמירין ומחייבים במתנות אף בחוצה לארץ; ונראין דברי המתירין וכן נהגו בכל גלילות אלו.

For Ri, Rabbi's Ilai and Naḥman both gave explicit leniencies for both the first shearing and the meat gifts even in the Talmudic period. Even though some Amora'im did not accept these leniencies, the normative Talmudic conclusion was not to give either of the two priestly portions. Ri's leniency is more powerful than Rashi's, arguing that the prevalent twelfth-century leniency was even found in the Talmud and was not just a later extension. But, the stronger leniency was also harder to justify in the text of the Talmud. While Rashi's measured justification could withstand the criticism of later generations, Ri's words could not.

Ri composed one responsum that addresses this question explicitly. It is found in *Shibolei Ha-Leket* (2:42), and, in somewhat truncated form, in the Responsa of Rabbi Meir of Rothenberg (Prague, 152). The focus of the responsum is a question of *kilaim*, so the editor who included the responsum in *Teshuvot Maharam* may have edited out some of the discussion of the meat portions that were not relevant, focusing instead on the crux of that issue. It is also apparent that there are words missing in *Teshuvot Maharam*, as the first few lines about our topic do not read smoothly. Yet, the discussion of *kilaim* in the two *teshuvot* is virtually identical, and the discussion of the meat portions is sufficiently similar for us to conclude that there is in fact one responsum here. What follows is the two texts, side by side, with the longer *Shibolei Ha-Leket* on the right:

	ורב נחמן בר יצחק גופיה דפסק דנהוג עלמא כתלתא סבי
לכך הקילו נמי לפטור ממתנות זרוע לחיים בחו"ל	ומתוך כך היה לו לפטור במתנות זרוע לחיים וקיבה בחו"ל
	כדפירש רבינו שלמה בשחיטת חולין דאדרבי אלעאי סמכינן שלא להפרישן בחוצה לארץ דמה היא טעמא דפטר בחוצה לארץ ³²
בראשית הגז כן נמי פטור בשער מתנות.	מראשית הגז פטר נמי ממתנות
מיהו [בפרק] הזרוע רב נחמן עצמו היה מחמיר, דקאמר התם דקניס גלימא	אפילו הכי, הוה מחייב בחוצה לארץ. כדאמרין פרק הזרוע והלחיים והקיבה, רב נחמן קנס גלימא.
היינו פירושו – שרובם במקומו היו נוהגין	

³² This section appears to be missing from the Responsum of Maharam because of homeoteleuton, of the words "חוצה לארץ."

כמותו, ולכך קנסו.	
מ"מ, אנו סמוכים לגמרי דנהגי העם כג' סבי	ומ"מ אנו סמכינן לגמרי אפסקה דנהוג עלמא כתלתא סבי
	ואעפ"י שהיו מחמירין על עצמן מקצת אמוראים וגם רב נחמן בר יצחק היה מחמיר עליהם לעשות כמנהג במקום שלא פשט בו ההיתר
... שלום. יצחק ברבי שמואל.	... שלום. יצחק ברבי שמואל. ³³

Ri has no reluctance with the leniencies and “entirely” follows Rav Nahman, without any reservations. Rashi interpreted Rav Nahman’s gift-giving as the norm (since no one followed Rabbi Ilai in the Amoraic period), but Ri interprets the story as exceptional (it was only in this non-typical location that the people did not follow Rabbi Ilai). Ri felt Rabbi Ilai and Rav Nahman naturally gave leniencies in two contexts, and the French community followed them entirely. On 138b, Ri’s commentary suffices with “ והוא הדין במתנות, ” וחדא מינייהו נקט” A *reportatia* of Rabbi Shimon of Sens from the Ri (*Shabbat* 139a) offers the same argument.³⁴

This position is presented with less clarity in two earlier works of French Tosafists, in Yaakov Tam’s *Sefer Ha-Yashar* (519) and Elazar of Metz’s *Sefer Yerayim* (149). In the former, Rabbeinu Tam’s focus is to demonstrate that there are Talmudic passages that contravene the statement of Rav Nahman bar Yizhak. Rabbeinu Tam explains, “וכיוצא בדבר אתה מוציא בהזרוע והלחיים דלא הוּו נהיגי כרבי אלעי – רב חסדא הוּו שקיל מתנתא מתורא” While Rashi’s responsum saw a clear distinction between the application of Rabbi Ilai to the shearings and the meat gifts, Rabbeinu Tam fully conflates the two issues. Rabbeinu Tam assumed that Rabbi Ilai’s statement applied equally to both the meat gifts and the first shearing, at all time peri-

³³ The signature helps demonstrate that the copyist did not take out any concluding parts of the responsum. If he did, he would surely have removed the final salutation and signature before he made any other cuts. Thus, though an editor may have removed certain irrelevant parts of the Responsum, an unthinking copyist trying to save space did not.

³⁴ This Tosafot ends with the notation “Mi-Pi Rabbi,” Rabbi Shimon’s signature that he had heard these words from his teacher, Ri. Regarding the general purity of earlier formulations and ideas in the Tosafot at the end of *Shabbat*, see E.E. Urbach, 601–605.

ods, and the Rabbis who gave the meat gifts just rejected Rav Naḥman bar Yitzchak. Elazar goes further:

נהוג עלמא כחלתא סבי, כרבי אלעי בראשית הגז, דאמר אינו נוהג אלא
בארץ, מההוא טעמא אמרינן מתנות בהזרוע לחיים והקיבה דלא נהיגי
דמחד טעמא נפיק ליה רבי אלעי, דתרוויהו יליף נתינה נתינה מתרומה.

Rav Elazar was so convinced that Rabbi Ilai stated his rule equally by both matters, he assumed that the *Talmud* relates that Rabbi Ilai used the “*Netinah-Netinah*” comparison to connect the meat gifts with the tithes for this matter. *Sefer Yerayim* has no misgivings about the common practice that ignored this commandment in the Diaspora in its entirety.³⁵

One third and final source verifies Ri’s understanding. The printed tosafot to *Hullin* 136b, edited by Elazar of Touques, appears to be a citation of Rash’s *reportatia* of the Ri’s lesson about the matter. Most of the words should be attributed to Ri, if not all. These tosafot of Elazar begin with the general assumption of the Tosafists that Rav Ilai said his rule by the meat portions and the first shearings. He then asks the same question that bothered Ri in his responsum, how Rav Naḥman could enforce the laws of meat gifts, against Rav Ilai. The answer here is slightly different, “ושמא קודם.” Here Rav Naḥman’s practice is attributed to an earlier point in his lifetime,³⁶ before people followed Rabbi Ilai, instead of a different place where people did not follow him. However, the answer maintains Ri’s general opinion that the positions of Rabbi Ilai and Rav Naḥman apply equally in both contexts, and any

³⁵ Ironically, the two Scriptural sources of this law provided by Rashi are also found in the early Tosafists. Like Rashi’s commentary, Ri argues that the laws of the meat portions are derived from the first shearings (*Berakhot* 22a). Whatever we say by the shearings is also “the rule by the gifts of the arm, cheeks, and innards, for they are learned from each other in the chapter “Ha-Zeroa’.” Meanwhile, *Sefer Yerayim* invokes the other method of derivation, using “*Netinah-Netinah*” from the tithe in some way. [This account is found in the *reportatia* of Ri’s Tosafot of Rabbi Yehudah Sir Leon to *Berakhot*, and is also cited in the Tosafot of the Rosh to that page. Tosafot Ha-Rosh here could easily be a mere copy of the Tosafot of Sir Leon. See Urbach, 596 and 600-1.]

³⁶ In the words of the Rosh, loc. cit., “כי כן היו נוהגין בתחילת ימיו”

sage who gave the gifts rejects the current normative Talmudic conclusion.³⁷

The Tosafot of the Rosh and of Elazar of Touques to this page probably are working off the same source, Ri's lessons as transcribed by the Rash.³⁸ The Rosh adds a line earlier in his discussion, in order to explain the practice of Rav Hisda and others, to give the gifts. Rosh adds

שוב בדורות האחרונים חזרו לנהוג כרבי עלאי בשניהם, ולהכי קאמר
'האידינא נהוג עלמא' אע"פ שעד עתה לא נהגו כן.

As one might expect, there is no discussion of these gifts in the *Sefer Mizvot Ha-Katan* of Rabbi Yizhak of Corbeil, either, demonstrating that he felt the law was not supposed to be practiced in the Diaspora. We cannot know if he wholeheartedly supported the lenient approach as the other Tosafists did, or if he supported it only with reservations as Rashi did.

We can reach a similar conclusion about the position of thirteenth-century Tosafist Rabbeinu Perez of Corbeil. When Tashbetz (387, also cited in Smak-Zurich, 240) is stringent, arguing that “הזדוע הזה מצריך ליתן לכהן אפילו בזמן הזה,” Rabbeinu Perez adds a lengthy footnote that the gifts are not required in the Diaspora, on account of Rashi's commentary in Tractate *Shabbat*. Here also, we cannot be sure if Rabbeinu Perez subscribed to the wholesale leniency of Ri, or the limited one of Rashi. Even at the close of the Jewish settlement in France, most authorities remained lenient in justifying the common practice not to give the gifts.³⁹

³⁷ These two solutions to the stringency found in the Talmud—that it represents either different places, or different times prior to Rav Naḥman's utterance—are both suggested in the analysis of the issues in *Sefer Ravya* (1125) as well.

³⁸ Urbach, 665-7. The end of this Tosafot of the Rosh is clearly Rosh's own words, but the bulk of the discussion is probably from the earlier source.

³⁹ Smak-Zurich's citation of Rabbeinu Perez goes further than his actual words. While Rabbeinu Perez said about the gifts that “אין צריך ליתן,” Smak-Zurich alters the text of his note and says “נהגו שלא ליתן,” further confirming that the lenient custom remained in place as late as the end of the thirteenth century.

Thirteenth-Century Criticism of the Lenient Positions Thorough Rejection of Ri, Weak Acceptance of Rashi

Some later Tosafists began to question the lenient conclusion. Moshe of Coucy (positive command 142) offers a thorough rejection of the Tosafist position in his *Sefer Mizvot Ha-Gadol*.⁴⁰ Rashi's position is then cited as a singular dissenting opinion:

ורשי פירש במסכת שבת, מאחר שנהגו העם כרבי אלעי בראשית הגז,
דאין נוהגת אלא בארץ, ואנו רואים שנהגו כן אף במתנות לא משנין
מנהגא.

Rashi's position is also questioned in the slightly earlier work of Rabbi Yaakov of Marvege, Responsum "Min Ha-Shamayim" (73). He writes that "Israel has sinned," and that Rashi's leniency ought not to be followed.

Rabbi Yizhak of Vienna also questioned the custom, as his peer Moshe of Coucy did. Or Zaru'a (479) begins his discussion in a combative pose.

"הזרוע הלחיים והקיבה נוהגין בארץ ובחוצה לארץ" הרי שנינו
שהמתנות נוהגות בחו"ל ונוהגות בז"ה. ואשכחן נמי אמוראים דיהבי
מתנתא ושקלי מתנתא... ופסקינן הלכתא כוותיהו.

⁴⁰ Though his teacher, Yehudah Sir Leon, accepted Ri's argument in his Tosafot to Berakhot 22a, Moshe of Coucy differed. Perhaps Moshe was motivated to question the French position after his exposure to other Jewish communities and Maimonides in the 1230s. Alternatively, the earlier readings of the Talmud offered by the early French Tosafists were just not able to withstand the arguments offered against them over time. Jacob Hazan of London, *The Etz Hayyim* ed. Israel Brodie (Jerusalem: Mossad Ha-Rav Kook, 1964), 102–104, follows in the wake of Semag, beginning with the unequivocal statement that it applies even in the Diaspora, and ending with a mere citation of Rashi as a final footnote. However, there is no open critique of Rashi like what is found in Semag. The contemporary Bible commentary of Hizkia Bar Mano'ah (Hizkuni) cites Rabbi Ilai to limit only the laws of shearing, not the laws of the gifts. Though Hizkia often quotes Rashi's commentary together with the Talmudic passage quoted, he refrains from quoting Rashi to this Talmudic passage. His position need not match that of Semag, although it may.

Or Zaru'a continues to draft nine more Amoraic statements and stories to the point and concludes, "הא למדת שהיו נוהגין אחר חורבן" "הא למדת שהיו נוהגין אחר חורבן, הבית בחו"ל להפריש מתנות" Rashi's responsum is cited at the end of the discussion only in order to defend the majority practice, but it is clearly not considered normative. Rabbi Yizhak even criticizes Rashi's comments to *Hullin* 138, which explained the Talmud's focus on the shearings, Rabbi Ilai's primary position, by replying, "ואיני מבין, דהא תרוויהו איתנייהו בברייתא, מתנות וראשית הגז" so how was one context more primary than the other?

Rabbi Meir ben Barukh of Rothenburg (Maharam) follows in a similar manner. Maharam begins that "דבר פשוט הוא דמתנות נוהגות אף" "דבר פשוט הוא דמתנות נוהגות אף" Rabbi Meir also adds a new argument, based on the Talmud (136a). This argument may have been alluded to in Or Zaru'a, but it receives its first full explication here:

ועוד ראייה גדולה לדבריי, דבפרק ראשית הגז פריך "אי מה תרומה בארץ אין, בחוצה לארץ לא, אף מתנות." ומשני "אין, דתני רבי אלעאי אומר אין מתנות נוהגות בחוצה לארץ. וכן היה רבי אלעאי אומר ראשית הגז אינו נוהג אלא בארץ. מאי טעמא דרבי אלעאי? יליף נתינה נתינה מתרומה..."
והשתא קשיא לי טובא, פתח במתנות ומפרש טעמא דראשית הגז? ולדבריי ניהא, דלא קיימא לן כרבי עילאי בהא דיליף נתינה נתינה מתרומה אלא בראשית הגז.

The Talmud explicated Rabbi Ilai's reasoning by the first shearing and not the gifts of meat, so he must be accepted only by the shearings. Maharam is bothered by Rashi's position, as understood by Ri, which held that Rabbi Ilai really said his rule by both, yet as we have noted above, this question is not a major problem for Rashi, who recognized that there was a hierarchy of applications, even within Rabbi Ilai himself. Maharam's question reflects the

⁴¹ Yizhak Zev Kahane, *Meir Bar Baruh of Rothenberg: Teshuvot Pesakim U-Minbagim* volume 2 (Jerusalem: Mossad Ha-Rav Kook, 1960), 11–13. This responsum appears in Kahane's manuscript, and is quoted in part in other sources, and is thus obviously the true opinion of Maharam. Tur (61) identified Maharam's position with Rashi, but this identification seems incorrect.

dominance of the Tosafists' recasting of Rashi's position, to which Rabbi Ilai said his rule in two contexts equally.

Maharam's observations force us to consider two other issues. First, Maharam notes that the Talmud asks for the reason to limit the laws to Israel by meat gifts and answers with the reasons for shearing. Though not directly related to our topic, addressing this difficulty in reading the Talmud would be incumbent on all students and commentaries of the Talmud. Second, Maharam's text surely implies that the laws of the meat gifts are learned from the tithes. Yet many of the early French sources were at best vague on this question. Some felt that the laws by meat gifts were actually derived from the shearing, while others argued that the derivation was "*Netinah-Netinah*," from the tithes. These two questions might imply that Rashi and the early Tosafists actually had a different text of the Talmud, entirely.

Rashi's text of *Hullin* 136a can be reconstructed from his commentary as follows:

דתניא, בהמת השותפין חייבת במתנות, ורבי אלעי פוטר. מאי טעמא?
יליף נתינה נתינה מראשית הגז: מה להלן דשותפות לא, אף כאן דשותפות
לא. ואי סלקא דעתך בתרומה מחייב [שותפין] נילף נתינה נתינה מתרומה
[רשי – והכי פטר במתנות]? אלא שמה מינא, בתרומה נמי פטור.
אי מה תרומה בארץ אין, בחוצה לארץ לא, אף ראשית הגז⁴² בארץ אין,
בחוצה לארץ לא? אמר רבי יוסי מנהרביל, אין, והתניא רבי אלעי אומר
ראשית הגז אינו נוהג אלא בארץ...

The Talmudic discussion has two parts. The Talmud begins by discussing the meat portions of an animal owned by two partners, and then moves to discuss the applicability of certain laws in the

⁴² This is evidenced in Rashi's quotation of the Gemara: בחוץ מה תרומה בחוץ לא מתנות לארץ לא, אף ראשית הגז בחוצה לארץ לא. One word difference changes the entire flow of the Talmud.

Maharshal and Maharam Lublin both assume that the meat portions are no longer the focus of the Talmudic discussion at this point; to Rashi's text. This text and its interpretation are also found in Rabbinovicz, Raphael Nathan Nata, *Dikdukkei Soferim* (Munich: Huver, 1886), 192.

Semag may have also had Rashi's text. He notes that the rule of "*Netinah-Netinah*" from tithes to meat gifts is accepted by Rabbi Ilai "for another matter" but not for the matter of determining if the gifts are given in exile.

Diaspora. Maharam felt that the two sections were connected, and were discussing the same categories of laws, the meat gifts. In contrast, Rashi separates the two sections, arguing that they addressed entirely different things. The Talmud first discusses meat gifts given by two partners, and then discusses whether the first shearings were given in exile. The second half of the Talmudic passage is only comparing shearing and tithes; it does not speak of the meat portions at all. It returns to an earlier discussion on the page (Rashi, s.v. *Iy Mah*), and is unconnected to the meat portions.⁴³ The Talmud never asked about, answered or derived this leniency by the meat portions. As we are already aware, Rashi felt that meat gifts are not learned from tithes in the Talmud as Maharam implied, they are only derived by later authorities from the laws of the first shearing that appeared in the Talmud. For Rashi, the extension to the meat gifts was a post-Talmudic development; for Maharam, it was found in the Talmudic text.⁴⁴ Thus, Maharam's position would be summarized as follows:

- a) Rav Ilai said his rule in equal contexts, shearings and meat portions.
- b) Rav Naḥman accepted Rav Ilai only in his one context (shearings), and must have denied him in the other context.
- c) Later authorities have no authority to accept Rav Ilai in a secondary context.

Mordekhai ben Hillel (*Hullin* 736-737) gives primacy to Maharam's argument along with the responsum of Rav Hai. Ravyah is cited and dismissed; after all, Maharam, Rambam, and Al-

⁴³ Thus, one could defuse one of Or Zaru'a's questions on Rashi, "And that which we mention first shearing [on 138b] for it is by it that Rabbi Ilai said his law explicitly, I do not understand, for they are both in the *Baraita* [on 136a], [meat] gifts and first shearing!" Maharam Lublin explains that Rashi's text of the *Baraita* must have had only one of the two.

⁴⁴ One wonders if Maharam's text reflects an alternate earlier tradition of the text that existed side by side with Rashi's, or if it somehow grew out of the common practice not to give the gifts in exile. If the latter is true, our text would be further evidence of the widespread effect of the old German custom.

Fasi all concluded the gifts were to be given even in the present Diaspora. Tashbetz (387, also cited in *Smak-Zurich*, 240) also quotes Maharam's position and concludes, "הזדוע מצריך ליתן לכהן אפילו בזמן הזה"⁴⁵

Spain

Jews returned to Spain only in the thirteenth century, after years of absence following Muslim persecutions. By that time, the early Tosafists had fully developed Rashi's justification by expanding and defending it, and the later Tosafists had already begun to question this justification. Entering into this world, Nahmanides is stringent and unmoved by both the common practice and the northern justification. Even if Rashi was correct, "אי נהוג [כרבי אלעי] – נהוג; ואי". So, the widespread leniency would be unacceptable for the Jewish community of Christian Spain.

Nahmanides offers two familiar reasons to disagree with Rashi, both of which demonstrate that Nahmanides had no knowledge of Rashi's responsum and Rashi's text. Besides asking why the Amora'im gave the gifts even outside of Israel, Nahmanides also adds a new reference to this discussion. *Yevamot* 63a speaks of the various decrees the Sasanian Empire made against the Jewish communities of Babylonia and Persia, and understands one of those decrees as a punishment for not giving the meat gifts as mandated by law. Though this source appears in a non-legal context, Nahmanides still feels comfortable using it to prove his case. This argument also

⁴⁵ Rosh departs from the trend begun by these thirteenth-century authorities and permits the leniency. Though he quotes Maimonides' and Maharam's stringency, he says that the common practice was to be lenient (*Hullin* 11:1 and in *Tur*, 61). Evidently, the many arguments offered against Rashi's position had held little sway, and the masses remained lenient. Rosh's decision to accept the French leniency is consistent with his general approach to follow the French decisions instead of the German ones. Rosh does quote many of the laws of the gifts, but then explains why (11:3): האריכו רבנן בהלכתיהם משום דרב נחמן בר יצחק לא פסק בהדיא הלכתא, אלא אמר דנהוג עלמא הכי, ואי איכא דוכתא דלא נהוג – שידעו הלכותיהם. Rosh highly doubts that there is a place that is not lenient, but he lists all the laws in case such a place does exist.

belies knowledge of the argument in Rashi's responsum. For Rashi, the leniency was post-Talmudic and non-ideal, and so it would be clear that the Amora'im of the Sasanian period would have been required to give the gifts. Only to the Tosafists, who felt the leniency was Talmudic, could one ask from the decree in the Talmudic era. This should not surprise us: if the Tosafists were unaware of Rashi's responsum, it is likely that Nahmanides was unaware as well.

Ramban also gives a fresh perspective on the riddle that bothered many of the authorities, why we would distinguish between the meat portions and the first shearing. We have seen how Rashi's position is built on the distinction between "primary context" and later "derived context," but we have also seen how others like Maharam and Ri felt that both the meat portions and first shearings are considered to be primary contexts. Ramban has the original idea of dividing between the two Amora'im, to be able to explain why Rav Nahman accepted Rabbi Ilai only piecemeal. Ramban argues that though Rabbi Ilai uses the "*Netinah-Netinah*" source, to extend his law to the meat gifts and to the shearings,⁴⁶ Rav Nahman derives the law of the first shearings using the "*Reishit-Reishit*" comparison, which could only connect tithes and first shearings, leaving the meat gifts in full effect, even outside of Israel.⁴⁷ Ramban later considers a justification that the gifts would be practiced only in Bavel, accounting for the stories in the Talmud where the gifts were given, but he rejects this as well. "אי דאורייתא, אי דרבנן – נוהגות הן המתנות בחוצה לארץ, בכל מקום ובכל זמן"

Earlier French, German, and Provençal authorities all questioned Rashi but were ultimately willing to accept his position and the common practice, at the last moment. Rashi was a serious authority for the common people to follow in their leniency. But Nahmanides had no such compunctions. He concludes, "ומכל מקום, כיון דחזינן לכולהו רבנן דגמרא דמפרשי ומשמתי עליה וקנסי, אפילו בכהן, ראוי

⁴⁶ Nahmanides gives this argument because he has Maharam's text of 136a, not Rashi's.

⁴⁷ Rabbeinu Nissim of Gerondi (*Hullin*, 46b in Al-Fasi pages) would criticize this position of Nahmanides. He feels that if Rabbi Nahman said his principle only by shearing, his motivation would be based on the nature of the different priestly portions, and not their Scriptural derivations.

"להחמיר ולהפריש כדפרישית, אלא שאין כח לשמת ולקנוס". Ramban will forgo only the fine and the excommunication, not the requirement.

Rabbi Shelomoh ben Avraham Aderet (Rashba), works off his teacher's argument in *Torat Ha-Bayit* (3:2).⁴⁸ Rashba begins by citing Rashi along with Ramban's objections. While Nahmanides feels that the gifts are surely mandatory, even if they are required only on account of a rabbinic enactment, Rashba argues that the rabbinic ordinance did not apply in Christian Spain. At first, Aderet feels the rabbinic ordinance was only limited to areas near Israel like Bavel of the Talmud, offering a justification that was raised in Ramban but is ultimately rejected there.

Then Aderet considers a new justification, one that Aderet felt was his own creation (יש לי לומר). This new justification, though, is really the one offered in Rashi's responsum. Buried by time and unknown to most medieval commentators, a new authority thought it up on his own, and claimed to be the originator of the idea. A good solution was bound to reappear in a later time, even if it had been lost in an earlier century.

דקיימא לן כרבי אלעאי, ולפיכך הכי דנהוג בראשית הגז כוותיה נהוג, אף אנו שנהגנו כוותיה במתנות נהגנו... שבקינן להו, כיון דשבקינן להו כוותיה בראשית הגז.

Even if the Talmudic justification was given only in regard to the first shearing, a post-Talmudic justification was provided in regard to the meat portions. Rashba feels:

- a) Rav Ilai said his rule in equal contexts, shearings and meat portions.
- b) Rav Nahman accepted Rav Ilai only in his one context (shearings), but denied him in the other context only because of an extraneous decree.
- c) Later authorities have the authority to accept Rav Ilai in both contexts, ignoring the extraneous decree.

Other students of Ramban's school reflect similar ambivalence on this question. They recognize Nahmanides' valid questions, but

⁴⁸ That section of the *Torat Ha-Bayit* is also reproduced as the commentary to *Hullin* 136b.

still try to defend Rashi's reading and the lenient practice. Rabbi Aharon Ha-Levi offers the Tosafists' solution to the first question of Nahmanides in the *Bedek Ha-Bayit*, saying that there were different communities that took different customs, even in the Talmudic period, so leniency could be maintained in Europe as well.⁴⁹ The writer of the *Sefer Ha-Hinukh* notes succinctly:

ולעניין אם נוהגות עכשיו בזמן הזה⁵⁰ אם לא: כבר חלקו על זה הרבה מגדולי המפרשים. והעולה מן השמועה בפרק הזרוע אם הפירוש הטוב שנוהגות הם היום, וכן דעת רב אלפסי זכרונו לברכה והרמבן זכרונו לברכה. אבל עכשיו אין בנו כח על הטבחים להכריכם ליתנם; "וקוי ה' יחליפו כח."⁵¹

Rav Yom Tov ben Avraham Al-Ashbili (Ritva) ends with a similar message that whoever is stringent receives a blessing. Like Rashi, Ritva knew both that the common practice was lenient,⁵² and that the Talmudic conclusion was stringent. So he offered a blessing to those few who chose to be stringent, possibly encouraging them to continue in the practice that was probably more correct. Basing themselves on the tradition of Maimonides and Al-Fasi, Spanish scholars clearly believed that Halakhah demanded the meat portions be given, in sharp contrast to the Tosafists. However, the earlier leniency was already part of the legal tradition and the national practice, and rabbinic leaders were reluctant to reject it totally. Instead, they fell back on difficult justifications for it, coming full circle to the arguments of Rashi from centuries before.

Many Jewish jurists noticed the divergence between the Talmud's application of the laws of the meat portions to the Diaspora, and the lenient common practice. Early Medieval authorities gener-

⁴⁹ Though this position is slightly different from Rashba's, it shares the same basic set of assumptions that Rashi's leniency is correct, but that the stringent practices in the Talmud reflect special circumstances. Thus, it prompted the reply from Rashba: ולא ביאר ולא פירש יותר ממה שכתוב בחיבור! ובכלל דברי המחבר אותו המעט שחשב להכמה. והעומד על החיבור ידענו.

⁵⁰ He almost surely means in this time that we live in exile, not in this time, specifically. See *Minhat Hinukh* to this section.

⁵¹ A play on Isaiah 40:31.

⁵² Ritva observes, "the people do not have the custom in all of these generations to separate the gifts." Ran offers an identical presentation.

ally respond to the divergence by taking one of two extremes, Mediterranean authorities ignored the common practice, while the French Tosafists justified the common practice, and argued that it was Talmudically sanctioned. Rashi is unique among these early authorities in that he provides a reluctant leniency; this is justified from a post-Talmudic perspective.

Later Medieval jurists are forced to offer more nuanced opinions. Some are still stringent, but still need to spend time and energy to reply to the Tosafists' justification, while others are begrudgingly lenient despite the evidence, but few would take the two extremes taken in the earlier generations. Ironically, though Rashi's justification seems to be the best one to account for all the evidence, it is virtually ignored by most authorities. His original responsum was lost, and by the time others intuited his ideas, the text of the Talmud had been changed, making his reasoning no longer relevant to the discussion at hand. ❧