

## Abstract

### The Legal Philosophy and Jurisprudence of Rabbi Moshe ben Nahman (Ramban)

Rabbi Moshe ben Nahman (Ramban) was an influential communal leader, biblical exegete, Jewish philosopher, kabbalist, poet, and halakhist. Ramban contributed extensively and profoundly to the whole range of these disciplines. Yet Ramban's greatest and most lasting impact was in the realm of halakhic jurisprudence. Ramban penned halakhic treatises in virtually every available genre of halakhic writing--codes, commentaries, compendiums, animadversions, glosses, sermons, exegesis--and he even founded a new genre of halakhic literature known as *hiddushim*. Furthermore, Ramban established one of the most fertile, influential, and enduring schools of halakhic thought. Ramban's academy—"beit midrasho shel ha-Ramban"—dominated Spanish Talmud study for the next two hundred years, down to the expulsion of Spanish Jewry in the late fifteenth century and produced some of the greatest talmudists of all time. To this day, Ramban and his school's legal writings are staples of Talmud study in traditional yeshivot.

Yet despite Ramban's extraordinary contributions to halakhic jurisprudence, contemporary Ramban scholarship has remained partial to the other aspects of the Ramban's life and works. Scholars have invested substantial resources into studying Ramban's kabbalah, his biblical exegesis, his Barcelona Disputation with Pablo Christiani, his role in the Maimonidean Controversy, and his poetry. Few studies have been dedicated to Ramban's halakhic oeuvre, and no study has focused on characterizing Ramban's jurisprudence. This lacuna in Ramban studies has left us with an incomplete and lopsided portrait of Ramban.

This dissertation, which studies Ramban's halakhic jurisprudence, is a step towards rounding out the scholarly treatment of Ramban's oeuvre. The first part of the dissertation (chapters one through three) studies the role of geonic legal precedent in Ramban's jurisprudence. I argue that Ramban, unlike many

of his predecessors, placed enormous weight in geonic legal precedent, and I contend that one of Ramban's central projects in his halakhic writings is to reestablish the importance of geonic precedent. I argue, against scholars who claim that Ramban was motivated by Andalusian patriotism, that Ramban's position flows from three considerations: his conception of the Talmud as a "closed text", his perception of the Geonim as possessing interpretative traditions from the Amoraim, and the need to maintain the stability and unity of the law.

The second part of the dissertation (chapters four through five) characterizes Ramban's method of halakhic analysis. I argue, against the widely accepted scholarly view, that Ramban was not engaged in a form of tosafist dialectic. I contend, rather, that what is distinctive of Ramban's method of talmudic analysis is best characterized as conceptualism. I offer several examples that illustrate Ramban's conceptualism and contrast Ramban's method with that of the tosafists.

The third part of the dissertation (chapter six) studies the role of the biblical verse in Ramban's normative halakhic jurisprudence. While the Babylonian Talmud is the unrivaled source of normative halakhah, contemporary scholars debate whether medieval halakhists also utilized their interpretation of the biblical verse to determine and decide normative Jewish law. I argue that the biblical verse was an important source for Ramban's jurisprudence. On many occasions, Ramban appeals directly to his interpretation of the verse to derive normative halakhic conclusions.

The Legal Philosophy and Jurisprudence of Rabbi Moshe ben Nahman (Ramban)

By

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by

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I owe a profound debt of gratitude to Professor Haym Soloveitchik. My first encounter with the history of halakhah occurred as a high school student in MTA when my father encouraged me to attend Professor Soloveitchik's Revel seminar on *yayn nesekh*. That experience turned out to be quite memorable. I still recall the excitement and energy in the classroom as Professor Soloveitchik interrogated his students and masterfully developed his analysis of *hamshakhah* through history, halakhah, and economics. After I returned from yeshiva in Israel, Professor Soloveitchik graciously bestowed upon me another six years of tutelage. Those formative years of study with Professor Soloveitchik provided me with a foundation in history and method, and an intimate acquaintance with the literature and personality of the Rishonim, for which I am forever grateful.

Completing a PhD in medieval Jewish history would have seemed quixotic if not for my family members who trod that path before me. My grandfather Rabbi Dr. Bernard Rosensweig completed his doctorate at Revel under Prof. Agus in 1970 and served as professor of Jewish history at Yeshiva College. My grandmother Professor Yaffa Eliach completed her PhD in 1973 at CUNY studying under Prof. Salo Baron and Prof. Saul Lieberman, after which she served as professor of Jewish history at CUNY. My mother, Professor Smadar Rosensweig, studied for her PhD at Columbia University under Prof. Yosef Hayim Yerushalmi and now serves as professor of Jewish studies at Yeshiva University. And my father, Rabbi Dr. Michael Rosensweig, received his PhD from Revel in 1996 under Prof. Haym Soloveitchik and Prof. David Berger and serves as a Rosh Yeshiva at Yeshiva University. My parents' and grandparents' love for Jewish history and their commitment to Jewish learning continues to nourish and guide me as I walk in their footsteps down the path they have set before me.

So much of my learning and intellectual interests come from my parents. From a young age, I was blessed to study Tanakh with my mother and Gemara with my father. I was also fortunate to spend ten years in my father's shiur at Yeshiva University. This dissertation would have been inconceivable if not for the learning and love of learning that permeates their home. My father was particularly helpful in discussing and ironing out some of the ideas and examples in this dissertation.

My two grandfathers, Rabbi Bernard Rosensweig and Rabbi David Eliach, both of whom passed away this year, expressed great interest and encouragement in my research of Ramban. My grandmothers, Prof. Yaffa Eliach and Rebbetzin Miriam Rosensweig, passed away before I began this dissertation, but their commitment to and love for *am yisrael* and Jewish learning continues to inspire me.

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*Aharon aharon haviv*, my greatest debt is owed to Esty, to whom I dedicate this dissertation with so much admiration, gratitude, and love. Esty's support and encouragement, her perspective and wisdom, her verve and creativity, suffuses and enriches every aspect of our lives. She has been my editor and sounding board for so many of the ideas that I have pursued over the last decade, constantly pushing me to refine and clarify both the substance of the ideas as well as their presentation. What I have accomplished over the last decade would have been impossible without her—*sheli, shelah hi*. This is in addition to Esty's achievements as an extraordinary mother to our children—Ayelet, Noam, and Adi (also my three delightful chavrusas)--and as a devoted physician, surgeon, and researcher, who takes meticulous care of her patients.



## Dedication

For Esty,

כל נשמתין דעלמא דאינון איבא דעובדוי דקודשא בריך הוא כלהו חד ברזא חד וכד נחתי לעלמא כלהו מתפרשין בגוונין דכר ונוקבא ואינון דכר ונוקבא מחוברין כחדא...

כד נשמתין נפקין דכר ונוקבא כחדא נפקין, לבתר כיון דנחתי מתפרשן דא לסטרא דא ודא לסטרא דא וקודשא בריך הוא מזוג לון לבתר ולא אתייהיב זווגא לאחרא אלא לקודשא בריך הוא בלחודוי דאיהו ידע זווגא דלהון לחברא לון כדקא יאות, זכאה הוא בר נש... דאתחבר נפש בנפש כמה דהוו מעקרא... הוא בר נש שלים כדקא יאות.

(זוהר, פרשת לך לך)

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## Introduction: Ramban's Legacy in Halakhah and Talmudic Commentary

Rabbi Moshe ben Nahman (1194 - 1270) was an extraordinary halakhist, philosopher, kabbalist, biblical exegete, and communal leader. He was the leader of the Jewish community of Gerona. He defended Judaism from the attacks of Pablo Christiani in a public disputation in Barcelona before King James I of Aragon, and he was a crucial mediator between the communities of Spain, northern France, and Provence during the Maimonidean Controversy.

Ramban's writings are some of the most influential works in the Jewish canon, and they span the range of literary genres: poetry, biblical exegesis, kabbalah, philosophical writings (e.g. *Sha'ar ha-Gemul*), legal interpretation and glosses, sermons, and codes of Jewish law. Ramban's commentary on the Torah is published in every standard version of the *mikra'ot gedolot* and is one of the most important and oft-studied biblical commentaries, second only to Rashi's. Ramban's commentary contains foundational writings on biblical exegesis, Jewish philosophy, kabbalah, and *ta'amei ha-mitzvot*.

Ramban's greatest impact was in the realm of talmudic study, halakhah and halakhic jurisprudence. Indeed, few medieval scholars left as profound and permanent a mark on halakhah as Ramban did.

Ramban's halakhic writings stand out for several reasons. First, the scope of Ramban's legal writings is extraordinary. Unlike Rashi, Rambam, or Rabbenu Tam, each of whom primarily contributed to one genre of Talmud study—Rashi as the great commentator, Rambam as the great codifier, and Rabbenu Tam as the dialectician par excellence—Ramban's influential halakhic writings span a wide range of genres. These include systematic *hiddushim* on the Talmud; practical halakhic treatises like *Torat ha-Adam*, *Hilkhhot Niddah*, and *Mishpat ha-Herem*; Rif-like talmudic summaries on Hilkhhot Hallah, Bekhorot and Nedarim; a systematic defense of Rif's rulings in *Milhamot Hashem* and *Sefer ha-Zekhut*; short

discourses, *Likkutim*, on contemporaneous halakhic problems;<sup>1</sup> *Hassagot* to Rambam's enumeration of the mitzvot and its theoretical foundations; a commentary on the Torah that includes novel halakhic principles and applications; and responsa.

A second striking feature of Ramban's legal thought is that it draws extensively from the entire range of halakhic cultures and schools. The writings of Provence, northern France, geonic literature, and the Andalusian Sefardic tradition constitute the warp and woof of Ramban's thought, and Ramban engages each of these traditions with equal respect and solemnity. By contrast, Ramban's predecessors worked within confined halakhic cultures and within specific schools of halakhic thought.<sup>2</sup>

Third, Ramban established one of the most fertile, influential and enduring schools of halakhic thought. Ramban's academy—"beit midrasho shel ha-Ramban"—would dominate Spanish Talmud study for the next two hundred years, down to the expulsion of Spanish Jewry in the late fifteenth century.<sup>3</sup> To this day, Ramban and his school's legal writings are staples of Talmud study in traditional yeshivot.<sup>4</sup>

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<sup>1</sup> See Israel M. Ta-Shma, *Talmudic Commentary in Europe and North Africa: Literary History Part Two, 1200-1400* (Hebrew; Jerusalem, 2004), pp. 36-37.

<sup>2</sup> See Moshe Halbertal, *Nahmanides: Law and Mysticism* (New Haven and London, 2020), pp. 101-102:

"Each of the twelfth-century halakhists... worked in his own little world, a world in which geocultural borders oftentimes defined the boundaries of discourse and debate. In Nahmanides's halakhic writings, these regional barriers are systematically broken down in a manner unprecedented for the Middle Ages. His Talmudic novellae are the supraregional halakhic text par excellence in terms of range--the distinct creative streams of the long twelfth century all drain into his novellae from as far away as northern France and North Africa, Provence and Andalusia. The full gamut of that great burst of creativity, with all its diversity, was at Nahmanides's fingertips."

<sup>3</sup> Note the remark of R. Isaac ben Sheshet (1326-1408) about Ramban (Responsa no. 415):

"וכבר ידעת כי היה סיני ועוקר הרים, וכל דבריו בגחלי אש, ועליו סומכין בכל גלילות קטלונאי כמשה מפי הגבורה."

<sup>4</sup> See Ta-Shma, *Talmudic Commentary Part Two*, p. 32:

ספר חידושיו לתלמוד... פותח דף חדש במקצוע זה, והשפעתו על קהל לומדי התורה בישיבות--באמצעות תלמידיו וממשיכי דרכו הגדולים שפעלו בספרד במשך כמאה וחמשים שנה אחריו--נמשכת עד עצם היום הזה...

Moreover, Ramban's school would produce some of the greatest and most influential talmudists of all time, including Re'ah, Rashba, R. David Bonafed, Ritva, Ran, R. Yosef Havivah, Rivash and Tashbetz.

The intellectual continuity and longevity of Ramban's academy stands in sharp contrast with the schools of his contemporaries and predecessors. Rambam, for example, left few disciples, and none of them continued, let alone developed, his distinctive legacy. Rashi had many disciples but few furthered or substantively developed his commentarial enterprise. Rabbenu Tam and Ri founded the tosafist school, but as Haym Soloveitchik has shown, the creative energies of the school were spent within a generation.<sup>5</sup> Rabad had disciples, but it is difficult to discern a common methodology or style that unifies his students with each other or even with their teacher. The absence of a common methodology also calls into question the extent to which the Andalusian school, founded by Rabbenu Hananel and Rif and continued by Ri Migash and Maimonides, constitutes a unified tradition or even a cohesive school of thought.

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בעקבות מפעלו הפרשני של הרמב"ן חיברו תלמידיו הגדולים, ביניהם הרשב"א, הרא"ה, הריטב"א וחכמים אחרים, פרשנות תלמוד רחבת היקף משלהם, שהיתה מיוסדת על עבודת רבם... מורשת ספרותית זו השפיעה, כאמור, בצורה מכרעת על כל תולדות לימוד התורה והוראת ההלכה שלאחריה, והשפעתה ניכרת עד היום הזה.

See also Haym Soloveitchik, "The Halakhic Isolation of Ashkenaz", *Collected Essays I* (Oxford, 2013), p. 32:

"the Catalonian school of Nahmanides was flourishing, and his works were widespread in Spain... Rashba'[s]... novellae are to this day staples of talmudic studies. And... Ritva[']s works are on the desk of all students of the Talmud."

And Haym Soloveitchik, "Printing and the History of Halakhah," *Collected Essays III* (Oxford, 2020), p. 405:

"The *Bet Midrasho shel ha-Ramban*... approached the halakhah... with an improved and more sophisticated version of scholastic dialectic than that of their French predecessors... A new way of thinking came into being with the publication of the writings of the *Bet Midrash* of Ramban... and, in the form that it assumed in Lithuania in the latter half of the nineteenth century, it remains the dominant approach in the yeshiva world to this day."

<sup>5</sup> See Haym Soloveitchik, "Catastrophe and Halakhic Creativity: Ashkenaz—1096, 1242, 1306 and 1298", *Collected Essays I*, pp. 16 - 17.

Ramban's academy stands in contrast to these schools for both its strong methodological and stylistic unity as well as its intellectual longevity over generations. The trained reader can leaf through a Ramban, Rashba, Ritva, or Ran and readily discern the common methodology and style that unites them.<sup>6</sup> The misattribution of commentaries within Ramban's school speaks to this point.<sup>7</sup> It is also worth noting that whereas the tosafist academy declined in stature and intellectual productivity after its initial burst of creativity with Rabbenu Tam and Ri, Ramban's academy continued to grow in stature and influence after Ramban's death, gaining intellectual momentum, clarity and precision over time, and reached its peak several generations later with the writings of Ritva and Ran.

Fourth, Ramban's legal methodology left an indelible mark on halakhic jurisprudence for the ages. In this sense, Ramban's distinctive methodological and substantive contributions to Talmud study are as monumental to the history of halakhah as the commentarial contributions of Rashi, the dialectical contributions of the tosafists, and the codificational contributions of Rambam. Indeed, some of Ramban's enduring contributions to Talmud study have been noted by contemporary scholars. Isadore Twersky and Israel Ta-Shma, for example, both credit Ramban with founding the *hiddushim* genre of talmudic novellae.<sup>8</sup> In a different vein, Haym Soloveitchik and Israel Ta-Shma have noted that the

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<sup>6</sup> Note Ritva's comment (Responsa no. 208):

"רוב החכמים שבארץ הזאת מרועה אחד קיבלנו...באמת זהו שבח חכמי ארצנו שקיבלנו מרועה אחד נאמן, וגדול ידו בכל ואומן, בורר אוכל מתוך פסולת ביתר שכל נאמן, שם חיטה שורה ושעורה נסמן, טעמו כל שומעי דבריו טוב טעמן, כי נמקן ויקראו את שמו מן."

<sup>7</sup> For example, collections of Rashba's responsa were attributed to Ramban (see the *Teshuvot ha-Rashba ha-Meyuhasot la-Ramban*); the *Hiddushim* of Ramban on Tractate Ketubot were attributed to Rashba; and the *Hiddushim* on Tractate Sanhedrin attributed to Ran were actually penned by R. Dovid Bonafed, a different member of Ramban's academy.

<sup>8</sup> Isadore Twersky, "Introduction" *Rabbi Moses Nahmanides (Ramban): Explorations in His Religious and Literary Virtuosity*, ed. Isadore Twersky (Cambridge, Massachusetts and London, England, 1983), p. 5: "[Ramban's] *hiddushim* are also the beginning of a great chain of such literary compositions (Rashba, Ritva, Ran, etc.)." See also Ta-Shma, *Talmudic Commentary Part Two*, p. 35:

הרמב"ן הוא אביהם של כל כותבי ה'חידושים' הספרדים המפורסמים... סוגה זו... קובעת שלב חדש בתולדות בפרשנות התלמוד.

distinctive style and method of Ramban's school played a critical role in the renaissance of Talmud study in the seventeenth and eighteenth centuries as well as the subsequent maturation of the Brisker method in nineteenth century Lithuania.<sup>9</sup>

Yet despite Ramban's extraordinary contributions to Talmud study and halakhic jurisprudence, his legal writings have been largely ignored by contemporary scholarship. The lion's share of Ramban scholarship

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<sup>9</sup> See Haym Soloveitchik, "Hadpasat Sefarim ve-ha-Historiyah Shel ha-Halakhah", *Bar Ilan* 30-31 (5766), p. 321:

מובן אפוא למה הכנסתה רחבת ההיקף של תורת בית מדרשו של הרמב"ן פתחה עידן חדש בהלכה, ומיד ניכרו רישומיה בחיבורי "פני יהושע", "נודע ביהודה" ובמידה מסוימת אף בספר ה"תומים". אך בודדות בלבד, גם אם פניה מרובות עד מאוד עדיין אינה גישה. רק בדור הבא, אצל בעל "קצות החושן" ובן דורו הצעיר, בעל "נתיבות המשפט", מתגבשות התובנות לכלל שיטת לימוד, ובגלגולה השני בליטא, בסוף המאה הי"ט, עיצבה שיטה זו את פני לימוד תורה הנהוג עד היום הזה."

Israel Ta-Shma, "Seder Hadpasatan shel Hiddushei ha-Rishonim le-Talmud" in *Studies in Medieval Rabbinic Literature II: Spain*, (Jerusalem, 2004), p. 220.

has focused on Ramban's kabbalah,<sup>10</sup> theology,<sup>11</sup> biblical exegesis,<sup>12</sup> *ta'amei ha-mitzvot*,<sup>13</sup> his statements at the Barcelona Disputation,<sup>14</sup> and his stance in the Maimonidean Controversy.<sup>15</sup> Writing in 1983,

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<sup>10</sup> See, e.g., Moshe Halbertal, *By Way of Truth: Nahmanides and the Creation of Tradition* (Jerusalem, 2006); Moshe Idel, "We have No Kabbalistic Tradition on This" in *Rabbi Moses Nahmanides (Ramban): Explorations in his Religious and Literary Virtuosity*; Haviva Pedaya, *Nahmanides' Cyclical Time and Holy Text* (Tel Aviv, 2003); Elliot Wolfson, "By Way of truth: Aspects of Nahmanides' Kabbalistic Hermeneutic" *AJS Review* 14:2 (1989).

<sup>11</sup> See, e.g., David Novack, *The Theology of Nahmanides Systematically Presented* (Atlanta, 1992); David Berger, "Miracles and the Natural Order in Nahmanides" in *Rabbi Moses Nahmanides (Ramban): Explorations in his Religious and Literary Virtuosity*; Jonathan Feldman, *The Power of the Soul Over the Body: Corporeal Transformation and Attitudes Towards the Body in the Thought of Nahmanides*, Dissertation, New York University, 1999).

<sup>12</sup> See, e.g., Yosef Ofer and Jonathan Jacobs, *Nahmanides' Torah Commentary Addenda: Written in the Land of Israel* (Hebrew; Jerusalem, 2013); Yaakov Elman, "It is no Empty Thing: Nahmanides and the Search for Omnisignificance" *The Torah U-Madda Journal* 4 (1993), pp. 1-83 ; Amos Funkenstein, "Parshanuto ha-Typologit shel ha-Ramban" *Tziyon* 45 (5740), pp. 35-59; Amos Funkenstein, "Nahmanides' Symbolical Reading of History," *Studies in Jewish Mysticism*, eds. Joseph Dan and Frank Talmage, (Ramat Gan, 2006), pp. 129-150; Mordechai Z. Cohen, "Nahmanides' Four Senses of Scriptural Signification: Jewish and Christian Contexts," *Entangled Histories: Knowledge, Authority and Jewish Culture in Thirteenth Century*, eds. E. Baumgarten, R. Mazo Karras & K. Mesler, (Philadelphia, 2017), pp. 38-58; idem, "Nahmanides: A New Model of Scriptural Multivalence" in *The Rule of Peshat: Jewish Constructions of the Plain Sense of Scripture and Their Christian and Muslim Contexts, 900–1270* (Pennsylvania 2020); Oded Yisraeli, "The Kabbalistic Remez and its Status in Nahmanides' Commentary on the Torah," *Journal of Jewish Thought and Philosophy* 24 (2016), pp. 1 - 30; idem, "Tradition and Creativity in Nahmanides' Kabbalah-- The Commentary on the Creation Story and its History," *Revue des Etudes Juives* 177 (2018) pp. 37-73; Michelle Levine, *Nahmanides on Genesis: The Art of Biblical Portraiture* (Providence, 2009); Michelle Levine, "Form and Rhetoric in Biblical Song: Nahmanides' Commentary on Song of the Sea" *Torah U-Madda Journal* 18, (2020-2021), pp. 131-174; Hillel Novetsky, "The Influences of Rabbi Joseph Bekhor Shor and Radak on Ramban's Commentary on the Torah" (MA Thesis: New York, 1992); Daniel Silver, "Nachmanides's Commentary on the Book of Job," *Jewish Quarterly Review* 60 (1969-1970), pp. 9-26; Bezalel Safran, "Rabbi Azriel and Nahmanides: Two Views on the Fall of Man," in *Rabbi Moses Nahmanides (Ramban): Explorations in His religious and Literary Virtuosity*, ed. Isadore Twersky, (London, 1983), pp. 75-106.

<sup>13</sup> See, e.g., Chayim Henoch, *Nachmanides--Philosopher and Mystic: The Religious Thought of Nachmanides From his Exegesis of the Mitzvot* (Jerusalem, 1978); Josef Stern, *Problems and Parables of Law: Maimonides and Nachmanides on Reasons for the Commandments* (New York, 1998).



Isadore Twersky noted the dearth of scholarship on Ramban's halakhah, observing that "we still lack a clear, comprehensive picture of Ramban as a halakist" and that "systematic study of Ramban as a halakist... is not in a felicitous state."<sup>16</sup> As "symptomatic of the state of scholarship--its foci, priorities, [and] imbalances,"<sup>17</sup> Twersky highlights Simon Dubnow's comment that Ramban's "report on the disputation of Barcelona has historic and religious value and will certainly live longer than his big books in the field of halakhah."<sup>18</sup>

Writing in 2004, some twenty years after Twersky's observation, Ta-Shma offers a similar appraisal of the field:<sup>19</sup>

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<sup>14</sup> See, e.g., Robert Chazan, *Barcelona and Beyond: the Disputation of 1263 and Its Aftermath* (California, 1992); David Berger, "Robert Chazan: Barcelona and Beyond: Disputation of 1263 and its Aftermath," *The Association for Jewish Studies Review* 20 (1995), pp. 379-388; Marvin Fox, "Nahmanides on the Status of Aggadot: Perspectives on the Disputation at Barcelona, 1263", *Journal of Jewish Studies* 40 (1989), pp. 95-109; Shalem Yahalom, "The Barcelona Disputation and the Status of Aggadah in Nahmanides' Thought" (Hebrew), *Zion* 69:1 (5764); Cecil Roth, "The Disputation at Barcelona (1263)," *Harvard Theological Review* 43 (1950), pp. 117-144.

<sup>15</sup> See, e.g., David Berger, "How Did Nahmanides Propose to Resolve the Maimonidean Controversy?" in *Cultures in Collision and Conservation: Essays in the Intellectual History of the Jews* (Boston, 2011); David Berger, "Judaism and General Culture in Medieval and Early Modern Time," *Judaism's Encounter with Other Cultures: Rejection or Integration?*, ed. Jacob J. Schachter (New Jersey, 1997); David Berger, "Nachmanides' Attitude Toward Secular Learning and its Bearing upon His Stance in the Maimonidean Controversy" ( M.A. Thesis: Columbia University, 1965); Nina Caputo, *Nahmanides in Medieval Catalonia: History, Community, and Messianism* (Notre Dame, 2007); Bernard Septimus "'Open Rebuke and Concealed Love': Nahmanides and the Andalusian Tradition" in *Rabbi Moses Nahmanides (Ramban)*, ed. I. Twersky; Moshe Idel, "Rabbi Moshe ben Nahman—Kabbalah, Halakhah and Spiritual Leadership", *Tarbitz* 64:4 (5755).

<sup>16</sup> Twersky, "Introduction", *Rabbi Moses Nahmanides (Ramban): Explorations in his Religious and Literary Virtuosity*, ed. Isadore Twersky (Cambridge, Massachusetts and London, England, 1983), p. 8.

<sup>17</sup> *Ibid.*, p. 8, n. 20.

<sup>18</sup> See Simon Dubnow, *Divre Yeme 'Am 'Olam* (Tel Aviv, 1968), Vol. V, p. 66.

<sup>19</sup> Ta-Shma, *Talmudic Commentary Part Two*, p. 32.

למרות שהרוב המכריע של יצירתו [של הרמב"ן] קשור כאמור, באופן ישיר, לפרשנות התלמוד, הוזנח מחקרו של תחום זה כליל, ותשומת הלב העיקרית במחקר הוסטה אל עבר מעמדו של הרמב"ן בתחום חכמת הקבלה הספרדית המתחדשת, ובמעט גם לעבודתו בתחום פרשנות המקרא. המעט שכתב הרמב"ן בחכמת הקבלה, שאינו מצטרף ליותר מכתריסר עמודים בסך הכול, לא חדל מלהעסיק את המחקר המדעי שנים רבות, ואילו עבודתו המקיפה בפרשנות התלמוד--המהווה את עיקר פרסומו והשפעתו בשעתו ולדורות--לא זכתה לעיון ביקורתי.

Ta-Shma notes that this trend in Ramban studies is exemplified by Yitzchak Baer's treatment of Ramban in his magnum opus, *A History of Jews in Christian Spain*. Ta-Shma observes that the halakhic works of Ramban and his school are not even mentioned in Baer's monumental work.<sup>20</sup>

As recent as 2012, Shalem Yahalom could characterize contemporary Ramban scholarship in the same manner:<sup>21</sup>

המחקר האקדמי עסק רבות בפרשנות התורה של הרמב"ן ובהגותו הקבלית, אך מיעט להתייחס לתובנות התלמודיות שהותוו בבית מדרשו.

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<sup>20</sup> Ibid:

ואף לא נזכרה כלל, ולאו בשורה אחת בספרו היסודי של י' בער, תולדות היהודים בספרד הנוצרית.

By contrast, Baer provides extensive discussion of Ramban's involvement in the Maimonidean Controversy and Barcelona Disputation, see Baer, *A History of the Jews in Christian Spain* (Philadelphia, 1961), pp. 102-106, 150-159.

See Ta-Shma's trenchant review of Baer's work: "Halakhah, Kabbalah, u-Filosofiya be-Sefarad ha-Notzrit," in Ta-Shma, *Studies in Medieval Rabbinic Literature II: Spain* (Hebrew; Jerusalem 2004).

<sup>21</sup> Shalem Yahalom, "Petah Davar" in *Between Gerona and Narbonne: Nahmanides' Literary Sources* (Jerusalem 2012), p. n. Yahalom's study is an important contribution to Ramban scholarship that reconstructs the Provencal layer of Ramban's *Hiddushim*. But the true subject of Yahalom's book is the writings of Rabad and his father in law, the Rav Av Beth Din--the Torah of Provence--which Yahalom excavates from Ramban's novellae.

Consider Oded Yisraeli's *Rabbi Moses b. Nachman (Nachmanides): Intellectual Biography*, published in 2020. Of the three hundred and sixty three pages in Yisraeli's book, Ramban's entire halakhic oeuvre--the *Tashlum Halakhot*, *Milhamot*, *Sefer ha-Zekhut*, the *Hiddushim*, the *Hassagot*, *Torat ha-Adam*--is relegated to twenty-eight pages. Seventy pages are dedicated to Ramban's kabbalah and theology, seventy-four pages are dedicated to Ramban's role in the Maimonidean Controversy and the Barcelona Disputation, and seventy-one pages are devoted to Ramban's biblical exegesis.

Moreover, one of Yisraeli's key theses is that Ramban's halakhic writings were produced very early in Ramban's career (according to Yisraeli, they were completed in Ramban's twenties) and reflect the halakhic interests of his youth. As Ramban matured, Yisraeli claims, Ramban turned to broader matters of theology, kabbalah, and biblical interpretation. According to Yisraeli, Ramban largely abandoned halakhic exposition and jurisprudence by the age of thirty and devoted the rest of his life to theology and biblical exegesis.<sup>22</sup>

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<sup>22</sup> See, e.g., Yisraeli, *Intellectual Biography*, p. 353:

במהלך העשורים הראשונים של חייו שקד רמב"ן על יצירתו התלמודית-ההלכתית... כעשר שנות היצירה האינטנסיביות של רמב"ן הצעיר (ככל הנראה משנות ה'עשרה' המאוחרות ועד לשנות השלושים המוקדמות של חייו)... לעומת זאת מכאן ואילך נראה שרמב"ן משך את ידו כמעט לחלוטין מן העיסוק בפרשנות התלמוד... ובאחת הוא פנה אל סוגות יצירה אחרות.

And p. 107:

כשאנו בוחנים את יצירותיו של רמב"ן על הרצף הביוגרפי-הכרונולוגי בולטת ביותר מגמה ברורה של מעבר מכתובה פרשנית לתלמוד לעיסוק גובר והולך בפרשנות המקרא... חיבוריו התלמודיים של רמב"ן חוברו ברובם המכריע עד לסוף העשור השלישי לחייו... בעשורים המתקדמים יותר של חייו התמקד רמב"ן ביצירות הנוגעות יותר ויותר בפרשנות המקרא ורק מעט מאוד בכתובה הלכתית.

and p. 131:

בשלב מסוים הגיע רמב"ן לידי הבנה שהמוקד התלמודי כשלעצמו חסר כבר את כוח המשיכה הנחוץ, ומכאן הוא יצא למסע שיבה אל היסודות הראשוניים יותר של דת ישראל, אל המקרא וצפונותיו.

See also pp. 124- 125:

אם בצעירותו הספרות התלמודית היא שעמדה במוקד עולמו ועל פרשנותה הוא עמל בתקופה זו, בשנות ה[מאוחרות] של חייו נתונים היו מעייניו דווקא לפירוש המקרא ובעיקר לפירוש התורה... מה ראה רמב"ן לנטוש את זירת היצירה התלמודית?

And on p. 132, Yisraeli writes:

קיבל רמב"ן גם הכרעה אישית בעלת משמעות כאשר היטה את אפיקי היצירה שלו מן התחום התלמודי אל השדה המקראי.

This is a surprising portrayal of one of the greatest and most influential talmudic commentators and halakhists of all time. It is nigh impossible that Ramban could have completed the *Tashlum Halakhot*, *Milhamot I* and *Milhamot II*, *Sefer ha-Zekhut*, *Torat ha-Adam*, and the voluminous *Hiddushim*, and mentor the next generation of scholars in his academy--Re'ah, Rashba, R. David Bonafed--all before he turned thirty.<sup>23</sup> Even if it were possible, the notion that one of the greatest and most influential talmudic commentators and halakhists of all time declared mission accomplished at thirty is so implausible and so

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See also p. 152, n. 147, where Yisraeli refers to:

טענתנו המרכזית בפרק זה על העתקת המוקד בעולמו של רמב"ן מן התלמוד אל המקרא.

And p. 155:

נוכל אפוא לסכם ולקבוע שבספר פירוש התורה וסביבו ניכר פיחות במשקלה של ספרות חז"ל, הנדחקה למקום פחות מרכזי בעולמו הדתי של רמב"ן. את התנועה הזו נראה שיש לזקוף לפנייתו של רמב"ן בתקופה זו אל המקרא בכלל ואל פשוטי המקראות בפרט.

<sup>23</sup> Haym Soloveitchik once remarked that he did not accept the claim that Ramban's *Hiddushim* were merely an early work. Given the scope of the *Hiddushim* and the depth and quality of Ramban's analysis, he argued, the *Hiddushim* reflect a lifetime of labor, not a work that was completed early in Ramban's career.

Putting aside the dating of the *Hiddushim*, Yisraeli's general claim that Ramban at the age of thirty turned his attention away from talmudic studies in favor of theology, kabbalah, and biblical exegesis fails to account for the fact that Ramban mentored the next generation of catalonian Talmud scholars. The most famous of these scholars mentored directly by Ramban are Rashba, Re'ah and R. David Bonafed. Throughout their novellae these scholars cite teachings and interpretations that they directly heard from Ramban ("*sham'ati mi-mori ha-Ramban...*") when they studied with him. (See Ta-Shma, *Talmudic Commentary Part Two*, pp. 55-60, 66-69; Yehoshua Horowitz, "Bonafed, David ben Reuben." *Encyclopaedia Judaica*, edited by Michael Berenbaum and Fred Skolnik, 2nd ed., vol. 4, Macmillan Reference USA, 2007, p. 53.) Rashba and Re'ah were born around 1235. R. Dovid Bonafed was born around 1240. (For Rashba, see Ta-Shma, *Talmudic Commentary Part Two*, p. 55 and Simha Assaf and David Derovan. "Adret, Solomon ben Abraham." *Encyclopaedia Judaica*, edited by Michael Berenbaum and Fred Skolnik, 2nd ed., vol. 1, Macmillan Reference USA, 2007, pp. 421-423; for Re'ah, see Simha Assaf, "Aaron ben Joseph Ha-Levi." *Encyclopaedia Judaica*, edited by Michael Berenbaum and Fred Skolnik, 2nd ed., vol. 1, Macmillan Reference USA, 2007, pp. 214-215; for R. Dovid Bonafed, see Yehoshua Horowitz, "Bonafed, David ben Reuben," *Encyclopaedia Judaica*, p. 53.) In other words, Ramban was over forty years old when these figures were born, which means that Ramban was at least fifty (by the most conservative estimate) when any of these figures joined his academy (assuming that Rashba and Re'ah were ten when they began to study with Ramban). There is no doubt, then, that Ramban was fully engaged in talmudic interpretation and analysis well into his fifties.

unprecedented in the history of halakhah that such a claim would have to be supported by powerful evidence. Yisraeli's argument falls well short of this standard.

Yisraeli's argument is primarily based on the fact that the *Sefer ha-Terumot* of R. Shmu'el ha-Sardi appears to have been written or completed around the year 1223. The *Terumot* cites Ramban's writings, and in a handful of places those citations roughly correspond to passages in Ramban's *Hiddushim*.

Yisraeli assumes that the *Sefer ha-Terumot* had made extensive use of Ramban's *Hiddushim* by 1223 and that he certainly had the entire corpus of the *Hiddushim* in his library. Yisraeli writes:<sup>24</sup>

הציטוטים המובאים כאן [בספר התרומות] לקוחים מן החיבור המוכר היום כספר 'חידושי רמב"ן' למסכתות כתובות, קידושין, בבא מציעא, בבא בתרא, ושבועות. נמצא אפוא שבעת שכתב הסרדי את 'ספר התרומות' שלו, כאמור בסביבות 1223 כבר היה מונח לפניו ספר 'חידושי רמב"ן'.

Yet there is no evidence to suggest that Ramban's *Hiddushim* constituted a single integrated work "*sefer hiddushei Ramban*." Even if R. Shmu'el had access to some tractates of Ramban's *Hiddushim*, there is no basis for the claim that he had all of them. An analysis of the actual citations in the *Sefer ha-Terumot* shows that the number of citations to Ramban's *Hiddushim* does not amount to more than five or six citations in total. In fact, most of these citations can be traced to Ramban's *Hiddushim* to the fourth chapter of Bava Metzia, on the laws of charging interest. There is one citation that roughly corresponds to a passage in Ramban's *Hiddushim* to the first chapter of Kiddushin, though the correspondence between the passages is inexact. And one citation that matches a few lines of a lengthy passage in Ramban's *Hiddushim* to the sixth chapter of Shevu'ot (though the *Terumot*'s version of the passage is significantly different from that which is published in the *Hiddushim*). In other words, the actual

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<sup>24</sup> Yisraeli, *Intellectual Biography*, p. 55.

evidence from the *Sefer ha-Terumot*, at most, supports the claim that by the time Ramban turned thirty he had composed (a first draft of) *Hiddushim* to (parts of) three or four tractates.<sup>25</sup>

In any event, Yisraeli's portrayal of Ramban is consistent with the historiographical trend in contemporary scholarship, paying relatively little attention to Ramban's jurisprudence and his halakhic contributions while emphasizing his biblical commentaries, kabbalah, theology, and role in the Maimonidean Controversy and the Barcelona Disputation.

The present dissertation, focusing on Ramban's halakhic jurisprudence, is a step towards correcting the incomplete and lopsided treatment of Ramban's oeuvre. This dissertation studies three areas of Ramban's halakhic jurisprudence. Part one (chapters one through three) studies the role of geonic legal precedent in Ramban's jurisprudence. Chapter one characterizes Ramban's *Milhamot*, *Sefer ha-Zekhut*, and *Hassagot* to Ramban's *Sefer ha-Mitzvot* and argues that Ramban's defense of Rif was primarily

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<sup>25</sup> Moreover, although the five or six citations in the *Sefer ha-Terumot* roughly correspond to passages in the *Hiddushim*, there are significant variations between the *Terumot's* citation and the text that appears in the *Hiddushim*. For instance, the *Terumot* quotes a passage from Ramban, beginning with a ל"ו and ending with an כ"ב, but the quotation actually mixes together a short passage from the *Hiddushim* with a longer discussion in the *Milhamot*, which might suggest either that the *Terumot* was citing a different document altogether or that the version of the *Hiddushim* in the hands of the *Terumot* was an early version that was later revised and abridged by Ramban. (See *Terumot* 26:5, p. 489 and compare with *Hiddushim* Shevuot 41b and *Milhamot* Shevuot 22a (Alfasi).) The fact that none of the citations perfectly correspond to any passage in the *Hiddushim* may support the view that the *Terumot* was working with an earlier draft of the *Hiddushim*. If that is the case, then Ramban continued to work on the *Hiddushim* well past the year 1223.

In summary, the evidence from the *Sefer ha-Terumot* supports only the limited conclusion that a few tractates of Ramban's *Hiddushim* were available to the *Terumot* by 1223. And even these tractates may have been an early draft of the *Hiddushim* that Ramban continued to edit and revise over the years.

Yisraeli's conclusion that Ramban abandoned halakhic exposition at the age of thirty is unsupported by the evidence. There is no basis for Yisraeli's conclusion that

מכאן ואילך [1223] רמב"ן משך את ידו כמעט לחלוטין מן העיסוק בפרשנות התלמוד

or that by this date Ramban had decided

לנטוש את זירת היצירה התלמודית.

motivated by his perception of Rif as the scion of the intellectual tradition of the Geonim. Here I argue against the theories advanced by contemporary scholars who suggest that Ramban's works were motivated by Andalusian pride, by the opportunity for a creative outlet, and by the desire to preserve works that would fall out of use.

Chapter two argues that Ramban's deference to the geonic-Rif tradition was unique among his Andalusian predecessors. The chapter then reconstructs Ramban's reasons for systematically defending the geonic tradition. The chapter argues that Ramban was motivated by his conception of the Talmud as a closed text (that is, a text that resists easy interpretation), his perception of the Geonim as the recipients of interpretative traditions handed down from the Amoraim, and his concern for the stability and unity of Jewish law. The chapter also argues that Ramban's thirteenth century Catalonian vantage point uniquely positioned him--and not his predecessors--to grapple with the fundamental role of legal precedent in Jewish law.

Chapter three considers how to reconcile Ramban's deference to legal precedent, on the one hand, with his bold intellectual and jurisprudential independence on the other. I argue, against claims in the literature, that Ramban never felt "unconditionally bound" to the rulings of the Geonim, even at the earliest stages of his career. The chapter offers a more precise characterization of Ramban's posture towards legal precedent and argues that Ramban's defense of geonic-Rif halakhah was not about the absolute authority of the Geonim or about the veracity of any particular geonic ruling but rather about demonstrating the substantial weight and persuasiveness of the geonic corpus overall and establishing a *legal presumption* in favor of the rulings of the Geonim. The chapter then shows how Ramban's characterization of talmudic methodology and his declaration of the impossibility of absolute proofs in Talmud study strongly cohere with his project in the *Milhamot* and *Sefer ha-Zekhut*.

Part two of the dissertation (chapters four and five) characterizes the distinctive features of Ramban's method of halakhic analysis in his *Hiddushim*. I argue that Ramban's method--at least that which is

distinctive about it--is best characterized as the conceptual method. Here I build off the observation of scholars that Ramban developed and advanced the method of the tosafists. But whereas these scholars believe that Ramban is best described as a practitioner of tosafist dialectic, I argue that Ramban's conceptualism is actually quite distinct from tosafist dialectic. Chapter four begins by surveying the characterizations of Ramban's method in contemporary scholarly literature. The chapter then carefully lays out the salient features of the conceptual method and contrasts them with the features of tosafist dialectic.

Chapter five presents the general conclusion of my study comparing Ramban's conceptualism to tosafist dialectic. The chapter offers eleven examples from Ramban's *Hiddushim* that illustrate his use of the conceptual method. These examples provide the reader with a perspicuous account of Ramban's conceptual method and illustrate how Ramban wields it as a powerful tool to solve talmudic difficulties that confounded his predecessors. Throughout these examples, I contrast how the tosafists approach the same talmudic difficulty utilizing dialectic with how Ramban approaches it utilizing his conceptual method. The central conclusion of the section--that Ramban's method is best characterized as conceptualist--is supported by the observation of contemporary scholars who have noted that the publication of Ramban and his school's novellae had a direct impact on the rise of conceptualism in nineteenth century Lithuania.

Part three (chapter six) of the dissertation analyzes Ramban's use of the biblical verse in his normative jurisprudence. Chapter six opens with a survey of contemporary scholarly views regarding the role of the biblical verse in determining normative halakhah. Although the Babylonian Talmud is the unrivaled source of normative Jewish law, contemporary scholars differ on the extent to which medieval halakhic authorities utilized their interpretation of the biblical verse--unmediated by the Talmud--to determine normative Jewish law. I argue that Ramban frequently appeals to his interpretation of the biblical verse



to derive normative halakhic conclusions. The chapter offers several examples of this phenomenon from Ramban's *Hiddushim* and commentary on the Torah.

I hope that, in addition to shedding light on three important areas of Ramban's halakhic jurisprudence, this dissertation will stimulate further study of Ramban's extraordinary halakhic oeuvre.

## Chapter 1: Ramban's Defense of Alfasi and the Geonic Tradition

One of the striking features of Ramban's halakhic oeuvre is his systematic and comprehensive defense of Rif and the halakhic tradition of the Geonim.<sup>26</sup> Ramban devoted three full works to defending the rulings of the geonic-Andalusian tradition.<sup>27</sup> His *Milhamot*, published in two parts, defends Rif's rulings from the attacks of R. Zerahyah ha-Levi;<sup>28</sup> his *Sefer ha-Zekhut* defends Rif from the criticisms of Rabad;<sup>29</sup> and his *Hassagot to Sefer ha-Mitzvot* defends Bahag's conception of the mitzvot and their enumeration from the incisive criticisms of Rambam. Beyond these works, defense of geonic traditions and the incorporation of their substantive rulings constitute a significant dimension of Ramban's novellae (*Hiddushim*) on the Talmud as well as his *Torat ha-Adam*.

This chapter begins by characterizing the three works of Ramban dedicated to the defense of Rif and the geonic halakhic tradition. I then consider a central question regarding the project underlying these three works: why did Ramban dedicate so much of his intellectual energy to defending the rulings of his

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<sup>26</sup> Both Charles Chavel and Isaac Unna dedicate a chapter in their respective monographs to Ramban as a defender of "the rishonim". See Isaac Unna's chapter "*Saneigor la-Rishonim*" in Unna, *Rabbi Moshe Ben Nachman: His Life and Work* (Hebrew; Jerusalem 1976), p. 42, and Charles Chavel's chapter "*Magen la-Rishonim*" in Chavel, C. B., *Rabbi Moshe Ben Nachman: His Life, Times and Works* (Hebrew; Jerusalem 1967), p. 83.

<sup>27</sup> On the geonic-Andalusian tradition, see Bernard Septimus, "Open Rebuke and Concealed Love: Nahmanides and the Andalusian Tradition", *Rabbi Moses Nahmanides (Ramban): Explorations in his Religious and Literary Virtuosity*, ed. I. Twersky (Cambridge, 1983), pp. 11-34; and Bernard Septimus, *Hispano-Jewish Culture in Transition: The Career and Controversies of Ramah* (Cambridge, Mass. 1982), pp. 80-114. See also Ephraim Kanarfogel, *Jewish Education and Society in the High Middle Ages* (Detroit 1992), pp. 46, 61.

<sup>28</sup> On R. Zerahyah and his criticism of Rif's rulings and the nature of the *Sefer ha-Ma'or*, see Israel Ta-Shma, *R. Zerahyah ha-Levi: Ba'al ha-Ma'or u-Venei Hugo* (Jerusalem, 1992), pp. 58-125.

<sup>29</sup> On Rabad and his criticism of Rif's rulings, see Isadore Twersky, *Rabad of Posquieres* (Philadelphia, 1980), pp. 117 - 127; Israel Ta-Shma, *Talmudic Commentary in Europe and North Africa: Literary History Part One* (Hebrew; Jerusalem 2000), pp. 201-208.

predecessors? After surveying several approaches that have been suggested, I will argue that Ramban's defense of Rif flows from his perception of Rif as the intellectual heir of the geonic halakhic tradition.

I will then show that Ramban's commitment to the geonic-Rif tradition goes beyond his three works explicitly dedicated to that project. Rif and geonic halakhah constitute a significant dimension within Ramban's other halakhic works and normative rulings. This will set the stage for chapter two, where I will argue that Ramban set out to defend geonic-Rif halakhic precedent because he perceived the Geonim to be the heirs and possessors of the rabbinic tradition of the Saboraim and Amoraim.

Finally, the chapter evaluates two arguments recently advanced by Oded Yisraeli. Yisraeli suggests, first, that Ramban's defense of Rif and the Geonim flowed from his feeling of despair over the collapse of the Andalusian yeshivot following the death of Ri Migash. Second, Yisraeli contends that Ramban's *Tashlum Halakhot*--his Rif-style codes on the laws of Bekhorot, Nedarim and Hallah--constitute a component of Ramban's project defending the works of Rif. I will argue against the validity of both of these contentions.

### *Milhamot Hashem and Sefer ha-Zekhut*

Ramban's *Milhamot* is divided into two parts. The first part (hereafter *Milhamot I*), covering the talmudic orders of *Nashim* and *Nezikin*, is one of Ramban's earliest writings. Ramban would later describe *Milhamot I* as a work 'roiled by the passions of youth.'<sup>30</sup> In the Aramaic preface to *Milhamot I*, Ramban characterizes it as a work "penned to defend an elder [Rif], a master of Talmud... a work of

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<sup>30</sup> See Ramban's introduction to *Milhamot II*, in *Kitvei Ramban I*, 413:

וכבר השלמתי חבורי בחלק הראשון על תכונה אחרת, כי הרתיחוני ימי הנעורים והקדיחו הבחורים אש באפי.

Similarly, in his introduction to the *Hassagot*, Ramban characterizes the *Milhamot* as written בימי חרפי. See Chavel, *Kitvei Ramban I*, p. 419.

clarification... that resolves all problems and answers all objections raised against the treatise authored by a divine being (i.e. Rif).”<sup>31</sup>

Ramban wrote the second part of the *Milhamot* (hereafter *Milhamot II*), covering the talmudic orders of *Zera'im* and *Mo'ed*, somewhat later. Enough time had passed that Ramban could now reflect back on *Milhamot I* as a work of his youth. Moreover, sufficient time had passed for Ramban to adopt a different tone towards R. Zerayah ha-Levi (the author of *Sefer ha-Ma'or*, Ramban's main adversary in the *Milhamot*). In *Milhamot II*, Ramban's tone is less combative, less vituperative, and more respectful.<sup>32</sup>

In his introduction to *Milhamot II*, Ramban describes the origins of the *Milhamot* project as flowing from his “zealous” sense of duty to defend Rif from the many detractors who “persecuted” him (rendering him a *nirdaf*)<sup>33</sup> and who picked away at his rulings.<sup>34</sup> Ramban's introduction also makes clear that he chose R. Zerayah's *Sefer ha-Ma'or* as a target not because he had a score to settle with him but

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<sup>31</sup> *Kitvei Ramban I*, p. 409.

ואפיון לא יסב, ברם עיטא יסב, דליחוש לגבר סב, וקשיש בגמרא... כעין ספרא בירין, ובה נחלין נגדין, באחוית אסירין, ומשרא כל קטרא, מפרק כל תמיון, בחבור בר אלהין.

<sup>32</sup> See Ramban's introduction to *Milhamot II*, in *Kitvei Ramban I*, p. 413:

ואחרי שובי נחמתי ואחרי הודעי חזרתי בי מן הדרך פן אהיה כמתגדר במלאכתי ואינה לפי כבוד הרב, והוא הארז האדיר יפה ענף וחרש מצל במקומותינו, כרוב ממשח הסוכך בגלילותינו. לכן נמנעתי בכל הסדר הזה, והוא סדר מועד, מהשיב על הרב הנזכר זולתי לבקש את הנרדף, רוצה לומר לתרץ דברי רבנו הגדול ולפרש אותם.

<sup>33</sup> See the next note (לבקש את הנרדף). Also observe Ramban's recurring phrase in the *Milhamot* (Shabbat 9a, and Pesachim 16b, respectively):

אמר הכותב זה הפי' בא במחותרת על דברי רבינו הגדול ז"ל ולפיכך ניתן להצילו.  
אמר הכותב זה הפסק בא במחותרת על דברי רבינו הגדול ז"ל לפיכך נתן לנו להציל.

<sup>34</sup> *Kitvei Ramban I*, p. 413:

וקנאתי לרבנו הגדול רבי יצחק אלפאסי זכרונו לברכה קנאה גדולה מפני שראיתי לחולקים על דבריו שלא השאירו לו כפי רב מחלוקותיהם ענין נכון בכל מה שדבר ולא דבר הגון בכל מה שפרש ולא פסק ראוי בכל מה שפסק, לא נשאר עם דבריהם בהלכות זולתי הדברים הפשוטים למתחיל פרק אין עומדין... נמנעתי בכל הסדר הזה, והוא סדר מועד מהשיב על הרב הנזכר זולתי לבקש את נרדף רוצה לומר לתרץ דברי רבנו הגדול ולפרש אותם.

because the *Sefer ha-Ma'or* exemplified the genre of Rif criticism.<sup>35</sup> That the *Milhamot* is devoted to defending Rif, not to criticizing R. Zerahyah, is further attested to by Ramban's later work, the *Sefer ha-Zekhut*, which defends Rif from the objections of Rabad, a critic Ramban himself revered.<sup>36</sup>

The *Sefer ha-Zekhut* is the last of Ramban's works devoted to the defense of Rif. In his introduction to the *Sefer ha-Zekhut*, Ramban writes that it "completes the literary plan that I began to construct [with the *Milhamot*]."<sup>37</sup> Clearly, Ramban saw these works as committed to a common enterprise (i.e., defending Rif rather than criticizing R. Zerahyah).

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<sup>35</sup> *Kitvei Ramban I*, p. 413:

ראיתי לחולקים על דבריו [הר"ף] שלא השאירו לו כפי רב מחלוקותיהם ענין נכון בכל מה שדבר... ולא פסק ראוי בכל מה שפסק...  
ובעבור היות רב דברי הרב רבי זרחיה הלוי זכרונו לברכה על הענין הזה השיבותי על כל מה שאינו נכון בעיני מספרו בסדרי נזיקין ונשים  
Note that Ramban acknowledges that the *Sefer ha-Ma'or* offers more than just criticism of Rif. He states that "most" (*rov*), but not all, of the *Sefer ha-Ma'or* is Rif criticism. See Israel Ta-Shma, *Rabbi Zerahyah Ha-Levi* (Jerusalem, 1992), p. 59, where Ta-Shma notes that a significant portion of the *Sefer ha-Ma'or* is dedicated to talmudic interpretation independent of Rif criticism.

My characterization of *Milhamot's* posture to R. Zerahyah in the text above contrasts with Septimus's claim that Ramban took on R. Zerahyah because he saw him as a Catalonian who defected to the North. See Bernard Septimus, "Nahmanides and the Andalusian Tradition", p. 33:

"R. Zerahyah ha-Levi, as the only great talmudist ever produced by Gerona, might have seemed a logical boyhood hero for the young Nahmanides. Instead he became the target of Nahmanides' youthful and sometimes stinging criticism. For Zerahyah's loyalty was fundamentally different from that of Nahmanides; *he* went over to northern halakhah."

<sup>36</sup> For an example of the reverence Ramban expresses toward Rabad, see Ramban's introduction to the *Sefer ha-Zekhut*, in *Kitvei Ramban I*, p. 416:

אמנם ה', כי מלאו חלחלה מתני, וקלמוסי וקנדרוסי, ינועו בין הידים, כאשר ינוד, הקנה במים, כאשר ידעתי, מעלת האישי ההוא  
בחכמה, וגדלתו ביראת אלהים.

Also note Ramban's characterization of Rabad in his introduction to *Hilkhot Niddah*, in *Kitvei Ramban I*, p. 421:

כבר קדמני אחד קדוש דורש, ולו נאה לדרוש, וחבר בהם ספר נכבד לבעלי הנפש.

Finally, note that throughout the *Sefer ha-Zekhut* Ramban closes his quotations of Rabad's glosses with "these are the words of the master." He opens his own analysis with "and these are the words of the student."

<sup>37</sup> *Kitvei Ramban I*, p. 415,

Furthermore, we need not rely only on Ramban's programmatic characterization of the *Milhamot* and *Sefer ha-Zekhut* to capture the nature of these works. A careful analysis of these works shows that Ramban rigidly adheres to his agenda of Rif defense throughout.<sup>38</sup>

Why did Ramban devote so much intellectual energy to defending Rif? Works like the *Milhamot* and *Sefer ha-Zekhut*, entirely dedicated to defending the views of a halakhic predecessor, were unprecedented.<sup>39</sup> Disagreement, debate, dissent, and animadversions are staples of talmudic and halakhic thought.<sup>40</sup> The notion that Rif needed to be "rescued" from the criticisms of R. Zerayah is as curious as the suggestion that the Amora Rabbi Yohanan needs to be saved from Reish Lakish, or Rava from Abbaye.

Ramban's statements in his introduction to *Milhamot II* only add to the conundrum. Ramban informs the reader that not all of his responses to R. Zerayah are decisive or even fully compelling and the

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ותלמדני דעת דרך תבונות, להשלים קרית ספר אשר החילותי לבנות.

And see Chavel's comment therein at n. 27.

<sup>38</sup> See also Chavel's characterization in *Rabbenu Moshe ben Nachman* (Jerusalem 1967) p. 86:

כל מגמתו בספר זה היא להשיב מלחמה שעה--לסתור דעות החכמים החולקים על הרי"ף המובאים בספר המאור ולהעמיד דברי הרי"ף... לעיניו של המחבר מרחפת תדיר מגמת החיבור--להגן על שיטת הרי"ף--וממטרתו אינו זז.

And Ta-Shma's description, *Talmudic Commentary in Europe and North Africa: Literary History Part Two* (Hebrew; Jerusalem 2004), p. 33:

ספר המלחמות מוקדש כולו למטרה אחת ויחידה זו, להגן על הרי"ף...

<sup>39</sup> In his lectures on the history of halakhah at Yeshiva University, Haym Solovetichik would remark that he could not understand why Ramban felt the need to become Rif's "intellectual lawyer," a position with no precedent in the history of halakhah prior to Ramban. Note the striking resemblance to Unna's characterization of Ramban as the "saneigor la-rishonim", in Unna, *Rabbi Moshe ben Nahman*, p. 42.

<sup>40</sup> Ramban himself appears to acknowledge as much in his introduction to *Milhamot II*, in *Kitvei Ramban I*, pp. 413-414:

יודע כל לומד תלמודנו שאין במחלקת מפרשיו ראיות גמורות ולא ברב קשיות חלוטות.

See also Ramban's *Commentary on the Torah* (Devarim 17:11):

כי התורה נתנה לנו בכתב, ויודע הוא שלא ישתוו הדעות בכל הדברים הנולדים...

reader should therefore be aware that Ramban himself did not find all of his arguments decisive.<sup>41</sup> To the contrary, Ramban readily acknowledges that some of his answers are forced, apologetic, or not dispositive.<sup>42</sup> These disclaimers deepen the question: Why would Ramban take on the mantle of defending Rif only to disavow the fruits of his labor?<sup>43</sup>

A third question regarding the *Milhamot* is why Ramban felt any sense of obligation or duty toward the rulings of Rif. Ramban's known teachers, R. Judah b. Yakar and R. Natan b. Meir, are disciples of Rizba and the northern French tosafists.<sup>44</sup> Ramban's cousin, R. Yonah b. Abraham of Gerona, also studied in northern France with the tosafists,<sup>45</sup> and his Catalonian predecessor, R. Zerahyah ha-Levi, traveled from

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<sup>41</sup> *Kitvei Ramban I*, p. 413:

ואתה המסתכל בספרי, אל תאמר בלבבך כי כל תשובתי על הרב רבי זרחיה זכרונו לברכה כלן בעיני תשובות נצחות, ומכריחות אותך להודות בהם על פני עקשותך, ותתפאר בהיותך מספק אחת מהן על לומדיה, או תטריח על דעתך להכנס בנקב המחט לדחות מעליך הכרח ראיותי. אין הדבר כן.

<sup>42</sup> *Kitvei Ramban I*, p. 414:

ויש אשר אנחנו מלמדים זכות על דברי רבנו עם היותם עדיין רחוקים בפשטי הסגיא או הסגיות. אבל כונתנו בזה לגלות און התלמידים במה שיש בהם מן הזכות, ואין אנו מעלימים מהגיד לכל מסתכל בספרנו מה שנשאר עליה מן הספק.

<sup>43</sup> I heard this question posed by Haym Soloveitchik during his lectures on the history of halakhah at Yeshiva University.

<sup>44</sup> See Chavel, *Rabbi Moshe ben Nahman*, pp. 38-46. The only two figures Ramban cites with the appellation of "mori" are R. Judah b. Yakar and R. Natan b. Meir, both Provencal disciples of Rizba. Note that Ramban refers to Rizba as "Rabbenu ha-Zarfati," with the definite article. See *Kitvei Ramban I*, p. 345. On R. Judah b. Yakar, see Shalem Yahalom, "R. Yehudah bar Yakar: Toldotav u-Mekomo be-Mishnat ha-Ramban" *Sidra* 17, 5762 pp. 79-107. On R. Meir b. Natan, see Shalem Yahalom, "Rabbi Natan be-Rabbi Meir Moro shel ha-Ramban: Hashpa'atah Shel Torat Provans be-Girona," *Pe'amim* 91 (5762), 5-25; See also Israel Ta-Shma, *Talmudic Commentary Part Two*, pp. 30-31.

<sup>45</sup> For R. Yonah and his connection with the tosafists, especially the German school, see Israel Ta-Shma, "Rabbenu Yonah Girondi—ha-Ish u-Fo'alo" in Ta-Shma, *Studies in Medieval Rabbinic Literature: Spain* (Hebrew; Jerusalem, 2004), pp. 109-48.

Gerona to Provence where he would soon become the Rif antagonist *par excellence*. How, then, and why, then, did the young Ramban emerge as Rif's greatest champion?<sup>46</sup>

Before I offer my own explanation of Ramban's project, let us briefly survey three explanations that have been offered.

### Theory 1: The Creative Outlet Theory

One theory addressing this question suggests that Ramban's defensive works were not intended as actual defenses of Rif's rulings. Rather they were an opportunity for Ramban to creatively explore a range of different interpretations (and, in the case of the *Hassagot* to *Sefer ha-Mitzvot*, meta-halakhic theories) without being bound to any normative or doctrinal conclusions. On this view, the purpose of the *Milhamot* was not to defend Rif's stature or rulings but to explore the logical space of talmudic interpretation and theory carved out by Rif's *Halakhot*.<sup>47</sup>

This approach both resolves the problem of Ramban acting as Rif's intellectual lawyer and explains how Ramban could so easily disclaim the *Milhamot's* specific conclusions. Yet it does not fully capture Ramban's project for three reasons. First, it is in tension with Ramban's description of his project in the introductions to the *Milhamot* and *Sefer ha-Zekhut*, where he explains the works as a defense of Rif, not

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<sup>46</sup> This question is forcefully put by Septimus in Bernard Septimus, "Nahmanides and the Andalusian Tradition", pp. 33-34; see also Oded Yisraeli, *Rabbi Moses b. Nachman (Nachmanides): Intellectual Biography* (Hebrew; Jerusalem 2020), p. 46:

מה עומד מאחורי קנאותו הבלתי מתפשרת של רמב"ן לתורת הרי"ף? ככל הידוע לנו רמב"ן לא השתייך מבחינה היסטורית לבית מדרשו של הרי"ף, ולא ניתן להצביע על רצף של מסורת הלכתית חיה בין הרי"ף לרמב"ן.

<sup>47</sup> My father, R. Michael Rosensweig, made this suggestion to me about the *Milhamot* in response to Haym Soloveitchik's observation above. Bernard Septimus offers a similar suggestion with respect to the *Hassagot*. See Septimus, "Nahmanides and the Andalusian Tradition" n. 83: "One senses that Nahmanides seized upon this project more as an opportunity to engage in fresh and wide-ranging exploration of fundamental issues not treated in his earlier works."



as a work of halakhic creativity.<sup>48</sup> Second, rather than exploiting the halakhic space created by Rif's position to explore new interpretations,<sup>49</sup> the *Milhamot* remains narrowly focused on defending Rif.<sup>50</sup> Third, the lion's share of the arguments in the *Milhamot* turn on technical issues rather than novel interpretational insights: whether one statement in the Talmud is disputing or explaining a preceding statement; does the fact that the Talmud closes a particular discussion (*sugya*) with an anecdote signal the Talmud's normative position; which Amora is usually seen as authoritative over another; does the geonic tradition support Rif's position; how do different jurisprudential principles (*kelalei ha-pesikah*) interact in a particular case; etc.<sup>51</sup> If anything, Ramban's *hiddushim* express greater versatility and

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<sup>48</sup> In addition to his vivid descriptions of being moved out of a sense of obligation to defend the persecuted Rif, Ramban writes, in *Kitvei Ramban I*, p. 412:

אין הספר הזה ברב דבריו מחדש דברים שלא נאמרו עד היותו.

<sup>49</sup> For an example of this kind of work, see *Hiddushei Rabbenu Hayyim ha-Levi al ha-Rambam*. In that work, R. Hayyim frequently shows that a solution offered by Tosafot to resolve a contradiction in the Talmud fails to solve the analogous problem within Rambam's system. Hence, a fresh solution is required, which is what R. Hayyim proceeds to offer. This tactic exploits the logical space created by a halakhic work like Rambam's *Mishneh Torah* when read against the fresh talmudic insights of the tosafists.

<sup>50</sup> Recall Chavel's statement in *Rabbenu Moshe ben Nahman* (Jerusalem 1967) p. 86:

כל מגמתו בספר זה היא להשיב מלחמה שעה--לסתור דעות החכמים החולקים על הרי"ף המובאים בספר המאור ולהעמיד דברי הרי"ף... לעיניו של המחבר מרחפת תדיר מגמת החיבור--להגן על שיטת הרי"ף--וממטרתו אינו זז.

<sup>51</sup> This is one of the reasons why it is so difficult to work through the *Milhamot*. We immediately find ourselves plodding through a dense pilpul-like discussion about whether we can assume that Amora X implicitly disagrees with the assumption of Tana Y and whether, therefore, when the Talmud approvingly cites Amora X it intends to reject the halakhic view of Tana Y. Much of the discussion in the *Milhamot* also turns on technical *kelalei ha-pesikah*: does the halakhah follow Rav or Shmuel, and what if there is a quiet majority opposing the otherwise authoritative Amora? There is also extensive discussion whether we can assume that statement X in the Yerushalmi is a novel interpretation of the views in the Bavli (and whether the Bavli in fact intended to oppose Amora X to Tana Y) or a rejection of the Bavli. The difficulty and density of the cumbersome *Milhamot* stands in sharp contrast with the lean and conceptually elegant *Hiddushim*. (See chapters four and five below for a discussion of Ramban's method in the *Hiddushim*.) The difficulty of plodding through the *Milhamot* is probably one

intellectual creativity than the *Milhamot*. Indeed, Ramban himself remarked about the *Milhamot* that “the majority of this work does not contain any new insights”.<sup>52</sup>

## Theory 2: Ramban and the Andalusian Tradition

Bernard Septimus offers a different interpretation of Ramban’s defense of Rif. He suggests that Ramban was motivated by a sense of cultural affinity and identification with the Spanish-Andalusian tradition.

Septimus sees and portrays Ramban as a “defender of the purity of Spanish tradition”:<sup>53</sup>

“From the very beginning of his career, Nahmanides identified strongly with the old Spanish halakhic tradition. Nahmanides’ preoccupation with the defense of Alfasi--not only in his *Milhamot* and *Sefer ha-Zekhut* but throughout the *Hiddushim*--should... be seen in this context.”

As for why Ramban appears to be exclusively preoccupied with the defense of Rif rather than other Spanish authorities, Septimus argues that “when Nahmanides began his career, there was... a very close

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reason why the *Milhamot* was hardly copied--there is not a single surviving manuscript of the *Milhamot*. See Israel Ta-Shma, *Talmudic Commentary: Part Two*, p. 34.

See also Oded Yisraeli’s conclusion, in Yisraeli, *Rabbi Moses b. Nachman (Nachmanides): Intellectual Biography*, p. 43 n. 7:

לשני חיבורי הפולמוס של רמב"ן, 'המלחמות' ו'הזכות', כמעט ואין בידינו כתבי יד קודם לבואם תחת מכבש הדפוס, ומכאן ניתן להסיק שהם לא זכו לפופולאריות רבה בקרב קהילת הלומדים בימי הביניים.

Yisraeli offers a different explanation for the (relative) lack of interest in the *Milhamot*. He writes:

יש מקום להניח שדחיקתו של ספר ה'מלחמות' משולחנם של הלומדים נעוץ בכך שההקשר הפולמוסי על מעמדו של הרי"ף לא עמד עוד בראש מעייניהם בדורות הבאים, ומאידיך ספר החידושים הבשל וה'מוסמך' שנחתם והופץ שנים לא רבות לאחר סיום כתיבת ה'מלחמות' ייתר, למעשה, בעיני הלומדים, את החיבור הפולמוסי הקדום יותר, והחליף אותו במהרה כשופר נאמן ועדכני של תורת רמב"ן.

In any event, my point here is not to deny that there are occasional brilliant insights in the *Milhamot*. Here and there we encounter them. The point is that these are not characteristic of the work, and these occasional flashes of conceptual insight do not constitute a sufficient explanation for why Ramban engaged in the *Milhamot* project.

<sup>52</sup> *Kitvei Ramban I*, p. 412:

אין הספר הזה ברב דבריו מחדש דברים שלא נאמרו עד היותו.

<sup>53</sup> Bernard Septimus, “Nahmanides and the Andalusian Tradition”, p. 30.

identification of Alfasi with the Spanish tradition itself."<sup>54</sup> In Septimus's view, Ramban's true motivation was to defend the Andalusian tradition more broadly, but he focused on Rif whom he saw as the greatest exemplar of that tradition.

Septimus goes so far as to suggest that we should discount Ramban's assertion that his project was motivated by a desire to defend the rishonim [ancients] and their rulings. According to Septimus, it was not the defense of halakhic precedent that motivated Ramban, but Andalusian patriotism:

"One ought not, therefore, be overliteral in interpreting Nahmanides' claim that his defense of Alfasi resulted from zeal for the honor of the ancients. Why after all, did Nahmanides concentrate so much of his zeal on this one particular ancient?... the "ancients" toward whom Nahmanides' conservative sensibility inclined were the great... figures who had become the pillars of Spanish halakhah. Its central pillar, "our great master" Alfasi, received Nahmanides' most sustained and deeply-felt loyalty."<sup>55</sup>

There are, I believe, several problems with this approach. First, it does not provide an adequate explanation for Ramban's exclusive focus on Rif from among all the leading rabbinic scholars of Andalusia. For example, Ramban does not express any special allegiance to Rambam or Ri Migash. The same is true regarding his posture towards R. Meir ha-Levi Abualfia, whose writings are conspicuously

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<sup>54</sup> Ibid, p. 31.

<sup>55</sup> Ibid, pp. 31-32. Beyond the impression that emerges from these quotations, I should note that Septimus's main argument in the article is that Ramban was culturally Andalusian. Thus Septimus appeals to Ramban's ability to compose poetry (pp. 26-27), his familiarity with Yehudah ha-Levi's poems (pp. 29-30), and his description of his own ability to conduct himself in a courtly manner (p. 25), among other Andalusian cultural ideals.

absent from Ramban's halakhic oeuvre.<sup>56</sup> If Ramban was motivated by his identification with Andalusian culture, why gloss over some of its greatest heroes?

Septimus actually concedes this point, but he attempts to address it by distinguishing between "more recent" and more "ancient" Andalusian scholars, arguing that Ramban's allegiance was reserved for the more ancient ones.<sup>57</sup> But that distinction is questionable because Ramban does not express the same kind of deference or systematic and comprehensive allegiance toward early Spanish figures other than Rif.<sup>58</sup>

Second, Septimus's claim that Ramban's devotion to Rif stems from his identification with the Andalusian tradition is problematic because the Andalusian tradition itself did not feel bound to Rif in the manner that Ramban did. Ri Migash, Rambam, and Ramah do not express anywhere near the same kind of commitment to Rif's rulings as Ramban does.<sup>59</sup> Indeed, these figures expressed remarkable independence and freedom to disagree and dismiss Rif's rulings.<sup>60</sup> Ramban ought to have known that taking up Rif defense to bolster his Andalusian *bona fides* would only expose him as an outsider.

Third, Septimus's reading of Ramban as an Andalusian patriot is less than persuasive. It fails to explain Ramban's strong identification with the tosafists. In fact, as we saw earlier, Ramban's known teachers

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<sup>56</sup> See Bernard Septimus, "Nahmanides and the Andalusian Tradition", n. 92: "I am unable to find any evidence that Nahmanides used Ramah's commentaries."

<sup>57</sup> See Septimus at note 83: "That there is an element of real conservatism in Nahmanides' defense of the "ancients" is evident in the fact that his attitude toward more recent Spanish scholars like Ibn Megash and Maimonides is not nearly so derential as it is to Alfasi..."

<sup>58</sup> Although, in Septimus's defense, none of these early Spanish figures (R. Samuel ha-Nagid, R. Isaac Giat, R. Judah of Barcelona) left as comprehensive a corpus of halakhic writing as Rif did.

<sup>59</sup> This point is made by Ezra Schwat in Schwat, "Introduction to Ramban on Tractate Ketubot" *Hiddushei ha-Ramban le-Masekhet Ketubot* (Hebrew; Jerusalem, 5750), n. 10\*.

<sup>60</sup> See my extensive discussion in chapter two below.

were disciples of the tosafists, he considered the tosafists to be his teachers (“they are the guides, they are the teachers, they reveal to us the hidden”;<sup>61</sup> “we drink from the font of the French tosafists’ talmud[ic teachings]”)<sup>62</sup> and he employed their method consistently throughout his *Hiddushim*.<sup>63</sup> Moreover, there was no reason for Ramban, a child of late twelfth-century Catalonia, to view himself as an Andalusian or as an heir to Spanish halakhah. As Septimus himself observes:

“In the twelfth century, it was not entirely clear where Catalonia belonged. Ibn Daud’s *Sefer ha-Qabbalah* does not yet consider Catalonia part of Sefarad, whereas Ha-Meiri refers to twelfth-century Provence and Catalonia as a single “land.” Political and linguistic ties could have supported a view of Catalonia and Provence as constituting a single realm. There are no known representatives of the Andalusian tradition in Catalonia in the second half of the twelfth century [and] the known teachers of Nahmanides and his Catalan colleagues are all northerners. The wonder then is that Nahmanides should suddenly emerge on the scene as a self-conscious representative of Spanish tradition.”<sup>64</sup>

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<sup>61</sup> Introduction to *Dina de-Garmi*.

<sup>62</sup> *Kitvei Ramban I*, p. 332:

ואם רבני צרפת, אשר מימי תלמודם אנו שותים.

See also *Kitvei Ramban I*, p. 338:

רבתינו הצרפתים תלמידיכם אנו ומימיכם אנו שותים.

<sup>63</sup> See below, chapters four and five, for a discussion of Ramban’s methodology and its relation to the tosafists’.

<sup>64</sup> Septimus, “Nahmanides and the Andalusian Tradition,” pp. 33-34. See also Haym Soloveithik, “Rabad of Posquieres,” in *Studies in the History of Jewish Society* (Jerusalem 1980), p. 27:

“till the thirteenth century Barcelona faced north. Both culturally and politically it was more linked to France than to Spain. Much of Provencal history in the twelfth century is the struggle between the Counts of Toulouse and Barcelona for hegemony of Languedoc. Barcelona dated its documents by the reigns of the kings of France and acknowledged them fealty. The language of Catalonia was then closer to Provencal than to Spanish. Its poetry is troubadour like that of Provence rather than epic as in Spain. Nothing was more natural than for R. Abraham of Narbonne to have studied in Barcelona, or for Rabad to

Fourth, Septimus's appeal to cultural patriotism is methodologically problematic. Why should a halakhist devote so much of his intellectual energy to a cause simply because he identifies with the regional culture? Does cultural patriotism or "close identification" with the Spanish tradition generate substantive reasons for a halakhist to pen works like the *Milhamot* and *Sefer ha-Zekhut*? And if we are to choose between an explanation that offers normative halakhic reasons for Ramban's project and the one proposed by Septimus, we should aim for the former.<sup>65</sup>

### Theory 3: The Decline of Spanish Learning

Oded Yisraeli has recently advanced a different theory to explain Ramban's defense of Rif. According to Yisraeli, Ramban's project should be understood against the background of the decline of Andalusian yeshivot following the death of Ri Migash and an ensuing sense of crisis over the state of Spanish

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have included that city in his Provençal itinerary. The Pyrenees, like the English Channel, was a geographic obstacle not a national boundary, and it should come as no surprise if Barcelona halakhically was then part of Provence."

<sup>65</sup> Here I may be in agreement with Oded Yisraeli, *Rabbi Moses b. Nachman (Nachmanides): Intellectual Biography*, p. 46, who writes:

על כן, את פעילותו הספרותית הזו של רמב"ן קשה לראות כביטוי למאבק בין חוגים ומסורות רבניות שונות.

Then again, this line from Yisraeli follows his observation, with a nod to Septimus, that Ramban had no known Spanish teachers.

More generally, Septimus's framework of trying to characterize Ramban by situating him within a northern French or Andalusian halakhic culture has been quite influential on Ramban studies. For almost a half century, Ramban scholarship has largely worked within the parameters erected by Septimus, trying to paint Ramban as either a northerner, a southerner, or some kind of hybrid in between. For the reasons outlined above, I am skeptical of both the accuracy and explanatory utility of this framework. Ramban emerges in the thirteenth century as an independent halakhist who draws freely from the range of sources and methods at his disposal--northern French, Provençal, geonic, Andalusian, and North African. He founded his own academy, with its distinctive method and character, that would swiftly become the preeminent school of halakhah for the next two centuries. Analyzing Ramban through Septimus's framework of north versus south or hybrid of the two and through the lense of cultural patriotism does not do justice to this halakhic giant. And it does not offer a compelling explanation for Ramban's defensive projects.

halakhah. Yisraeli suggests that Ramban saw the need to stop this decline before it became irreversible.<sup>66</sup> Yisraeli paints a picture of Ramban as a conservationist, depressed and heartbroken over the state of Spanish learning, struggling to preserve the remnants of a once great past. Yisraeli writes:

את 'מלחמותיו' של רמב"ן על מעמדו של הרי"ף יש להבין אפוא בהקשר רחב יותר, ובעיקר על רקע צומת הדרכים ההיסטורי בתולדות הספרות הרבנית, שאליה נקלע רמב"ן. כמה עשרות שנים קודם ללידתו כזכור ציין החכם הספרדי ר' אברהם אבן דאוד ב'ספר הקבלה' שחבר 'כי לאחר פטירת ר' יוסף הלוי [אבן מיגש] ז"ל שמם העולם מן הישיבות של חכמה'. תיאור זה המשקף תחושה של שפל ביצירה הרבנית בספרד באמצע המאה השתים-עשרה עולה, כאמור, גם ממקורות אחרים בני התקופה. דלדול היצירה התלמודית בספרד בתקופה זו בולט ביותר משום שהוא עומד בניגוד גמור ליצירה התלמודית בת אותה תקופה באשכנז ובצרפת, ומאיך גיסא גם בניגוד ליצירות רוחניות אחרות בתחומי פרשנות המקרא, הדקדוק והפיוט שפרחו באותה עת בספרד עצמה. אל תוך שממת היצירה הרבנית הזו צמח הרמב"ן והתבגר בה. למעלה משנות דור חלפו מאז פטירת ר"י מיגאש (בשנת 1141), תלמידו הבכיר של הרי"ף, ובעיני הרמב"ן דלדולה של היצירה הרבנית הספרדית איים להפוך לתלישות היסטורית בלתי-הפיכה. הוא ראה בעיניו כיצד עולם התורה הולך ומאבד את אחיזתו הרופפת ממילא במסורת הספרדית העתיקה, שאת מייצגה החשוב הוא ראה כמובן ברי"ף. רמב"ן היה בוודאי מודע לכך שבצפון צרפת תורתם של בעלי התוספות מתפתחת ועושה פירות. הוא לבטח גם הכיר את מרכזי התורה הפורחים בפרובנס... למרות זאת, אופייה היצירתי והביקורתי של התורה שהגיעה מן הצפון והייתה בנויה על הסברה, על החידוש ועל הפלפול לא מילא בעיניו, ככל הנראה, את המקום החיוני של שימור המסורת העתיקה. על כן יציאתם של חכמים פרובנסאליים כמו ר"ה וראב"ד כנגד תורתו של הרי"ף סיכנה בעיניו לא רק את מעמדו של החכם הקדמון הנערץ, אלא גם את מה שנותר מן המסורת העתיקה של חכמי ספרד, שעלולה הייתה לאבד בזאת את נושא דברה המוסמך החשוב ביותר. המניע העמוק של רמב"ן בחיבוריו הפולמוסיים ובמערכה הלוחמנית אותה הוא קשר כנגד ההשגות על הרי"ף היה אפוא הצורך העמוק להיאחז במסורת העתיקה של הגאונים ושל חכמי ספרד, מסורת אשר רמב"ן צפה בעיני רוחו בדאבון לב, כיצד היא הולכת ונבלעת בסערת גלי הזמן בתוך קו האופק של העבר.<sup>67</sup>

<sup>66</sup> Oded Yisraeli, *Rabbi Moses b. Nachman (Nachmanides): Intellectual Biography*, (Jerusalem 2020) pp. 47-48.

<sup>67</sup> Ibid, p. 47.

Yisraeli's theory advances several ideas, each of which needs to be interrogated. I shall focus here on two of them. First, there is no evidence to support the notion that the decline of the Spanish academies in the first half of the twelfth century would cause Ramban to be dismayed in the first half of the thirteenth century. On one level, Yisraeli assumes that Ibn Daub's description of the state of affairs in Spain in 1141 was still relevant nearly three quarters of a century later. There were several major scholars writing and teaching in Spain during and immediately preceding Ramban's career. These include Ramah in Toledo, R. Yonah, first in Gerona and later in Toledo, and R. Zerahyah ha-Levi who had returned to Catalonia from Provence.<sup>68</sup> On another level, this approach assumes, like that of Septimus, that Ramban identified strongly with the Andalusian tradition such that he would feel a need to breathe new life into it.

Second, Yisraeli characterizes the *Milhamot* project as one of conservation. He refers to Ramban's desire to "preserve... what was left of the old Spanish tradition... from vanishing... into the past."<sup>69</sup> But it is not clear how this desire, if Ramban indeed had it, relates to the *Milhamot* project. The *Halakhot* of Alfasi were readily available and intensely studied throughout Spain and Provence, and there is no indication that they were going to fall into disuse or become lost.<sup>70</sup> Furthermore, and more importantly, the

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<sup>68</sup> It is not clear when R. Zerahyah returned to Gerona. Our knowledge of R. Zerahyah's travels come from Meiri's report in *Magen Avot*. Meiri writes:

ובימי ר' זרחיה הלוי, שיצא בבחורותו מעיר גירונדא וזכה ללמוד במגדל לוניל ועמד שם זמן רב וחזר לו לשם [גירונדא] והנהיג בשם כל בני הקהל כמנהג הארץ הלזו [פרובאנס] ונקבע במחזורותיהם בדרך שהוא קבוע במחזורים שלנו..."

For a discussion of R. Zerahyah's travels, see Israel Ta-Shma, *R. Zerahyah ha-Levi: Ba'al ha-Ma'or u-Venei Hugo* (Jerusalem, 1992), p. 15. In a different work, Ta-Shma speculates that R. Zerahyah returned to Gerona "about two years" before his death. See Ta-Shma, *Talmudic Commentary Part One*, p. 196:

ר' זרחיה נפטר בשנת 1186, וכשנתיים לפני כן, עזב את פרובנס וחזר לגירונה מולדתו ושם נפטר.

<sup>69</sup> Yisraeli, *Rabbi Moses b. Nachman (Nachmanides): Intellectual Biography*, p. 47.

<sup>70</sup> See Israel Ta-Shma, *Talmudic Commentary Part One*, pp. 146, 208:



*Milhamot* does nothing to preserve the content or material of the old Spanish tradition. The *Milhamot* is a *substantive* defense, by means of sustained and complex legal arguments, of the specific legal conclusions reached by Rif--and it is not clear how a project like the *Milhamot* relates to either the cessation of Andalusian yeshivot in the twelfth century or to the preservation and conservation of old Spanish teachings.<sup>71</sup>

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חדירתו לפרובנס ובהתפשטותו הכובשת של ספר הלכות הרי"ף במהלך המאה הי"ב... גדולי פרשני התלמוד בפרובנס במאה הי"ב העמידו את ספר הלכות של הרי"ף במרכז התעניינותם ועיוניהם...ספרי המזרח, חלקם בערבית, שמספרם אינו מועט כלל, מרבים להשתמש ברי"ף, ופרשנותם התלמודית מניחה אותו במרכז לימודם...

See also Ta-Shma, *R. Zerahyah ha-Levi*, Chapter 7.

Menahem b. Zerah writes "in [Ramah's] time and prior to it, all that was studied in this land [Spain] were the Halakhot of R. Alfasi." For a discussion of this passage, see Bernard Septimus, *Hispano-Jewish Culture in Transition: The Career and Controversies of Ramah* (Cambridge, Mass., 1982), p. 20.

<sup>71</sup> Yisraeli also suggests that the fact that Ramban was not born into a respected rabbinic family explains (or helps to explain) why he was motivated to preserve the old Spanish tradition. Yisraeli, *Intellectual Biography* p. 47, n. 20, writes:

אפשר שתחושת התלישות ההיסטורית של רמב"ן ניזונה במידה זו או אחרת גם מן העובדה הביוגרפית שהוא עצמו לא השתייך למשפחה בעלת שורשים רבניים מובהקים או ששימרה מסורות רבניות עתיקות.

But I find it difficult to see how one affects the other. Why should Ramban's rabbinic pedigree or the matter of whether his family "preserved ancient rabbinic traditions" bear on this alleged sense of detachment?

Moreover, the assertion that Ramban was born into an undistinguished family is not self-apparent. Tashbetz, (Responsa 1:72) who married Ramban's great-granddaughter, believed that Ramban was a descendant of R. Yitzchak ben Reuven Albargeloni, one of the greatest Spanish rabbis of the eleventh century, whom Ramban refers to (in *Tashlum Halakhot Nedarim* Chapter 5) as *adoneinu ha-zaken*. Tashbetz writes:

והרביעי הי' רבי יצחק בן ראובן אלבר'גלוני שבא מברצלונא לארץ דניא שהיתה שם קהלה גדול' והי' רב גדול ופייטן וחבר האזהרות המתחילות איזה מקום בינה. והרב ר' משה בר נחמן זקנו של מורי חמי הי' ממשפחתו שכן כתוב בה' נדרים שלו שהוא קורא אותו אדוננו הזקן ר' יצחק בן ראובן אלבר'גלוני ובחדושי בתרא שלו כתב עליו ודקאמר מרן ז"ל נראה שממשפחתו ויוצאי יריכו היה וא"כ בני הם מיוצאי יריכו של זה הרב.

If Tashbetz is correct, Ramban was born into one of the most prestigious rabbinic families of Catalonia. See Yisraeli, *Intellectual Biography*, p. 25, n. 34. Charles Chavel, *Rabbi Moshe ben Nachman*, pp. 27-287 accepts Tashbetz's statement, as does Ta-Shma, *Talmudic Commentary Part One*, p. 169; and Ta-Shma, *Talmudic Commentary Part Two*, p. 38:

Put differently, Ramban's project seems to have had nothing to do with the decline of the Andalusian yeshivot. Even if these yeshivot were thriving, there would still be a need to defend Rif's substantive rulings from northern attacks. The *Milhamot* were written to convince the northerners--at least as much as the southerners--of the veracity of Rif's rulings. And this relates to the second point. A work written to defend the substantive legal conclusions reached by Rif has nothing to do with conserving ancient teachings before they recede into the abyss of time.

For these reasons, it is difficult to see how Ibn Daud's observation about the decline of the Andalusian yeshivot in the twelfth century explains Ramban's *Milhamot* project in the thirteenth century.

### Rif and the Geonic Tradition

How, then, are we to understand the Rif-defense project of the *Milhamot* and *Sefer ha-Zekhut*? The first step is to recognize that Ramban perceived Rif as the intellectual heir to the Geonim and their great halakhic tradition. In some circles, Rif was considered a disciple of Rabbenu Hananel, who in turn was considered a disciple of R. Hai Gaon, the last great Gaon of the Yeshiva in Pumbedita. This relationship--or perception of it--is captured by Rabbenu Tam's comment in *Sefer ha-Yashar*: "You will see this in the text of Rabbenu Hananel the student of Rav Hai and in the text of R. Yitzhak Alfasi his student."<sup>72</sup>

Nor was this perception of Rif's lineage unique to Ashkenaz. Ibn Daud in his *Sefer ha-Kabbalah* portrays Rif as a disciple of Rabbenu Hananel and proceeds to associate Rif with R. Hai Gaon:

"By far the greatest of them all (the five Isaacs) was R. Isaac b. Jacob b. Al-Fasi of Qal'at

Hammad, a disciple of R. Nissim b. R. Jacob and of R. Hananel.... He composed a code in the

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שורשיו של הרמב"ן אכן ספרדיים מובהקים הם, שכן הוא מכנה את ר' יצחק ב"ר ראובן הברצלוני--אחת מחמשת הרבנים הגדולים שפעלו בספרד במאה ה"א, ואשר שמם הפרטי היה יצחק--בתואר אדוננו הזקן.

<sup>72</sup> Rabbenu Tam, *Sefer ha-Yasher* (Responsa) pg. 89:

"וגם תראה בגירסת רבנו חננאל תלמיד רב האי, ובגירסת רבנו ר' יצחק אלפס תלמידו".

form of an abridged Talmud. Ever since the days of R. Hai there has been no one who could match him in scholarship.”<sup>73</sup>

Ibn Daud, in the above cited passage, points to another important connection between Rif and the geonic tradition: R. Nissim b. R. Jacob, whom Ibn Daud earlier in *Sefer ha-Kabbalah* refers to as someone who

“received much from Rabbenu Hai, who held him in great affection and sent him letters in response to all of his problems without exception. Indeed, it was through R. Nissim that R. Samuel ha-Nagid used to drink of the waters of Rabbenu Hai.”<sup>74</sup>

Putting aside the question of a personal master-disciple relationship connecting Rif to R. Hai Gaon (which may have been more tenuous than implied by the comments of Rabbenu Tam and Ibn Daub),<sup>75</sup>

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<sup>73</sup> *Sefer ha-Kabbalah*, ed. Gerson Cohen, *The Book of Tradition: Sefer Ha-Qabbalah by Abraham Ibn Daud* (London 1967), p. 84.

ועוד גדול מכלם רב יצחק בר' יעקב בן אלפאסי מקלעה חמאד ותלמידו של ר' נסים בר' יעקב ותלמידו של ר' חננאל.... וחבר הלכות כמו תלמוד קטן. ומימות רב האי לא מצא כמוהו בחכמה.

<sup>74</sup> *Ibid*, p. 77.

אחר פטירת רב חושיאל נסמכו במדינת אלקירואן בנו ותלמידו רב חננאל ורב נסים בר' יעקב בן שאהון שקבלו מר' חושיאל. וקבל רבינו נסים הרבה מרבינו האי שהיה אוהבו מאד ושולח לו ספרים בתשובות כל ספיקותיו על יד. ורב שמואל הנגיד על יד רב נסים היה שותה מימיו של רבינו האי...

R. Nissim's father was an ambassador for the geonic academies. See Ta-Shma *Talmudic Commentary Part One*, p. 139.

No doubt the relationship between Rabbenu Hananel and R. Nissim also explains R. Hananel's access to R. Hai's teachings.

Note also R. Perahyah bar Nissim's report, cited in Ta-Shma, *Talmudic Commentary Part One*, p. 148:

רבי יוסף הלוי אבן מיגש ז"ל, שקיבל מרבי יצחק בעל ההלכות ז"ל, שקיבל מרבנו נסים ז"ל בעל מגילת סתרים.

<sup>75</sup> The actual connection here is more difficult to trace. It is undisputed that Rif is heavily influenced by Rabbenu Hananel's teachings and writings. It is also undisputed that R. Hananel's writings are heavily influenced by the writings and teachings of R. Hai and R. Sherira. But whether and when Rif studied with R. Hananel and whether R. Hananel or his father Hushiel ever studied directly with R. Hai is difficult to discern. See Ta-Shma, *Talmudic*

Rif and Rabbenu Hananel were the vital artery through which the geonic teachings and rulings flowed into Europe. The stamp of R. Sherira and R. Hai is instantly recognizable on every page of Rabbenu Hananel's commentary,<sup>76</sup> and the influence of Rabbenu Hananel on Rif is evident throughout the Rif's *Halakhot*.<sup>77</sup> For Ramban, Rif was the indisputable scion of the geonic tradition and a reservoir of their teachings.<sup>78</sup>

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*Commentary Part One*, pp. 122-124 and 146-148, We do know that R. Hai had great respect for R. Hushiel and attempted to contact him in Kairouan. See Ta-Shma, *Talmudic Commentary Part One*, pp. 123-124. The perception of the Rif-Rabbenu Hananel bridge to Babylonia appears to have been widespread in Ramban's day.

In any event, two facts are important for the argument in the text above. First, there is no doubt that Rif received a reservoir of geonic teachings from R. Hai Gaon. Second, there was a *perception* both in northern France and in Andalusia that Rif had a direct master-disciple relationship with disciples of R. Hai.

<sup>76</sup> Ta-Shma, *Talmudic Commentary Part One*, pp. 125-126:

קיים קשר הדוק בין פירושי הגאונים ופירוש רבנו חננאל, כי פירושיהם מהווים את עמוד התווך של פירושו, במידה כה גדולה, עד כי ניתן לראות את הישגו העיקרי בכך שהצליח לגבש את קטעי תורתו של רב האי, שאותה שאב ממקומות שונים ובלתי רצופים, לכדי פירוש מסודר, שוטף ושיטתי, לסוגיות התלמוד... דרכו להעתיק מדברי רב האי בצורה מילולית ובשטף, על פי רוב בצורה אנונימית... עד כדי כך גדולה תלותו של רבנו חננאל בפירושי רב שרירא ורב האי, שפעמים רבות אין אנו יודעים אם קטע גניזה שהעלינו לקוח מפירוש רב האי או מפירוש רבנו חננאל המעתיק מפירוש רב האי... מחלוקותיו של רבנו חננאל עם הגאונים מועטות מאוד..."

<sup>77</sup> Ta-Shma, *Talmudic Commentary Part One*, pp. 131-132:

ניתן לומר--אולי בהגזמה מסוימת--כי הלכות הרי"ף, הקבועות על בסיס הסוגיות התלמודיות ומהלכן, משקפות ניסיון לזקק מגמת פסיקה ברורה יותר מתוך (ואף כי לא דווקא בעקבות) חיבורו של רבנו חננאל, שהוא מאוזן יותר, בדרך כלל, בין שתי המגמות.

And p. 137:

התמודדות מתמדת, עקיבה ושיטתית עמו [הר"ח] מצויה בספר ההלכות של ר' יצחק אלפסי, שלפי המסורת היה תלמידו של רבנו חננאל ולמד בפניו... הרי"ף מביא אמנם פעמים רבות את דעת רבנו חננאל... רבה מאוד תלותו של הרי"ף בפירוש רבנו חננאל, גם כאשר אינו מזכיר את פירושו כלל, ויש רגליים להנחה כי במקומות הרבים שבהם הביא הרי"ף מדברי הירושלמי, עשה כן בעקבות דברי רבנו חננאל שלפניו ומתוכם. גם סגנון דיבורו של הרי"ף לקוח מסגנונו הפולמוסי של רבנו חננאל.....

And p. 150: Ta-Shma speaks of

הזיקה הרבה הקיימת בין ספר הרי"ף לפירוש רבנו חננאל לתלמוד, הן על פי החומר מפירוש רבנו חננאל המשוקע בו, והן על פי מחויבות הרבה לתלמוד הירושלמי, העשויה אף היא על רבנו חננאל, ובתמוד לו. אולם הזיקה ביניהם מעמיקה יותר מכל זה....

<sup>78</sup> See Ta-Shma, *Talmudic Commentary Part One*, p. 154:

הרי"ף תוקף אפוא בעלי הלכה אחרים על שחלקו על רב האי גאון וסומו מעמדו... בעיקרו של דבר מיוסד ספרו [ההלכות] בשתיקה ובקיצור, על הוראותיהם של הגאונים ואפן הבנתם הם את הסוגיות, אף על פי שאין שמם נזכר על הדברים.

In fact, Moshe Halbertal has shown that Ramban divides the history of halakhah between rishonim and aharonim. Rishonim for Ramban, refers to the geonic tradition culminating with Rif. Aharonim refers to the post-Rif scholars. Ramban usually refers to Rif directly as “our great master” (rabbenu ha-gadol), reflecting his special status as the bridge between the two eras. Halbertal writes:

הרמב"ן הוא בעל ההלכה הראשון העושה הבחנה שיטתית וחשובה בין "ראשונים" ל"אחרונים" כציון תקופות, וההבחנה הזאת עומדת במרכז תפישת תולדות ההלכה של הרמב"ן... תקופת הראשונים כוללת את הגאונים וסופה הוא הרי"ף. הצירוף של הגאונים והרי"ף מכונה בלשונו של הרמב"ן "הראשונים ורבנו הגדול", כינוי המופיע בחיבורי ההלכה של הרמב"ן על כל שכבותיהם. בתואר "אחרונים" מציין הרמב"ן את פרשני התלמוד ובעלי ההלכה הבאים אחרי הרי"ף, עד לזמנו שלו.<sup>79</sup>

Halbertal also notes that Ramban's periodization of the history of halakhah is designed to position the Rif as the great, final act of the geonic era:

האופן שבו תוחם הרמב"ן את תולדות ההלכה מלמד על מעמדו הסגולי של הרי"ף בתמונה היסטורית זו... התמונה ההיסטורית שהרמב"ן מעוניין להציג היא הראשונים והרי"ף, ולעומתם האחרונים. אזכורו הנבדל של הרי"ף בשיוכו לראשונים מלמד על כך, שכמי שעומד בסופה של תקופת הראשונים, הוא גם מייצג את שיאה...<sup>80</sup>

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Bernard Septimus, “Nahmanides and the Andalusian Tradition”, n. 81, notes that Rambam (Maimonides), too, saw Rif's *Halakhot* “as the culmination and peak of geonic literature.” This, based on the following passage in Rambam's introduction to the Mishnah:

חברו הגאונים הפירושים המרובים, אבל לפי ידיעתנו לא יכל אף אחד מהם להשלים פירוש כל התלמוד, יש שמנעו קוצר החיים, ויש שמנעתו טרדת בני אדם במשפטיהם. וכן חברו חבורים בפסקי הלכות מהם בערבית ומהם בעברית, כגון הלכות גדולות, והלכות קטועות, והלכות פסוקות, והלכות רב אחא משבחא, וזולתם. וההלכות שעשה הרב הגדול רבינו יצחק זצ"ל הספיקו במקום כולם, לפי שהם כוללים כל תועליות הפסקים והמשפטים הנצרכים בזמננו זה כלומר זמן הגלות, וכבר בירר בהם כל השגיאות שנפלו בפסקי קודמיו, ולא הוקשו לנו בהם אלא הלכות מעטות לא יגיעו לעשר בשום פנים. אבל המצוים לכל הגאונים הרי הם נבדלים כפי הבדל בינתם, והאיש הנבון הבקי בתלמוד יכול להכיר תכונת כל גאון וגאון מדבריו ופירושי.

<sup>79</sup> Moshe Halbertal, *By Way of Truth: Nahmanides and the Creation of Tradition* (Hebrew; Jerusalem, 2006), pp. 90-91.

<sup>80</sup> *Ibid*, p. 93.

Indeed, Ramban's project of Rif-defense in the *Milhamot* and *Sefer ha-Zekhut* has a lot to do with Rif's connection to the Geonim. Throughout the *Milhamot*, Ramban repeatedly emphasizes Rif's special access to the geonic teachings and traditions. The phrase "*rabbenu ha-gadol* (Rif) *ve-ha-ge'onim*" appears all over Ramban's halakhic writings to refer to a Rif-geonic tradition.<sup>81</sup>

Moreover, throughout his halakhic writings, Ramban will argue that we should rely on the Rif's ruling *because* of his special access to the geonic tradition. Consider the following examples:

"Regarding Ba'al ha-Ma'or's assertion that the geonic enactment was a temporary one: Our great master [Rif] knows the geonic enactments better than any of us, and from his words it is clear that the enactment was also for future generations."<sup>82</sup>

"For these [complicated] matters one needs a teacher, and our great master [Rif] received a tradition from the Geonim...and R. Shimon, author of the Bahag, has the same position and Rabbenu Hananel agrees with it, and since this is a received tradition, we accept it with open arms..."<sup>83</sup>

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<sup>81</sup> For a some examples, see *Milhamot* Eruvin 31b, Pesachim 20b, Yoma 2b, Bava Metzia 22b; *Sefer ha-Zekhut* Yevamot 34a, Gittin 18a; *Hiddushim* Shabbat 133b, Eruvin 46a, Pesachim 7b, Rosh Hashanah 32a, Megillah 21b, Mo'ed Katan, Ketubot 18b, 100b, Gittin 82a, Shavuot 41a, Hullin 88a, Niddah 42a; *Torat ha-Adam 'inyan ha-keri'ah* s.v. 'od katav, 'inyan ha-avelut s.v. *ve-i kashi'a*, s.v. *aval rabbenu*.

<sup>82</sup> *Milhamot* Ketubot 27a:

ומה שאמר בעה"מ ז"ל שתקנת הישיבה הוראת שעה היתה הלא רבינו הגדול ז"ל יודע תקנת הגאונים יותר מכולנו ומדבריו ניכר שלדורות תקנו.

<sup>83</sup> *Milhamot* Shabbat 48a:

בכגון זה אמרו צריכה רבה והרי רבינו הגדול ז"ל קבל מן הגאונים שזה שאמרו בפ' המצניע והאידיא דסבירא לן כרבי שמעון שרי אפי' לכתחלה אף על מבכדות וכן כתב ר' שמעון בעל הלכות ראשונות ואף רבינו חננאל הסכים בזה וכיון שקבלה נקבל בסבר פנים יפות.

“It would appear from the Talmud that [the license to bathe the infant in hot water] applies only after the circumcision... nevertheless our great master [Rif] possesses a tradition that he received from the Geonim that [this license] applies even before the circumcision.”<sup>84</sup>

“This is the received tradition of our master [Rif] and all the Geonim.”<sup>85</sup>

“[The right ruling] is like Rif, and R. Aha of Shabha rules likewise, and it is a consensus and received tradition from the Geonim. And do not mingle with those who [interpret the passage] differently.”<sup>86</sup>

Furthermore, one of Ramban’s overarching strategies in the *Milhamot* is to show that Rif’s rulings are grounded in the commentaries and rulings of the Geonim.<sup>87</sup> In doing so, Ramban shows that the attacks of Rabad and R. Zerayah are leveled not at Rif but at the geonic tradition. Moreover, Ramban believes that by revealing the geonic foundation of Rif’s rulings he is extending the authority of the geonic tradition to the rulings of Rif. The following examples capture Ramban’s attempt to ground Rif’s rulings in the tradition of the Geonim:

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<sup>84</sup> *Hiddushim* Shabbat 134b:

היה נראה דדוקא לאחר המילה אבל קודם המילה מזלפין משום דאוקימתא דסבי עיקר ורבנן לא שרו בין לפני המילה בין לאחר המילה  
אלא בזילוף וראב"ע לא שמעינן ליה דפליג אלא בלאחר המילה, אבל קבלה היא ביד רבינו הגדול שקיבל מן הגאונים ז"ל דאפי' לפני  
המילה.

<sup>85</sup> *Hiddushim* Niddah 48b:

וכן היא קבלת רבינו וכל הגאונים ז"ל

<sup>86</sup> *Milhamot* Hulin 4a:

ואין סומכין על האומדות ולא אמרו לסמוך על רוב כגון זה אלא בדליתיה קמן כדברי ר' יצחק וכ"כ רב אחא משבחה ודבר מוסכם ומקובל  
הוא מן הגאונים ועם שונים אל תתערב

<sup>87</sup> Isaac Unna, *Rabbi Moshe Ben Nahman*, pp. 46-47, seems to make this point:

במקומו הרבה הוא מביא את דעת הגאונים הראשונים כגון רב אחאי משבחה ובעל הלכות גדולות...

“I will copy here what Rabbenu Hananel wrote in order to make known and reveal the position of the Geonim... to show you that the Geonim were well aware of Ba'al ha-Ma'or's proofs and nevertheless were unperturbed by them... And all the Geonim are unanimous [in this ruling], and this ruling is clear in their codes and responsa... Thus I have explained our Mishnah according to Rabbenu Hananel and Rif.”<sup>88</sup>

“I am astonished [that Ba'al ha-Ma'or would write this] for it is known that all of the Geonim agree [to this principle].... And Rabbenu Hai Gaon writes as much, as do all the early Geonim and most of the recent ones... And Rif writes in a responsum [the same rule]... and this is a famous and well known position of the Geonim.”<sup>89</sup>

“My interpretation is correct, and such is the position of all the Geonim.”<sup>90</sup>

“With this, we have additional support for the words of our master [Rif] and the Geonim...”<sup>91</sup>

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<sup>88</sup> *Milhamot Ketubot 47b:*

אכתוב בכאן מה שכתב ר"ח כדי להודיע ולגלות דעת הגאונים ז"ל... אלו הן דברי ר"ח וכתבתי אותם ללמד שראיותיו של בעה"מ הזה ז"ל לא נעלמו מן הגאונים ואעפ"כ לא חששו לדבר והסכימו שאין נפרעים לעולם מן המשועבדים אלא בשבועה והנה כל הגאונים ז"ל שוין בדבר והדין הזה פשוט הוא בחבוריהם ובתשובותיהם... הרי פירשנו משנתינו לדעת ר"ח ורבינו ז"ל

<sup>89</sup> *Milhamot Shevu'ot 27a:*

תמהני עליו שהרי ידוע הוא זה כי כל הגאונים ז"ל הסכימו שכל המוציא ממון מתחת יד אחר אף על פי שהוא נאמן במגו נשבע שבועה חמורה מפני שאינו נשבע על גופו של משכון וכ"כ רבינו האי"י גאון ז"ל והגאונים הראשונים ורובי האחרונים... ורבינו יצחק אלפסי ז"ל כתב בתשובות שאלה בעסק חד גברא דתפיס מקרא ואמר שהיא ממושכנת בידו כלשון הזה ואם אין דרך המקום לשאול אותה וכיוצא בה יהיה ראובן נאמן עד כדי דמיה לא יותר לאחר שישבע שבועת התורה שאין לו בה פחות משוויה והדבר מפורסם וידוע לדברי הגאונים ז"ל

<sup>90</sup> *Milhamot Shabbat 9a:*

כמו שפירשתי עיקר וכן דעת כל הגאונים ז"ל

<sup>91</sup> *Sefer ha-Zekhut Yevamot 34a:*

ובזה קיימנו עוד דברי רבינו והגאונים



“And both Rabbenu Hai Gaon and Rif, the pillars of Torah upon which the world rests, agree to this [interpretation].”<sup>92</sup>

“The rishonim (i.e. Geonim)<sup>93</sup> rule in accordance with our master [Rif]... And such is the consensus of all the Geonim, and so writes Rabbenu Hananel...”<sup>94</sup>

“[Ba'al Ha-Ma'or] shut his eyes to avoid seeing the words of the Geonim, so that he could attack the words of our master [Rif]. For they all (the Geonim) hold this way... And Rabbenu Hananel also explains it this way, and it is also written in the Bahag like our master (Rif)....”<sup>95</sup>

“Such is the ruling of all the Geonim and our master [Rif].”<sup>96</sup>

“Ba'al ha-Ma'or must not have heard the words of the rishonim (Geonim), nor did he see the rulings of R. Yitzchak ibn Giat, nor did he find [the ruling of] R. Mari Gaon. Nor did he read the responsum written by Rabbenu Hai Gaon in its entirety--he read only a portion of it, [ignoring the rest] so that his complaint would be exclusively against our master [Rif].”<sup>97</sup>

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<sup>92</sup> *Milhamot Shabbat* 24a.

והסכימו רבינו האי גאון ורבינו יצחק אלפסי עמודי התורה אשר העולם נכון עליהם

<sup>93</sup> Moshe Halbertal has shown that Ramban consistently and systematically uses the word “rishonim” to refer to the pre-Rif geonic tradition. See the discussion in the text above.

<sup>94</sup> *Milhamot Shabbat* 11a-b.

וכך מורים הראשונים כדברי רבינו ז"ל... והרב הנשיא אלברצלוני כתב ואמר מר רב האי המפטיר בראש חדש שחל להיות בשבת צריך להזכיר של ראש חדש וכן עמא דבר ע"כ. וכך הסכימו כל הגאונים וכן כתבו רב חננאל....

<sup>95</sup> *Milhamot Rosh Hashanah* 8b.

בבאן עצם עיניו מראות דברי הגאונים כדי לתפוס על דברי רבינו ז"ל שכולם כך כתבו דר"ח בפסוקי מלכיות זכרונות ושופרות נמי נאמרה וכן פי' ר"ח וכן כתוב בהלכות רב שמעון כדברי רבינו...

<sup>96</sup> *Milhamot Pesachim* 26b.

וכן פסקו כל הגאונים ורבינו ז"ל

<sup>97</sup> *Milhamot Pesachim* 26b.

בבאן לא שמע בעל המאור ז"ל דברי הראשונים ולא ראה הלכות הרב ר' יצחק בן גיאת ז"ל ולא מצא רב מארי גאון גם מן התשובה שכתב לרבינו האי גאון לא קרא ממנה אלא מקצתה כדי שלא יהיה לו תרעומות אלא על דברי רבינו... וזהו מה שאמר רבינו הגדול ז"ל...

Thus, at least one important dimension of the *Milhamot* is Ramban's attempt to call attention to the geonic foundations of Rif's *Halakhot*.

### Defense of the Geonim in the *Milhamot* and *Sefer ha-Zekhut*

Further, a careful examination of the *Milhamot* and *Sefer ha-Zekhut* shows that Ramban's interest in the Geonim goes beyond demonstrating the geonic foundations of Rif's thought. Ramban's consistent engagement with the geonic corpus is much more than a strategy employed in the service of Rif-defense. In many cases, Ramban appears more interested in defending the geonic tradition on its own terms rather than defending Rif or the specific ruling of Rif at issue.<sup>98</sup>

Consider the following examples from the *Milhamot*:

"The objections of Ba'al ha-Ma'or have now been invalidated, and the words of the Geonim are upheld."<sup>99</sup>

"And regarding Ba'al ha-Ma'or's approach... with it he has unbound a permanent bond, [a principle] that is a received tradition and a consensus from the Geonim."<sup>100</sup>

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ואין אנו משגיחין על כל מה שהתיר בבעל המאור ז"ל ולא שומעין אנו לדבריו לפרוץ גדרן של ראשונים

<sup>98</sup> Chavel appears to have made this observation in Chavel, *Rabbebu Moshe Ben Nahman*, p. 89:

מה שמצוין עוד את ספר "מלחמות" היא ההגנה על תורתן של הגאונים.

<sup>99</sup> *Milhamot* Bava Batra 74b.

עכשיו בטלו מכאן טענותיו של בעל המאור ז"ל ונתקיימו דברי הגאונים ז"ל

<sup>100</sup> *Milhamot* Sukkah 3b.

ומה שהשיב בעל המאור ז"ל... התיר בזה קשר של קיימא המקובל והמוסכם מן הגאונים

“What can we do for [Ba’al ha-Ma’or, who talks only] so that his spit won’t become stale in his mouth,<sup>101</sup> for he has come to dispute the words of all of the Geonim... without any proof or support.”<sup>102</sup>

“There is no room for this debate, for the books of the Geonim are more credible than his (Ba’al ha-Ma’or’s) books.”<sup>103</sup>

“Perish the thought of modifying the position of the Geonim in such a clear ruling, one that is a consensus in all of their works.”<sup>104</sup>

“The knowledge of the Geonim was greater than our knowledge. They knew what they were talking about.”<sup>105</sup>

“The tradition of the Geonim is dispositive.”<sup>106</sup>

“Rabbenu Sherira and his son Rabbenu Hai, who[se rulings are binding] like [a decision rendered by] the majority of the Sanhedrin, [hold this way].”<sup>107</sup>

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<sup>101</sup> Ramban’s insult is based on Nazir 59b. See the *girsā* of Shitah Mekubetzet there s.v. *amar*.

<sup>102</sup> *Milhamot* Rosh Hashanah 12a.

מה נעביד ליה למר דלא ליסרי רוקיה שהוא בא לחלוק על דברי כל הגאונים ועל מנהג כל ישראל בלא ראייה ולא סמך של כלום

<sup>103</sup> *Milhamot* Bava Batra 74a:

אמר הכותב אין מקום למחלוקת זו שספרי הגאונים יותר נאמנים מספריו

<sup>104</sup> *Sefer ha-Zekhut* Ketubot 26b.

וח"ו לשנות שיטת הגאונים ז"ל בהלכה פשוטה ומסכמת בחבורי כולם ז"ל

<sup>105</sup> *Sefer ha-Zekhut* Gittin 38a:

ודעת הגאונים רחבה מדעתנו הם ידעו מה שאמרו

<sup>106</sup> *Milhamot* Berakhot 35b.

וקבלת רבותינו הגאונים מכריע

<sup>107</sup> *Milhamot* Ketubot 21a:

ורבינו שרירא ורבינו האי"י בנו שהוא שקול כרובא של סנהדרין כך כתבו...

The centrality of Geonim-defense to the *Milhamot* project is also evident from Ramban's introductions to the *Milhamot*. These introductions support the thesis that the *Milhamot* is at least as much about defending the geonic tradition as it is about defending Rif as an individual (and his rulings). In the introduction to *Milhamot II*,<sup>108</sup> Ramban characterizes it as a work that

“explains the words of the ancients (*pl.*) and will raise up the rishonim (Geonim)<sup>109</sup> (*pl.*) who have been abandoned, men who are pillars of Torah study, and who are the foundation of its chambers, and [who are] windows into its secrets, men who are worthy of being called divine angels.”<sup>110</sup>

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<sup>108</sup> Oded Yisraeli has argued that this portion of the introduction, which Chavel published as part of the introduction to *Milhamot II*, is really the Hebrew introduction to *Milhamot I* (See Yisraeli, *Intellectual Biography*, p. 48 n.25):

שתי ההקדמות מובאות בדפוסים ברצף בפתיחת ה'מלחמות' על מסכת ברכות, ובמהדורת שעוועל (הקדמה לספר מלחמות ה', כתבי רמב"ן, א, עמ' תי-תיד) הובאו בהקדמה אחת ('הקדמה לספר מלחמות ה''). מאחר ומן האמור בהמשך ההקדמה ה'אחת' ברור שמדובר על הקדמה לחלק שני של החיבור, תהה המהדיר 'מפני מה לא כתב הרמב"ן הקדמה לחלק הראשון של ה"מלחמות" (שם, הערה 1). ואולם מן הדפוסים הראשונים ברור שבנוסח הרחב המובא על ידי שעוועל כלולות שתי ההקדמות ברצף: האחת פותחת במילים 'בראשית רחישת המחשבה' (עמ' תי), והיא-היא ההקדמה לחלק הראשון, והאחרת-הקדמת החלק השני-פותחת במילים 'אמר משה בר נחמן ז"ל...!' (עמ' תיב)

Indeed, the flow of the introduction supports Yisraeli's conclusions. For the ease of referencing Chavel's edition, I use Chavel's division, but I will make a note of the true chronology where it matters for the substantive argument of the dissertation.

<sup>109</sup> See Halbertal, *By Way of Truth: Nahmanides and the Creation of Tradition* (Hebrew; Jerusalem, 2006), pp. 90-91.

<sup>110</sup> *Kitvei Ramban I*, p. 412:

הספר הזה... מבאר דברי הקודמים, ושוממות ראשונים יקומם, מן האנשים שהם עמודים לתלמוד התורה, ומכונות לחדריה וחלונות לסתריה, אשר הם ראויים להקרא מלאכי אלהים.

Later in the introduction to *Milhamot II*, Ramban again suggests that the work is about more than just Rif: “For I have come [in this work] to argue in defense of our great rabbi and the words of the rishonim (Geonim).”<sup>111</sup>

Ramban’s allusive Aramaic poetic introduction to *Milhamot I* may lend further support to the centrality of the Geonim to the *Milhamot* project. There Ramban explains that

“We will not be biased in [Rif’s] favor, but we will take up our pen, to defend a respected elder of talmud[ic scholarship].”<sup>112</sup>

Immediately following that declaration, Ramban appears to offer an explanation for his defense of Rif:

“For our Torah is vast... it originated from Sinai, and its content has not changed (i.e. has not been corrupted), for its content and wisdom has been handed down [from generation to generation] by elders.”<sup>113</sup>

Since the lines both immediately preceding and following this statement clearly refer to Rif’s work,<sup>114</sup>

Ramban leaves us with the impression that his defense of Rif is motivated by the fact that the tradition, handed down from generation to generation--from the Amoraim to the Savoraim to the Geonim to Rif--

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<sup>111</sup> *Kitvei Ramban I*, p. 414.

מפני שאנו באים ללמד זכות על הרב הגדול ודברי הראשונים.

<sup>112</sup> *Kitvei Ramban I*, p. 409:

ואפין לא יסב, ברם עיטא יסב, דליחוש לגבר סב, וקשיש בגמרא.

<sup>113</sup> *Kitvei Ramban I*, p. 409:

דאוריתין רבא, וכל חכים ליבא, משלהי ולאי בה, דמלתא יקירא, ומן סיני שריו ומלתא לא שניו דמן סבי היתיו גמרא וסברא.

<sup>114</sup> The lines immediately following the one cited in the text above refer to the *Milhamot* as a defense of Rif, and right after that Ramban returns again to Rif:

חבור בר אלהין... סביר אף גמיר, למפשר כל חמיר, ובליש כל טמיר, וגלא כל סתרא... והוא בני ביתא, דשלותה סתרא... ואפריון על אמון, ררברה מן תמן, מתקן ומהימן, להודעה פשרא.

These lines clearly refer to Rif.

has not been corrupted. Ramban's poetic introduction to *Milhamot I* thus suggests that the special role of the Geonim in transmitting the received tradition from the Amoraim to the north African and Sefardic scholars of the tenth and eleventh centuries--among them Rabbenu Hananel, Rabbenu Nissim, and Rif--is the background against which the *Milhamot* project should be understood.

To briefly summarize the analysis of this section: I have argued that Ramban's defense of Rif in the *Milhamot* and *Sefer ha-Zekhut* was more than a defense of Rif. Ramban saw Rif as the heir of the geonic tradition. Indeed, the *Milhamot* and *Sefer ha-Zekhut* very often dive deep into geonic literature to unearth the geonic foundation of Rif's rulings. Furthermore, in many instances, Ramban's goal is to defend the geonic position, rather than the particular ruling of Rif.

This analysis suggests that Ramban's motivation in undertaking the enterprise of the *Milhamot* and *Sefer ha-Zekhut* is better understood as flowing from his desire to defend the geonic tradition than from a sense of allegiance to Rif.<sup>115</sup> It was Rif as the contemporary, and most prominent, embodiment of the great geonic tradition that explains Ramban's project in the *Milhamot*.<sup>116</sup>

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<sup>115</sup> Recall also Chavel, *Rabbi Moshe ben Nachman*, p. 89:

מה שמציין עוד את ספר מלחמות היא ההגנה על תורתן של הגאונים.

<sup>116</sup> Recall Halbertal, *By Way of Truth*, p. 93:

האופן שבו תוחם הרמב"ן את תולדות ההלכה מלמד על מעמדו הסגולי של הרי"ף בתמונה היסטורית זו.... אזכורו הנבדל של הרי"ף בשיוכו לראשונים מלמד על כך, שכמי שעומד בסופה של תקופת הראשונים, הוא גם מייצג את שיאה....

My analysis in this section, and my conclusion that Ramban saw the Rif as the contemporary embodiment and culmination of the geonic tradition, has important ramifications for how the history of halakhah perceives Rif's relationship with the Geonim. There is a recent school of thought that sees Rif as an antagonist to the geonic tradition and one of the figures responsible for freeing European halakhah from geonic hegemony. Consider, for example, Haym Soloveitchik, "Rabad of Posquieres", p. 12, who writes:

"R. Isaac of Fez had discarded the Geonim before him. He had attempted to decide the Talmudic controversies independently of their (i.e. the geonim's) writings, but there is little indication that he essentially understood those controversies differently. There is no evidence that he read the sources

It will be illustrative to contrast my characterization of the *Milhamot* project with Septimus's characterization of it. For Septimus, Ramban's interest in the Geonim derives from his devotion to the great figures of "Spanish halakhah." On Septimus's account, Ramban took interest in the Geonim because the geonic-north African "tradition must have seemed especially 'Spanish' with Spanish Jewry's

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afresh, or that he sought to expand the traditional perimeter of Halakhic concerns. Unable to pose a positive alternative, Alfasi's dislodgement of the past could not succeed."

This formulation is neutral in its portrayal of Rif as approaching the Talmud with the categories of the Geonim, but quite radical in its characterization of Rif as someone who "discarded the Geonim". This characterization is directly in tension with my portrayal of Ramban's conception of Rif. In any event Soloveitchik doesn't offer any evidence to support his contention and in a footnote (n. 9) he quickly disavows responsibility for the claim:

"Rabbi S. Abraham once remarked to me that a good deal of Alfasi's importance is his removal of the Geonim and a great deal of the point of the Sefer ha-Ittim is their restoration. For all other remarks in the paragraph I bear full responsibility."

It bears mentioning that the inference from the remark to the conclusion in the text does not follow. It is quite true that the Rif removed the Geonim from the discussion in that he does not explicitly cite them in his *Halakhot*. Perhaps this was quite instrumental in freeing talmudic discussion in later generations from the Geonim. But it does not follow that Rif himself "decided the talmudic controversies independently of their writings."

Isadore Twersky also appears to have been under the impression that Rif was instrumental in diminishing the influence of the Geonim. He writes, in his *Introduction to the Code of Maimonides*, p. 9:

"Maimonides' dissatisfaction with the Geonim is clearly mirrored in his praise of R. Isaac Alfasi, whose *Halakhot*, by calculated and consistent omission or skillful use of understatement and nuances of formulation and emphasis, diminished the import and impact of Gaonic writing."

Once again, my analysis of Ramban's portrayal of Rif's (and his *Halakhot's*) relationship with the geonic corpus is in tension with Twersky's view. It is possible, however, to distinguish, as before, between the extent to which the *Halakhot* were grounded in geonic rulings and the impact, on later generations, of the work not explicitly citing the geonic writings. Still, Twersky's formulation suggests that Rif intentionally sought to diminish geonic influence ("by calculated and consistent omission or skillful use of understatement and nuances of formulation and emphasis..."). He also seems to think that Rambam *praised* Rif for diminishing the geonic influence. If this is correct, then it would turn out that Ramban and Rambam had opposite perceptions of Rif's relationship with the Geonim. For portrayals of Rif more in line with my analysis above, that emphasize Rif as incorporating geonic rulings throughout his *Halakhot*, see Aptowitz, *Mavo Ravyah*, p. 372, and Ta-Shma *Talmudic Commentary Part One*, pp. 148-151.

entry into Europe and confrontation with Franco-German halakhah.”<sup>117</sup> On Septimus’s view, Ramban culturally identified with Rif, but because the Geonim constitute an important dimension of Rif’s halakhah, Ramban became interested, by extension, in the geonic tradition as well. Septimus concedes that Ramban’s introduction to *Milhamot II* reflects a “consciousness of defending a tradition rather than a single authority,” but for him, this speaks to the Geonim as incorporated into the Spanish tradition.<sup>118</sup> According to Septimus, Ramban was interested in the geonic tradition because it seemed Spanish.

My analysis suggests that for Ramban, the Spanish-geonic relationship runs the other way. Ramban was primarily motivated to defend the geonic tradition, and his defense of Rif stems from his perception of him as the culmination of that intellectual tradition and its greatest, most recent exemplar. This characterization--against Septimus’s--is additionally supported by the fact that Ramban has little interest in figures who would be the natural heroes of Spanish learning such as Ri Migash, Rambam, and Ramah. Even Septimus is forced to concede that “there is an element of real conservatism in Nahmanides’ defense of the ‘ancients’ ... evident in the fact that his attitude toward more recent Spanish scholars like Ibn Megash and Maimonides is not nearly so deferential as it is to Alfasi and the geonim.”<sup>119</sup>

Indeed, Ramban’s commitment to the geonic tradition in his other works, especially in his *Hassagot to Sefer ha-Mitzvot*, the *Hiddushim* on the Talmud and *Torah ha-Adam*, reinforce the thesis that Ramban was committed to the geonic tradition independent of any sense of allegiance to Rif and Spain.<sup>120</sup> The next section discusses Ramban’s *Hassagot to Sefer ha-Mitzvot*. After that, I discuss the prominence of the geonic tradition in the *Hiddushim* and *Torat ha-Adam*.

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<sup>117</sup> Septimus, “Nahmanides and the Andalusian Tradition,” n. 81.

<sup>118</sup> Ibid.

<sup>119</sup> Septimus, “Nahmanides and the Andalusian Tradition,” n. 83.

<sup>120</sup> Ta-Shma’s *Talmudic Commentary Part Two* discusses the Rif dimension of Ramban’s *Milhamot* and *Sefer ha-Zekhut* but, strikingly, seems unaware of the geonic dimension.



## *Hassagot to Sefer ha-Mitzvot: Ramban's Defense of the Author of Halakhot Gedolot*

(Bahag)

Ramban's *Hassagot to Sefer ha-Mitzvot*, written much later in his career, is Ramban's third work dedicated to the defense of the geonic-Rif tradition.<sup>121</sup> Ramban's enumeration of the mitzvot, and the

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<sup>121</sup> That the *Hassagot* were written late in Ramban's career is evident from his introduction to the *Hassagot, Kitvei Ramban I*, p. 419:

והיום, כאשר זרחו על פני כוכבי זקוני...

See Chavel's comment there, n. 31:

רמז לכך שהספר הזה כתב לעת זקנותו.

Moshe Halbertal also assumes that the *Hassagot* is a late work. See Halbertal, *By Way of Truth*, p. 79, where he refers to the *Hassagot* as the חיבור הזקונים שלו.

But see Oded Yisraeli, *Intellectual Biography*, p. 52 n. 34, who argues that the phrase refers to the stage in life when one's hairs begin to turn white:

'והיום כאשר זרחו על פני כוכבי זקני', היינו בשעה שהלובן החל לעלות בשערותיו.

This would suggest that the *Hassagot* was written closer to middle age. But I remain unpersuaded by Yisraeli's suggestion. First, even if Yisraeli is correct that the phrase indeed refers to white hairs, it is not clear that it should refer to the moment of transition when hairs *begin* to turn white. It may refer to the (much later) stage in life when the hairs of the face are fully white. The relevant imagery, on this interpretation, is the white hairs that radiate like stars from the darker backdrop of the face.

Second, the phrase may not refer at all to hairs/stars "emanating from one's face". *Zarhu al panai* could refer to "stars of old age shining down onto my face (from above)." In this rendering, the phrase would refer to the emergence of stars in the evening as a metaphor for twilight, meaning that Ramban has entered his twilight years (see for example Job 3:9).

The most likely interpretation, in my opinion, is that "*zarhu al panai kokhvei zikunai*" refers to Ramban's eyes which glimmer on his face. Accordingly, the phrase should be rendered, "and today, when my aged eyes (i.e. dim eyes) flickered on my face...". This interpretation fits elegantly with the end of that same sentence where Ramban writes about "seeing" (lit. being shown) the manuscript of Ramban's *Sefer ha-Mitzvot*: "*her'ani Hashem ve-hinei lefanai ma'amar ve-sefer...*"

Note that Rivash (Responsa no. 44), uses the same metaphor and a similar phrase to refer to his eyes ("my eyes lit up upon receipt of your letter"):

foundational principles upon which his project was built, directly challenged Bahag's system. To make matters worse, Rambam's language at times goes so far as to ridicule Bahag's learning and scholarship. Rambam's project, escalated by his style and language, antagonized Ramban, for whom Bahag was a towering figure. For Ramban, Bahag is an exemplar of geonic learning and tradition, and he authored one of the most important and influential codes of the early geonic period.<sup>122</sup> Ramban cites Bahag's rulings countless times throughout the *Milhamot* and *Hiddushim*.<sup>123</sup>

In his introduction to the *Hassagot*, Ramban characterizes the work as a continuation of the project he began in the *Milhamot* and *Sefer ha-Zekhut*--notwithstanding the fact that the *Hassagot* has nothing to do with Rif. Ramban devotes the opening lines and about half of the entire introduction to describing his earlier project defending Rif and Geonim and explains, in great detail, how the *Hassagot* is a direct continuation of that project. Let us closely examine Ramban's language in the introduction to the *Hassagot*.

The introduction opens with Ramban referring back to his youthful commitment to defend the rishonim and Geonim.

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הוניין לרבי אפרים בן אנקואה י"א האגרת מהודרת מקוטרת מור ולבונה מכל אבקת רוכל. מעולפת ספירים אמרים מיושרים ודברים דבורים על אפניהם בדעת ובהשכל. כתפוחי זהב פרוים מזוקק שבעתים במשכיות כסף נבחר כצמר צחר. מעשה חרש וחושב במשפט מכלכל על דבר אמת וענוה צדק מקשיב חכמים אחר משיב ודעת יסכל. הובאת אלי ותגע על פי ויאירו כוכבי נשפי.

If Ramban is using כוכבי in the same way, he would be referring to his eyes of old age, meaning his dim eyes. See Bereshit 48:10: ועיני ישראל כבדו מזוקן, which Ramban might be working off when he says זקוני כוכבי.

<sup>122</sup> See Robert Brody, *The Geonim of Babylonia and the Shaping of Medieval Jewish Culture* (New Haven, 1998), pp. 223 - 232.

<sup>123</sup> For the *Milhamot*, see Shabbat 16b, Shabbat 50a, Rosh Hashanah 7b, Pesachim 7b, Pesachim 19a, Pesachim 24a-b, Mo'ed Katan 2b, Mo'ed Katan 14b, Yevamot 34b, Bava Kamma 37a, Bava Batra 17a, Bava Batra 72b, Sanhedrin 17b, Hullin 40a. For the *Sefer ha-Zekhut*, see Yevamot 2b, Yevamot 13b, Yevamot 24a, Yevamot 36a.

“From my youth [I was committed to this pursuit] and through my old age I will not put it down, I have remained resolute throughout, I will not neglect [my commitment] ... to defend the rishonim and to explain the words of the Geonim, for they are the pillar and cornerstone of our Talmud study. They are the ones that have guided us and taught us. They set us in the ways of the Torah and its paths. And from them we inquire of earlier scholars which road we should travel (i.e. how to decide halakhah).”<sup>124</sup>

Two observations are noteworthy for now. First, Ramban connects his present *Hassagot* to the projects of his youth (*Milhamot* and *Sefer ha-Zekhut*). Second, Ramban characterizes this overall, lifelong project as one that set out to defend the rishonim and Geonim. Here we should bear in mind Halbertal’s observation that Ramban uses the word “rishonim” to refer to the Geonim.<sup>125</sup>

Immediately following these lines, Ramban provides a vivid description of what motivated him to write the *Milhamot* earlier in his career:

And behold, in recent generations hordes and hordes of clever scholars, roaring like lions and beasts, come forth with objections and arguments to destroy the temple of wisdom (erected by the Geonim and Rif), and in their hands they wield a double edged sword... to kill wisdom that should not die and to give life to ideas that should not live (i.e. their novel rulings and interpretations). They grasp with loose hands at uncertain rulings. They attempt to revive stones from the dust piles--but they are unsuitable.

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<sup>124</sup> *Kitvei Ramban I*, pp. 418-419.

מנעורי גדלני כאב ומבטן אמי אנחנה וגם עד זקנה ושיבה לא אניחנה, במדתי החזקתי ולא אזניחנה... ללמד זכות על הראשונים ולפרש דברי הגאונים. כי הם לנו בלמוד התלמוד פנה ועמוד, הם אשר הורונו ולמדונו, הם שהעמידונו, על דרכי התורה ושבילם, ומהם שאלנו לנתיבות עולם, אי זה דרך הטובה ללכת בה.

<sup>125</sup> Halbertal, *By Way of Truth*, p. 93.

And I, the smallest of my tribe and the humblest of my clan, I was in my prime years, and I heard a holy being speaking (i.e. Rif), he composed a [precious] work, golden and full of jewels. But then behold a high ranking officer (R. Zerahyah) emerged rearing, to uproot, to pull down, to destroy, and to break [Rif's precious work apart]. So I wrapped myself in the zeal of the almighty God, and He gave me the power to discern and to understand. I examined the books that he authored, I listened [to what he had to say] and I [quickly] realized that what he says is inaccurate [and improper]. So the spirit inside me pressed me [to defend Rif], and throughout [this project] I was supported [to keep going] by [Rif's] righteousness, until I was able to restore the Torah to its proper dwelling place (i.e. the Rif-geonic tradition), and rebuild it on its foundation."<sup>126</sup>

Ramban then seamlessly transitions to his current project of the *Hassagot*:

“And today, when the stars of my old age shine down on my face, God showed me and behold before me was a treatise and a book [Rambam's *Sefer ha-Mitzvot*]... and he too rages against the rishonim, roaring like a lion...”<sup>127</sup>

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<sup>126</sup> *Kitvei Ramban I*, pp. 418-419.

מנעורי גדלני כאב ומבטן אמי אנחנה וגם עד זקנה ושיבה לא אניחנה, במדתי החזקתי ולא אזניחנה... ללמד זכות על הראשונים ולפרש דברי הגאונים. כי הם לנו בלמוד התלמוד פנה ועמוד, הם אשר הורונו ולמדונו, הם שהעמידונו, על דרכי התורה ושבילם, ומהם שאלנו לנתיבות עולם, אי זה דרך הטובה ללכת בה. והנה בדורות האחרונים המונים המונים כולם תחכמונים, שאגת אריות וקול לבאים באים בקושיות והויות, להפיל חכמות בנויות לתלפיות. ובידם חרב פיפיות להמית ולהחיות. להמית חכמות אשר לא תמותנה ולחיות דברים אשר לא תחיינה. יחזקו ידיים רפות בהלכות רופפות, יחיו את האבנים מערמות העפר והמה שרופות. ואני הקטן בשבטי הדל באלפי הייתי בימי חרפי, ואשמעה אחד קדוש מדבר, זהב ורב פנינים מחבר, והנה אחד השרים הראשונים מתגבר, לנתוש ולנתוך להאבד ולשבר. לבשתי קנאות וי"י אל"ים צבאות נתן לי אוזנים לשמוע ועינים לראות. בינותי בספרים אשר חברו, הקשבתי ואשמע לא כן ידברו. ורוח בטני הציקתני וצדקתו היא סמכתני, עד אשר החדרתי התורה לאכסניא שלה ונבנתה על תלה.

<sup>127</sup> *Kitvei Ramban I*, pp. 419-420:

Note how Ramban integrates the *Hassagot* project with the *Milhamot*. He opens this passage with the conjunction “he *too* rages against the rishonim,” conjoining R. Zerayah’s *Sefer ha-Ma’or* with Rambam’s *Sefer ha-Mitzvot*. Moreover, Ramban unifies the *Milhamot* and *Hassagot*--two very different types of work--under the single banner of works that counter those who “rage against the rishonim”, despite the fact that the *Milhamot* is organized around defending the rulings of Rif while the *Hassagot* sets out to defend Bahag.

The introduction to the *Hassagot* is quite explicit about its purpose to defend Bahag and the Geonim:<sup>128</sup>

“[Rambam] too rages against the rishonim, roaring like a lion, bringing proofs that the Bahag, R. Shimon (Kayara), was barely able to see (comprehend), was unable to stand on his own feet, that a thick fog [obscured his vision], that he [must have] counted the mitzvot and enumerated the laws with his eyes shut and his hands tied up, that he made basic errors [and] obvious mistakes. [But] in reality [Bahag] was a towering giant, incomparable in dignity and greatness...

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והיום כאשר זרחו על פני כוכבי זקוני הראני י"י והנה לפני מאמר וספר נותן אמרי שפר, אגרת מקוטרת מור וקדה יקר מכל כלי חמדה. חבור לרב הגדול מבצר ומגדול, בניין בעניין אין לו חקר ומניין, עמוק עמוק מי ימצאנו ורחוק רחוק מי יראנו. וגם הרב במאמר על הראשונים יתמרמר. שאגה לו כלביא...

<sup>128</sup> *Kitvei Ramban I*, pp. 418 - 420. The first part describes how he has remained steadily committed to his project from his youth through his old age. He then proceeds to describe his earlier project of the *Milhamot* and how it relates to the *Hassagot*.

מנעורי גדלני כאב ומבטן אמי אנחנה, גם עד זקנה ושיבה לא אניחנה, גם עד זקנה ושיבה לא אניחנה, במדתי החזקתי ולא אזנחנה, כי לב כל נבון יקחנה, וחכם באחור ישבחנה, ללמד זכות על הראשונים ולפרש דברי הגאונים... ואני הקטן בשבטי הדל באלפי הייתי בימי חרפי ואשמעה אחד קדוש מדבר, זהב ורב פנימים מחבר, והנה אחד השרים הראשונים מתגבר, לנתוש ולנתוץ להאביד ולשבר, לבשתי קנאת ה' צבאות, נתן לי אזנים לשמע ועינים לראות, בינתי בספרים אשר חברו, הקשבתי ואשמע לא כן ידברו, ורוח בטני הציקתני, וצדקתו היא סמכתני, עד אשר החזרתי התורה לאכסניא שלה ונבנתה על תלה, והיום כאשר זרחו על פני כוכבי זקוני, הראני ה' והנה לפני, אגרת מקטרת מר וקדה, יקר מכל כלי חמדה, חבור לרב הגדול, מבצר ומגדול, בנין בענין, אין לו חקר וענין... וגם הרב על הראשונים יתמרמר.

no difficulty eludes him. [Therefore] I was moved to argue in his defense, to inform the Rabbi [Maimonides] that he failed and did not succeed [in his critique of Bahag].”<sup>129</sup>

Immediately following this passage, Ramban explains his project as reflecting “his want and passion to be a student of the rishonim, to uphold their words and support them, to adorn myself with their teachings...”<sup>130</sup> As we saw earlier, Ramban typically reserves the word “rishonim” to refer to the Geonim.

Within the body of the *Hassagot* we also find Ramban emphasizing the geonic tradition:

“I have not seen a single one of the rishonim offer the interpretation [that Rambam attributes to Bahag]... Surely Rambam saw what Bahag wrote there... and such is the view of R. Aha of Shabha in the She’iltot, and it is also explicit in the rulings of Rif, and this is the position of all of the Geonim”.<sup>131</sup>

“I am astonished that the Rabbi accuses Bahag without first looking to see what he wrote. Even if the Rabbi were responding to a young student it would only be appropriate for the Rabbi,

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<sup>129</sup> *Kitvei Ramban I*, p. 420:

וגם הרב על הראשונים יתמרמר, שאגה לו כלביא, ראיות להביא, כי בעל ההלכות רב שמעון, הביט צר מעון, לא עמדו במרחב רגליו, ועננה תשכן עליו, בעינים סגורות וידיים אסורות, ספר המצוות ומנה התורות, שגה בפשיטות, טעה בברורות. והיה ארז בלבנון בכבוד, ובגדל עצי עדן לא דמוהו, מים גדלוהו תהומות רוממוהו כל סתום לא עממוהו. ותשאני רוח ללמד עליו זכות, ולבי ערב להודיע אל הרב שלא בא עד התכלית ואל המופת לא קרב, ובמקום אשר לא חשב עמד ולא ישב.

<sup>130</sup> *Kitvei Ramban I*, p. 420:

חפצי וחשקי, להיות לראשונים תלמיד, לקים דבריהם ולהעמיד, לעשות אותם לצוארי רביד, ועל ידי צמיד.

<sup>131</sup> *Hassagot*, Shores 9:

לא ראיתי מעולם לאחד מכל הראשונים שפירשו כך. ובידוע שראה הרב דברי בה"ג והוא כתב בהלכות דגים בלשון הזה ... עד כאן בהלכות. וכן כתב רב אחא משבחה גאון בשאלתות (ס"פ שמיני). וכן מפורש בהלכות רבינו יצחק אלפסי (סוף פא"ט) וזה הוא פירוש הגאונים כולם ז"ל.

given his learning and moral stature, to first read and consider what the student wrote. All the more so when he responds to one of the great Geonim and accuses him of being confused.”<sup>132</sup>

“We have now clarified this position according to the view of the rishonim [Geonim].”<sup>133</sup>

To summarize, Ramban’s introduction to the *Hassagot* clearly states that the *Hassagot* is a direct continuation of the *Milhamot* and *Sefer ha-Zekhut*--even though Rif plays no role in the *Hassagot*. Ramban opens the introduction with a recap of his earlier work, and he asserts that the *Hassagot* is driven by the same motivation. Moreover, Ramban describes the entire, joint project--the *Milhamot* and *Hassagot*--as driven by his commitment to defend the rishonim and to explain the words of the Geonim, where the word rishonim is most likely intended to pick out the Geonim.

This analysis puts additional pressure on Septimus’s theory that Ramban’s defensive projects were motivated by Spanish loyalty and his identification with the Andalusian tradition. Indeed, Septimus concedes that the *Hassagot* does not fit neatly into his argument, and he goes so far as to attempt to explain away the *Hassagot* as a different type of work, incompatible with the project of the *Milhamot*:

“Nahmanides did defend the geonic Halakhot Gedolot against Maimonides in his *Hassagot* to *Sefer ha-Mitzvot*. But one senses that Nahmanides seized upon this project more as an opportunity to engage in fresh and wide-ranging exploration of fundamental issues not treated in his earlier works.”<sup>134</sup>

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<sup>132</sup> *Hassagot*, Shores 14:

ואני תמה ומתפלא על הרב הפלא ופלא שיאשים לבעל ההלכות ויתפוש עליו, למה לא יסתכל בדבריו ולא יביט בהם כלל. ואם היה משיב על אחד מן התלמידים ראוי הרב לחכמתו ולכבוד מוסרו להסתכל במאמר התלמיד ההוא ולהתבונן בו כל שכן בהשיבו על גדול שבגאונים ויאשים אותו ויחשבהו מן מבולבלי השכל חס ושלום. אבל כונת בעל ההלכות מבוארת בדבריו.

<sup>133</sup> *Hassagot*, Shore 9:

עכשיו ביררנו השטה הזו על דעת הראשונים, והסכמת כולם היא לחייב על כל לאו מלקות.

<sup>134</sup> Bernard Septimus, “Nahmanides and the Andalusian Tradition,” n. 83.

But Ramban's own description of the *Hassagot* as a continuation of the project he began in the *Milhamot*; his characterization of the *Milhamot*, in his introduction to the *Hassagot*, as a work that defends the Geonim; and the internal evidence within the *Milhamot* indicating that Ramban was deeply engaged in defending the geonic tradition all suggest a unifying theme: Ramban set out to uphold the geonic tradition and to defend it from its twelfth century critics. Indeed, Ramban's commitment to the geonic tradition extends beyond the *Milhamot*, *Sefer ha-Zekhut*, and the *Hassagot*. As the next section demonstrates, the Geonim and their rulings constitute an important component of Ramban's other halakhic writings, especially the *Hiddushim* on the Talmud and *Torat ha-Adam*.

### Geonic Legal Precedent and Defense of the Geonim in the *Hiddushim* and *Torat ha-Adam*

In addition to devoting three works to the cause of defending geonic-Rif halakhah--the *Milhamot*, *Sefer ha-Zekhut*, and the *Hassagot*--Ramban consistently defends the rulings of the Geonim throughout his *Hiddushim* on the Talmud. In the *Hiddushim*, Ramban often compares the views advanced in the revolutionary commentaries of northern France and Provence with the literature of the Geonim and rebuts the former when they conflict with the geonic tradition. A careful study of Ramban's *Hiddushim* on the Talmud shows that an important dimension of Ramban's own talmudic jurisprudence is restoring the centrality of geonic precedent. This observation is consistent with Moshe Halbertal's conclusion:

"נוסף על החיבורים המיוחדים שייחד הרמב"ן לעימות עם הרמב"ם, בעל המאור, והראב"ד, שעניינם הגנה על עמדותיהם של הגאונים והרי"ף, ימצא המעיין בחידושיו לתלמוד את עשרות הפעמים שבהן הרמב"ן דוחה את תפישותיהם של רש"י, רבינו תם, והראב"ד, לטובת עמדותיהם של הרי"ף והגאונים."<sup>135</sup>

<sup>135</sup> Halbertal, *By Way of Truth*, p. 81.



Ramban consistently upholds the geonic tradition as dispositive in resolving interpretive disputes.<sup>136</sup>

After citing a French or Provençal position that disagrees with the geonic one, Ramban will offer the following type of conclusion:

“The received tradition of the Geonim is decisive.”<sup>137</sup>

“The received tradition of the gaon is decisive.”<sup>138</sup>

“It is not necessary for me to argue this point, for the tradition of the Geonim is decisive.”<sup>139</sup>

“Heaven forbid that I would disagree with an enactment of the Geonim, for who am I to disagree and differ on an issue that was practiced in the geonic academies for many years. Moreover, I criticize [those who dispute the Geonim on this] arguing that it is more appropriate to follow the ruling of the Talmud over the geonic enactment. They should listen to the Geonim and abide by their enactment.”<sup>140</sup>

“We ought not tamper with a practice authorized by the Geonim.”<sup>141</sup>

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<sup>136</sup> Here are a few examples: *Hiddushim* Shabbat 124b, Bava Metzia 62b, Berakhot 36a, Shabbat 51b, Ta’anit 15a, Megillah 2a, 21a, Yevamot 91b, 122b, Ketubbot 31b, 63b, Gittin 29a, Kiddushin 27a, Bava Metsi’a 32a, 47b, 50 b, 72b, 114a, Bava Batra 46a, 53b, 59a, Sanhedrin 23a, Shevuot 41a, 42b, 44b, 45b, Hullin 3b, 46b, 48a, Niddah 37a, 64a.

<sup>137</sup> *Hiddushim* Shabbat 124b s.v. *ha*,

וקבלת הגאונים ז"ל תכריע.

<sup>138</sup> *Hiddushim* Bava Metzia 62b s.v. *amar rabah*.

וקבלת הגאון ז"ל תכריע.

<sup>139</sup> *Hiddushim* Bava Metzia 50b s.v. *amar rava*:

ואין צורך לכתוב זה שקבלת הגאונים ז"ל תכריע.

<sup>140</sup> *Hiddushim* Ketubbot 63b s.v. *ve-khulah*:

וח"ו שלא הייתי חולק על תקנת הגאונים כי מי אנכי לחלוק ולשנות במה שנהגו בו גאוני הישיבות שנים מרובות ולא עוד אלא שאני קורא תגר על שאומרים שאינו ראוי לילך אחר תקנתם אלא בדין התלמוד, אלא ראוי היו לשמוע להם ולעשות כתקנתם.

<sup>141</sup> *Hiddushim* Megillah 21b.

“It is not appropriate to disagree with the Geonim.”<sup>142</sup>

“If you find anything in the treatises or responsa of the Geonim that points in favor of one of these approaches—follow their precedent.”<sup>143</sup>

“I cite Tosafot’s position only to nullify it, for the Geonim have demonstrated...”<sup>144</sup>

“[Rabbenu Tam’s] words have already been nullified by the words of the Geonim.”<sup>145</sup>

A similar deference to the geonic tradition is evident in Ramban’s *Torat ha-Adam*. Here the influence of geonic halakhah is evident on every page of the work, and the work as a whole has well over a hundred citations from the Geonim. Consider the following examples from *Torat ha-Adam* that reflect Ramban’s commitment to the geonic tradition:

“A different approach from the commentary of Rashi:[...] but his explanation is faulty. The right explanation is like the Geonim.”<sup>146</sup>

“[Rabbenu Tam] rules in *Sefer ha-Yashar*... but the Geonim, *zikhronam li-verakhah*, do not rule that way.”<sup>147</sup>

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אין ליגע במה שהונהג על פי הגאונים ז"ל.

<sup>142</sup> *Hiddushim Bava Metzia* 47b:

ואין ראוי לחלוק על הגאונים ז"ל.

<sup>143</sup> *Hiddushim Niddah* 64a:

ואם ימצא בחבורי הגאונים או בתשובותיהם ענין מורה על אחת מאלו הדרכים בה ראוי ללכת ולצאת בעקבותיהם.

<sup>144</sup> *Hiddushim Yevamot* 91b.

זה דעת מקצת מפרשים, ולא כתבתי דעתם אלא כדי לבטלו שכבר מצאו הגאונים בירושלמי...

<sup>145</sup> *Hiddushim Hullin* 48a:

וכבר בטלו דבריו מפני דברי הגאונים.

<sup>146</sup> *Kitvei Ramban II*, p. 56:

ענין אחר מפני רש"י ז"ל:.... אבל פירוש משובש הוא ואינו אלא כמו שפירשו הגאונים.

<sup>147</sup> *Kitvei Ramban II*, p. 175:

“In the Yerushalmi it is written this way... and this formulation supports the Geonim.”<sup>148</sup>

“And now I am going to offer further support for the Geonim”<sup>149</sup>

“To this extent we have succeeded in justifying the words the Geonim and to defend them.”<sup>150</sup>

“This is the version of the Geonim and Rif... but some have the version... and this is how Rambam [holds].... And who should we rely upon? Come let us rely on the words of the rishonim (i.e. Geonim) whose words are a received tradition and [therefore] do not need further support.”<sup>151</sup>

“This is further support to the words of the Geonim.”<sup>152</sup>

“This position of Rabad is radical... And if he were to [be consistent and] always follow this method--how often his rulings would contradict the rulings of the Geonim! And it is inconsistent with the principles [of pesak] that we received.”<sup>153</sup>

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ובספר הישר פוסק... ולא כן פסקו הגאונים ז"ל.

<sup>148</sup> *Kitvei Ramban II*, p. 188:

ובירושלמי תני להא מתניתא הכי... וזה הלשון סיוע לדברי הגאונים ז"ל.

<sup>149</sup> *Kitvei Ramban II*, p. 210:

ועכשיו אני חוזר לסייע לדברי הגאונים ז"ל.

<sup>150</sup> *Kitvei Ramban II*, p. 213:

עד כאן השיגה דעתנו לתרץ דברי הגאונים ז"ל וללמד עליהם זכות.

<sup>151</sup> *Kitvei Ramban II*, p. 226:

וזו היא גירסת הגאונים ורבינו הגדול ז"ל. ויש שגורס שם... וזו דעת הרמב"ם ז"ל וכת אחרת מן החכמים ז"ל שמסכימין בדעת הזה. ואנו על מי נסמוך, בואו ונסמוך על דברי הראשונים שדבריהם דברי קבלה ואינן צריכין חיזוק.

Note that because of the homeoteleuton Chavel's version is missing the phrase 'וזו היא גירסת הגאונים וכו'.

<sup>152</sup> *Kitvei Ramban II*, p. 228:

וגם זה סמך וסעד לדברי הגאונים ז"ל.

<sup>153</sup> *Kitvei Ramban II*, p. 90:

In this section, I've argued that Ramban's defense of the geonic rulings and his allegiance to their tradition extends beyond the *Milhamot*, *Sefer ha-Zekhut* and *Hassagot*. It also constitutes an important dimension of his *Hiddushim* and *Torat ha-Adam*.<sup>154</sup> This conclusion supports the larger thesis of this chapter, that it was the Geonim that loomed large in Ramban's jurisprudence, more than any sense of kinship with Rif or Andalusian patriotism.

### The Tashlum Halakhot

This chapter has outlined the scope of Ramban's project to defend Rif and the Geonim. I have also shown the centrality of the geonic tradition and geonic legal precedent in Ramban's *Hiddushim* and *Torat ha-Adam*. In this brief section, I consider whether Ramban's *Tashlum Halakhot*--his Rif-style codes on *Hilkhot Bekhorot*, *Nedarim* and *Hallah*, penned early in Ramban's career--fall within this project.<sup>155</sup>

Oded Yisraeli has recently argued that it does.<sup>156</sup> He contends that the *Tashlum Halakhot* should be seen as an attempt to "redeem" Rif's work by presenting it as more complete and more comprehensive than

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וזו שיטה חדשה שתפס לו הרב ז"ל שנפסוק במחלוקת הגמרא שלנו מפני הירושלמי שנשנית שטתו כאחד מן האמוראים. ואם ינהוג הרב כשיטה זו בכל מקום, כמה וכמה שיפסוק בהם שלא כפסקי הגאונים ז"ל ולא כדרכי הכללים המסורים בידינו.

<sup>154</sup> Note as well the prominence of the Geonim in the *Hassagot* to Rabad's *Hilkhot Lulav*. See for example:

זה הפירוש עלה לנו במחשבה כדי להתקיים דברי הגאונים.

<sup>155</sup> On Ramban's *Tashlum Halakhot*, see Oded Yisraeli, *Intellectual Biography*, pp. 44-45; Israel Ta-Shma, *Talmudic Commentary Part Two*, pp. 34-35.

<sup>156</sup> Oded Yisraeli, *Intellectual Biography*, pp. 44-45. Note that Yisraeli is the first to portray the *Tashlum Halakhot* as part of Ramban's Rif-defense project. Yitzchak Unna, who devotes a chapter in his monograph to Ramban as an advocate of Rif and the Geonim, does not include the *Tashlum Halakhot* in that discussion. Chavel also distinguishes between the defensive works and the *Tashlum Halakhot*. Chavel divides Ramban's works into categories and distinguishes between works of practical halakhic rulings, which includes the *Tashlum Halakhot*, *Hilkhot Niddah* and *Torat ha-Adam*, and works that were written to defend the Geonim and Rif, which include the *Milhamot*, *Sefer ha-Zekhut* and the *Hassagot*. Ta-Shma's *Talmudic Commentary Part Two*, pp. 34-35, indicates that he, too, did not see the *Tashlum Halakhot* as part of Ramban's defensive works.

it was when it left Rif's desk. The purpose of this project, Yisraeli suggests, was to fortify the status of Ramban's great Andalusian hero. Yisraeli characterizes the *Tashlum Halakhot* as the "positive side" of the same project as the *Milhamot*, *Sefer ha-Zekhut*, and *Hassagot*. These latter works sought to bolster Rif's stature by defeating objections to the *Halakhot* (hence the "negative" side of the project). The *Tashlum Halakhot*, on Yisraeli's view, is the positive side of the campaign which sought to bolster Rif's rulings by rounding out the scope of Rif's code. Yisraeli writes:

במפעל הלכתי זה בקש אפוא רמב"ן 'לגאול' את 'השמטותיו' של הרי"ף, היינו את החסרים שבחיבורו, על ידי פענוח, ליקוט וסידור של החומר ההלכתי הנוגע בנושאים האמורים (נדרים, בכורות וחלה) ואשר מפוזר וטמון, במפורש או במשתמע, בתוך מרחבי חיבורו של הרי"ף עצמו. למעשה רמב"ן מבקש כאן 'לדובב' את הרי"ף ולהשלים את מפעלו מתוך יצירתו-שלו, בתחומים שבהם הוא לא הוציא מתחת ידיו יצירה הלכתית מסודרת. את חיבור ההלכות של הרי"ף בקש רמב"ן להציע כעת כיצירה מלאה ומקיפה יותר מזו שיצאה מתחת ידיו של המחבר עצמו.

במפעל השלמת מפעלו ההלכתי של הרי"ף יש לראות אפוא את צדו האחר, הפוזיטיבי (והקודם כרונולוגית), של פעילות רמב"ן לביצור מעמדו של מי שהיה למאורה של היהדות האנדלוסית במאה השתים-עשרה והשלוש-עשרה... אפשר ובכך הוא בקש לתת מענה ולהעמיד חומה בצורה כנגד איום שהתרגש ובא מן הדרום-התעצמותו של ספר 'משנה תורה' לרמב"ם, גם הוא חיבור הלכתי מקיף-אשר ממש בעצם הימים ההם הלך וצבר יוקרה וסמכות בעולם התורה הספרדי והפרובנסאלי וערער גם הוא, גם אם לא במתכוון, על בכירותו של חיבור הלכות הרי"ף. חיבור זה התיימר כידוע להחזיק בהגמוניה ספרותית מסכמת ומכריעה בתולדות ההלכה. אף שהרמב"ם הוקיר את הרי"ף ובהכרעת ההלכה נטה אחריו, הרי שבעצם מפעלו זה הציב, למעשה, איום על מעמדו של הרי"ף כפוסק אחרון.<sup>157</sup>

While it is true that the *Tashlum Halakhot* reflects Ramban's great estimation for Rif--Ramban imitates Rif's style and saw himself as picking up where Rif left off--I think it is incorrect to view the *Tashlum Halakhot* as an aspect of Ramban's project of Rif-defense. First, there is no evidence to support Yisraeli's claim that Ramban sought to portray Rif's *Halakhot* as more comprehensive and more complete than

<sup>157</sup> Yisraeli, *Intellectual Biography*, pp. 45-46.

they actually were. And why would anyone confuse Ramban's addenda with the actual *Halakhot* authored by Rif? To the contrary, *Tashlum Halakhot* draws attention to the lacunae in Rif's work.<sup>158</sup> Moreover, no one had ever objected to Rif's work on the ground that it was incomplete. The objections stemmed from Rif's substantive rulings, not the scope of the work. Finally, it is not clear how a few addenda on the laws of Bekhorot, Hallah, and Nedarim would provide even an iota of support against the magisterial sweep of the *Mishneh Torah*. For these reasons, it is incorrect to view the *Tashlum Halakhot* as a component of Ramban's project defending the halakhic precedent of Rif and the Geonim.

### Chapter Summary

This chapter has documented the scope of Ramban's project defending the halakhic precedent of Rif and the Geonim. I have argued that Ramban's *Milhamot* and *Sefer ha-Zekhut* were not motivated by Andalusian patriotism; nor were they motivated by a desire to pursue creative intellectual exploration or by a nostalgic attempt to preserve the golden era of Spain. Instead, I have argued, the *Milhamot* and *Sefer ha-Zekhut* should be understood as consistent with the project of the *Hassagot* and Ramban's jurisprudential deference to the Geonim in his *Hiddushim* and *Torah ha-Adam*. Indeed, it was the perception of Rif as the scion to the intellectual tradition of the Geonim and their teachings--through the chain of R. Hananel and R. Nissim and R. Hai Gaon--that explains Ramban's deference to the rulings of Rif.

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<sup>158</sup> Note that in the *Tashlum Halakhot* Ramban refers to Rif's *Halakhot* in the third person. Unlike the ghost-written volumes of the *Hardy Boys*, there is no indication that Ramban was trying to represent his own *Tashlum* as a component of Rif's work. For example, Ramban writes in the *Tashlum Halakhot* (Nedarim 52b):

תמיה לן מאי דכתב רבינו הגדול ז"ל בהלכות דיליה...

Statements like this clearly indicate that the *Tashlum Halakhot* was not intended as a completion of the actual *Hilkhot Alfasi*, just as the *Tosafot* are not intended as a completion of Rashi or the Talmud.

While this conclusion clarifies Ramban's project in the *Milhamot* and *Sefer ha-Zekhut* and contextualizes these works within Ramban's broader oeuvre, it raises further questions of its own. Why did Ramban feel so beholden to the geonic tradition when many of his predecessors and contemporaries did not (e.g., Rabad, R. Zerayah ha-Levi)? It is to this question that we turn in the next chapter.

## Chapter 2: Legal Precedent: The Talmud as a Closed Text and the Stability of the Law

Ramban's defense of the geonic-Rif tradition and his commitment to it was more than a side project. It was a pillar of his life's work, and it spanned the arch of his intellectual productivity. It commenced with his youthful and vigorous *Milhamot I*, continued through his mature years with *Milhamot II* and the *Sefer ha-Zekhut*, and culminated in his later years with the *Hassagot* to *Sefer ha-Mitzvot*. Ramban's introduction to the *Hassagot* shows that Ramban himself conceived of his defense of the Geonim and Rif as a unified project spanning the arch of his career.<sup>159</sup> Moreover, Ramban's commitment to geonic-Rif halakhah is a leitmotif throughout his *Hiddushim* and other halakhic works.

Why did Ramban, a thirteenth-century Catalanian, feel so bound to the geonic tradition? To paraphrase Septimus:

“the wonder then is that Nahmanides should suddenly emerge on the scene as a self conscious representative of [geonic] tradition. The story of how and why this happened remains to be written.”<sup>160</sup>

As this chapter will document, neither the tosafists in northern France nor Rabad in Provence felt bound to the geonic tradition in the way Ramban did. Even the great Andalusian disciples of Rif--Ri Migash and Rambam--do not display the kind of commitment to the geonic tradition that Ramban does.<sup>161</sup> Nor does

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<sup>159</sup> See above, chapter one.

<sup>160</sup> Septimus, “Nahmanides and the Andalusian Tradition,” p. 34.

<sup>161</sup> See the discussion below.



Ramah, a scholar whom Nahmanides viewed as a “remnant of the old Andalusia” and a master “of the Andalusian tradition.”<sup>162</sup>

Why, then, did Ramban dedicate so much intellectual energy to defending the geonic tradition? Why did Ramban feel so bound to geonic halakhic precedent such that it constitutes the backbone of his rulings in *Torat ha-Adam* and the *Hiddushim*?

### Attitudes Toward the Geonim Among the Predecessors of Ramban

To appreciate the distinctiveness of Ramban’s orientation towards geonic halakhah, it will be helpful to survey that of his halakhic predecessors. This section briefly sketches the posture of the great halakhists of the twelfth century towards the Geonim, surveying the leading figures of three halakhic cultures: Ashkenaz, Provence, and Sefarad-Andalusia. The section begins with the pre-Crusade figures of Ashkenaz and the tosafists of northern France. Next, it discusses Rabad of Provence, and finally, it surveys the Andalusian figures: Ri Migash, Rambam, and Ramah.

#### Early Ashkenaz and the Northern French Tosafists

Early Ashkenaz shows no special deference to geonic halakhah. Haym Soloveitchik recently characterized pre-Crusade Ashkenaz’s attitude towards the Geonim. He writes:

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<sup>162</sup> For Ramban’s perception of Ramah as a representative of the Andalusian tradition, see Septimus, “Nahmanides and the Andalusian Tradition,” pp. 29-30; and Septimus, *Hispano-Jewish Culture in Transition*, p. 15.

See Ramban’s poem, cited by Septimus, where he writes of Ramah:

“Let’s go the land of ma’arav,  
to the most excellent scholar,  
(ge’on) of [‘ever] and ‘arav,  
R. Meir ha-Rav.”

For Ramah as the last representative of old Andalusian learning, see Septimus, *Hispano-Jewish Culture in Transition*.

“A new community emerged in north-western Europe and immediately claimed... that the holding of its founder or master teacher was superior in halakhic authority to that of the Geonim... This independence of the Geonim, even curt dismissals of their rulings... are characteristic of Early Ashkenaz generally...”<sup>163</sup>

Haym Soloveitchik also characterizes Early Ashkenaz’s posture towards the Geonim as one of “disregard, even disrespect”.<sup>164</sup> And later in that essay he refers to the

“dismissive attitude to the Geonim that emerged so clearly from the writings of Rabbenu Gershom and those of his pupils. Rabbenu Gershom saw his teacher as being clearly superior to the Geonim.”<sup>165</sup>

The tosafists of northern France took up their ancestors’ posture towards the Geonim, for they too show little deference towards the Geonim, and even less interest in their corpus. In a different essay characterizing the tosafists, Soloveitchik writes, “No doubt, the Tosafists knew, as did their German and Provençal contemporaries, many responsa of the Ge’onim... yet one will search in vain the tosafist literature for any substantive references to them.”<sup>166</sup> Or, as he puts it in a different work, “The French

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<sup>163</sup> Haym Soloveitchik, “The Third Yeshiva of Bavel,” *Collected Essays II* (Oxford 2014), pp. 153-154.

<sup>164</sup> *Ibid*, p. 156.

<sup>165</sup> *Ibid*, p. 187. See David Berger’s criticism of Haym Soloveitchik’s characterization (or at least the version of it presented by Soloveitchik in his initial lecture on the subject), p. 213 therein. This certainly tempers Soloveitchik’s claims about Ashkenaz’s disrespect towards the Geonim, but it does not dispute Ashkenaz’s independence from them.

For further discussion of the place of the geonic literature in pre-Crusade Ashkenazic thought, see Avraham Grossman, *The Early Sages of Ashkenaz: their lives, leadership and works 900-1096* (Hebrew; Jerusalem 1981), pp. 78-80, 103-106, 204-206, 384-386, 424-435.

<sup>166</sup> Haym Soloveitchik, “The Halakhic Isolation of Ashkenaz,” in *Collected Essays I* (Oxford 2013), p. 35.

tosafists ignored... the teachings of the Geonim.”<sup>167</sup> Ta-Shma offers a similar analysis in explaining why Rif hardly made inroads into twelfth century Ashkenaz.<sup>168</sup>

Equally important to note is that the tosafist method of reconciling contradictions and harmonizing them through dialectic ran contrary to the Geonim’s approach of resolving contradictions by appealing to the dominant discussion (*sugya di-shema’ta*).<sup>169</sup>

## Rabad

Turning to Rabad, Haym Soloveitchik has offered the following vivid characterization of Rabad’s independence from the geonic corpus:

“[Before Rabad,] Provence, for all its independence in many areas of religious practice, still revolved in a Geonic orbit. Rabad changed all that.... Remove the Geonim from the Eshkol and the work collapses, subtract the Geonim from the ‘Ittur and it limps badly, take away the Geonim from Rabad and the loss is barely noticeable. The student of Geonica has no reason to rejoice in Rabad’s advent. Before Rabad, Provencal writings are a storehouse of Geonic literature. After him the Geonic material in Provencal works dwindles radically. When Geonic dicta then appear, they are generally summed up rather than cited, conceived as doctrines to be

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<sup>167</sup> Haym Soloveitchik, *Wine in Ashkenaz in the Middle Ages: Yein Nesech--A Study in the History of Halakhah* (Hebrew; Jerusalem 2008), p. 127:

בעלי התוספות הצרפתיים התעלמו... מתורתם של גאוני בבל.

<sup>168</sup> Ta-Shma, *Talmudic Commentary Part One*, pp. 138-139:

ובשאלת אופן קליטתו של פירוש רבנו חננאל באשכנז ובצרפת, וסיבת השוני שבינו לבין ספר הרי"ף--התלוי בו--שתהליך קליטתו שם היה איטי ומהוסס בהרבה... [הוא נובע מ]תחושתם כי המסורת ההלכתית המשתקפת בו אינה תואמת את מסורתם הם, שלא היתה תלויה כל כך... במסורת התלמודית-גאונית דווקא.

See also Ta-Shma, *Rabbi Zerachyah ha-Levi*, pp. 43-44, 68-72, 93-95, 106-112, 148-149; and Ta-Shma “Kelitam shel Sifrei ha-Rif, ha-Rah, ve-“Halakhot Gedolot”, in Ta-Shma, *Studies in Medieval Rabbinic Literature I: Ashkenaz* (Hebrew; Jerusalem 2004), pp. 43-61.

<sup>169</sup> On this difference in method, see Haym Soloveitchik, “The Printed Page of the Talmud”, *Collected Essays I*, p. 5.

juxtaposed, not as precious decisions to be preserved and discussed. Rabad disrupted the Geonic transmission... it was Rabad who broke the Geonic dominion.”<sup>170</sup>

Equally important is Haym Soloveitchik’s conclusion regarding Rabad’s rejection of geonic rulings in his halakhic-legal codes:

“The absence of Geonica in Rabad’s commentaries is nigh total. No code... can, however, dispense with precedent. Despite this fact the absence of prior doctrines in Rabad’s commentary-codes is striking. Hundreds of rulings are laid down in the Ba’alei Ha-Nefesh, yet the Geonim (including here R. Hananel and R. Isaac of Fez) are cited on less than a score of occasions. Most of these citations, furthermore, occur where Rabad has something to say on the matter, e.g. rejecting a doctrine outright, conjecturing as to its source, illuminating an obscurity, rejecting a popular misapprehension or simply juxtaposing differing views so as to set the stage for a decision based on his own argumentation. Rare indeed is that Geonic ruling which is brought simply as a Halakhic datum.”<sup>171</sup>

Summing up Rabad’s posture toward the Geonim, Soloveitchik concludes, “the works of Rabad... reveal to us the declaration of European independence from Geonic thought.”<sup>172</sup>

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<sup>170</sup> Haym Soloveitchik, “Rabad of Posquieres: A Programmatic Essay”, p. 12.

<sup>171</sup> Haym Soloveitchik, “Rabad of Posquieres” pp. 12-13 n.10.

<sup>172</sup> Haym Soloveitchik, “Rabad of Posquieres”, p. 37. See also Isadore Twersky, *Rabad of Posquieres* (Philadelphia, 1980), p. 220, who draws attention to Rabad’s ruling (*Katuv Sham* I, 64; *Rosh Sanhedrin* 4:6) to the effect that “if one, knowing the Geonic decision, would have disagreed with it because of his own interpretation or reasoning and hence judged erroneously, it would still be as if he erred concerning a teaching of the Mishnah.” As Professor Berger has commented to me regarding this Rabad, “people don’t always abide by their theoretical pronouncements.” Twersky downplays the significance of this passage. See also Twersky’s general characterization of Rabad’s relationship with the Geonim in *Rabad of Posquieres*, pp. 216-221.

## The Spanish-Andalusian Tradition

The Andalusian scholars who followed Rif might seem the most likely candidates for adherence to the geonic tradition.<sup>173</sup> But a brief survey of their most important scholars suggests that the Geonim did not occupy a central place in Andalusian halakhah after Rif.

### *Ri Migash*

Yisrael Ta-Shma, who studied Ri Migash's relationship with the Geonim in both his responsa and talmudic *Hiddushim*, offers the following conclusion. Regarding the responsa, Ta-Shma concludes:<sup>174</sup>

...עינינו הראות ש[הרימיגש] פוסק הרבה נגד הגאונים... למעשה נחלק הרימיגש עם הגאונים בפרטים רבים... וכבר כתבתי שההתחשבות בהכרעת הגאונים עמדה במקום אחרון בסולם העדיפויות של הרימיגש, שבראשו עמד הרי"ף אחריו הרי"ח, ואחריהם הגאונים.

Ta-Shma offers a similar conclusion regarding Ri Migash's talmudic *Hiddushim*:<sup>175</sup>

פעמים שהוא דוחה את דברי הקדמונים, כולל דברי הרי"ף רבו, בלשון חד משמעית.... ואולם בדרך כלל הוא נוטה להסכים עמו למעשה.... לפירושו של הרי"ף... מתייחס הרימיגש ביתר חופשיות.... [הרימיגש סבר ש]אפשר לדחות את מסקנות הרי"ף ואת הלכותיו, אך בתנאי מוקדם שתיבדק קודם הסוגיא לכל צדדיה.... שונה היא עמדתו כלפי רבנו חננאל. את דבריו הוא דוחה ברוב המקומות שהוא נוקב בשמו.... בענין רב האי גאון... ההזכרות מועטות, בדרך כלל ברוח של דחייה....

<sup>173</sup> For the idea of the geonic-Andalusian tradition, see Septimus, *Hispano-Jewish Culture in Transition* pp. 80-101, 106-114; E. Kanarfogel *Jewish Education and Society in the High Middle Ages*, p. 46.

<sup>174</sup> Israel Ta-Shma, "Yezirato ha-Sifrutit Shel Rabbenu Yosef ha-Levi Ibn Migash," *Studies in Medieval Rabbinic Literature II: Spain* (Hebrew; Jerusalem 2004), pp. 41-46. See, however, Ephraim Kanarfogel, "Progress and Tradition in Medieval Ashkenaz," *Jewish History* 14:3 (2000), pp. 297-298, who portrays Ri Migash's relationship with geonic precedent differently from Ta-Shma. Kanarfogel writes that "within the corpus of his responsa, Ri Migash deviates from geonic precedent in only a handful of instances. In several of these cases, unspecified or little-known ("lesser") Geonim are involved. In the remainder, Ri Migash is following the view of another Gaon or of R. Isaac Alfasi."

<sup>175</sup> Israel Ta-Shma, "Yezirato ha-Sifrutit Shel Rabbenu Yosef ha-Levi Ibn Migash," pp. 27-31. See also Ta-Shma, *Talmudic Commentary Part One*, pp. 178-182.

ניתן לומר בבירור, כי ככל שהחכם מאוחר יותר, כך מקובלים דבריו יותר על הרימיגש, הרי"ף--רבו--בראש הסולם, רבנו חננאל לאחריו, והגאונים לבסוף.

### *Rambam*

Turning to Rambam's posture towards the Geonim, we have already seen his unequivocal and irreverent dismissal of Bahag's system of mitzvot. Furthermore, Isadore Twersky has noted that Rambam's nod in his introduction to the *Commentary on the Mishnah* to the geonic tradition and the Geonim's role in transmitting the tradition is perfunctory at best, especially when compared with his glowing praise for Ri Migash and Rif. Twersky writes:

"The silence concerning the Geonim in this context--they are , to be sure, mentioned summarily, almost ritualistically... and there is a lean, bare-bones enumeration of book titles immediately before the paeon to R. Isaac Alfasi--suggests the difference he perceived between their methods and accomplishments and his own. Indeed, Maimonides' dissatisfaction with the Geonim is clearly mirrored in his praise of R. Isaac Alfasi, whose Halakhot, by calculated and consistent omission or skillful use of understatement and nuances of formulation and emphasis, diminished the import and impact of Gaonic writing."<sup>176</sup>

Twersky suggests that Rambam's celebration of Ri Migash and Rif, read against his perfunctory listing of geonic works, reflects Rambam's intention to emphasize the "diminished... import and impact of Gaonic writing."<sup>177</sup>

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<sup>176</sup> Isadore Twersky, *Introduction to the Code of Maimonides (Mishneh Torah)*, (New Haven, 1980), p. 9. For a discussion of Twersky's striking claim that Rif intentionally sought to diminish the impact of the Geonim, see above, chapter one.

<sup>177</sup> *ibid.*

Twersky also draws attention to passages where Rambam dismisses geonic rulings: “I have seen statements by Geonim... and (they are so wide of the mark) that it is not worth refuting them at length... And as for the truth, we have already explained its way.”<sup>178</sup>

Another example offered by Twersky is Rambam’s criticism of the Geonim in *Hilkhhot Ma’akhalot Asurot*: “Some of the Geonim have ruled... but there is no basis for this view.” And again, “Some of the Geonim have ruled... it would appear to me that this is a wrong decision based on an erroneous interpretation of the Scriptural verse... one should not pay any attention to this (Gaonic) ruling.”<sup>179</sup>

Rambam’s most important statement concerning the authority of the Geonim appears in his introduction to *Mishneh Torah*, where he draws a sharp distinction between the authority of the Talmud and the authority of Geonim:

“If a court established in any country after the time of the Talmud made decrees and ordinances or introduced customs for those residing in its particular country or for residents of other countries, its enactments did not gain the acceptance of all Israel because of the remoteness of the Jewish settlements and the difficulties of travel... No compulsion is exercised on those living in one country to observe the customs of another country; nor is any court directed to issue a decree that had been issued by another court in the same country; nor is any court directed to issue a decree that had been issued by another court in the same country. So too, if one of the Geonim taught that a certain way of judgment was correct, and it became clear to a court at a

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<sup>178</sup> *Mishneh Torah*, Ma’aser Sheni 9: 12. Twersky, *Introduction to the Code of Maimonides*, p. 124. Twersky also points to *Issurei Bi’ah* 11:15: “That which you’ll find in the responsa of some of the Geonim... is not a legitimate practice but rather an error.” See Twersky, *Introduction to the Code of Maimonides*, p. 124 n.86.

<sup>179</sup> *Mishneh Torah*, *Ma’akhalot Asurot* 15:18, discussed in Twersky, *Introduction to the Code of Maimonides*, pp. 155-156. See also Rambam’s criticism of geonic fund-raising for their academies, discussed in Twersky, *Introduction to the Code of Maimonides*, p. 453 n.236.

later date that this was not in accordance with the view of the Gemara, the earlier authority is not necessarily followed but that view is adopted which seems more reasonable, whether it be that of an earlier or later authority.”<sup>180</sup>

The practical result of Rambam’s theory is that the jurisdiction of the Geonim is quite limited. The interpretations and rulings of the Geonim do not bind Jews outside of the sphere of influence of the geonic academies. Nor do they bind later generations. As Isadore Twersky notes:

“Maimonides’ assessment of the intellectual legacy of the Geonim was not, to say the least, routinely adulatory. He realized and exposed the limitations of their achievements... but above all he questioned their exclusive or preemptive rights in the realm of explication and adjudication. Only the Mishnah and the Talmud were universally binding.... Maimonides’ halakic-historical formulations underscored a basic socio-political fact: Gaonic teachings lacked intrinsic authoritativeness and could not possibly aspire to universal recognition.”<sup>181</sup>

Moshe Halbertal offers a similar summary of Rambam’s position:

“The decisions of the Geonim were not accepted by all Jews...that historical fact resulted in the geonic rulings being local and temporary. A gaon’s halakhic instruction bound neither other courts in other communities nor succeeding generations... Maimonides uses th[is] historical

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<sup>180</sup> *Introduction to Mishneh Torah*, discussed in Twersky, *Introduction to the Code of Maimonides*, pp. 128-129. Twersky there, pp. 130-131, shows that Rambam put this theory to practical use. See *Mishneh Torah* (Ishut 14:14) “The Geonim have said that in Babylonia they had different customs... but these customs have not spread among the majority of Israel, and many great scholars in most places disagree with them. It is proper, therefore, to follow the rule of the Talmud and decide accordingly.”

<sup>181</sup> Twersky, *Introduction to the Code of Maimonides*, p. 83.



picture ... as the mechanism for creating his desired gap between the absolute authority of the Talmud and the limited authority of the Geonim.”<sup>182</sup>

Halbertal also offers a variety of examples where Rambam ridicules the geonic position.<sup>183</sup> He also shows how Rambam reconsidered many of his early rulings (in the *Commentary on the Mishnah*) because he felt they were overly influenced by geonic halakhah.<sup>184</sup>

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<sup>182</sup> See Halbertal’s discussion in “The Authority of the Talmud and the Authority of the Geonim,” in *Maimonides: Life and Thought* (Princeton, 2014), pp. 175-181, and his general conclusion on p. 19: “Maimonides did not accept the halakhic authority of the Geonim.”

<sup>183</sup> Halbertal, *Maimonides*, p. 75: “Maimonides’s... tone in halakhic discussions was... harsh, even when he engaged in a dispute with the greatest of Geonim”.

Halbertal also points to Rambam’s criticism of the Geonim’s position on the nature of halakhic disagreement and how it came about. Regarding the Geonim’s view, Rambam writes, “this type of contention, God knows, is an extremely depraved and ugly statement. These are words of someone without understanding, and who is not meticulous about fundamentals and who blemishes the people through whom the commandments were received. All this approach is void. That which brought one to believe in this depraved conviction was a paucity of contemplation into the works of the Sages that are found in the Talmud.”

<sup>184</sup> Halbertal, *Maimonides*, p. 93: “Maimonides addresses one of the principles that underlies these revisions--his increasing liberation from geonic positions... Maimonides [explains that] the mistakes in the Commentary on the Mishnah stemmed from over-reliance on the Geonim.”

For example, Rambam states that “in most of [my mistakes] I was misled by following the Geonim.” Halbertal, p. 94, suggests that many of the hundreds of revisions from the Commentary on the Mishnah to Mishneh Torah “show a steadily increasing independence... vis-a-vis geonic attitudes.”

As Professor Kanarfogel has remarked to me, not all of the Geonim were cut of the same cloth, and it stands to reason that Rambam discriminated between different Geonim with respect to the authority of their halakhic views. Such an analysis, however, lies beyond the scope of this study. For our purposes here it is clear that Rambam nowhere expresses the kind of consistent deference to the geonic corpus that Ramban expresses. See also Meir Havazelet, *ha-Rambam ve-ha-Geonim* (Jerusalem, 5727).

### Ramah

Turning now to Ramah, Ta-Shma has characterized Ramah's orientation towards the Geonim as one of "great independence," and he offers several examples where Ramah curtly dismisses the Geonim's interpretation.<sup>185</sup>

For example, Ramah writes, referring to some geonic commentaries: "I have seen several commentaries on this discussion, some of them are incorrect, and some of them are not sufficiently precise, but I came up with an excellent interpretation of this passage...."<sup>186</sup>

In another context, Ramah writes of the Geonim: "The great masters labored to force an interpretation on this passage, but they were unsuccessful... but if you look at our explanation, these passages can be understood correctly."<sup>187</sup>

Ta-Shma writes that these formulations are characteristic of how Ramah dismissed geonic rulings and interpretations.<sup>188</sup> Ta-Shma goes so far as to suggest that one of the distinguishing features of the *Yad Ramah* is the harsh, critical language that it employs against the Geonim, Rabbenu Hananel and Rif.<sup>189</sup>

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<sup>185</sup> Israel Ta-Shma, *Talmudic Commentary Part Two*, pp. 11-19; Ta-Shma, "Yezirato ha-Sifrutit shel R. Meir ha-Levi Abulafia" in Ta-Shma, *Studies in Medieval Rabbinic Literature II: Spain* (Hebrew; Jerusalem, 2004) pp. 74-77.

<sup>186</sup> *Yad Ramah*, Sanhedrin 8a.

"ושאר הא שמעתתא חזינא בה כמה פירושין, איכא מינייהו דלא דייקי, ואיכא מינייהו דלא דייקי כולי האי, ואנן איסתבר לן בה פירושא מעליא וחזינן לבירורה לשמעתתא שפיר לפום פירושא דאיסתבר לן."

<sup>187</sup> *Yad Ramah*, Sanhedrin 9b:

"וטובא איחבטו רבואתא בהני תרי שמעתתא... לאוקמינהו בחד טעמא, ולא יכילו. וכן מעיינת בהדין טעמא דילן סלקי לך הני תרי שמעתתא אליבא דהלכתא."

<sup>188</sup> Ta-Shma, op. cit., comments:

בלשונות אלו וכדוגמתן משתמש הרמ"ה גם נגד הרי"ף עצמו, נגד הר"ח ונגד הגאונים.... כל אלו מעידים על עצמאותו הרבה של הרמ"ה בהלכה.

<sup>189</sup> Ta-Shma, "Yezirato ha-Sifrutit shel R. Meir ha-Levi Abulafia", pp. 74-77:

סגולות מיוחדות לו לספר "פרטי פרטים" [ואחת מהן] לשונות הביקורת הקשים שבהם הוא משתמש אף ביחס לגאונים, לר"ח ולרי"ף.

As this survey reflects, the authority of the Geonim was hardly apodictic in twelfth century Spain, even amongst its elite talmudic scholars. An exchange found in the genizah records a debate between a Spanish scholar and a learned Egyptian merchant. The Spanish scholar scolds the Egyptian merchant for sending him a lengthy discussion of the geonic ruling without even knowing its talmudic source. The scholar proceeds to declare that he has no need for the rulings of the Geonim, for he is able to divine the correct halakhic rulings directly from the Talmud. The Scholar writes:

נעלם ממך המקור ובאת לנצחני במה שאמרו הגאונים, ולו הבנת את המקור וידעת את מקומו בתלמוד ועמדת עליו ונתת דעתך עליו, לא היית נכשל במה שנכשלת. כי הגאונים לא אמרו זה אלא לפי הכללים שכלל התלמוד...ה' לא הצריכני לדברי הגאונים, אלא מעיין אני בתלמוד ומגלה את כלליו.<sup>190</sup>

### Ramban and Geonic Legal Precedent

This brief survey of the halakhic orientation of Ramban's predecessors--the tosafists, Rabad, the sefardic scholars including Ri Migash, Rambam and Ramah--toward the geonic tradition brings Ramban's strong commitment to the geonic tradition into sharper relief.

Why did Ramban dedicate so much intellectual energy to defending the geonic tradition in the *Milhamot*, *Sefer ha-Zekhut*, and *Hassagot to Sefer ha-Mitzvot*? Why did Ramban feel bound to geonic halakhic precedent such that it constitutes the backbone of his rulings in *Torat ha-Adam* and the *Hiddushim*?

We have already seen Septimus's attempt to answer this question by portraying Ramban as a Spanish patriot. I have argued that this portrayal of Ramban is inaccurate. I have also argued that there is nothing "Spanish" about Rif-geonic defense, as the brief survey of Ri Migash, Rambam and Ramah

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<sup>190</sup> For a discussion of this exchange, see Ta-Shma, "Yezirato ha-Sifrutit shel Rabbenu Yosef ha-Levi Ibn Migash," p. 43. For further analysis of this exchange and the significance of the scholar's statement that he can divine the correct halakhic ruling directly from the Talmud, see chapter three, below.

demonstrates. We have also seen Yisraeli's theory that Ramban was motivated by the sense of loss following the demise of the great Spanish yeshivot and the need to preserve the ancient Spanish teachings. I've argued that Ramban's project cannot be characterized as one of conservation and, moreover, that there is no reason to believe that the Catalonian Ramban would be motivated by, or have been depressed about, the loss of Andalusian yeshivot half a century before he was born.

In chapter one I have tried to show that Ramban was motivated directly by the geonic tradition, of which he saw Rif as the great denouement.<sup>191</sup> In the sections that follow, I develop this theory to show that Ramban was specifically motivated by the importance of geonic *legal precedent*. I shall argue that several factors, and particularly their confluence, explain Ramban's commitment to the geonic halakhic tradition. First, I will show that Ramban saw the Geonim as the institutional and intellectual heirs of the Savoraim and Amoraim. The significance of this relationship between the Geonim and Amoraim, for Ramban, is primarily epistemic: The Geonim had special access to the teachings of the Amoraim, and as the heirs of amoraic learning, the Geonim would possess traditions of talmudic interpretation and traditions of halakhic rulings dating back to the *hakhmei ha-Talmud* themselves. In the next chapter, I will address whether this perception of the Geonim was universal or unique to Ramban.<sup>192</sup>

This fact by itself does not explain Ramban's project. For instance, it seems reasonable that Ramban's predecessors might agree to this characterization of the Geonim, or at least have similar perceptions of the geonic role in the chain of tradition, yet they did not express anywhere near the same kind of allegiance and commitment to the geonic corpus. More must be said, then, to explain Ramban's project.

This brings us to a second feature of Ramban's talmudic jurisprudence. I'll argue that Ramban perceived the Talmud as a "closed text" (*sefer satum*). By this I mean that Ramban saw the meaning of the Talmud

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<sup>191</sup> See the discussion in chapter one about this perception of Rif as the culmination of the geonic tradition.

<sup>192</sup> See, for example, Isadore Twersky's claim in *Rabad of Posquieres*, p. 216.

as resistant to efforts at unmediated understanding. In the sections below, I shall demonstrate that Ramban believed that the Talmud is a difficult corpus to unlock and master, all the more so if the goal is to divine its normative rulings: It is futile to approach the Talmud without a guide, and Ramban believed that the most reliable guide is the geonic tradition. After all, the Geonim had studied in the very same academies that wrote and sealed the Talmud, and if anyone possessed an accurate tradition on how to navigate the text, it was they. The geonic tradition was the key to unlocking the Talmud. These two ideas--the Geonim as the intellectual heirs of the Amoraim and the Talmud as a closed text--I'll suggest, constitute the most important ground of Ramban's defense of the Geonim.

Further, I will argue that there is another important ground for Ramban's project: A normative view that contemporary halakhic rulings ought to follow the Rif-geonic tradition because of the chronological priority of these rulings over those of later halakhic cultures. The idea is that contemporary rulings ought to defer and yield to the legal precedent set by earlier authorities. Thus, Ramban maintained that someone like R. Zerayah ha-Levi ought to have deferred to the rulings of Rif and the Geonim under the normative principle of *kevar horah zaken*.

Finally, I'll suggest that Ramban's project of restoring geonic-Rif precedent should be understood against the historical backdrop of the twelfth century--a century of halakhic revolution whose force had the potential to shatter the cohesion and stability of Jewish law. Against these revolutions, Ramban emerges in the thirteenth century as a jurist seeking to ensure the stability and uniformity of Jewish law by restoring (geonic) legal precedent to its proper place.

## The Talmud as a Closed Text

The Talmud is a difficult text. Take away the commentaries of the rishonim, and other interpretive and commentarial aides, and the reader is immediately lost in the high seas of the talmudic back and forth.

Consider Haym Soloveitchik's description of the talmudic text:<sup>193</sup>

“If one reads an accurate translation of the Talmud, such as the translation published by the Soncino Press, one will understand all the words of the text and the general line of argument, but the individual steps lack clarity and the argument as a whole hangs loosely together. The reason is that the Talmud is, as it were, a ‘telegraphic’ text: the main points are stated, but the flow, the linkage of the various points, is left up to the reader to reconstruct.”

Soloveitchik also notes that this was “a problem that had confronted scholars for close to half a millennium--how to turn the abrupt and sometimes gnomic formulations of the talmud into a coherent and smoothly flowing text.”<sup>194</sup> And this is even before we consider how one could begin to “discern the meaning of the innumerable Persian, Greek, and Latin words that abound in the Talmud.”<sup>195</sup>

When we examine Ramban's introductions to his various works, a striking, recurring theme is his characterization of the Talmud as a “closed,” “cryptic,” and “unexplained” text, with “hidden” laws and “buried” rulings. Ramban repeatedly characterizes the Talmud as a corpus in need of explication, a body of closed knowledge whose meaning needs to be unpacked and revealed.

In his Aramaic introduction to *Hilkhot Bekhorot* and *Hallah*, Ramban asks for wisdom to be able to “reveal all the concealed” in codifying the Talmud's rulings on *Bekhorot* and *Hallah*:

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<sup>193</sup> Haym Soloveitchik, “The Printed Page of the Talmud”, *Collected Essays I*, p. 3.

<sup>194</sup> *Ibid*, p. 6.

<sup>195</sup> *Ibid*, p. 4.

“And from the Ancient of Days [I should receive the wisdom to] reveal all the concealed [rulings of the Talmud].”<sup>196</sup>

In the Hebrew introduction to the same work, Ramban describes how he uses Rif’s *Halakhot* to discern and discover “closed off... and hidden [rulings]” in the Talmud.<sup>197</sup>

In his Aramaic introduction to *Milhamot I*, Ramban repeatedly uses the imagery of revealing secrets and discovering that which is hidden to describe Rif’s ability to create a normative work of halakhic rules out of the talmudic jungle:

“[Rif’s work] is vast in knowledge and deep with analysis, to solve all the difficulties, and to detect all the hidden [laws], and to reveal all the secrets [of the Talmud]. And he removes the clay to unearth the gem beneath.”<sup>198</sup>

And in the introduction to *Milhamot II*:

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<sup>196</sup> *Kitvei Ramban I*, p. 406:

ומן עתיק יומיו, יגל כל טמירתא, קרץ עינוי, בצפר, בנגהא בשפרפר.

Chavel translates the phrase:

מן ה' שהוא עתיק ימים... תבוא לו החכמה לגלות כל טמון.

<sup>197</sup> *Introduction to Hilkhhot Nedarim u-Vekhorot*, published at the end of *Hilkhhot Bekhorot* in the standard editions of the Talmud:

בשם קורא הדורות, אתחיל הלכות נדרים ובכורות. חברתים לתשלום הלכות רבנו הגדול ז"ל שאלו מהשמטותיו אשר בהלכותיו אינם נזכרות. אמנם מפני שהן נוהגות בכל זמן ובכל מקום, כתב מקצתן בתלמודנו מפוזרות. ואני קטן תלמידי תלמידי יצאתי בעקבותיו הישרות ולמדתי מדבריו סתומות ממפורשות, ומן הנגלות הנסתרות.

<sup>198</sup> *Kitvei Ramban I*, pp. 409 - 410:

וסביר אף גמיר, למפשר כל חמיר, ובליש כל טמיר, וגלא כל סתרא, וחספא די מחתא, ומרגלי תותה...

“The obligation that is incumbent upon us to search the contents of the Torah and the Mitzvot [is to] bring to light the hidden [rulings] buried in it.”<sup>199</sup>

And later in the introduction to *Milhamot II*:

“God... should endow me with a learned tongue, to bring to light all the hidden [rulings], and to [be able] to make known the wisdom shut [inside it].”<sup>200</sup>

In the introduction to *Dina de-Garmi*, Ramban characterizes the tosafists’ Talmud study in a similar manner:

“They are the guides, they are the teachers, they reveal to us what is hidden [in the Talmud].”<sup>201</sup>

Read out of context, one would be tempted to read these passages as allusions to a deeper, kabbalistic interpretation of the Talmud.<sup>202</sup> But that is clearly not Ramban’s intent. In these passages, Ramban is referring to the difficulties of discerning and extracting the normative halakahic rulings from the talmudic text. The student or scholar is tasked with ferreting out conclusive legal rulings obscured--hidden, buried, concealed, shut--within the talmudic corpus.

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<sup>199</sup> *Kitvei Ramban I*, p. 411:

החייב המטל עלינו לחפש בעיני התורה והמצוות, ולהוציא לאור תעלומות מצפונים.

<sup>200</sup> *Kitvei Ramban I*, p. 414:

והאל אשר בתהלתו כל יצוריו מודים, ויודעיו את שמו מיחדים, יתן לי לשון למודים, להוציא לאור כל תעלומה, ולהודיע בסתום חכמה.

<sup>201</sup> *Kitvei Ramban I*, p. 417:

הם המורים הם המלמדים הם המגלים לנו נטמן.

<sup>202</sup> In fact, Oded Yisraeli appears to lean this way when he suggests, in Yisraeli, *Intellectual Biography*, p. 45 n. 12, that these statements of Ramban reflect the kernel of his kabbalistic hermeneutic:

בהצהרתו של רמב"ן כאן בדבר כוונתו לזהות ולחשוף בטקסט את ה'סתומות' וה'נסתרות' ניתן לראות את ניצניה של מגמה הרמנויטית רחבה שלימים תעמוד ביסוד פרשנות הסוד שלו לתורה.



Thus, throughout his different works Ramban consistently characterizes Talmud study as an enterprise of revealing the secrets of the Talmud, clarifying its obscure rulings, and detecting hidden principles and rulings.<sup>203</sup> Clearly, Ramban perceives the Talmud as a difficult text to penetrate--a challenging code of law to reconstruct--and the task of the commentator or jurist is to discover its hidden content, clarify its meaning, and give it clear, precise expression.

Rashi's commentary had of course shed much light on the Talmud, its meaning, and the flow of its logic. It made the Talmud accessible, at least to a scholar, and it may even have "democratized talmudic scholarship" to some extent.<sup>204</sup> But the utility of Rashi's commentary is primarily in its ability to clarify the meaning of the talmudic discussion and the logic of its flow. In good northern French fashion, it is a superb commentary for the student interested in studying and understanding the back and forth of the Talmud.

Rashi's commentary is far less useful if one is studying the Talmud to discern its normative conclusions and final rulings. Rarely does the Talmud inform us who the halakhah follows, and Rashi generally does not attempt to do so.<sup>205</sup> And indeed, ferreting out the normative conclusions and final rulings of the

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<sup>203</sup> Note as well Ramban's depiction of Bahag's erudition in the introduction to the *Hassagot*, in *Kitvei Ramban I*, p. 420:

כל סתום לא עממוהו.

<sup>204</sup> Haym Soloveitchik's conclusion is exaggerated. See Soloveitchik, "The Printed Page of the Talmud," in *Collected Essays I*, p. 4, where he writes:

"The commentaries of Rashi democratized talmudic scholarship.... with the appearance of Rashi's work, anyone, regardless of means, could by dint of talent and effort master any talmudic topic, and could do so with far greater precision than had previously been possible. This was true for the beginner and equally so for the accomplished scholar..."

But witness the proliferation of talmudic aids and resources that have been published in the last century. Even with Rashi, the beginner would still be lost in the high seas of the talmudic give and take.

<sup>205</sup> See for example, Ta-Shma, *Talmudic Commentary Part One*, p. 43:

Talmud was an integral part of Ramban's life work. This includes the *Tashlum Halakhot* (Hilkhot Nedarim, Bekhorot and Hallah), *Torat ha-Adam*, *Hilkhot Niddah*, *Hilkhot Lulav*, *Milhamot* and *Sefer ha-Zekhut*. And determining the Talmud's final ruling is one of the central goals of the *Hiddushim*.<sup>206</sup>

Let me elaborate. One can have full commentarial grasp of the talmudic discussion but have no idea of its normative conclusion. Rarely does the Talmud reveal its final legal ruling. The talmudic discussion usually contains disagreements, debates, arguments, and multiple resolutions to a single inquiry. It will sometimes reject an argument, raise an objection to an opinion, cite an anecdote supporting one view over another, suggest that one view depends on another view presented elsewhere, but rarely does it offer decisive rulings.<sup>207</sup>

Consider Robert Brody's description of the Talmud:

"The Talmud is an extremely complex literary work, comprising legal and other materials, which evolved over centuries. Even in its legal portions, many discussions are wholly or partly of an academic nature, and many disputes on practical issues remain unresolved. Furthermore, the

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רש"י נמנע לחלוטין מלערב שיקולים אחרים מלבד שיקולי פרשנות טהורים בפירושו, והתרחק תכלית ריחוק מפסיקת הלכה במהלך עבודתו. בזה נבדל לחלוטין, כפירושי מגנצא שלפניו, מסגנון פרשנות התלמוד שנכתבה אז בארצות האסלאם, החל בפירושי רבנו חננאל, שיסוד הפסיקה הוא עמוד השדרה שלהם. פעמים נדירות ביותר תמצא בפירושו רש"י קביעת הלכה, והמעט הנמצא קשור לסוגיות בעלות חשיבות מעשית רבה.

<sup>206</sup> See for example Ta-Shma's characterization of the *Hiddushim* in Ta-Shma, *Talmudic Commentary Part Two*, p.

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מן המורשת הספרדית לקח את מגמת פסיקת ההלכה למעשה כחלק מהותי של העבודה הפרשנית וכאחת ממטרותיה הראשיות.

<sup>207</sup> R. Samson of Sens makes this point in his criticism of Rambam's code. The Talmud is decidedly not a decisive code of normative law:

ואיש אל ישים יגיעו בספרים הסתומים... כי אם ללמוד מהם להוראת שעה. צא ולמד ממשנה ותלמוד ספרא וספרי ותוספתא, שלא מסרו לאחרונים פסקי הלכות לבדם, אך כתבו להם דברים המטמאים והמטהרים דברי האוסרים והמתירים טעמי אלו ואלו, כולם נתנו מרועה אחד, וההוגה בהם מקבל שכר על כולם, ופעמים נגלים לאחרונים דברים הצפונים מהראשונים, והוי רץ למשנה ולתלמוד.

This statement is cited and discussed in Ephraim Urbach, *The Tosafist: Their History, Writings and Methods*

(Hebrew; Jerusalem, 1986), pp. 743-744.

material is not organized systematically, in the style of a legal code; a single issue may figure in a variety of contexts, and the relationship (if any) between the various discussions, as well as the weight to be assigned to them in deriving legal conclusions, is rarely self-evident. We have no way of knowing to what extent, if at all, the “editors” of the Talmud--as distinct from the authors of the legal dicta embedded within it--intended to create a normative legal work rather than an academic or literary corpus.”<sup>208</sup>

Ri Migash, in a responsum, captures the difficulty of divining normative halakhic rulings directly from the Talmud. Asked whether a scholar can offer normative rulings based directly on his interpretation of the Talmud, Ri Migash responds:

“Those who rule [exclusively] on the basis of their analysis of the halakhah and their analysis of the Talmud--those are the ones who need to be stopped. For there is no one in our day who is fit to do so [rule directly from his analysis of the Talmud]. And there is no one who has achieved the rank [of excellence] in the wisdom of the Talmud to rule solely on the basis of his analysis [of the text].”<sup>209</sup>

Indeed the Talmud itself reinforces this view when it states that “one ought not derive normative halakhic conclusions from study of the Talmud”.<sup>210</sup>

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<sup>208</sup> Robert Brody, *The Geonim of Babylonia and the Shaping of Medieval Jewish Culture* (New Haven, 1998), p. 161.

<sup>209</sup> *Responsa Ri Migash* no. 114, cited and discussed in Ta-Shma “Yezirato ha-Sfirutit shel Rabbenu Yosef Ha-Levi Ibn Migash,” *Studies in Medieval Rabbinic Literature II: Spain*, p. 41:

ואותם שמדמים להורות מעיון ההלכה ומחזק עיונם בתלמוד הם שראוי למנעם מזה לפי שאין בזמננו זה מי שיהי' ראוי לכך ולא מי שהגיע בחכמת התלמוד לכלל שיורה מעיונו...

<sup>210</sup> See *Niddah* 7b:

אין למדין הלכה מפי תלמוד.

And *Bava Batra* 130b:

אין למדין הלכה לא מפי למוד ולא מפי מעשה - עד שיאמרו לו הלכה למעשה.

How, then, is the normative ruling to be divined? The medieval halakhic jurists used a variety of methods to arrive at conclusive legal rulings. At times they could point to *kelalei pesikah*: which view had greater support among the Amoraim; which Amora is deemed a greater expert in the subject at issue; whether one Amora preceded the other chronologically. Oftentimes these halakhic jurists tried to divine the normative ruling from clues in the talmudic presentation: does the Talmud implicitly endorse Amora X's view by citing it as a default position in a different sugya; does the Talmud's line of questioning tacitly presuppose view Y; when the Talmud relates an anecdote at the end of its discussion, is that intended to convey its normative stance; is one sugya more "fleshed out" and therefore more reliable than another; is Amora Z's view just a derivative of Tanna A's position and therefore rejected along with it or does Amora Z's view stand even after Tanna A's position is rejected? These kind of inquiries constitute the core of early *pesak*.

Applying even the more basic *kelalei pesikah* can be exceedingly difficult. Take for example the principle that the halakhah should follow the view supported by the majority of Amoraim. This requires an analysis of all the relevant passages and all the relevant comments of the various Amoraim and a determination whether that Amora's statement implicitly expresses support for one side of the debate over the other. This kind of analysis is further complicated by the fact that the Talmud rarely explains what role a given Amora's view is supposed to play in the overall flow of the talmudic back and forth. Moreover, there is widespread debate about how the *kelalei pesikah* interact with each other--e.g. which rule has priority over the other--and exactly what the rules themselves are.<sup>211</sup> There is also disagreement about the extent to which *pesak* emerges exclusively from these *kelalei pesikah* or also

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<sup>211</sup> See for example, Ramban's *Tashlum Halakhot*, Nedarim 25b:

איכא מאן דפסק כרבה משום דהוא רביה דרבה, ואיכא מאן דפסק כרבה דבתרא הוא, ואע"ג דלא ממייכרעא לן מילתא בעלמא הכא גבי נדרים לחומרא נקטינן כרבה...

from the rational convictions and personal assessment of the jurist.<sup>212</sup> In some instances, the Talmud will establish a rule, such as “the normative halakhah is like Abaye in the cases of ם יעל קג” without specifying what the acronym stands for.

Considerations like these render the Talmud a closed text when it comes to attempting to derive normative halakhah from it. As I noted earlier, the lion’s share of the *Milhamot* dives deep into these kinds of *kelalei pesikah* inquiries. Ramban’s preoccupation with *kelalei pesikah* is a core component of his halakhic writings, as Shraga Abramson’s work demonstrates.<sup>213</sup>

Rashi’s great commentary made the Talmud’s discussion of legal ideas accessible. It perhaps democratized the Talmud as a corpus of theoretical legal discussions, but as a code of normative law,

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<sup>212</sup> See Halbertal’s characterization, *Maimonides*, pp. 94-96, of Rambam relying heavily on the *kelalei pesikah* of the Geonim earlier in his career, but abandoning them later on in life in favor of his own interpretations and analysis of the sugya:

“In the first phase of writing the Commentary on the Mishnah, Maimonides tended to accept the decision-making principles enshrined in the Babylonian Talmud: in a controversy between single sage and multiple sages, the law accords with the majority; the law follows R. Joshua against R. Eliezer; the law follows an anonymously attributed Mishnah; and so forth. Maimonides’ revisions over time demonstrate that he liberated himself from the automatic application of these principles or from following the legal precedents common among halakhists who predated him... Close study... reveals the steadily increasing independence that Maimonides demonstrated in his rulings, whether vis-a-vis geonic traditions or with regard to previously accepted methods of reaching halakhic decisions.”

<sup>213</sup> Shraga Abramson, *Kelalei ha-Talmud be-Divrei ha-Ramban* (Jerusalem, 1971). Note Abramson’s surprise, p. 5, that Ramban’s emphasis on *kelalei ha-pesak* and *kelalei ha-Talmud* has been insufficiently noticed:

ולאחר שכל הפזורים נאספו יחדו אתה תמה על עצמך על המרובה שיש בדברי הרמב"ן שלא שזפתו עינך קודם לכן, ואף על פי שדברי הרמב"ן סידורים תמיד לפניך. ולא עוד אלא שאף גדולי בעלי הכללים לא הביאו מדברי הרמב"ן אלא בממועט. אין זאת אלא משום מה שאמרו חז"ל הכל בחזקת סומים עד שהקב"ה מאיר את עיניהם.

See also Ta-Shma, *Talmudic Commentary Part Two*, p. 42:

נושא אחר שניכרת בו נטייתו הספרדית של הרמב"ן היא מגמתו להרחיב ולשכלל עד מאוד את מערכת 'כללי התלמוד' ככלי פרשני... Note that R. Zerayah ha-Levi also attempted to codify *kelalei ha-pesak* in his *Sefer ha-Tzava*. On this work, see Ta-Shma, *R. Zerayah ha-Levi*, pp. 29-31.

the Talmud remained as closed off as it always had been. To unlock its rulings, one needs a guide--or a map with a legend.<sup>214</sup>

### The Geonic-Saboraic-Amoraic Tradition

What guidance or tools does the halakhic jurist have at his disposal when approaching the difficult corpus that is the Talmud? Ramban's position, I shall contend, is that it is through the works of the Geonim--who had studied in the same academies as the Amoraim and Savoraim and received traditions of interpretation and jurisprudence from them--that the halakhic jurist can begin to approach the talmudic corpus. It is through the Geonim's teachings and rulings that the jurist can gain access to the jurisprudential traditions of halakhah that stretch back to the drafting and sealing of the Talmud itself. The best way to approach a difficult corpus is with the key provided by its authors and editors. For Ramban, the geonic writings were the key to unlocking the Talmud. In his view, the insights and principles of jurisprudence that animated the academies of the Amoraim who forged the Talmud would have found their way into the teachings of the Geonim.<sup>215</sup>

Ramban's reasons for endowing the geonic tradition with significant weight are primarily epistemic. Given their proximity to the figures and academies that drafted, edited, and sealed the Talmud, the

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<sup>214</sup> One reason why we do not sufficiently appreciate today how closed off the Talmud is as a work of normative law is that we rarely approach the text of the Talmud as a direct source of normative halakhah anymore. *Pesak halakhah* works backward from the *Shulhan 'Arukh*, which is already filtered through the Rif, Rambam, and Rosh. These rishonim did so much of the spade work in laying out the foundations of the Talmud's normative rulings--and the process of *pesak halakhah* is so thoroughly framed by them and filtered through them--that we hardly even consider what it would be like to derive normative rulings directly from the Talmud. (That is, as Professor Berger has remarked to me, unless we are the Maharshah or Gra.)

<sup>215</sup> In the next chapter, I consider whether Ramban's contemporaries and predecessors shared this perspective. In that discussion I consider the intriguing statements made in *Responsa Ri Migash* no. 114.

Geonim and their tradition would hold the key to revealing the legal secrets of this “difficult” and “obscure” text.

A vivid example of Ramban’s perception of the Geonim as the intellectual and institutional heirs of the Babylonian Amoraim, and the presumption it creates in favor of their halakhic rulings, is his analysis in the *Derashah le-Rosh Hashanah*. Ramban records a dispute between the Spanish scholars and the Geonim whether nine blessings are recited in the silent *musaf* prayer of Rosh Hashanah or only seven. Ramban acknowledges the persuasive arguments supporting the Spanish position, but ultimately he upholds the geonic tradition on the ground that the Geonim must have received a tradition from the Amoraim:

“the [Ritz Giat’s] arguments are compelling, but since the Geonim testify and state that this was never the practice in the Yeshiva...and that this has been their practice forever, we must accept their testimony. For the Geonim received a tradition from and saw the practice of the Savoraim, and the Savoraim from the Amoraim, and they sit and study in the very same academy and chair that Rav Ashi sat in, and they prayed in the very same prayer room that he prayed in.”<sup>216</sup>

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<sup>216</sup> *Kitvei Ramban I*, p. 248:

ובאמת שטענותיו של הרב טענות גדולות הן, אבל כיון שהגאונים מעידים ואומרים שמעולם לא נעשה כן בישיבה, אלא היחידים מתפללין שבע ושליח צבור אומר לפנייהם תשע, וכך מנהגם מעולם, על כרחינו יש לנו לקבל עדותם שהגאונים קבלו וראו מרבנן סבוראי ורבנן סבוראי מרבנן אמוראי ובישיבתו ועל כסאו של רב אשי הן יושבין ושונין, ובבית הכנסת שלו היו מתפללין, ועוד שהרי מנהגם פשוט ברוב ישראל עד שבאו דברי ה"ר יצחק אבן גיאת וחזר מקצת המערב למנהג שלו, ומפני זה נתתי לבי בדבר ונתקיים בי מה שאמרו חכמים (עי' ירו' פאה פ"א ה"א) כל דבר שבית דין נותנין לבם עליו לסוף עולה בידם כמו שנאמר למשה בסיני.

Note further that this remarkable expression of deference to geonic halakhah appears in one of Ramban’s latest works. This puts some pressure on Oded Yisraeli’s thesis that it was only in the early stage of his career that Ramban felt bound to the geonic tradition. See my discussion below in chapter three.

Note that Ramban here sides with the geonic tradition over the established Spanish custom.<sup>217</sup> This, I believe, further erodes Septimus's claim that Ramban's interest in the Geonim was but a derivative of his Spanishness.<sup>218</sup>

Addressing that same controversy in the *Milhamot*, Ramban writes:

“Were we [in fact] required to recite nine blessings in each prayer of Rosh Hashanah... how did [our practice] get so corrupted--and with everyone's approval? And why, then, did the early Geonim who received their tradition from the Savoraim... not enact this practice? [If it is indeed the correct practice] how is it possible that the Geonim of the two yeshivot did not inherit a single siddur [reflecting this practice] from the late scholars of the Talmud. The truth is that anyone who doubts [our current practice] is undercutting the received tradition [handed down from one generation to the next]. For this is a received practice and it is agreed upon and it has spread throughout the Jewish nation, and not a single person challenged it... And you should learn from here that anyone who deviates from the words of the rishonim [Geonim], it is like they are turning away from life [itself].”<sup>219</sup>

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<sup>217</sup> And this Spanish custom had deep roots. R. Isaac Giat (*Kitvei Ramban I*, p. 247) introduces it as:

ואנו קבלנו מחכמים גדולים ובעלי הוראה ואנשי מעשה שקבלו אף הם מחכמים גדולים שלפניהם, ובגון רבי שמואל הלוי שקיבל מהרב ר' חנוך וזקנים שבדורו הלכה למעשה שאין מתפללין שבע כלל אלא תשע, וכך מורין ועושין...

And note Ramban's recognition, *Kitvei Ramban I*, p. 248, of the old Spanish custom:

בא[.]... ה"ר יצחק אבן גיאת להחזיר המערב למנהג שלו...

<sup>218</sup> See above, chapter one.

<sup>219</sup> *Milhamot* Rosh Hashanah 12b:

אילו היו ישראל חייבין להתפלל ט' בכל תפלות ר"ה ערבית שחרית ומנחה היאך נשתבשו השבשו הגדול הזה בהסכמת כולן והגאונים הראשונים שקבלו מרבנן סבוראי דבסוף הוראה למה לא הנהיגו כן והיאך אפשר שלא נשאר בשתי ישיבות סדור אחד מסדורי בעלי התלמוד האחרונים ובאמת שכל המפקפק בדבר הזה מבטל שלשלת הקבלה שזה המנהג מקובל ומוסכם ופשוט הוא בכל ישראל ולא ערער אדם בדבר מעולם וכבר הראיתיך מפורש מן הגמ' שאף בימי רבותינו חכמי התלמוד כן הוא ולמדת שכל הפורש מדבריהם של ראשונים כפורש מחיים והאל יכפיל שכר טרחנו אשר טרחנו לדונם לזכות וידין אותנו לזכות.



Particularly noteworthy in this passage is Ramban's claim that anyone who doubts the practice handed down from the Geonim "is undercutting the received tradition."

And another important example from Ramban's *Derashah le-Rosh Hashanah*:

"... these are supports and proofs to the practice of the Geonim, and they are certainly correct for this was the practice in the two Yeshivot and they (the Geonim) always follow the practice of their predecessors going all the way back to Rav Ashi. Therefore, we in Sefarad<sup>220</sup> practice [this

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<sup>220</sup> This is the only place I am aware of that Ramban self-identifies as a man of Sefarad. Recall from chapter one that thirteenth century Catalonia had strong linguistic, social, and political connections with Provence. Note that Ramban's statement of *nahagnu anu be-Sefarad* appears in his *Derashah le-Rosh Hashanah*, after he arrived in Israel (see the end of that work). Perhaps the local population wouldn't recognize Catalonia as a distinct culture so Ramban simply mentions Sefarad for the ease of identification.

In his earlier works Ramban appears to view Sefarad as a distinct location from Catalonia. He repeatedly refers to manuscripts that arrived (and that he received) from Sefarad, implying that he did not view himself as residing there. See for example *Milhamot Pesachim* 7b:

וקבלה בידיהם מראשונים ופשטה ברוב ישראל בספרים ישנים ובכל הבאים מספרד ומן הישיבות.

*Milhamot Bava Kamma* 31a:

וכן בספרים המוגהים הבאים מספרד ומישיבתו של ר"ח ורבינו חושיאל אביו ז"ל מצאתי.

*Milhamot Hullin* 12a:

וליתא ברוב הספרים המוגהים הבאים מספרד.

And in his *Hassagot to Hilkhot Lulav*:

והרבה נוסחאות בדוקות הבאות מספרד אין כתוב בהן אלא ונשתיירו בהן שלשה בדי עליון כשר.

In the *Hiddushim Berakhot* 11b, Ramban appears to rely on Ramah's testimony about the practice in Sefarad, which implies that had no direct evidence of the practice there:

ומפני שנהגו וצרכתי לשאול מן הרב רבי מאיר הלוי והשיב דבר ברור שהוא טעות ואינו נהוג בספרד ולא בארץ ישראל, ונתבטל השבש הזה ממקומו.

In the *Hassagot to Sefer ha-Mitzvot*, Shores 1, Ramban appears to identify Sefarad with Andalusia:

והנה על פי זו המימרא בא בעל הלכות גדולות ומנאן אחת לאחת למצוא חשבון ואחריו נתפשט הדבר מאד והוסכם בין כל החכמים והתלמידים ונתפרסם בהמון שזה סכום כל המצות ונתחברו בזה שירות פיוטין ואזהרות נעימי זמירות. מהם לחכמי ספרד רבות מאד בארץ אנדלוס כאשר הזכיר הרב זצ"ל (בהקדמה) ומהם בארצות אחרות בכל פנות הגולה.

as well]....and I heard that in northern France they do not.... But I have already shown the right way with proofs from the Talmud and from the actual practice of the Geonim..."<sup>221</sup>

The following examples from Ramban's halakhic writings are illustrative of both his conviction that the Geonim possessed legal and interpretative traditions from their amoraic predecessors and the normative consequence that we ought, therefore, defer to geonic precedent:

"It seems that [Rav Yehudai] gaon possessed a tradition on this, and they (i.e. the Geonim) must have received this ruling from the Savoraim."<sup>222</sup>

In *Torat ha-Adam*, after recording a dispute between Rambam and the Geonim about which practices of mourning are observed on the holidays, Ramban rules:

"And upon whom should we rely? Come let us rely upon the words of the Rishonim [Geonim] whose words are a received tradition and [therefore] do not need [additional] support."<sup>223</sup>

And in other contexts:

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<sup>221</sup> *Kitvei Ramban I*, pp. 233-234:

כל אלו סמכים וראיות למנהג הגאונים, כל שכן שהיה מעשה בשתי ישיבות ומנהג אבותיהם בידיהם מימות רב אשי, לפיכך נהגנו אנו בספרד לתקוע בשופרות בתעניות של התרעה, ושמעתי שאין עושין כן בצרפת כלל, שמא הם סבורין דמה שאמרו (פסחים נ"ד ב') אין תענית צבור בבבל אפילו לתפילה קאמר, כלומר לעשרים וארבע ולנעילה ולתקיעות, ואנו כבר עמדנו (בחיידושים ריש תענית) על עיקר זה הדבר בראיות מן הגמרא ובמעשה מן הגאונים שיש תענית צבור בבבל לכל ענין תפילה לענין נעילה ולעשרים וארבע ולתקיעות...

<sup>222</sup> *Hiddushim Bava Batra* 62b:

ומה שכתוב בנוסחאות הגמ' ושמעין מהני תרי לישני דרבא וכו' ולישנא דמר רב יהודאי גאון ז"ל הוא, קשיא לי דכל ספיקי במוכר ולוקח המוציא מחברו עליו הראיה הוא וכל פלוגתא דמספקא ותיקו דגמ' קולא לתובע וחומר לנתבע הוא וקרקע בחזקת בעליה עומדת, אלא י"ל שקבלה היא ביד הגאון ז"ל בזו ומרבנן סבוראי קבלו פסק זה.

<sup>223</sup> *Kitvei Ramban II*, p. 226:

ואנו על מי נסמוך, בואו ונסמוך על דברי הראשונים שדבריהם דברי קבלה ואינן צריכין חיזוק.

“The Bahag and the author of the *Halakhot Pesukot* both [rule this way].... and this is a tradition in their hands from earlier [generations]...”<sup>224</sup>

“The Geonim say... and because it is a received tradition, we accept it.”<sup>225</sup>

“Since this is a tradition in the hands of our masters the Geonim, we will gladly accept it.”<sup>226</sup>

“Our masters [the Geonim] explained.... but Rabbenu Tam wrote.... And we rely upon the received tradition.”<sup>227</sup>

“Rabbenu Tam brought support to his interpretation... but this is certainly not a proof... rather the consensus of the Geonim is correct, and we accept their received tradition.”<sup>228</sup>

“Bahag writes... and Rif relies upon him in his ruling in the *Halakhot*... but I am surprised because I have yet to find the Geonim and Rif relying on the Yerushalmi for normative rulings... but this

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<sup>224</sup> *Milhamot* Pesachim 7b:

אמר הכותב רבותא למחשב גברי והא בעל הלכות גדולות ובעל הלכות פסוקות כולם אמרו מדלא קא יהיב רבא שיעורא ש"מ במשהו וקבלה בידיהם מראשונים ופשטה ברוב ישראל בספרים ישנים ובכל הבאים מספרד ומן הישיבות וכבר נבדקו בבבל ספרי הישנות בזה ע"פ שאלת חכמי הצרפתים וכן נמצא בנוסחאות בדוקות לגאונים הראשונים וכל זה מוכיח שהוא דבר מוסכם משנים קדמוניות

<sup>225</sup> *Hiddushim* Rosh Hashanah 32a:

ואמרו הגאונים ז"ל אין פוחתין מעשרה אבל מוסיפין עליהם, וכיון שקבלה היא נקבל.

<sup>226</sup> *Milhamot* Hullin 3b:

הואיל וקבלה הוא ביד רבותינו הגאונים נקבל בסבר פנים יפות.

<sup>227</sup> *Hiddushim* Kiddushin 51a:

יע"ל קג"ם. פי' רבותינו ז"ל ל" לחי העומד מאליו בפ"ק דעירובין (ט"ו א'), ור"ת ז"ל היה אומר לידה, ימי לידה שאינה רואה בהן אם עולין לה לימי זיבה דאיפליגו בה במסכת נדה (ל"ז א'), ועל הקבלה אנו סומכין.

<sup>228</sup> *Hiddushim* Bava Metzia 114a:

ותו סיעיה ר"ת ז"ל למימריה ואמר... והא ודאי לאו ראייה היא דשאני התם... אלא כמו שהסכימו הגאונים ז"ל עיקר והקבלה נקבל.

[ruling] is probably a received tradition that the Bahag possessed... and Rif was relying on [Bahag's] received tradition."<sup>229</sup>

### The Geonim as Guides and Windows into the Talmud's Hidden Content

I have argued that Ramban saw the Talmud as a closed text and that he saw the traditions embedded within the geonic corpus as an important key to unlocking it. A close analysis of Ramban's introductions to the *Milhamot* and *Hassagot* to *Sefer ha-Mitzvot* reinforces the thesis. Ramban perceived the Geonim as the guides who can reveal the Talmud's hidden principles:

In his introduction to *Milhamot II*, Ramban describes the Geonim and Rif as

"men who are pillars of Torah study, the foundation of its chambers, and windows into its hidden principles".<sup>230</sup>

Ramban offers a similar description of the role of the rishonim and Geonim in his introduction to the *Hassagot* to *Sefer ha-Mitzvot*:

"[the rishonim and Geonim] are the cornerstone and pillar of our study of the Talmud. They are the ones who have guided us and taught us. They are the ones who have set us in the ways of

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<sup>229</sup> *Kitvei Ramban II*, p. 203:

וכתב בעל הלכות ז"ל בכלל גדול ובאבל ובלפני אידיהן הלכה כר"ש בן אלעזר, ובזה סמך רבינו הגדול ז"ל בהלכותיו, ודבר זה מצאתי אותו בירושלמי, (שבת פ"א ה"ח) אבל אני תמה שלא ראיתי גדולי הגאונים ורבינו הגדול ז"ל שיהו סומכין על הירושלמי בפסק הלכה, וכמה הלכות פסוקות בירושלמי שאין הגאונים מורין (נ"א סומכין) לנו כך, ובמסכתא זו עצמה לא פסקו כירושלמי, וכן הדין נותן שלא לסמוך על הירושלמי בזה לפי שכל מקום שלא פסקו בגמרא שלנו הלכה כדברי יחיד ודאי הוא שדעתם מכרעת לדברי המרובים, והגמרא הירושלמית שפוסקת כדברי יחיד חולקת היא ואין סומכין עליה. ואולי קבלה היא ביד בעל ההלכות בזו, כאותה שאמרו הגאונים ז"ל במיפך שבועה וחיורי שהיא הלכה שפסוקה בידם בקבלה, ורבינו ז"ל סומך על קבלתו.

<sup>230</sup> *Kitvei Ramban I*, p. 412:

אנשים שהם עמודים לתלמוד התורה, ומכונות לחדריה וחלונות לסתריה, אשר הם ראויים להקרא מלאכי אלהים.

the Torah and on its paths. And from them (the Geonim) we [are able to] ask the earlier generations<sup>231</sup> what path we ought to take (i.e. how to rule).”<sup>232</sup>

These passages bring the argument full circle. Until now, we have seen two separate ideas emerge from Ramban’s writings. The first is the idea of the Talmud as a closed text. The second is the idea of the Geonim as the recipients of interpretive traditions. These two ideas come together in the passages just cited from the introduction to the *Milhamot* and *Hassagot*. The Geonim’s traditions are the key to the Talmud’s secrets. Thus, the Geonim are the “windows” into the Talmud’s “hidden principles,” and they are the “ones who guide us” and “set us in the Torah’s paths.”

Let us briefly take stock. In chapter one, I argued that a core component of Ramban’s life project was defense of geonic halakhah. Specifically, I’ve argued that Ramban’s *Milhamot*, *Sefer ha-Zekhut*, and *Hassagot* to *Sefer ha-Mitzvot* should be understood in this light. I have also shown that geonic halakhah occupies a prominent place in Ramban’s halakhic works like the *Hiddushim* and *Torat ha-Adam*. In this chapter, I have argued, first, that Ramban saw the Talmud as a closed text, at least with respect to issuing normative halakhic decisions. Second, I have argued, contra-Septimus, that the reason why Ramban, a thirteenth century Catalanian with no known connections to geonic halakhah, felt so committed to the geonic tradition is primarily epistemic. The Geonim must have received invaluable

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<sup>231</sup> Ramban’s phrase, as Chavel notes, is borrowed from Jeremiah 6:16:

כה אמר ה' עמדו על דרכים וראו ושאלו לנתיבות עולם אי זה דרך הטוב ולכו בה ג'

R. Yosef Kara there interprets “netivot ‘olam” as *dorot ha-rishonim*. Radak similarly writes:

גם שאלו בעבור נתיבות עולם כמו שאמר משה רבינו עליו השלום שאל אביך ויגדך בן אמר להם שאלו נתיבות עולם כלומר ... הדורות שעברו.

<sup>232</sup> *Kitvei Ramban I*, p. 419:

ללמד זכות על הראשונים ולפרש דברי הגאונים, כי הם לנו בלמוד התלמוד פנה ועמוד, הם אשר הורונו ולמדונו, הם שהעמידונו על דרכי התורה ושבילם, ומהם שאלנו לנתיבות עולם אי זה דרך הטובה ללכת בה.

traditions of halakhic jurisprudence from the Amoraim and Savoraim, and these traditions hold the key to unlocking the rulings embedded within the talmudic corpus.

Still the mere fact that Ramban was committed to the geonic tradition does not by itself explain why he would dedicate three full works to their defense. As Haym Soloveitchik noted, the role of intellectual lawyer was unprecedented in the history of halakhah. Moreover, as we saw above, none of Ramban's predecessor's felt the same commitment to the geonic-Rif tradition, and no one dedicated even a fraction of the intellectual energy that Ramban did towards defending the geonic tradition. That Ramban should dedicate so much intellectual energy to the defense of the Geonim, and to do so systematically throughout his career--the *Milhamot*, *Sefer ha-Zekhut*, *Hassagot*--even if he felt strongly about the authority of their traditions and their ability to shed light on the dark corners of the talmudic corpus, demands further explanation. For this, we turn to the thirteenth century context in which Ramban wrote.

### The Thirteenth Century Context

The twelfth century was a century of halakhic revolution. In northern France, the tosafists refined a sophisticated method of dialectic, which they systematically applied to reinterpret the written page of the Talmud. Rabbenu Tam and Ri articulated and applied new principles that reverberated throughout the entire system of Jewish law.<sup>233</sup> In Provence a newfound sense of independence and self-confidence

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<sup>233</sup> See Haym Soloveitchik, "The Printed Page of the Talmud," *Collected Essays I*, pp. 7-8:

"Rabbenu Tam's influence extended over the entire talmudic corpus; he scarcely treated a topic that he did not revolutionize by dialectic... Rabbenu Tam rewrote halakhic thought by his revival and use of dialectic."

And in "Rabad of Posquieres", p. 19:

"While Maimonides was hewing in granite the upshot of Talmudic discussions, a new Talmud was being written in northern France."

led Rabad to break from the Geonim and their traditions.<sup>234</sup> Likewise, Rambam's comprehensive restatement of Jewish law not only divorced halakhic rulings from the Talmud's enigmatic give and take, but fundamentally restructured the conceptual principles that underlie Jewish law.<sup>235</sup> Not since the redaction of the Mishnah had Jewish law been so fundamentally and so thoroughly reconstituted.

Haym Soloveitchik describes the revolutionary ethos of the twelfth century:

“Sometime late in the second quarter of the twelfth century, Europe declares her independence of Babylonian tutelage and within the wondrous span of sixty years achieves it. North of the Loire it was the dialectical revolution of Rabbenu Tam which heralded the advent of European Halakhic thought, south of the Loire it was the commentarial labors of Rabad. Both were bringing a newly forged vision of Truth and each was well aware of the fact. Not by accident does the same imperious sense of self stamp everything that those two titans wrote. Both personalities exuded power and boldness... Not that they overthrew the past--Heaven forbid; they simply rendered much of it irrelevant. And it is not for the meek to discard 500 years of tutelage.”<sup>236</sup>

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<sup>234</sup> See Haym Soloveitchik, “Rabad of Posquieres”, pp. 13-14:

“In Rabad's writings one witnesses a mind working unaided and untrammelled in (what to his view is) virgin territory. And subsequent generations found in *his* interpretation, in *his* categories, in brief, in *his* conception of the field, greater stimuli, more fruitful points of departure, than in the works of the Geonim which now began to appear distant. .. Rabad's impact upon Talmudic studies was correspondingly massive.... Hundreds upon hundreds of his original insights were assimilated, adapted and extrapolated... and thus shaped the contours of the Halakhah.”

<sup>235</sup> See Isadore Twersky, *Introduction to the Code of Maimonides*, pp. 515-517: “The Mishneh Torah represents a quantum jump in the development of Rabbinic literature as a whole and the history of codification in particular...[it] changed the entire landscape of Rabbinic literature.”

<sup>236</sup> Haym Soloveitchik, “Rabad of Posquieres,” p. 14.

The revolutions of the twelfth century stand in sharp contrast to the apparent conservatism that characterized earlier halakhic thought. From the sealing of the Talmud through the eleventh century, Jewish law evolved linearly and conservatively. The Geonim refined the *kelalei pesikah* of their predecessors and applied the principles of halakhah to the affairs of their daily lives. They issued decisions and opinions, and they adjudicated between conflicting talmudic passages. Some Geonim authored commentaries explaining cryptic and inaccessible talmudic passages, while others summarized the normative portions and final decisions of the talmudic discussion. But at the close of the eleventh century, halakhah stood, in substance and in form, pretty much where it left off centuries earlier.<sup>237</sup>

The revolutions of the twelfth century—Rabbenu Tam, Rabad, Rambam—brought sophisticated analytical methods to Talmud study, allowing for greater conceptual nuance and more precise and fine-grained interpretations of the halakhic legal system. The brilliant theorists of the twelfth century were ‘discovering’ thousands of new legal principles, rewriting the written page of the Talmud and reconstituting halakhic doctrine. Yet, the wave of new concepts and novel interpretations also threatened the stability of the law, its transmission and legitimacy. If Rabbenu Tam and Rabad could reinterpret the significance of the talmudic discussion and cast aside hundreds of years of geonic precedent, then Jewish law was just a matter of interpretation, a malleable tool at the mercy of a creative jurist.<sup>238</sup>

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<sup>237</sup> On the Geonim’s halakhic works, see Robert Brody, *The Geonim of Babylonia*.

<sup>238</sup> As Rabbenu Tam once exclaimed regarding his interpretive powers: “even when the Talmud says ‘liable’ in one place and ‘exempt’ in another place, I can reconcile them beautifully; a fortiori [I can resolve any] other matter.” See *Sefer ha-Yashar* (Responsa) no. 56:

כי אפילו כשיש בתלמוד חייב במקום אחד ופטור במקום אחר אנו מתרצים יפה כ"ש קושיות אחרות.

Even a figure as bold as Rabad bristled at the brashness of the tosafists. As Rabad once remarked, *Teshuvot u-Fesakim*:

וידעתי כי הגיע בכם יד הצרפתים החדשים החושבים בלבם כי המה הגבורים אשר מעולם.



The twelfth century revolutions brought a host of concerns to the foreground. First, any legal system depends on the orderly and consistent application of its norms over time and throughout its jurisdiction.<sup>239</sup> The thunderbolts of the twelfth century were mesmerizing, but they were also disorienting, and they threatened to undermine the law's stability. Each generation and each region, it

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Rabad himself declared, "excluding nonsensical matters, I can adjudicate all legal cases." In a response to an enquiry, Rabad writes, "Continue to inquire, my son, about all matters which are doubtful to you, for interpretations belong to God and to the children [intellectual faculties] which He has graciously given to his servant Abraham (i.e. himself)." Elsewhere he declares, that his rabbinic predecessors all groped in the dark like blind men in the absence of his novel and accurate interpretation:

ולוא כבוד רבותי הייתי אומר בו כי במקל של סומים היו בו כל ימינו, אך עת לכל חפץ תחת השמים וכמה מקומות הניחו לי אבותינו להתגדר בהם...

In another context, Rabad could boldly declare, "... in all these matters I have nothing to fall back upon, neither from a rabbi or a teacher, but only upon [that which I have received] with the help of God alone who teaches man to understand."

אין עמי בכל אלה לא מפי רב ולא מפי מורה כי מעזרה האל לבדו המלמד לאדם דעת.

For an analysis of these statements of Rabad, see Twersky, *Rabad of Posquieres*, pp. 40-41.

Moshe Halbertal, *By Way of Truth*, p. 77, characterizes Rabbenu Tam and Rabad as

מתוארים כמי שבכוחם לטהר את השרץ בק"ן טעמים.

<sup>239</sup> Note Ramban's requirement, *Hiddushim Bava Batra 55a*, for *dina de-malkhuta*, that the law must be public, known, and applied consistently and universally for it to qualify as a legitimate law:

נראין הדברים דכי אמרינן דינא דמלכותא דינא כגון הדינין הידועין למלך בכל מלכותו שהוא וכל המלכים אשר היו לפניו הנהיגו הדברים והם כתובים בדברי הימים ובחוקי המלכים, אבל מה שהמלך עושה לפי שעה או חוק חדש שהוא עושה לקנוס העם במה שלא נהגו בימי האבות, חמסנותא דמלכא הוא ואין אנו דנין באותו הדין, והרי ר' יהוסף הלוי ז"ל הורה שאם גזל המלך לאחד מבני עמו ממונו שבא עליו בעלילה, דחמסנותא דמלכותא מיקרי, אבל במאי דעבד בכל ארעיה הורמנותא דמלכא הוא ודינא הוא, והוראה נכונה היא אלא שיש להוסיף עליה מה שכתבתי. ודייקנא לה מדאמרינן דינא דמלכותא דינא ולא אמרינן דינא דמלכא דינא, אלמא דינא דידיע לכולהו מלכי קאמרינן ולא מה שהמלכים עושים מעצמם באונס, ואף במלכי ישראל הקדושים דיני המלך ידועים כמו שכתוב בקבלה על ידי שמואל הנביא, ואמרו רבותינו (סנהדרין כ' ב') כל האמור בפרשת המלך מלך מותר בו....

ומצאתי לי חבר במה שאמרתי שהמלך שדן דין חדש שלא כחוקי המלכים חמסנותא הוא, שכתבו מקצת חכמי צרפת ז"ל בחבוריהם שיש מקומות שישראל יוצאין ממלכות למלכות והמלך מחזיק בכל מה שנמצא להם במלכותו, אם בא ישראל אחר וקנה מן המלך, זה היה מעשה ופסקו הדין שאין זה דינא דמלכותא אלא חמסנותא דמלכותא, לפי שהדבר ידוע בדיניהם שדין היהודים כדין הפרשים לדור בכל מקום שירצו, וכיון שכן אם יש מלכות שבאה לשנות את הדין ולעשות דין לעצמה אין זה דינא דמלכותא, וזה סיוע לדברי.

seemed, could reinterpret the law for itself. And if every generation and region had its own interpreters, the law has no consistent or uniform meaning.<sup>240</sup>

Second, the halakhic revolutions of the twelfth century raised questions of interpretive legitimacy.

Rabad and Rabbenu Tam bulldozed geonic precedent and rewrote halakhic doctrine--but what made their interpretations legitimate? Granted, their novel suggestions solved textual and conceptual problems of talmudic law, but problem-solving cannot be the only test of interpretive legitimacy.

Coherence with halakhic precedent is another criterion. And to the eyes of one thirteenth century Catalonian jurist, it was a criterion insufficiently respected by the brilliant minds of the twelfth century.

Against the revolutions of the twelfth century, Ramban emerges in the thirteenth century as a conservative jurist seeking to bestow stability on the law and to restore the centrality of geonic halakhic precedent. As we saw, this project was more than a side-pursuit for Ramban. It spanned the length of his career, and it constitutes one of the pillars of his life work. Ramban devoted three full treatises to the defense of pre-twelfth century halakhah, and as we saw, the project constitutes an important dimension of his *Hiddushim* and *Torat ha-Adam*.

Ramban's introduction to the *Hassagot to Sefer ha-Mitzvot* gives voice to his concern for the decimation of halakhic precedent:

“[I have come] to defend the rishonim and to explain the words of the Geonim. For they are the pillar and cornerstone of our Talmud study. They are the ones that have guided us and taught us. They set us in the ways of the Torah and its paths. And from them we inquire of earlier scholars which road we should travel (i.e. how to rule). But behold, in recent generations hordes and hordes of clever scholars, roaring like lions and beasts, come forth with objections and

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<sup>240</sup> Ramban explicitly addresses this concern of Torah law devolving into “several [inconsistent systems of] law” (*shetei torot*) in both his *Hassagot to Sefer ha-Mitzvot* and his commentary on the Torah, discussed below.

arguments to destroy the temple of wisdom (erected by the Geonim and Rif), and in their hands they wield a double edged sword... to kill wisdom that should not die and to give life to ideas that should not live (their novel rulings and interpretations). They limply hold onto uncertain rulings.”<sup>241</sup>

Here Ramban paints a picture of a mass movement (“hordes and hordes of clever scholars”) declaring war against the geonic tradition (“to destroy the temple of wisdom”).<sup>242</sup> These roaring scholars reflect the revolutionary ethos of the twelfth century. In fact, even though Ramban is here describing his motivation for writing the *Milhamot*, he does not single out R. Zerahyah until later in the introduction (“And behold one of the princes armed himself [for battle], to uproot and to pull down, to destroy and to break [Rif’s halakhot]”).<sup>243</sup> Nor can the phrase “hordes and hordes of clever scholars” reduce to one man. The picture Ramban paints is wide enough to include Tosafot, Rabad, Rambam, and R. Zerahyah, among other critics.<sup>244</sup> Ramban’s introduction to the *Hassagot*, then, captures the historical context

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<sup>241</sup> *Kitvei Ramban I*, pp. 418-419.

מנעורי גדלני כאב ומבטן אמי אנחנה וגם עד זקנה ושיבה לא אניחנה, במדתי החזקתי ולא אזניחנה... ללמד זכות על הראשונים ולפרש דברי הגאונים. כי הם לנו בלמוד התלמוד פנה ועמוד, הם אשר הורונו ולמדונו, הם שהעמידונו, על דרכי התורה ושבילם, ומהם שאלנו לנתיבות עולם, אי זה דרך הטובה ללכת בה. והנה בדורות האחרונים המונים המונים כולם תחכמונים, שאגת אריות וקול לבאים באים בקושיות והויות, להפיל חכמות בנויות לתלפיות. ובידם חרב פיפיות להמית ולהחיות. להמית חכמות אשר לא תמותינה ולחיות דברים אשר לא תחיינה. יחזקו ידים רפות בהלכות רופפות, יחיו את האבנים מערמות העפר והמה שרופפות.

<sup>242</sup> Ramban invokes a similar architectural metaphor at the conclusion of his *Hassagot to Sefer ha-Mitzvot* (Frenkel ed., p. 412):

ואין לנו בשכל הקנוי בזה קנין, ולא בסתירת דברי הראשונים בנין.

<sup>243</sup> *Kitvei Ramban I*, p. 419:

והנה אחד השרים הראשונים מתגבר, לנתוש ולנתוץ להאביד ולשבר...

See also Ramban’s introduction to *Milhamot II* where he discusses the culture of criticizing Rif and not leaving any of his rulings intact, *Kitvei Ramban I*, p. 413:

וקנאתי לרבינו הגדול רבי יצחק אלפסי ז"ל קנאה גדולה מפני שראיתי לחולקים על דבריו שלא השאירו לו כפי רובי מחלקותיהם ענין נכון בכל מה שדבר ולא דבר הגון בכל מה שפירש ולא פסק ראוי בכל מה שפסק לא נשאר עם דבריהם בהלכות זולתי הדברים הפשוטים למתחיל פרק אין עומדין.

<sup>244</sup> See Chavel in *Kitvei Ramban I*, p. 413 note 53, who catalogues the range of Rif critiques.

which motivates his project: the destabilizing revolutions wrought by the twelfth century halakhists (“to destroy the temple of wisdom”) that would undermine the stability of the law.

Naturally, the revolutions of the twelfth century, and the destabilization and disunification of halakhic jurisprudence that they entailed, would be harmless if they did not conflict with an antecedent conception of law—a conception that demands some measure of uniformity across regions and stability over time. It is to this conception of law, that we now turn.

### Legal Precedent, Uniformity, and the Stability of the Law

In several places Ramban emphasizes the “great importance” of stabilizing halakhah by limiting disagreement and imposing uniformity on the law. In his *Commentary on the Torah*, Ramban explains why it is crucial for a legal system to have a central judicial body empowered to decide the law and settle any controversy surrounding it:

“The master and commander of the mitzvot instructed [us] that we should follow the rulings of the [scholars in the high court]... He gave [us] the Torah in accordance with their interpretation of it... The need for this commandment is exceedingly great. For the Torah was given to us as a text, and it is well known that opinions will differ [about how to apply its principles to] new cases that will arise. Inevitably, what will happen is that there will be disagreement [about how

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Septimus, “Nahmanides and the Andalusian tradition,” p. 32, also reads Ramban as describing more than just R. Zerahyah’s criticism, but interprets Ramban’s attacks as being laser focused on the tosafists: “those roaring warriors of ‘recent generations’ sound very much like masters of the new northern dialectic.” And in note 83, Septimus writes: “The recent challenge to them by hordes of brilliant dialecticians seems to me to reflect Nahmanides’ perception of the confrontation of the geonic-Andalusian tradition with the new northern halakhah.” But I see no reason to limit Ramban’s characterization to the tosafists. Ta-Shma has argued that R. Zerahyah was deeply influenced by Rabbenu Tam, see Ta-Shma, *R. Zerahyah ha-Levi*, pp. 106-112:

ההשפעה הגדולה ומרחיקת הלכת ביותר על הרז"ה באה מצד מפעלו של רבינו תם...

to interpret the text and apply it] and then the law will splinter into multiple laws [each school with its own interpretation of it]. Therefore the Torah commands us to follow the rulings of the high court in Jerusalem on all matters relating to the interpretation of the law. And it does not matter whether their interpretation is based on a tradition they received from Moshe or whether it is based on their own understanding of the meaning of the text or its intent. For the Torah was given with [the intent] that its meaning should be determined by [the high court].”<sup>245</sup>

Here Ramban interprets the authority of the high court as grounded in the pragmatic need to stabilize and impose unity on the law. Without a centralized judicial body, the law will splinter into several different systems, with each court and each jurisdiction interpreting the law in its own way. Note that Ramban does not require that the court decide the matter on the basis of a received tradition. The court’s rulings are binding on the entire Israel even when they are based on the subjective interpretation of the court, solely so that there can be a unified interpretation and application of the law.

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<sup>245</sup> Ramban Devarim 17:11:

ימין ושמאל - אפילו אם אומר לך על ימין שהוא שמאל או על שמאל שהוא ימין, לשון רש"י. וענינו, אפילו תחשוב בלבך שהם טועים, והדבר פשוט בעיניך כאשר אתה יודע בין ימינך לשמאלך, תעשה כמצותם, ואל תאמר איך אוכל החלב הגמור הזה או אהרוג האיש הנקי הזה, אבל תאמר כך צוה אותי האדון המצוה על המצות שאעשה בכל מצותיו ככל אשר יורוני העומדים לפניו במקום אשר יבחר ועל משמעות דעתם נתן לי התורה אפילו יטעו, וזה כענין רבי יהושע עם ר"ג ביום הכיפורים שחל להיות בחשבוננו (ר"ה כה א):

והצורך במצוה הזאת גדול מאד, כי התורה נתנה לנו בכתב, וידוע הוא שלא ישתוו הדעות בכל הדברים הנולדים, והנה ירבו המחלוקות ותעשה התורה כמה תורות. וחתך לנו הכתוב הדין, שנשמע לבית דין הגדול העומד לפני השם במקום אשר יבחר בכל מה שיאמרו לנו בפירוש התורה, בין שקבלו פירושו עד מפי עד ומשה מפי הגבורה, או שיאמרו כן לפי משמעות המקרא או כוונתה, כי על הדעת שלהם הוא נותן (ס"א לנו) להם התורה, אפילו יהיה בעיניך כמחליף הימין בשמאל, וכל שבן שיש לך לחשוב שהם אומרים על ימין שהוא ימין, כי רוח השם על משרתי מקדשו ולא יעזוב את חסידיו, לעולם נשמרו מן הטעות ומן המכשול. ולשון ספרי (שופטים קנד) אפילו מראין בעיניך על הימין שהוא שמאל ועל שמאל שהוא ימין שמע להם.

Of course, this passage does not suggest that Ramban believed that the Geonim were the institutional equivalent of the high court in Jerusalem.<sup>246</sup> Rather Ramban's interpretation of *Lo Tasur* reflects his sensitivity to the need to limit disagreement and unify legal practice. In his *Hassagot to Sefer ha-Mitzvot*, Ramban extends this idea of the necessity of unifying the law and minimizing disagreement to explain the need to resolve conflict even within the high court:

“Even when there is a dispute within the court... whatever the majority decides, that is the Torah law that we are commanded to follow, and anyone who violates the majority's decision by relying on his own intellect and opinion is a rebellious elder...<sup>247</sup>

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<sup>246</sup> Though in some cases Ramban appears to allude to this kind of connection. See for example *Milhamot Ketubot* 21a:

“Rabbenu Sherira and his son Rabbenu Hai, who[se rulings are binding] like [a decision rendered by] the majority of the Sanhedrin, hold this way.”

ורבינו שרירא ורבינו האי בן שוהא שקול כרובא של סנהדרין כך כתבו...

Robert Brody, *The Geonim of Babylonia*, p. 147, notes that there are many “references to the Geonic court as ‘the Great Court which corresponds to the Sanhedrin.’” He also notes, p. 147, the many statements to the effect that “one should not deviate from this (decision) either to the right or to the left” in reference to the geonic rulings. Brody also notes, p. 49, that the geonic academies were comprised of “seventy scholars who are sometimes said to constitute, and sometimes to correspond to, the Sanhedrin. This is the clearest instance of the borrowing of ancient terminology and its accompanying prestige.”

Note also the responsum of Ri Migash, no. 114, where he says that anyone who relies on the geonic rulings, even if he does so blindly, is considered to have acted in reliance upon a great court:

מי שמורה מתשובות הגאונים וסומך עליהם, ואע"פ שאינו יכול להבין בתלמוד, הוא יותר הגון ומשובח.... לפי שהוא מה שעשה ע"פ ב"ד גדול מומחה לרבים עשה".

Though it should be noted that Ri Migash does not say *beit din ha-gadol*, rather *beit din gadol*.

<sup>247</sup> *Hassagot*, Shores 1:

אבל הדבר הברור המנוקא מכל שבוש הוא שנודיע שאין הלאו הזה לא תסור אלא במה שאמרו בפירושי התורה כגון הדברים הנדרשים בתורה בגזרה שוה או בבנין אב ושאר שלש עשרה מדות שהתורה נדרשת בהן או במשמעות לשון הכתוב עצמו וכן במה שקבלו הלכה למשה מסיני תורה שבעל פה שאם יראו הם שזה הדבר אסור או מותר מן התורה לפי מדרש הכתוב או לפי פירושו או הלכה מפי השמועה ממשה רבינו ויראה הוא הפך חייב לבטל דעתו ולהאמין במה שאמרו הם. זהו שאמר הכתוב כי יפלא ממך דבר למשפט בין

After once again explaining the importance of minimizing halakhic disagreement, Ramban explains that legal precedent is necessary to prevent individual scholars from following their own interpretations and arguments. *Lo Tasur* commands that those individual scholars are bound to the legal precedent and interpretations of the high court:

“For the Torah was given to us by Moshe as a text, and it is known that opinions will differ regarding new cases that will arise, so [in order to minimize disagreement] the Torah commands us to be abide by the rulings of the high court... in order that a scholar (interlocutor) won’t say “how can I permit myself to eat this when I know that the high court is mistaken.” Behold we can tell him: you are obligated to follow their rulings.”<sup>248</sup>

These statements reflect Ramban’s concern for the uniformity and stability of the law.<sup>249</sup> Yet it need not follow that Ramban’s interpretation of *Lo Tasur*--a halakhic rule pertaining to the authority of the high court--would be normatively relevant to his assessment of twelfth century geonic-antagonism. Yet, in his introduction to *Milhamot II*, Ramban both alludes to the principle of *Lo Tasur* and explicitly appeals

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דם לדם בין דין לדין כלומר שנתכסה מהם דבר ונחלקו במשפטי התורה ואיסוריה ונגעיה והעובר על דברי ב"ד הגדול שבדורו וסומך על דעתו עובר על עשה ועל לא תעשה הללו. ואפילו אם נחלקו ב"ד עצמם בדבר הולכין בהם אחר הרוב כמו שאמרו במחלוקתם (פח ב) אם שמעו אמרו להם ואם לאו עומדין למנין רבו המטמאין טמאו המטהרין טהרו. ומה שהסכימו עליו רובם הוא הדבר שנצטוינו עליו מן התורה והעובר עליו וסומך על דעתו שאינו כמו שהסכימו הם נעשה זקן ממרא בזמן דיני הנפשות. והוא שנאמר אשר יעשה בדרך לבלתי שמוע אל הכהן. וענשו אבוד מן העוה"ז ומן העולם הבא. וזו היא כת הצדוקים הארורים ששמם במזרח קראין.

<sup>248</sup> Ibid:

התורה נתנה לנו ע"י משה רבינו בכתב וגלוי הוא שלא ישתוו הדעות בכל הדברים הנולדים וחתך לנו ית' הדין שנשמע לב"ד הגדול בכל מה שיאמרו בין שקבלו פירושו ממנו או שיאמרו בן ממשמעות התורה וכונתה לפי דעתם. כי על המשמעות שלהם הוא מצוה ונותן לנו התורה. וזה הוא מה שאמרו (ספרי שם) אפילו אומרין לך על שמאל שהוא ימין ועל ימין שהוא שמאל שכך היא המצוה לנו מאדון התורה יתעלה שלא יאמר בעל המחלוקת היאך אתיר לעצמי זה ואנכי היודע בוודאי שהם טועים והנה נאמר לו בכך אתה מצווה.

<sup>249</sup> For a discussion of the significance of these passages with respect to Ramban’s wider conception of *de’oraita*, see Moshe Halbertal, *By Way of Truth*, pp. 66-69, and Halbertal, *People of the Book*, (Cambridge, Mass. 1997), pp. 45-89.

to a normative halakhic principle that requires a scholar to yield to the rulings and precedents of a greater court as well as to the precedent set by an earlier court.

“It is evident from my treatise [*Milhamot*] that the majority of disagreements [between Rif and R. Zerahyah] are to be resolved in favor of our master [Rif]. And even when the evidence is in equipoise [favoring neither] we are nevertheless obligated by the law [of *Lo Tasur*] not to deviate at all from his [Rif’s] rulings (*beli le-hattot mi-devarav yamin u-semol*). As we are taught: “[if there is a dispute about the law] follow the scholar who possesses greater wisdom and whose rulings enjoy greater support.” All the more so [we are bound to follow Rif] for he came first, and [the later scholars] had no right to argue [with him], for they should have said “an elder scholar has already ruled” (*kevar horah zaken*).”<sup>250</sup>

The fact that Ramban alludes to *Lo Tasur* (*beli le-hattot mi-devarav yamin u-semol*) combined with the fact that he appeals to a normative duty to defer to the precedent set by earlier scholars, provides strong grounds for believing that Ramban’s defense of the rulings of Rif and the Geonim was motivated by reasons similar to those he articulated in his interpretation of *Lo Tasur*: to stabilize and impose unity on the law through binding precedent and legal uniformity.

Ramban’s concern for the uniformity and stability of Jewish law also appears in his other writings. In his *Hiddushim to Tractate Megillah*, Ramban is troubled by the structure of the holiday of Purim. Walled cities celebrate Purim on the fifteenth of Adar, but all other cities celebrate Purim on the fourteenth.

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<sup>250</sup> *Kitvei Ramban I*, p. 414:

ברובם (ברוב המקומות) מחשבתנו נכרת מתוך ספרנו שעיקרי הדברים מוכרעין בדברי רבינו ואפי' בשקולין הרי הדין פסוק עלינו בלי להטות מדבריו ימין ושמאל כמו ששנו חכמים היו שנים א' מטמא אחד מטהר אחד אוסר אחד מתיר אם היה אחד מהם גדול מחבירו בחכמה ובמנין הלך אחריו וכל שכן בהיותו קודם שהמחלוקת מנועה מבעליה שהיה לו לומר כבר הורה זקן.



Why, Ramban asks, did the rabbis institute the holiday such that Jews in different jurisdictions will celebrate it on different days?:

“That which we learned that cities fortified with walls dating back to Yehoshua ben Nun read [the Megillah] on the fifteenth and towns and large cities on the fourteenth, I am astonished. Why in the world (lit. what did they see and what came upon them) did they make the Jewish people into clusters (i.e. disunified) in performing this mitzvah? And even though there is no technical violation of the prohibition of [disunity in practicing the law in this manner], nevertheless why, *ex ante*, would they split the Jewish people into two camps [of practice]? Moreover, where do we find in the Torah that a commandment is split this way [requiring different practices from different groups]? To the contrary, the Torah requires “One unified law and one unified set of rules.”<sup>251</sup>

Here Ramban questions the sages’ institution of two different practices for Purim on the ground that it violates the requirement of a unified law.<sup>252</sup> Interestingly, even after Ramban acknowledges that there may be no formal violation of dividing into separate camps of practice (*lo titgodedu*), he argues that it would violate a more general halakhic principle of “splintering the law” (“*Torah ahat u-mishpat ehad yihyeh lakhem*”).<sup>253</sup> It is a testament to Ramban’s sensitivity to the stability and uniformity of the law that no other commentator was ever bothered by the question that troubles Ramban here.

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<sup>251</sup> *Hiddushim* Megillah 2a:

מה ששנינו כרכין המוקפין חומה מימות יהושע בן נון קורין בחמשה עשר כפרים ועיירות גדולות בארבעה עשר. אני תמה מאד מה ראו על ככה ומה הגיע אליהם לעשות ישראל אגודות במצוה הזו, ואף על גב דליכא הכא משום לא תתגודדו דהו"ל שני בתי דינים בשתי עיירות כדאיתא בפ"ק (דיומא) [דיבמות] מ"מ לכתחלה למה חלקום לשתי כתות, ועוד היכן מצינו בתורה מצוה חלוקה בכך והתורה אמרה תורה אחת ומשפט אחד יהיה לכם.

<sup>252</sup> See *Yevamot* 13b.

<sup>253</sup> *Hiddushim*, Megillah 2a:

Another example that sheds light on Ramban's attempt to minimize halakhic disagreement--especially in areas with established geonic practice--appears later in his *Hiddushim to Tractate Megillah*. There Ramban notes that although there is little textual support for a certain geonic practice, it is nevertheless important to abide by it in order to minimize disagreement:

“The practice that the Geonim authorized... no one agrees with them, but we ought not meddle with practices that were authorized by the Geonim... and we have learned that a person should not deviate [from the accepted practice] because [it would create] disunity in the law.”<sup>254</sup>

Ramban's letter in the heat of the Maimonidean Controversy also speaks to his concern for legal uniformity. There Ramban argues that the ban against Rambam's works<sup>255</sup> will only exacerbate the differences between the legal cultures and splinter the law even further:

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ועוד היכן מצינו בתורה מצוה חלוקה בכך והתורה אמרה תורה אחת ומשפט אחד יהיה לכם.

See Bamidbar 15:16, Talmud *Sotah* 47b, and *Sanhedrin* 88b.

<sup>254</sup> *Hiddushim Megillah* 21b:

זהו המנהג שאנו רואין ע"פ הגמ' שלנו כפי מ"ש למעלה, אבל המנהג שהנהיגו הגאונים ז"ל על פי שלהן דאמצעי שהוא השני דולג אין כאן מי שהסכים עמהם, אלא שאין ליגע במה שהונהג על פי הגאונים ז"ל וכ"ש בזה שאין במנהג שלהם משום איסור וכבר שנינו אל ישנה אדם מפני המחלוקת.

This halakhic principle, *al yeshaneh adam mipnei ha-mahloket*, is stated in Pesachim 50. Note Ramban's strong stance there, *Milhamot Pesachim* 17a:

ולפי דעתי שהבא ממקום אחר לשם אל ישנה מפני המחלוקת ואפי' כולם חכמים כולם יודעין את התורה, דלעולם חוששין למחלוקת ואפי' בחדרי חדרים אסור ואף על פי שדעתו לחזור.

For an analysis of Ramban's position here, see Moshe Halbertal, *By Way of Truth*, pp. 94-102.

<sup>255</sup> For an analysis of Ramban's position during the controversy, see David Berger, "How did Nahmanides Propose to Resolve the Maimonidean Controversy," *Cultures in Collision and Conversation: Essays in the Intellectual History of the Jews* (Boston, 2011).

For a discussion of the origin of this ban and whether it was issued by the tosafists, see Kanarfogel, "Varieties of Belief in Medieval Ashkenaz: The Case of Anthropomorphism," in Daniel Frank and Matt Goldish, eds., *Rabbinic*

“And when these communities hear your words [of excommunication and of your banning Maimonides’ works] they will cast off the yoke of reverence... and defy the rabbis of northern France and they will double down... in their support of the great master [Rambam]... The law will splinter into multiple laws (*te’aseh Torah ki-shetei Torot*) and the [single] entity of Israel into two camps. One camp will adjudicate in the Valley of Yehoshaphat. The other will come and settle in the rivers of the unplowed fields.”<sup>256</sup>

I have shown that Ramban championed the importance of legal uniformity and stability, and I have argued that Ramban sought to counter the destabilizing effects of the twelfth century revolutions.<sup>257</sup>

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*Culture and Its Critics: Jewish Authority, Dissent, and Heresy in Medieval and Early Modern Times* (Detroit, 2008), pp. 117-159; and Kanarfogel, *The Intellectual History and Rabbinic Culture of Medieval Ashkenaz* (Detroit, 2013), pp. 519-529.

<sup>256</sup> *Kitvei Ramban I*, pp. 341-342:

וקהלות האלה בשמעם את דברי האלה היוצאת, הלא יפרקו עול המורא, ויגלו פנים בתורה, להתריס כנגד רבני צרפת ידברו, ואיש את רעהו יעזרו, לחזק מתנים ולאמץ כח על דברי הרב הגדול, וללומדי בספריו יאמרו חזק... להחזיק ידים ולהוסיף ישיבה עוד, ולאמץ בה מאד, תעשה תורה כשתי תורות, וכל ישראל שתי חבורות, אלה ישפט[ו] בעמק יהושפט, ואלה יבואו ונחו בנחלי הבתות, ושתי ישותו אשר אין משפטם לשתות, אלה יעמדו על גזרתכם, ואלה לא יחושו על מעלת תורתכם...

<sup>257</sup> Throughout this chapter I have argued that Ramban’s project was motivated by the need for legal stability and uniformity, which was being undermined by the revolutions of the twelfth century. This contrasts with Halbertal’s characterization, *By Way of Truth*, p. 77, of Ramban’s project. Halbertal suggests that the sophisticated methods of the twelfth century halakhists made the the methods of the Geonim seem primitive:

פריצות הדרך המושגיות והראייה הסינופטית הנוצרות בבתי המדרש של המאה השתים-עשרה הופכות את הישגי הגאונים לגולמיים ולראשוניים. בעלי התלמוד הגדולים של מאה השתים-עשרה משולים לאותם מדענים שפיתחו כלי תצפית וניתוח משוכללים. מסורת הגאונים שקדמה להם נראית בעיניהם כמו שנראתה המסורת המדעית הקדומה לאחר הופעת הטלסקופ והמיקרוסקופ.

I do not agree with this characterization--that twelfth century halakhah makes the geonic tradition look primitive--nor do I see evidence to suggest that Ramban’s project is in any way related to this tension. In my view, what mattered for Ramban is the legal instability that would result from the sustained and systematic disagreement between the twelfth century halakhists and the geonic tradition. The concern was less about the relative sophistication or primitiveness of one school against the other but about the sustained attacks on the Geonim’s legal rulings and halakhic conclusions.

There is, I believe, one lingering assumption in the argument that should be explicated. Granted that Ramban saw the pressing need for legal uniformity and stability. But does it follow that Rif and his *Halakhot* should be the arbiter of halakhic disputes?

I think the answer here is straightforward. Recall the reasons Ramban provides in the introduction to the *Milhamot*:

“Even when the evidence is in equipoise [favoring neither] we are nevertheless obligated by the law [of *Lo Tasur*] not to deviate at all from his [Rif’s] rulings (*beli le-hattot mi-devarav yamin u-semol*). As we are taught: “[if there is a dispute about the law] follow the scholar who possesses greater wisdom and whose rulings enjoy greater support.” All the more so [are we bound to follow Rif] for he came first, and [the later scholars] had no right to argue [with him], for they should have said “an elder scholar has already ruled” (*kevar horah zaken*).”<sup>258</sup>

Here Ramban cites two separate normative principles of halakhic jurisprudence that, he believes, favor Rif’s judicial authority. The first is the idea that the court with greater wisdom and greater scholarly support (“*gadol... be-hokhmah u-ve-minyan*”) prevails.<sup>259</sup> The second is the idea that preference should be given to the precedent set by the court or scholar that came first.<sup>260</sup>

The second idea is ostensibly straightforward. It is undisputed that Rif’s *Halakhot* were published a century before the revolutions of the twelfth century. Ramban contends that the twelfth century scholars ought to have yielded to Rif’s precedent. The first idea is more difficult, and it appears to turn

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<sup>258</sup> *Kitvei Ramban I*, p. 414.

ברובם מחשבתנו נכרת מתוך ספרנו שעיקרי הדברים מוכרעין בדברי רבינו ואפי' בשקולין הרי הדין פסוק עלינו בלי להטות מדבריו ימין ושמאל כמו ששנו חכמים היו שנים א' מטמא ואחד מטהר אחד אוסר ואחד מתיר אם היה אחד מהם גדול מחבירו בחכמה ובמנין הלך אחריו וכל שכן בהיותו קודם שהמחלוקת מנועה מבעליה שהיה לו לומר כבר הורה זקן.

<sup>259</sup> See 'Avodah Zarah 7a.

<sup>260</sup> Based on *Shabbat* 51a (“*kevar horah zaken*”).

on Ramban's subjective assessment of Rif's brainpower over that of his disputants. Or if not on Ramban's subjective assessment of Rif's brainpower then on his subjective assessment of the relative support enjoyed by Rif's rulings over that of his adversaries.

Perhaps that is the case, but it seems unlikely that Ramban could simply assume a point which needed to be argued (unless he believed that it was a point undisputed by Rif's interlocutors). But given our conclusion in chapter one, that Ramban saw Rif's rulings as grounded in the geonic tradition and geonic precedent, Ramban's position here may be less about Rif and more about the Geonim. The Geonim's rulings, especially where they constitute a unified, enduring tradition, surely qualify as *gadol be-hokhmah u-ve-minyan*, or so at least Ramban could confidently assert. And as the scion of geonic learning, Rif's *Halakhot* should enjoy the same privilege.<sup>261</sup>

In this section, I have argued that the intellectual context of the thirteenth century, framed against the halakhic revolutions of the twelfth century, sheds light on why Ramban devoted so much of his productive powers to defending the geonic tradition. Ramban sought to bestow stability and uniformity on the law through restoring halakhic precedent. Ramban characterizes his *Milhamot* as a reaction to the "hordes and hordes of scholars" seeking to topple the "temple of knowledge" erected by Rif and the Geonim. Moreover, we have seen that Ramban was acutely aware of the "profound importance" of a unified and stable law, and his allusions in the introduction to *Milhamot II* suggest that those same considerations motivated the *Milhamot* project.

Ramban sought to restore legal stability through preserving the legal precedent of the Geonim, and by fortifying them against the destructive weapons of the twelfth century halakhists. As Ramban put it elsewhere:

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<sup>261</sup> In a similar vein, the geonic rulings can be seen as preceding even those of early Ashkenaz.

“Demolishing the words of the rishonim is not [a] constructive [act].”<sup>262</sup>

### Non-Geonic Precedent

There is one further point to be raised in relation to the argument of this section, though its careful examination lies beyond the scope of this study. The preceding discussion makes two separate claims: first, that Ramban sought to restore halakhic precedent in order to bestow stability on the law and to unify it, and second, that it is geonic-Rif legal precedent that prevails over the rulings of later scholars.

The question, then, is whether Ramban deferred to precedent set by other scholars when there was no geonic precedent to fall back upon? Did Ramban take seriously the idea of halakhic precedent, to bestow stability and uniformity on the law, even when it was not anchored in the rulings of Rif and the Geonim?

A detailed examination of this question lies beyond the scope of this study, but as a general impression it seems that no halakhic tradition looms so large over Ramban’s normative halakhah as the geonic-Rif tradition. It is even possible that, for Ramban, the Geonim were the last group of scholars to enjoy sufficient widespread support and juridical legitimacy such that only their precedent mattered.<sup>263</sup>

Still, it is possible that a careful study of *Torat ha-Adam* might reveal that Ramban consistently relies on the rulings of Ibn Giat when they do not conflict with the rulings of Rif or the Geonim. Or for that matter,

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<sup>262</sup> *Hassagot to Sefer ha-Mitzvot* (Frenkel ed., p. 412):

ואין לנו בשכל הקנוי בזה קנין, ולא בסתירת דברי הראשונים בנין.

<sup>263</sup> Put differently, we might say that in the same manner that Rambam distinguished between the Talmud and the Geonim (see above), Ramban distinguished between the Geonim-Rif and later commentators. Halbertal signals at this idea when he discusses Ramban’s periodization of halakhic history with Rif and the Geonim as “the rishonim” and the later scholars as the “aharonim”.

it may turn out that Ramban silently accepts Rabad's or Rambam's rulings throughout his *Hiddushim* whenever the geonic-Rif tradition is silent.<sup>264</sup>

There are, I think, two statements of Ramban that may shed some light on this question. First, in his introduction to *Hilkhot Niddah*, Ramban expresses his reservations about writing a treatise of practical law in an area of halakhah where Rabad had already issued rulings in a prior treatise:

“A group of respected and God-fearing men... requested of me to compose for them the laws of Niddah, for such a work is needed. I responded to them saying: search and read it in God's book (i.e. Rabad's treatise), for not one [of the laws of Niddah] is missing from it. For I was preceded by a holy being who expounds [the laws], and [indeed] he expounds elegantly, and he composed a venerable treatise [on the Laws of Niddah] for men of spiritual stature.”<sup>265</sup>

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<sup>264</sup> Note Haym Soloveitchik's comments in “Rabad of Posquieres”, pp. 14-15, that Rabad's halakhah became influential through Ramban's school:

“Hundreds upon hundreds of his insights were adopted and elaborated upon by the Spanish school and thus shaped the contours of the Halakhah. Indeed any penetrating study of the Halakhic literature of the thirteenth and fourteenth centuries... might disclose that, in many areas, the basic perception of the Talmud Bavli for the past 600 years has been that of Rashi, R. Hannanel and Rabad, as amended by the schools of Ramerupt and Gerona. It is to these seminal writings of Rabad that subsequent writers make constant reference, and it is upon them that his position in the history of Halakah rests.”

And later on, p. 29:

“It was through his influence on the school of Gerona--*bet midrasho shel ha-Ramban*--that Rabad affected Halakhah for close to a millennium.”

For an evaluation of this claim, see Shalem Yahalom, *Between Gerona and Narbonne: Nahmanides' Literary Sources* (Hebrew; Jerusalem, 2012).

<sup>265</sup> *Kitvei Ramban I*, p. 421.

שאל שאלו ממני קצת החברים מאנשי יראת השם ומן החרדים אל דברו לחבר להם הלכות נדה כי הם מן הצורך, ואען לאמר דרשו מעל ספר ה' וקראו אחת מהנה לא נעדרה שכבר קדמני אחד קדוש דורש ולו נאה לדרוש וחבר בהם ספר נכבד לבעלי הנפש

Ultimately Ramban agrees to compose the work, but on the technical ground, apparently, that his treatise will be more accessible to the reader:

“And they responded to me: behold, the scholars of each generation would translate the laws of *shehitah*, each generation in accordance with its style and language, to facilitate their study. And indeed this is all the more necessary in this field [of Niddah] so I yielded to their argument.”<sup>266</sup>

This might suggest that even within the post-geonic era, Ramban felt that a thirteenth-century scholar like himself ought to defer to the precedent set by an accepted twelfth century work.<sup>267</sup> Indeed Ramban closes his *Hilkhot Niddah* with the following peroration:

“Praise and glory to the Master of masters, we have completed the laws of Niddah that apply nowadays, with elegant and wise words, collected from statements of the early scholars. As the saying goes, this matter was begun by great [scholars] and has been completed by lesser ones.”<sup>268</sup>

Also noteworthy is Ramban’s defense of *Mishneh Torah* in the midst of the Maimonidean Controversy. There Ramban singles out one set of Rambam’s laws for praise. It is perhaps no accident that it happens to be the one area of practical Jewish law not treated in the geonic corpus, as Ramban himself underscores:

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<sup>266</sup> *Kitvei Ramban I*, p. 421:

היתה על ידי תשובתם הנה נהגו חכמי הדורות לתרגם הלכות שחיטה איש ואיש ככתבו וכלשונו להקל למודם ורואים אנו שהדברים ק"ו בצורך המלאכה הזאת, והסכמתי לדעתם

<sup>267</sup> On the other hand, as Professor Berger has noted to me, the passage may simply mean that a work already exists that adequately deals with the subject matter in question.

<sup>268</sup> *Hilkhot Niddah* (Hershler ed.), p. 298:

תהלה ושבח לאדוני האדונים השלמנו הלכות נדה הנוהגות באלה הזמנים, בדברים ערבים ונבונים, לוקטו ממאמרי חכמים הקדמונים, ובענין שאמר דבר זה נפתח בגדולים ונסתיים בקטנים.



“He (Rambam) shows sinners to the path [of repentance] with his Laws of Repentance, [and he does so] with composure and aplomb, resolving problems and difficulties. He has produced a precious work, for the Talmud does not present the laws of repentance systematically but scatters them and disperses them between various laws and aggadic sayings [which makes the whole subject] unclear. And in all the works of the Geonim, ancient and recent, we do not find these matters fully explicated and easily accessible as they are expounded and explained in that work [of Rambam].”<sup>269</sup>

In this passage it is noteworthy that Ramban praises Rambam for his *Hilkhot Teshuvah* specifically because it is an area left untreated by the geonic corpus.<sup>270</sup> Although Ramban does not here take any position on whether Rambam’s *Hilkhot Teshuvah* therefore has some special status in establishing legal precedent, it is striking to note the extent to which Ramban in the last section of *Torat ha-Adam (sha’ar ha-gemul)* follows Rambam’s *Hilkhot Teshuvah* and its framework.

These two examples may reflect Ramban’s deference to precedent even when the precedent is non-geonic. In *Hilkhot Niddah*, Ramban defers to Rabad’s *Ba’alei ha-Nefesh*, and Ramban characterizes his own work as merely summarizing that which has been written by his predecessors. Second, Ramban celebrates Rambam’s definitive *Hilkhot Teshuvah*--precisely because there was no geonic precedent on the topic.

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<sup>269</sup> *Kitvei Ramban I*, p. 343.

יורה חטאים דרך בהלכות תשובה, ובנחת ושובה ובלי קושיות והיות, מפיק מרגליות, כי לא מצינו דברי תשובה בתלמוד רק מפוזרים ומפורדים בין ההלכות וההגדות בלתי ברורים, ובכל חבורי גאונים הראשונים ואחרונים לא מצינו אותם ענינים דרושים לכל הפציהם ומזומים, כאשר המה מפורשים ומבוארים בספר ההוא.

<sup>270</sup> Then again Ramban might simply be praising Rambam for his groundbreaking work.

## Summary

In this chapter, I have demonstrated that Ramban's commitment to the geonic tradition was unique, and it contrasts sharply with the posture of his twelfth-century predecessors from across the spectrum of halakhic cultures. I have argued that Ramban's position flows from his conception of the Talmud as a closed text; its rulings are inaccessible and difficult to divine without a key to unlock them and without critical interpretive guidance. Furthermore, I have argued that Ramban saw the Geonim as the critical guides and as the key to unlocking the Talmud's rulings. This stems from the Geonim's special connection to the Savoraim and Amoraim. The fact that the Geonim were the intellectual and institutional heirs of the Amoraim creates the presumption that the Geonim had received interpretive traditions from the very authors and editors of the Talmud: What better way to approach the talmudic text than to do so armed with the interpretive traditions handed down from its authors and editors? Indeed, Ramban might argue, there is no other legitimate way to approach it.

I have also suggested that Ramban's project should be understood as a reaction to the twelfth-century halakhic revolutions of Rambam, Rabad, and the tosafists and that Ramban was motivated by the need to bestow stability and uniformity on the law, which was being undermined by the revolutions of the prior century.

The next chapter takes a closer look at the nature of Ramban's relationship with the geonic tradition and offers a more fine-grained analysis of it. As we have seen in this chapter and in chapter one, Ramban was deeply committed to the geonic tradition, and he devoted an extraordinary amount of energy to defending it. The next chapter considers whether Ramban felt unconditionally bound to the Geonim's rulings and whether he ever felt free to disagree with their interpretations. The next chapter also considers Ramban's disclaimer to the effect that his arguments in defense of Rif and the Geonim are not

always ironclad or absolute and that he will defend Rif even when he personally believes that Rif ruled incorrectly. Why pen a defense of Rif and the Geonim only to discredit it?

## Chapter 3: The Impossibility of Conclusive Halakhic Proofs and the Weight of the Geonic Tradition

### Introduction

The previous chapters have argued that defense of geonic rulings was a core component of Ramban's halakhic writings. They have also shown that Ramban perceived the Geonim as the institutional and intellectual heirs of the Babylonian Amoraim and Savoraim. As such, Ramban believed that the Geonim received interpretive traditions and rulings from their halakhic predecessors. For this reason, Ramban saw the Geonim as the key to deciphering the Talmud and its rulings. Without the guidance of the Geonim's interpretive traditions, the Talmud would remain indecipherable, and its normative halakhic rulings would remain inaccessible. I have also argued that Ramban sought to restore geonic halakhic precedent in order to stabilize and unify halakhic practice following the destabilizing halakhic revolutions of the twelfth century.

The present chapter has three aims. First, it documents Ramban's intellectual and halakhic independence. Whereas chapter one focused on Ramban's respect for halakhic precedent, the present chapter rounds out our perspective of Ramban by documenting how Ramban did, on occasion, disagree with the rulings of Rif and the Geonim. In addition, Ramban expresses and even emphasizes his intellectual and halakhic independence throughout his introductions to his various works.

The second aim of this chapter, which follows from the first, is to consider the following problem raised by scholars: how are we to reconcile Ramban's commitment to geonic-Rif precedent with Ramban's bold, independent, and often creative halakhic jurisprudence, which at times clashes with the rulings of Rif and the Geonim. This chapter will evaluate Oded Yisraeli's thesis that the tension is to be resolved by distinguishing between Ramban's early works where, according to Yisraeli, Ramban felt "absolutely bound" by geonic legal precedent, and Ramban's later works where, Yisraeli claims, Ramban began to assert his intellectual and halakhic independence. I shall argue that the evidence from Ramban's writings

does not support Yisraeli's thesis. I propose, instead, that Ramban's posture towards geonic-Rif precedent remained consistent throughout his career. I suggest that viewing Ramban's defensive projects against the backdrop of his intellectual freedom and creativity casts important light on the nature of his defensive project in the *Milhamot* and *Sefer ha-Zekhut*. This analysis will also shed light on Ramban's conception of legal precedent more generally. These observations will lead us to a more nuanced and more precise formulation of the role of geonic-Rif precedent in Ramban's halakhic jurisprudence.

The third aim of this chapter is to analyze why Ramban's predecessors did not feel bound to geonic precedent in the way that Ramban did. This discussion follows naturally from the conclusions of chapter two. Having explained *Ramban's* position in chapter two, the present chapter considers the possible points of disagreement between Ramban and his predecessors.

At the end of this chapter, I further suggest that Ramban's unique historical position in thirteenth century Catalonia brought the problem of halakhic-legal precedent into sharp relief for him, whereas the historical circumstances of Ramban's predecessors was such that the problem of legal precedent was not posed as acutely to them.

### Ramban's Halakhic and Intellectual Independence

Ramban was a bold, original, and independent halakhic thinker. His oeuvre reflects his novel interpretations of talmudic passages and his bold halakhic rulings, as well as his willingness to challenge the rulings of his predecessors--even those of the Geonim he so profoundly revered. In this section, I briefly survey examples where Ramban freely disagrees with the rulings of the Geonim. The purpose of this section is to document the manner in which Ramban felt free to disagree with geonic precedent--to counter any perception created by Ramban's systematic defense of geonic legal precedent that Ramban felt "absolutely bound" to geonic rulings--and to set the stage for my evaluation of Yisraeli's analysis.

Some scholars, noting Ramban's deference to the geonic tradition and his resistance to the twelfth century criticisms of Rif, have concluded that Ramban was "a reactionary writer who lowered his head before authority and thus stifled free thought" and that he was "hopelessly conservative" with his "unbounded respect for earlier authorities."<sup>271</sup> As we shall see, these characterizations of Ramban are completely off mark.

Throughout his halakhic writings, including his works dedicated to the defense of the Geonim and Rif, Ramban expresses his intellectual independence and willingness to challenge Rif and the Geonim's rulings when he deems it appropriate to do so. Consider the following examples:

"I already mentioned that the Geonim all agree on this [ruling]... but they are forced [by their position] to dismiss the entire talmudic discussion at the beginning of the chapter... But I have offered a [different interpretation] that solves and resolves all the issues with certainty, and [my interpretation] is correct and self-evidently true. And even though we are their (the Geonim's) students and we drink their water, nevertheless, in matters like this, a student must speak out before his masters and must not remain silent."<sup>272</sup>

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<sup>271</sup> For citations and discussion of this characterization of Ramban, see Isadore Twersky, *Rabad of Posquieres*, p. 217 and notes 6 and 8 therein.

<sup>272</sup> *Hassagot to Hilkhot Lulav*:

והרי הרב אומר כן בגזול ושל אשרה ושל עיר הנדחת דפסולין לעולם, אבל נסתייע מן הגמרא הזו בהכשר שאר הפסולין בשני דומיא דחסר שהכשירו בגמרא שלנו, וכבר הזכרתי שהגאונים הסכימו בזה וכך אמרו ביום טוב ראשון דאוריתא פסולין בשאר יומי דרבנן כשרין כדאמרינן באתרוג חסר, אבל הם הוצרכו לדחות הסוגיא שבתחלת הפרק כולה שהוא חולק לפי דעתם על מעשה דר' חנינא וכן הסכימה דעת הרב... ואנו קימנו והעמדנו דברים על בוריין בדברים נכונים ומעידין על עצמן שהם אמת, ואף על פי שתלמידים אנו ומימיהם של ראשונים אנו שותים כל כי הא מילתא לימא איניש קמיה רביה ולא לשתוק.

“If the early Geonim had written this on the basis of a received tradition, I would accept it. But since their reasoning is based on [their unpersuasive reading of the text]... And since it is known that [their reading] is not correct, it is appropriate for us to rely on the [other opinion].”<sup>273</sup>

“This is the precise formulation of the Geonim’s view. But I humbly [disagree] for I do not rely [on a ruling] that chops up the words of the Talmud and makes them float about in the air of speculation... And may the Almighty save us from any sin or mistake.”<sup>274</sup>

“I’m astonished that all the Geonim rule this way, and I have yet to see an explicit reason in their treatises [for ruling this way]. But as I work through the talmudic passages in order to justify their position, I can say the following [in their defense]...”<sup>275</sup>

“This [interpretation] is totally incorrect, and I am not aware of any good argument that would sufficiently justify these words of the Geonim, unless perhaps they explain this passage as referring to an unenforceable obligation...”<sup>276</sup>

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<sup>273</sup> *Milhamot Shabbat 11b.*

אמר הכותב אלו היו דברי הגאונים הראשונים כן וקבלה היא קבלנו אבל אם מאחר שאין טעמן של ראשונים אלא ממה שאמרו סד"א כדברא והדבר ידוע שאינו כמו שעלה על דעתם אלא כדברי רבינו הגדול ז"ל ראוי לנו לסמוך עליו יותר מדברי אלו בעלי אפשרות האחרונים.

<sup>274</sup> *Milhamot Shabbat 60b*

וזהו דעת הגאונים בדקדוק אבל אנו בעניותנו אין אנו נסמכים לחתך דברי הגמרא ולעשותן פורחין באויר הסברות... והאל יצילנו מכל חטא ושגיאות.

<sup>275</sup> *Milhamot Beizah 4a:*

ואני תמה על כל הגאונים שכך פסקו כולם זכרונם לברכה ולא ראינו להם בחבוריהם המגיעים לידינו טעם מפורש בדבר וכשאני מחפש ומהפך בשמועות לזכותם יש לי לפרש ולומר...

<sup>276</sup> *Hiddushim Yevamot 24b:*

וזה אינו נכון כלל, ואיני יודע בזה טענה מספקת לדברי הגאונים הללו אלא אם כן הם מפרשין אותה לצאת ידי שמים.

“This is a famous and known position of the Geonim, but we think it is incorrect, for we have not found any basis for it, and we have not seen them bring any proof for it, and moreover, we have objections to this ruling of theirs. Indeed this talmudic passage itself refutes their view. Still it is possible to interpret the passage...but this is very forced... but then again I would be surprised if the Geonim were not aware of such an obvious objection...”<sup>277</sup>

“Indeed our French masters taught us [this interpretation]... and it is certainly correct, and no other interpretation of this passage is right. But what can we do for the Geonim who all interpret [it differently]?... Perhaps the reason for their view is...”<sup>278</sup>

“I do not understand these arguments of the Geonim.”<sup>279</sup>

“I am astonished at the Geonim, for how did they rely on [this opinion and not that one], they [erroneously] relied on the [principle] that is the exception and not on [the principle] that is the rule.”<sup>280</sup>

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<sup>277</sup> *Milhamot Shevuot* 27a:

והדבר מפורסם וידוע לדברי הגאונים ז"ל ולא שהדין מחוור אצלנו שלא מצינו לו עיקר ולא ראינו להם עליו ראייה של כלום ועוד יש לנו תשובות על הדין הזה שלהם גם זו השמועה תשובה עליו אבל אפשר דלצדדין קתני דעל בעל הבית להביא ראייה או יביא ראייה ויטול טליתו או ישבע אומן ויטול שכרו ומפני שברשותו היא לא חש לפרושה כדקתני סיפא המוציא מחבירו עליו הראייה שפ"י לצדדין וזו הרחקה יתירה ותמהני אם רבותינו הגאונים ז"ל לא נשמרו מתשובה פשוטה הזאת...

<sup>278</sup> *Sefer ha-Zekhut Ketubot* 56b:

אמר המחבר באמת שכך למדונו רבותינו הצרפתים ז"ל מוכרת למזונות והולכת עד כדי שלא תשאיר אלא כדי כתובה וסמ"ך לה שתגבה כתובתה מאותו השאר כלומר ולא ממה שמכרה הא אילו רצתה ניזונית לעולם והוא בודאי פי' נכון ואין ענין אחר מתחזור בכאן. אבל מה נעשה לגאונים שהם כולם ז"ל מפרשי' שאינה יכולה למכור אלא כדי כתובתה וכ"כ רבינו הגאון ז"ל ורבי' חננאל ז"ל ואולי הטעם לדבריהם...

<sup>279</sup> *Milhamot Hullin* 36a

ואנו לא עמדנו על הסברות הללו מדברי הגאונים.

<sup>280</sup> *Hiddushim Eruvin* 48a:



“The Geonim’s words here are incorrect... and from where did they extract such an idea, and where do we have anything analogous in the Talmud?”<sup>281</sup>

“The Geonim say.... but this is a mystery to me.”<sup>282</sup>

“I found in the responsa of the Geonim.... and they base their ruling on the talmudic passage... and they also found [this interpretation in the writings of] Rabbenu Hai. But we humbly disagree with their ruling.... the Geonim got this passage wrong...”<sup>283</sup>

“This question that you raise already appears in the responsa of the Geonim, and Rav Sherira responded with an incorrect answer... And even though a great man said it, it is wrong, and you should not rely on it... [in fact, because of these errors, I would say that] the Gaon never signed this responsum and [that] he [actually] never wrote it.”<sup>284</sup>

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ואני תמה על הגאונים ז"ל א"כ היאך סמכו עליה בהלכה דר' יהושע בן לוי כרבי יוחנן בן נורי, סמכו על הפרט ולא סמכו על הכלל.

<sup>281</sup> *Torah ha-Adam, Kitvei Ramban II*, p. 249:

ומ"מ אין דברי הגאונים ז"ל בכאן מחוורין להפסיק בסעודה ולחזור ולאכול, וכי מנין יוציאו הגאונים דבר זה ומנין לנו בתלמוד כיוצא בזה.

<sup>282</sup> *Hiddushim Yevamot 92b*

אבל הגאונים אמרו שאסורה לשני לעולם כדי שלא יהא חוטא נשבר, וכן אפילו בישראל אם חלץ לה אפילו מדעתו אסורה לשני, וזה תימה בעיני.

<sup>283</sup> *Torat ha-Adam, Kitvei Ramban II*, p. 66:

באת לו שמועה במועד, שמועה קרובה שנוהג בה לאחר המועד שבעה ושלישים ודאי קורע, שמועה קרובה במועד ולאחר המועד תעשה רחוקה, מצינו בתשובת הגאונים כיון דאינו נוהג שבעה ושלישים אינו קורע. ותלו לה מדאמרינן בגמרא קריעה בלא שבעה מי איכא, וכך מצאו עוד לרבינו האי ז"ל. ואין עניות דעתנו מסכמת לדבריהם, לפי שהשמועה הזו קרובה היא וראוי לנהוג עלי' שבעה ושלישים אלא שהרגל מבטל לפי שאינו ראוי לאבילות, אבל ראוי הוא לקריעה, הלכך קורע בשעת שמועה דשעת חימום הוא. ולא אמרו בגמרא דליכא קריעה בלא שבעה אלא בשמועה רחוקה, לומר דכשם שהקלו עליו שאינו נוהג שבעה מפני שהוא אבילות ישנה, כך נקל עליו שלא יהא קורע, אבל הכא קרובה היא והרגל מפסיק מה שראוי להפסיק ונוהג מה שראוי לנהוג כשאר אבילות. ובעל הלכות ז"ל כתב אפילו בשמועה קרובה אסור לקרוע במועד וכך השיב רב נטרונאי, נשתבש זה אצל הגאונים, דשמועה קרובה כמי שמתו מוטל לפניו וקוברו במועד הוא, ותנן בהדיא דקרובים של מת קורעים.

<sup>284</sup> *Responsa* (ed. Chavel), no. 3:

“We are astonished by the Geonim that they all rule this way in their codes.”<sup>285</sup>

“Our great master [Rif] wrote a responsum on this matter [ruling that x]... and these are the words of our great master [Rif]... and even though we have deep reverence for his great wisdom, we cannot be partial in judgement (i.e. we cannot let our reverence for Rif bias our halakhic judgement).<sup>286</sup>

These examples from Ramban’s halakhic writings reflect Ramban’s intellectual independence and his willingness to criticize the geonic rulings. Furthermore, Ramban’s introductions to the *Milhamot* and *Hassagot* further underscore his intellectual independence. In his introduction to *Milhamot I*, Ramban writes that although he has set out to defend Rif’s rulings, he will not be biased in Rif’s favor:

“I will not be biased [in Rif’s favor], even though I have devoted my pen to defending [this] elder and scholar of Talmud.”<sup>287</sup>

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תשובה הוי יודע שזו השאלה כבר מצאנוה בין תשובות הגאונים. והשיב בה רבי' שרירא תשובה משובשת ואמ' דהוה ליה חשודא ואף על פי ששבועה זו אינה של תורה אלא תקנת חכמים היא שבנגדו נשבע ונטול מדאמר' ב תנא פסולין דאורייתא וקתני פסולין דרבנן ע"כ כנסח השאלה. ואף על פי שתלויה באילן גדול שבוש הוא ולא תסמוך עליו. שאין אדם נעשה חשוד אלא על פי עדים כשרים להעיד לו ולא קרובים פסולים וכל שכן על פי עצמו. כדאמר' ג אדם קרוב אצל עצמו וכו'. וכן כתב הרמב"ם בפ' מבואר ואין צריך לפנים. ותמה על עצמך אפי' מי שאמ' במקום שאין מכירין אותו חשוד אניה נאמן זה שהודה מפי עצמו תחלה לא כל שכן שלא יפסל? וזהו קל וחומר שאין עליו תשובה. ועוד נשתבשה התשובה הזו במה שאמ' אף על פי שאין שבועה זו אלא תקנת חכמים. נהי דליתא/דליתא/ לענין חיוב שבועה אלא מדרבנן, דמדאורייתא אינו צריך שבועה מ"מ לענין אסור שבועה דאורייתא היא. שהרי שבועת היסת בשם או בכנוי משביעין וסוף סוף הויא לה שבועת שקר לא אכלתי ואכלו לא לוי' ולוה. אבל חס ושלוש שאין גאון חתום עליה ולא כתבה מעולם.

<sup>285</sup> *Milhamot* Rosh Hashanah 8b:

אלא שאנו תמהים על הגאונים ז"ל שכתבוה כולם בחבוריהם ומדבריהם יש ללמוד שהיו סבורין שלא ביבנה בלבד נאמרה אלא בכל יום ראשון של ר"ה שחל להיות בשבת בכל מקום לפי שאין בלמוד גזירה דרבה..

<sup>286</sup> Responsa Ramban (ed. Chavel) no. 25:

רבינו הגדול כתב תשובה בענין זה.... אלו דבריו של רבינו הגדול... ואע"פ שאימת חכמתו מוטלת עליו אין משוא פנים בדיו....

<sup>287</sup> *Kitvei Ramban I*, p. 409:

ואפין לא יסב, ברם עיטא יסב, דליחוש לגבר סב, וקשיש בגמרא.

And in his introduction to *Milhamot II*:

“The obligation incumbent upon us in the study of the Torah and its commandments... is to not be intimidated by anyone in issuing halakhic rulings or in [in interpreting] its laws, as the Torah states, “fear no man.””<sup>288</sup>

Ramban’s statements in the introduction to the *Hassagot* are even more striking:

“Even with my desire to be a student to the Geonim, to uphold their words and to support them... I will not make myself into their mule who always has to carry their books. I will choose their path and know their worth, but when their rulings cannot be explained, I will judge their rulings [on the merits] and [critically] evaluate them with my own eyes, and when the halakhah is clear[ly against them], I will not [attempt to defend their views], for God grants wisdom in all times and generations.”<sup>289</sup>

Ramban repeatedly tells his readers that he will use his intellect to judge whether the geonic ruling is compelling, and a subtle theme running throughout Ramban’s introductions is that the intellect and

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Note that Ramban makes a similar statement in his introduction to the *Hassagot*:

אשפט למראה עיני... לא אשא פנים לתורה.

<sup>288</sup> *Kitvei Ramban I*, p. 412.

החויב המטל עלינו לחפש בעיני התורה והמצוות .... ולא לירא אדם בהוראותיה ומשפטיה. כמו שכתוב, לא תגורו מפני איש, וכאשר בא באור הכתוב הזה ויתר הכתובים הדומים לו בדברי חכמי ישראל זכרונם לברכה.

As Chavel notes, Ramban is referring to the Talmud in Sanhedrin 6b that a student must speak up to challenge his teacher’s ruling when he believes that the ruling was incorrect.

<sup>289</sup> *Kitvei Ramban I*, p. 420.

והנני עם חשקי וחפצי להיות לראשונים תלמיד, לקיים דבריהם ולהעמיד, לעשות אותם לצוארי רביד ועל ידי צמיד, לא אהיה להם חמור נושא ספרים תמיד. אבחר דרכם ואדע ערכם. אך באשר לא יכילו רעיוני אדון לפניהם בקרקע אשפוט למראה עיני. ובהלכה ברורה לא אשא פנים בתורה. כי י"י יתן חכמה בכל הזמנים ובכל הימים. לא ימנע טוב להולכים בתמים.

rational power of the mind remain fixed across generations. His intellect is not inferior to that of his predecessors. Consider Ramban's introduction to *Sefer ha-Zekhut*:

“Because I know the great wisdom of that man (Rabad) [with whom I am going to argue].... I therefore call forth your name [God], for I know and recognize, that you cut my mind from the same quarry that you cut [the minds] of the ancients, and that you nipped me from the same block of matter that you nipped them.”<sup>290</sup>

And in the introduction to *Milhamot II*:

“At the beginning of creation He created me, when He set the heavens in place I was there.”<sup>291</sup>

And as we saw earlier in the introduction to the *Hassagot*:

“God grants wisdom in all times and generations.”<sup>292</sup>

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<sup>290</sup> *Kitvei Ramban I*, p. 416:

כאשר ידעתי מעלת האיש ההוא בחכמה וגדלתו ביראת אלהים, לפיכך שמך אזכיר, כי ידעתי ואכיר, אזנים כרית לי, ממחצב הקדמונים חצבת שכלי, ומחומר קרצת אותם קרצתי.

<sup>291</sup> *Kitvei Ramban I*, p. 411:

ראשון ואחרון לבריותיו בראני, בהכינו שמים שם אני.

Professor Berger has noted to me that this line simply means that Ramban's soul, like all other souls, was created on the first day of creation. This is of course true as a translation of the phrase. But if we read this line together with Ramban's statements in his other introductions--such as the quote immediately preceding it in the text above, “you cut my mind from the same quarry that you cut [the minds] of the ancients” and the quote immediately following it, “God grants wisdom in all times and generations,” Ramban's statement could be interpreted as a declaration of the the mind's extraordinary capacity, reflected in its being the centerpiece of creation: *rishon ve-aharon li-beriyotav bera'ani ba-hakhino shamayim sham ani*.

<sup>292</sup> *Kitvei Ramban*, p. 421:

כי ה' יתן חכמה בכל הזמנים ובכל הימים.

Also noteworthy is Ramban's introduction to his *Tashlum Halakhot*, where he justifies his right to complete Rif's treatise:

“Do not object [to my work] and think that I believe that I am like a divine being and [therefore] able to complete Rif's work.... I am but the [Rif's] agent... and [besides that] nothing prevents God from giving a small person great [intellect] and stature, and to elevate [someone who is] low.”<sup>293</sup>

And in the *Milhamot*, after suggesting a novel interpretation:

“We have followed in the path of the angel he sent before us to issue rulings (i.e., Rif), relying on the intellect that he has given us, and assured by the verse that states “God's secrets are [known] to those who fear him.”<sup>294</sup>

And in his *Hiddushim*:

“Even though the rishonim are like angels, we are human beings [with capable intellects], and the truth will guide us in its path.”<sup>295</sup>

How do these bold assertions of intellectual independence cohere with Ramban's systematic defense of the rulings of Rif and the Geonim and the central role that their legal precedent plays in his

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<sup>293</sup> *Kitvei Ramban I*, p. 406:

ולא תהוון תמהוין, בגין דחשיב אהוין, למדמי בר אלהין, ומשלם עבידתא, ארום רב חרטמין, עבד כל מטעמין, ושיגדין דקימין, ורשי עגלא תלתא, ודין הוא פרונוקה, ואתי בחריקה, קשוט די מן פתקה, הות ליה אובנתא, ולית לאלה עצרא, למיתב לזעירא, ריבותא ויקרא, ומסקי לממיכתא.

<sup>294</sup> *Milhamot Ketubot 50a*:

והאל יצילנו משפת יתר וירים מכשול מדרכנו. כי בעקבות מלאכו אשר שלח לפנינו להורות יצאנו. סמוכים על מה שחלק לנו מן השכל ובטוחים על מקרא שכתוב סוד ה' ליראיו ובריתו להודיעם.

<sup>295</sup> *Hiddushim Bava Metzia 98a*:

אף על פי שהראשונים מלאכים אנו בני אדם והאמת יורה לנו דרכו.

jurisprudence? Troubled by what he calls Ramban's "dualist" posture (*ha-yahas ha-kaful*) towards the Geonim<sup>296</sup>--submission in some cases and independence in others--Oded Yisraeli has recently advanced a thesis to explain the apparent inconsistency in Ramban's oeuvre. The next section presents and evaluates Yisraeli's thesis.

### Yisraeli's Interpretation of Ramban's Project

Oded Yisraeli has recently argued that the tension between Ramban's allegiance to the legal precedent of Rif and the Geonim, on the one hand, and his intellectual independence from them, on the other, is resolved by distinguishing chronologically between different points in Ramban's career. Consistent with the general thesis of Yisraeli's book, which attempts to document Ramban's "intellectual development and progression" over his career, Yisraeli contends that Ramban's allegiance to the Geonim and his commitment to defending their halakhic views is true only of Ramban's early career and early works.

Yisraeli writes that at the beginning of his career Ramban felt "unconditionally bound to the geonic tradition and to Rif."<sup>297</sup> According to Yisraeli, Ramban's earliest works reflect this absolute and unconditional allegiance to the geonic corpus and to Rif, but over time, Ramban slowly began to express greater independence and freedom from their rulings. Specifically, Yisraeli claims this transition can be documented by comparing Ramban's posture towards geonic precedent in *Milhamot I* with his posture in *Milhamot II*. Yisraeli writes:<sup>298</sup>

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<sup>296</sup> Yisraeli, *Intellectual Biography*, p. 54 n. 37.

<sup>297</sup> Yisraeli, *Intellectual Biography*, p. 49, refers to Ramban's

עמדת ההגנה הבלתי מותנית על הרי"ף.

On p. 51, he refers to Ramban's

דבקותו הבלתי מתפשרת במשנתו של הרי"ף ובמסורת הגאונים.

And on p. 52, he refers to Ramban's

שעבוד הבלתי-מותנה למסורת 'הראשונים' הקדומה של הגאונים והרי"ף.

<sup>298</sup> Yisraeli, *Intellectual Biography*, pp. 49-50.

עיון מדוקדק בחלקו השני של ספר המלחמות עשוי לזהות שינוי מגמה מהותי עוד יותר. במקומות אחדים רמב"ן נוטש במקצת את עמדת ההגנה הבלתי מותנית על הרי"ף, ומגלה נכונות, אף אם זהירה ומהוססת, לחשוף בקיעים בין עמדתו האישית לבין דעת הרי"ף. במקרים מסוימים הוא אף מצטרף במשתמע לעמדת הביקורת, ומניח לקורא להבין שדברי ההגנה שהוא נושא לזכותו של הרי"ף אינם משקפים בהכרח את דעתו-הוא. כך, למשל, במקום אחד הוא מעיר בנימת הסכמה על דברי רז"ה: 'וכן היה נראה, אלא שדברי רבינו הגדול צריכין לפנינו' (סוכה ד ע"ב), ובסמוך לכך: 'אני לא לחלוק באתי שאיני כדי, אבל דעתו של רבינו הגדול ז"ל גליתי ופירשתי' (סוכה ה ע"ב). במקום אחר רמב"ן איננו נמנע מלהעלות תמיהה על עמדת הגאונים כולם: 'הנה בעל המאור מתמיה על רבינו הגדול ז"ל ואני תמה על כל הגאונים שכך פסקו כולם זכרונם לברכה, ולא ראינו להם בחבוריהם המגיעים לידינו טעם מפורש בדבר...!' (ביצה ד ע"א). ויש והוא מודה בגילוי לב של ממש: '...וכל זה [רק] להעמיד דברי הראשונים אם נוכל לה' (חולין מד ע"א)...

Yisraeli reinforces his argument by noting the change in tone and substance from the introduction to *Milhamot I* to the introduction to *Milhamot II*. Noting Ramban's statement in the introduction to *Milhamot II* that his own view does not always align with the position he offers in defense of the rulings of Rif and the Geonim, Yisraeli writes:<sup>299</sup>

הצהרה זו בראש חלקו השני של ספר המלחמות, כמו גם הנימה המהוססת-משהו והבוטחת פחות בצדקת עמדתו של הרי"ף משקפת אפוא שינוי בטעמו ודרכו של רמב"ן. מתברר שבניגוד לחלק הקדום של ה'מלחמות' שעל פי עדותו העצמית של רמב"ן נכתב תחת השפעתה של 'רתחת ימי הנעורים' ועל כן מבטא את רוחו הקנאית ודבקותו הבלתי מתפשרת במשנתו של הרי"ף ובמסורת הגאונים, בחלק המאוחר יותר (אכן, ככל הנראה, לא הרבה מאוחר יותר), מתבטאות התמתנותו היחסית וראשית התגבשותה של עצמאותו הפרשנית. רמב"ן אשר מוכן להודות בהקדמה זו שלעיתים פירושו של הרי"ף 'עדין רחוקים בפשטי הסוגיא או הסוגיות', גם אם בזהירות מופלגת, איננו אותו רמב"ן שקנאותו לרי"ף הביאה אותו בימים אחרים לצאת בביטויים יוצאי דופן בחריפותם, כנגד מבקריו, ביטויים אשר לימים הוא עתיד להתחרט עליהם, כפי שנזכרנו.

<sup>299</sup> Yisraeli, *Intellectual Biography*, pp. 51-52.

מגמה זו של השתחררות מן השעבוד הבלתי-מותנה למסורת 'הראשונים' הקדומה של הגאונים והרי"ף והתגבשות עצמאותו הפרשנית של רמב"ן הבשילו באופן סופי במהלך הפרקים הבאים של יצירתו: בחידושיו לתלמוד שאותם חיבר בשנות העשרים המתקדמות של חייו, ובאופן מיוחד ביצירה המאוחרת יותר, היא חיבור ה'השגות' על 'ספר המצוות' לרמב"ם.

In this passage, Yisraeli advances two related claims. First, that Ramban's attitude toward the rulings of the Geonim and Rif evolved over time. Second, that at the outset of his career, Ramban felt "unconditionally bound" by, and had an "unwavering commitment" to, the legal rulings and positions of the Geonim and Rif.

I believe that both of these claims are incorrect. Regarding the first claim, there is no evidence to support the contention that Ramban's attitude toward the rulings of Rif and the Geonim changed over time. In the next section I will demonstrate that Ramban felt free to disagree with the rulings of Rif and the Geonim from the very outset of his career, and he did so in his earliest works. This demonstration will also refute Yisraeli's second claim: There was no point at which Ramban felt "unconditionally bound" to the rulings of the Geonim and Rif. More importantly, I shall argue, Yisraeli's characterization of what he calls Ramban's early *shi'abud ha-bilti mutneh le-masoret ha-ge'onim* and *devekuto ha-bilti mitpasheret be-mishnato shel ha-Rif u-ve-masoret ha-ge'onim* is inconsistent with the very nature of Ramban's project in the *Milhamot* and *Sefer ha-Zekhut*.

Let us begin by examining the evidence. Do Ramban's earliest writings, *Milhamot I* and the *Tashlum Halakhot*, support Yisraeli's claim that Ramban felt unconditionally bound to the rulings of the Geonim? To support his contention, Yisraeli cites four cases in *Milhamot II* where Ramban distances himself from the position of Rif and the Geonim.<sup>300</sup> Yet these instances do not support Yisraeli's claim unless it can be

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<sup>300</sup> Recall Yisraeli, pp. 49-50:



shown that there are no such instances of disagreement between Ramban and the Geonim or Rif in Ramban's earliest works--*Milhamot I* and the *Tashlum Halakhot*. Put differently, it is not sufficient for Yisraeli to show that Ramban disagrees with the Geonim in his later works. He must show that such disagreement is *unique to Ramban's later works* and absent from his early ones. Yisraeli's argument supposes that Ramban did not feel this freedom in *Milhamot I* and in the *Tashlum Halakhot* and that it was only in *Milhamot II* that we begin to see fissures between Ramban's position and Rif's.

A careful study of *Milhamot I*, which covers the talmudic orders of *Nashim* and *Nezikin*, reveals that Ramban felt free to criticize the rulings of Rif and the Geonim from the very beginning of his career.

Consider the following examples, all drawn from *Milhamot I*:

"This is a real problem for Rif's ruling, unless he will push [unpersuasively and] say..."<sup>301</sup>

"This is what I think [must be said] to correct the words of our great master, and may God save us from any obstacle and iniquity."<sup>302</sup>

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עיון מדוקדק בחלקו השני של ספר המלחמות עשוי לזהות שינוי מגמה מהותי עוד יותר. במקומות מספר רמב"ן נוטש במקצת את עמדת ההגנה הבלתי מותנית על הרי"ף, ומגלה נכונות, אף אם זהירה ומהוססת, לחשוף בקיעים בין דעת הרי"ף לבין עמדתו האישית. במקרים מסוימים הוא אף מצטרף במשתמע לעמדת הביקורת, ומניח לקורא להבין שדברי ההגנה שהוא לזכותו של הרי"ף אינם משקפים בהכרח את דעתו-הוא. כך, למשל, במקום אחד הוא מעיר בנימת הסכמה על דברי רז"ה: 'וכן היה נראה, אלא שדברי רבינו הגדול צריכין לפני' (סוכה ד ע"ב), ובסמוך לכך: 'אני לא לחלוק באתי שאיני כדי, אבל דעתו של רבינו הגדול ז"ל גליתי ופירשתי' (סוכה ה ע"ב). במקום אחר רמב"ן איננו נמנע מלהעלות תמיהה על עמדת הגאונים כולם: 'הנה בעל המאור מתמיה על רבינו הגדול ז"ל ואני תמה על כל הגאונים שכך פסקו כולם זכרונו לברכה, ולא ראינו להם בחבוריהם המגיעים לידינו טעם מפורש בדבר...' (ביצה ד ע"א). ויש והוא מודה בגילוי לב של ממש: '...וכל זה [רק] להעמיד דברי הראשונים אם נוכל לה' (חולין מד ע"א)...

<sup>301</sup> *Milhamot Ketubot* 38a:

וזה דבר קשה על דברי רבינו יצחק ז"ל א"כ ידחוק ויאמר...

<sup>302</sup> *Milhamot Ketubot* 60b:

זהו מה שנראה לי לתקן דברי רבינו הגדול ז"ל והאל יצילנו מכל מכשול ועון.

“The truth is that I think Rif’s position is incorrect. Nevertheless, the specific objection [that R. Zerahyah raises] has no merit.”<sup>303</sup>

“We ought to be concerned for Rif’s position, and moreover, R. Hai Gaon the father of Israel writes similarly in his responsa.... But I have a really strong objection against them... but it is possible [to defend their view]... and I can further defend their position... I offer this elaborate defense just so that we can rely on the received tradition of the Geonim.”<sup>304</sup>

“And this is Rif’s position, but he is wrong about this interpretation....nevertheless we should not rule in accordance with [my own interpretation], for it is just a commentary... so for the purpose of ruling, the halakhah should follow Rif, and regarding that which I wrote [to the contrary], I was writing like a scribe trying to improve his [penmanship].”<sup>305</sup>

“This is my gloss to correct [Rif’s] words.”<sup>306</sup>

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<sup>303</sup>*Milhamot Gittin 4b:*

אמר הכותב באמת אין הדברים נראין כן כדברי רבינו ז"ל אבל זו קושיא של הבל היא.

<sup>304</sup>*Milhamot Gittin 30b:*

אמר הכותב אבל צריכין אנו לחוש לדברי רבינו ז"ל ולא עוד אלא שאף רבינו האיי גאון אביהן של ישראל כך כתב בתשובתו דנערה דוקא אבל קטנה שיש לה אב אביה ולא היא ובדאי מתני' נמי דיקא מדלא קתני קטנה להודיעך כחן דרבנן דכח.... אבל יש לנו קושיא גדולה כנגדם דגרסי' במס' קדושין ... ואפשר שהיה ר"נ יכול לומר וליטעמיק בשיש לה אב... וכן נמצא בכמה מקומות שהיה יכול לומר וליטעמיק וכל דבמסקנא לא קיימא איכא למדחיה מהלכה ו... ועוד יש לי ללמד עליהם ז"ל זכות... וכל זה לסמוך על קבלת רבותינו הראשונים.

<sup>305</sup>*Milhamot Bava Kamma 26a:*

הוא דעת רבינו ז"ל ובהא לא נהירא... אפ"ה לית לן למיפסק הלכתא כיחידאה דפירושא בעלמא היא. ועיקר פסק העולה בידנו בכל זה כמ"ש רבינו הגדול ז"ל ואנו במה שכתבנו כסופרים העשויים להתלמד.

<sup>306</sup>*Milhamot Bava Kamma 26a*

זה השגתי לתקן דבריו.

“I am astonished at the words of Rif, for [actually] the more correct ruling is... and this ruling (i.e. Ramban’s alternative) seems correct to me.”<sup>307</sup>

“Based on this, Rif’s words require further analysis...”<sup>308</sup>

“Rashi’s interpretation [of this passage] is clear and explicit, and there is not doubt [that he is correct].... and the serious question that I have on Rif is that he writes in a responsum.... and the responsum appears to contradict his ruling in the *Halakhot*. Perhaps [Rif] intentionally retracted [his ruling from the *Halakhot*] (i.e. he recognized that it was wrong)... The upshot is that this Mishnah should be interpreted in accordance with Rashi’s explanation.”<sup>309</sup>

These examples, all drawn from *Milhamot I*, demonstrate Ramban’s intellectual freedom early in his career. Ramban had no qualms raising objections against Rif’s rulings, “correcting” Rif’s words where he finds it necessary, suggesting that Rif’s analysis of the sugya is less than compelling, and even suggesting alternative explanations. In any event, these examples from *Milhamot I* express at least as much

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<sup>307</sup> *Milhamot Bava Kamma* 45b:

אני תמה על דברי רבינו הגדול ז"ל, דפסקא דמחזור טפי הכי הוא דכיון דשמואל ור' יוחנן ורב חסדא אמרי לדעת מנין פוטר הלכתא כוותייהו וכיון דרב ושמואל תרוייהו אמרי שלא לדעת מנין מיהא צריך כוותייהו קי"ל דרבים נינהו ואין דבריו של אחד במקום שנים וזה הפסק נראה שהוא נכון.

<sup>308</sup> *Milhamot Makkot* 3b

מעתי דברי רבינו הגדול ז"ל צריכין תלמוד.

<sup>309</sup> *Milhamot Sanhedrin* 6b:

אבל דברי ר"ש ברורים הם ומפורשים הם ואין בדבר ספק... ותמה הגדול שאני תמה על רבי' הגדול ז"ל לפי שראיתי בתשובותיו תשובה בלשון הזה ... זהו נוסח תשובתו, והתשובה הזאת עם הכתוב בהלכות נראין כסותרין זה את זה, ושמא חזרה לדעת היתה, וכללו של דבר שענין המשנה הזו ברור הוא כדברי רבינו שלמה ז"ל.

intellectual independence as the four examples from *Milhamot II* cited by Yisraeli and upon which he bases his argument.<sup>310</sup>

An analysis of Ramban's earliest work, the *Tashlum Halakhot*, also refutes Yisraeli's thesis. Yisraeli acknowledges that the *Tashlum Halakhot* is Ramban's earliest work and was written prior to the *Milhamot*.<sup>311</sup> Yet an examination of the *Tashlum Halakhot* shows that Ramban felt free to disagree with Rif and the Geonim even in his earliest work:

"I have brought these proofs for I am astonished by what our great master (Rif) writes in his *Halakhot*... he holds [the view that x] but we already showed that [x is wrong]. But perhaps our great master was motivated by the following problem... But that problem is not really a problem at all.... And it is impossible to deflect the proofs that I wrote [showing that x is wrong] because of that question. Rather [x is wrong] and that is the halakhah."<sup>312</sup>

<sup>310</sup> See above, n. 300.

<sup>311</sup> See Yisraeli, *Intellectual Biography*, p. 44 and n. 9 therein:

דבקותו של רמב"ן בדמותו של הרי"ף ובעיקר במפעלו ההלכתי בא לידי ביטוי בחיבור שיצא מתחת ידיו של רמב"ן ככל הנראה אף קודם לחיבור ה'מלחמות' והוא מפעל ההשלמה להלכות הרי"ף, שכלל את הלכות בכורות, נדרים וחלה... קדימותם הכרונולוגית של חיבורים אלה מוכחת מתוך כך שבחיבורי ההגנה על הרי"ף אשר, כאמור, התחברו על ידי רמב"ן בשנות יצירתו המוקדמות ביותר, מצויות הפניות לחיבורי ההלכה הללו, ראו, למשל, 'מלחמת ה', שבועות, ז ע"ב; ספר הזכות, גיטין, לח ע"א. מסקנה זו גם עולה בקנה אחד עם עדותו של המחבר עצמו שבחרוים בלשון הארמית שהקדים לחיבור ההלכות שלו כינה את עצמו 'דרדק', 'זעירא' (קטן), 'עולם' (עלם), ואף הביע את שאיפתו ותקוותו שיזכה, בבוא היום לבוא במחיצתם של 'קושרי הכתרים', היינו חכמי הדור (שיר והקדמה לתשלום הלכות נדרים ופסקי בכורות, כתבי רמב"ן, א, עמ' תג-תו). הערכתו של שלמה זלמן שכטר, לפיה רמב"ן היה בן חמש-עשרה בלבד בעת שחיבר את מפעל ההשלמה לרי"ף, גם אם איננה מוכחת, ככל הנראה איננה רחוקה מן האמת. ראו: שכטר, רמב"ן, עמ' 79.

<sup>312</sup> *Tashlum Halakhot Nedarim 52b*:

ואיצטרכינן להני ראיות דתמיה לן מאי דכתב רבינו הגדול ז"ל בהלכות דיליה.... אלמא ס"ל למרן ז"ל דאפילו שלא במינו בטיל אע"פ שיש לו מתירין. אלא מיהו איכא מימר בגמרין דקשיא אהך סברא ודילמא איהי אקשיתיה לרבינו הגדול ז"ל... וכבר איפריק בהך קושיא... ותו איכא למימר דלא קושיא היא... ואי אפשר לדחויי הנך ראיות דכתבינן משום הך קושיא אלא כי אמרינן דבר שיש לו מתירין לא בטל במינו אבל שלא במינו בנותן טעם הוא וכן הלכתא.

Consider Ramban's rejection, also in the *Tashlum Halakhot*, of R. Hai Gaon's analysis of *asmakhta*:

"This is our view regarding *askmakhta*, and [our] arguments are sound, and they have a firm basis in logic. And we were compelled to express it in this [work, the] *Tashlum Halakhot*, because we have seen our master [R. Hai] gaon in *Sefer Ha-Mekah* [write] things that contradict our approach...."<sup>313</sup>

These examples put considerable pressure on Yisraeli's thesis that Ramban felt unconditionally bound in his early works to the rulings of the Geonim and Rif and that it was only in his later works that he began to express his independent views.

If Yisraeli's distinction between Ramban's early work and later works is untenable--if Ramban felt free to disagree with the legal precedent of the Geonim and Rif from the beginning of his career--how are we to explain the conflicting evidence of Ramban's strong commitment to the legal precedent of Rif and the Geonim, on the one hand, and his bold intellectual independence on the other?

### A More Precise Characterization of Ramban's Project

Ramban's intellectual and halakhic independence and his willingness to challenge geonic rulings even as he devoted so much of his career to fortifying geonic legal precedent suggest that Ramban's project in the *Milhamot*, *Sefer ha-Zekhut*, and *Hassagot* was never about establishing the absolute or unconditional authority of the Geonim and Rif. Halbertal is undoubtedly correct when he writes:

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<sup>313</sup> *Tashlum Halakhot* 27b:

הדין היא סברא דילן באסמכתא ומילי ברירן אינון דאית להון אסמכתא בסברא ואצטרכינן למיתבינהו בהאי תשלום הלכות משום דאשכחן לרבינו הגאון ז"ל בספר המקח מילי דסרתן לדידן....

“Nahmanides’s loyalty to the halakhic traditions of Rif and the Geonim is not blind or absolute... The defense of Geonic traditions and Rif is no statute set in stone, and Nahmanides does, at times, disagree with their rulings on a practical level.”<sup>314</sup>

Yet it would be a meaningful contribution to Ramban studies to offer a more nuanced characterization of Ramban’s relationship with the Geonim, one that moves away from the simplistic characterizations of contemporary scholarship.<sup>315</sup>

Here it is helpful to draw upon the distinction, developed by philosophers of law, between legal rules and legal principles.<sup>316</sup> Ronald Dworkin explains that legal rules apply in an “all or nothing fashion.” If a rule applies to a given circumstance, it determines the particular legal outcome. If it does not apply, it is simply irrelevant to the outcome. “If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.”<sup>317</sup>

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<sup>314</sup> Moshe Halbertal, *Nahmanides: Law and Mysticism* (New Haven and London 2020), pp. 71-72.

<sup>315</sup> The contemporary scholarship characterizes Ramban’s relationship with the Geonim in terms such as: ‘Ramban felt bound by geonic precedent’; ‘Ramban was loyal to the geonic tradition early in his career but not later in his career’; and ‘Ramban was mostly loyal to the geonic tradition except in cases where he strongly disagreed with their view.’ See the discussion in Yisraeli, *Intellectual Biography*, pp. 44-52 and Twersky, *Rabad of Posquieres*, pp. 216-218 and notes 6 and 8 therein.

See also Shalem Yahalom, “Hakabalah Nekabel: ha-Ramban ve-ha-Talmud ha-Yerushalmi,” *Shenaton Mishpat Halvri* 24, (5765) p. 37-38, who contends that Ramban often paid lip service to the geonic corpus without actually feeling bound to it.

<sup>316</sup> Ronald Dworkin *Taking Rights Seriously*, (London 1977), pp. 14 - 28. For a quick overview, of the distinction, see Marmor, Andrei and Alexander Sarch, "The Nature of Law", *The Stanford Encyclopedia of Philosophy* (Fall 2019 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/fall2019/entries/lawphil-nature/>>.

<sup>317</sup> Ronald Dworkin, *Taking Rights Seriously*, (London 1977), p. 24.

Legal principles, by contrast, do not determine an outcome even if they clearly apply to the pertinent circumstances. Principles provide judges with a *legal reason* to decide the case one way or the other, and hence they only have a dimension of *weight*. The reasons provided by principles can have different weights: some may be relatively strong or weak, but they are never “absolute”. Such reasons by themselves cannot determine an outcome, as rules do. “A principle... does not purport to set out conditions that make its application necessary. Rather, it states a reason that argues in one direction, but does not necessitate a particular decision.”<sup>318</sup>

A first step towards a more precise characterization of Ramban’s posture towards the Geonim is to appreciate that his conception of geonic legal precedent is best characterized as a legal principle, not a legal rule. Drawing on Dworkin’s distinction, we can say that the existence of a geonic legal precedent, for Ramban, does not make its application necessary. Rather it generates a *reason* that argues in favor of that precedent. It does not *necessitate* a normative ruling in accordance with it.

The second step is to recognize that the weight of geonic precedent--the strength of the reasons favoring the Geonim’s position--is determined by the underlying reasons we encountered in chapter two: the fact that the Talmud is a closed text that is difficult to decipher without interpretive traditions, the fact that the geonim likely possessed interpretive traditions from the Savoraim and Amoraim, and the fact that the stability and uniformity of the law required that normative halakhic rulings be anchored in an interpretive tradition deeper and more permanent than the creative mind of a given jurist.

Put this way, Ramban did not believe that a prior ruling of the Geonim automatically determines the normative halakhah. This is because on any given talmudic discussion the underlying reasons favoring geonic legal precedent can either be attenuated or defeated by countervailing reasons. For example, a

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<sup>318</sup> Ibid, p. 26.

given talmudic passage may turn out to be quite accessible on its own, without the need for an interpretive tradition. Or in some instances it may turn out that the Geonim were offering their own novel interpretation of a passage without appealing to a received tradition handed down from the Amoraim. Likewise, there may be instances where the stability and uniformity of the law actually requires breaking from the Geonim's interpretation, such as when a non-geonic interpretation had already received widespread support. Note how this characterization of Ramban's project allows for the possibility that the weight of geonic precedent can vary depending on how these different reasons apply to a given case.

The evidence from Ramban's writings demonstrates that Ramban disagreed with the Geonim on many occasions. It should now be clear that this is consistent with Ramban's underlying reasons for championing geonic legal precedent in the first place. Ramban's reasons support giving careful consideration to geonic legal precedent as a central principle of normative halakhic jurisprudence. They support a *legal presumption* in favor of adopting the geonic rulings, but they do not support automatic or absolute adherence to them. Ramban's project in the *Milhamot* and *Sefer ha-Zekhut* is best understood as an attempt to restore the legal presumption in favor of the Geonim's rulings and to defend the claim that the Geonim's rulings ought to be endowed with substantial weight.<sup>319</sup>

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<sup>319</sup> This idea of assigning weight, rather than "absolute authority", might shed light on other areas of Ramban's jurisprudence. For example, in the Barcelona Disputation, Ramban states that Midrash and Aggadah are not binding in the same way that the Talmud is. See *Kitvei Ramban I*, pp. 306-308. But scholars have pointed out that Ramban in his other works appears to rely on Aggadah to reach normative halakhic conclusions. It is safe to say that this one problem is probably the most active and most discussed aspect of Ramban scholarship.

One easy way of defusing the problem is to show that Ramban's comments in the Disputation should be understood as declaring that Aggadah and Midrash have less *weight* in determining normative halakhic outcomes relative to other factors. But this is quite consistent with their playing *some* role in and being factored into normative halakhic decision-making, which explains how Ramban could appeal to aggadot in certain instances to arrive at halakhic conclusions. For a summary of the literature on Ramban's attitude to Aggadah, see Shalem



Understood this way, there is no tension at all between Ramban's commitment to the geonic tradition throughout his oeuvre and the fact that he did, on occasion, disagree with their rulings after carefully considering and weighing their position. There is no need to distinguish between Ramban's early works and late works.<sup>320</sup> Nor is there any basis to speak of Ramban as a reactionary writer "who lowered his head before authority and thus stifled free thought."<sup>321</sup> Nor is there any basis to speak of Ramban's "dualist" (*yahas kaful*) position vis-a-vis the Geonim.<sup>322</sup> And there is no reason to postulate that Ramban simply paid "lip service" to the Geonim's rulings either.<sup>323</sup>

My characterization of Ramban's project--to fortify the halakhic precedent of Rif and the Geonim, to restore the legal presumption in favor of that tradition, and to demonstrate the weight of the Geonim's positions--is reinforced by Ramban's characterization of his project in his introduction to the *Milhamot* and *Hassagot*. These introductions indicate that Ramban did not set out to defend each and every ruling handed down by the Geonim, but to defend the overall integrity, coherence, and persuasiveness of the geonic corpus.

As we saw in the introduction to the *Milhamot*, Ramban criticizes the revolutionary twelfth century halakhists who attacked Rif. But note that Ramban never faults these halakhists for disagreeing with Rif's rulings. For that, Ramban has no principled objection. Instead, Ramban writes that he composed the *Milhamot* because these adversaries

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Yahalom, *Between Gerona and Narbonne*, pp. 313-327. See also Yaakov Taubes, "In Denial: A Fresh Approach to Nahmanides and Aggadah at Barcelona", *Jewish Quarterly Review* 110:4 (Fall 2020).

<sup>320</sup> Yisraeli, *Intellectual Biography*, pp. 51-54.

<sup>321</sup> See the citations in Twersky, *Rabad of Posquieres*, p. 217 and notes 6 and 8 therein.

<sup>322</sup> Yisraeli, *Intellectual Biography*, p. 54 n. 37.

<sup>323</sup> Shalem Yahalom, "Hakabalah Nekabel: ha-Ramban ve-ha-Talmud ha-Yerushalmi," *Shenaton Mishpat Ha-Ivri* 24, (5765) p. 37-38

“with their many attacks did not leave *any* of Rif’s rulings intact. Nor did they acknowledge *any* of his interpretations as valid, or *any* of his rulings as correct... With all their attacks, *nothing remains* of [Rif’s] Halakhot, except the most basic and trivial of its rulings (i.e. the ones that are obvious).”<sup>324</sup>

It was the attempt of the twelfth century revolutionaries to completely decimate the integrity of the rulings of Rif and the Geonim and to undercut the standing of their entire corpus that spurred Ramban to action.

Likewise, in the introduction to the *Hassagot* Ramban explains that he was motivated to defend Bahag, not because he believed Bahag was always correct, but because Rambam had attempted to demonstrate--or at least gave off the impression that he had demonstrated--that Bahag was totally incompetent and halakhically inept:

“And [Rambam] also rages against the rishonim, roaring like a lion, bringing proofs to demonstrate that Bahag, R. Shimon (Kayara), was barely able to see (comprehend), was unable to stand on his own feet, that a thick fog [obscured his vision], that he [must have] counted the mitzvot and enumerated the laws with his eyes shut and his hands tied up, that he erred in basic matters [and] made mistakes in clear ones, when in fact [Bahag] was actually respected as a towering figure, few could match his greatness, he was distinguished and praised--no difficult

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<sup>324</sup> *Kitvei Ramban I*, p. 413:

וקנאתי לרבינו הגדול רבי יצחק אלפסי ז"ל קנאה גדולה מפני שראיתי לחולקים על דבריו שלא השאירו לו כפי רובי מחלקותיהם ענין נכון בכל מה שדבר ולא דבר הגון בכל מה שפירש ולא פסק ראוי בכל מה שפסק לא נשאר עם דבריהם בהלכות זולתי הדברים הפשוטים למתחיל פרק אין עומדין.

[issue] could confound him. [Therefore] I was moved to argue in his defense, to inform the Rabbi (Rambam) that he failed and did not succeed [in demonstrating this about Bahag].”<sup>325</sup>

Here too Ramban never faults Rambam for disagreeing with Bahag’s rulings. Nor does Ramban state that he will defend each and every of Bahag’s rulings. Instead, Ramban criticizes Rambam for portraying Bahag as totally incompetent and for cavalierly dismissing his rulings as child’s material. The goal of the *Hassagot*, Ramban explains, is to demonstrate that Rambam had failed by not giving Bahag and his work the serious attention and treatment that it deserved. Ramban levels similar accusations against Rambam in the substance of the *Hassagot*.<sup>326</sup> Put differently, Ramban criticized the twelfth century revolutionaries for failing to recognize the *weight* of the geonic corpus.

As we noted above, this characterization of Ramban’s posture towards geonic precedent--as a legal principle endowed with weight--is consistent with Ramban believing that the geonic tradition is not infallible or automatically decisive. Ultimately the geonic tradition can be overridden if in a given case the reasons generally favoring geonic precedent are inapplicable or defeated by counter-considerations.

Consider, for example, the theory developed extensively in chapter two that the geonic tradition incorporated rulings and traditions handed down from the Amoraim. It does not follow from this that each ruling of the Geonim is normatively binding. For even if the geonic corpus generally included

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<sup>325</sup> *Kitvei Ramban I*, p. 420:

וגם הרב במאמר על הראשונים יתמרמר. שאגה לו כלביא ראיות להביא, כי בעל ההלכות רב שמעון הביט צר מעון. לא עמדו במרחב רגליו ועננה תשכון עליו. בעינים סגורות וידיים אסורות ספר המצות ומנה התורות שגה בפשוטות טעה בברורות. והוא ארז בלבנון בכבוד ובגודל. עצי עדן לא דמוהו. מים גדלוהו, תהומות רוממוהו, כל סתום לא עממוהו. ותשאני רוח ללמד עליהם זכות ולבי ערב להודיע אל הרב שלא בא עד התכלית ואל המופת לא קרב. ובמקום אשר חשב, לא עמד ולא ישב.

<sup>326</sup> *Hassagot*, Shores 14:

ואם היה משיב על אחד מן התלמידים ראוי הרב לחכמתו ולכבוד מוסרו להסתכל במאמר התלמיד ההוא ולהתבונן בו כל שכן בהשיבו על גדול שבגאונים ויאשימו אותו ויחשבהו מן מבולבלי השכל חס ושלום.

traditions of interpretation and rulings from the Amoraim, it is an open question regarding any particular geonic ruling whether that ruling has its origins in an amoraic tradition.

To be sure, Ramban did believe that many of these traditions from the Amoraim had found their way into the geonic corpus (and also that the absence of a geonic position on something could evidence the absence of an amoraic one).<sup>327</sup> But on any given topic (*sugya*) it remains an open question whether the geonic position was a matter of received tradition or the product of their own speculation and argument. It is most revealing that throughout Ramban's writings we find him willing to interrogate the cogency of the geonic position, yet ready to concede the point *if* the particular geonic position at bar is in fact a received tradition. The following examples are illustrative:

"Some of the Geonim write...and *if* this is a tradition they received, we will accept it."<sup>328</sup>

"These [two views] are equally compelling, so the side that has a tradition [behind it] is the more credible... *if* the Geonim received this interpretation as a tradition, then we ought to rule like them."<sup>329</sup>

"[R. Yehudah Barzeloni] writes that all the [geonic] rabbis agree on this. And *if* [their position] is a received tradition, we will accept, but judging it on its own merits, it can be challenged."<sup>330</sup>

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<sup>327</sup> See the discussion in chapter two about the number of blessings in the silent prayer on Rosh Hashanah.

<sup>328</sup> *Hiddushim Shabbat* 21b.

ומצאתי למקצת הגאונים ז"ל שאמרו שאם כבתה ונשאר שמן בנר ביום ראשון מוסיף עליו ומדליקו ביום שני וכן שאר הימים ואם נשאר בה ביום אחרון עושה לו מדורה ושורפו במקומו שהרי הוקצה למצותו, ואם קבלה הוא נקבל.

<sup>329</sup> *Milhamot Shabbat* 27b.

אמר הכותב מצא בעל המאור ז"ל מקום לחלוק ולפי דעתי שקולים הם ומי שיש לו קבלה הוא הנאמן ... ואם הגאונים קבלו זה הפי' בדין לפסוק עליהם.

<sup>330</sup> *Hiddushim Shevuot* 48a:

אלא שהרב ז"ל כתב דהכי אסכימו כלהו רבוותא ז"ל, ואם קבלה נקבל ואם לדין יש תשובה.

“The Geonim write... and since it is a tradition we will accept it--even though it would seem [that the talmudic passage means something different].”<sup>331</sup>

### “Our Proofs are Not Decisive”

Armed with this more nuanced characterization of Ramban’s project, we are now positioned to address the second question posed by Haym Soloveitchik regarding the *Milhamot*.<sup>332</sup> Recall that Ramban introduces *Milhamot II* with a broad disclaimer:

“You, the reader who looks into my treatise, do not think that I believe that all of my responses to R. Zerahyah are decisive, and that [these answers are the kind] that you are forced to submit to and admit to them, [or the kind] that you should celebrate if you are able to poke holes in them, [or the kind] that would require you to go through mental gymnastics to resist the force of my proofs. That is not the case...

[In fact], in some instances, I will attempt to justify our master’s words even though they do not cohere with the straightforward reading of the talmudic passage or with the [meaning of the] relevant passages [taken together]. [This is because] our intention is to offer students a charitable reading of Rif. I do not hide from the reader that there are still lingering doubts [regarding my defense of Rif’s ruling].”<sup>333</sup>

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<sup>331</sup> *Milhamot* Rosh Hashanah 32a:

ואמרו הגאונים ז"ל אין פוחתין מעשרה אבל מוסיפין עליהם, וכיון שקבלה היא נקבל, ואף על פי שהיה נראה לכאורה שמצוה מן המובחר...

<sup>332</sup> See above, chapter one, n. 43.

<sup>333</sup> *Kitvei Ramban I*, p. 414:

. ואתה המסתכל בספרי אל תאמר בלבבך כי כל תשובתי על הרב רבי זרחיה ז"ל כולן בעיני תשובות נצחות ומכריחות אותך להודות בהם על פני עקשותך ותתפאר בהיותך מספק אחת מהן על לומדיה או תטריח על דעתך להכנס בנקב המחט לדחות מעליך הברך

If Ramban set out to defend the absolute authority of the rulings of Rif and the Geonim, why did he insert a disclaimer, in the very introduction of the *Milhamot*, to the effect that his arguments and proofs advanced in their defense are not decisive? Why pen a treatise only to undermine the very purpose for which it was written?

Ramban's disclaimer can be understood, however, by contextualizing it within the interpretation of Ramban's project that I offered above. Ramban's project was not to affirm each and every ruling of Rif and the Geonim. The goal of the project was to defend the integrity of geonic-Rif halakhah from its twelfth century detractors, whose multipronged attacks and disregard for geonic rulings made the tradition seem incompetent, inept and unreliable.<sup>334</sup> Ramban set out not to establish the consistent superiority of the geonic rulings but to demonstrate that they are, in fact, well-founded, coherent, sound and in most cases compelling. Understood this way, Ramban's project is fully consistent with his disclaimer that the geonic rulings are not always irrefutable or even demonstrably true. Their rulings are well-founded even when they turn out to be wrong, and they are sound even when they cannot be demonstrably proven as true.

There is, I think, a second point that sheds more light on Ramban's disclaimer, and which relates back to one of the reasons underlying Ramban's deference to the geonic tradition. Immediately following the above disclaimer, Ramban articulates a general methodological principle of talmudic interpretation. It is

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ראיותי אין הדבר כן... ויש אשר אנחנו מלמדים זכות על דברי רבינו עם היותם עדיין רחוקים בפשטי הסוגיא או הסוגיות אבל כוונתנו בזה לגלות אופן התלמידים במה שיש בהם מן הזכות ואין אנו מעלימים מהגיד לכל מסתכל בספרנו מה שנשאר עליה מן הספק.

<sup>334</sup> This claim should be distinguished from Halbertal's claim that the *methods* of the twelfth-century halakhists made the *methods* or achievements of the Geonim seem primitive. See Halbertal, *Nahmanides*, p. 67: "The conceptual breakthroughs made and the synoptic outlook formed in the study halls of the twelfth century made the achievements of the Geonim look crude and rudimentary by comparison." My formulation is quite different; to wit, the active, sustained criticism of the geonic corpus made the Geonim seem incompetent as halakhists.

one of the most striking, and arguably precise, descriptions of talmudic methodology in the history of halakhah.<sup>335</sup>

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<sup>335</sup> Oded Yisraeli, *Intellectual Biography*, p. 51, writes that this passage is striking for its admission that talmudic proofs are not as absolute as mathematical ones:

הדרך שבה רואה רמב"ן את טיבה של מלאכת פרשנות התלמוד מפתיעה ויוצאת דופן, וככל שידוע לי אין למצוא דומה לה בספרות הרבנית של ימי-הביניים. גדול פרשני התלמוד בספרד מודה כאן שאין בידי, ולא יכולה להיות, דרך להגיע לתשובות חד-משמעיות בשאלות הפרשניות השונות, שכן העיון התלמודי לעולם לא ישיג את הדיוק המדעי הנדרש מן העיון המתמטי ('חשובני התשובות') או מהניסיון האסטרונומי ('נסיוני התכונה').

I do not think Ramban's statement is striking for that reason--the difference between mathematical proof and weaker forms of argument were well known since Aristotle. It would be surprising if there were talmudists in Ramban's day who believed talmudic proofs could achieve the certainty of Euclid's geometry.

Isadore Twersky, *Introduction to the Code of Maimonides*, pp. 168-169 writes that Ramban's statement that "Talmud study is not for the most part based on final proofs and absolute questions" is "implicit in Maimonides as well." Indeed, Twersky correctly states that this idea, articulated by Ramban, is "a basic attitude or modus operandi which conditions so much of Talmudic study and militates, strongly and irresistibly, against absolute finality: the admissibility of two or more equally tenable interpretations of a uniform text, and therefore of divergent conclusions."

In fact, as I discuss in the text below, the *Talmud Yerushalmi* (Sanhedrin 4:2) and *Masekhet Sofrim* (16:5) describe the process of Talmud study as one of weighing forty-nine reasons that favor the conclusion of *tahor* and forty-nine reasons that favor the conclusion of *tame*, with the final decision to be determined by a vote of scholars. In other words, halakhic decisions are not to be resolved by conclusive proofs, but by a vote procedure decided by the majority of votes. Inconclusiveness and indeterminacy prior to the decision-procedure for deciding the practical ruling are constitutive of talmudic jurisprudence. See the discussion in Ritva (*Eruvin* 13b) of *ellu va-ellu* and Ran's formulation (*Derashot* no. 7) discussed in the text below.

For a discussion of this kind of indeterminacy in Jewish law, see R. Michael Rosensweig, "Elu va-Elu Divre Elokim Hayyim: Halakhic Pluralism and Theories of Controversy", *Tradition* 23:3, (1992) pp. 4-23; and Moshe Halbertal, *People of the Book: Canon, Meaning, and Authority* (Cambridge, Mass., 1997), pp. 63-72.

What is striking about the Ramban passage is the part, discussed below in the text, in which Ramban describes, with brilliant accuracy and brevity, the talmudist's method of:

[מ]רחיק אחת מן הדעות בסברות מכריעות ונדחוק עליה השמועות ונשים יתרון הכשר לבעל דינה מפשטי ההלכות והוגן הסוגיות עם הסכמת השכל הנכון.

“Anyone who studies our Talmud knows that there are no complete proofs in disputes between the commentators. And there are no absolute [answers] to objections. For, unlike the mathematical and empirical sciences, this discipline (Talmud study) does not have demonstrable proofs.”<sup>336</sup>

Therefore, Ramban argues, “The best we can do, and the intention of any wise and God-fearing man engaged in the science of Talmud is:”<sup>337</sup>

“that in all matters of disagreement we use our greatest efforts--and it is sufficient that we do this--to show, with compelling arguments, that one view is less plausible [than the other], and that it is in tension with the teachings [of the Talmud], and to [show that] the other opinion is superior based on the straightforward meaning of the laws and the [overall] coherence of the [relevant] passages, along with its conciliation with rational reason.”<sup>338</sup>

Ramban depicts the science of Talmud study as an uncertain enterprise. No proofs are definite, and the best we can do is to argue based on the preponderance of evidence that one view has an advantage--based on how it coheres with the talmudic language and other rulings, and based on its agreement with

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Here we have Ramban’s three-pronged standard for good talmudic argumentation: “to [show that one] opinion is superior based on (a) the straightforward meaning of the laws and (b) the [overall] coherence of the [relevant] passages, along with (c) its conciliation with rational reason.”

<sup>336</sup> *Kitvei Ramban I*, p. 414:

יודע כל לומד תלמודנו שאין במחלוקת מפרשיו ראיות גמורות ולא ברוב קושיות חלוטות שאין בחכמה הזאת מופת ברור כגון חשבונות התשבורות ונסיוני התכונה.

<sup>337</sup> *Ibid*:

זאת תכלית יכלתנו, וכונת כל חכם וירא אלהים בחכמת הגמרא....

<sup>338</sup> *Ibid*:

אבל נשים כל מאדנו ודיינו מכל מחלוקת בהרחיק אחת מן הדעות בסברות מכריעות ונדחוק עליה השמועות ונשים יתרון הכשר לבעל דינה מפשטי ההלכות והוגן הסוגיות עם הסכמת השכל הנכון.



reason--over the other.<sup>339</sup> This passage does double duty for Ramban's project. On one level, it follows Ramban's disclaimer that some of his arguments in defense of Rif and the Geonim may be less than

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<sup>339</sup> Remarkably, Ramban's declaration that there are no conclusive proofs (*she-ein be-mahloket mefarshav ra'ayot gemurot*) did not stop him from declaring, throughout his halakhic works, that he has "conclusive proof" ("*re'ayah gemurah*") to support his position or argument. See, for example, *Milhamot Shabbat* 12a:

ועוד ראייה גמורה מלשון הגמ'....

*Milhamot Shabbat* 16a:

אלא ש"מ דלמאן דמתני לישנא דלהחזיר לשהות מותר אפי' מצטמק ויפה לו וזו ראייה גמורה

*Milhamot Shabbat* 54a:

ועוד מאן פסקה דפשיטא ליה אי לאו משום דקי"ל בעלמא כוותיה וזו ראייה גמורה לדברי רבינו

*Milhamot Yoma* 1b:

וזו ראייה גמורה שדשון מזבח הפנימי היה בכהן הדיוט

*Milhamot Beitzah* 4b:

ובאמת אם זו שאמר בפרק משילין היא עיקר בנוסחאות ראייה גמורה היא

*Milhamot Beizah* 11a:

ולפי פירושינו יש ראייה גמורה דהלכה כר' יוסי הגלילי ממתני' דקליפין ועצמות דהוי מוקצה לאדם

*Milhamot Ta'anit* 3a:

וזו ראייה גמורה

*Milhamot Ketubot* 20b:

אלא ש"מ לומר תהא מכירתו לכתובה או למזונות וזו ראייה גמורה

*Milhamot Bava Kamma* 3a:

ובאמת שזה ראייה גמורה למי שלא יתעקש לפי מה שכתבנו

*Milhamot Bava Kamma* 18a:

וזו ראייה גמורה לדברי רבינו הגדול ז"ל

*Milhamot Bava Metzia* 28b:

אבל לרבנן ליכא רווחא כדפרישית וזו ראייה גמורה

*Milhamot Bava Batra* 20a:

וכל היכא דאיכא עדי פקדון וראה אפילו אחר דלאו אומן אין לו חזקה בהן לעולם כדאיתא לקמן בהדיא וכמו שהסכימו הגאונים ז"ל כולם

וזו ראייה גמורה

*Milhamot Sanhedrin* 7b:

ויש ראייה גמורה בפ' הזהב מסוגיא דמטבע נעשה חליפין דקנין סודר בפני עד א' קנין הוא ואפי' בלא עד כלל וכמו שכתב רבינו הגדול

ז"ל במס' קדושין

*Sefer ha-Zekhut* 38a:

ושקלינן וטרינן בה טובא ולא אשכחן מיאון בגדולה ואף על גב דלא בעל אלא לר' יהודה עד שירבה שחור על הלבן וגם זו ראייה גמורה

*Sefer ha-Zekhut Ketubot 43b:*

ועוד ראייה גמורה ממעשה דההיא איתתא דנפקה שטרא מתותי ידה

*Sefer ha-Zekhut Gittin 48a:*

גם זו ראייה גמורה.

*Hiddushim Shabbat 130b:*

וראיתי לרבתינו הצרפתיים ז"ל שהכריעו כדבריו מההיא דאתמר התם (עירובין ס"ח א') בההוא ינוקא אחרינא דאשתפוך חמימיה אמר להו רבא לשייליה לאימיה אי צריכה ליחם גוי אגב אימיה, אלמא אי לא צריכה לא אמרינן לגוי דליחום ליה לינוקא ומדחייא מילה, וזו ראייה גמורה שאפי' אם באו הראשונים לשבש הנוסחאות גם בזו ולגרס ליחום ליה אגב אימיה, אי אפשר להם להתיר אלא ע"י גוי...

*Hiddushim Ketubot 3a:*

ומה שפירשו דקדושי כסף דרבנן וע"כ יכולין להפקיעם מה שאינם יכולין לעשות כן בקדושי ביאה אלא ברצונו של בעל שקידש על דעתם, אינו כלום כמ"ש רש"י, וכבר כתבתי ראייה גמורה בפ"ק דקדושין,

*Hiddushim Gittin 35a:*

וראייה גמורה נמי מדאמרינן פרק שני דייני גזירות (ק"ז א')

*Hiddushim Bava Batra 23a:*

והרב אב ב"ד ז"ל נסתפק בדבר, ואני אתן לך ראייה גמורה שאין להם חזקה לעולם

*Hiddushim 'Avodah Zarah 73b:*

ועוד יש לי תירוץ אחר וכתבתיו בהלכותי במס' נדרים (שם). אבל זו ראייה גמורה שהוא בטל מדתנן במס' נדרים

*Torah ha-Adam, Sha'ar ha-Avel 'Inyan Shabbat:*

ועוד ממקומו הוא מוכרע שהרי הביאו דברי ר' יוחנן לענין ימי חופה, והרי הקובר מתו בתוך ימי חופתו כקובר בתוך הרגל דמי, שאף הם אינן עולים כרגלים ואף על פי כן נוהג בצינעא, וזו ראייה גמורה,

*Torah ha-Adam Sha'ar ha-Avel 'Inyan Avelut Yeshanah:*

וזו ראייה גמורה למה שכתבנו ופירשנו.

These formulations--some written before the introduction to *Milhamot II*, some written afterward--are directly in tension with Ramban's declaration that there are no conclusive proofs. Ramban even employs the identical phrase, *re'ayah gemurah*. Note that virtually all of the instances where Ramban employs this phrase are cases of *mahloket mefarshav* and Ramban brings a "conclusive proof" to defend one side. I suppose one way to resolve this problem is to suggest that Ramban's statements throughout his halakhic works should be interpreted as qualified by his background disclaimer that there are no conclusive proofs in this discipline. In other words, when Ramban uses the phrase *re'ayah gemurah*, he means "these are conclusive proofs, to the extent that there can be conclusive proofs in the study of Talmud."

perfect or at least subject to certain vulnerabilities.<sup>340</sup> On this level, the point of the passage stating “there are no final proofs in the study of Talmud” (*ein be-hokhmah ha-zot mofet barur*) is to manage the reader’s expectations about what he could reasonably expect from Ramban’s proofs and arguments throughout the work; he cannot provide irrefutable arguments in defense of Rif, for that is not possible in the discipline of the Talmud.

But this passage also leads into the next argument of the introduction: The cumulative evidence of talmudic analysis is often indeterminate between the different views of the commentators. Often the evidence does not favor one interpretation over the other, at least not in any decisive way. In such cases, Ramban argues, the right course of action should be determined by (geonic) halakhic precedent:

“In most cases, I make it clear throughout this treatise that the preponderance of evidence is decisively on the side of Rif’s rulings. And even when the cumulative evidence is indeterminate, the law is that we are not allowed to deviate from Rif’s rulings.... [in fact, Rif’s] interlocutors had no right to disagree with his rulings, for they ought to have said “an elder has already ruled on this.”<sup>341</sup>

Read this way, Ramban’s disclaimer fits nicely into a theme we have already encountered in Ramban’s writings: the Talmud is a difficult text to decode--and halakhic decision-making becomes all the more challenging because the discipline of talmudic analysis resists decisive proofs. When the cumulative

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<sup>340</sup> *Kitvei Ramban I*, p. 413:

ואתה המסתכל בספרי אל תאמר בלבבך כי כל תשובתי על הרב רבי זרחיה זכרונו לברכה כלן בעיני תשובות נצחות ומכריחות אותך להודות בהם על פני עקשותך, ותתפאר בהיותך מספק אחת מהן על לומדיה, או תטרח על דעתך להכנס בנקב המחט לדחות מעליך הכרח ראיותי...

<sup>341</sup> *Kitvei Ramban I*, p. 414:

זה במיעוט המקומות אבל ברובם מחשבתנו נכרת מתוך ספרנו שעיקרי הדברים מוכרעין כדברי רבינו ואפי' בשקולין הרי הדין פסוק עלינו בלי להטות מדבריו ימין ושמאל כמו ששנו חכמים היו שנים א' מטמא אחד מטהר אחד אוסר אחד מתיר אם היה אחד מהם גדול מחבירו בחכמה ובמנין הלך אחריו וכל שכן בהיותו קודם שהמחלוקת מנועה מבעליה שהיה לו לומר כבר הורה זקן.

evidence is indeterminate, we ought to defer to geonic precedent. It is *because* of the indeterminacy of talmudic analysis that it becomes especially necessary to rely on geonic precedent.

There are two ways to flesh out this relationship between the indeterminacy of the text and the importance of geonic precedent, and both relate to the underlying reasons, discussed above in chapter two, that Ramban provides for relying on geonic precedent. The first is epistemic. If the evidence is indeterminate between the two views, the presumption lies with the geonic tradition since they received interpretive traditions from the Amoraim.

The second is normative. The more remote the possibility of “final proofs” in talmudic analysis and debate, the more it becomes clear that halakhic decision making cannot be a function of mere analysis or argumentation. It must depend, at least in part, on antecedent procedural rules--*kelalei pesikah*.

Thus, notwithstanding all the brilliant insights of Rabbenu Tam and Rabad, talmudic interpretation is not just a function of intellectual analysis and argument. Ramban appeals to the indeterminacy of halakhic argumentation to reinforce his argument that the rules of *pesak* are what determine the normative outputs of the law--and those rules of *pesak* require deference to legal precedent (*kevar horah zaken*). The impossibility of final talmudic proof suggests the necessity of relying on precedent and other jurisprudential rules.<sup>342</sup>

This idea has its roots in the *Yerushalmi* (Sanhedrin 4:2) and *Masekhet Sofrim* (16:5) and has strong support within Ramban’s *beit midrash*. Both the *Yerushalmi* and *Masekhet Sofrim* state that the Torah was given with forty nine reasons that favor *tame* and forty nine reasons that favor *tahor*, the normative

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<sup>342</sup> Of course halakhic decision-making still depends somewhat on argument and reasoning, as Ramban’s introduction makes clear, but the impossibility of absolute halakhic proof makes normative rules for determining practical rulings more essential and central.

halakhah lying indeterminately between the two. The final decision depends on a procedure and is determined by the scholars of each generation. The *Yerushlami* states:

א"ר ינאי אילו ניתנה התורה חתוכה לא היתה לרגל עמידה. מה טעם וידבר ה' אל משה אמר לפניו רבונו של עולם הודיעני היאך היא ההלכה אמר לו [שמות כג ב] אחרי רבים להטות רבו המזכין זכו רבו המחייבין חייבו כדי שתהא התורה נדרשת מ"ט פנים טמא ומ"ט פנים טהור.

And similarly in *Masekhet Sofrim*:

אמר ר' ינאי תורה שנתן הקדוש ברוך הוא למשה, ניתנה לו בארבעים ותשעה פנים טמא ובארבעים ותשעה פנים טהור, שנאמר ודגל"ו, בגימטריא ארבעים ותשעה הוא, אמר לו האיך עבדת, אמר לו רבו המטמאין טמא, רבו המטהרין טהור.

Two of the most prominent members of Ramban's school embrace this idea explicitly. Take Ritva's explanation (*Eruvin* 13b) for the idea of *ellu va-ellu*:

אלו ואלו דברי אלהים חיים. שאלו רבני צרפת ז"ל היאך אפשר שיהו שניהם דברי אלהים חיים וזה אוסר וזה מתיר, ותירצו כי כשעלה משה למרום לקבל תורה הראו לו על כל דבר ודבר מ"ט פנים לאיסור ומ"ט פנים להיתר, ושאל להקב"ה על זה, ואמר שיהא זה מסור לחכמי ישראל שבכל דור ודור ויהיה הכרעה כמותם.

And Ran's formulation (*Derashot* no. 7):

הענין כן הוא, שדבר ידוע שכל התורה שבכתב ובעל פה נמסרה למשה... שהראהו הקדוש ברוך הוא למשה דקדוקי תורה ודקדוקי סופרים ומה שסופרים עתידים לחדש ומאי ניהו מקרא מגילה, דקדוקי סופרים הם המחלוקות וחילוקי הסברות שבין חכמי ישראל, וכולן למדם משה מפי הגבורה בלא הכרעה כל מחלוקת ומחלוקת בפרט. אבל מסר לו כל[ל] אשר בו יודע האמת, והוא (שמות כג ב) אחרי רבים להטות, וכן (דברים יז יא) לא תסור מן הדבר אשר יגידו לך. וכשרבו המחלוקת בין החכמים, אם היה יחיד אצל רבים היו קובעים הלכה כדברי המרובים, ואם רבים אצל רבים או יחיד אצל יחיד, כפי הנראה לחכמי הדור ההוא. שכבר נמסרה ההכרעה להם, כאמרו (שם ט - יא) ובאת אל הכהנים הלויים ואל השופט אשר יהיה בימים ההם וכו' לא תסור וגו', הרי שניתן רשות לחכמי הדורות להכריע במחלוקת החכמים הנראה להם...

Both Ritva and Ran see the need for normative rules of *pesak* as flowing directly from the indeterminacy of talmudic law. Because there are forty-nine reasons favoring each side, the ultimate decision or ruling

must be a function of something other than conclusive proof. Ramban's introduction to *Milhamot II*, I believe, is offering a similar argument. Ramban's statement on talmudic indeterminism clears the path for his declaration that the principles of *pesak*, specifically *kevar horah zaken* and *Lo Tasur* (or some variation of it), determine halakhic rulings, and it is to Rif and the Geonim that these principles point.

In this section, I have argued that Ramban's disclaimer--which, as Haym Soloveitchik noted, seems prima-facie incongruous with the *Milhamot's* project--actually fits squarely within his project properly understood. I have argued, first, that Ramban's project should not be characterized as a ruling-by-ruling defense of Rif and geonic halakhah or as an absolute endorsement of their every ruling. Rather it is best understood as a broad project to restore the centrality, weight, and integrity of Rif-geonic halakhah. Second, I've suggested that Ramban's statement on the impossibility of absolute proofs in talmudic analysis is presented as an argument for the indispensability of legal precedent and other jurisprudential rules of halakhic decision-making to determine the normative halakhah, especially when the talmudic evidence is not dispositive one way or the other. Given Ramban's characterization of the Talmud as a closed and difficult text, the cumulative evidence is rarely dispositive, and therefore we ought to defer, quite often, to geonic precedent. Geonic legal precedent and interpretive traditions become all the more indispensable when the text resists demonstrative proofs.<sup>343</sup>

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<sup>343</sup> Some commentators appear to conflate two different ideas in interpreting Ramban's statement on the inconclusiveness of halakhic proofs: the idea of *relativism* and the idea that it is impossible to offer irrefutable, demonstrative proofs to decide talmudic disputes. Ta-Shma, *Talmudic Commentary Part Two*, p. 34, refers to this principle of Ramban's as:

עקרון יחסיותה של ההלכה.

Isadore Twersky, *Introduction to the Code of Maimonides*, p. 168, also refers to it as Ramban's "concept of relativism."

However, I do not see any basis in Ramban's statement to support Ta-Shma and Twersky's claim of "relativism". Ramban's point is simply that there are no irrefutable, demonstrable proofs to decide arguments pertaining to talmudic interpretation. But this is very different from asserting that halakhic truth is subjective or contextual.

## Ramban's Interlocutors and their Posture Toward the Geonim

Thus far, these three chapters have focused on Ramban's commitment to the geonic tradition and his attempt to restore geonic legal precedent. In chapter two, we saw that Ramban's predecessors--Tosafot, Rabad, Rambam--did not share Ramban's strong commitment to geonic legal precedent. In this section, I analyze the nature of the disagreement between Ramban and his predecessors.

The previous chapters have reconstructed Ramban's reasons for deferring to geonic precedent. One reason was the presumption that the Geonim had received interpretive and jurisprudential traditions from the Amoraim. A second reason was Ramban's conception of the Talmud as a closed text, especially with respect to deciding practical halakhic rulings. Ramban believed that the geonic traditions were a crucial key to unlocking the Talmud's rulings. A third reason pertained to the stability and unity of Jewish law. Ramban realized that the revolutions of the twelfth century could undermine the consistent application and interpretation of the law--both over time and across locations. We saw that Ramban in his commentary on the Torah and in the *Hassagot to Sefer ha-Mitzvot* called attention to the "great need" to unify the law (*Torah ahat*) and ensure that it does not splinter into several separate legal systems through legal disagreement.

In the sections below, I offer an account of where Ramban's interlocutors might disagree with Ramban's reasons. In doing so, I hope to accomplish two things. First, to offer an account of a fundamental and

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There may not be any irrefutable proof to demonstrate that the Goldbach Conjecture is true (or false), but it does not follow that the truth of the conjecture is relativistic. On relativism, see Baghramian, Maria and J. Adam Carter, "Relativism", *The Stanford Encyclopedia of Philosophy* (Spring 2021 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2021/entries/relativism/>.

Moreover, Ramban explicitly states that one should bring proofs and arguments to show that one view is more reasonable and more consistent with the plain meaning of the *sugya* and with the *sugyot* overall. He just acknowledges that these kinds of proofs are not as absolute as Euclid's geometry.

central issue in the history and philosophy of halakhah. Second, to bring Ramban's own position into clearer focus by contrasting it with the positions of his interlocutors.

### Amoraic Traditions in the Geonic Corpus

Let us first consider the idea that the Geonim possessed interpretive traditions going back to the Amoraim. Here there are several responses available to Ramban's interlocutors. First, they might deny, as a factual matter, that the Geonim possessed substantial traditions going back hundreds of years to the last Amoraim. There are several ways to formulate this idea. For example, they could hold that even if the early Savoraim had received traditions from the Amoraim, there was no clear indication that these traditions had been passed down uninterrupted into the later geonic period. Further, they could argue that the robust disagreement between the different Geonim and geonic academies shows that there is no cohesive body of tradition handed down to them from the Amoraim. Alternatively, they could argue that perhaps the Geonim did receive a few traditions here and there, and wherever the Geonim assert that they possessed a tradition on a matter then they ought to be deferred to, but as a general matter there is no indication that the Geonim were operating on the basis of received traditions. Therefore, there is insufficient evidence to establish a general presumption in favor of geonic halakhah.

Robert Brody draws attention to some of these themes:

"The Geonim rarely lay claim to specific exegetical traditions going back to talmudic times, but there are occasional instances of this sort. It is evident from the numerous disagreements within the Geonic milieu over the understanding of specific passages that there was no uniform interpretive tradition covering the entire talmudic corpus... The Geonim disagreed among themselves about the permissibility of drawing halakhic implications from academic discussions..."<sup>344</sup>

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<sup>344</sup> Brody, *The Geonim of Babylonia*, pp. 164-165.



Brody also emphasizes that there is no way to know the scope of geonic traditions dating back to the Amoraim. On the one hand, the Geonim on occasion assert that they possessed these special traditions. On the other hand, the number of times they actually do so is quite limited:

“In addition to utilizing large parts of the talmudic literature, the Geonim and their contemporaries were able to draw upon a body of extra-talmudic traditions which were transmitted for generations in the milieu of the Geonic academies... Leaving aside tradition concerning events of the Geonic period and those of an aggadic nature... we are confronted with a stock of anonymous traditions on matters of Talmud and halakhah. The scope of this body of traditions is unknown: there are only a few explicit testimonia concerning traditions of this sort, but it is very likely that these represent merely the tip of the iceberg.”<sup>345</sup>

As Brody notes, this

“raises a series of questions, which, at least in our current state of knowledge, are unanswerable. Foremost among these is the question of quantity. The sum total of the specifically formulated extra-talmudic traditions which are explicitly attested in Geonic responsa would occupy only one or two printed pages; but it seems overwhelmingly likely that these particular traditions do not comprise an exhaustive list and that the Geonim, had they been so inclined, could have added numerous traditions to this list. These particular traditions were cited and identified as such because of their importance for the topics discussed in specific Geonic responsa, rather than from any desire to compile a corpus of early traditions. There is no telling how many traditions of this type have been lost forever. On the other hand, it is very

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<sup>345</sup> Ibid, pp. 171-172.

possible that large quantities of traditional material have been embedded in the words of the earlier Geonic period [without explicit attribution]...<sup>346</sup>

Brody's analysis captures the uncertainty about the scope of amoraic and savoraic traditions embedded within the geonic corpus. Medieval scholars could disagree in good faith, then, about the extent to which the geonic corpus as a whole should be viewed as presumptively authoritative on the theory that the Geonim received traditions of talmudic interpretation and normative halakhic rulings from the

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<sup>346</sup> Ibid, p. 175.

Savoraim.<sup>347</sup> As we saw earlier in this chapter, Ramban himself hedged in some cases and conditioned his deference to geonic rulings on whether the geonic position was in fact a received tradition.<sup>348</sup>

### The Perception of the Talmud as a Closed Text

The second area where Ramban and his interlocutors might disagree is over the conception of the Talmud as a closed text that can be navigated only with guidance from the Geonim. Consider, for example, the exchange we encountered in chapter two that took place sometime in the twelfth century between a Spanish scholar, one R. Yaakov, and a learned Egyptian merchant, Halfon bar Netanel. R. Halfon had sent R. Yaakov a lengthy discussion of the geonic ruling on some matter but had difficulty

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<sup>347</sup> My conclusion here, I believe, is in tension with Isadore Twersky's sweeping statement in *Rabad of Posquieres*, p. 216. Twersky appears to believe that all the medieval scholars acknowledged, in principle, the absolute authority of geonic interpretations:

“The attitude of medieval writers toward the Geonim is complex. Theoretically, Geonic teachings were sacrosanct and their interpretations were indisputable. Chronologically the immediate successors and direct continuators of the Amoraim, the Geonim of Babylon became also their intellectual heirs. They amplified Talmudic teachings, enacted special ordinances, extended the scope of certain laws in keeping with their spirit, systematized the liturgy, and generally entrenched the halakhic way of life among the people... It is small wonder that all later Talmudic authorities looked back reverently at the Geonim, usually abided by their opinions, and approached them with humility and self-effacement... [A]ll accepted in principle the authoritativeness of the Geonim...”

Not only is this statement too broad in stating that all rishonim embraced the Geonim in this way, but even regarding Ramban, Twersky omits the most important reason favoring geonic interpretations--that they had presumably received interpretive traditions from the Amoraim. Twersky here appears to focus on the status of the Geonim as the *institutional* successors of the Amoraim and therefore as the heirs to their political-social *authority*. Twersky focuses on the Geonim being endowed with the *authority* to issue ordinances, extend the scope of the laws, and systematize the liturgy. He does not focus on what I earlier called the epistemic argument, that the Geonim had received traditions from the Amoraim.

<sup>348</sup> Similarly, see the debate between Haym Soloveitchik and David Berger over how to read Rabbenu Gershom's rejection of the geonic ruling of *hepech shevu'a* in Haym Soloveitchik, “The Third Yeshiva of Bavel”, *Collected Essays II*, p. 213.

explaining the Geonim's stance because he could not recall the talmudic source of the Geonim's position. R. Yaakov scolds R. Halfon for relying entirely on the Geonim while not even knowing the talmudic source of the ruling:

"נעלם ממך המקור ובאת לנצחני במה שאמרו הגאונים, ולו הבנת את המקור וידעת את מקומו בתלמוד ועמדת עליו ונתת דעתך עליו, לא היית נכשל במה שנכשלת. כי הגאונים לא אמרו זה אלא לפי הכללים שכלל התלמוד ולא מצאו צורך להסבירם מפני שהם ברורים, ומאחר שנעלם ממך המקור, והוא בסוף מציעא ומקצתו בגיטין, התנצחת עמי באריכות דברים בטלים שאין להם טעם ולא שורש אלא שיבשת את הדברים".<sup>349</sup>

Noteworthy in this exchange is R. Yaakov's statement that the Geonim, in this case, were simply applying the straightforward ruling of the Talmud--they did not add anything to the discussion. His next line is even more striking, and gives voice to the idea that the Talmud can be interpreted directly, without any need for the exposition of the Geonim:

ה' לא הצריכני לדברי הגאונים, אלא מעיין אני בתלמוד ומגלה את כלליו.<sup>350</sup>

This R. Yaakov confidently expressed the view that halakhic rulings should emerge directly from analysis of the Talmud, without the need of geonic intermediaries. He has no need for the geonic corpus, for he can analyse the Talmud and extract its principles on his own.

Ephraim Urbach offers a similar characterization of the tosafists' approach to halakhic decision-making.

According to Urbach, the tosafists issued rulings directly from the Talmud and their analysis of it:

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<sup>349</sup> For the text of this responsum and a discussion of its provenance and content, see Ta-Shma, *Studies in Medieval Rabbinic Literature II: Spain*, p. 43. See also Kanarfogel, "Progress and Tradition in Medieval Ashkenaz", *Jewish History* 14:3 (2000), pp. 287-315.

<sup>350</sup> Ibid.

הם [התוספות] הורו מהתלמוד מכוח עיונם בו, ועם כל יראת-הכבוד שלהם כלפי גאונים וקדמונים, לא היו מוכנים לוותר על זכותם זו. והם קיימוה תוך הסתכלות רחבה וכשרון סוקר, המבין אל כל פרטי הדברים, שנעלמו לעתים מעיני רבים, צורפם וכוללם יחד.<sup>351</sup>

Indeed, Haym Soloveitchik suggests that, prior to Maharam, the tosafists had no conception of legal precedent:

בעלי התוספות הצרפתיים התעלמו לא רק מעמיתיהם הגרמניים אלא עף מתורתם של גאוני בבל, וגם מכל מה שנאמר ונמסר מאשכנז הקדומה. הם היו מהפכנים וכמו רוב המהפכנים עסוקים ושרויים היו בעשייתם הם ולא נתנו את דעתם למחשבותיהם של אחרים. הם נשאו אתם חזון של הבנה חדשה של התורה וכל מה שלדעתם לא תרם להגשמתו היה אצלם כאין....

ספק אם בכלל קיים היה המושג "תקדים" אצל חכמי אשכנז. כמובן, אם ידעו על פסק קודם ציטטו אותו בדרך כלל, אך לא ניסו ליצור מאגר של פסקים קודמים שהיה אפשר לדלות ממנו בעקיבות. מהר"ם הבין את הנחיצות של רכיב זה במסורת הפסיקה וממילא גם את חשיבותו של ה"תקדים" לעצמו.<sup>352</sup>

Another example of the tosafist approach favoring direct encounter with and direct interpretation of the talmudic text, without regard for geonic interpretive traditions, is offered by Rosh, with additional argument. Rosh states that one is not bound to the geonic rulings at all when he feels that he has talmudic proofs to the contrary. This is because, Rosh argues, normative halakhah is defined by only those rulings that emerge from the Talmud itself, as it was sealed by Ravina and Rav Ashi. "Extra talmudic" traditions cannot normatively bind future generations:

<sup>351</sup> Urbach, *The Tosafists: Their History, Writings, and Methods*, p. 739. See also Ta-Shma, *Studies in Medieval Rabbinic Literature 2: Spain*, p. 43 n. 49 who cites Urbach approvingly:

ראה אורבך.... הניגוד המוטעם על ידו בין הרימיגש לבין בעלי התוספות, בשאלת היחס אל התלמוד עצמו כמקור הוראה נכון מאוד בלי שום ספק.

<sup>352</sup> Haym Soloveitchik, *Wine in Ashkenaz the Middle Ages*, pp. 127-129.

ומה שפסקו הגאונים אחר סתימת הש"ס מדעת מכרעת ולא מהלכה ברורה ופסוקה מן הש"ס כסוגיין דעלמא הוי. ומאן דטעי ביה טעי בשקול הדעת ולא בדבר משנה.... [ו]אם לא ישרו בעיניו דבריהם (של הגאונים) ומביא ראיות לדבריו המקובלים לאנשי דורו. יפתח בדורו כשמואל בדורו. אין לך אלא שופט אשר יהיה בימים ההם ויכול לסתור דבריהם כי כל הדברים שאינם מבוארים בש"ס שסדר רב אשי ורבינא אדם יכול לסתור ולבנות אפילו לחלוק על דברי הגאונים.<sup>353</sup>

In other words, the Geonim may perhaps possess interpretative traditions, but they are not decisive for determining normative halakhah.<sup>354</sup> Once the Talmud has been sealed, the halakhah is determined only by the rulings that can be extracted from the Talmud itself (*devarim ha-mevu'arim be-shas*).<sup>355</sup> This tension is one of the most important fault lines in halakhic jurisprudence, between those who rule based on their direct interpretation of the talmudic text and those whose rulings are mediated by the established traditions of halakhic precedent and the interpretations of predecessors.<sup>356</sup>

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<sup>353</sup> Rosh, *Sanhedrin* 4:6.

<sup>354</sup> For the idea of the Geonim possessing extra-talmudic traditions, see Robert Brody, *Geonim of Babylonia*, Chapter 11.

<sup>355</sup> Note the affinity to "textualism" as a theory of constitutional and legal interpretation. One of the marks of this theory is its disregard for legal precedent, original intent, and any non-textual factor. It is the meaning of the text that matters, not the interpretive history. "The core idea of textualism is that the text prevails over other factors." See the discussion of textualism in Greenberg, Mark, "Legal Interpretation", *The Stanford Encyclopedia of Philosophy* (Fall 2021 Edition), Edward N. Zalta (ed.), forthcoming URL = <https://plato.stanford.edu/archives/fall2021/entries/legal-interpretation/>.

<sup>356</sup> See for example the discussion in Haym Soloveitchik, "Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy" *Tradition* 28:4 pp. 111-112:

"The contemporary shift to text authority explains the current prevalence in yeshivah circles of the rulings of the GRA. The GRA, while far from the first to subject the corpus of Jewish practice to textual scrutiny, did it on an unprecedented scale and with unprecedented rigor. No one before him (and quite possibly, no one since) has so often and relentlessly drawn the conclusion of jettisoning practices that did not square with the canonized texts... With the further disappearance of the traditional orah hayyim in the twentieth century, the ritual of daily life had to be constructed anew from the texts; the GRA's work exemplified this process in its most intense and uncompromising form, and with the most comprehensive

## The Uniformity of the Law

Let us now turn to Ramban's third reason--the importance of unifying and stabilizing the law through relying on legal precedent. Here it would seem that Ramban's interlocutors could argue that the pursuit of legal "truth", as embedded in the Talmud alone, overrides the value or importance of uniformity and stability. Consider, for example, R. Samson of Sens's criticism of Rambam's code, and his warning to students not to study from it:

ואיש אל ישים יגיעו בספרים הסתומים, כי המסדר לא סדרם לעכב את הגאולה, שאין בו דבר בשם אומרו, כי אם ללמוד מהם להוראת שעה, וצא ולמד ממשנה ותלמוד, ספרא וספרי ותוספתא, שלא מסרו לאחרונים פסקי הלכות לבדם, אך כתבו להם דברי המטמאים והמטהרים דברי האוסרים והמתירים טעמי אלו ואלו, כולם נתנו מרועה אחד, וההוגה בהם מקבל שכר על כולם. ופעמים נגלים לאחרונים דברים הצפונים מהראשונים, והוי רץ למשנה ולתלמוד, כי יש תלמיד רואה מה שאין רבו רואה. מדבריו מחכים את רבו ומכוון את שמועתו....<sup>357</sup>

In this passage, R. Samson portrays the process of extracting normative rulings from the Talmud as very much an open enterprise. Each student should scour the Talmud for proofs, for he may find principles

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master of those texts. It is this consonance with the contemporary religious agenda and mode of decision making [*pesak*] that has led to the widespread influence of the GRA today in the yeshiva and haredi world....

The crux of the Gaon's approach both to Torah study and *pesak* was its independence of precedent. A problem was to be approached in terms of the text of the Talmud as mediated by the *rishonim* (and in the Gaon's case even that mediation was occasionally dispensed with). What subsequent commentators had to say about this issue, was, with few exceptions (e.g. Magen Avraham, Shakh), irrelevant. This approach is writ large on every page of the *Biur ha-Gra*, further embodied in the *Hayyei Adam* and the *Arukh ha-Shulhan*, and has continued on to our day in the works of such Lithuanian posekim, as the Hazon Ish and R. Moshe Feinstein. The *Mishnah Berurah* rejects *de facto* this approach and returns to the world of precedent and string citation. Decision are arrived at only after elaborate calibration of and negotiation with multiple "ahronic" positions."

<sup>357</sup> Urbach, *The Tosafists*, pp. 743-744.

and concepts that eluded his teachers. Unlike Ramban's retrospective conception of halakhic jurisprudence, which looks back to legal precedent, R. Samson's prospective conception champions the student's ability to overturn his teacher's rulings on the basis of new evidence and discovery in his pursuit of halakhic truth. A similar, confident tosafist expression of a contemporary scholar's right to overturn the rulings and interpretations of his predecessors in his pursuit of halakhic truth is put forth by RiD:

כל דבר שאינו נראה בעיני אי אמרה יהושע בן נון לא צייתנא ליה ואיני נמנע מלדבר עליו מה שייראה לי לפי מיעוט שכלי ואני מקיים עלי מקרא זה ואדברה בעדותיך נגד מלכים ולא אבוש, ועדי בשחק נאמן סלה שאף במקום שנראה לי שאני אומר יפה על כל אחד מדברי רבותי הראשונים ז"ל חלילה שיזיהיני לבי לומר אף חכמתי עמדה לי אלא אני דן בעצמי משל הפילוסופים שמעתי מחכמי הפילוסופים שאלו לגדול שבהם ואמרו לו הלא אנחנו מודים שהראשונים חכמו והשכילו יותר ממנו והלא אנחנו מודים שאנו מדברים עליהם וסותרים דבריהם בהרבה מקומות והאמת אתנו היאך יכון הדבר הזה, השיבם אמר להם מי צופה למרחוק הננס או הענק הוי אומר הענק שעיניו עומדות במקום גבוה יותר מן הננס, ואם תרכיב הננס על צוארי הענק מי צופה יותר למרחוק הוי אומר הננס שעיניו גבוהות עכשיו יותר מעיני הענק, כך אנחנו ננסיים רכובים על צוארי הענקים מפני שראינו חכמתם ואנו מעניקי' עליה ומכח חכמתם חכמנו לומר כל מה שאנו אומרים ולא שאנו גדולים מהם.<sup>358</sup>

<sup>358</sup> Responsa no. 62, discussed in E. Kanarfogel, "Progress and Tradition in Medieval Ashkenaz", *Jewish History* 14:3 (2000).

Both R. Samson of Sens and RiD emphasize the contemporary scholar's interpretive advantage over his predecessors. For RiD this stems from the fact that the contemporary scholar can work off the wisdom of his predecessors. For R. Samson this has to do with the plausible fact that a contemporary scholar might discover new insights that have eluded previous generations. There is a formulation within Ramban's *beit midrash* that suggests that the normative rules of *pesak* specifically empower the more recent scholars over the earlier ones, *ha-shofet asher yihyeh ba-yamim ha-hem*. See *Derashot ha-Ran* no. 7:

וכשרבו המחלוקת בין החכמים, אם היה יחיד אצל רבים היו קובעים הלכה כדברי המרובים, ואם רבים אצל רבים או יחיד אצל יחיד, כפי הנראה לחכמי הדור ההוא. שכבר נמסרה ההכרעה להם, כאמרו (שם ט - יא) ובאת אל הנהנים הלויים ואל השופט אשר יהיה בימים ההם וכו' לא תסור וגו', הרי שניתן רשות לחכמי הדורות להכריע במחלוקת החכמים הנראה להם, ואף אם יהיו הקדומים מהם גדולים



It seems, then, that the tosafists put far less of an emphasis on the unity and stability of the law than Ramban did. These scholars disagree about the relative importance of the stability of the law when it might conflict with the pursuit of objective legal truth.

In this section, I've considered some of the possible points of disagreement between Ramban and his interlocutors about the nature and weight of (geonic) legal precedent in halakhah. At the beginning of this section, I considered the debate over whether the geonic corpus should be viewed as containing amoraic traditions of talmudic interpretation. I then considered whether Ramban's interlocutors share his assessment of the Talmud as a closed text and whether the normative halakhah can be divined directly from the text of the Talmud. Finally, I suggested that Ramban's interlocutors may not share his concern for the uniformity and stability of the law when it clashes with the pursuit of halakhic truth. In the next section, I consider why Ramban, in contrast to his interlocutors, would be particularly concerned about the stability and uniformity of Jewish law.

### Ramban's Thirteenth-Century Catalonian Vantage Point

Is it possible to offer an explanation for the differing views on legal precedent, the role of fresh talmudic exploration, and the importance of halakhic stability and uniformity? Can we go deeper and explain why Ramban comes out one way on this question and his interlocutors the other? I do not believe we can do so fruitfully. But I believe we can shed further light on why Ramban in particular, in thirteenth-century Catalonia, emerged especially concerned for the stability and uniformity of Jewish law. Or at least we can reasonably speculate.

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מהם ורבים מהם. ונצטוינו לילך אחר הסכמתם, הן שיסכימו לאמת או להפכו...ההכרעה נמסרה לחכמי הדורות, ואשר יסכימו הם הוא אשר צוהו ה'.

Some interpret this formulation of Ran as reflecting the idea that *pesak* is sensitive to the contingencies of each generation. Hence, the power to rule one way or the other lies, perforce, in the hands of the most recent generation.

Earlier, in chapter two, we saw that Ramban was responding in part to the destabilizing halakhic revolutions of the twelfth century. Why would these revolutions trouble Ramban more than his interlocutors? The first reason, perhaps, is the distance of time. Revolutionaries are often unaware of the destabilizing effects of their work, and it takes at least a generation or so to see a revolutions' lasting effects. Rabbenu Tam, Rabad and Rambam could all work in their own laboratories--writing, arguing, challenging--but the practical, destabilizing effects of their labors would not surface until a generation later.

Second, each of these bold figures worked within the confines of their own culture. The destabilizing effects of halakhic change are substantially mitigated when they are contained within local jurisdictions. "Seek out the court of your era." Rabbenu Tam could reign supreme over the communities of northern France, Rabad over his community in Posquieres, and Rambam over the Jews of Fustat, without compromising the local perception of the law's stability and uniformity. These figures worked within the confined parameters of their halakhic culture, and for that reason their own revolutionary thinking, and their recognized authority in their own jurisdiction, could absorb, or mask, their explosive force.

Ramban's reality in thirteenth century Gerona is altogether different. About a century had passed since the writings of Rabad, Rambam, and Rabbenu Tam, and the cumulative ripple effects--their cross-current forces and destructive interference--had emerged into the full glare of history. More important than the passage of time is Ramban's unique Catalonian vantage point. As we saw chapter one, Catalonia was a halakhic no-man's-land on the map of halakhic cultures. Catalonia had no antecedent halakhic culture or tradition of its own. It was neither Andalusian nor Provencal. Its earliest scholars, like R. Yitzchak bar Reuven ha-Barzeloni, had traveled to Andalusia; its most recent intellects, like R. Zerahyah and R. Yonah b. Abraham, had traveled to Provence and northern France.

It should not surprise us, therefore, that Ramban is the first great halakhist to draw extensively from all the halakhic cultures of his day. Ramban's *Hiddushim* are the great sea into which the learning of Provence, Spain, and northern France all flowed. For the first time in the history of halakhah there is a systematic attempt to collect and compare the various rulings and teachings of the different halakhic cultures. Consider Halbertal's description of Ramban's unique vantage point:

מחוללי התמורה בשדה ההלכה במאה האחת-עשרה והשתים-עשרה פועלים כל אחד בתחומו שלו. הרמב"ם אינו מזכיר אפילו פעם אחת את עמדותיהם של רש"י ורבנו תם. המשא ומתן ההלכתי שלו מוגבל בעיקרו למסורת האנדלוסית הצפון-אפריקאית שבתוכה הוא מצוי. מעבר לאלה כאילו לא קיים דבר. דברים דומים, אולי במידה פחותה במקצת, מצויים באשכנז ובצרפת. מידת זיקתו של רבנו תם לר"ף היא מוגבלת ביותר, והדיון ההלכתי שהוא מנהל ממוקד בעמידתו היצירתית מול רש"י והמסורות האשכנזיות, ובדיוניו הרחבים עם חכמי צרפת בני דורו. בפרובנס השיחה שמנהלים הרמב"ם, העיטור ובעיקר בעל המאור הוא רחב יותר. בעלי ההלכה של המאה השתים-עשרה, המשנים ביסודיות את טיבה ואופייה של ההלכה, פועלים כל אחד בעולמו, ובעולם זה גבולות האזור התרבותי מגדירים לעתים את גבולות השיחה וחילופי הדברים.

בכתבי הרמב"ם כבעל הלכה נשברות המחיצות האזוריות באופן שיטתי חסר תקדים בימי הביניים. חידושי הרמב"ם לתלמוד הם הטקסט ההלכתי המובהק ביותר שאפשר לכנותו על-אזורי בהיקפו, ואל הטקסט הזה מתנקזים בו זמנית הזרמים היצירתיים השונים של המאה השתים-עשרה כולה--הצרפתיים, הפרובנסאליים, האנדלוסיים והצפון-אפריקאיים. הרמב"ם ניצב אפוא מול מלוא התמונה של הפרץ היצירתי הגדול שנוצר במאה השתים-עשרה על כיוונו השונים והגוונים... הוא מנקז אליו את המכלול הגדול של השטף היצירתי שיצר איש-איש בתחומו שלו.<sup>359</sup>

Ramban's unique position as the great synthesizer of these disparate traditions would immediately bring to the fore the question of how to unify the various streams of halakhic thought into a stable and

<sup>359</sup> Halbertal, *By Way of Truth*, pp. 115-116.

coherent system of law.<sup>360</sup> One important tool for managing the traffic flowing in from all directions is to give the right of way to the established (geonic) legal precedent, whose tradition appeared to present the last unified halakhic tradition before it had splintered into the disparate cultures of Europe (Ashkenaz, Zarfaz, Italy, Provence, Christian Spain), Andalusia and North Africa.

And this would have been the case even if the twelfth century halakhists were conservative jurists. But the need for stability and unification became all the more acute given the revolutionary character of twelfth-century halakhah. Ramban's unique historical and geographical position provides at least a

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<sup>360</sup> It is interesting to note that the concern for halakhic precedent seems to arrive in Ashkenaz in a similar manner. Maharam of Rothenburg is the first Ashkenazic figure to seriously engage with the full range of halakhic cultures, and he also is the first figure there to take halakhic precedent seriously. See Haym Soloveitchik, *Wine in Ashkenaz in the Middle Ages*, pp. 127- 129:

בבית מדרשו של מהר"ם עסקו גם בדברים שעד כה לא נתנו חכמי אשכנז את דעתם עליהם. הרחבת התחומים אצל יוצאי בית מדרשו ייחודית כל כך... כבר אמרנו שצרפת התעלמה מגרמניה, אך עלינו להוסיף שצרפת וגרמניה גם יחד התעלמו לחלוטין מפרובאנס ובמעט התעלמו מספרד, כלומר מתורת אנדלוסיה...

ר' מאיר מרוטנבורג היה משוחרר מכל תחושה של עליונות תרבותית. כשניגש לחבר הלכות שמחות הוא עמד על המחסור במסורת פרשנית בת-סמכא להלכות-אבל הבאות במסכת מועד קטן. הוא אף הבחין שראב"ד מפוסקייר, שנודע בשם ראב"ד בעל ההשגות, תרם תרומה מכרעת להבנתן. בהלכות שמחות שלו עשה מהר"ם את פירושו של ראב"ד על מועד קטן לאחד מעמודי התווך של חיבורו... וגדולה מזו... תלמיד מהר"ם ר' מאיר הכהן, ניסה, וקרוב הוא בעקבות הראייה הסגולית של רבו, לקלוט את החיבור [של המשנה תורה] כולו על ידי הגהה והשגה... בהגהות מיימוניות עקב ר' מאיר אחרי דברי הרמב"ם עקב בצד אגודל וציין בשיטתיות את המקומות שחלקו עליו בעלי התוספות... כבר הערנו ששאלות ותשובות לא היו סוגה של יצירה הלכתית בצרפת... ספק אם בכלל קיים היה המושג תקדים אצל חכמי אשכנז. כמובן, אם ידעו על פסק קודם ציטטו אותו בדרך כלל, אך לא ניסו ליצור מאגר של פסקים קודמים שהיה אפשר לדלות ממנו בעקיבות. מהר"ם הבין את הנחיצות של רכיב זה במסורת הפסיקה וממילא גם את חשיבותו של התקדים לעצמו... בבית מדרשו החלו בכינוס של כל התשובות שנכתבו בצרפת ובגרמניה, אם בידי גדולי ישראל אם בידי תלמידי חכמים מן השורה, מראשית ימיה של אשכנז ועד לזמנם של המאספים ועד בכלל.

If my analysis of Ramban in the text above is correct, it is no coincidence that halakhic precedent is championed by the two figures who first begin to engage seriously with halakhic rulings and commentaries from across different halakhic cultures.

partial explanation for why the importance of halakhic legal precedent loomed so large over his jurisprudence in a manner that it did not for his twelfth century predecessors.<sup>361</sup>

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<sup>361</sup> On this interpretation of Ramban's unique position, I am more or less in agreement with Halbertal's characterization of Ramban, *By Way of Truth*, pp. 115-116. Halbertal offers two further explanations for why Ramban felt the need to stabilize halakhic jurisprudence while his halakhic predecessors did not. First, Halbertal suggests (p. 114) that Ramban had a conservative psychological disposition which clashed with his intellectual creativity. Halbertal suggests that since Ramban offered many radically new halakhic interpretations of his own (see below chapters four and five), he felt the need to "compensate" by limiting the practical ramifications that would follow from his novel insights in geonic legal precedent:

השילוב המורכב הזה, של יצירתיות אינטלקטואלית ונטייה שמרנית, גרם לכך שככל שגבר כוחו של הרמב"ן בהבנה מחודשת ויצירתית של הסוגיות התלמודיות, כך הוא ניסה לעגן את המסקנות המעשיות הנגזרות מהן בנקודה ארכימדית יציבה, הלוא היא מסורת הגאונים והר"ף.

I am skeptical of this psychological evaluation of Ramban's jurisprudence. Moreover, most of Ramban's novel insights (*hiddushim*) are not grounded in geonic halakhah at all. I see no evidence to support Halbertal's contention that Ramban attempts to ground his more radical *hiddushim* in the geonic tradition. They generally stand independent of the geonic tradition, and Ramban makes no attempt to ground them in it. Ramban will offer a novel interpretation here and there to justify the geonic position--but that is very different from Halbertal's claim. To be sure, Halbertal's suggestion flows from his broader characterization of Ramban's contribution to halakhic literature as one that "used the intellectual tools of the twelfth century (particularly the tosafists) to defend the geonic tradition" (p. 86):

דיון זה מלמד על טיב פעולתו ההלכתית של הרמב"ן, העושה שימוש בהשגי המאה השתים-עשרה כדי להגן על מסורת הגאונים שנתעררה במאה השתים-עשרה.

This tidy characterization of Ramban--using tosafist methods to defend the geonic tradition--is inaccurate. As I mentioned earlier, most of Ramban's defense of the Geonim does not depend on this methodology or even brilliant or creative insights. They mostly turn on *kelalei pesikah* and textual-contextual suggestions about the role that a given statement plays in the flow of the *sugya*. The vast majority of Ramban's creative and novel *hiddushim* (see below chapters four and five) are unrelated and orthogonal to the geonic corpus.

Halbertal offers a second explanation for Ramban's distinctive concern to stabilize the law. He suggests (p. 114) that the difference in level of observance between the communities of northern France and Catalonia can explain the difference in attitudes of halakhic decisors toward geonic precedent. According to Halbertal, the community in Catalonia was far less religiously committed than its northern French counterparts. Halbertal suggest that in a community of lax observance a halakhist must be cautious and avoid reaching halakhic rulings on the basis of

## Summary

This chapter concludes our analysis of Ramban's conception of the centrality of legal precedent and his deference to the geonic tradition. Chapter one argued that Ramban's defensive projects should not be understood as an expression of Andalusian pride or as an opportunity to express his creativity but rather as flowing from his commitment to geonic legal precedent. Chapter two argued that Ramban's commitment to geonic legal precedent stems from his perception of the Geonim as the possessors of

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dialectical analysis of the text, for such a method can serve the interests of someone who desires to reach more lenient rulings:

בסביבה כזאת מן הראוי אפוא להיזהר מהסקת מסקנות הלכתיות מרחיקות לכת באמצעות דיאלקטיקה תלמודית חריפה, שכן מהלכים כאלה עלולים לשרת את מי שמקל ראש בכל העניין מלכתחילה. הנאמנות המוחלטת והוודאית של שלומי אמוני ישראל בצרפת ובפרובנס נסכה ברבנו תם והראב"ד את הביטחון הדרוש לשם המרחב היצירתי ההלכתי, ביטחון שאולי לא היה קיים בסביבת הרמב"ן.

There are two major flaws with this argument. First, Ramban *did* reach practical halakhic conclusions based exclusively on his own reasoning on all sorts of matters where the geonic tradition was silent (see below, chapters four and five), and he did so quite often. In fact Ramban reached practical halakhic conclusions on the basis of his own novel interpretations of the biblical verse! (See below, chapter six.)

Second, it is difficult to see how the overall religious commitment of the lay population has any bearing on how the elite jurists arrive at their halakhic conclusions. The community at large was not employing dialectic. Dialectic was a tool at the disposal of the elite jurists and halakhic decisors. The community at large would generally have no idea how the halakhists arrived at their legal conclusions or, for that matter, what the geonic precedent on any given topic was. So it is not at all apparent how the level of communal religiosity should bear on the presumption in favor of geonic legal precedent.

I am also not persuaded by Halbertal's factual claim about the level of religious commitment in northern France and Provence compared to Catalonia. In his letter to the northern French rabbis, *Kitvei Ramban I*, p. 342, Ramban characterizes his community as quite committed:

אנו קבלנו גזרתכם ונזהר מחרב פיכם... כי אין סביבותינו פחים, אין בארצותינו נודד כנף ופוצה פה ומצפץ כנגד קבלתנו, אין פרץ ואין יוצאת ואין צווחה ברחובותינו.

This statement of Ramban also undercuts Haym Soloveitchik's claim that Ramban did not seek to justify the Catalonian community's practices because the community was lax in its observance of the mitzvot. See "Religious Law and Change Revisited", *Collected Essays I*, pp. 273-274, and the discussion below, chapter five, n. 48. Note that in several of the examples discussed in chapter five and six Ramban appears to justify the Catalonian communal practice.

interpretive traditions dating back to the Amoraim, his conception of the Talmud as closed text-- especially when it comes to divining its normative halakhic rulings--and the need to stabilize and unify the law following the halakhic revolutions of the twelfth century. Chapter three argued that Ramban's project should not be characterized by absolute or unconditional deference to the geonic tradition. Ramban expresses his intellectual independence throughout his halakhic works. Rather, Ramban's project should be understood as upholding the legal presumption in favor of geonic rulings while defending the integrity, coherence, and well-founded nature of the tradition overall.

## Chapter 4: Tosafist Dialectic and Ramban's Conceptualism

### Ramban and the Tosafists

Ramban's halakhic jurisprudence was profoundly influenced by the tosafists and their intellectual achievements. Ramban's two talmudic teachers--R. Natan b. Meir of Trinquetaille and R. Judah b. Yakar--were students of Rizba, a prominent student of the leading northern French tosafist, R. Isaac ben Samuel of Dampierre (Ri).<sup>362</sup> Indeed, Ramban consistently refers to the French tosafists as his masters and teachers. Throughout his *Hiddushim*, Ramban cites "our French masters" (*rabbotainu ha-zarfatim*). In one striking formulation, Ramban declared that the tosafists are "the guides, they are the teachers, they reveal to us the hidden."<sup>363</sup>

The impact of the tosafists' method of dialectic is evident on almost every page of Ramban's talmudic *Hiddushim*, and scholars have called attention to this influence of the tosafists on Ramban's halakhic thought. Bernard Septimus writes that "there is no doubt that without the achievements of the Tosafists... Nahmanides' talmudic career would have been inconceivable."<sup>364</sup> Isaac Unna characterizes Ramban's methodology in the *Hiddushim* as "close to the method of the tosafists."<sup>365</sup> Ta-Shma also emphasizes that Ramban primarily employed the tosafist method in his analysis of Talmud.<sup>366</sup> Ta-Shma

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<sup>362</sup> See Ta-Shma, *Talmudic Commentary Volume Two*, p. 31. On Rizba, see Urbach, *The Tosafists*, pp. 261-266.

<sup>363</sup> *Kitvei Ramban I*, p. 412.

<sup>364</sup> Septimus, "Nahmanides and the Andalusian Tradition," p. 32.

<sup>365</sup> Unna, *Rabbenu Moshe ben Nahman*, p. 27:

דרכו בקודש קרוב לדרך בעלי התוספות, שהוא מעריך אותם מאד.

<sup>366</sup> Ta-Shma, *Talmudic Commentary Volume Two*, p. 30:

מן הבחינה הלימודית הטהורה, היינו השיטה הלימודית שהנהיג הרמב"ן בספריו ובין כותלי הישיבה, היתה ידה של המסורת הצרפתית על העליונה.



characterizes Ramban's talmudic analysis as "a direct continuation of Rabbenu Tam's project."<sup>367</sup> In an even more forceful formulation, Ta-Shma writes:<sup>368</sup>

היסוד המעמיד [של חידושי הרמב"ן] הוא תלמודם של בעלי התוספות הצרפתים, שהשפיע עמוקות על כל דרך חשיבתו וסגנון לימודו של הרמב"ן. בהינטל מרכיב צרפתי זה מספר חידושים, ניטלה ממנו תמצית גבורתו וכמעט שלא נתבטל מהיכנו. ואין כוונתי לציטוטים הרבים, המפורשים והסתומים, מן התוספות, המצויים בספר... כוונתי לאופי השאלות הבסיסיות שהרמב"ן מציע ומתלבט בפתרון, שמן התוספות נלקחו בדרך כלל... וגם דרך המחשבה וטכניקת העיון היצירתי, בשאלה ובעיקר בתשובה, מהם נלמדו.

Similarly, Haym Soloveitchik writes that "The Catalonian school of Nahmanides and his disciples was... the true intellectual successor of Ri and Rabbenu Tam, and openly acknowledged their debt."<sup>369</sup>

Most recently, Oded Yisraeli has written that:<sup>370</sup>

אפיו של הדיון ב'חידושים' מושפע באופן בולט מן הסגנון והמבנה של חיבורי ה'תוספות'... בדרך עיון התלמודי מייצג רמב"ן את ההמשך המובהק ביותר של בעלי התוספות... חיבורי התוספות הם אלו אשר עומדים במוקד הדיון הלמדני, ובמקרים רבים הם משמשים נקודת מוצא עיונית לדיונים הפרשניים שב'חידושים'. באופן שיטתי מובאים ב'חידושים' פירושיהם של בעלי התוספות בעקבות פירושו של רש"י ועל יסוד דבריהם מכונן רמב"ן את המשכו של המשא והמתן הפרשניים....

<sup>367</sup> Ta-Shma, *Talmudic Commentary Volume Two*, p. 36:

את עבודתו של הרמב"ן ניתן לתאר... כהמשך ישיר לפעולתו של רבנו תם עצמו.

<sup>368</sup> Ta-Shma, *Talmudic Commentary Volume Two*, pp. 38-39.

<sup>369</sup> Haym Soloveitchik, *Collected Essays II*, p. 189.

Note as well Ta-Shma's periodization of the literature of the rishonim in Christian Spain. In his "Seder Hadpasatam Shel ha-Rishonim," *Studies in Medieval Rabbinic Literature II: Spain*, p. 220, Ta-Shma divides Sefardic talmudic commentaries into two periods, marked by the arrival of Ramban. The crucial divide, for Ta-Shma, is the incorporation of tosafist literature into Spanish Talmudic commentaries, which begins with Ramban's *Hiddushim*: "פירושי הספרדים, הנחלקים מצדם לשתי תקופות: ראשונה, עד לרמב"ן, גישתם שונה מיסודה מגישת בעלי התוספות, ואחרונה, מהרמב"ן ועד הריב"ש, הממזגים היטב את מורשת התוספות עם דרך הלימוד הספרדית הקלסית."

<sup>370</sup> Oded Yisraeli, *Intellectual Biography*, p. 58.

There is little doubt, then, of the profound influence of the tosafists and their jurisprudence on Ramban.

At the same time, there is also widespread recognition that Ramban's jurisprudence was novel and that Ramban's genre of *hiddushim* literature was distinct from the tosafist style. Some scholars see Ramban's *Hiddushim* and his distinct jurisprudence as the dawn of a new period and genre of halakhic literature. Isadore Twersky, for example, sees Ramban as the founder of the distinct genre of *hiddushim* literature. Twersky writes that "[Ramban's] *hiddushim* are... the beginning of a great chain of such literary compositions (Rashba, Ritva, Ran, etc.)."<sup>371</sup>

Ta-Shma also sees Ramban as the founder of the *hiddushim* genre. According to Ta-Shma, this distinctive genre of *hiddushim*, founded by Ramban and born out of his *beit midrash*, constituted a new stage of talmudic interpretation:<sup>372</sup>

ה"הרמב"ן הוא אביהם של כל כותבי ה"חידושים" הספרדים המפורסמים... ואשר כולם תלמידיו היו או תלמידי תלמידיו, עד לימיו של הרב נסים ב"ר ראובן גירונדי, שחתם סוגה ספרותית זו. סוגה זו... קובעת שלב חדש בתולדות פרשנות התלמוד.

Oded Yisraeli also emphasizes that Ramban's *Hiddushim* heralded a new style of talmudic analysis.<sup>373</sup>

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<sup>371</sup> Twersky, "Introduction," in Twersky (ed.) *Rabbi Moses Nahmanides (Ramban): Explorations in His Religious and Literary Virtuosity*, (Harvard, 1983) p. 5.

On this point, Twersky remains consistent in characterizing Rabad's works on the Talmud as commentaries, not *hiddushim*. See Twersky, *Rabad of Posquieres: A Twelfth Century Talmudist* (Philadelphia, 1980), p. 82: "[Rabad's work on Bava Kamma] is clearly a commentary and not a series of novellae like those of Nahmanides, Rashbah, or T. Yomtob b. Abraham (Ritva)." Thus, Ramban's *novellae* are the first of the *hiddushim* genre. It was Ramban who founded this style of talmudic analysis.

<sup>372</sup> Ta-Shma, *Talmudic Commentary Volume Two*, p. 35. See also S. Yahalom, *Between Gerona and Narbonne: Nahmanides' Literary Sources* (Hebrew; Jerusalem 2012), p. 5:

[ה"הרמב"ן] נחשב אבי ספרות החידושים...

<sup>373</sup> Oded Yisraeli, *Intellectual Biography*, p. 54.

בתשתיתה של יצירה זו [חידושי הרמב"ן] מוטמעת תפיסה למדנית חדשה אשר כמותה איננה מוכרת מתולדות פרשנות התלמוד קודם לכן.

We are thus confronted with opposing characterizations of Ramban's halakhic jurisprudence. On the one hand, Ramban is portrayed as a practitioner of tosafist dialectic. On the other hand, Ramban is portrayed as the founder of a new method and school of talmudic analysis.

This chapter, together with chapter five, seeks to accomplish two related goals. The primary goal is to characterize Ramban's distinctive method of talmudic analysis. Different medieval scholars are associated with different styles and methods of talmudic commentary and analysis. For example, Rashi is seen as the talmudic commentator par excellence. Rambam is perceived as the master codifier and classifier of talmudic law. And the tosafists are recognized for their distinctive method of dialectic. The primary goal of this chapter and the next is to characterize the distinctive features and method of Ramban's jurisprudence.

The second goal is to compare Ramban's method with tosafist dialectic. As we shall see, contemporary Ramban scholarship portrays Ramban as someone who "developed" and "advanced" the tosafist method. This reflects the trend in the scholarly literature, promoted and defended by Unna, Soloveitchik, Ta-Shma, and others, which I surveyed above, to view Ramban as a practitioner of tosafist dialectic, albeit a more sophisticated version of it. The scholarly literature widely agrees that Ramban *advanced* the tosafist method in some way, but none of these scholars has offered a precise characterization of *how* Ramban advanced it.

The scholarly literature, as will be documented below, leaves us with incomplete and imprecise characterizations of what distinguishes Ramban's jurisprudence from tosafist dialectic. We are told that Ramban's dialectic is "sharper", "crisper", "more sophisticated" or "more legal." But these formulations are not truly helpful because the literature does not provide concrete examples or explain what these

terms are meant to convey. In the next chapter, I will provide eleven perspicuous examples of Ramban's halakhic reasoning and will contrast Ramban's analysis with that of the tosafists. By doing so, these chapters attempt to explicate the sense in which Ramban's legal thought is to be distinguished from that of the tosafists.

I will conclude that the widely accepted portrayal of Ramban in the scholarly literature is inaccurate. The literature portrays Ramban as a practitioner of tosafist dialectic--again, a more sophisticated version of it, but a version of it nonetheless. I shall argue, after characterizing tosafist dialectic and then carefully characterizing Ramban's method and supporting that characterization through examples drawn from Ramban's halakhic writings, that Ramban's method is best characterized as *conceptualism*, which is actually quite distinct from tosafist dialectic. If my analysis is correct, these chapters are an important corrective to the regnant understanding of Ramban's halakhic jurisprudence.

This chapter unfolds as follows. In the following section, I survey the portrayal of Ramban as a practitioner of tosafist dialectic and as someone who developed and advanced the tosafist method. Next, I characterize tosafist dialectic in order to set the groundwork for comparing Ramban's method with that of the tosafists. I will then contend that Ramban's method is best characterized as a form of conceptualism and devote a section to defining and characterizing conceptualism as a method of talmudic analysis. Here I draw on characterizations of conceptualism associated with the nineteenth century Lithuanian school. To motivate the relationship between Ramban's jurisprudence and the conceptual method, I appeal to observations made by Soloveitchik and Ta-Shma, who have noted affinities between Ramban's method and this later school of conceptualism in the period of the aharonim. These scholars have even posited a causal influence of Ramban's halakhic jurisprudence and *Hiddushim* in bringing about the conceptual revolution of the nineteenth century.

## Ramban's Advancement of the Tosafist Method

A number of contemporary scholars have noticed that Ramban developed and furthered the method of the tosafists. Haym Soloveitchik, for example, characterizes Ramban and his school as the next stage of tosafist dialectic. According to Soloveitchik, it was in Ramban's school that tosafist dialectic received its most "sophisticated" expression:

"Nahmanides' school was the natural offshoot—indeed, the second stage of the tosafist movement. The true intellectual successors of Rabbenu Tam and Ri of Dampierre were... the great halakhists of Catalonia. Indeed, in Ritva's writings, the Franco-German dialectic received its most literate and sophisticated expression."<sup>374</sup>

Elsewhere, Soloveitchik writes:<sup>375</sup>

חכמי ספרד [הרמב"ן ותלמידיו] ניגשו למלאכת הפרשנות ולפניהם פירושים רבים ומגוונים של קודמיהם. הם היו מצוידים גם בשיטת החשיבה של בעלי התוספות, ועוד פיתחו ושכללו אותה. אין תמה שהחשיבה ההלכתית של בעלי התוספות הגיעה למלוא שיעור קומתה בבית מדרשו של הרמב"ן. והבית שהחל רבינו תם לבנות גמר לבנותו הריטב"א.

And more recently, Soloveitchik has written:<sup>376</sup>

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<sup>374</sup> Haym Soloveitchik, *Collected Essays I* (Oxford, 2013), p. 32.

<sup>375</sup> Haym Soloveitchik, "Hadpasat Sefarim ve-ha-Historiyah Shel ha-Halakhah" (Hebrew), *Bar Ilan 30-31* (5766), p. 321.

<sup>376</sup> Haym Soloveitchik, "Beit Ha-Behirah Le-R. Menahem Ha-Meiri ve-Goralo", in *Asufah Le-Yosef* (Jerusalem 5774), p. 258.

In this passage, Soloveitchik appears to exclude Ramban himself from this phenomenon. He writes:

ממד זה ניכר פחות אצל רמב"ן מטעמים שאין מקום להביאם כאן, אבל הוא בולט לעין אצל תלמידיו, ובפרט אצל תלמידי תלמידיו.

יורשיהם הרוחניים של רבנו תם ור"י הם חכמי קטלוניה, רמב"ן ובית מדרשו--רשב"א, רא"ה, ריטב"א ור"ן. בית מדרש זה הוסיף לא רק רובד של תירוצים חדשים אלא גם ממד חדש לחשיבה הדיאלקטית--הנמקת "החילוקים" וה"אוקימתות"-- הענקת משמעות משפטית להבחנות שהציעו... בכתבי ריטב"א ור"ן הגיעה החשיבה הדיאלקטית לשיאה בבהירות הניסוח ובהטעמה משפטית.

These formulations suggest that Ramban's method is best characterized as a more literate and sophisticated expression of tosafist dialectic.

Ta-Shma offers a similar observation about the relationship between Ramban's *Hiddushim* and tosafist dialectic.<sup>377</sup> He characterizes Ramban's *Hiddushim* as

"a direct continuation--a kind of sophisticated advancement--of the tosafist method that preceded it..."<sup>378</sup>

Halbertal also writes that Ramban developed and advanced the method of the tosafists.<sup>379</sup>

"Nahmanides, living in the thirteenth century, carried the same toolkit as the twelfth-century halakhists; the lenses of his microscope and telescope had no less a polish than those of his predecessors. His tools of conceptual analysis did not fall short of those of Rabbeinu Tam or Ra'avad, whose modes of analysis and thinking profoundly influenced him. Like them, he also had colossal command over the range of halakhic sources, which allowed him to adopt the

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Soloveitchik does not provide criteria for what he considers "discernable (*nikar*)", but this is a surprising statement, and in my view it is incorrect. A student of Ramban's Talmudic writings will readily discern this dimension of Ramban's work.

<sup>377</sup> Israel Ta-Shma, *Talmudic Commentary Part Two*, p. 39.

<sup>378</sup> Ta-Shma, *Talmudic Commentary Part Two*, p. 35:

הרמב"ן הוא אביהם של כל כותבי ה"חידושים" הספרדים המפורסמים, שבהם עוסק ברך זה... סוגה זו מהווה המשך ישיר--מעין פיתוח מתקדם--לשיטת ה"תוספות" קודמתה...

<sup>379</sup> Moshe Halbertal, *Nahmanides* (2020), pp. 68-69.

synoptic approach that he inherited from his Tosafist predecessors. He even sharpened those instruments, whetting them to perfection. Nahmanides novellae constitute, therefore, a clear and impressive continuation of the great change that occurred in the twelfth century.”

Most recently, Oded Yisraeli has characterized Ramban as simply expanding the scope of the kind of analysis that Tosafot employ on the Talmud and Rashi, by applying it to study Tosafot’s commentary itself. For Yisraeli, Ramban is a “Tosafot to Tosafot”:<sup>380</sup>

אם בעלי התוספות נשאו ונתנו בפירוש הסוגיה התלמודית תוך שהם מבקרים את פירושו של רש"י לתלמוד, הרי שרמב"ן הרחיב את היריעה עוד והביא בכור הביקורת הן את פירושו של רש"י והן את אלה של בעלי התוספות, כאשר לעיתים רבות הוא חותם את הדיון בהצעה משלו השונה מכל הפירושים הללו גם יחד.... אם בעלי התוספות ראו עצמם כ'מוסיפים' על פירושו של רש"י, הרי שבחידושי רמב"ן ניתן לראות מעין 'תוספות' ל'תוספות'.

As this survey shows, the scholarly literature is in agreement about two general claims regarding Ramban’s *Hiddushim*: first, that Ramban was a practitioner of tosafist dialectic and, second, that Ramban advanced and further developed their method.

Although these scholars describe Ramban as advancing and developing the tosafist method, they provide no insight into how and in what sense he did so. They do not characterize what is distinctive of Ramban’s method. Nor do they provide examples that compare Ramban’s method to that of his tosafist predecessors. They provide no answer to the following questions: What is distinctive about Ramban’s talmudic analysis? How should we characterize Ramban’s method? How does Ramban’s method differ from that of the tosafists? In what sense did Ramban *develop* the tosafists’ method? The literature sheds little light on these important questions.

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<sup>380</sup> Yisraeli, *Intellectual Biography*, pp. 58- 59.

## Yahalom and Yisraeli on Ramban's Method Compared to the Tosafot

Like the scholars cited above, Shalem Yahalom concludes that "Nahmanides refined the distinction drawing ability of the French Sages."<sup>381</sup> However, unlike the scholars surveyed above, Yahalom attempts to explicate the sense in which Ramban's method differs from that of the tosafists, and he provides specific examples to document his conclusion.

According to Yahalom, the tosafists used the distinction between biblical rules and rabbinic enactments to resolve talmudic contradictions. When faced with a contradiction, Yahalom claims, the tosafists were able to explain away one of the passages as an *ad hoc* rabbinic enactment while maintaining that the other passage (or passages) reflects the unadulterated biblical rule.<sup>382</sup> Yahalom writes:

"[The tosafists] viewed the Talmud in its entirety as a single, integrated text and developed principles intended to reconcile contradictory passages. In many instances this ideal collapsed in the confrontation with a recalcitrant passage, the details of which could not be squared with contrived, mandatory rules. In dealing with the phenomenon of incongruity, the Baalei Ha-Tosafot developed the well known distinction between de'orayta and de'rabbanan. The category of din torah therefore reflected the general rule, whereas exceptions to the rule were the result of a specific decree enacted by the sages of the Oral Law."<sup>383</sup>

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<sup>381</sup> Shalem Yahalom "De'orayta and Derabanan: The Standing of the Creative Personality in Nahmanides' Jurisprudence," *Hispania Judaica* 6 (2008), p. 53.

<sup>382</sup> For a good example of this phenomenon, see my discussion in chapter five of Tosafot Pesachim 4b s.v. *mi-de'oraita*.

<sup>383</sup> Shalem Yahalom "De'orayta and De'rabbanan: The Standing of the Creative Personality in Nahmanides' Jurisprudence," *Hispania Judaica* 6 (2008), p. 53.



Yahalom's thesis is that whereas the tosafists, when confronted with a contradiction between talmudic passages, would explain away one passage as a rabbinic enactment, Ramban labored to preserve both passages on a biblical level:

“The result [of Ramban's analysis] was the inclusion of certain cases within the fundamental (de'orayta) category, instead of being defined as exceptional cases of rabbinic origin, as per the Baalei Ha-Tosafot.”<sup>384</sup>

Yahalom's conclusion that, compared to the tosafists, Ramban attempts to maintain a wide set of *de'oraita* principles in the Talmud does appear to be a general trend in Ramban's thought. Indeed, it appears to hold especially true regarding his commentary on the Torah and the *Hassagot to Sefer ha-Mitzvot*.<sup>385</sup> Yet, notwithstanding the importance of the phenomenon that Yahalom documents, it does not describe *a method* of talmudic analysis. Rather, it describes an interpretive tendency or preference of Ramban, a preference for interpretations that preserve the de'oraita status of talmudic rules. Later in this chapter, I will develop a different explanation of what distinguishes Ramban's jurisprudence from the tosafists' as it pertains to his *method* rather than to his desire to maintain the biblical legal status of the regulations in question.<sup>386</sup>

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<sup>384</sup> Ibid.

<sup>385</sup> For some interesting examples from the commentary on the Torah, see my discussion below in chapter six. See also Ramban's *Hassagot*, shoreish 2. For examples from Ramban's *Hiddushim*, see *Hiddushim*, Pesachim 4b (regarding *bittul*); and *Hiddushim*, Yevamot 46b (regarding conversion of *geirim* nowadays).

<sup>386</sup> Consider the rivaling candidates for methods: commentary (explication of the text), associated with Rashi; dialectic, associated with the tosafists; codification of law, associated with Rambam; *pilpul*, associated with the early *aharonim*; conceptualism, associated with the nineteenth century Lithuanian school. The tendency to interpret rules as biblical or rabbinic addresses a different type of issue. It is a preference for a particular legal outcome rather than a method of interpretation or a mode of analysis.

Oded Yisraeli cites Yahlom's conclusion on what distinguishes Ramban's approach from the tosafists'. He formulates Yahlom's conclusion as follows:<sup>387</sup>

לעיתים קרובות [בחידושי הרמב"ן]... ניכרת נטייה להבחנות משפטיות עקרוניות יותר מאשר לפתרונות טכניים כדרכם של בעלי התוספות.

Taken by itself, Yisraeli's formulation suggests that Ramban's jurisprudence differed from the tosafists' in preferring "fundamental legal distinctions." Whereas the tosafists offered "technical solutions" to talmudic difficulties, Ramban sought to provide "fundamental legal distinctions." Understood this way, Yisraeli's formulation supplies important content to the literature noting that Ramban developed and advanced the method of the tosafists. Yisraeli's formulation suggests that the difference should be understood in terms of "technical solutions" versus "fundamental legal distinctions." The tosafists engaged in the former, while Ramban engaged in the latter. This is an important formulation, though Yisraeli does not offer any examples to explicate what he means by technical solutions versus fundamental distinctions. Nor does he provide further insight or explanation to give content to or to flesh out this distinction.

Moreover Yisraeli, in this formulation, is summarizing Yahlom's conclusion which, as we saw, actually offers a very different conclusion from the one that Yisraeli states. Yahlom argued that Ramban preferred to interpret talmudic rules as biblical in nature rather than rabbinic.<sup>388</sup> But even if we take

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<sup>387</sup> Oded Yisraeli, *Intellectual Biography*, p. 58.

<sup>388</sup> Since Yisraeli is citing Yahlom's conclusion, and since Yahlom uses the term "fundamental" to pick out the category of *de'oraita*, it seems that Yisraeli's formulation should be taken to mean "Ramban prefers distinctions that interpret rules as legally fundamental (i.e. belonging to the category of *de'oraita*)." This is clearly Yahlom's conclusion and would bring Yisraeli's summary of it in line with Yahlom's thesis.

The difficulty with Yisraeli's formulation, given that it is summarizing Yahlom's conclusion, is that it appears to conflate two different propositions. The proposition that Yisraeli states (or at least the plain meaning of it) appears

Yisraeli's formulation on its own, how should we understand this distinction? What makes a distinction "fundamental" versus "technical"?

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to be about the *types of distinctions* that Ramban draws. But Yahalom's conclusion actually only supports a (very different) proposition about the *desired result* of offering certain legal distinctions.

The difference between the two propositions is evident in cases where preserving a rule as *de'oraita* actually blocks an important, fundamental legal distinction from being drawn. For example--one from Yahalom's own analysis (see Yahalom, "De'orayta and De'rabanat", pp. 56-57)--Ramban interprets the category of *garmi* (indirect torts) as *de'oraita*. This results in the extension of a single *de'oraita* legal rule (tort liability) to cover a greater set of cases (*garmi* cases as well). By contrast, the tosafist position, which interprets *garmi* as a rabbinic penalty to deter certain types of activities--not a duty of repair for moral wrongdoing--actually requires a more fundamental legal distinction to be drawn between different types of torts (deterrent-penalty types and moral accountability-repair types) even though one set is rabbinic in nature.

A different way of putting this general point is that Yahalom's analysis just stipulates that the *de'oraita* categories are "fundamental" while the rabbinic categories are "ad hoc". But this is puzzling. Oftentimes, from the perspective of jurisprudence, a rabbinic category can be legally fundamental (e.g. *garmi*, *muktzah*, *Purim*, *Hanukkah*). Further the proliferation of rabbinic categories can generate and require a richer framework of fundamental legal distinctions (e.g. differences between Hanukkah candles and Shabbat candles; differences between Megillah reading and Torah reading; differences between types of *muktzah*). So Yahalom's mistake is to conflate "legally fundamental" with *de'oraita*. Yisraeli's summary of Yahalom's conclusion appears to incorporate this mistake by characterizing Yahalom's finding as having demonstrated that Ramban prefers legally fundamental distinctions.

Note the difference between Yahalom's statement of his conclusion in the Hebrew part of his article and Yisraeli's summary of it. Yahalom writes (p. 54):

[הרמב"ן] שיפר את יכולת ההבחנה של חכמי צרפת והכניס תחת הכללים העקרוניים מקרים שבעלי התוספות הגדירם חריגים מדרבנן.

While Yisraeli writes (p. 58), citing Yahalom:

בהצעתיו הפרשניות של רמב"ן ניכרת נטייה להבחנות משפטיות עקרוניות יותר מאשר לפתרונות טכניים כדרכם של בעלי התוספות (ראו: יהלום, דאורייתא ודרבנן)

The former discusses distinctions that allow for more rules to fall under the *de'oraita* category. The latter speaks of legal distinctions that are more fundamental or more principled.

In the text above, I work with Yisraeli's formulation as an independent formulation, and ignore the fact that it is summarizing Yahalom's conclusion. As an independent formulation, it comes closer to the thesis I propose later in this chapter, and document in the next chapter, about Ramban's conceptualism.

## Tosafist Dialectic

The distinctive features of Ramban's method can be discerned by carefully contrasting Ramban's method with that of his tosafist predecessors. The tosafists employed the method of dialectic, similar to the method employed by the scholastics.<sup>389</sup> The tosafists scoured the Talmud for parallel discussions and passages, collated all the discussions on a given topic, noted any contradiction between the different passages, and resolved the contradictions by distinguishing between the cases under discussion.<sup>390</sup> As Urbach and Soloveitchik have emphasized, the tosafists sought to *harmonize* the different passages of the Talmud and to render them consistent with each other.<sup>391</sup> They set out to "resolve contradictions and solve problems" by distinguishing between the different cases under discussion.<sup>392</sup> The "premise of dialectic is... that... the Talmud in its totality is a harmonious whole."<sup>393</sup>

In a concise passage, Soloveitchik describes dialectic as follows:<sup>394</sup>

ומה היא דיאלקטיקה? "עשיית" התלמוד או כל קורפוס אחר ל"כדור אחד" ... כלומר הדיאלקטיקה היא יישוב סתירות הנגלות בין כמה מקומות בקורפוס מסוים... השיטה הדיאלקטית מורכבת מפוא משלוש פעולות: איסוף (collatio) בלשון הסכולסטיקאים של ימי הביניים), גילוי סתירות (contradictio), ויישובן....

Characteristic of this method is Rabbenu Tam's bold assertion that even "when the Talmud rules 'liable' in one place and 'exempt' in another place, we [can] resolve them elegantly."<sup>395</sup> In other words, even if

<sup>389</sup> See Urbach, *The Tosafists*, pp. 744-752.

<sup>390</sup> Haym Soloveitchik, *Collected Essays I*, pp. 5- 7, 19.

<sup>391</sup> Urbach, *The Tosafists*, p. 741; Soloveitchik, *Collected Essays I*, p. 5.

<sup>392</sup> Urbach, *The Tosafists*, p. 752, describes the tosafists as being interested in:

יישוב סתירות וסילוק קושיות.

<sup>393</sup> Soloveitchik, *Collected Essays I*, p. 5.

<sup>394</sup> Haym Soloveitchik, *Wine in Ashkenaz in the Middle Ages* (Jerusalem, 2008), p. 116.

<sup>395</sup> See Urbach, *The Tosafists*, p. 741.

the Talmud flatly contradicts itself, Rabbenu Tam saw himself as capable of resolving the contradiction. R. Shlomo Luria's characterization of the tosafists captures this idea as well. He describes the tosafists' accomplishment as having brought together the different parts of the Talmud and forming it into a single, unified and coherent surface. This formulation captures the tosafist project of collation and reconciliation.<sup>396</sup>

Because the tosafist method focused on resolving contradictions in order to render the Talmud consistent, there is no pattern, certainly no ongoing rule, about *how* the tosafists reconciled these contradictions. Indeed, the tosafists employed a whole battery of tools to distinguish between talmudic cases. In some instances, they argue that passage A operates under the ruling of sage X, while passage B operates under the ruling of sage Y. In other cases, the tosafists distinguish between the facts of case A and the facts of case B (*ukimta*). In other cases the tosafists will offer a textual emendation to one passage in order to render it consistent with others.

The important point is that the tosafists' method emphasized reconciliation and harmonization, not the manner or content of the resolution. It is the fact of harmonization that matters, not the method or doctrinal content of the particular resolution. As Urbach notes, the tosafists did not seek to innovate or articulate fundamental or systematic legal principles.<sup>397</sup> Their goal was to resolve contradictions--to smooth out the wrinkles and knots in the system. For this reason, the tosafists employ a wide range of

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<sup>396</sup> Yam Shel Shlomo, Introduction Hulin II:

לולי חכמי הצרפתים בעלי התוספות שעשאוהו בכדור אחד... והפכוהו וגלגלוהו ממקום למקום שנראה לנו בחלום מבלי פותר... אלא סוגיא זו אומרת בכה וסוגיא זו אומרת בכה ולא קרב זה אל זה, ונמצא מיושר התלמוד ומקושר וכל הסתומות יתפשרו ותוכן פסקיו יאושר.

<sup>397</sup> Urbach, *The Tosafists*, p. 743:

גם לא חידשו עקרונות סידוריים.

techniques to resolve contradictions--distinguishing between authorities, offering an *ukimta* to distinguish the facts of the cases in question, textual emendations, etc.--without a clear preferred approach for one method over another. In many instances, the tosafists offer a distinction, without even explaining why the distinction should be legally or conceptually relevant to explaining the different rulings in the cases.<sup>398</sup> This is consistent with the characterizations of the tosafist method above offered by Urbach and Soloveitchik. It is the fact of harmonization that matters, not the legal principles or explanations that emerge from such distinctions.

Soloveitchik's formulation captures this phenomenon:<sup>399</sup>

בעלי התוספות בדרך כלל אינם מסבירים את הסבירות המשפטית ב"החילוקים" שלהם אלא אומרים בלשון קצרה "וי"ל דהבא מיירי" וכדומה.

And most recently, Soloveitchik writes:<sup>400</sup>

"The Tosafist approach is that of scholastic dialectics. One collates all the relevant texts on a given subject, takes note of the contradictions, and seeks to resolve them by making a distinction. One can almost always distinguish between two cases, and so pointing to a factual distinction is but half a solution. One must then show that this difference of fact is of legal

<sup>398</sup> See, for example, Tosafot Sanhedrin 3b s.v. Dinei Mamonot; Tosafot Bava Metzia 81b s.v. ve-Ha; and Tosafot Bava Metzia 99a s.v. de-Lo, discussed below in Chapter 5, example D.

Note also Soloveitchik's point that Ramban's school offered answers that are often more "logical" than Tosafot's. See Haym Soloveitchik, "Hadpasat Sefarim ve-ha-Historiyah Shel ha-Halakhah" (Hebrew), *Bar Ilan* 30-31 (5766), 321, noting that Ramban's answers are often

סבירים יותר מן התירוצים שבתוספות.

This stems from the fact that the tosafists sometimes offer distinctions without explaining why the distinction should matter legally and without providing any underlying rationale for the distinction.

<sup>399</sup> Haym Soloveitchik, "Beit Ha-Behirah Le-R. Menahem Ha-Meiri ve-Goralo", in *Asufah Le-Yosef*, p. 258.

<sup>400</sup> Haym Soloveitchik, "The Riddle of Meiri's Recent Popularity", *Collected Essays III* (2021), p. 400.

significance. Rabbenu Tam and Ri rarely explain the legal significance of their distinctions. They are content to simply state the factual difference... They leave the task of investing these distinctions with legal significance to their successors.”

### Ramban’s Conceptual Approach

In this section, I shall argue that Ramban’s method is distinguished from tosafist dialectic by its consistent and systematic pursuit of conceptual and fundamental legal distinctions. Whereas the tosafists focused on distinctions, *tout court*, Ramban systematically pursued a particular type of distinction: conceptual distinctions that a) articulate fundamental legal concepts and principles and b) that distinguish these concepts from each other by drawing fine-grained distinctions between them. It is this feature of Ramban’s method that distinguishes it from the tosafists’ method, and it is in this sense that it can be said that Ramban’s method “advanced” that of the tosafists. I shall contend that Ramban’s method is therefore best characterized as conceptualism. In chapter five I offer eleven examples of Ramban’s conceptualism that illustrate how Ramban’s method contrasts with tosafist dialectic. That analysis will demonstrate that it is inaccurate to portray Ramban’s method simply as a form of dialectic. Ramban’s conceptualism stands out as its own genre of halakhic jurisprudence. The scholarly literature which portrays Ramban as working within tosafist parameters continues to do so only because it has yet to offer a clear study or characterization of Ramban’s method.

There is a further sense in which Ramban’s method should be distinguished from tosafist dialectic. As the brief survey of dialectic makes clear, one of the key features of the dialectic is the scouring of the Talmud for parallel passages in search of contradictions. In Soloveitchik’s three-stage description of dialectic--*collatio*, *contradictio*, *distinctio*--the first two stages are conspicuously absent from Ramban’s *Hiddushim*. There is little evidence to suggest that Ramban was actively engaged in scouring the Talmud for fresh contradictions. In general, Ramban *uses* the problems and contradictions discovered by the

tosafists to offer his own solutions and conceptual distinctions. By contrast, the tosafists were actively engaged in collating talmudic passages in search of discovering contradictions.<sup>401</sup>

Conceptualism, as a method of talmudic analysis, is usually associated with the later scholars of the aharonim, especially the nineteenth century Lithuanian school founded by R. Chaim Soloveitchik. To a lesser extent, conceptualism is sometimes associated with earlier aharonim with a conceptualist bent, such as R. Aryeh Leib Heller, the author of the *Ketzot ha-Hoshen*, and R. Yaakov Lorberbaum, the author of the *Netivot ha-Mishpat*. At times, it is associated with even earlier aharonim such as R. Yaakov Yeshoshua Falk, author of the *Pnei Yehoshua*, R. Ezekiel Landau, author of the *Noda Bi-Yehudah*, and R. Yonatan Eybeschütz, author of the *Tumim*.<sup>402</sup>

Nevertheless, several scholars have noted the affinity between Ramban's method of talmudic analysis and that of these aharonim. Before we can identify the conceptualist method in Ramban's *Hiddushim*, we must identify and define the salient features of conceptualism. Only then can we ask whether Ramban's halakhic writings exemplify the conceptual approach.

### What is Conceptualism?

What characterizes the conceptual method of talmudic analysis? What are the salient features of conceptualism? As I use the term in this chapter, conceptualism is a method of talmudic analysis with two salient features. First, the conceptual method focuses on articulating and characterizing the

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<sup>401</sup> Note R. Menachem ibn Zerah's description of Ri's academy, cited in Urbach, *The Tosafists*, pp. 251-252:

שהיו לומדים לפניו ס' רבנים, שכל אחד מהם היה שומע ההלכה שהיה מגיד, גם היה לומד כל אחד לבדו מסכתא שלא היה לומד חבירו והיו חוזרים על פה ולא היה מגיד רבינו יצחק הלכה שלא היה בפיהם בין כולם כל הגמרא בין עיניהם כאותה הגדה עד שנתברר כל ספיקות שבגמרא, וכל הלכה ומאמר תנא או אמורא, שנראה היפך או סתירה במקום אחד, ישב ותיקן על אופנו...

This description clearly captures the tosafists' enterprise of comparing parallel talmudic discussions in search of contradictions. Ramban's academy could not be described as such.

<sup>402</sup> See the discussion of Ta-Shma and Soloveitchik below.



fundamental legal concepts, categories, and principles of the system of Jewish law. Thus, the conceptual method is less interested in how a legal rule gets applied to a given case. It is not interested in resolving contradictions *per se*--just for the sake of minimizing contradictions or harmonizing the corpus of law. It is primarily interested in ferreting out the fundamental concepts and principles of law that are often obscured by the Talmud's focus on rules, applications, and case law discussions.<sup>403</sup>

Second, the conceptual method employs fine-grained, nuanced conceptual distinctions (i.e. fine-grained distinctions between different concepts or types of concepts) to distinguish between different legal-talmudic principles. Conceptual distinctions do not distinguish between cases by distinguishing between the facts of case A and the facts of case B. Nor do they distinguish between cases by suggesting that case A follows the view of sage X and case B sage Y. Conceptual distinctions distinguish *conceptually* between the cases by showing that different legal concepts are at work in the different cases. Although two cases may appear similar on their surface, they can be distinguished by a careful analysis of the underlying concepts at work in each case.<sup>404</sup>

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<sup>403</sup> Note Normon Solomon's characterization of conceptualism as distinct from pilpul, in Normon Solomon, *The Analytic Movement: Hayyim Soloveitchik and His Circle* (University of South Florida Press, 1993), p. 105:

"[In] the non-Analytic [i.e. non-conceptualist] trend... contradictions are typically resolved by showing some difference in the circumstances to which each text applies. Every account of *pilpul* is replete with examples of this method... Amongst its most outstanding exponents we may mention Arye Lob ben Asher (d. 1785), author of Sha'agat Aryeh. For all his brilliance and ingenuity, the conceptualism characteristic of the Analysts is lacking in his thought. Even where he actually discusses a concept..., he carefully examines the circumstances and conditions under which the concept is applied by the great authorities who preceded him, but makes no attempt to analyse the concept itself apart from such considerations."

<sup>404</sup> This is why some writers characterize the conceptual method by its tendency to demonstrate that where others perceive a problem that needs to be solved, the conceptualist method can establish that "there never was a problem in the first place." See for example, R. Aharon Lichtenstein "The Conceptual Approach to Talmud Torah" in *Lomdus* R. Yosef Blau (ed.) *Lomdus*, (New York 2006), p. 18, discussed below:

*The First Dimension of Conceptualism: Fundamental Legal Concepts*

Scholars addressing the classic modern expressions of the conceptual method have drawn attention to both of these aspects of that method. In this section, I will show that my above characterization of conceptualism fits comfortably with characterizations of conceptualism in the literature. Regarding the first component of conceptualism--its emphasis on discovering the fundamental legal concepts and principles underlying the talmudic discussion--R. Yitzchak Adler writes:<sup>405</sup>

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“The conceptualist’s initial and instinctive thrust is in yet another direction. He will strive, wherever possible, to disarm the contradiction by portraying it as illusory. Even when affirmative and negative statements are diametrically opposed, the propositions need not be contradictory. They may refer, respectively, to different halakhic areas, each of which has its own set of definitions. Even when the nomenclature is identical, the terms may vary, depending on context.”

For a vivid example of this in Ramban’s *Hiddushim*, see the discussion below in Chapter 5, example H (Ramban Hullin 2b), where after documenting Tosafot’s question and answer, Ramban proceeds to offer a conceptual distinction defusing the very basis for Tosafot’s question. Ramban declares that, given his answer, the question is illusory:

אין הקושיא כלום!

See also Ramban, *Hiddushim* Shabbat 5a, where after citing Tosafot’s opinion, Ramban declares:

ואני אומר שאין עיקר קושייתם קושיא כלל!

See as well Ta-Shma’s astute observation, *Talmudic Commentary Part Two*, pp. 46-47:

מודעותו של הרמב"ן למשמעות ההבדל שבין סברותיהם של בעלי התוספות ל"חידושים" שחידש הוא, עולה בבירור מאופן התבטאותו, לעתים קרובות, בשעה שהוא מציג את עמדתו לעומת סברותיהם: 'ואני אומר שאין עיקר קושייתם קושיא כלל'; היינו הקושיא מעיקרא ליתא, כי יש לתפוס באופן אחר את עיקרו של העניין... הרמב"ן אינו רואה בו עוד 'תירוץ', אלא ביטול הקושיא מיסודה, משום שהוא מעמיד תפיסה חדשה של העיקרון הבסיסי העומד מאחורי הכלל הנידון.

<sup>405</sup> R. Yitzchak Adler, *Lomdus: A Substructural Analysis* (New York, 1989) p. vii. Note how Adler’s formulation of the method’s goal “to expose latent and camouflaged legal principles” is almost identical to Ramban’s formulations, discussed above in chapter two, in his introduction to his various works where he refers to the goal of talmud study as “to detect all the hidden [laws], and to reveal all the secrets [of the Talmud]” (Introduction to Tashlum Halakhot) and “to bring to light all the hidden [rulings], and to [be able] to make known the wisdom shut [inside it]” (Introduction to Milhamot).

“The conceptual approach... *lomdus*... is based on the idea that Talmudic statements are often reflections of *fundamental legal concepts*... The most complete form of comprehension of these statements is possible only upon discovery of their substructural elements. The conceptual approach views every Talmudic statement with the intent of discovering its substructural framework. It probes every line of the Talmudic tradition attempting to expose latent and camouflaged legal principles.”

Similarly, R. Aharon Lichtenstein explains: “The conceptual approach... is overwhelmingly tilted toward fundamentals... The conceptualist strives... to grasp the essential character of a particular element and... classify it.”<sup>406</sup>

Chaim Saiman notes that practitioners of the conceptual school believe that

“numerous and minute [legal] technicalities reflect an underlying coherent system of conceptual legal principles. The goal of classical legal analysis thus revolved around exploration and definition of these basic legal categories... The analysts moved away from the Talmud’s meandering narration, focusing instead on the concepts embedded within each passage.”<sup>407</sup>

R. Michael Rosensweig further observes that the conceptualist approaches talmudic problems with an eye towards formulating and characterizing fundamental legal principles:

“[Conceptualists] seize the opportunity provided by problematic positions... to dramatically reassess the character and scope of basic halakhic doctrines.... R. Hayyim’s clarification of a

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<sup>406</sup> R. Aharon Lichtenstein, “The Conceptual Approach to Torah Learning: The Method and Its Prospects,” in Yosef Blau (ed.) *לומדוט: The Conceptual Approach to Jewish Learning* (New York, 2006), p. 9.

<sup>407</sup> Chaim Saiman, “Legal Theology: The Turn to Conceptualism in Nineteenth-Century Jewish Law”, *Journal of Law and Religion* Vol 21 (2006), pp. 41, 71.

difficult Rambam entails a reexamination and reformulation of halakhic definitions that significantly transcend the difficulty that engendered his analysis.”<sup>408</sup>

Thus, the dialectician (such as the tosafist) and the conceptualist approach talmudic contradictions with different goals in mind. The dialectician approaches contradictions with an eye toward resolving them. His goal is to harmonize the corpus of law by minimizing contradictions within the corpus. The conceptualist approaches the same contradictions with an eye toward clarifying, characterizing, and classifying basic halakhic doctrines.

R. Aharon Lichtenstein emphasizes this dimension of conceptualism and contrasts it with other methods of talmud study. Conceptualism (unlike tosafist dialectic) is characterized by the type of legal interpretations it pursues:

“The theoretical bias of the conceptual approach is reflected not only in the question it poses and emphasizes but in the interpretation it prefers... [It prefers] to explain detail or controversy about detail, in terms of an ideational construct rather than with reference to factual or technical factors... The conceptual approach... is inherently oriented to dealing with primary issues...”<sup>409</sup>

[In general] contradictions between two authoritative texts can be resolved in several ways. One possibility is the emendation... A second is the acknowledgement that the conflict is irreconcilable, but that both sources can be sustained by ascription to different persons or

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<sup>408</sup> R. Michael Rosensweig, “Reflections on the Conceptual Approach to Talmud Torah,” in Yosef Blau (ed.), לומדות: *The Conceptual Approach to Jewish Learning* (New York 2006), pp. 193-194.

<sup>409</sup> Lichtenstein, “The Conceptual Approach,” p. 12.

traditions. The third is the neutralization of one or the other text by confining it to a given case....

“[Yet these approaches do not relate to] the world of ideas. Hence the conceptualist’s initial and instinctive thrust is in yet another direction. He will strive, wherever possible, to disarm the contradiction by portraying it as illusory. Even when affirmative and negative statements are diametrically opposed, the propositions need not be contradictory. They may refer, respectively, to different halakhic areas, each of which has its own set of definitions. Even when the nomenclature is identical, the terms may vary, depending on context.”<sup>410</sup>

As R. Lichtenstein notes, the conceptualist approaches contradictions with an eye toward probing the conceptual categories and principles underlying the different talmudic passages:

“The quest for resolution serves as a powerful catalyst for renewed examination and deeper probing of halakhic material; its upshot is frequently a revised and more precise understanding of the basic categories.”<sup>411</sup>

### *The Second Dimension of Conceptualism: Fine-Grained Distinctions Between Concepts*

Scholars have also drawn attention to the second component of conceptualism: the employment of novel fine-grained conceptual distinctions--introducing a set of concepts and distinctions that do not

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<sup>410</sup> Lichtenstein, “The Conceptual Approach”, p. 18.

<sup>411</sup> Lichtenstein, *ibid*, p. 17.

See also Saiman, *Halakhah: the Rabbinic Idea of Law* (Princeton, 2018), p. 203:

“These [conceptual] inquiries not only clarify talmudic conundrums but speak to foundational concepts like ownership, property rights, tort liability, marriage and divorce, the obligation of giving charity, the prohibition on charging interest, liability for intentional bodily harm, fasting, and prayer. In the Brisker’s hand, myriads of halakhic details that are neither intuitive nor relevant are recast as meaningful indicators of halakhah’s conceptual structure.

appear explicitly in the talmudic discussion--in order to distinguish between different types of legal concepts and principles. For example, whereas the Talmud speaks of a duty to expunge (*le-hashbit*) leavened bread before Passover, the conceptualist distinguishes between two distinct conceptions of the duty: between a duty *in personam* (to rid oneself of such bread) and the duty *in rem* (that the bread be destroyed). The conceptualist introduces this distinction even though the Talmud does not explicitly take up the *in personam/in rem* distinction in that context. Likewise, whereas the Talmud speaks of act-obligations, the conceptualist is interested in distinguishing between act-obligations whose legal significance resides in its consequence and act-obligations whose legal significance inheres in the performance of the act. Similarly, whereas the Talmud speaks of testimony but does not explicitly distinguish between different functions of testimony, the conceptualist is interested in distinguishing between testimony that is constitutive of some legal effect (*edei kiyum*) and testimony that is merely evidentiary of some event having taken place (*edei berur*).<sup>412</sup>

In all of these cases, the conceptualist introduces a richer conceptual framework of ideas than that which is explicit or manifest in the talmudic discussion.<sup>413</sup> As Lichtenstein explains,

“the conceptual approach finds expression in the cutting of new keys--some analogous to existing ones and extrapolated by transference, others perhaps wholly novel. These... enter the world of learning and enrich its vocabulary....<sup>414</sup>

Similarly, Yitzchak Adler:

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<sup>412</sup> For some of these examples, see *Hiddushei Rabbenu Hayyim ha-Levi al ha-Rambam*, Hilkhoh Hametz and Hilkhoh Yibbum, respectively.

<sup>413</sup> For further types and examples of the conceptualist school's fine-grained conceptual distinctions, see Adler's *Lomdus: A Substructural Analysis of Conceptual Talmudic Thought*; Saiman's *Legal Theology*, pp. 53 - 62; Normon Solomon, *The Analytical Movement*, pp. 117-197.

<sup>414</sup> Lichtenstein, "The Conceptual Approach," p. 16.

“This method, in order to successfully compare and contrast fundamental issues requires accurate definitional terminology and precise schemes of classifications. Such definitional precision and classificatory accuracy are the hallmarks of this method.”<sup>415</sup>

And Saiman notes that the conceptualist method is typified by

“introducing a distinction--often structured as a two-sided query--that refines the traditional understanding of the legal rule under review. The query often demonstrates that the rule is in fact comprised of two or more elemental components, or that there are two ways to understand the mechanism through which the legal rule is said to “work”.”<sup>416</sup>

Shai Wozner also emphasizes this aspect of conceptualism:<sup>417</sup>

הניתוח האנליטי... רואה חשיבות מיוחדת בניתוח אנליטי של המושגים הנדונים... באמצעות הניתוח האנליטי של המושגים מפריד הלומד בין העיקר לטפל, בין היסודות המהותיים של המושג או של הנורמה המשפטית לבין משתנים אקראיים.... כדי להגדיר במדויק את יסודות ההלכה... לעתים נחשפים באמצעות הניתוח האנליטי ממדים סמויים של הלכה שבמבט ראשון נראה שיש לה רק ממד אחד. זו היא תורתו של ר' חיים מבריסק, שהבחין בין שני 'דינים' במקום שאחרים ראו רק 'דין' אחד... באמצעות הניתוח אפשר להראות שלמרות הדימוי החיצוני בין הלכות סותרות מדובר לאמיתו של דבר בעניינים שונים שההבדל ביניהם מצדיק את הפער הנורמטיבי.

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<sup>415</sup> Adler, *Lomdus*, p. vii. The “definitional precision and classificatory accuracy” refers to the fine grained conceptual categories and distinctions that are not explicitly present in the Talmud’s surface discussion. See the many types of distinctions discussed in Adler’s work. In an “approbation” to Adler’s work, R. Michel Feinstein expresses skepticism about the use of terms or concepts not explicit in the talmudic discussion. R. Feinstein writes: ברם, לאדועי בעי שאין אנו צריכים לביטויים ומטבעות לשון מן החוץ אלא הכל מדברי התורה עצמם, הן ההלכה וגם הביטויים והסברת העניינים הכל ממנה מקשה אחת.

<sup>416</sup> Saiman, “Legal Theology”, pp. 50-51.

<sup>417</sup> Shai Wozner, *Legal Thinking in the Lithuanian Yeshivah* (Hebrew; Magnes, 2016), pp. 48-49.

We are now armed with a working characterization of conceptualism. Throughout this chapter and the next, I take conceptualism as a method that emphasizes these two goals: (1) the articulation of the fundamental legal concepts and principles of the legal system, and (2) the employment of fine-grained conceptual distinctions to characterize halakhic ideas and rules and to distinguish them from each other. To paraphrase R. Lichtenstein, the conceptual method is characterized by its pursuit of “[a] fundamental conceptual categories and [its use of (b)] finely honed distinctions.”<sup>418</sup> These are the two salient characteristics that identify the conceptualist method. It is with respect to these features that Ramban’s method of talmudic analysis can be characterized as conceptualist.

### Conceptualism and Nineteenth Century Conceptualism

Conceptualism as a method of talmudic analysis is generally associated with nineteenth century Lithuanian Talmud study, and the above characterizations of conceptualism from Lichtenstein, Rosensweig, Solomon, Saiman, and Wozner are primarily interested in characterizing that nineteenth century movement. However, it would be a mistake to view conceptualism as a uniquely nineteenth century phenomenon or even to limit it exclusively to the period of the aharonim. One important consequence of my thesis that Ramban’s method is best characterized as conceptualist is that conceptualism was very much alive in the period of the rishonim. Indeed, the above scholars acknowledge that the conceptual method was not invented in nineteenth century Lithuania. The conceptual approach can be traced back to the Talmud and rishonim.<sup>419</sup>

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<sup>418</sup> Lichtenstein, “The Conceptual Approach”, p. 24.

<sup>419</sup> Note, by way of analogy, Haym Soloveitchik’s observation about tosfist dialectic. This method wasn’t invented by Tosafot. The Amoraim employ this method in analyzing the Mishnah. But the method was dormant for hundreds of years until it was revived and employed systematically by the French tosafists. See Soloveitchik, *Wine in the Middle Ages*, p. 117:



Lichtenstein, for example, notes that

“the conceptual approach is no recent innovation. Its primary features are clearly present in Hazal, recurrently manifest in Rishonim, and amply exemplified by many Ahronim who were precursors of the Brisker tradition, with which the approach is now most familiarly associated.”<sup>420</sup>

And Normon Solomon acknowledges that “with the exception of certain linguistic peculiarities, none of the distinguishing characteristics of the [Conceptual] School is unique to it.”<sup>421</sup>

Similarly Rosensweig:

“The conceptual method did not arise in a vacuum [in the nineteenth century], nor does it represent any discontinuity in the unfolding of the *mesorah*.... The roots of this *derekh* are clearly evident in countless Talmudic passages. In some tractates, like *Keritot and Sanhedrin*, whole sections read like conceptual dialogue. Numerous trenchant examples of this mode of... conceptual thought can be adduced from the literature of Rishonim...”<sup>422</sup>

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רבנו תם לא המציא את הדיאלקטיקה ואף לא היה הראשון שעמד על הסתירות בתלמוד. הדיאלקטיקה כתובה בעט ברזל בכל עמוד ועמוד של התלמוד... מאז חתימת התלמוד עמדו הלומדים גם על הסתירות שיש בתלמוד, אך רבנו תם היה הראשון שהחזיר את עטרת הדיאלקטיקה ליושנה. בכוח גאוניותו הפעיל את המתודה הידועה לכול בהיקף שאיש לא פילל ובפוריות שלא שיערו קודמיו, ושינה את פני ההלכה.

<sup>420</sup> Lichtenstein, *ibid*, p. 23.

<sup>421</sup> Normon Solomon, *The Analytic Movement*, p. 100.

<sup>422</sup> R. Michael Rosensweig, “Reflections on the Conceptual Approach”, pp. 200-201. And note the following anecdote, p. 201 therein: “When the *Rav* encountered a particularly sharp or profound conceptual development in the *Rishonim*, he would sometimes comment with great excitement that its author was the forerunner of the Brisker *derekh*.”

Thus, although conceptualism is generally associated with particular schools of nineteenth century Lithuanian talmudism, it is not limited to those schools. As Rosensweig remarks, "R. Hayyim did not invent conceptual halakhic thinking. It was his systematic, sustained and disciplined [use of it], his unique halakhic vocabulary.... that was innovative."<sup>423</sup>

Shai Wozner's careful synopsis of conceptualism supports this conclusion:<sup>424</sup>

לאור האמור אין זה פלא שחשיבה אנליטית מצויה בשיח ההלכתי לדורותיו. מהסוגיות התלמודיות ועד דברי הראשונים והאחרונים, המנסים לברר את הגדרותיה ואת היקפה המדויק של כל הלכה והלכה. ובכל זאת, תופעה חדשה נגלית לפנינו בשיטה הליטאית החדשה. עד ל'מהפכה הליטאית' מעטים היו החכמים והחיבורים ההלכתיים שרוב עיסוקם בלימוד הסוגיות נעשה מנקודת מבט אנליטית. מאז התלמוד ואילך מוצאים אנו לצד הדיונים האנליטיים גם מתודות לימוד אחרות, והיו אף פרשני תלמוד ופוסקי הלכה שלא התעניינו כלל בביתוח האנליטי של המושגים ההלכתיים הנדונים. עיון בהיסטוריה... מגלה שדווקא המתודות האחרות, ולא המתודה האנליטית, הן שהתקבלו על פי רוב בבסיס העיקרי ללימוד... במשך דורות הקדישו לומדי התלמוד את עיקר מאמציהם לפרשנות הסוגיה מבחינה טקסטואלית ולבירור השקלא וטריא של התלמוד ושל בעלי התוספות, לעתים רבות מתוך הזנחת הניתוח האנליטי של המושגים הנדונים בסוגיה.

There is, then, widespread acknowledgement that conceptualism predates nineteenth century Lithuania. What distinguishes the nineteenth century movement is its scope: with respect to the number of practitioners as well as the manner in which it completely replaced competing methods to become the sole or primary method of talmudic analysis.

In Ramban's jurisprudence, conceptualism looms large as perhaps the most prominent method of talmudic analysis that he employed. This is not to say that Ramban did not also employ other methods. Whereas a work like R. Hayyim Soloveitchik's novellae on Rambam is *exclusively* devoted to conceptual

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<sup>423</sup> Ibid, p. 202.

<sup>424</sup> Shai Wozner, *Legal Thinking in Lithuanian Yeshivah*, p. 49.

analysis, Ramban's talmudic *Hiddushim* employ conceptualism alongside other methods of analysis: textual commentary, textual emendations on the basis of manuscripts, dialectic, and practical halakhic rulings.

However, a careful study of Ramban's *Hiddushim* demonstrates Ramban's consistent and systematic use of the conceptual method. Moreover, when we compare Ramban's analysis on a given talmudic discussion with that of his predecessors, it is Ramban's conceptualism that stands out as unique against the analysis of his predecessors. Ramban utilized the conceptual method in a more consistent and fruitful manner than any of his halakhic predecessors. Through his conceptual method, Ramban formulated hundreds if not thousands of novel legal distinctions and concepts throughout his halakhic writings.

Likewise, when we consider the works of Ramban's students--particularly Rashba and Ritva--the aspect of Ramban's *Hiddushim* that gets refined and sharpened in their works is the conceptual dimension.<sup>425</sup>

Thus, if we are looking to capture Ramban's distinctive contribution to talmudic analysis--where did halakhah stand before Ramban and where did it stand after--it is conceptualism that stands out as distinctively associated with Ramban's jurisprudence and legacy. Conceptualism looms large in Ramban's *Hiddushim* both as a prominent and consistent form of analysis that he employs and as one of

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<sup>425</sup> On the refinement of Ramban's insights through his disciples, see Haym Soloveitchik, "Beit Ha-Behirah Le-R. Menahem Ha-Meiri ve-Goralo", in *Asufah le-Yosef*, p. 258:

פעמים רבות לא חידשו רשב"א, ריטב"א, ור"ן שיטה חדשה אלא ניסחו בדרך מאירת עיניים... את שיטת הרמב"ן. הקורא בדבריהם יגלה עם איזה רעיון יוריספרודנצי התמודד רמב"ן ואף ניסה לבטא אותו. הם הבהירו והעמיקו את השיטות שאימצו. אצל אחרוני בית מדרשו של רמב"ן באים הרעיונות של קודמיהם לידי גמר-ביטוי ולפעמים אף לידי שכלול תוכן.... לעתים יש בכתבי רמב"ן כמה מילים עמומות אך "טעונות", ומרגישים שהן מקפלות בתוכן רעיון יסוד אלא שהן דורשות פיתוח וחשיפת המשמעות. באו תלמידיו ותלמידיו וגילו לנו מה רצה רמב"ן להביע.

the most distinctive features of his *Hiddushim* when compared to the talmudic works of his predecessors.

### Ramban and Conceptualism

Before we turn to document Ramban's conceptualism and to study specific examples of his conceptualist method, I should like to draw attention to the scholarly literature that has already observed a clear connection--both causal and substantive-stylistic--between Ramban's method (and that of his students and *beit midrash*) and the conceptualist method practiced by later aharonim.

Haym Soloveitchik has observed that the conceptualists of the aharonim--Pnei Yehoshua, Noda bi-Yehudah, Tumim, Ketzot, Netivot--were influenced by Ramban's method. He has also suggested that it was the publication of Ramban's *Hiddushim* in the eighteenth century that gave rise to this new era of halakhic conceptualism. Soloveitchik writes:<sup>426</sup>

לא רק התוכן הטכני של שיטות בית מדרשו של הרמב"ן השפיעו אלא אף החשיבה והניסוח. דומני שבלא הגזמה אביע תחושה כללית אם אומר שלעיתים תכופות התירוצים הניתנים בחידושי הריטב"א מהוקצעים יותר--מנוסחים ביתר בהירות ולפעמים אף סבירים יותר מן התירוצים שבתוספות. במילים פשוטות: אנו "נהנים" מהריטב"א יותר משאנו "נהנים" מהתוספות....חכמי ספרד ניגשו למלאכת הפרשנות ולפניהם פירושים רבים ומגוונים של קודמיהם. הם היו מצוידים גם בשיטת החשיבה של בעלי התוספות, ועוד פיתחו ושכללו אותה. אין תמה שהחשיבה ההלכתית של בעלי התוספות הגיעה למלוא שיעור קומתה בבית מדרשו של הרמב"ן. והבית שהחל רבינו תם לבנות גמר לבנותו הריטב"א. מובן אפוא למה הכנסתה רחבת ההיקף של תורת בית מדרשו של הרמב"ן פתחה עידן חדש בהלכה, ומיד ניכרו רישומיה בחיבורי "פני יהושע", "נודע ביהודה" ובמידה מסוימת אף בספר ה"תומים". אך בודדות בלבד, גם אם פניה מרובות עד מאוד עדיין אינה גישה. רק בדור הבא, אצל בעל "קצות החושן" ובן דורו הצעיר, בעל "נתיבות המשפט", מתגבשות

<sup>426</sup> Haym Soloveitchik, "Hadpasat Sefarim ve-ha-Historiyah Shel ha-Halakhah" (Hebrew), *Bar Ilan* 30-31 (5766), 321.

התובנות לכלל שיטת לימוד, ובגלגולה השני בליטא, בסוף המאה הי"ט, עיצבה שיטה זו את פני לימוד תורה הנהוג עד היום הזה.

According to Haym Soloveitchik, it was the method and style of Ramban's *beit midrash* that influenced and even ignited the turn to the conceptual method of Talmud study amongst the aharonim.<sup>427</sup>

More recently, Soloveitchik has called attention to the similarity in style between Ramban's school and the Lithuanian conceptual school, emphasizing the two dimensions of conceptualism that we outlined earlier in the chapter:

בכתבי ריטב"א ור"ן הגיעה החשיבה [הזאת] לשיאה בבהירות הניסוח ובהטעמה משפטית. גם הגישה הליטאית מנסה להבחין בין דברים שלכאורה הם זהים או דומים, לגלות את התוכן הרעיוני של שיטות על ידי הבחנות בין הדברים האלה ולזרוע אור על הרעיון המשפטי הגנוז ביסוד שיטה משפטית טכנית. זה שורש הקרבה של אסכולה זו לגישת ה"ראשונים", ההתרכזות הבלבדית בדבריהם וקרבתם המיוחדת לריטב"א ולר"ן.<sup>428</sup>

Yisrael Ta-Shma offers a similar insight connecting Ramban's method to the rise of conceptualism in the period of the aharonim. He demonstrates that the decline of *pilpul* as the dominant method of talmudic

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<sup>427</sup> Note especially:

הכנסתה רחבת ההיקף של תורת בית מדרשו של הרמב"ן פתחה עידן חדש בהלכה.

<sup>428</sup> Haym Soloveitchik, "Beit Ha-Behirah Le-R. Menahem Ha-Meiri ve-Goralo", in *Asufah Le-Yosef*, p. 258. See, most recently, Haym Soloveitchik, "The Riddle of Me'iri's Recent Popularity", *Collected Essays III*, p. 400:

"This school [of Ramban] not only advanced systematically new and different distinctions, but also gave a jurisprudential dimension to their own distinctions and those of the Tosafists... The currently dominant Lithuanian school of talmudic analysis also attempts to draw distinctions between ostensibly similar rulings and to uncover the conceptual content of differing legal positions. This is the main reason for the sense of closeness that exists between the two schools, especially in the Lithuanian attraction to the *hiddushim* of Ritva and Ran."

analysis amongst the aharonim and the rise of the conceptual method correlate to the printing and publishing of the *Hiddushim* of Ramban and his school. Ta-Shma calls attention to, what he calls,

[ה]קשר ההדוק הקיים... בין המפנה הדרמטי שנתחולל בשיטת הלימוד בישיבות מרכז אירופה מאמצע המאה ה"ח ואילך לבין חדירת חידושי הספרדים [מבית מדרשו של הרמב"ן], שהחלו נדפסים לראשונה באותן שנים, לאזורים אלה.<sup>429</sup>

Identifying Ramban's method with the conceptual method employed in contemporary yeshivot, Ta-Shma suggests that "Ramban's method" is now the "classic" method of study in contemporary yeshivot. He also credits Ramban with influencing the Pnei Yeshoshua's conceptual approach to Talmud.<sup>430</sup> Ta-Shma writes:

את שיטתו העביר הרמב"ן לתלמידיו ולתלמידי תלמידיו, גדולי ישראל המפורסמים כמו הרשב"א, הרא"ה, הריטב"א, הר"ן ועוד. אלה קיימו גם הם ישיבות גדולות ומרובות תלמידים בספרד, ובהן הלכה ונתבססה, הלכה ונשתכללה, "שיטת הרמב"ן". שיטה ממוזגת זו, שהיא השיטה הקלסית בלימוד התורה, נוהגת עד היום הזה, ובמיוחד בתקופות האחרונות, בכל ישיבות ישראל הגדולות, בארץ ובחו"ל. אולם, היא נעלמה מעיני הלומדים, בעיקר בישיבות האשכנזיות, ולא נודעה שוב עד ראשית המאה ה"ח, משום שלא נדפסה כמעט כלל. מתוך כך נשתרש יותר ויותר ה"פלפול", הבלתי ממוזג ובלתי מסויג...

הדפסתם של חידושי הספרדים [מבית מדרשו של הרמב"ן], החל בראשית המאה ה"ח... היא שהביאה את הקץ על פרק זה בתולדות הלימוד האשכנזי ופתחה בו פרק חדש. בעל ספר "פני יהושע" שהיה מראשי המהלך החדש, היה מודע

<sup>429</sup> Israel Ta-Shma, "Seder Hadpasatan shel Hiddushei Ha-Rishonim Le-Talmud" in *Studies in Medieval Rabbinic Literature II: Spain*, (Jerusalem, 2004), p. 220.

<sup>430</sup> See Ta-Shma's characterization of Pnei Yehoshua's analytic-conceptual method in Israel Ta-Shma, "Seder Hadpasatan" p. 235n:

פעולתו של בעל הפני יהושע שהעמיד במקום השיטה הדיאלקטולוגית-הפורמלית, בעלת המסגרת השמרנית והכללים הנוקשים לניתוח כל סוגיה במקומה בדרך לא השוואתית, את שיטת ההעמקה האנליטית-התוכנית, תוך הסתייעות מרובה בספר "יד החזקה" לרמב"ם וחשיפת הגיונה הפנימי של הסוגיה.

בבירור להשפעת הספרדית החדשה, והיא משתקפת בבירור ובגלוי בין דפי ספריו... גם שלב ההתפתחות החדש ביותר בסגנון לימוד התורה בקרב האשכנזים, הלוא היא שיטת הלימוד מיסודו של ר' חייב סולובייצ'יק הינה, בעומק הדבר, שכלול (לוגי וטרמינולוגי) של מפעלו של בעל "פני יהושע".<sup>431</sup>

In addition to Haym Soloveitchik and Yisrael Ta-Shma, students of Rabbi J. B. Soloveitchik report that R. Soloveitchik on occasion would remark that Ramban in particular was a forerunner of the Brisker/conceptual approach. For example, R. Michael Rosensweig writes:

“The Rav has noted that Ramban is particularly inclined to approach and then shy away from... some [conceptual] halakhic breakthroughs... Surely the very fact that a halakhist of Ramban’s stature is predisposed to a given perspective [i.e. that of the conceptualist] establishes its significance.”<sup>432</sup>

In different ways, these scholars have identified important similarities between Ramban’s method and the method of the conceptualists of the aharonim.<sup>433</sup> These similarities and influences lend additional support to my contention that Ramban’s method is best characterized as conceptualist. I put forth this characterization of Ramban’s method in the next chapter.

## Chapter Conclusion

In this chapter, I have shown that the scholarly literature is in agreement that Ramban advanced the tosafist method. But the same literature provides no characterization of Ramban’s method. Nor does it

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<sup>431</sup> Israel Ta-Shma, “Seder Hadpasatan shel Hiddushei Ha-Rishonim Le-Talmud” in *Studies in Medieval Rabbinic Literature II: Spain*, (Jerusalem 2004) pp. 235-236.

<sup>432</sup> R. Michael Rosensweig, “Reflections on the Conceptual Approach”, p. 205. Professor Berger has also related to me that R. Soloveitchik singled out Ramban, in particular, as an important forerunner of the Brisker-conceptual method.

<sup>433</sup> Even though these same scholars characterize Ramban as a practitioner of tosafist dialectic!

provide a clear characterization of the manner in which Ramban's method differs from that of the tosafists or how he advanced tosafist dialectic.

Further, I have suggested that Ramban's method is best understood as conceptualism. I have carefully reconstructed and identified the core features of the conceptual approach, drawing on the literature characterizing the nineteenth century Lithuanian movement. This clears the path for my presentation in chapter five where I will document eleven examples that demonstrate Ramban's conceptual method. To motivate the relationship between Ramban's jurisprudence and conceptualism, I have shown that several scholars have noticed crucial similarities between Ramban's method and that of the Lithuanian conceptualists as well as the conceptualists of the earlier period of the aharonim. I have also shown that scholars perceive a causal influence of Ramban's *Hiddushim* and method on the birth of the later conceptualist school. They have not, however, set forth with any specificity how Ramban's method adumbrates and influenced that school.

Since one of my goals is to explicate the observation of the scholarly literature that notes a difference between Ramban's method and that of the tosafists, I have also carefully characterized tosafist dialectic and argued that it is actually quite distinct from Ramban's method of conceptualism. This suggests that, if I am right to characterize Ramban's method as conceptualist, much of the scholarly literature is mistaken in characterizing Ramban's method as an articulate and more literate form of tosafist dialectic.<sup>434</sup>

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<sup>434</sup> There appears to be some confusion in the literature about the extent to which the contemporary method employed in Lithuanian yeshivot follows the tosafist method of dialectic or Ramban's method. Haym Soloveitchik, for example, writes (*Wine in Ashkenaz in the Middle Ages*, p. 117) of dialectic:

החשיבה ההלכתית בימינו עדיין סמוכה על שולחנם של רבנו תם ור"י גם בשעה שהיא מפליגה ממנו ולעילא.



## Chapter 5: Ramban's Conceptual Jurisprudence

### Introduction

This chapter offers eleven examples of Ramban's conceptual reasoning. Having systematically studied Ramban's *Hiddushim* over several talmudic tractates, and after carefully comparing Ramban's analysis of the talmudic discussion to that of the tosafists, it became clear to me that Ramban not only added a further layer of analysis to the talmudic discussion over that which was offered by the tosafists but that Ramban's analysis was qualitatively different. The strong trend that emerged from my study was that Ramban consistently offered "more fundamental" legal solutions to the problems raised by the tosafists and was introducing fine-grained legal distinctions where the tosafists did not. By comparing Ramban's analysis and method to that of the tosafists, I concluded that whereas the tosafists were primarily engaged in dialectic, Ramban was engaged in conceptualism. Ramban's analysis exemplifies the features

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As we saw, Soloveitchik elsewhere ("Beit ha-Behirah le-R. Menahem ha-Me'iri ve-Goralo") characterizes Ramban's method as a "more literate" expression of dialectic. In one formulation, he states:

יורשיהם הרוחניים של רבנו תם ור"י הם חכמי קטלוניה, רמב"ן ובית מדרשו...בית מדרש זה הוסיף לא רק רובד של תירוצים חדשים  
אלא גם ממד חדש לחשיבה הדיאלקטית...

Soloveitchik thus characterizes Ramban's method as a form of dialectic. Clearly, Soloveitchik has a capacious conception of dialectic. Given the important differences between dialectic and conceptualism that I've outlined above, it is more precise to characterize Ramban's method as conceptual, which is distinct from dialectic. If this is correct, then it is safe to say that the חשיבה ההלכתית בימינו is more לעילא [מר"ת והר"י] and less סמוכה על שולחנם.

This coheres more with Ta-Shma's formulation ("Seder Hadpasatan shel Hiddushei ha-Rishonim le-Talmud" in *Studies in Medieval Rabbinic Literature II: Spain*, (Jerusalem, 2004) pp. 235-236) which sees Ramban's method as the classic method employed in contemporary Yeshivot:

את שיטתו העביר הרמב"ן לתלמידיו ולתלמידי תלמידיו, גדולי ישראל המפורסמים כמו הרשב"א, הרא"ה, הריטב"א, הר"ן ועוד. אלה קיימו גם הם ישיבות גדולות ומרובות תלמידים בספרד, ובהן הלכה ונתבססה, הלכה ונשתכללה, "שיטת הרמב"ן". שיטה ממוזגת זו, שהיא השיטה הקלסית בלימוד התורה, נוהגת עד היום הזה, ובמיוחד בתקופות האחרונות, בכל ישיבות ישראל הגדולות, בארץ ובחו"ל.

of conceptualism outlined in chapter four; the tosafists' method does not.<sup>435</sup> Moreover, Ramban's method fails to exemplify some of the core features of dialectic. Ramban generally does not engage in an original enterprise of collating talmudic discussions (*collatio*) in search of contradictions (*contradictio*). Instead, he largely works off the contradictions discovered by the tosafists, offering new solutions to the problems they discovered.

To demonstrate Ramban's conceptualism, this chapter provides eleven examples that illustrate Ramban's conceptual method of talmudic analysis. The aim of this chapter is two-fold. First, by presenting these examples that contrast Ramban's approach to the *sugya* with the approach of the tosafists, I wish to convey, in tangible form, the palpable trend that emerged from my study of Ramban across several tractates. I present these examples as illustrative of the larger trend that was borne out by my study.

Second, these perspicuous examples of Ramban's conceptualism offer the reader concrete, full-blooded illustrations of Ramban's conceptual method in action. The examples clearly demonstrate the nature of Ramban's conceptualism, how Ramban utilized the conceptual method as a powerful tool of talmudic analysis, and how Ramban's conceptual approach differs from tosafist dialectic. Throughout these examples, I show how Ramban's analysis consistently pursues the two features of conceptualism that

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<sup>435</sup> In chapter four, we saw that conceptualism has two important features: fine grained conceptual distinctions and the articulation of the fundamental legal concepts and principles. As I note above, Ramban's analysis exemplifies the features of conceptualism whereas the tosafists' does not. Here I wish to emphasize that the distinction between Ramban and Tosafot also cuts the other way: Ramban's method *fails* to exemplify certain features of dialectic. For instance, dialectic is characterized by collation and contradiction (see above, chapter four), in addition to reconciliation. However, there is scant evidence to suggest that Ramban was actively engaged in collating talmudic passages on a given topic to note contradictions. Ramban worked with the set of problems discovered by the tosafists. In other words, Ramban did not engage in the enterprise of collation and contradiction which are two core features of dialectic. He simply *used* the problems discovered by the tosafists to engage in his own conceptual analysis.

were outlined above in chapter four: a) the articulation of fundamental legal concepts and principles, and b) the use of fine-grained conceptual distinctions to define and to refine the legal categories of halakhah.

Throughout these examples, I contrast Ramban's conceptual analysis with the more *ad hoc* and non-conceptualist approach of his tosafist predecessors. In many of these cases, Ramban's conceptualism allows him to offer compelling solutions where his predecessors fell short. It also allows him to offer crucial insight into the fundamental legal principles that lie at the heart of Jewish law.<sup>436</sup>

#### A. Damages for Breach of Affirmative Duty

Our first example is drawn from Ramban's discussion of a witness's duty to testify and whether the witness can be liable in tort to the litigant for failing to testify on his behalf. Commentators (see, e.g., *Piskei ha-Rid* Bava Kamma 56a; Meiri Bava Kamma 56a) raise the following difficulty. The Talmud in Bava Batra 2a discusses a defendant who breached his duty to his neighbor by failing to repair a wall that separated the defendant's vineyard from the plaintiff's wheat field. The defendant's vines invaded the plaintiff's field, rendering the latter's produce a "mixed kind" (*kilayim*) and disqualifying it from consumption. Because the defendant breached his affirmative duty to repair the wall, the Talmud finds him liable for damages.<sup>437</sup>

But commentators note that this appears to contradict the legal principle that emerges from the Talmud's ruling in Bava Kamma 55b-56a. There the Talmud rules that a witness's breach of his affirmative duty to testify on behalf of a litigant cannot result in liability, even if the latter suffers a

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<sup>436</sup> These examples also illustrate the sense in which Ramban generally worked off the problems and contradictions discovered by the tosafists. In all of the examples below, Ramban offers novel solutions to problems raised by the tosafists. Ramban is not engaged in his own original enterprise of *collatio* and *contradictio*.

<sup>437</sup> Bava Batra 2a-b:

מחיצת הכרם שנפרצה - אומר לו גדור, חזרה ונפרצה - אומר לו גדור, נתיאש הימנה ולא גדרה - ה"ז קידש וחייב באחריות!.

financial loss as a result.<sup>438</sup> Thus, whereas the Talmud in Bava Batra 2a appears to hold that a passive breach of an affirmative duty constitutes a tort and may result in financial liability, the Talmud in Bava Kamma 55b-56a appears to hold that it cannot.

Commentators disagree on how to reconcile the two passages. In both cases the defendant breached his affirmative duty, resulting in losses for the plaintiff. But only the Bava Batra vineyard case generates liability. Some commentators from the tosafist school attempt to reconcile the passages through the technique of *ukimta*, by limiting the discussion in Bava Kamma to a case of a single-witness (*'ed ehad*). R. Isaiah di Trani (RiD) argues that since the testimony of a single-witness (*'ed ehad*) in Jewish law is not dispositive in resolving the dispute, the single-witness's breach of duty did not cause the litigant any financial loss, so the single-witness cannot be held liable. In other words, RiD concedes that two witnesses who jointly breach their affirmative duty to testify would in fact be found liable in tort.<sup>439</sup> This brings the ruling in Bava Kamma 55b in line with Bava Batra 2a.

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<sup>438</sup> Bava Kamma 55b:

תניא, אמר ר' יהושע: ארבעה דברים, העושה אותן פטור מדיני אדם וחייב בדיני שמים, ואלו הן... והיודע עדות לחבירו ואינו מעיד לו.

<sup>439</sup> See Piskei ha-RiD Bava Kamma 56a:

והיודע עדות לחברו ואינו מעיד לו. במאי עסיקי' אילימ' בבי תרי בדיני אדם נמי נחייב דכת' באם לא יגיד ונשא עונו קאי, אלא בחד.

RiD's interpretation of the Bava Kamma passage contrasts with the standard interpretation that denies monetary compensation, see, e.g., Meiri Bava Kamma 56a:

ומה שאמרו בסוגיא אי בתרי באם לא יגיד קאי לאו למימרא דליחייב בידי אדם דמה ענין לחייב את האדם במניעת דבור.

RiD studied with R. Simhah of Speyer in Germany together with R. Yitzhak Or Zarua'. RiD maintained a close relationship with R. Yitzhak Or Zarua' even after returning to Italy. See Ta-Shma *Talmudic Commentary Part Two*, p. 175.

For RiD's relationship with the tosafists and whether his works should be viewed as part of the French tosafist canon, see Ta-Shma, *Studies in Medieval Rabbinic Literature III: Italy and Byzantium* (Jerusalem, 2005), p. 9:

הרב ישעיה די טראני, בעל ספר "תוספות רי"ד" לתלמוד, מחכמי התורה המפורסמים במאה הי"ג היה... מבחינת אופי תורתו ודרכי לימודו יש לראותו כחכם אשכנזי מובהק--או ליתר דיוק: חכם אשכנזי-צרפתי מבית מדרשם של בעלי התוספות, וניכרים קשריו המיוחדים עם רבי יצחק אור זרוע, ראש לחכמי אשכנז במחצית הראשונה של המאה הי"ג.

see also Ta-Shma, *Talmudic Commentary Part Two*, p. 177:

Other commentators reconcile the passages by arguing that even two witnesses who jointly breach their duty to testify cannot be found liable in tort, because the causal connection between their breach of duty and the litigant's loss is too tenuous to generate liability. After all, it is quite possible that their testimony would not have been sufficient to generate liability; even had they testified, they might have been disqualified by cross examination (*derishah va-hakirah*). Moreover, it is quite possible that their testimony may not have been necessary to generate liability; a different set of witnesses might testify and secure the same legal result. Given these possibilities, the witness's breach of duty did not cause the litigant's loss with certainty. Therefore, the witnesses cannot be held liable. By contrast, in the vineyard case, the defendant's vines are the certain cause of the plaintiff's loss.<sup>440</sup> According to this approach, the talmudic passages are reconciled by distinguishing between different degrees of causal involvement.

Ramban's approach is different. He argues that the distinction between the cases is explained by the conceptual difference between two types of obligations. Whether a breach of a primary duty gives rise

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אכן מיוחד במינו הוא ספר 'תוספות רי"ד'... השם 'תוספות' נקרא על חיבור זה כבר בכתב-היד האיטלקי הקדום שממנו נדפס... מן הצד הזה היה ראוי לשאול האם אכן מהווים תוספות רי"ד חלק מן המכלול הספרותי הנכבד המכונה 'תוספות'... התשובה לשאלה זו אינה פשוטה. הספר מקיים קווי דמיון בולטים לספרות התוספות מחד גיסא... מהווה הספר מעין שלב ביניים בין פרשנות שמגמתה פסיקתית מובהקת, בסגנון ספריהם של הפוסקים האשכנזיים הגדולים בני המאה הי"ג אשר אצל מקצתם למד, לבין פרשנות למדנית טהורה, בעלת אופי 'תוספותי' צרפתי. פרשנות 'לשמה' המגלגלת יחדיו סוגיות רבות ומגוונות ל'כדור אחד', בסגנון פלפול בעלי התוספות וסברותיהם המקוריות...

<sup>440</sup> See Meiri Bava Kamma 56a, citing Hakhmei ha-Dorot:

היודע עדות לחברו ואינו מעיד בין שהם שנים שכבישת עדותם מפסדת ממון בין שהוא אחד שכבישת עדותו מפקעת שבועה פטור בדיני אדם... שאף גרמא אין כאן הואיל ואין כאן מעשה ומה שאמרו בסוגיא אי בתרי באם לא יגיד קאי לאו למימרא דליחייב בידי אדם דמה ענין לחייב את האדם במניעת דבור אלא כך פירושו באם לא יגיד קאי ופשיטא דחייב בידי שמים ואף ברוב ספרים גורסים בה בהדיא פשיטא ושמה תאמר והלא במחיצת הכרם שנפרצה ב"ב' ב' אם נתיאש בעל הכרם ולא גדרה חייב באחריותה... חכמי הדורות שלפנינו תירצו בה שמאחר שנודע בודאי שהאיסור בא על ידי כך הרי הוא כגורם בידיים.

Still others argue that the plaintiff's loss in the vineyard case resulted from an act of commission—the *active* growth of the defendant's vines—whereas the harm in the case of the witness's forbearance results from the defendant's act of omission—his refusal to testify. See Meiri Bava Kamma 56a:

יראה לי בו שמ"מ יש כאן מעשה שלו והוא שגפניו מתפשטים מתוך גדולם ומקדשים את התבואה.

to a secondary duty of compensation depends on the conceptual nature of the primary duty. Ramban argues that the duty to testify is grounded in the concept of *gemilut hasadim*, what we might call a “charitable duty”—that is, a supererogatory duty or an “imperfect” duty. Breaching a duty of *gemilut hasadim*—like failing to give charity—does not generate a secondary duty of compensation. This type of primary duty is not sufficiently obligatory to generate a duty of compensation upon its breach.<sup>441</sup>

By contrast, Ramban argues, the defendant’s duty to maintain the vineyard wall to shield his neighbor from *kilayim* is a “strict” monetary duty (*hiyuv mamon*)—what we might call a strong duty or a perfect duty.<sup>442</sup> Breaching this type of duty is tortious and generates a secondary duty of compensation.<sup>443</sup>

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<sup>441</sup> For the distinction between primary and secondary duties, see Wesley Newcomb Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning”, *Yale Law Journal* 26:8 (1917), p. 752 (“A... primary right, or claim... should, regarding its character as such, be carefully differentiated from the... secondary right, or claim... arising from a violation of the former.... It is clear that if B commits a destructive trespass on A’s land, there arises at that moment a new right, or claim, in favor of A--i.e. A so-called secondary right that B shall pay him a sum of money as damages.”)

See also Jules Coleman, Scott Hershovitz, and Gabriel Mendlow, “Theories of the Common Law of Torts,” in *The Stanford Encyclopedia of Philosophy* (Winter 2015 Edition), Edward N. Zalta (ed.). (“Corrective justice theory... understands tort law as embodying a system of first- and second-order duties. First order duties prohibit conduct... or inflicting an injury... Second order duties in torts are duties of *repair*. These duties arise upon the breach of first-order duties.”)

<sup>442</sup> For the distinction between perfect and imperfect duties, see Samuel Fleischacker, *A Short History of Distributive Justice* (2004), pp. 20- 28.

<sup>443</sup> Ramban, Dina De-Garmi (ed. Hirshler), pp. 129-130.

והיודע בעדות חברו ואינו מעיד לו, אי בחד בלחוד לא עבד ליה ולא מידי דדילמא הוה משתבע היאך ומפטור, ומיהו תרי נמי מפטרי דאקשינן בגמרא אפטור מדיני אדם וחייב בדיני שמים אי בתרי דאורייתא הוא, ולא אקשינן אי בתרי אמאי פטור מדיני אדם, ותניא בתוספתא דשבועות (פ"ג ה"א) וכן המשביע את העדים על דבר שיש בו שוה פרוטה וכפרו הרי אלו חייבין קרבן ופטורין מן הממון (של) [שנאמר] ונשא עונו, וטעמא דמילתא שאף הוא אינו חייב להעיד לו אלא מדין גמילות חסדים שחייבה תורה להעיד, ואם לא רצה לקיים אותה מצוה אין מן הדין לחייבו ממון, מה שאין כן בנתיאש הימנה ולא גדרה דכיון שהוא חייב ממון לגדור ולא גדר ונתיאש חייב, שהרי הוא מזיקו ביאושו וגפניו הם האוסרין והוא גורם האיסור, אבל מי שאינו רוצה להעיד פטור שאין עליו חייב ממון אלא מדרך גמילות חסדים ואם אינו רוצה לטרוח ולהצילו לזה אינו חייב, למה זה דומה למי שרואה כיסו של חברו אבד ואינו מצילו או מי שאינו רוצה ליתן

Thus, Ramban reconciles the talmudic passages by distinguishing conceptually between two different types of duties: imperfect duties (or weak duties) that arise in *gemilut hasadim* and perfect duties (or strong duties) that arise in *hiyuv mamon*. This type of distinction is characteristic of the conceptual method's use of fine-grained conceptual distinctions that enrich and expand the categories that appear in the text of the Talmud according to its plain meaning. The Talmud speaks of obligations, but Ramban distinguishes internally between these two different conceptions of obligations: perfect and imperfect ones.

Ramban's analysis also embodies the second feature of conceptualism: the explication of the fundamental concepts and principles of Jewish law. Here Ramban's distinction articulates a hitherto unformulated fundamental concept in Jewish law. In Ramban's analysis, certain "hoshen mishpat" civil obligations (e.g. the duty to testify) are really grounded in *gemilut hasadim* and are governed by a different set of legal rules (e.g. no duty to compensate upon breach).

Ramban applies this newly articulated legal principle elsewhere. In his commentary on the Torah, in Devarim 23, Ramban asks why it is permissible to charge interest to a gentile if the Torah prohibits improper takings from a gentile in other areas of law, such as theft and price gouging. Applying the above distinction, Ramban argues that the prohibition of charging interest is an imperfect (weak) duty, while the prohibitions against theft and price gouging are perfect ones. The prohibition of interest, Ramban argues, is grounded in *gemilut hasadim* (*hesed, tzedakah*). Therefore the prohibition only applies to special relationships framed by a sense of communal fraternity (*ahvah*). Unlike theft and price

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פרוטה משלו לעני שאין בית דין מחייבין אותו בכך, אף כאן אין בית דין מחייבין אותו לשלם מביתו שלא חייבתו התורה בכך אלא כשאר המצות היא זו ואינה בדין ממון.

Professor Halbertal has pointed out to me that Ramban here also appears to emphasize the notion of *cause*:

וגפניו הם האוסרין והוא גורם האיסור.

gouging, which are grounded in perfect duties of *hiyuv mamon* and therefore apply equally between Jew and gentile, the interest prohibition applies only between Jews.<sup>444</sup>

To conclude our discussion of this example, Ramban's conceptualist approach to the contradiction between the talmudic passages in Bava Kamma and Bava Batra clearly differs from that of his colleagues and predecessors. Ramban offers a conceptual distinction between two types of legal duties (perfect and imperfect, or *mamon* vs. *hesed*), while articulating a fundamental legal category of "hoshen mishpat" duties grounded in *gemilut hasadim*. Other commentators offered more *ad hoc* solutions. Tosafot RiD put forth an *ukimta*, restricting the Bava Kamma ruling to a case of a single witness. Another commentator distinguished between different degrees of causal involvement. By contrast, Ramban's distinction unearths a fundamental category of jurisprudence and creates fresh conceptual categories. Ramban's distinction not only resolves the contradiction between the passages; it offers an important framework for classifying different duties and the kinds of liabilities they can generate.

## B. Contracts: an Employer's Liability for Reneging on an Employment Arrangement

The second example is drawn from Ramban's analysis of an employer's obligation to pay damages when he backs out of an employment arrangement. The Talmud, Bava Metzia 76b, outlines basic rules for holding an employer liable for reneging on an employment arrangement. According to the Talmud, if the employer reneges before the worker "sets out" to the job (*lo halkhu*) then the employer is not liable. But

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<sup>444</sup> Ramban Devarim 23:20:

וביאר בבאן שיהיה רבית הנכרי מותר, ולא הזכיר בן בגלז ובגנבה כמו שאמרו (ב"ק קיג ב) גזל גוי אסור. אבל הרבית שהוא נעשה לדעת שניהם וברצונם לא נאסר אלא מצד האחווה והחסד, כמו שצוה (ויקרא יט יח) ואהבת לרעך כמוך, וכמו שאמר (לעיל טו ט) השמר לך פן יהיה דבר עם לבבך בליעל וגו', ועל כן אמר למען יברכך ה' אלהיך - כי חסד ורחמים יעשה עם אחיו כאשר ילוננו בלא רבית ותחשב לו לצדקה. וכן השמיטה חסד באחים, לכך אמר (שם פסוק ג) את הנכרי תגוש, וקבע לו ברכה, כי הכתוב לא יזכיר הברכה רק בצדקה ובהסדים, לא בגזל ובגנבה ובאונאה.



the employer is liable when he reneges after the worker has set out (*halkhu*) on his commute to the job.<sup>445</sup>

The tosafists are troubled by the Talmud's *halkhu* standard. Why should the workers' setting out to the job (*halkhu*) constitute the critical point for determining the employer's liability? Indeed, Tosafot argue that under the general halakhic rule that assigns tort liability for indirect but proximate damages (*garmi*), articulated in Bava Kamma 100a, the employer should be liable in *garmi* for backing out, so long as he causes the worker to lose the value of the day's work. Thus, Tosafot contend, the Talmud's distinction in Bava Metzia 76b between *halkhu* and *lo halkhu* appears to be inconsistent with the Talmud's general liability rule of *garmi*.<sup>446</sup>

To reconcile the two passages, Tosafot reinterpret the discussion in Bava Metzia 76b to bring it in line with the *garmi* rule. Tosafot argue that the passage in Bava Metzia 76b is in fact an application of the *garmi* rule: the basis of the employer's liability for reneging is *garmi*, and the reason for the employer's liability is that he caused the worker to lose the value of a day's labor. As for the problematic *halkhu* criterion, Tosafot argue that the Talmud's formulation is imprecise and inexact. What actually matters for determining the employer's liability is not whether the worker set off to the job (*halkhu*) but whether the worker was deprived, by the employer's reneging, of securing alternative employment for the day. If the employer reneged while the worker still had ample opportunity to secure other

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<sup>445</sup> Bava Metzia 66b:

תניא: השוכר את האומנין והטעו את בעל הבית, או בעל הבית הטעה אותן - אין להם זה על זה אלא תרעומת. במה דברים אמורים - שלא הלכו, אבל הלכו חמרים ולא מצאו תבואה, פועלין ומצאו שדה כשהיא לחה - נותן להן שכרן משלם.

<sup>446</sup> Tosafot Bava Metzia 76b s.v. ein:

אין להם זה על זה אלא תרעומת - קשה לר"י דהא קי"ל כר"מ דדאין דינא דגרמי בהגוזל קמא (ב"ק דף ק.). א"כ אמאי לא יתן להם כפועל בטל כיון שעל ידו נתבטלו אותו היום.

employment for the day, then the employer is not liable.<sup>447</sup> But if the employer reneged after it was too late for the worker to secure other employment for the day, then the employer is liable. Tosafot contend that when the Talmud speaks of “*halkhu*” it really means “did the employer back out after it was too late for the worker to secure alternative employment for the day.” In their view, the Talmud uses the *halkhu* threshold as a loose proxy for determining whether the worker can still secure alternative employment. Tosafot claim that, generally, if the worker has not yet departed to the employer’s house, he could still secure other jobs for the day.<sup>448</sup>

To summarize Tosafot’s position: Troubled by the inconsistency between the *halkhu* standard and the *garmi* rule, Tosafot explain the *halkhu* standard as an application of the *garmi* tort rule. To do this, Tosafot reinterpret the *halkhu* standard as a proxy for an inquiry into whether the worker could still secure alternative employment. If the worker cannot, then the employer has harmed him by causing him to lose out on work opportunities for the day and is liable to compensate him under the tort principle of *garmi*.

Ramban rejects Tosafot’s interpretation. His chief complaint is that Tosafot’s theory completely ignores the plain meaning of the talmudic language. The Talmud established *halkhu* as the crucial determinant

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<sup>447</sup> Ibid:

ו"ל דמיירי שכשחוזר בו עוד ימצאו להשתכר.

<sup>448</sup> Ibid:

וכי מפליג בסמוך בין לא הלכו החמרים להלכו ומצאו שדה לחה הוה מצי לפלוגי אף בלא הלכו כלל בין יכולין עוד להשתכר בין חוזר בו אחר שלא מצאו עוד להשתכר אלא אורחא דמילתא נקט דבהלכו לא שכיח שימצאו עוד להשתכר ואם לא הלכו מסתמא כשבא לחזור חוזר מיד בעוד שימצא להשתכר.

See also Ramban’s report of Tosafot’s position, in Ramban Bava Metzia 76b, s.v. *ve-ha*:

והא דקתני הלכו חמרים יש מפרשים דה"ה אם לא הלכו הם אלא ששלח בעל הבית שלוחו ומצא שדה לחה כיון שעבבן עד שעה שאין הפועלים נשכרים נותן להם שכרם כפי מה שקבל עליו.

of liability. Tosafot's theory ignores *halkhu* and replaces it with a different criterion (i.e., whether the worker can still secure alternative employment).<sup>449</sup>

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<sup>449</sup> *Hiddushim Bava Metzia 76b, s.v. ve-ha:*

ואין זה מחוור דא"כ למה ליה לאפלוגי בין הלכו ללא הלכו

Ramban's rejection of Tosafot here flows from Ramban's insistence on preserving the straightforward meaning of the talmudic passage. Note that in his introduction to the *Milhamot*, Ramban states that the "straightforward" meaning of the talmudic passages is an important criterion for demonstrating the superiority of a given halakhic interpretation. See *Kitvei Ramban I*, pp. 413-414:

כי יודע כל לומד תלמודו שאין במחלקת מפרשיו ראיות גמורות, ולא ברב קשיות חלוטות, שאין בחכמה הזאת מופת ברור... אבל נשים כל מאדנו ודינו מכל מחלקת בהרחיק אחת מן הדעות בסברות מכריעות, ונדחק עליה השמועות, ונשים יתרון הכשר לבעל דינה מפשטי ההלכות והגן הסוגיות עם הסכמת השכל הנכון. וזאת תכלית יכלתנו, וכונת כל חכם וירא האלהים בחכמת הגמרא.

In that same discussion, Ramban acknowledges, begrudgingly, that at times he will have to defend Rif even when Rif's position appears to diverge from the straightforward meaning of the talmudic passage:

ויש אשר אנחנו מלמדים זכות על דברי רבנו עם היותם עדין רחוקים בפשטי הסגיא או הסגיות. אבל כונתנו בזה לגלות און התלמידים במה שיש בהם מן הזכות.

These passages clearly reflect the importance of preserving the straightforward meaning of the talmudic passages in Ramban's jurisprudence. In the example discussed above, Ramban's rejection of Tosafot's interpretation stems from Tosafot abandoning the straightforward meaning of *halkhu* as the legal standard for determining liability. For a similar style argument where Ramban rejects Tosafot's position based on the plain meaning of the talmudic passage, see *Dina de-Garmi* (ed. Hirshler), p. 118, where Ramban rejects Tosafot's interpretation of *garmi* as a penalty based on the Talmud's formulation of *dina de-garmi* (rule of *garmi*), rather than *kenasa de-garmi* (fine of *garmi*):

בעלי סברא זו טעו בשקול דעתם וצללו במים אדירים והעלו בידם חרס, ואנן דינא דגרמי קאמרין ולא קנסא דגרמי.

See also Ta-Shma, *Talmudic Commentary Part Two*, p. 48:

ערך לימודי נוסף עולה מתוך ההקפדה המרבית שהקפיד הרמב"ן על פרשנות מדוקדקת של לשון הסוגיא ותחבירה כפשוטה, במידה שאינה נופלת מהקפדתו על עומק הסברה ובחינת הדברים בשורשם. באופן זה נאחז הרמב"ן בסוגיא שלפניו ומונע מן הלומד לשוט על כנפי הסברה יתר על המידה ולראות בה חזות הכול, תוך ויתור על פשט הדברים במקומם... בהקשר זה אמר 'ואין לדון כאן אלא כלשונו (כתובות יט.)', היינו שלא לסטות אל מעבר למה שמפורש בסוגיא.

Ramban therefore distinguishes conceptually between damages that arise in tort and damages that arise in contract. He argues that the principle at work in Bava Metziah 76b is actually distinct from the *garmi* rule in Bava Kamma 100a. Indeed, Bava Metziah 76b has nothing to do with tort liability. Instead, Ramban argues, the Talmud is articulating a new conceptual basis for liability that arises in *contract* (*kinyan*).<sup>450</sup> Ramban contends that the talmudic passage does *not* hold the employer liable for *harming* the worker by causing him to lose out on other work opportunities. Rather, Ramban argues, the employer must compensate because by setting out (*halakh*) to perform the job, the worker consummates the work contract and *acquires* the right to be compensated for the job he was hired to perform.

Ramban contends that the worker's "setting out" (*halakh*) constitutes commencement of performance (*hathalat ha-melakhah*), which consummates the agreement between the parties. When the contract is consummated by the worker commencing performance, it triggers a transfer of entitlements, like a sale of goods: The worker acquires a right to his salary and the employer acquires the right to have the work performed.<sup>451</sup> Thus, if the employer reneges after this point, the worker has already acquired his right to be paid. By renegeing, the employer has simply waived his right to have the work performed but remains obligated to pay the salary that the worker has acquired.<sup>452</sup>

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<sup>450</sup> For the distinction between contract and tort, see Daniel Markovitz, "Theories of the Common Law of Contracts," *The Stanford Encyclopedia of Philosophy* (Winter 2019 Edition), Edward N. Zalta (ed.)

<sup>451</sup> For the idea of contract as a transfer of entitlements, similar to Ramban's characterization of contract as *kinyan*, see Peter Benson, "Contract" in *The Blackwell Companion to Philosophy of Law and Legal Theory* (Blackwell, 1999), pp. 41-42. "Contract could now be conceived as a mode of acquisition... the promisee would acquire an enforceable entitlement to the promisor's performance... a promisor in breach could be viewed, not merely as failing to confer a benefit on the promisee, but as interfering with what already belongs to the promisee in virtue of their contract."

<sup>452</sup> *Hiddushim* Bava Metziah 76b:

Thus, Ramban distinguishes between two distinct conceptual grounds for the employer's liability: tort and contract. He contends that the *halkhu* standard determines whether the contract has been consummated and therefore whether the worker has "acquired" his right to compensation. The *halkhu* standard, in other words, determines whether there is a contractual basis for compensation. Ramban acknowledges that there may be cases where the tort *garmi* principle, distinct from the contract-kinyan one, remains relevant. Prior to commencing performance (i.e., prior to setting out to work), where there is no contractual basis for compensation, the employer may be held liable to compensate the worker in tort/*garmi* if he deprived him of alternative work opportunities. But Ramban emphasizes that the different conceptual grounds for compensation (tort-*garmi* vs. contract-*kinyan*) yield different legal consequences.

Ramban notes an important conceptual difference between the tort basis for compensation and the contractual one. On the tort basis, the employer, by canceling at the last minute, is liable to pay *for depriving the worker of his next best offer*. The idea is that, had the employer notified the worker of the cancellation earlier, the worker would have been able to secure an alternative employment opportunity. By canceling at the last minute, the employer wrongfully deprived him of that alternative employment opportunity. By contrast, on the contract theory, the employer is liable to pay for the actual job that the worker had acquired the right to perform.

Ramban then presents two legal consequences that distinguish the contract theory from the tort theory of compensation. First, suppose there was no alternative job available for the worker to secure. (Suppose for example that there is only one employer in town.) On the tort basis, the employer is not liable for reneging, since his doing so did not cause the worker to lose an alternative job opportunity.

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כיון שהתחילו במלאכה נתחייב מעכשיו ליתן להם שכרן משלם כמו שקבל עליו, שכשם ששאר הדברים נקנין בקנין כך שכירות פועלים נקנית בהתחלת מלאכה.

However, on the contract theory, the employer would still be liable, since the worker has already acquired the full value of the contract by commencing performance. On the contractual basis, the worker is entitled to be paid regardless of whether he was deprived of alternative employment elsewhere.

Second, Ramban notes that the different bases of liability will generate different amounts of compensation. Suppose the contract with the employer was worth \$10, but the standard rate for the worker's services, and the amount he would have made had he sought alternative employment for the day, is only \$3. Ramban notes that on the tort basis, the worker would only be entitled to \$3, since that is the amount that the employer harmed him and deprived him of securing by renegeing at the last minute. However, on the contractual basis, the worker is entitled to the full value of the contract with the employer, \$10, regardless of how much he would have made had he taken a different job for the day.<sup>453</sup> On the contract theory, the worker acquired the value of the contract when he commenced performance.<sup>454</sup>

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<sup>453</sup> Ramban's theory parallels the common law's doctrine of expectation damages for contracts. See for e.g. Marvin Chirelstein, *Contracts* (New York, 2006) p. 4. "The injured party may recover from the party in breach a dollar sum sufficient to put him in as good a position as he would have occupied had the contract been performed in full. This principle, easily the most important single idea in the whole contracts field--is referred to by convention as the "expectation damage" rule, and of course it is the injured party's "expectations" that are being compensated."

In Ramban's analysis, the \$10 amount represents expectation damages--the amount the worker would have received had the contract been performed in full. The \$3 amount--what the worker could have secured from the next best offer--represents a form of reliance damages, which the worker would be entitled to recover under tort. For some of these distinctions, see Itamar Rosensweig and Tzirel Klein, "[Depriving a Worker of Employment Opportunities](#)," *Jewishprudence* (October 2020), note 4.

<sup>454</sup> *Hiddushim Bava Metzia 76b*:

והא דקתני הלכו חמרים יש מפרשים דה"ה אם לא הלכו הם אלא ששלח בעל הבית שלוחו ומצא שדה לחה כיון שעבבן עד שעה שאין הפועלים נשכרים נותן להם שכרם כפי מה שקבל עליו, והרב ר' יצחק אלברגלוני פירש כך, ואלו דבריו במה דברים אמורים שחזר בהם

Let us now consider how Ramban's analysis differs from that of Tosafot, and how Ramban's analysis reflects his conceptual approach. Tosafot had reconciled the apparent inconsistency between Bava Metzia 76b and Bava Kamma 100a by reinterpreting Bava Metzia 76b as an application of the tort principle (*garmi*) of Bava Kamma 100a. This required Tosafot to finesse the *halkhu* standard and to interpret it as a proxy for whether the workers can still find alternative employment for the day. For Tosafot, the basis for the employer's liability is tort (*garmi*). By contrast, Ramban utilized the talmudic inconsistency to offer and develop a conceptual distinction between two different grounds of liability:

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קודם שיספיקו ליליך לשדה ואמר להם השכירו עצמכם אבל הלכו נותן להם שכרם משלם שהרי נתבטלו משכירות היום על ידו, ואין זה מחוור דא"כ למה ליה לאפלוגי בין הלכו ללא הלכו, ועוד קשה דאי משכחי לאוגורי ודינא הוא אמאי איכא עליה תרעומת כדמקשינן לקמן בגמרא (ע"ט ב') גבי ספינה,

ואני מודה לו בדין זה שאם היו יכולים להשכיר עצמן בתחלת היום או מאמש ועיכבן עד שעה שאינן מוצאין להשכיר ודאי נותן להם שכר...

ומיהו ברייתא הלכו דוקא קתני שאע"פ שלא היו יכולין מתחלה להשכיר עצמן שאינן במקום שמשכירין בו פועלים או שהיו הפועלים נשכרין בתלתא ואמר להו ליתן להם עשרה, כיון שהתחילו במלאכה נתחייב מעבשיו ליתן להם שכרן משלם כמו שקבל עליו, שכשם ששאר הדברים נקנין בקנין כך שכירות פועלים נקנית בהתחלת מלאכה.

Note how Ramban condenses this distinction into two or three terse lines. In a single, short sentence Ramban articulates two legal ramifications of the contract theory:

לא היו יכולין מתחלה להשכיר עצמן שאינן במקום שמשכירין בו פועלים או שהיו הפועלים נשכרין בתלתא ואמר להו ליתן להם עשרה...

And he articulates the contract-*kinyan* basis of compensation in two terse clauses:

כיון שהתחילו במלאכה נתחייב מעשכיו ליתן להם שכרן משלם כמו שקבל עליו, שכשם ששאר הדברים נקנין בקנין כך שכירות פועלים נקנית בהתחלת מלאכה.

This is typical of Ramban's compressed style in the *Hiddushim*. Ritva, Shevu'ot 23b, describes Ramban as someone who generally writes tersely:

והיא בשיטת רבינו הגדול הרמב"ן ז"ל אלא שקצר בלשונו כמשפטו.

See also R. Isaac Canpanton (Castille 1360-1463) who writes of Ramban's *Hiddushim*:

ובחידושי הרמב"ן צריך אתה לעיין דק היטב, ולהשתדל ולהוציא ולצמצם כל לשונו בענין שלא ישאר בו דבר מיותר אפילו אות כי כל דבריו הם במספר, במשקל ובמידה.

See also Haym Soloveitchik, "The Riddle of Me'iri's Recent Popularity", *Collected Essays III* (2021), pp. 400-401.

For the idea of compression and terseness in halakhic writing as a virtue, see R. Joseph B. Soloveitchik, *Halakhic Man* (Philadelphia, 1983), pp. 86-87.

tort and contract. According to Ramban, the discussion in Bava Metzia 76b and the *halkhu* standard set forth there are about liability in contract, not in tort.

Ramban's analysis embodies both aspects of conceptualism. Ramban offers a fine-grained conceptual distinction to distinguish internally between two grounds of liability (tort and contract). Whereas the Talmud speaks of "liability," Ramban shows that this concept can be unpacked into two different concepts (tort and contract), with the passage in Bava Kamma 100a dealing with the former and the passages in Bava Metzia 76b with the latter. Moreover, Ramban here articulates a fundamental doctrine of talmudic contract law: that a contract, like a sale, transfers to the worker the right to the compensation upon its consummation, even when performance has not been completed.

### C. Renouncing Hametz Before Passover (*Bittul Hametz*)

A third example is drawn from Ramban's analysis of *bittul hametz* in tractate Pesachim. Jewish law prohibits owning *hametz* during passover. One way to avoid the prohibition is to destroy any *hametz* in one's possession before the holiday. The Talmud, in Pesachim 4b, provides another means of avoiding the biblical prohibition: *bittul*. According to the Talmud, it is sufficient to verbally "annul/renounce" (*bittul*) one's *hametz*.<sup>455</sup>

Commentators disagree about how to understand *bittul* and the mechanism through which it avoids the biblical prohibition. Tosafot (Pesachim 4b s.v. *mi-de'oraita*) contend that *bittul* works through the principle of *hefker*, which is the general halakhic procedure for renouncing ownership and abandoning an object. According to Tosafot, *bittul* is a process through which one declares their *hametz* items

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<sup>455</sup> Pesachim 4b:

בדיקת חמץ מדרבנן הוא, דמדאורייתא בביטול בעלמא סגי ליה.



*hefker*, thus renouncing their ownership of them. Once the owner has abandoned title, he no longer violates the Passover prohibition.<sup>456</sup>

Tosafot's interpretation of *bittul* as *hefker* raises difficulties. As Tosafot themselves observe, if *bittul* works through the mechanism of renouncing title, then it appears to contradict the general rules of renouncing title (*hefker*) articulated elsewhere in the Talmud. In Nedarim 45 the Talmud requires that an act of renunciation be performed in the presence of three witnesses. Yet the Talmud in Pesachim appears to recognize *bittul* as effective even when no witnesses are present. How then can *bittul* be a straightforward application of *hefker*?

Troubled by this contradiction, Tosafot propose that the general *hefker* rules should be reinterpreted in light of the Talmud's *bittul* application. Tosafot argue that the rules of *bittul* demonstrate that the requirement of three witnesses to evidence an act of renunciation (*hefker*) is merely a rabbinic stringency and can be dispensed with in certain cases.<sup>457</sup> Thus, faced with the contradiction between the *hefker* requirement of three witnesses and the *bittul* rule which allows for the renunciation of *hametz* without any witnesses present, Tosafot revise the general rules of *hefker* and interpret the requirement of three witnesses as a rabbinic stringency.

Ramban (Pesachim 4b s.v. '*inyan*') raises several objections to Tosafot's theory of *bittul*. The core of Ramban's attack develops the challenge that Tosafot had already noted: the apparent incompatibility of the rules of *hefker* with the familiar procedure of *bittul hametz*. Ramban develops this challenge and

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<sup>456</sup> Tosafot Pesachim 4b s.v. *mi-de'oraita*:

ואומר ר"י דמדאורייתא בביטול בעלמא סגי מטעם דמאחר שביטלו הוי הפקר ויצא מרשותו ומותר מדקאמרינן אבל אתה רואה של אחרים ושל גבוה.

<sup>457</sup> Ibid:

ואומר ר"י דמדאורייתא בביטול בעלמא סגי מטעם דמאחר שביטלו הוי הפקר ויצא מרשותו ומותר... והא דאמרינן בנדריים (דף מה.) הפקר בפני שלשה מדאורייתא אין צריך.

demonstrates that the inconsistencies between *bittul* and *hefker* are far more systematic and irreconcilable than Tosafot had acknowledged.

After summarizing Tosafot's position,<sup>458</sup> Ramban opens his attack by noting that the Talmud never uses the term *hefker* in the context of *bittul*. Indeed, Ramban argues, the fact that the Talmud specifically uses the term *bittul* suggests that *bittul* is a concept distinct from *hefker*.<sup>459</sup>

Next, Ramban enumerates the apparent legal differences between *bittul* and *hefker*. First, according to one Tannaitic view about *hefker* (R. Yossi in Nedarim 43a), the abandoner (*mafkir*) does not lose title to the item until it has been captured or claimed by another party. According to this view, *bittul* would be ineffective until a new party takes possession of the *hametz*. Anyone who renounces the *hametz* in their possession on the day before Passover would remain in violation of the biblical prohibition until a stranger intentionally claims title to the abandoned *hametz* by seizing it. If this analysis were true, *bittul* would be rendered ineffective as a mechanism for avoiding the biblical prohibition, since typically no one takes possessions of the *hametz* before Passover.<sup>460</sup>

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<sup>458</sup> Ramban Pesachim 4b s.v. *inyan*:

פירשו בשם ר"ת ז"ל דמה שאמרו בביטול בעלמא סגי משום דביטול היינו הפקר, ונפקא להו היתירא משום שנאמר לך שלך אי אתה רואה אבל אתה רואה כו' וזה אינו שלו, זהו דעת רבותינו הצרפתים ז"ל בביטול.

<sup>459</sup> Ibid:

וקשה א"כ למה הזכירו כמה פעמים בכל מסכתא זו לשון ביטול מי סני הפקר ששנו חכמים בכל מקום, ולא מישתמיט תנא למימר בחמץ הפקר ולא למימר ביטול במקום הפקר בשום מקום בעולם, וכן לענין ע"ז ששנינו (ע"ז נ"ב ב') נכרי מבטל כו' ע"ז שלו ושל חבירו, אינו הפקר שאינו מפקיר דבר שאינו שלו, ועוד דפחס או שקטע ראש חוטמה בטלה, ואין כאן הפקר כלל. וכן נמי ביטול רשות שהזכירו לענין עירוב (עירובין ס"א ב') אינו מפקיר ביתו שישבו בו אחרים, אלא שהוא עוקר דעתו מלדור עם השותפין ביומו כדי שיהו הם כמי שדרים לבדם.

<sup>460</sup> Ibid:

ועוד קשה לי שהביטול דבר פשוט הוא בגמרא בלא מחלוקת דמדאורייתא בביטול בעלמא סגי ליה, ואלו בהפקר איתמר בנדירים בפרק אין בין המודר (מ"ג א') דלר' יוסי הפקר כמתנה מה מתנה עד דאתיא לרשות מקבל לא נפקא מרשות נותן, אף הפקר עד דאתי לרשות זוכה לא נפיק מרשות מפקיר, ולהך סברא הפקיר חמצו כל זמן שלא זכו בו גוים עובר.

Second, as Tosafot had noted, some tannaitic opinions maintain (Nedarim 45a) that the legal act of abandonment is valid only if it is witnessed by three people. Yet *bittul hametz* does not need to be witnessed by anyone.<sup>461</sup> Third, Ramban notes that whereas renouncing ownership through *hefker* is prohibited on the Sabbath (as a prohibited form of property transaction (*mekah u-mimkar*), the Talmud assumes (Pesachim 7a) that *bittul* can be performed on the Sabbath.<sup>462</sup> Fourth, Ramban notes that the Talmud assumes that for *bittul* one can renounce *hametz* in one's "mind", but for *hefker* it requires a verbal declaration of the intent to abandon.<sup>463</sup>

Fifth, Ramban tentatively observes that the Talmud's formulation of the *bittul* utterance--"any leaven and/or bread that is in my possession shall be null and considered like dust"--ought not work as a form of *hefker*. *Hefker* requires abandonment and renunciation of title. Simply declaring the *hametz* to be "like dust" should not constitute a valid form of legal abandonment. After all, Ramban notes, people actually do own soil and dirt.<sup>464</sup>

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<sup>461</sup> Ibid:

ואיכא דאמרי התם (מ"ה א') הפקר בפני שלשה הוא הפקר בפני שנים לא הוא הפקר והכא מבטלו בלבו.

<sup>462</sup> Ibid:

ועוד קשה לי שהתירו ביטול בשבת כדתיניא (ז' א') מבטלו בלבו אחד שבת ואחד י"ט, והלא הפקר נראה שאסור לאדם להפקיר נכסיו בשבת כענין ששנינו (ביצה ל"ו ב') אין מקדישין ואין מעריכין ואין מחרמינן גזירה משום מקח וממכר.

<sup>463</sup> Ibid:

ועוד קשה לי ששנו חכמים ז"ל בכל מקום מבטלו בלבו והפקר בפה הוא ולמה הזכירו בלבו בכאן.

<sup>464</sup> Ibid:

ועוד אני מסתפק בענין הזה, שהראשונים כולם אמרו בביטול כל חמירא דאיכא ברשותי יהא בטיל וחשיב כעפרא, ובגמ' ירושלמי (פ"ב ה"ב) נמי כלשון הזה פירשו רב אמר צריך שיאמר כל חמץ שיש לי בתוך ביתי ואינו יודע בו יבטל, ואינו יודע אם אדם מפקר בלשון הזה שיאמר כל נכסי יהיו בטלים וחשובים כעפר... ומ"מ חשובים כעפר שהזכירו הגאונים ז"ל למה, הלא עפרו של אדם אינו מופקר.

On the basis of these observations Ramban concludes, contra Tosafot, that *bittul* must be conceptually distinct from *hefker*.<sup>465</sup> Ramban therefore proposes a different theory of *bittul*. Ramban's account begins by observing that as a matter of Jewish property law, persons do not have the legal power to own prohibited items (*issurei hana'ah*) such as *hametz*. Jewish law blocks persons from holding title to such prohibited goods. Since *hametz* is a prohibited item on Passover, the principles of Jewish property law imply that it is not possible to violate the Torah prohibition of owning *hametz* on Passover.<sup>466</sup> A *hametz* owner is legally dispossessed of his *hametz* the moment the Passover prohibition goes into effect. How, then, is the *hametz* prohibition ever violated?

Ramban argues that while formally the principles of property law would make it impossible to violate the *hametz* prohibition, the Torah imposes a special penalty on persons who "intend and desire to preserve" *hametz* over Passover (*da'ato alav ve-hu rotzeh be-kiyumo*). It imposes this penalty by overriding the standard rules of Jewish property law and artificially assigns ownership back to the person who wants to (and in fact does) possess *hametz*. The Torah assigns this ownership solely for the purpose of holding him accountable for the *hametz* transgression (see Pesachim 6b).<sup>467</sup> It is crucial to Ramban's theory that this penalty through assignment of ownership is limited to persons who "intend

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<sup>465</sup> Ibid:

מ"מ שיהא הביטול הפקר אינו מתקבל בכל הסוגיות הללו שלנו ולא בגמ' הירושלמית.

<sup>466</sup> Ibid:

ואיסורי הנאה אינן ממון ולא קרינן ביה לך, בדין הוא שלא יעבור עליו בכלום.

<sup>467</sup> Ibid:

אלא כך אני אומר שהביטול מועיל להוציאו מתורת חמץ ולהחשיבו כעפר שאינו ראוי לאכילה, והיתר זה מדברי ר' ישמעאל הוא דאמר (ו' ב') שני דברים אינן ברשותו של אדם ועשאן הכתוב כאלו הן ברשותו, לומר דכיון שלא הקפידה תורה אלא שלא יהא חמץ שלו ברשותו, ואיסורי הנאה אינן ממון ולא קרינן ביה לך, בדין הוא שלא יעבור עליו בכלום, אלא שהתורה עשאתו כאלו הוא ברשותו לעבור עליו בשני לאוין מפני שדעתו עליו והוא רוצה בקיומו.

and desire” to possess *hametz* over the holiday. What matters, for this penalty, is the *hametz* possessor’s state of mind.

*Bittul*, Ramban argues, is a procedure for avoiding the penalty of artificial ownership assignment. It is a formal declaration about one’s state of mind that he neither desires nor intends to possess or benefit from *hametz* over the holiday. If one has no desire to benefit from *hametz* or to possess it over Passover, he will not be penalized with artificial ownership and will thus not violate the *hametz* prohibition, even if unwittingly he happens to have *hametz* in his possession over Passover. Since Jewish property law automatically dispossesses him of his *hametz*, all that is needed of him to avoid the prohibition is to recite or mentally assent to the *bittul*, acknowledging that he has no interest in preserving *hametz* over the holiday.<sup>468</sup>

Let us now consider the difference between Tosafot’s approach and Ramban’s conceptual approach. Tosafot was confronted by the relationship between *hefker* and *bittul*, both of which are principles of renunciation. Tosafot argued that *bittul* is simply an application of *hefker*. Confronted by the apparent discrepancy in rules, Tosafot revise the general *hefker* rules in light of the *bittul* application. At the biblical level, three witnesses need not evidence an act of *hefker*.

Ramban’s conceptual approach differs from Tosafot’s approach. Ramban utilizes the legal discrepancies to tease out and to explicate the conceptual distinction he draws between *hefker* and *bittul*. Indeed, Ramban even ventures to speculate that the rules of *hefker* and *bittul* will diverge in areas where the

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<sup>468</sup> Ibid:

לפיכך זה שהסכימה דעתו לדעת תורה ויצא לבטלו [שלא] יהא בו דין ממון אלא שיהא מוצא מרשותו לגמרי שוב אינו עובר עליו, דלא קרינא ביה לך כיון שהוא אסור ואינו רוצה בקיומו... דהא שוייא כעפר ולא ניחא ליה בגויה... שאין אדם עובר אלא על חמץ שלו שהוא רוצה בקיומו ודעתו עליו, הא נתייאש ממנו ונתן דעתו שאינו רוצה מחמת איסורו ולא יהנה בו לעולם אינו עובר, משל [ל]ממון אבדה כיון שנתייאש ממנו בלבו יצא מרשותו וכל הזוכה בו קנאו, אף חמץ בזמנו ממון אבוד הוא מבעליו ויצא מרשותו ביאוש.

talmudic law is indeterminate.<sup>469</sup> Confronted with *hefker* renunciation and *bittul* renunciation, Ramban shows that these renunciations are actually conceptually distinct from each other. *Hefker* is about renouncing title as a matter of legal ownership. *Bittul* is about asserting a mental state consistent with the Torah's position on the *hametz* prohibition, the purpose of which is to avoid the penalty of artificial assignment of ownership.

Ramban's analysis of *bittul* exemplifies both aspects of the conceptual method. His distinction between two concepts of renunciation captures the aspect of fine-grained conceptual distinctions. His articulation of the *sui generis* method of avoiding the Torah prohibition through simply assenting to the Torah's will of not preserving *hametz*<sup>470</sup> exemplifies the conceptualist's quest to articulate and characterize the core concepts of Jewish law. Ramban's analysis is arguably the most important treatment of the concept of *bittul*.

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<sup>469</sup> For example, in Ramban's analysis above, the Talmud is not explicit that *hefker* must be verbalized. Nor is it explicit about a prohibition of *hefker* on the Sabbath. Ramban speculates that the talmudic law will differ between *hefker* and *bittul* on these matters. This suggests that Ramban was not so much confronted by a legal problem that needed solving, but rather saw the legal differences as a means towards explicating the conceptual difference between the principles before him.

This phenomenon is consistent with R. Michael Rosensweig's observation, in "Reflections on the Conceptual Approach to Talmud Torah," Yosef Blau (ed.), לומדות: *The Conceptual Approach to Jewish Learning* (New York 2006), pp. 193-194, that

"[conceptualists] seize the opportunity provided by problematic positions... to dramatically reassess the character and scope of basic halakhic doctrines..... R. Hayyim's clarification of a difficult Rambam entails a reexamination and reformulation of halakhic definitions that significantly transcend the difficulty that engendered his analysis."

<sup>470</sup> Ramban Pesachim 4b:

זה שהסכימה דעתו לדעת תורה ויצא לבטלו [שלא] יהא בו דין ממון אלא שיהא מוצא מרשותו לגמרי שוב אינו עובר עליו.

#### D. The Standing and Sitting Shofar Blasts of Rosh Hashanah

Our fourth example is drawn from Ramban's analysis of the Rosh Hashanah shofar blasts before and during the musaf prayer. The Talmud, *Rosh Hashanah* (16a-b), records the practice to sound the shofar both before the musaf prayer (*di-meyushav*) and during the musaf prayer (*di-me'umad*).<sup>471</sup>

Commentators are puzzled by this practice, and they disagree over which of these sets of blasts constitutes and satisfies the biblical obligation of shofar on Rosh Hashanah.

This question became particularly acute in the middle ages in light of the reigning practice, apparently a tradition from the Geonim, of sounding different types of blasts during the different blessings of the musaf prayer. The problem was as follows. All commentators agree that the Torah commandment of shofar on Rosh Hashanah requires three *teru'ah* blasts, each of which is to be surrounded by two *teki'ah* blasts. This brings the total number of blasts to nine.<sup>472</sup> But because of a doubt regarding how to sound the *teru'ah* blast, three different traditions of the *teru'ah* emerged. The three traditions of the *teru'ah* blast are known as *shevarim*, *teru'ah*, and *shevarim-teru'ah*.

Because of this uncertainty as to the sound of the *teru'ah*, the Talmud requires the sounding of each type of *teru'ah* blast (i.e. *shevarim*, *teru'ah*, *shevarim-teru'ah*), in effect multiplying the required number of blasts by a factor of three. Thus, given the uncertainty, the Talmud appears to hold that to satisfy the biblical requirement, three sets of תר"ת (a '*teru'ah*' surrounded by two *teki'ot*), three sets of תש"ת (a *shevarim* surrounded by two *teki'ot*), and three sets of תשר"ת (a *shevarim-teru'ah* surrounded by two

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<sup>471</sup> Rosh Hashanah 16a-b:

אמר רבי יצחק... למה תוקעין ומריעין כשהן יושבין, ותוקעין ומריעין כשהן עומדין? כדי לערבב השטן.

<sup>472</sup> See Rosh Hashanah 33b-34a.

teki'ot) all need to be sounded.<sup>473</sup> Indeed, it was accepted practice to sound all thirty of these blasts before musaf for the sitting blasts (*di-meyushav*).

The problem that confronted medieval commentators was the regnant practice of sounding the standing blasts (*di-me'umad*) during the musaf prayer. The special musaf prayer of Rosh Hashanah consists of three special blessings during each of which the shofar is sounded: *malkhuyot*, *zikhronot*, and *shofarot*. The regnant practice was to sound a single תשר"ת during the *malkhuyot* blessing, a single תש"ת during *zikhronot*, and a single תר"ת during *shofarot*. The problem, as virtually all the commentators observe, is that given the uncertainty of the teru'ah sound, this formula guarantees that at least two of the blessings will have sounded the "wrong" shofar blast. In other words, the established practice for the *me'umad* blasts effectively guarantees that two out of three blessings will have sounded the shofar improperly. This contradicts the apparent obligation to sound the shofar during each of the musaf blessings.<sup>474</sup>

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<sup>473</sup> Rosh Hashanah 34a:

אתקין רבי אבהו בקסרי: תקיעה, שלשה שברים, תרועה, תקיעה. - מה נפשך? אי ילולי יליל - לעביד תקיעה תרועה ותקיעה, ואי גנוחי גנח - לעביד תקיעה שלשה שברים ותקיעה! - מספקא ליה אי גנוחי גנח אי ילולי יליל. - מתקיף לה רב עוירא: ודלמא ילולי הוה, וקא מפסיק שלשה שברים בין תרועה לתקיעה! - דהדר עביד תקיעה תרועה ותקיעה. - מתקיף לה רבינא: ודלמא גנוחי הוה, וקא מפסקא תרועה בין שברים לתקיעה! - דהדר עביד תקיעה שברים תקיעה. - אלא רבי אבהו מאי אתקין? אי גנוחי גנח - הא עבדיה, אי ילולי יליל - הא עבדיה! - מספקא ליה דלמא גנח ויליל.

<sup>474</sup> See, e.g., Tosafot Rosh Hashanah 33b, s.v. *shi'ur*:

נוהגין לתקוע בישיבה לאחר קריאת התורה שלשים קולות ג' קשר"ק וג' קש"ק וג' קר"ק ובתפלה תוקעין אמלכיות קשר"ק ואזכרונות קש"ק ואשופרות קר"ק...ועל מנהג שלנו היה תמיה ר"ת דקשר"ק של מלכיות וקש"ק דזכרונות וקר"ק דשופרות סותרין זה את זה דאי גנח ויליל כולהו בעי למיעבד קשר"ק ואי גנח לחוד כולהו בעי למיעבד קש"ק ואי יליל כולהו קר"ק.

See also *Sefer ha-Yashar*, Teshuvot 68:5; and Ramban, *Derashah Le-Rosh Hashanah* (ed. Hirshler), p. 166:

ובודאי דבר קשה הוא במעומד דלא כחד אנו נוהגין, דאין אנו עושין לא לדעת מתני' ולא לדעת ברייתא ולא לגנח ויליל דר' אבהו.



### *Tosafot's Analysis and Solution*

Tosafot propose a solution to this problem. They argue that the communal practice ought to be revised to ensure that each blessing sounds each type of *teru'ah* blast. Tosafot suggest to sound ten blasts, a set of each *teru'ah* type (i.e. תש"ת תר"ת תרש"ת), in each *musaf* blessing to ensure that each blessing is accompanied by the right *shofar* sound. Tosafot found support for this idea in the *Sefer he-Arukh*.<sup>475</sup>

Some *tosafists*, hesitant to fully revise the accepted practice, offered a variation of the above idea to correct the accepted practice in a less intrusive manner.<sup>476</sup> Rabbenu Tam suggests that it may be sufficient to blast a single תשר"ת during each blessing, since the *shevarim-teru'ah* technically incorporates all three sounds of the *teru'ah*.<sup>477</sup> Rabbenu Tam's strategy is the same as the other one

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<sup>475</sup> Tosafot Rosh Hashanah 33b, s.v. *shi'ur*:

לכאורה נראה לתקוע בתפלה כמו בן אמלכיות זכרונות ושופרות קשר"ק קש"ק קר"ק אכל חד וחד כדי לצאת מספק דרבי אבהו ובערך פ"י שהיו עושין בן שפ"י בערך ערב דהלין דמחמרי [ועבדי] שלשים כדיתבין ושלשים בלחש.

<sup>476</sup> Ibid:

שלא לשנות המנהג ביותר.

<sup>477</sup> Ibid:

והנהיג רבינו תם במקומינו לתקוע גם אזכרונות ואשופרות קשר"ק כמו במלכיות דהשתא נפיק מכל ספיקי וליכא אלא הפסק ובהכי סגי שלא לשנות המנהג ביותר.

Note that Rabbenu Tam appears to acknowledge that from a theoretical standpoint he prefers to sound ten blasts in each blessing. His suggestion to sound a single תשר"ת is a compromise so as not to "overly disturb the accepted practice."

One objection to Rabbenu Tam's compromise suggestion is that each *teru'ah* is not immediately surrounded by two *teki'ot*, since there is an interruption (*hefsek*) by the competing *teru'ah* contender either before or after (the *shevarim-teru'ah* interpretation of *teru'ah* being an exception to this). Rabbenu Tam thought that these interruptions between the *teki'ah* and the *teru'ah* do not disqualify the set of blasts. Ramban disagrees with Rabbenu Tam's position on the interruptions not disqualifying the set and therefore rejects Rabbenu Tam's suggestion. See Ramban, *Derashah le-Rosh Hashanah* (ed. Hirshler), pp. 166-167:

ולפיכך אמרו עליו על ר"ת שהיה אומר לעשות תשר"ת למלכיות וכן לזכרונות וכן לשופרות דמוטב לחוש לספקות ולא לחוש להפסקות, וכן כתב רבינו שמשון בתוספות שלו.... וכל זה הענין ממה שהזכרנו כבר שהנה הרב סובר שאין הפסקה פוסלת... והדין עמו לפי

adopted by Tosafot: to rehabilitate the musaf blasts by sounding each type of teru'ah during each blessing.

To summarize Tosafot's position, Tosafot were faced with the contradiction between the talmudic rule requiring three different types of teru'ah and the accepted practice of sounding only one type of teru'ah for each musaf blessing. Tosafot sought to resolve the contradiction by revising the communal practice through adding each type of teru'ah into each musaf blessing, in order to bring communal practice in line with the talmudic ruling.

### *Ramban's Analysis and Solution*

Ramban offers a different solution to the problem posed by Tosafot. Ramban distinguishes conceptually between two different aspects of the shofar obligation on Rosh Hashanah. One aspect is the special Rosh Hashanah shofar obligation, incumbent upon each individual to hear the teru'ah shofar blasts on the Jewish new year. This obligation is discharged before musaf with the sounding of the thirty blasts.<sup>478</sup>

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פירושו לחוש לספיקות ולא להפסקות, אבל אנו כבר ביארנו שההפסקה פוסלת לדברי הכל כמו שמפורש בתוספתא... אם כן יותר ויותר יש לנו לחוש להפסקות דפוסלות לגמרי למתניתין ולמתניתא.

For Tosafot's commitment to justifying communal practice, see Jacob Katz, "Ma'ariv bi-Zemano ve-Shelo bi-Zemano: Dugma le-Zikah bein Minhag, Halakhah, ve-Hevrah", *Zion* 35 (1971), 35-60; and Haym Soloveitchik, "Religious Law and Change", in *Collected Essays I*, pp. 246-247: "The Franco-German community, in its state of intense religiosity, saw the word of God as being, as it were, incarnated in two forms: first, in the canonized literature (i.e. the Talmud); second, in the life of its people. If the new dialectical method, with its sweeping collation of the most varied sources, with its constant juxtaposition of contradictory passages, discovered that among the contradictions uncovered was one not simply between a passage in the first volume of the Talmud and another passage in the last, but between a passage in the Talmud and the practice of a God-fearing community, to the Tosafists the problem was one and the same..."

Note that in *Wine in Ashkenaz in the Middle Ages*, pp. 368-369, Haym Soloveitchik limits this phenomenon to areas of law that required great personal and economic sacrifice.

<sup>478</sup> *Milhamot* Rosh Hashanah 11a:

Ramban then develops a second aspect of the shofar obligation which, he argues, is distinct from the first and flows from the communal obligation of prayer during communal emergencies. Ramban demonstrates that communal prayers during special communal emergencies--communal fast days and during wartime--need to be accompanied by shofar blasts. In these cases, the shofar blasts have nothing to do with the Rosh Hashanah shofar commandment, but rather are intended to reinforce the urgent communal prayers.

Ramban contends that, in these instances of communal emergencies, the shofar blasts are components of communal prayer (*hovat berakhot*). Ramban proceeds to argue that the shofar blasts of Rosh Hashanah musaf (*di-me'umad*) are like the shofar blasts that accompany communal prayers on fast days and during wartime. These blasts all flow from the communal prayer obligation and are components of prayer. They have little to do with the individual's obligation to hear the teru'ah blasts for the Rosh Hashanah commandment of shofar.<sup>479</sup> Thus, the pre-musaf blasts (*di-meyushav*) are sounded to satisfy

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ועיקר הדברים מיוסד על פי מה שפירשנו למעלה... תוקעין ומריעין כשהן יושבין ויוצאים ידי חובתן... בר"ה נמי כיון שיצאנו ידי חובת תקיעות של תורה [בתקיעות דמיושב] ואין כל יחיד ויחיד חייב בתקיעות [דמעומד]....

And *Derashah le-Rosh Hashanah*, p. 171:

שיצאנו ידי חובת תקיעות של תורה מיושב.

<sup>479</sup> *Milhamot Rosh Hashanah* 11a:

ועיקר הדברים... תוקעין ומריעין כשהן עומדין על סדר הברכות שהברכות הללו מלכיות זכרונות ושופרות כל עיקרן בהתרועות נתקנו וכן בתעניות וכן בשעת מלחמה שמוסיפין שש ברכות ובהן נמי זכרונות ושופרות מתריעין עליהן כדאיתא במס' תעניות... וחוזרין ותוקעין על סדר ברכות דומיא דתעניות שאע"פ שאין היחיד חייב בתקיעות תוקעין הצבור על סדר הברכות...

למדנו מכאן דכיון שאין יחיד ויחיד חייב בתקיעות ותרועות אלא חובת ברכות הוא שמתריעין בהן... כדי שיתעלה תפלתנו בשופר הלכך בר"ה נמי כיון שיצאנו ידי חובת תקיעות של תורה ואין כל יחיד ויחיד חייב בתקיעות לא נשאר לנו אלא חובת ברכות שתקנו בהן תקיעות כדי שיעלה זכרוננו לטובה בשופר והוה ליה כתעניות ובתקיעה כל שהוא יצאו ידי התרעה של ברכות וזה טעם יפה מרפא לעצם ומתוק לפה ואם באת לדון אחריו כבר נהגו.

the special Rosh Hashanah shofar obligation. The musaf blasts (*di-me'umad*) are sounded to boost the communal prayer with shofar blasts during communal emergencies.

To elucidate the conceptual difference between the shofar obligation of Rosh Hashanah and the prayer obligation of shofar during communal emergencies, Ramban offers a further conceptual distinction, between individual obligations and communal obligations. Whereas the Rosh Hashanah shofar obligation (*di-meyushav*) is incumbent upon *individuals*, the prayer obligation of shofar during communal emergencies (and thus during Rosh Hashanah musaf) is a *communal* obligation incumbent upon the community as an entity. Thus, Ramban argues, even if the individual discharged his Rosh Hashanah obligation of shofar before musaf, the *community* must still accompany its urgent Rosh Hashanah prayers with a shofar blast, as it does on fast days and during wartime.<sup>480</sup>

Armed with this distinction, Ramban sets out to resolve the contradiction between the communal practice and the talmudic ruling. Ramban argues that the talmudic requirement to hear each variation of teru'ah applies only to the individual's Rosh Hashanah shofar obligation, which is performed before musaf (*di-meyushav*), not to the community obligation to boost their emergency communal prayers with a shofar blast, which is performed during musaf (*di-me'umad*). This is because the teru'ah obligation is unique to the Rosh Hashanah commandment. For the communal prayer requirement, *any type of blast* is sufficient to provide the necessary reinforcement to the prayers.<sup>481</sup> The communal practice to sound a

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<sup>480</sup> See above note, especially:

ש"פ שאין היחיד חייב בתקיעות תוקעין הצבור על סדר הברכות.

<sup>481</sup> *Milhamot* ibid:

different type of *teru'ah* for the different *musaf* blessings is perfectly valid, since the specific type of *teru'ah* is not important for the communal prayer obligation.

Ramban's conceptual analysis differs from Tosafot's approach. Both are faced with the same legal problem, the contradiction between the talmudic ruling and communal practice. Tosafot resolve the contradiction by revising the communal practice to cohere with the talmudic ruling.<sup>482</sup> Ramban's analysis

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למדנו מכאן דכיון שאין יחיד ויחיד חייב בתקיעות ותרועות אלא חובת ברכות הוא שמתריעין בהן די להם בתקיעה כל שהוא כדי שיתעלה תפלתנו בשופר הלכך בר"ה נמי כיון שיצאנו ידי חובת תקיעות של תורה ואין כל יחיד ויחיד חייב בתקיעות לא נשאר לנו אלא חובת ברכות שתקנו בהן תקיעות כדי שיעלה זכרוננו לטובה בשופר והוא ליה כתעניות ובתקיעה כל שהוא יצאו ידי התרעה של ברכות

See also *Derasha le-Rosh Hashanah*, pp. 170-171:

ועדין נשארה עלינו הקושיא שהזכירו הראשונים למה אין תוקעין את כולן על סדר הברכות, ותשובת שאלה זו... חוזרין ותוקעין על סדר ברכות, דומיא דתעניות ושעת מלחמה שאומרין זכרונות ושופרות ותוקעין עליהן, ואף על פי שאין היחיד חייב בתקיעות כלל, הציבור תוקעין בשעת תפילה כדי להעלות התפילה בתקיעה, ... עכשיו למדנו דכיון דאין אדם חייב בתקיעות בתענית אלא חובת ברכות היא שמתריעין בהן כדי שתעלה תפלתנו בתקיעה, די להם בתקיעה כל שהו, הלכך בראש השנה נמי כיון שיצאנו ידי חובת תקיעות של תורה מיושב, ולא נשאר עלינו אלא חובת ברכות שתקנו בהן תקיעות כדי שיעלה זכרוננו לטובה בשופר, הוא ליה כתעניות ובתקיעות כל שהו יוצאין ידי התרעה של ברכות, ודי שיאמר באחת תקעו ובאחת הריעו וליכא הפסק ופסול כלל, אלא שרצו הראשונים לתקוע על סדרן הואיל ואין התוספת פוסל כאן כלל, וזה ענין הגון ומתוקן מאד, ובמחילה מן המחברים.

<sup>482</sup> It is interesting to note that in this instance, Tosafot *revise* the communal practice in order to bring it in line with the talmudic ruling. By contrast, Ramban's solution *upholds* the communal practice by offering a novel interpretation of the two different aspects of the shofar obligation. This result is inconsistent with the general trend, well-documented in the literature, that it is the tosafists who reinterpret talmudic law to render it consistent with communal practice, while the Spanish scholars revise communal practice in order to bring it in line with talmudic law. See above, n. 476.

In "Religious Law and Change Revisited", *Collected Essays I*, pp. 273-274, Haym Soloveitchik singles out Ramban for not embracing the tosafist trend of justifying communal practice:

"The Tosafists moved... to justify a wide range of specific financial arrangements practiced by members of the Ashkenazic community. The Talmudists of other cultures studiously refrained from following suit. R. Shemu'el ha-Sardi (of Cergaigne) asked Nahmanides in Gerona: On what basis do Jews rely on Rava's opinion in the Talmud and employ one type of mortgage to avoid the usury injunction, when it seems clear that the talmudic holding is against this position? Nahmanides replied in astonishment: Jews are

openly taking interest from their co-religionists, and you are bothered that they conduct themselves in some business dealings in line with opinion 'A' in the Talmud when it seems that the ruling is in favor of opinion 'B'? (See Teshuvot Ramban no 42.) Not only did the Catalanian and Spanish scholars not justify the practice of their communities, they declined even to cite the justifications advanced by the Tosafists... The works of Nahmanides and his disciples invariably open with the problems raised by the Tosafists, present the tosafist solutions, and proceed either to amplify them or suggest new ones. However, when it comes to questions of communal practice, these works systematically refrain from reproducing the solutions of the Tosafists... no hidden halakhic insights were to be found, to their thinking, in the habitual religious practice of the people."

See also Ephraim Kanarfogel, "On the Assessment of R. Moses ben Nahman (Nahmanides) and His Literary Oeuvre," *Jewish Book Annual* 54 (1997), p. 77, who also concludes that "Nahmanides, regardless of the area of law that was involved, did not adhere to the Ashkenazic strategy of reconciling practices and conventions that appeared to be in conflict with Talmudic law."

Yet in our shofar example, Ramban--not Tosafot--justifies the communal practice. In the *Milhamot* (Rosh Hashanah 11a), Ramban even leans on the communal practice as a reason to adopt his novel interpretation:

זדה טעם יפה מרפא לעצם ומתוק לפה ואם באת לדון אחריו כבר נהגו.

How are we to make sense of this "recalcitrant" result? In general, I am skeptical of Soloveitchik's sweeping conclusion distinguishing Ramban from the tosafists on this matter. In fact, in that very same responsum (no. 42) that Soloveitchik cites, Ramban proceeds to defend the Spanish communal practice:

ומכל מקום כמה סברות וכמה דברי משא ומתן של הלכה נאמרו בדברים הללו וסוף דבר שהיא הלכה רופפת מאד שאין הכרעתו של רבינו הגדול לאסור אלא מדרב כהנא ורב פפא ורב אשי דלא אכלי בכיתא, והם יש לומר לפי שהיו חכמי ישראל נהגו להחמיר על עצמן.... הא לשאר אינשי י"ל דלדברי הכל מותר, וכן כתב בעל הלכות "והאידינא מעשים בכל יום וקא אכלי בכיתא". וכן כתב בעל המתיבות בשם גאון...

But if we want to preserve Soloveitchik's conclusion, two points can be offered to explain Ramban's shofar comment. First, this particular shofar practice appears to stem from the geonic academies. Ramban would accord the geonic practices significant weight, even if he would not be willing to do so for a local Spanish practice. Second, it is possible that Ramban just really liked his intricate and novel interpretation of the *sugya*. He leans on the communal practice to lend additional credence to his novel talmudic interpretation. Ramban's formulation might imply as much:

זדה טעם יפה מרפא לעצם ומתוק לפה--ואם באת לדון אחריו כבר נהגו.

resolves the contradiction by offering a conceptual distinction between two types of shofar obligations: the individual's Rosh Hashanah shofar obligation and the communal prayer obligation to accompany prayers during communal emergencies with a shofar blast.

As before, Ramban's analysis embodies both aspects of conceptualism. First, he offers conceptual distinctions (individual vs. communal obligations; prayer obligations vs. shofar-blast obligations) to distinguish internally between categories that are masked by the straightforward reading of the Talmud. From the plain meaning of the talmudic discussion it would be difficult to divine two separate shofar obligations on Rosh Hashanah. Ramban's conceptual analysis shows that there are different types of shofar obligations, one of which actually flows from the principles of *Tractate Ta'anit* rather than from the principles of *Tractate Rosh Hashanah*. Second, Ramban explicates and sheds new light on the nature of a basic Jewish law concept: the nature of the musaf shofar obligation of Rosh Hashanah (*teki'ot dime'umad*) and the general obligation to blast the shofar during communal emergencies.

#### E. The Legal Status of the Jewish Servant

A fifth example is drawn from Ramban's analysis in *Kiddushin* 16a of the legal status of the Jewish servant as "an owned person" (*gufo kanuy*). In that passage, the Talmud concludes that a Jewish servant is considered "an owned person." The Talmud derives this conclusion from the legal rule that a Jewish servant cannot be freed by his master's mere verbal declaration; the master must release him via a written writ of release (*shetar*).<sup>483</sup>

Tosafot (*Bava Metzia* 99a s.v. *de-lo*) note that this ruling appears to contradict several other passages in the Talmud that explicitly rule that a Jewish servant is not considered "an owned person" (*ein gufo*

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<sup>483</sup> Kiddushin 16a:

שטר למה לי? לימא ליה באפי תרי זיל, א"נ באפי בי דינא זיל! אמר רבא, זאת אומרת: עבד עברי גופו קנוי, והרב שמחל על גרעונו - אין גרעונו מחול.

*kanuy*). For example, in *Bava Metzia* 99, the Talmud rules that an item delivered by a non-Jewish servant (*eved kena'ani*) is legally equivalent to it being delivered by his master. This is because the non-Jewish servant is an “owned person” (*gufo kanuy*) and thus the property of his master. But the Talmud there states that this delivery rule does not hold for a Jewish servant because he is “not owned” by the master (*lo kani leh gufeh*). This contradicts the Talmud’s conclusion in *Kiddushin* 16a.

Two other passages also appear to contradict the Talmud’s ruling in *Kiddushin* 16a. In *Yevamot* 70a-b, the Talmud rules that whereas a non-Jewish servant owned by a Kohen can eat *terumah*, because he is “owned” by his master, a Jewish servant cannot because he is “not owned by his master” (*lo kani leh rabeh*). Likewise in *Bava Metzia* 12a, the Mishnah distinguishes between a Jewish and gentile servant regarding whether a lost item picked up by the servant is automatically acquired by his master. The item found by the gentile servant is automatically acquired by the master because the master owns him. This rule does not apply to the Jewish servant because he is not considered to be owned by his master.<sup>484</sup>

Tosafot document these contradictions and proceed to limit the significance of the Talmud’s ruling in *Kiddushin* 16a. They argue that, in fact, a Jewish servant is *not* owned by his master. As for the Talmud’s ruling in *Kiddushin* 16a, Tosafot contend that this is a limited rule relating to one legal matter: that a Jewish servant cannot be freed by the master’s mere verbal proclamation. For Tosafot, *gufo kanuy* has no legal relevance beyond this one application.<sup>485</sup> While this limitation of the *gufo kanuy* rule defuses the contradiction, Tosafot do not provide any legal reason or rationale for the limitation. They do not

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<sup>484</sup> See also *Eruvin* 79b.

<sup>485</sup> See Tosafot *Bava Metzia* 99a s.v. *de-lo*:

דלא קני ליה גופיה - אף על גב דבפ"ק דקדושין (דף טז. ושם) אמרינן דעבד עברי גופו קנוי היינו לענין שאין גרעונו מחול אם מחל בעל פה אלא בשטר.

And Tosafot *Yevamot* 70b s.v. *alma*:

אלמא לא קני ליה רביה - והא דאמר בפ"ק דקדושין (דף טז. ושם) דעבד עברי גופו קנוי היינו לענין שצריך גט שחרור ואין יוצא באמירה בעלמא.



explain why the Jewish servant should require a writ of release if he is not owned by his master. As we saw in chapter four, this is characteristic of the tosafists' approach. Tosafot defuse the contradiction, but they often do not explain why their solution is persuasive or legally compelling.<sup>486</sup>

Ramban cites Tosafot but criticizes their resolution. Ramban contends that Tosafot's answer lacks a legal rationale and is conceptually indefensible.<sup>487</sup> If the Jewish servant is not "owned" by the master, what basis is there to require a writ of release? Nowhere, Ramban contends, do we find that a mere agreement to provide services requires such a writ of release. If there is no *kinyan ha-guf*, there is no basis for a *shetar shihzur*.<sup>488</sup>

Ramban offers a different solution to the contradiction between the talmudic passages by distinguishing conceptually between two different senses of *gufu kanuy*. The first sense, Ramban explains, pertains to ownership and the property-rights relationship between the master and the servant for matters of civil and commercial law. In this sense of *gufu kanuy* the question is: to what extent does the master own

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<sup>486</sup> See Haym Soloveitchik, "The Riddle of Meiri's Recent Popularity", *Collected Essays III*, p. 400:

"The Tosafist approach is that of scholastic dialectics. One collates all the relevant texts on a given subject, takes note of the contradictions, and seeks to resolve them by making a distinction. One can almost always distinguish between two cases, and so pointing to a factual distinction is but half a solution. One must then show that this difference of fact is of legal significance. Rabbenu Tam and Ri rarely explain the legal significance of their distinctions. They are content to simply state the factual difference... They leave the task of investing these distinctions with legal significance to their successors."

<sup>487</sup> Recall from chapter four that the pursuit of the underlying rationale for a distinction is one of the hallmarks of the conceptual approach. Recall R. Lichtenstein's observation ("Reflections on the Conceptual Approach," p. 18) that "the resolving conceptualist... is not content with a distinction without a difference."

<sup>488</sup> *Hiddushim Kiddushin 16a s.v. zot*:

זאת אומרת עבד עברי גופו קנוי והרב שמחל על גרעונו אין גרעונו מחול. יש מפרשים דהכי קאמר עבד עברי גופו קנוי לגבי הרב שמחל על גרעונו שאינו מחול, אבל לא שיהא גופו קנוי למילי אחרני, שהרי אין ידו כיד רבו במציאה ובעירוב ובפדיון מעשר כדאיתא במציעא (י"ב א'), ותימא הוא היכן מצינו קנין מעשה ידיו שאינו יוצא במחילה בלא שטר.

the person of the servant? Does the servant exist as a legal domain distinct from his master? Ramban refers to this sense of *gufo kanuy* as *kinyan mamon*.

The second sense of *gufo kanuy* is not about property or ownership but about the changed religious and ritual status of the servant. It is this sense of *gufo kanuy* that explains the modified “personal status” of the servant. The modified personal status of the servant determines religious-ritual questions such as whether the servant is permitted to marry a Jewish woman or to cohabit with a gentile woman, and the extent to which he is obligated in mitzvot.<sup>489</sup>

Armed with this distinction between two different conceptions of *gufo kanuy*, Ramban sets out to resolve the contradictory talmudic passages. Ramban argues that the passages which conclude that the Jewish servant is not owned (*ein gufo kanuy*) are referring to the civil-law, ownership sense of *kinyan mamon*. Thus, the Jewish servant can capture lost objects and acquire title to them in his own name without having to forfeit them to his master. Similarly, the physical presence of the servant does not amount to the legal presence of his owner (see *Bava Metzia* 99). Moreover, the Jewish servant is not considered “property” of his master (*kinyan kaspo*) to allow him to eat the *terumah* of his kohen master. In short, a Jewish servant is not owned by his master in this sense of property-ownership.

By contrast the talmudic passage in *Kiddushin* that concludes *gufo kanuy* is referring to the changed religious and personal status of the servant. Ramban argues that the Jewish servant’s changed religious and personal status is evidenced by the fact that he is now permitted to cohabit with a gentile maidservant (*shifhah kena’anit*).<sup>490</sup> Ramban further argues that it is the personal status change (and

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<sup>489</sup> Ibid:

אבל כך נראה לי דכיון דשני קנינין הן בעבדות, אחד קנין ממון והוא קנין דמעשה ידי, ואחד קנין איסור שהוא אוסרו בבת ישראל ופוטרו ממקצת מצוות.

<sup>490</sup> Ibid:

שאף עבד עברי יש לרבו בו קנין איסור, שהרי מתירו בשפחה כנענית.

therefore that meaning of *gufo kanuy*) that drives the Talmud's requirement of a writ of release for the Jewish servant. The religious-personal status of the servant can only be modified through a written release, just as a married woman's personal status change can only be effected through the written release of a *get*.<sup>491</sup> Thus, Ramban resolves the contradiction between the talmudic passages by

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<sup>491</sup> Ibid

וקנין הגוף הזה הוא המצריכו גט חירות ואינו נפקע בדיבור, דומה לקנין אישות שהוא צריך גט להתירו, וממנו הוא למד, לפיכך אמרו שאף עבד עברי יש לרבו בו קנין איסור, שהרי מתירו בשפחה כנענית, ואין קנין איסור נפקע בלא גט, בין באישות בין בעבדות, הילכך הרב שמחל על גרעונו אין גרעונו מחול אלא הוה ליה כמפקיר עבדו שצריך גט שחרור.

It is interesting to note that in all five examples discussed so far, legal analogies (and arguments by way of legal analogy) play an important role in Ramban's analysis. In our first example, Ramban argued that failing to testify on behalf of a litigant cannot result in tort liability. He drew the following analogy:

מי שאינו רוצה להעיד פטור שאין עליו חיוב ממון אלא מדרך גמילות חסדים ואם אינו רוצה לטרוח ולהצילו לזה אינו חייב, למה זה דומה למי שרואה כיסו של חברו אבד ואינו מצילו או מי שאינו רוצה ליתן פרוטה משלו לעני שאין בית דין מחייבין אותו בכך, אף כאן אין בית דין מחייבין אותו לשלם מביתו שלא חייבתו התורה בכך אלא כשאר המצות היא זו ואינה בדין ממון.

In our second example, Ramban argued that the worker acquired the value of the contract once he commenced performance. Ramban drew the following analogy:

כיון שהתחילו במלאכה נתחייב מעכשיו ליתן להם שכרן משלם כמו שקבל עליו, שכשם ששאר הדברים נקנין בקנין כך שכירות פועלים נקנית בהתחלת מלאכה.

In our third example, Ramban analogized *bittul hametz* to *ye'ush*:

שאינן אדם עובר אלא על חמץ שלו שהוא רוצה בקיומו ודעתו עליו, הא נתייאש ממנו ונתן דעתו שאינו רוצה מחמת איסורו ולא יהנה בו לעולם אינו עובר, משל [ל]ממון אבדה כיון שנתייאש ממנו בלבד יצא מרשותו וכל הזוכה בו קנאו, אף חמץ בזמנו ממון אבוד הוא מבעליו ויצא מרשותו ביאוש.

In the fourth example, Ramban drew a legal analogy between the musaf blasts and the blasts on communal fast days and during wartime:

ועיקר הדברים... תוקעין ומריעין כשהן עומדין על סדר הברכות שהברכות הללו מלכיות זכרונות ושופרות כל עיקרן בהתרועות נתקנו וכן בתעניות וכן בשעת מלחמה... למדנו מכאן דכיון שאין יחיד ויחיד חייב בתקיעות ותרועות אלא חובת ברכות הוא שמתריעין בהן... כדי שיתעלה תפלתנו בשופר הלכך בר"ה נמי כיון שיצאנו ידי חובת תקיעות של תורה ואין כל יחיד ויחיד חייב בתקיעות לא נשאר לנו אלא חובת ברכות שתקנו בהן תקיעות כדי שיעלה זכרוננו לטובה בשופר והוה ליה כתעניות ובתקיעה כל שהוא יצאו ידי התרעה של ברכות.

distinguishing between two different conceptions of *gufo kanuy*. Note further that, having drawn this distinction, Ramban is able to show its explanatory power in other areas of Jewish law.<sup>492</sup>

Let us now compare Ramban's conceptual approach with Tosafot's approach. For Tosafot, the contradiction between the passages is reconciled by their suggestion that the Jewish servant is generally considered un-owned, except with regard to one area: requiring a writ of release. For this one legal matter, he is considered owned. Tosafot provide no explanation for why the writ of release should constitute an exception to the unowned status of the Jewish servant. They resolve the contradiction, but provide no legal rationale or explanation.

Ramban, by contrast, seizes on the talmudic contradiction to offer a conceptual distinction between *kinyan mamon* and *kinyan issur*. This exemplifies the aspect of conceptualism that offers fine-grained

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And in the current example, Ramban draws an analogy between the *get shihrur* of the servant and the *get* of divorce:

וקנין הגוף הזה הוא המצריכו גט חירות ואינו נפקע בדיבור, דומה לקנין אישות שהוא צריך גט להתירו, וממנו הוא למד.

For further examples, see *Hiddushim* Eruvin 43a, where Ramban draws an analogy between carrying 4 *amot* in a public domain and the *tehum* prohibition:

דג' פרסאות בהלוך של תורה בארבע אמות של העברה ברשות הרבים כל שמעביר מתחלת ארבע לסוף ארבע באיסור חייב וכל שמהלך שלש פרסאות באיסור לוקה, הא בשלא הלך ואין ביציאתו חוץ לתחום איסור אין בהלוכו משום חיוב תורה עד שיהלך משם שנים עשר מיל.

See also the commentary on the Torah, Vayikra 23:36:

וצוה בחג המצות שבעה ימים בקדושה לפנייהם ולאחריהם כי כולם קדושים ובתוכם ה', ומנה ממנו תשעה וארבעים יום שבעה שבועות כימי עולם, וקדש יום שמיני כשמיני של חג, והימים הספורים בינתיים כחולו של מועד בין הראשון והשמיני בחג, והוא יום מתן תורה שהראם בו את אשו הגדולה ודבריו שמעו מתוך האש.

<sup>492</sup> *Hiddushim* Kiddushin 16a s.v. *zot*:

וכן קנין הגוף האמור בפ' השולח על זה הדרך הוא ופירשתי שם.

See *Hiddushim* Gittin 38b s.v. *gufeh*:

ה"ק קנין הגוף שיש לישראל על העבדים אי אפשר להקדש לקנותו, שאין יד להקדש בדק הבית אלא לקנות ממון וזה אינו קנין ממון, ששני קניניו יש בעבד אחד קנין ממון דהיינו למעשה ידיו ואחד קנין הגוף שהוא אסור דומיא דקנין אישות אשת איש ולא פקע אלא בגיטא דחירותא אף על גב דפקע קנין ממון שבו כגון שהפקירו או שנתיאש ממנו, ולא מצינו דין זה אלא להדיוט אבל לא להקדש.

conceptual distinctions. The Talmud does not distinguish between different conceptions or aspects of *gufo kanuy*. In fact, the Talmud uses the identical phrase indiscriminately as if it represented a single legal concept. Yet Ramban shows that the term actually denotes very different concepts, and bears a different legal meaning, across the various talmudic passages. As we saw in chapter four, this is one of the hallmarks of the conceptual approach. The same term can actually refer to distinct legal concepts.<sup>493</sup> Ramban's analysis also exemplifies the second aspect of conceptualism by articulating and clarifying the fundamental legal concept of changed personal status. Ramban identifies and formulates, for the first time, the concept of *kinyan issur* as a distinct halakhic category with applications in both the laws of servitude and the laws of marriage.

#### F. Contributory Negligence

Our sixth example is drawn from Ramban's discussion of the strict liability rule for a tortfeasor. In *Bava Kamma* 26a-b, the Talmud appears to establish a rule of strict (or absolute) liability for torts directly caused by persons. Under this rule, a person who causes harm to another is strictly liable to compensate, regardless of whether he was at fault. The tortfeasor is liable even if he was not negligent and even if his conduct was not faulty in any way.<sup>494</sup>

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<sup>493</sup> See above, chapter four, especially Shai Wozner's formulation (above, chapter four, note 417):

לעתים נחשפים באמצעות הניתוח האנליטי ממדים סמויים של הלכה שבמבט ראשון נראה שיש לה רק ממד אחד... באמצעות הניתוח אפשר להראות שלמרות הדימוי החיצוני... מדובר לאמיתו של דבר בעניינים שונים....

Note as well R. Lichtenstein's formulation, "The Conceptual Approach," p. 18, that for the conceptualist, "even when the nomenclature is identical, the terms may vary, depending on context."

For another clear example of Ramban arguing that an identical talmudic phrase can bear distinct conceptual meanings, and his criticism of Rabad for failing to appreciate the different meanings, see Ramban, *Dina de-Garmi* (ed. Hirshler), pp. 115-122:

והוי יודע שלשון דבר הגורם לממון כממון דמי הזוכר בתלמוד על דרכים רבים... ומי שדמה שני עניינים אלו וערבן חייב משום כלאים.

See also note 117 therein.

<sup>494</sup> *Bava Kamma* 26a-b:

Tosafot observe that this statement of strict liability appears to contradict other talmudic passages. For example, the Talmud, Bava Kamma 27a, rules that if the plaintiff left his jug in a public area and the defendant accidentally smashed it as he was traveling through the area at night when it would be difficult for him to see the jug and avoid it, the plaintiff is not entitled to recover damages.<sup>495</sup> Similarly, Tosafot note the Talmud's case of a beam-carrying defendant who was walking behind a barrel-carrying plaintiff. If the barrel carrier stopped short, and the defendant smashed his beam into the barrel, the defendant (the beam carrier) is exempt from liability.<sup>496</sup>

Tosafot also note that a third ruling, this time from the Yerushalmi (Bava Kamma 2:8), contradicts the Talmud's strict liability rule. The Mishnah rules that if the defendant damages someone or something in his sleep, he is liable to compensate the victim, under the halakhic theory of strict liability.<sup>497</sup> The Yerushalmi qualifies this ruling and states that if the defendant had gone to sleep first, and the plaintiff later lay down near him, and the slumbering defendant rolled over and harmed the plaintiff, the defendant is exempt, since he was there first.<sup>498</sup> Tosafot note that these cases all imply that a defendant

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אדם מועד לעולם, בין שוגג בין מזיד, בין ער בין ישן.... אמר חזקיה, וכן תנא דבי חזקיה, אמר קרא: פצע תחת פצע, לחייבו על השוגג כמזיד, ועל האונס כרצון.

For a discussion of strict liability and fault liability in Jewish law, see Shana Schick, *Negligence and Strict Liability in Babylonia and Palestine: Two Competing Systems of Tort Law in the Rulings of Early Amoraim*, 29 *Diné Israel*, p. 139. For general discussion of strict liability and fault liability, see Richard Epstein, *A Theory of Strict Liability*, 2 *Journal of Legal Studies* 151 (1973); Ernest Weinrib, *The Idea of Private Law* (1995), pp. 145-203.

<sup>495</sup> Bava Kamma 27a-b:

מתני'. המניח את הכד ברה"ר, ובא אחר ונתקל בה ושברה - פטור.... ובא אחר ונתקל בה ושברה - פטור. אמאי פטור? איבעי ליה לעיוני ומיזל! אמרי דבי רב משמיה דרב: בממלא רה"ר כולה חביות; שמואל אמר: באפילה שנו... רבי יוחנן אמר: בקרן זוית.

<sup>496</sup> Bava Kamma 31b-32a:

מתני'. זה בא בחביתו וזה בא בקורתו... היה בעל חבית ראשון ובעל קורה אחרון... אם עמד בעל חבית - פטור, ואם אמר לבעל קורה עמוד - חייב.

<sup>497</sup> Above, n. 59.

<sup>498</sup> Yerushalmi Bava Kamma 2:8:

is not held strictly liable for the damage he caused, contradicting the talmudic statement of strict liability.

Faced with this contradiction, Tosafot move to qualify the Talmud's strict liability formulation. They argue that the Talmud did not intend to hold defendant's strictly liable for harm that they caused if it was absolutely beyond their control (אונס גמור).<sup>499</sup> Rather the talmudic rule must be reinterpreted to mean that defendants are liable when their action borders on negligence (קרוב לפשיעה). Thus, Tosafot resolve the talmudic contradiction by qualifying (and reinterpreting) the Talmud's strict liability rule. In their view, a defendant is exempt from liability in a case of absolute 'ones (אונס גמור), but liable for 'onsim that border on negligence.<sup>500</sup>

Ramban (Bava Metzia 82b s.v. *ve-asa*) notes the contradiction between the various talmudic passages, quotes Tosafot's solution, and rejects it. His main ground for rejecting Tosafot's theory is that it is inconsistent with other passages in the Talmud that appear to hold a defendant strictly liable for even

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א"ר יצחק מתניתא בשהיו שניהם ישינין אבל אם היה אחד מהן ישן ובא חבירו ליטן אצלו זה שבא ליטן אצלו הוא המועד.

<sup>499</sup> This despite the Talmud's unambiguous formulation, above n. 59, *le-hayev al ha-'ones ke-ratzon*.

<sup>500</sup> Tosafot Bava Kamma 27b s.v. *ve-shemu'el*:

ואף על גב דלעיל (דף כו:): מרבין אונס כרצון באדם המזיק מפצע תחת פצע אונס גמור לא רבי רחמנא דהא בירושלמי פוטר אותו שישן ראשון אם הזיק לפני הבא אצלו לישן... ובמתניתין נמי תנן היה בעל חבית ראשון ובעל קורה אחרון דאם עמד בעל חבית ונשברה חבית בקורה פטור ונראה לדקדק דאדם המזיק דמפטר באונס שהוא כעין גניבה.... ש"מ דבאונס דכעין גניבה אדם המזיק פטור... אבל באונס שהוא כעין אבידה שהיא קרובה לפשיעה יותר כדאמרין בהשואל (ב"מ דף צד:): דגניבה קרובה לאונס ואבידה קרובה לפשיעה נראה דאדם המזיק חייב דא"א לומר שלא יתחייב אלא בפשיעה.

See also Tosafot Bava Metzia 82b s.v. *ve-savar*:

... אמאי פטור והא אדם המזיק מרבין (ב"ק דף כו:): מפצע תחת פצע לחייב על אונס כרצון וי"ל דלא בכל אונס חייב אדם המזיק אלא באונס דכעין גניבה ואבידה כמו רוח שאינה מצויה... אבל באונס גמור פטור אדם המזיק כדמשמע בירושלמי דאם היה ישן ובא חבירו וישן אצלו והזיקו זה את זה הראשון פטור והשני חייב.... ובריש המניח (שם דף כז: ושם ד"ה ושמואל) לפי שאין דרכן של בני אדם להתבונן בדרכים ושאר שינויי דהתם דפטר ליה לפי שלא היה לו לידע וכן במתניתין דהתם (דף לב.) היה בעל חבית ראשון כו' ואם עמד בעל חבית פטור בעל קורה והרבה כיוצא באלו.

See also Tosafot Bava Batra 93b s.v. *hayav*.

the most unforeseeable and unpreventable types of *onsim* (*onsim ha-gedolim ba-'olam*).<sup>501</sup> Ramban therefore develops a different approach that distinguishes conceptually between liability rules that flow from the defendant's conduct ("is there a sufficient basis to hold the defendant liable?") and defenses based on the plaintiff's conduct that bar him from recovering damages ("is the plaintiff entitled to collect?").

Ramban argues that the passages cited by Tosafot which excuse the defendant from liability are conceptually unrelated to the strict liability rules flowing from the defendant's conduct. Those passages, therefore, do not undermine the Talmud's statement that a defendant is strictly liable for damage that he causes. Rather, the passages in question turn on a conceptually distinct principle of *contributory negligence*.<sup>502</sup> According to Ramban, the passages cited by Tosafot demonstrate that the victim's contributory negligence (*peshi'ah de-nizak*)--his own negligent or faulty conduct--bars him from recovering damages.<sup>503</sup>

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<sup>501</sup> *Hiddushim Bava Metzia 82b s.v. ve-'asa*:

ומצאתי בתוס' בב"ק (כ"ז ב') שמפרשים אותה משום אדם המזיק, וא"כ למה פטרוהו לדברי האומר אנוס הוא והלא אדם מועד לעולם בין באונס בין ברצון, והם השיבו שאינו חייב באונסין גדולים וסמכו אותה מן הירו' שאמרו בישן ובא חבירו וישן אצלו הוא המועד, ואי אפשר להעמידה...

וסוף דבר כיון שהזכירו חכמים באונס נזקין אבן מונחת בחיקו ולא הכיר בה מעולם (ב"ק כ"ו ב'), ונפל מן הגג ברוח שאינה מצויה (שם כ"ז א') הרי הזכירו סוף האונסין כלם, דרוח שאינה מצויה אפילו באותה של אליהו במשמע, דרוח מצויה הזכירו לענין ש"ח אבל רוח שאינה מצויה לא הזכרה בתלמוד אלא לענין אונס דהוא מן האונסין הגדולים שבעולם...

<sup>502</sup> On contributory negligence, see *Prosser and Keeton on Torts*, Section 65 "Contributory Negligence." See also Kenneth Abraham, *The Forms and Functions of Tort Law* (2012), pp. 165-166: "contributory negligence is the failure of the plaintiff to exercise reasonable care to protect himself or his property from the risk of harm or loss... At the core of the defense of contributory negligence is the notion that it would be unfair to impose liability on the defendant when the plaintiff has negligently contributed to his own injury."

<sup>503</sup> *Ramban Bava Metzia 82b s.v. ve-'asa*:

ומצאתי בתוס' בב"ק (כ"ז ב') שמפרשים אותה משום אדם המזיק, וא"כ למה פטרוהו לדברי האומר אנוס הוא והלא אדם מועד לעולם בין באונס בין ברצון, והם השיבו שאינו חייב באונסין גדולים וסמכו אותה מן הירו' שאמרו בישן ובא חבירו וישן אצלו הוא המועד, ואי



Thus, Ramban resolves the contradiction by preserving the absolute (strict) liability rule.<sup>504</sup> A defendant is strictly liable for any harm that he causes, even when he is not at all at fault. The talmudic passages that exempt the defendant are based on *the plaintiff's* contributory negligence. The plaintiff's faulty conduct bars him from recovering damages--even though there are sufficient grounds to hold the defendant liable under the halakhic doctrine of strict liability.

Notice the difference between Ramban's conceptual approach and Tosafot's approach. For Tosafot, the upshot of their analysis is to qualify (essentially reject) the strict liability rule (*adam mu'ad le-'olam*) and convert it into a fault-liability rule. By contrast, Ramban's analysis distinguishes conceptually between two types of liability issues: a) whether the defendant committed a cognizable tort, and b) whether the victim is barred from recovery because of his own negligent conduct. Thus, where the Talmud (and Tosafot) appears to only consider the question of "is the defendant liable", Ramban argues that the various passages are actually concerned with two different conceptual matters.

Ramban's analysis also exemplifies the second feature of conceptualism by articulating, for the first time, a halakhic doctrine of contributory negligence. In this sense, Ramban's analysis embodies the

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אפשי להעמידה דהתם משום דשני פשע בעצמו, וכן מה שאמרו באם היה בעל קורה ראשון ובעל חבית אחרון וכולה מתני', וכן מה שאמרו לפי שאין דרכן של בני אדם להתבונן בדרכים, כלם כשהם אדם המזיק משום פשיעה דניזק פטרו בהם.

For a discussion of contributory negligence in Jewish law and the centrality of Ramban in articulating the doctrine, see Itamar Rosensweig and Alex Maged, ["Contributory Negligence in Halakhic Tort Theory,"](#) *Jewishprudence* (April 2021).

<sup>504</sup> Note that Ramban's analysis preserves the plain meaning of the strict liability rule articulated in Bava Kamma 26a-b. Although Ramban does not mention this as a consideration in rejecting Tosafot's theory, this type of consideration is consistent with Ramban's desire (and programmatic statement that Talmud scholars ought) to preserve the plain meaning of the talmudic passage. See above, n. 449. By contrast, Tosafot radically reinterpret the strict liability rule into a negligence-fault rule.

dimension of conceptualism that seeks to articulate and classify the fundamental concepts and principles of Jewish law.

### G. The Authority of Judges

Our seventh example comes from Ramban's analysis of the qualification of judges and their authority to preside over litigants and their disputes. The Talmud, *Sanhedrin* 2b, establishes that certain classes of civil cases, *gezelot va-havalot*, must be presided over by ordained judges (*mumhin*). The Talmud derives this from the biblical word *elohim*, which the Talmud interprets to refer to an ordained judge (*mumheh*).<sup>505</sup>

Tosafot note that the Talmud in *Gittin* 88b appears to invoke a different biblical source--*lifneihem ve-lo lifnei hedyotot*--to establish the ordination requirement of judges.<sup>506</sup> Thus, the two talmudic passages appear to contradict one another about the source for the ordination requirement. Tosafot resolve the contradiction by asserting that the *lifneihem* source cited in *Gittin* ultimately reduces to the *elohim* source cited in *Sanhedrin*. Tosafot explain that the implied referent of the word *lifneihem* in the biblical passage is the '*elohim*' mentioned in that same biblical context.<sup>507</sup> For Tosafot, the *Gittin* source reads:

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<sup>505</sup> Sanhedrin 2b:

האי דקתני גזילות וחבלות - משום דעיקר שלשה דכתיבי - בגזילות וחבלות כתיבי. גזילות דכתיבי ונקרב בעל הבית אל האלהים... קסבר עירוב פרשיות כתוב כאן, ובדין הוא דליבעי נמי מומחין...

<sup>506</sup> Gittin 88b:

אביי אשכחיה לרב יוסף דיתיב וקא מעשה אגיטי, א"ל: והא אנן הדיוטות אנן, ותניא, היה ר"ט אומר: כל מקום שאתה מוצא אגוריאות של עובדי כוכבים, אף על פי שדיניהם כדיני ישראל, אי אתה רשאי להיזקק להם, שנאמר: ואלה המשפטים אשר תשים לפניהם, לפניהם ולא לפני עובדי כוכבים, דבר אחר: לפניהם - ולא לפני הדיוטות!

<sup>507</sup> Tosafot Sanhedrin 2b s.v. *liba'i*:

ליבעי נמי מומחין - תימה דמשמע הכא דממעטינן הדיוטות מדכתיבי אלהים ובפרק המגרש (גיטין דף פח:): ממעט להו מדכתיבי לפניהם ולא לפני עכו"ם ולא לפני הדיוטות וי"ל דהתם ממעטינן מלפניהם משום דלפניהם קאי אאלהים דהכא כלומר לפני הדיינין המפורשין במקום אחר.

See also Tosafot Gittin 88b s.v. *lifneihem*.

“These are the legal issues that you shall bring before [the ordained judges (*elohim*)].” Thus, Tosafot resolve the contradiction by reducing the *Gittin* 88b source to the *Sanhedrin* 2b source.

Ramban cites Tosafot and declares their analysis “unpersuasive (*bedohak*).”<sup>508</sup> Ramban then offers a different solution to the contradiction by distinguishing conceptually between two types of procedural issues. The first issue is whether a judge has automatic jurisdiction or authority to hear and issue a binding ruling on a given dispute. Here the issue is whether the judge’s decision can be binding on the litigants without their submission.<sup>509</sup> The second type of procedural issue is whether it is *permissible* for litigants to circumvent the “ordained” judges (*mumhin*) and submit to a lay judge (*hedyot*). Likewise, within this second issue, is it *permissible* for the lay judge (*hedyot*) to accept and to preside over a dispute when *mumhin* are available. Even if the first issue of jurisdiction can be solved by the parties voluntarily submitting to the lay judge, thereby granting him authority to resolve their dispute, it is an open question whether it is permissible for them (and for the lay judge) to circumvent the system of ordained judges.<sup>510</sup>

Ramban argues that the different talmudic passages, and by extension the different biblical sources, are addressing these different legal principles. The passage in *Sanhedrin* and the *elohim* source are

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<sup>508</sup> Ramban Sanhedrin 23a s.v. *ve-ra'ituy*:

וראיתי בתוספות קושיא אהא דאמרינן בשמעתא קמייתא (ב' ב') אי קסבר עירוב פרשיות כתוב כאן ליבעי נמי מומחין... והא בפרק המגרש (שם) אמרינן אביי אשכחיה לר' יוסף דקא מעשי אגיטא אמר ליה והא אנן הדיוטות אנן ותניא לפנייהם ולא לפני גוים דבר אחר לפנייהם ולא לפני הדיוטות אמר ליה שליחותיהו קא עבדינן מידי דהוה אהודאות והלואות, אלמא פסולא דהדיוטות מהתם, והם מעלין אותה בדוחק.

<sup>509</sup> By way of analogy, the first issue distinguishes between something like a state court system, which has automatic jurisdiction over litigants and disputes, on the one hand, and arbitration panels that only have jurisdiction if the parties submit to them. *Mumhin*, like the state courts, have automatic jurisdiction. *Hedyotot* have no jurisdiction without the explicit submission of the parties.

<sup>510</sup> Keeping with the analogy of the prior note, the question is whether it is *permissible* or *proper* to circumvent the state court system and to submit to arbitration.

addressing the matter of jurisdiction and authority. Only an ordained judge (*elohim*) has automatic jurisdiction and authority to issue binding decisions on litigants even without their submission. *Hedyotot* do not have such authority, and as such, their rulings are not binding or valid without the submission of the parties.<sup>511</sup>

The passage in *Gittin* and the *lifneihem* source, Ramban argues, are addressing the different issue of the appropriateness of submitting to lay judges when it circumvents the court system presided over by *mumhin*.<sup>512</sup> Ramban contends that the *lifneihem* source establishes a dual prohibition. It prohibits litigants from submitting to lay judges when ordained ones are available, and it prohibits lay judges (*hedyotot*) from agreeing to preside over cases where ordained judges are available.<sup>513</sup> According to

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<sup>511</sup> See Ran citing Ramban (*Hiddushim Sanhedrin 2b s.v. u-be-din*):

הך סוגיא דהכא היא לענין הדין עצמו אם הוא כשר בהדיוטות... שאמרה תורה עד האלהים יבא דבר שניהם שהם מומחין ואם אינן מומחין הדין פסול מדאורייתא...

And Ramban's own formulation (*Hiddushim Sanhedrin 2b s.v. ve-ra'iti*):

אבל לא בא כתוב אלהים אלא לומר שדינים של הדיוטות אינו דין.

<sup>512</sup> See Ran citing Ramban (*Sanhedrin 2b s.v. u-be-din*):

ואותה סוגיא שבפרק המגרש הוא ענין מצוה אחרת שאמרה תורה שאסור לבא לפני הדיוטות ואע"פ שקבלו עליהן בעלי הדין את דינם... כדי שלא ישתמשו ההדיוטות בכתר המומחין אסרה תורה שלא לבא לפני הדיוטות.

And Ramban's own formulation (*Hiddushim Sanhedrin 2a s.v. ve-ra'iti*):

...לאסור עלינו שלא נזקק לפניהם... הוצרך הכתוב לפניהם לומר לא לפני גויים ולא לפני הדיוטות, ... בהדיוטות אסור לך להיזקק להם.

<sup>513</sup> *Hiddushim Sanhedrin 2b s.v. ve-ra'iti*:

ואני אומר הדיוטות שפסולין ודאי מאלהים נפקא, היכא דכתיב אלהים בעינן מומחין היכא דלא כתיב אלהים לא בעינן מומחין אלא הדיוטות כשרין, אבל לא בא כתוב אלהים אלא לומר שדינים של הדיוטות אינו דין אבל לאסור עלינו שלא נזקק לפניהם אינו במשמע, לכך הוצרך הכתוב לפניהם לומר לא לפני גויים ולא לפני הדיוטות, כשם שאגוריות של גויים אף על פי שאתה יודע שדיניהם כדין תורה אי אתה רשאי להזקק להם כך בהדיוטות אסור לך להיזקק להם.

Note the legal analogy that Ramban draws from gentile judges to lay judges. For this phenomenon, see above, n.

491.

See also Ramban's commentary on the Torah, Shemot 21:1:

Ramban, these prohibitions, based on *lifneihem*, are in place separate and apart from the question of jurisdiction and authority raised by *elohim*. Thus, even where a *hedyot's* decision may be binding, such as when the parties submit to the *hedyot* for a binding decision, it is still inappropriate for them (and for the lay judge) to circumvent the system of *mumhin*.<sup>514</sup> Similarly, it may be inappropriate (*asur*) to appeal to a lay judge for recourse, even when his decision will be ineffective.<sup>515</sup> Ramban applies this conceptual analysis to draw far reaching practical conclusions of Jewish law.<sup>516</sup>

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ולכך אמר בבאן שהמשפטים האלה ישימו אותם לפני האלהים שיזכיר, ולא לפני גוים, ולא לפני מי שאינו שופט על פי התורה, והוא הדיוט לזה, שאסור לבא בפניו כשם שאסור לבא לפני הגוים. ואף על פי שידוע שההדיוט הזה יודע שורת הדין וידין לו כהוגן, אבל הוא אסור לשומו דיין ולצעוק לו שיכוף את בעל דינו לדון לפניו, וההדיוט עצמו אסור לדון להם.

<sup>514</sup> Ran's formulation (Sanhedrin 2b s.v. *u-be-din*), citing Ramban, is clear on this point:

ועוד קשה דהתם משמע דמדרשה דלפניהם ולא לפני הדיוטות בעינן מומחין... והתירוץ הנכון לכל זה דהך סוגיא דהבא היא לענין הדין עצמו אם הוא כשר בהדיוטות אם לא והוא נפקא מעירוב פרשיות שהוא בעיקר הדין שאמרה תורה עד האלהים יבא דבר שניהם שהם מומחין ואם אינן מומחין הדין פסול מדאורייתא... ואותה סוגיא שבפרק המגרש הוא ענין מצוה אחרת שאמרה תורה שאסור לבא לפני הדיוטות ואף על פי שקבלו עליהן בעלי הדין את דינם כדרך שאסור לבא לפני הכותים אף ע"פ שקבלו עליהם בעלי הדין את דינם ואף עפ"י שבשניהם הדין אינו כלום מן התורה אפילו הכי כדי שלא יבואו בערכאותיהם שהוא עליו יראתם או כדי שלא ישתמשו ההדיוטות בכתר המומחין אסרה תורה שלא לבא לפני ההדיוטות... זו היא השטה הנכונה מהרמב"ן ז"ל שכתבו תלמידיו משמו.

<sup>515</sup> This is one way of reading Ramban's commentary on the Torah (Shemot 21:1):

אסור לשומו דיין ולצעוק לו שיכוף את בעל דינו לדון לפניו, וההדיוט עצמו אסור לדון להם.

<sup>516</sup> Ramban argues, based on his analysis, that the principle of *shlihutayhu* uniquely addresses the prohibition (*isur*) of circumventing the system of *mumhin* by appearing before lay judges. (Recall Ran's formulation of Ramban's theory: (כדי שלא ישתמשו ההדיוטות בכתר המומחין אסרה תורה שלא לבא לפני ההדיוטות). Thus, wherever it is too difficult or impossible to secure judgement through *mumhin*, or where there is no court system presided over by *mumhin*, it is perfectly permissible to have recourse to *hedyotot*. See Ramban Sanhedrin 3a s.v. *ve-ra'iti*:

וראיתי בתוספות בזה דחוקים שאין בהם ממש, וכן בספר הישר, ואני אומר במקום מומחין נשנית משנה זו וקתני... גזלות וחבלות צריכין מומחין... ומיהו אנן בבבל דהדיוטות אנן דלא איפשר במומחין עבדינן שליחותיה דמומחין ודיינינן בשליחותא דידהו... גזלות וחבלות במקום דאיפשר במומחין לא תקנו חכמים במקום דלא אפשר כל דשכיח ואית ביה חסרון כיס לא ראו שיבטל דיניהם מכל ישראל שבחוצה לארץ וצוו שנעשה שליחותם ונדון ברשותם... ובגזלות וחבלות בבבל שליחותיהו עבדינן בהו, דאי לאו הכי, אסור לנו לדון בהם כלל משום דכתיב לפניהם ולא לפני הדיוטות....

Similarly, in Ran's formulation (Sanhedrin 2b):

וזהו שאלתו של אב"י לרב יוסף כלומר שאע"פ שתקנו חכמים שיהיה הדין כשר בהדיוטות עדיין איסור זה במקומו עומד ואין כח בחכמים לבטל זה הענין והוא ליטול כתרן של מומחין וכן אף על פי שהיה יודע שעשוי הגט מועיל מתקנת חכמים מכ"מ למה לא חששו

Let us now compare Tosafot's approach with Ramban's conceptual analysis. Whereas the tosafists reconciled the conflicting passages and sources by reducing one source to the other (*lifneihem* refers to *elohim*), Ramban seized the contradiction to articulate fresh categories of Jewish court procedure and to distinguish between different procedural principles. Ramban's analysis utilizes conceptual distinctions to distinguish between a judge's legal authority to issue binding decisions (*dino din*) and the appropriateness of appearing before lay judges (*asur lavo le-fanav*) when ordained ones are available.

Note how Ramban's analysis embodies both aspects of conceptualism. First, the Talmud's presentation, and Tosafot's interpretation of it, suggests a single principle of *mumhin*. Ramban's analysis shows that there are really two separate principles at work in the *mumhin* requirement, each of which is treated separately in the two talmudic passages and two biblical sources under discussion. Second, Ramban's analysis allows him to formulate a new, fundamental principle of Jewish court procedure (*asur lavo lifnei ha-hedyot*) and to reconceptualize a whole area of halakhic jurisprudence (*shlihutayhu*).

#### H. Resolving Ritual Uncertainty and Vigilance in the Temple

Our eighth example is drawn from Ramban's analysis of the rules for resolving ritual uncertainty and the requisite level of vigilance required for sacrifices offered in the Temple. The Talmud, *Hullin 2b*, states that a ritually impure person can slaughter a sacrifice in the Temple, so long as he slaughters with a long knife to ensure that he does not touch and disqualify the sacrifice.<sup>517</sup> The Talmud requires that the

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על איסור לפנייהם ולא לפני הדייטות ותירץ לו דשליחותיהו קא עבדינן והם שנתנו כח לדון בהדייטות הם עצמן מוחלו כבודן על זה. ובשליחותן עושין מה שעושין ההדייטות בבבל וזהו שאמרו מידי דהוה אהודאות והלואות שהדין דין ולענין האיסור סומכין על שליחותן עשוי הגט נמי דכתייהו.

The far reaching halakhic conclusion is that whereas Tosafot limit the authority of *hedyotot* in Babylonia to extremely limited cases (See Tosafot Bava Kamma 84b, s.v. *iy nami*), Ramban grants *hedyotot* wide-ranging powers, since they have complete permission to adjudicate wherever *mumhin* are unavailable.

<sup>517</sup> Strictly speaking, he must stand outside the Temple itself, since a ritually impure person cannot enter the Temple area.

person testify that he is certain (*bari li*) that he did not come into direct contact with the sacrificial animal. Without that testimony, the sacrifice is disqualified.<sup>518</sup>

Tosafot (Hullin 2b s.v. *de-leteh*) observe that the Talmud's ruling is inconsistent with the general rules of uncertainty (*safek*) regarding ritual impurity (*tumah*) that are articulated elsewhere in the Talmud. In general, the Talmud holds that uncertainties regarding ritual impurity in public areas are to be resolved as pure (*safek tumah bi-reshut ha-rabim tahor*). Tosafot note that since the Temple slaughtering area (*'azarah*) is considered a public area (*reshut ha-rabim*), the Talmud in *Hullin* should not have required the impure slaughterer to testify with certainty (*bari li*) that he did not come into contact with the sacrificial animal.<sup>519</sup> The Talmud in *Hullin* 2b should have applied the general rule of *safek tumah bi-reshut ha-rabim tahor*.

Tosafot resolve the contradiction with ad hoc proposals. One suggestion they put forth is to limit the *Hullin* passage (through an *ukimta*) to a case of slaughtering sacrifices at a private *bamah* (as opposed to the Temple as the straightforward reading of the Talmud would suggest), which may not constitute a public area. In private areas, doubts about ritual purity are resolved as *tame* (*safek tumah bi-reshut ha-yahid tame*). In another suggestion, Tosafot propose that the act of ritual slaughter involves such close physical proximity to the animal that there is now a presumption of contact. Tosafot suggest that when there is a presumption of contact, there is no genuine legal doubt (*safek tumah*).<sup>520</sup>

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<sup>518</sup> Hullin 2b:

כיצד הוא עושה? מביא סכין ארוכה ושוחט בה, כדי שלא יגע בבשר ובמוקדשים לא ישחוט, שמא יגע בבשר, ואם שחט ואומר ברי לי שלא נגעתי - שחיטתו כשרה.

<sup>519</sup> See for example, Pesachim 19b:

עזרה רשות הרבים היא, והוה ליה ספק טומאה ברשות הרבים, וכל ספק טומאה ברשות הרבים - ספיקו טהור.

<sup>520</sup> Tosafot Hullin 2b s.v. *de-leteh*:

דליתיה קמן דנשייליה - ואף על גב דעזרה רה"ר היא כדאמר בפ"ק דפסחים (דף יט:): והיה לנו לטהר כאן מספק האי ספק לא דמי לשאר ספק טומאה ברה"ר משום דרוב פעמים לא יכול להזהר מליגע ואי איירי בבמה אתי שפיר.

Ramban cites Tosafot's analysis and rejects it.<sup>521</sup> Ramban resolves the contradiction by distinguishing between two different halakhic concepts. The first, Ramban argues, is the legal principle for resolving uncertainty regarding ritual purity and impurity (*safek tumah*). This principle is about determining the ritual status (*tame* or *tahor*) of the object in question. It is with respect to this concept that the rule of *safek tumah bi-reshut ha-rabim tahor* applies.

However, there is a second concept, Ramban argues, distinct from the first, of "extra vigilance" (*shimur*) in the realm of Temple sacrifice. This principle requires that Temple sacrifices be *known to be pure* (*bari lo she-hen tehorin*) otherwise they are disqualified as a sacrifice. This concept is not about ritual purity and impurity (*tame* or *tahor*) per se, but rather about the qualifications for eligible sacrifices (*pesulei ha-mukdashim*).

Armed with this conceptual distinction between *tumah* and *shimur*, Ramban argues that the standards of *shimur* that determine the eligibility of a sacrifice are different from the rules that determine the ritual *tame* or *tahor* status of the item. A sacrifice is valid only when it satisfies *shimur*, that is, when it is *known to be pure beyond any doubt*. If the sacrifice is not known to be pure, then it is disqualified even when the halakhah will resolve the sacrifice's ritual status by rendering it "pure". Thus, if its status is in

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<sup>521</sup> *Hiddushim Hullin 2b s.v. ve-im:*

ואם שחט ואמר ברי לי שלא נגעתי שחיטתו כשרה. איכא דקשיא ליה למה ליה ברי לי כי מספקא ליה נמי שחיטתו כשרה דמכדי עזרה רשות הרבים היא כדאמרי' בפ"ק דפסחים (י"ט ב') זאת אומרת עזרה רשות הרבים היא וכיון שכן ספק טומאה ברשות הרבים הוא וספק טומאה ברשות הרבים ספיקו טהור... וניחא ליה דכיון דשחיט רגלים לדבר דנגע וכל היכא דאיכא רגלים לדבר אפילו ברשות הרבים נמי ספיקו טמא... זה כתבו בתוספות, ולזה הפירוש טמא בחולין דשוחט באומר ברי לי הוא הא לאו הכי אפילו בדיעבד טמא, ומפני זה יבטל הפירוש הזה... ועוד לא נהירא דספק טומאה ברשות הרבים הלכתא גמירי לה... וכי איצטריך הלכתא להיכא דאיכא רגלים לדבר איצטריך, דאי לאו הכי משום העמד דבר על חזקתו הוא טהור, ואיכא מאן דמתרץ הכא כיון דשחיט כמאן דודאי נגע דמי אי לא אמר ברי לי, וליתא.



doubt, it is disqualified as a sacrifice because it fails the *shimur* requirement—even where the rules for *safek tumah* resolve it as pure.<sup>522</sup>

Ramban's approach differs markedly from Tosafot's. For Tosafot, the talmudic contradiction is resolved either by *ukimta* (relegating the talmudic passage to a case of *bamah*) or by a presumption of physical contact. By contrast, Ramban's approach distinguishes conceptually between the concept of ritual purity status (*tame* vs. *tahor*) and the concept of *shimur* that determines the eligibility of sacrifices (kosher vs. *pasul*). Ramban's approach also breaks new ground in articulating this fundamental halakhic doctrine of extra vigilance (*shimur*) as a legal requisite for Temple sacrifices.<sup>523</sup>

### I. The Standard of Care Required of the Unpaid Bailee

Our ninth example is drawn from Ramban's analysis of the negligence standard in bailments and torts. The Talmud, *Bava Metzia* 93b, reports the following incident. A paid shepherd (*shomer sakhar*) had led his flock over a bridge. While on the bridge, one sheep shoved another, pushing it into the river where it drowned. Rav Pappa found the shepherd liable on the ground that he breached his duty to the owner by not leading the animals over the bridge in a single file.<sup>524</sup> Had the shepherd taken greater care by leading the animals in a single file, the sheep would not have been shoved into the river.

For a variety of reasons, Tosafot (*Bava Metzia* 93b s.v. *Iba'i*) and other commentators note that the context of the Talmud's discussion implies that the shepherd's failure to take the animals in a single file

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<sup>522</sup> Ibid:

אין הקושיא כלום דבמוקדשין בבי האי גונא לאו בספק טומאה דיינינן דהא בעו שימור דכתיב משמרת תרומותי, אלא צריך שיהא ברי לו שהן טהורין ואם לאו אסור להקריבן.

<sup>523</sup> Note Ramban's declaration, in the above note, that Tosafot's question "is no question" (אין הקושיא כלום). See above, Chapter 4 n. 404, for a discussion of this as a feature of conceptualism.

<sup>524</sup> *Bava Metzia* 93b:

בר אדא סבולאה הוי קא מעבר חיותא אגמלא דנרש, דחפה חדא לחברתה ושדיתה במיא. אתא לקמיה דרב פפא, חייביה. אמר ליה: מאי הוה לי למעבד? - אמר ליה: אבעי לך לעבורי חדא חדא.

does not constitute an act of negligence (*peshi'a*). Rather it constitutes a breach of the higher standard expected of a paid watchman (*shomer sakhar*) to maintain an excellent standard of care (*netiruta yetarata*). Thus, Tosafot conclude that an unpaid watchman (*shomer hinam*), who is liable only for negligence, would be exempt under the same circumstances.<sup>525</sup>

Understood this way, Tosafot observe, Rav Pappa's ruling in *Bava Metzia* 93b is in tension with at least one Amora in *Bava Kamma* 58a who holds that failure to lead animals in a single file constitutes negligence. In *Bava Kamma* 58a, the Talmud records a debate about the following case. An owner takes his flock near his neighbor's property. One animal shoves the other, causing it to fall into the neighbor's field, where the animal then consumes some of the neighbor's produce. Whether the animal owner is liable in tort to compensate the neighbor depends on whether he is considered to have acted negligently. R. Kahanah finds the animal owner to have acted negligently, as "he ought to have taken his flock in single file," and therefore finds him liable to compensate the neighbor.<sup>526</sup> The Talmud there also records Rava's dissenting view exempting the animal owner from liability.

Tosafot note that R. Pappa's ruling in *Bava Metzia* 93b--which holds that the bailee did not act negligently by failing to take the flock in a single file but rather breached the higher standard of care (*netiruta yetarata*) expected of a paid bailee--contradicts R. Kahanah's ruling in *Bava Kamma* 58a, which finds the owner to have acted negligently by failing to take the animals in a single file and therefore liable in tort.

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<sup>525</sup> Tosafot *Bava Metzia* 93b s.v. *Iba'i*:

איבעי לך לעבורי חדא חדא - נראה דלא חשיב לה פשיעה מהאי טעמא אלא כעין גניבה ואבידה ומחייב מטעמא דאדעתא דהכי יהבי לך אגרא דתינטר נטירותא יתירתא כרב חסדא ורבה בר רב הונא מדמייתי לה הכא...

<sup>526</sup> *Bava Kamma* 58a:

אבל דחפתה חברתה פשעה, ומשלמת מה שהזיקה, דא"ל: איבעי לך עבורי חדא חדא.

Tosafot conclude that Rav Pappa's ruling in *Bava Metzia* 93b is in fact inconsistent with Rav Kahanah's position in *Bava Kamma* 58a. According to Rav Kahanah, failure to lead the animals in a single file constitutes negligence (*peshi'a*) while according to Rav Pappa, it does not. On this basis, Tosafot conclude that Rav Pappa must hold like Rava's dissenting opinion in *Bava Kamma* 58a.<sup>527</sup>

Ramban begins his analysis by agreeing that, based on the Talmud's presentation in *Bava Metzia* 93b and Rif's ruling there, an unpaid bailee (*shomer hinam*) would be exempt from damages if he failed to lead his flock in a single file. Such conduct does not constitute negligence (*peshi'a*). But Ramban notes that Rif rules like Rav Pappa in *Bava Metzia* 93b and like Rav Kahanah in *Bava Kamma* 58a. This makes Tosafot's solution--that Rav Pappa's ruling is in fact inconsistent with Rav Kahanah's position in *Bava Kamma*--impossible, at least within Rif's framework. How, then, are we to make sense of the contradiction between the passages? *Bava Kamma* 58a implies that such an act is negligent, while *Bava Metzia* 93b implies that it is not.<sup>528</sup>

Ramban sets out to resolve the contradiction by distinguishing conceptually between the basis for liability in tort cases and the basis for liability in bailment cases. The passage in *Bava Kamma* 58a is interested in determining an animal owner's liability *in tort* for failing to prevent his animal from harming a neighbor's property. *Bava Metzia* 93b is interested in determining a bailee's liability to the owner for failing to have properly protected the item he had accepted, *by agreement*, to safekeep.

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<sup>527</sup> Tosafot *Bava Metzia* 93b s.v. *Iba'i*:

וסבר רב פפא דהנא כרבא דפרק הכונס (ב"ק דף נח.) דאמר משום דאיבעי לך לעבורי חדא חדא לאו פשיעה היא ולא כרב כהנא דאמר התם דהוי פשיעה גבי נפלה לגינה.

<sup>528</sup> *Hiddushim* *Bava Metzia* 93b s.v. *iba'iy*:

איבעי לך לעבורי חדא חדא וכו'. מדברי רבינו הגדול ז"ל למדנו שלא אמר כן אלא בשומר שכר דבעי נטירותא מעלייתא וכדרב חסדא ורבה בר רב הונא ואיברא סוגיא הכי משמע אבל בשומר חנם פטור שאין זו פשיעה, וקשיא לי דבפ' הכונס (נ"ח א') גבי נפלה לגנה ורב כהנא אמר... דחפתה חברתה פשיעה היא דא"ל איבעי לך לעבורי חדא חדא ופסק רבינו הגדול ז"ל הלכה כוותיה, אלמא פשיעה גמורה היא לחייב עליה אפי' שומר חנם כדקאמרי' בגמ' בהדיא...

Given this distinction, Ramban argues that whereas the standard for liability in tort is negligence (*peshi'a*), the standard for an unpaid bailee--because it is a contractual relationship *by agreement* between two parties--depends on the implied standard of care that the bailee *agreed* to provide when he accepted the bailment from the owner. The implied standard for the unpaid bailee, Ramban argues, is set at the level of care that he would exercise with his own property (*kemo she-'oseh be-shelo*).<sup>529</sup> Thus, tort liability depends on an objective standard of negligence; bailment liability depends on breaching the implied terms of the agreement (*mah she-kibel alav*).

With this conceptual distinction between the basis and standard of liability in tort and bailments, Ramban resolves the contradiction between the talmudic passages as follows. Failure to take the animals in a single file is in fact negligent. This is sufficient to generate liability in tort, as Rav Kahanah holds in *Bava Kamma* 58a and as Rif there rules. But for bailments, an unpaid bailee will be exempt from liability, *even when he acts negligently*, so long as he abides by the standard of care that he implicitly accepted, which is set by default at the standard of care that he would exercise *with his own property*. For this reason, Rav Pappa holds in *Bava Metzia* 93b that an unpaid bailee would not be liable for failing to take the animals in a single file.<sup>530</sup> Thus the two talmudic passages are in fact discussing two different legal concepts with distinct legal standards.

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<sup>529</sup> Ibid:

שומר חנם פטור שלא קבל עליו לטרוח כ"כ אלא שיהא שומרן ומעבירן כמו שעושה בשלו, הילכך אף על פי שאין כאן שמירה כלל פטור שעל מנת בן קבל,.... אלמא אין שומר חנם צריך לשמירה פחותה בכל מקום אלא כדרך השומרין את שלהן.

<sup>530</sup> Ibid:

ואיכא למימר ודאי פשיעה היא שכיון שדרכן להיות דוחפות זו את זו והעבירן כאחת אין כאן שמירה לא מעולה ולא פחותה הילכך בשן ורגל חייב שאין כאן שמירה כלל, ומיהו שומר חנם פטור שלא קבל עליו לטרוח כ"כ אלא שיהא שומרן ומעבירן כמו שעושה בשלו, הילכך אף על פי שאין כאן שמירה כלל פטור שעל מנת בן קבל... אלמא אין שומר חנם צריך לשמירה פחותה בכל מקום אלא כדרך השומרין את שלהן, וזו שפסק רבינו הגדול ז"ל התם כרב כהנא ולא כרבא...

Let us now compare Ramban's conceptual approach with Tosafot's approach. For Tosafot, the contradiction is reconciled by distinguishing between different sages' opinions. The passage in *Bava Metzia* follows Rav Pappa's view which disagrees with Rav Kahanah's opinion in *Bava Kamma*. By contrast, Ramban reconciles the contradiction by distinguishing between two different legal concepts: the standard of negligence for tort actions and the implied standard of care, by contract, of "as I would watch my own property" for the unpaid bailee.

Ramban's analysis exemplifies both aspects of the conceptual method. First, it articulates a core legal principle of the unpaid bailee's implied contractual basis of liability.<sup>531</sup> It also exemplifies the method of utilizing fine-grained conceptual distinctions, demonstrating that the simplicity of the talmudic language belies the complexity of its underlying concepts. On the surface, the Talmud applies the same *peshi'ah* standard of liability to both torts and bailments. In some instances, the Talmud even uses the same phrase "*shemirah pehutah*" to characterize the standard of care required in both areas of law.<sup>532</sup>

Ramban's contention is that these phrases actually have a different conceptual meaning in the two areas of law. In torts it denotes a negligence standard (*peshi'a*). In bailments it denotes the standard of *kemo she-'oseh be-shelo*.<sup>533</sup> As we saw earlier, it is one of the hallmarks of the conceptual approach that

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<sup>531</sup> Note that Ramban puts this distinction to work in other areas. See for example *Hiddushim Bava Metzia 78a s.v. ha*, where Ramban interprets the Mishnah's rule as stemming from a breach of the implied contractual understanding of the parties. According to Ramban's analysis there, the bailee's liability turns on whether he had breached the implied contractual understanding between the parties--even though he was not negligent (*poshe'a*): אבל הטעם הנכון במשנתנו שאין השינוי מהר לבקעה פשיעה לפי שהזיקה מצוי בזה כמו בזה, ומיהו אינה שמירה למה שאמר משכיר, הילכך אם הוחמה בעלייה בהר חייב שאמר לו לשמרה מחמום ולא שמרה, וכן כשאירע לה מיתת אויר שנשבה הרוח בהר באותו היום ומתה בו או נחש הכישה חייב, שאם שמר כמו שאמר בעה"ב לא אירע לה מיתה זו, דכל כה"ג אינה פשיעה ואינה שמירה... ומסתברא דאפי' בשומר חנם הוא חייב.

Tosafot (*Bava Metzia 77a s.v. huhmah*), by contrast, who do not distinguish between the negligence standard and the implied contractual terms, are forced to interpret the Mishnah as a negligence rule.

<sup>532</sup> See for example *Bava Kamma 45a*.

<sup>533</sup> For a vivid example, see Ramban *Hiddushim Bava Metzia 42a s.v. kesafim*.

the nuance of the underlying conceptual and legal principles is sometimes masked by the Talmud's language.

#### J. The Paid Bailee's Liability for Theft under Conditions of Impossibility

Our tenth example is drawn from Ramban's discussion of the liability rules of a paid bailee.

Commentators are troubled by the following problem. Jewish law provides that both a paid and unpaid bailee are liable for "negligence" (*peshi'ah*) and that both are exempt from impossibility and *force majeure* (*'ones*). Yet Jewish law outlines a distinct category of liability for the paid bailee: he is liable for theft and for losing the item (*genevah va-avedah*).<sup>534</sup>

Commentators ask: in what way is the *genevah va-avedah* liability of the paid watchman a distinct principle of liability? If the bailee was negligent by failing to take proper precautions in protecting the item, then he is negligent (*poshe'a*), and even an unpaid bailee would be liable.<sup>535</sup> And if he took proper precautions, then he should be exempt under the category of *'ones*.

#### Distinguishing "Genevah" Liability from Negligence Liability

Addressing the first horn of the dilemma--distinguishing negligence liability of the unpaid bailee from *genevah va-avedah* liability of the paid one--Tosafot distinguish between different degrees of precautions. Appealing to the standards of liability in torts, Tosafot explain that an unpaid bailee must take low-level precautions, that is, the type of precautions that would secure the item from common risks (*ru'ah mezuyah*), whereas the paid bailee must protect from a greater set of risks that include less

<sup>534</sup> See Mishnah Bava Metzia 93a; Bava Metzia 94b; Bava Kamma 4b and Rashi there s.v. *shomer hinum*.

<sup>535</sup> Ramban *hiddushim* Bava Metzia 42a s.v. *kesafim*:

נושא שכר והשוכר משלמין את האבדה ואת הגנבה, מאי גנבה ואבדה אי שלא נעל כראוי אף שומר חנם חייב בו דפשיעה היא...

common ones (*ru'ah she-einah mezuyah*). Thus, the standard of care is set at different degrees for the different types of bailees.<sup>536</sup>

Ramban offers a different analysis. In his view, the *genevah va-avedah* liability rule does not simply pick out a wider scope of risks (*einah mezuyah vs. mezuyah*) as Tosafot would have it. Rather, it refers to a conceptually distinct type of protection and guardianship (*shemirah*). According to Ramban, the *genevah va-avedah* standard requires that the bailee be *physically present* with the item and that he surveil it *with his own person* (*yoshev u-meshamer*) throughout the duration of the bailment.

The paid and unpaid bailees, then, are distinguished by different *types* of *shemirah* obligations. For the unpaid bailee it is sufficient that he ensures that the item is protected. He can lock it in his house or place it in a locker. The paid bailee, however, must physically watch over and be present with the item throughout the bailment (*yoshev u-meshamer*). Even if he took extraordinary precautions to protect the object, the paid bailee is liable if he was not physically present with the object to guard it.<sup>537</sup> Thus,

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<sup>536</sup> Tosafot Bava Metzia 82b s.v. *ve-savar*:

וסבר רבי מאיר בו' - ...אונס דכעין גניבה ואבידה כמו רוח שאינה מצויה .... ורוח שאינה מצויה הוי כעין אבידה כדאמרין סוף פרק ד' וה' (שם ד' מה.) וכולן חייבים להחזיר דמי השור לבעליו חוץ מש"ח ומוקי לה התם דנטריה שמירה פחותה ולא נטריה שמירה מעולה ש"ח כלתה שמירתו בו' ושמירה פחותה היינו דלת שיכולה לעמוד ברוח מצויה ואינה יכולה לעמוד ברוח שאינה מצויה כדמשמע בריש הכנס (שם דף נה:;) והוי כעין גניבה ואבידה דש"ח פטור וש"ש חייב.

See Ramban's summary of Tosafot's position in *Hiddushim* Bava Metzia 42a s.v. *kesafim*:

כספים אין להם שמירה אלא בקרקע... תנן (צ"ג א') שומר חנם נשבע על הכל נושא שכר והשוכר משלמין את האבדה ואת הגנבה, מאי גנבה ואבדה אי שלא נעל כראוי אף שומר חנם חייב בו דפשיעה היא, ... ובעלי הדין [תוספות] אומרים משכחת לה כגון שנעל בפני הבהמה בדלת שהוא יכול לעמוד ברוח מצויה דגבי שומר חנם פטור וגבי שומר שכר משלם עד שינעול בדלת שיכולה לעמוד בפני כל רוח, אבל אם נעל בדלת שיכולה לעמוד בפני כל רוח כראוי ובאו ליסטים ופרצוה ויצאת ונאבדה אף שומר שכר פטור.

<sup>537</sup> *Hiddushim* Bava Metzia 42a s.v. *kesafim*:

לעולם שומר שכר לא כליא שמירתו עד שיהא יושב ומשמר.

And Raman Bava Metzia 93a s.v. *ha*:

whereas Tosafot resolve the difficulty by distinguishing between different *degrees* of precautions (*mezuyah vs. einah mezuyah*), Ramban distinguishes between two different *types* of safeguarding: merely taking precautions, and actively, physically surveilling the item with one's own person.<sup>538</sup>

### Distinguishing "Genevah" from Impossibility and Force Majeure Cases

The second horn of the dilemma is how to distinguish *genevah va-avedah* liability from *force majeure* and impossibility cases. Suppose the item was stolen from the paid bailee under circumstances beyond his control. Does that fall under the *genevah va-avedah* rule, in which case the paid bailee would be liable, or under the 'ones rule, in which case the paid bailee would be exempt?

For example, Tosafot (*Bava Metzia* 42a s.v. *amar*) inquire whether a paid bailee who took ill and therefore was unable to guard the item when it was stolen would be liable under the principle of *genevah* or exempt under the principle of 'ones. Tosafot are very strongly inclined to suggest that the paid bailee would be exempt under a theory of 'ones.<sup>539</sup> But they concede that this suggestion is apparently inconsistent with the following talmudic ruling.<sup>540</sup>

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הא דתנן ארבעה שומרין הן וכו' נושא שכר והשוכר משלמין את הגנבה ואת האבדה. אפי' נעל בפניה כראוי ואפי' הטמין מאה אמה תחת הקרקע כל זמן שהניח פקדון ואינו יושב אצלו ומשמרו.

<sup>538</sup> Ramban's conceptual distinction is developed further by later *aharonim* (see for example *Mahaneh Ephraim*, Shomrim no. 18), who argue, based on Ramban's distinction, that the paid bailee is like a "worker" (*po'el*), since he has to sit and guard the item with his own person. The unpaid bailee, by contrast, who can simply take precautions such as locking the item away, is not considered to have the status of a "worker". Whether someone has the status of a worker (*po'el*) will affect various halakhot of employment, including the right to withdraw from the employment relationship.

<sup>539</sup> Tosafot *Bava Metzia* 42a s.v. *amar*:

תמהוין גדול הוא למה לא יהא אונס אם העמיק בקרקע ק' אמות דמאי ה"ל תו למיעבד או אם תקפתו שינה או חולי גדול ואיך יתכן ששום גניבה לא נמצא שתהא אונס גמור... אין סברא כלל שלא נמצא גניבת אונס שיפטר בה שומר שכר...

<sup>540</sup> Ibid:

ובפרק הכונס (ב"ק דף נז. ושם ד"ה כגון) משמע דחייב... אלמא כל גניבה לא הויא אונס.



A talmudic rule, *to'en ta'anat ganav be-pikadon*, holds a bailee liable to pay the bailor double the value of the object (*kefel*) if the bailee swears falsely, in an attempt to evade liability, that the object was stolen from him. However, the Talmud explains that this rule is generally limited to an unpaid bailee, for the following reason. Since a paid bailee is liable for *genevah*, he will be liable to pay out actual damages in every case that he claims the object was stolen and will therefore never be given the opportunity to swear to exempt himself.<sup>541</sup>

Tosafot observe that this discussion implies that a paid bailee will be liable for cases of *genevah* even under conditions of *'ones*. For if the paid bailee was exempt in such cases, the Talmud should have acknowledged that there may be many cases of double damages (*kefel*) for *to'en ta'anat ganav be-pikadon* with a paid bailee: to wit, in every case where the paid bailee claims that the item was stolen under conditions of *'ones* he would be exempt from paying actual damages, which in turn would trigger the swearing requirement (and thus the *kefel* penalty for swearing falsely).<sup>542</sup>

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<sup>541</sup> Bava Kamma 57a

הטוען טענת גנב באבידה - משלם תשלומי כפל, ואי ס"ד שומר שכר הוי, אמאי משלם תשלומי כפל? קרנא בעי שלומי! א"ל: הכא במאי עסקינן - כגון שטוען טענת לסטים מזויין. א"ל: ליסטים מזויין גזלן הוא! א"ל, שאני אומר: לסטים מזויין, כיון דמיטמר מאינשי גנב הוא.

The Talmud singles out one exception to this rule: a case of armed robbery according to the view that armed robbery is a form of *genevah*. As the tosafists note, the fact that the Talmud singles out this exception as *the only exception* implies that in every other case of *genevah*, no matter the circumstance, the paid bailee will be held liable. Thus, the implication of the Talmud's ruling is that a paid bailee is generally liable for *genevah* under conditions of *force majeure*.

<sup>542</sup> Tosafot Bava Metzia 42a s.v. *amar*:

צריך עיון אם שמרם בקרקע ונגנבו משם אם שומר שכר חייב ובפרק הכונס (ב"ק דף נז. ושם ד"ה כגון) משמע דחייב דפריך אביי לרב יוסף והאמר ר' יוחנן הטוען טענת גנב באבידה משלם תשלומי כפל ואי שומר אבידה שומר שכר הוי קרנא בעי לשלומי ומאי פריך דלוקמא בטוען שנגנבה באונס כגון שהעמיק בקרקע ק' אמות או שתקפתו שינה או חולי אלמא כל גניבה לא הויא אונס אלא לסטים מזויין וכן בתר הכי דמייתי לא אי אמרת בשומר חנם שבן משלם כפל ואי לסטים מזויין גנב הוא שומר שכר נמי משלם כפל משמע דמשום גניבה לא מפטר שומר שכר אם לא בטענת גניבת ליסטים מזויין.

Tosafot are thus torn between what they take to be the straightforward application of the 'ones rule--to exempt the paid bailee from *genevah* in conditions of 'ones--and the implication of the *to'en ta'anat ganav be-pikadon* passage--which implies that the paid bailee would be liable in such cases of 'ones.

Different tosafists propose different solutions, each adopting a different extreme position. One tosafist rejects the straightforward application of the 'ones rule and concludes that a paid bailee will be strictly liable for *genevah*, regardless of the fact that no precaution in the world could have prevented the theft.<sup>543</sup> Other tosafists go to the opposite extreme, ignoring the implications of the *to'en ta'anat ganav* discussion, and hold that so long as the paid bailee exercises a reasonable standard of care (*ru'ah she-einah mezuyah*) he will be exempt from damages in cases of *genevah*.<sup>544</sup>

Ramban resists either of these extreme positions by distinguishing conceptually between two different legal questions. One question, Ramban explains, is whether a bailee satisfied the standard of care expected of him as a bailee. This category is about a bailee being *exempt from liability*. The other question, Ramban explains, is *whether the person who accepted the bailment is considered "a bailee" in the first place*. Just as a person is not a bailee before he receives the bailment, there can be certain conditions that undercut his "status as a bailee" during the term of the bailment. Thus, there is a

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<sup>543</sup> Tosafot Bava Kamma 57a s.v. *kegon*:

ונראה לר"י דכיון שחייב הכתוב שומר שכר בגניבה וסתם גניבה קרובה לאונס כדאמרינן בהשוואל (שם) סברא הוא דבכל ענין שתהיה הגניבה יתחייב מגזרת הכתוב אפילו באונס גמור.

<sup>544</sup> In the printed Tosafot (Bava Metzia 42a s.v. *amar*) this is left as Tosafot's firm preference, but it is not clear if this is Tosafot's decisive conclusion:

תמהון גדול הוא למה לא יהא אונס אם העמיק בקרקע ק' אמות דמאי ה"ל תו למיעבד או אם תקפתו שינה או חולי גדול ואיך יתכן ששום גניבה לא נמצא שתהא אונס גמור כליסטין מזוין... אין סברא כלל שלא נמצא גניבת אונס שיפטר בה שומר שכר.

Ramban, *Hiddushim* Bava Metzia 42a s.v. *kesafim*, appears to be citing Tosafot's position as conclusive:

איכא דאמרי דבקרקע יש להם שמירה אפי' בשומר שכר, ... [ד]אם נעל בדלת שיכולה לעמוד בפני כל רוח כראוי ובאו ליסטים ופרצוה ויצאת ונאבדה אף שומר שכר פטור.

R. Akiva Eger (Choshen Mishpat 303:2) also takes Tosafot's position as a firm conclusion of law:

דעת תוס' פ"ג דבב"מ דאונס גמור כגון שנתנה במחילת קרקע או שתקפתו חולה שינה אף ש"ש פטור.

distinction to be drawn between an *exempt bailee* and a *non-bailee*. Ramban puts this distinction to work to solve the difficulty that confounded Tosafot: how to navigate the straightforward application of the *'ones* rule with the implication of the *to'en ta'anat ganav* passage.

Regarding the *'ones* rule, Ramban holds that if the paid bailee is unable to be physically present with the object because he suddenly became ill or became unconscious in a manner that he could not control, he would be exempt from liability if the object was stolen during his incapacitation. In other words, Ramban believes in a straightforward application of the *'ones* rule for the paid bailee in cases of *genevah* where the *shomer* was prevented from being present with the object. How then to make sense of the *to'en ta'anat ganav* passage? Wouldn't every paid bailee be liable to pay double damages (*kefel*) when they swear that the object was stolen when they were physically incapacitated?

Here Ramban claims "no." He argues that being physically incapacitated from exercising *shemirah* does not constitute a claim of a bailee to be exempt from liability, but rather a claim that he was disabled from functioning as a bailee and therefore *did not have the legal status of a bailee* when the *genevah* occurred. The *kefel* liability is only triggered by a claim of a bailee attempting to *exempt* himself from liability. It is not triggered by a claim that the bailee *was not in fact a bailee* when the object was stolen.<sup>545</sup> Thus whereas Tosafot is forced to either embrace the *'ones* rule but reject the *to'en ta'anat*

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<sup>545</sup> Ramban Bava Metzia 42a s.v. *kesafim*:

אם קפץ עליו חולי או אירעו אונס אחר בגופו ומחמת אונס אחר נגבב היאך אתה יכול לחייבו א"כ מצינו שומר שכר חייב באונסין, אלא ודאי מודינא באונסין כגון אלו שהוא פטור... שהוא בכלל אונסין מאחר שהוא אינו יכול לשמור ולהציל, והא דאמרינן התם (ב"ק שם) ואי ס"ד ליסטים מזויין נגבב הוא הרי שומר שכר משלם וכו'... ואפשר שאם טען טענות אלו ונמצא שהוא גנבו אינו משלם תשלומי כפל דכיון שהוא טוען נאנסתי בגופי ולא יכולתי לשמור, כטוען לא נעשיתי לך שומר לאותה שעה שנגבבה שאינו משלם תשלומי כפל שלא מצינו תשלומי כפל אלא בשומר שהוא חייב לשמור וטען שמרתי כראוי לי, אבל זה מכיון שנאנס נפטר מן השמירה לגמרי וזה צ"ע.

Note how Ramban formulates his theory tentatively. He qualifies it with "*ve-efshar*" and concludes it with "*ve-zeh tzarikh iyun*". This is a common trend in Ramban's *Hiddushim* where he will frequently introduce a novel theory but cautiously qualify it with "*ve-efshar*." These qualifications are usually dropped when Rashba and later rishonim adopt Ramban's theory. These later rishonim embrace Ramban's suggestions without his tentative reservations.

*ganav* implication, or to embrace the *to'en ta'anat ganav* implication but reject the *'ones* rule, Ramban is able to embrace both by distinguishing conceptually between an *'ones* that exempts a bailee from liability and conditions that vitiate the bailee's status as a bailee altogether.

Throughout this example, Ramban's analysis exemplifies both dimensions of conceptualism. First, Ramban articulates, for the first time, fundamental doctrines of bailment laws (*yoshev u-meshamer; lo na'aseiti shomer*). Second, whereas the Talmud appears to speak only of a bailee exempt from liability (*patur*), Ramban offers fine-grained conceptual distinctions to explicate the difference between two types of bailment exemptions. One type exempts a bailee. The other type undercuts his very status as a bailee. Ramban's conceptual analysis allows him to solve problems that, in this discussion, were insurmountable for the tosafists.

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Such is the case in our example when Ramban's doctrine is taken up by Rashba and Ritva. See Rashba Bava Metzia 42a s.v. *kesafim* and Ritva Bava Metzia 93b s.v. *ata*.

For another example of this trend, see Ramban Bava Batra 4b s.v. *ve-'adayin*, where Ramban writes:

שאלו מתחלה בא לימלך ומיחה על ידו אינו רשאי ליגע בה ואפשר שאינו חייב לו כלום.

But Rashba Bava Batra 4b s.v. *ve-ikah*, adopting Ramban's position, drops the qualifications and writes:

ותירץ הרמב"ן נ"ר... שאם עמד הניקף ומיחה במקיף ואמר שלא לגדור מחמתו על מנת שישלם לו מדמי הגדרים כלום הרי זה פטור.

What explains this trend? One possibility is that Ramban had a more conservative disposition than his students and therefore formulated his novel positions more tentatively. See R. Michael Rosensweig, "Reflections on the Conceptual Approach to Talmud Torah", p. 205 ("The Rav has noted that Ramban is particularly inclined to approach and then shy away from, or at least not fully develop, some halakhic breakthroughs.") A different possibility is that this phenomenon is consistent with a general trend in the history of halakhah that the first theorist to put forth a novel idea does so hesitantly. Once the idea has been formulated and suggested, it loses its sense of novelty and is enthusiastically embraced by the next generation of halakhists without hesitation. For this phenomenon, though in the specific context of a new theory conflicting with established custom, see Haym Soloveitchik, "Can Halakhic Texts Talk History", *Collected Essays I*, p. 185.

Note also Ta-Shma's astute observations, *Talmudic Commentary Part Two*, p. 48-49:

רווח למדי בחידושי הרמב"ן הדיין המהסס... במקומות אלו משתף הרמב"ן את הלומד בהתלבטויותיו, בספקותיו ובפקפקויו...

### K. Perjury: Hazamah and Hakhashah

Our last example is drawn from Ramban's analysis of the relationship between *hazamah* and *hakhashah* in his commentary on the Torah. It is important to note that Ramban offers the same types of conceptual legal distinctions in his commentary on the Torah as he does in his *Hiddushim* on the Talmud.<sup>546</sup> This indicates that Ramban did not utilize conceptual analysis merely as a tool to solve difficulties in the Talmud. Rather, he consistently employed conceptual analysis in order to probe and clarify the core principles of Jewish law--separate and apart from the need to resolve talmudic contradictions.

The present example pertains to the rules of testimony when inconsistencies are found between groups of witnesses. Jewish law distinguishes between the case where two groups of witnesses contradict each other's testimony—*hakhashah*—and the case where a second group of witnesses testifies that a prior group could not have witnessed the alleged event (*'imanu heyitem*)—*hazamah*. In the case of *hakhashah*, neither group prevails and all the testimony is thrown out. But in *hazamah*, the latter group is considered credible over the first. Commentators struggle to explain the discrepancy: In both cases the witnesses' testimony are mutually contradictory. Why in one case does the second group prevail but in the other case neither prevails?<sup>547</sup>

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<sup>546</sup> Some of these instances come up incidentally in Chapter 6. A prime example is Ramban's distinction in Vayikra 23:7 between the *melakhah* prohibition of the Sabbath and the *melakhah* prohibition of the holidays, discussed below in chapter six. Ramban argues that the *melakhah* prohibition of the holidays is conceptually distinct from the prohibition of the Sabbath. On the holidays, the Torah prohibits *meleket 'avodah* but not *meleket han'ah*. On the Sabbath it prohibits *all* forms of *melakhah*. See also Ramban *Hiddushim* Shabbat 117b s.v. *Ha*.

<sup>547</sup> See the discussion in Sanhedrin 27a:

עד זומם; אבוי אמר: למפרע הוא נפסל, ורבא אמר: מיכן ולהבא הוא נפסל. אבוי אמר: למפרע הוא נפסל, מעידנא דאסהיד רשע הוא, והתורה אמרה אל תשת ירך עם רשע - אל תשת רשע עד. רבא אמר: מיכן ולהבא הוא נפסל; עד זומם חידוש הוא: מאי חזית דסמכת אהני? סמוך אהני! אין לך בו אלא משעת חידושו ואילך.

Tosafot acknowledge the problem and state that the discrepancy is logically unexplainable. In their view, it results from a Torah *hiddush*.<sup>548</sup> Ramban, however, explains the difference by drawing a conceptual distinction between *hazamah* and *hakhashah*. In a case of *hazamah*, the second group testifies *against* (or *about*) the first group. The first group is the *object* of the second group's testimony. But in the case of *hakhashah*, the two groups merely contradict each other in the substance of their testimony.<sup>549</sup> Thus, while both cases are instances of inconsistency between the witnesses' testimony, they are conceptually different. In the one case, the inconsistency results from one group testifying *about* the other group. In the other case, the inconsistency is between the substantive content of the testimony as it pertains to the facts of the case.

Although this analysis appears in the commentary on the Torah, Ramban's distinction was so powerful and persuasive that it was accepted as doctrine by the *Arba'ah Turim* and other halakhists.<sup>550</sup> As we shall

<sup>548</sup> Tosafot Sanhedrin 27a s.v. *ein*:

אין לך בו אלא חידושו - משמע דהחידוש הוי ממה שאני פוסל את הראשונים תימה דהתם (ב"ב דף לא): קאמר לימא רבא דאמר כרב חסדא דאמר בהדי סהדי שקרי למה לי ומפסלי שתי העדות אפי' בהוכחשו בעלמא דמכחשי אהדדי תרווייהו פסולי ואם כן מאי חידוש הוא גבי הזמה אי פסלינן עדים הראשונים ויש לומר דלמאי דבעי למימר התם מעיקרא דרבא סבירא ליה דרב חסדא היינו ללישנא דפסידא דלקוחות וי"מ דהא דקאמר הכא חידוש לאו אפסולא דקמאי קאי אלא אהכשירא דבתראי כלומר היה לנו לפוסלן כל שתי כיתות ובין דאיכא חידוש לא ילפינן אף לגבי הפסול לפוסלן כלל הראשונים למפרע.

<sup>549</sup> Ramban Devarim 19:18:

ודרשו השפטים היטב והנה עד שקר העד - לא פירש הכתוב איך יודע שהוא עד שקר, כי בהיות הענין בשני עדים שמעדין על הדבר, אפילו יבואו מאה ויכחישו אותם לא יתברר ששקר ענו. ולא נוכל לומר שבא הרוג ברגליו, כי לא יאמר בזה ודרשו השופטים היטב. ועל כן באה הקבלה הנאמנת, ופירשה כי ההזמה תהיה כשיאמרו והלא ביום פלוני עמנו הייתם (מכות ה א). והטעם, מפני שהעדות הזו היא על גופם של עדים, והם אינם נאמנים על עצמם לומר לא עשינו כך, שהרי יכולים הללו לומר עליהם שהרגו את הנפש או שחללו את השבת.

<sup>550</sup> Tur Hoshen Mishpat no. 38:

ומה יש בין הכחשה להזמה הכחשה אינה בגוף העדים אלא שמכחישין אותן שאלו אומרים פלוני לוח מפלוני ואלו אומרים יודעין אנו שלא לוח כי היינו אצלו כל היום וראינו שלא לוח (ב) והזמה בגוף העדים שאומר באותו שעה שאתם אומרים שלוח הייתם עמנו. ומפני

see in chapter six, some of Ramban's legal distinctions in his commentary on the Torah were later incorporated into the talmudic commentaries and codes of the next generation of Spanish scholars. Ramban's conceptual distinction was also adopted by later authorities to explain why *hazamah* must take place in the presence of the first group of witnesses. Rivash explains this rule by appealing to Ramban's analysis.<sup>551</sup>

## Conclusion

This section has offered eleven examples of Ramban's conceptualism and illustrates how Ramban wields conceptualism as a powerful tool to both resolve talmudic difficulties and to articulate, classify, and distinguish the core principles and concepts of Jewish law. These examples exemplify the method Ramban employs throughout his halakhic writings. To be sure, this does not mean that Ramban utilized the conceptual method in every comment of the *Hiddushim*. That would be an unreasonable and misleading standard for determining a scholar's method. The tosafists do not employ dialectic in each of their comments either. But if we seek to characterize the type of legal reasoning that Ramban consistently employs and that distinguishes his type of reasoning from that of his tosafist predecessors, it is the conceptual method that looms large.

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זה האחרונים נאמנים כיון שמעידים על גופן של העדים והוי כאלו העידו עליהן שהרגו הנפש או שחללו שבת והן אינן נאמנים על עצמן לומר לא עשינו כך וכך.

See also *Sefer ha-Hinukh* no. 524 and *Pnei Yehoshua* Makot 5a.

<sup>551</sup> Responsa Rivash 266:

דמאי דאמרינן אין מזימין את העדים אלא בפניהם זהו לחייבן בגוף או בממון מועשיתם לו כאשר זמם. וטעמא משום דכתיב והעד בבעליו. אמרה תורה יבא בעל השור ויעמוד על שורו. דמהאי טעמא נמי אמרינן בפ' הגוזל בתרא /מסכת בבא קמא/ (קי"ב:) אין מקבלין עדים שלא בפני בעל דין. אבל לבטל עדותן לא. דכיון שהמזימין מעידין בגופן של מוזמין לומר עמנו היו במקום פלוני. והתורה האמינתם. הרי הוא כאלו פסלום בגזלנות או בשאר פסול הגוף. שיכולין לפסלן ולבטל עדותן אפי' שלא בפניהם כמו שכתב הרמב"ן ז"ל.

In chapter four, we saw the formulations of Soloveitchik and Ta-Shma who suggested that Ramban developed and advanced the tosafists' method and directly influenced the rise of conceptualism in the period of the *aharonim*. In one respect, my analysis and conclusion supports Soloveitchik and Ta-Shma's contention that Ramban moved beyond the dialectic of the tosafists and that Ramban is an important bridge between the dialectic of the tosafists and the conceptualism of the *aharonim*.

In a different respect, however, my analysis demonstrates that it is incorrect to characterize Ramban as a dialectician. Ramban's method is best characterized as conceptualism, not as a form of dialectic (not even, that is, a more sophisticated form of dialectic). This chapter offers an important corrective to the portrayal of Ramban's method in recent scholarship. Beginning with Isaac Unna, scholars have characterized Ramban as a dialectician employing the method of the tosafists. Recall Unna's formulation characterizing Ramban's method as similar to that of the tosafists:<sup>552</sup>

...דרכו בקודש קרוב לדרך בעלי התוספות...

We also saw Soloveitchik's depiction of Ramban as a dialectician who gave the tosafists' method a more literate and sophisticated expression:

"Nahmanides' school was the natural offshoot—indeed, the second stage of the Tosafist movement. The true intellectual successors of Rabbenu Tam and Ri of Dampierre were... the great halakhists of Catalonia. Indeed, in Ritva's writings, the Franco-German dialectic received its most literate and sophisticated expression."<sup>553</sup>

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<sup>552</sup> Isaac Unna, *Rabbi Moshe ben Nahman*, p. 27

<sup>553</sup> Haym Soloveitchik, *Collected Essays I* (Oxford, 2013), p. 32.

See also Soloveitchik, "Hadpasat Sefarim:"



“The school of Nahmanides and his disciples, Rashba, Ritva, Rah, and Ran, constituted the second stage of the dialectical revolution in halakhah. The first stage was Rabbenu Tam and Ri, the second, the Spanish-Catalonian school. The works of Nahmanides and his disciples invariably open with the problems raised by the Tosafists, present the tosafist solutions, and proceed either to amplify them or suggest new ones...Their authors embraced the method of the Tosafists, refined their thought, and gave it its most sophisticated expression.”<sup>554</sup>

Similarly, Ta-Shma observed that Ramban’s *Hiddushim* were a

“a direct continuation--a kind of sophisticated advancement--of the tosafist method that preceded it.”<sup>555</sup>

And:

היסוד המעמיד [של חידושי הרמב"ן] הוא תלמודם של בעלי התוספות הצרפתים, שהשפיע עמוקות על כל דרך חשיבתו וסגנון לימודו של הרמב"ן. בהינטל מרכיב צרפתי זה מספר חידושים, ניטלה ממנו תמצית גבורתו וכמעט שלא נתבטל מהיכבו. ואין כוונתי לציטוטים הרבים, המפורשים והסתומים, מן התוספות, המצויים בספר... כוונתי לאופי השאלות

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חכמי ספרד ניגשו למלאכת הפרשנות ולפניהם פירושים רבים ומגוונים של קודמיהם. הם היו מצוידיים גם בשיטת החשיבה של בעלי התוספות, ועוד פיתחו ושכללו אותה. אין תמה שהחשיבה ההלכתית של בעלי התוספות הגיעה למלוא שיעור קומתה בבית מדרשו של הרמב"ן. והבית שהחל רבינו תם לבנות גמר לבנותו הריטב"א.

<sup>554</sup> Haym Soloveitchik, “Religious Law and Change Revisited,” *Collected Essays I*, p. 274. See also Soloveitchik, *Collected Essays III*, p. 404: “the members of the school of Ramban were the intellectuals heirs of the Tosafists; they constituted the second stage of the tosafist dialectical movement.”

<sup>555</sup> Ta-Shma, *Talmudic Commentary Part Two*, p. 35:

הרמב"ן הוא אביהם של כל כותבי ה"חידושים" הספרדים המפורסמים, שבהם עוסק כרך זה, ואשר כולם תלמידיו היו או תלמידי תלמידיו, עד לימיו של הרב נסים ב"ר ראובן גירונדי, שחתם סוגה ספרותית זו. סוגה זו מהווה המשך ישיר--מעין פיתוח מתקדם-- לשיטת ה"תוספות" קודמתה...

הבסיסיות שהרמב"ן מציע ומתלבט בפתרון, שמן התוספות נלקחו בדרך כלל... וגם דרך המחשבה וטכניקת העיון

היצירתי, בשאלה ובעיקר בתשובה, מהם נלמדו.<sup>556</sup>

The analysis of this chapter and of chapter four shows these formulations to be inadequate, or at least imprecise. These chapters are the first substantial study devoted to characterizing Ramban's method. So long as Ramban's method remained uncharacterized, scholars perceived Ramban as a dialectician in the spirit of the tosafists, albeit in a more sophisticated form.<sup>557</sup> This study offers a correction to that portrayal of Ramban and concludes that Ramban's method is best characterized as conceptualist, which is distinct from the dialectic method of the tosafists.

As we saw in chapter four, tosafist dialectic is characterized by its attempt to scour the Talmud for contradictions and to reconcile them in order to harmonize the talmudic text: collation, contradiction, and reconciliation. How the contradictions are harmonized and what legal principles result from such harmonizations--or the underlying rationale for those harmonizations--are less significant than the fact of resolving the problem of contradiction. As the examples discussed in this chapter demonstrate, the tosafists employ a battery of techniques to defuse the contradictions. In the above examples, many of Tosafot's resolutions are technical and *ad hoc*; few of them, if any, result in fundamental or jurisprudentially rich legal conclusions.

By contrast, Ramban's conceptual method is characterized by the particular method of resolving the contradictions and the type of answers it prefers. In the above examples, Ramban consistently resolves the contradictions through conceptual distinctions that articulate, clarify, and distinguish foundational

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<sup>556</sup> Ibid, pp. 38-39.

<sup>557</sup> Of course, scholars have realized that Ramban also has a traditional Spanish bent toward practical halakha. But within his theoretical method of talmudic analysis, they are in agreement about the tosafist-dialectic characterization.

principles of Jewish law.<sup>558</sup> Furthermore, Ramban generally does not engage in two of the stages that lie at the heart of the method of dialectic: *collatio* and *contradictio*. The eleven examples discussed in this chapter illustrate the difference between tosafist dialectic and Ramban's conceptualism. These considerations suggest that it is inaccurate to characterize Ramban's method as a form of tosafist dialectic.

To be sure, Ramban draws extensively from the literature of the tosafists. He uses their questions and their research to launch his own enterprise. Yet there is scant evidence to suggest that Ramban engaged in his own systematic scouring of talmudic discussions to document contradictions.<sup>559</sup> Ramban used the tosafists' research, and even their set of problems, to launch his own analysis. Ramban's project may have been impossible without Tosafot. But that is a different proposition than the one that claims that Ramban was engaged in a form of tosafist dialectic.<sup>560</sup>

The conclusion of this chapter supports the conception of Ramban as the founder of a new school of halakhic jurisprudence and of a new genre of halakhic literature.<sup>561</sup> Moreover, this conclusion further

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<sup>558</sup> Note the observation of Mordechai Breuer, *Oholei Torah: The Yeshiva, Its Structure and History*, (Jerusalem, 2003) p. 107.

הרמב"ן... עוסק פחות מן התוספות ביישוב סתירות קלות וקשות בין מקומות שונים בש"ס.. הוא חותר תמיד אל האמת שבדברי התלמוד ואינו מעלה סברות דחוקות כדי לתרץ כל קושיה....

<sup>559</sup> See also Mordechai Breuer, *Oholei Torah: The Yeshiva, Its Structure and History*, (Jerusalem, 2003), p. 107:

נראה כי חידושי הרמב"ן יותר מתיישבים עם טעמו של הלומד הספרדי מאשר התוספות. הרמב"ן מבאר את הסוגיא מתוך היבט מקיף ורחב, ועוסק פחות מן התוספות ביישוב סתירות קלות וקשות בין מקומות שונים בש"ס...

<sup>560</sup> Just as Tosafot's project may have been impossible without Rashi. But that does not imply that Tosafot were engaged in a commentarial enterprise.

<sup>561</sup> See, e.g., Twersky, "Introduction," in Twersky (ed.) *Rabbi Moses Nahmanides (Ramban): Explorations in His Religious and Literary Virtuosity*, (Harvard, 1983) p. 5; Ta-Shma, *Talmudic Commentary Volume Two*, p. 35:

הרמב"ן הוא אביהם של כל כותבי ה"חידושים" הספרדים המפורסמים... ואשר כולם תלמידיו היו או תלמידי תלמידיו, עד לימיו של הרב נסים ב"ר ראובן גירונדי, שחתם סוגה ספרותית זו. סוגה זו... קובעת שלב חדש בתולדות פרשנות התלמוד.

erodes the historiographical tendency to study Ramban through the lens of Ashkenaz versus Sefarad and north versus south.<sup>562</sup> There is no reason to believe that Ramban saw himself as a practitioner working within the tosafist school or method of dialectic. Based on his method of talmudic analysis, Ramban should not be seen as a disciple of any antecedent school of halakhic thought, even though he drew extensively from the entire range of existing halakhic cultures. Ramban's halakhic project stands independently and on its merits.<sup>563</sup>

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<sup>562</sup> See, e.g., Septimus, "Nahmanides and the Andalusian Tradition." My approach here, resisting the trend in the scholarship to view Ramban as a "northerner", is consistent with my comments above, chapter one, n. 40, resisting the claim that Ramban was a "southerner".

<sup>563</sup> Here I wish to reiterate that the use of a conceptual distinction is not itself novel. The Talmud offers conceptual distinctions on occasion, as do some of Ramban's predecessors (see above, chapter four). The question is whether Ramban's predecessors utilized conceptual distinctions consistently enough to be characterized as engaging in such a *method* of analysis. In my estimation, neither the tosafists nor Rabad nor any of the Andalusian rishonim utilized conceptualism as a method. Of Ramban's predecessors, the closest to constituting an antecedent to Ramban's conceptualism would be Rabad--and it is indeed possible that a careful study of Rabad's talmudic insights may indicate that Rabad was a forerunner of Ramban's conceptualism, though in much weaker and less consistent form. The role of conceptualism in Rabad's halakhic thought would require a careful study of Rabad's halakhic oeuvre. If traces of the conceptual method are in fact detected in Rabad's works, then such a finding would complement Yahalom's conclusion regarding the substantial influence of Rabad's halakhic writings on Ramban and broaden his conclusion to include methodology. For a general discussion of Rabad's influence on Ramban, see S. Yahalom, *Between Gerona and Narbonne: Nahmanides' Literary Sources* (Hebrew; Jerusalem, 2012) and Haym Soloveitchik, "Rabad of Posquieres". My own impression is that the conceptual method is not prominent in Rabad's works and that Ramban's consistent use of the conceptual method appears to be his own novel contribution to the history of halakhah. For a parallel methodological discussion regarding dialectic and its origins, see Haym Soloveitchik, "The Printed Page of the Talmud," *Collected Essays*, pp. 5-7.

## Chapter 6: The Biblical Verse as a Source of Normative Law in Ramban's Jurisprudence

### 1. The Biblical Verse as a Novel Source of Normative Halakhic Jurisprudence

The biblical text, particularly the *Humash*, is one of the most important texts in Judaism. It is endowed with sanctity, and it is read and studied in set portions on a weekly basis. But with respect to post talmudic halakhic jurisprudence--deriving, explicating, and crafting normative Jewish law--the biblical verse is not of central importance. The Talmud is the locus of Jewish law, and halakhic jurisprudence derived, almost exclusively, from the explication and interpretation of the Talmud.<sup>564</sup> To the extent that biblical verses were cited by halakhists in their normative jurisprudence, it was mediated by the Talmud's use and interpretation of those verses. Medieval halakhic authorities generally did not utilize the biblical verse as a direct basis for their normative halakhic jurisprudence. They did not derive novel halakhic conclusions directly from their interpretation of the biblical verse.

Zechariah Frenkel's formulation in his *Darkhei ha-Mishnah* is most illustrative:<sup>565</sup>

הדורות הראשונים היו בוני ומשלימי התורה על פי מדרש המקראות. לא כן דרך האחרונים. הם מצאו אחרי חתימת התלמוד השולחן ערוך והבית בבנה, ולא ניתן שוב המקרא להדרש. ואם נולד להם ספק בדין מדיני התורה לא התירו אותו במדרש המקרא, כי אם בשאלם פי חכמי הש"ס.

<sup>564</sup> In some instances other canonical sources of Jewish oral law, such as the Tosefta and the Yerushalmi, are important. Similarly, minhag and communal practice, in some cases, are important sources of the oral tradition.

<sup>565</sup> Zechariah Frenkel, *Darkhei ha-Mishnah* (Leipzig, 1859), p. 18.

Likewise, R. Aharon Ha-Levi of Barcelona (Re'ah) expresses this very idea while criticizing a colleague for appearing to have derived a normative halakhic conclusion directly from a novel interpretation of the biblical verse. Re'ah exclaims:<sup>566</sup>

אנן לית לן למידרש קראי דלא דרשי להו רבנן!

In the rare instances where medieval halakhists appear to use the biblical verses as the basis for a novel halakhic principle or rule, scholars have claimed that these cases are exceptional, motivated by extreme pressure or communal sensitivity. In other cases, scholars have shown that the citation of the biblical verse was not performing substantive halakhic work--it was bolstering an already-reached halakhic conclusion or practice--or simply offering guidance on a matter that was at bottom not 'halakhic'.

#### *The Grossman-Soloveitchik Debate*

Perhaps the best way to capture the medieval halakhist's attitude toward using the biblical verse as a basis for novel normative jurisprudence is to consider Haym Soloveitchik and David Berger's response to Avraham Grossman's suggestion that early Ashkenazic authorities utilized the biblical verse in just such a way. Grossman characterizes what he takes to be Rabbenu Gershom's novel use of the biblical verse to derive normative halakhic conclusions:<sup>567</sup>

ובאשר לדרשות המקרא אף הן מצויות אצל ר' משולם, ריט"ע ור"י הכהן, אך רגמ"ה מרבה יותר מהם להשתמש בהן. יש להפריד בין שתי דרכים: דרשות מקוריות של רגמ"ה לעומת פסוקים שהובאו ונדרשו על-ידו, אך, למעשה, עיקר הדרשה מצויה כבר בתלמוד. רגמ"ה השמיט את מסקנת הדרשה ואת מקורה, והרי הוא כאילו דורש את הכתוב עצמו, אך, למעשה,

<sup>566</sup> Re'ah Ketubot 60a, s.v. *Tanu Rabbanan*.

For a list of similar exclamations from other medieval and early modern halakhists, see Y. Gilat, "Midrash ha-Ketuvim ba-Tekufah ha-Batar-Talmudit" in Gilat and Stern (ed.), *Mikhtam le-David: Sefer Zikaron le-Rav D. 'Uks*, (Ramat Gan 5738), pp. 376-377.

<sup>567</sup> Avraham Grossman, *Hakhmei Ashkenaz Ha-Rishonim*, p. 155.

כיוון אליה... עשרות כתובים מן המקרא הוסמכו ונדרשו על ידו בדרך זו... דרך זו איננה רגילה אצל הפוסקים, ויש בה עדות על זיקתו של רגמ"ה למקרא. אך חשובה הימנה הדרך האחרת בה הלך, ועליה נסב עיקר דיונו כאן: דרשות של כתובים שאינן בתלמוד, אשר חודשו על ידו לצורך פסיקתו, הלכה למעשה, בעניינים שונים...

And in a later chapter, Grossman writes:<sup>568</sup>

חכמי אשכנז הסתמכו על המקרא גם בבואם להכריע בשאלות של הלכה למעשה.

After citing a few examples, Grossman notes that Rabbenu Gershom's (legal) interpretations of the biblical verse are in fact quite novel:<sup>569</sup>

ואכן אותם דיוקים מן המקרא... מחודשים הם... אין צריך לומר, שבדרך כלל דיוקים אלה מן המקרא אינם הכרחיים לפי פשטם של כתובים....

Summarizing his assessment of Rabbenu Gershom's normative use of the biblical verse, Grossman recognizes that this phenomenon is "extremely rare" in the history of halakhah:<sup>570</sup>

שכיחותה של התופעה ודבריו המפורשים של רגמ"ה--המקנים מקום מרכזי בהכרעותיו למקרא...--מעמידים את דרכו זו באור מיוחד ומעידים כי מכוונת היא. היא מצויה גם אצל חכמים אחרים באשכנז בדור השני והשלישי, דהיינו עד למחצית המאה האחת-עשרה, ואז נעלמת היא. נדירה היא עד מאוד במרכזים אחרים, וקרוב הוא, שיש לקושרה עם הזיקה אל המורשה הארץ-ישראלית.

In a later chapter, Grossman reiterates how unusual this phenomenon was and that it did not hold true for later generations:

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<sup>568</sup> Ibid, p. 430.

<sup>569</sup> Ibid, p. 156.

<sup>570</sup> Ibid. p. 157.

דרך זו נעלמה לחלוטין במחצית השנייה של המאה האחת-עשרה. אין כלל דרשות מחודשות או דרשות שהורחבה תחולתן במאות התשובות ששרדו מתקופה זו: לא מר' יצחק בר' יהודה, לא מר' שלמה בר' שמשון ולא מרש"י.

Similarly, Grossman notes that it was wholly unprecedented in post-talmudic history of halakhah:

לפנינו תופעה מפליאה של הזדקקות למקרא בפסק אצל חכמי אשכנז עד המאה האחת-עשרה. לא מצינו כן אצל גאוני בבל ואצל חכמי ספרד הראשונים בני זמנם (ר' משה בר' חנוך, חנוך בנו ויוסף אבן-אביתור).

According to Grossman, then, the norm in the history of halakhah is that the biblical verse did not serve as a novel source of normative halakhah in post-talmudic halakhic jurisprudence. In Grossman's view, Rabbenu Gershom and a handful of pre-Crusade Ashkenazic scholars were rare exceptions to the general rule.

In a review of Grossman's work, David Berger emphasizes that characterizing the phenomenon of utilizing the biblical verse to draw normative halakhic conclusions is important in itself, and he notes that this is one of the most interesting insights of Grossman's work.<sup>571</sup>

יצירת דרשות מחודשות לפסק הלכה היא תופעה חשובה ביותר לכשעצמה, וההצבעה על שימוש במקרא לצורך זה, היא מן החידושים המעניינים ביותר שבספר.

Berger also emphasizes that this phenomenon is extremely rare in the history of halakhah of later generations (*tofa'ah zo nedirah me'od bi-tekufot me'uharot*).<sup>572</sup> Berger points to a later example of a medieval halakhic authority offering a novel interpretation of a biblical verse to derive a normative halakhic conclusion. Maharam of Rothenburg was asked whether atonement is necessary for a man who had killed his wife and children to prevent their capture and forced conversion to Christianity during a

<sup>571</sup> David Berger, "Heker Rabbanut Ashkenaz ha-Kedumah" *Tarbiz* 53:3 (5744), 484.

<sup>572</sup> *Ibid.*



crusade. In response, Maharam offers a novel interpretation of the biblical verse and extends the license to kill oneself to sanctify God's name to also permit the killing of others.<sup>573</sup> Still, Berger notes that this case is exceptional given the highly emotional context of the Crusades and the background fact of its widespread practice. It thus constitutes an exception to the normal rules of normative halakhic jurisprudence:<sup>574</sup>

וכדאי ... להעיר על תשובה אחת של המהר"ם, המשמשת דוגמא מעניינת ביותר לדרשה מחודשת... מן המקרא, דרשה הנוצרת תחת לחץ כבד של המציאות ההיסטורית. על התשובה כבר הצבעתי... כהדגמה לתגובה האמוציונלית של חכמי הלכה בצרפת ואשכנז לשאלת קידוש השם, תגובה שחרגה משיקולי הלכה רגילים...

While Grossman concedes that the post-Talmudic halakhic norm was certainly not to derive normative halakhic conclusions directly from the interpretation of the biblical verse, he does maintain that pre-

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<sup>573</sup> Ibid.

<sup>574</sup> David Berger, "Heker Rabbanut Ashkenaz ha-Kedumah," *Tarbiz* 53:3 (5744), 484 n. 6. See also Berger, *The Jewish Christian Debate* (Philadelphia, 1979), pp. 25-26 ("Ashkenazic Jews were hardly able to discuss the issue of martyrdom, even in a halakhic context, without a passionate, emotional response. A remarkable *tosafot*, for example, points out that a certain talmudic passage seems to require a normative legal decision that a Jew is not obligated to resist to the death when forced to engage in a private idolatrous act. But, say the tosafists, "this is difficult", and one expects that this standard formula will be followed by the ordinary kind of legal or exegetical argumentation. Instead, we are confronted, at least initially, by an emotional outburst.")

See also Haym Soloveitchik, "Halakhah, Hermeneutics, Martyrdom," in *Collected Essays II*, p. 231, ("The strange reasoning of the Tosafists on the subject of martyrdom does not, I contend, bear legal scrutiny... their justification of suicide... and their even more surprising defense of parents slaughtering infants to prevent them from being reared as Christians were *ex post facto* justifications of the conduct of Jewish communities during the First Crusade.")

Discussing Maharam and other tosafist's arguments for martyrdom, Soloveitchik concludes, pp. 253-254, "We can safely say that the classic writings of the Tosafists, indeed, the very doctrines and arguments of their four greatest figures, Rabbenu Tam, R. Yitshak of Dampierre (Ri), R. Shimshon of Sens, and R. Me'ir of Rothenburg, all show such massive and atypical gaps in reasoning that we may conclude that something is deflecting their thought process from its normal course."

Crusade Ashkenaz constituted an exception of sorts to this rule. It is not clear from Grossman's analysis how strong of an exception he believes pre-Crusade Ashkenaz to have constituted. At one point, Grossman appears to concede that even in pre-Crusade Ashkenaz it was not the interpretation of the biblical verse that drove the legal conclusion. Rather, the biblical verse served as a "support" (*askmakhta*) to an already arrived at legal conclusion.<sup>575</sup>

Responding to Grossman's analysis, Haym Soloveitchik convincingly argues that Grossman's claim about pre-Crusade Ashkenaz is ill-founded. Soloveitchik writes: "Of all the current notions about Early Ashkenaz with which I find myself in disagreement, the most incomprehensible to me is the contention that the eleventh-century Talmudists in the Rhineland... frequently ruled according to their own understanding of biblical verses...."<sup>576</sup> After reviewing all of the cases cited by Grossman, Soloveitchik shows that in most of them the biblical verse plays no substantive halakhic role. In some cases, the verse is cited only because the Talmud had already attributed to it a certain legal meaning. In other cases, the verse is cited because the biblical verse would have greater resonance to the inquirer than an obscure passage in the Talmud. And in most cases the verses are cited for rhetorical purposes rather than substantive halakhic doctrine.<sup>577</sup>

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<sup>575</sup> Grossman, *Hakhmei Ashkenaz*, p. 430:

שלושה סוגי דרשות הן: (א) כתובים שנדרשו בתלמוד ודרשתם איננה למעשה, אלא חזרה על הדרשה התלמודית... למרות שגם דרך זו איננה מקובלת בדרך כלל על פוסקים אחרים, וראויה גם היא להדגשה, אין הכוון באן אליה, אלא לשני הסוגים האחרים. (ב) שימוש בדרשה קיימת תוך הרחבה תחולתה, או (ג) יצירתה של דרשה מחודשת לחלוטין. אמנם, גם את שתי אלה תלינו, למעשה, במעין אסמכתא, כי קרוב הוא, שהסיק המשיב את מסקנתו על סמך שיקולים אחרים אך מבחינת המיבנה שלה והחידוש שבה, דרשה היא.

<sup>576</sup> Soloveitchik, "The Authority of the Babylonian Talmud and the Use of Biblical Verses and Aggadah in Early Ashkenaz," in *Collected Essays II*, p. 70.

See also op. cit., p. 71, "I must dissent from the now widely held view... that the scholars of Early Ashkenaz... knowingly and openly disregarded [the Bavli] and resolved halakhic questions on the basis of Mishnah, aggadah, and biblical verses."

<sup>577</sup> Ibid, pp. 85-100.

*The Soloveitchik/Ta-Shma Debate*

A second important exchange about the normative role of biblical verses in halakhic jurisprudence is a debate between Yisrael Ta-Shma and Haym Soloveitchik. Ta-Shma cites a responsum of R. Isaac of Dampierre (Ri ha-Zaken) to support the thesis that the tosafists, like their pre-Crusade ancestors (per Grossman), extracted new normative doctrines from the biblical verse. Ri was asked about the permissibility of killing an informer (*moser*) and whether normative Jewish law sanctioned such a killing. Ri responds unequivocally in the affirmative. As for the legal basis of such killings, Ri cites some aggadic talmudic sources and exclaims that, in addition, there may be a biblical verse to support such killings:<sup>578</sup>

אפשר שיש שם שום פסוק על זה.

Ta-Shma argues that Ri was prepared to justify the killing of an informer on the basis of some (unknown!) biblical verse, even without a clear talmudic-halakhic source. This, Ta-Shma contends, supports Grossman's conclusion that Ashkenazic authorities were prepared to derive normative halakhic conclusions directly from the biblical verse. But as Soloveitchik convincingly argues, Ri's declaration proves too much:

"Ri advances a number of perplexing arguments, one of which is the suggestion that there may be some biblical verse justifying this execution. Anyone who gives an allowance on the basis of the possible existence of a permissive biblical verse, though he doesn't know what that verse is, is effectively saying that the matter is permissible, with or without a verse. When the question at bar is nothing less than the permissibility of killing someone, we may be sure that the decisor has never in his life entertained any doubts on the matter. The 'possible verse' that is invoked is

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<sup>578</sup> Israel Ta-Shma, "Teshuvat Ri ha-Zaken be-Din Moser," *Studies in Medieval Rabbinic Literature IV: East and Provence* (Jerusalem 2010), p. 162.

simply an *asmakhta*, a hook on which to hang something known independently from the outset.... Clearly [Ri] is not deducing anything... Ri's argument for the execution of informers is not a deduction of any sort; it is simply another rare instance when the culturally axiomatic invokes a text of any sort--here of the wildest sort--as an *asmakhta*.<sup>579</sup>

### *Yitzchak Gilat's Analysis*

These debates reflect fundamental scholarly disagreement over the role of biblical verses in post-talmudic normative halakhic jurisprudence. In an insightful article, Yitzchak Gilat offers several examples where important halakhists appear to derive normative halakhic conclusions directly from their novel interpretation of biblical verses. Gilat writes:

מצינו, שגם הגאונים, הראשונים, ואף האחרונים נקטו מידת רבותיהם הקדמונים: דרשו בשאר רוחם את המקרא וגילו בדברי הכתובים פתרון, סעד ועזר לשאלות חוק ומשפט מחודשות, שהתעוררו בבתי-מדרשם ובתנאי מציאות חייהם... ההסתמכות על דרשת המקרא היא אפוא שיקול בעל משמעות נכבדה בחשיבתם ההלכתית, המטה את הכרעותיהם הלכה למעשה.<sup>580</sup>

Gilat emphasizes two important features of the cases in his study. He writes:<sup>581</sup>

נעיין... בדוגמאות אחדות של הלכה שהצד השווה שבהן הוא: א. אין להן מקור בספרות התלמודית (לעתים אך דומה כי מן המקורות הקדומים אפשר להסיק אחרת). ב. מדרש הכתוב משמש מרכיב בעל משקל מכריע, ראשי או משני, בהסקת ההלכה המחודשת, או בקביעת ההלכה למעשה כאשר קיימות אלטרנאטיבות אחרות.

<sup>579</sup> Haym Soloveitchik, "On the Use of Aggadah by the Tosafists: A Response to I.M. Ta-Shma," *Collected Essays II*, pp. 102-103.

<sup>580</sup> Yitzchak Gilat, "Midrash ha-Ketuvim be-Tekufah ha-Batar Talmudit", pp. 377-378. Gilat and Stern (ed.), *Mikhtam le-David: Sefer Zikaron le-Rav D. 'Uks*, (Ramat Gan, 5738) 374-393.

<sup>581</sup> Ibid, p. 378.



הרי לפנינו מדרש גאוני, שלא מצאנוהו בתלמודים, המפקיע הלכות ייבום מן המומר. את התפיסה הדתית-חברתית על המומר... שהיתה רווחת בחלק ניכר של החכמים והאומה, עיגנו הגאונים במדרשי כתובים מחדשים, והחילו אותה על הפקעת האשה מזיקת ייבום למומר.<sup>585</sup>

While this example is quite significant—and intriguing—it is important to note that the topic of apostates and levirate marriage is a highly charged one. In some contexts, it would mean that a Jewish woman would be unable to remarry if the apostate brother wasn't available or willing to perform *halitzah*. It is thus quite possible that this example would fall under the exception characterized by Berger and Soloveitchik above. Levirate marriage was an extremely charged area of halakhic jurisprudence, and we ought not infer a general principle of jurisprudence from an extraordinary case.<sup>586</sup>

In a second intriguing example, Gilat shows that medieval halakhic authorities appealed directly to their interpretation of the biblical verse regarding the scope of the prohibition of returning to Egypt.<sup>587</sup>

Several medieval authorities were puzzled by the fact that Jewish communities continued to exist in Egypt, which appears to transgress an explicit Torah prohibition. R. Eliezer of Metz writes:<sup>588</sup>

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<sup>585</sup> Gilat, "Midrash Ha-Ketuvim", 379-380.

<sup>586</sup> See also Yosef Hayim Yerushalmi's contention in the first chapter of *From Spanish Court to Italian Ghetto* that historians ought to exercise great caution when deriving conclusions from halakhic decisions that immediately bear on an urgent humanitarian crises. Yerushalmi cautions that a halakhic decision rendering a Marrano "non-Jewish" may reflect more about the decisor's desire to free a woman from levirate marriage and *halitzah* than about the halakhic status of a Marrano. See Yerushalmi, *From Spanish Court to Italian Ghetto* (Seattle and London, 1981), pp. 25-28 and n. 39 therein.

<sup>587</sup> On the prohibition of returning to Egypt see Devarim 17:16; Sukkah 51b; Rambam Melakhim 5:7-8; *Sefer ha-Mitzvot*, Lo Ta'aseh 46.

<sup>588</sup> *Sefer Yere'im* no. 309.

לא תוסיפו לשוב בדרך. צוה הבורא שלא ישובו ישראל למצרים דכתיב ב' שופטים וה' אמר לכם לא תוסיפון לשוב בדרך הזה עוד ... וראיתי ושמעתי כמה בני אדם טובים שהלכו למצרים ונפלאתי על מה סמכו ויש לומר מדכתיב בדרך הזה שלא אסר הכתוב אלא לשוב מארץ ישראל למצרים אבל בשאר ארצות מותר...

R. Eliezer of Metz thus derives a normative halakhic conclusion from his interpretation of the verse. On his interpretation, the verse doesn't prohibit dwelling in Egypt *per se*, it specifically prohibits returning to Egypt from the Land of Israel, literally, via the route that the Jews took during the exodus (*ba-derekh ha-zeh*).<sup>589</sup>

R. Eliezer of Metz's interpretation of the verse was partially motivated by the need to explain the practice of Jews dwelling in Egypt. Still, this example does not appear to be as emotionally charged as the prior example involving levirate marriage. Nor do the halakhic and practical stakes appear to be as high. Furthermore, R. Eliezer could have offered a host of other answers to justify the practice of Egyptian Jewry without having to derive his normative conclusion from a novel interpretation of the biblical verse. Indeed, some of his colleagues did just that.<sup>590</sup>

<sup>589</sup> See also *Semag*, Lo Ta'aseh 227:

צוה הקדוש ברוך הוא שלא ישובו ישראל למצרים שנאמר (דברים יז, טז) לא תוסיפון לשוב בדרך הזה עוד ... ויש תימה על כמה קהילות השוכנים שם וגם רבינו משה בר' מיימון הלך לשם לגור ... ואין לנו טעם להתיר אם לא נפרש כפירוש הרב רבי אליעזר ממיץ (שם) לא תוסיפון לשוב בדרך הזה אלא אסרה תורה אלא בדרך הזה כלומר מארץ ישראל למצרים אבל משאר ארצות מותר.

See also *Ritva Yoma 38a*, who cites R. Eliezer of Metz's novel interpretation of the verse, but rejects it:

אלכסנדריא של מצרים. פי' דאע"ג דכתיב לא תוסיפון לשוב בדרך הזה עוד כבר פירשו בסיפרי לגור שם אי אתה חוזר אבל אתה חוזר לסחורה ולכבוש את הארץ, ומיהו תמיהא מילתא על מה סמכו העולם לגור בזמן הזה במצרים כגון הרמב"ם ז"ל וכמה גדולים אחרים, ויש אומרים שאותן עיירות כבר נתבלבלו ונחרבו ואלו עיירות אחרות הן שנתיישבו אחרי כן, וה"ר אליעזר ממיץ תירץ שלא אסר הכתוב אלא להלך בדרך ההוא שמארץ ישראל והמדבר למצרים דהכי כתיב קרא לא תוסיפון לשוב בדרך הזה עוד, והנכון יותר שאין האיסור ההוא אלא בזמן שישראל שרויין על אדמתם אבל בזמן הזה שנגזר עלינו להיות נדחים בכל קצוי הארץ כל חוצה לארץ אחד הוא ואין איסור אלא שלא לצאת מדעת מן הארץ לחוצה לארץ.

See also *Kaftor va-Ferah* chapter 5.

<sup>590</sup> See the three answers offered by *Ritva*, cited in the above note.

Gilat's insightful article offers several more examples of this phenomenon, with varying degrees of persuasiveness.<sup>591</sup> Gilat's article does not point to any particular figure as especially associated with this phenomenon. Nor does he attempt to show, or make claims about, how systematically this method was applied in the history of halakhah.

### The Biblical Verse as a Source of Normative Halakhah in Ramban's Jurisprudence

I will argue that Ramban systematically looked to the biblical verse to illuminate normative halakhic doctrine, and in many instances he derived practical halakhic conclusions directly from his novel interpretations of the biblical verse. This section discusses several examples where Ramban employs this method, and I show how later halakhic authorities adopted Ramban's conclusions as normative. Unlike the examples discussed earlier in the chapter, the halakhic issues at bar in the examples below are not instances of extraordinary humanitarian need or areas of law where emotions might run high. These examples therefore support the general conclusion that the biblical verse played an important role in Ramban's ordinary jurisprudence.<sup>592</sup> To grasp the manner in which Ramban used the biblical verse to derive normative halakhic conclusions, we must take a close look at the instances where he does so. As we shall see, Ramban's use of the biblical verse to derive normative halakhah spans a wide range of halakhic areas including: monetary civil law, political authority, the administration of justice and civil

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<sup>591</sup> Y. Gilat, "Midrash ha-Ketuvim bi-Tekufah ha-Batar Talmudit" in Gilat and Stern (ed.), *Mikhtam le-David: Sefer Zikaron le-Rav D. 'Uks*, (Ramat Gan 5738) 374-393.

<sup>592</sup> For some discussion of the role of the biblical verse in Ramban's halakhic jurisprudence, see Yisraeli, *Intellectual Biography*, pp. 152-154:

בפירוש התורה עצמו משתקפת נטיית רמב"ן 'למתוח' את פירושי הפשט של המקראות אל המסקנות ההלכתיות המתבקשות מכך, ולעיתים אף לנסח מכוחם היגדים הלכתיים שאין להם כל יסוד בספרות התלמודית."

See also Yosef Erel, *Hashpa'ot Hadadiyot Bein Parshanut ha-Peshat le-Bein ha-'Iyun ha-Hilkhati be-Yezirato shel Ramban* (MA Thesis, Jerusalem 5766); Yosef Erel, *Parshanut Peshat le-Mikra ve-Halakhah Pesukah be-'Avodato Shel Ramban*, JSIJ 8 (2009), pp. 117-152.



procedure, marital and family law, the sabbath and the holidays, ritual sacrifice in the temple, and meta-legal principles.

## I. Monetary Civil Law

### *Price Gouging in Real Property*

Jewish law prohibits price gouging. The Talmud in *Bava Metzia* (49b-51a) provides that price gouging more than 1/6 of the price of the item invalidates a transaction, less than 1/6 is prohibited but does not invalidate a transaction. The Talmud further states (*Bava Metzia* 56a) that “real property is exempt from [the strictures] of price gouging.”<sup>593</sup> The standard interpretation amongst talmudic commentators is that this exemption for real property excludes real property from all aspects of the price gouging injunction, including the prohibition itself.<sup>594</sup> In other words, there are no restrictions, legal or moral, on how much a person can permissibly mark up their real property when they put it for sale.

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<sup>593</sup> *Bava Metzia* 56a:

אלו דברים שאין להם אונאה: העבדים, והשטרות, והקרקעות.

<sup>594</sup> See for example, Rashi *Bava Metzia* 56b s.v. *davar*, implying that the prohibition of price gouging is limited to personal property (*metaltelin*):

דבר הנקנה מיד ליד - הזהיר עליו בבל תונו.

For this interpretation of Rashi, see *Hikrei Lev*, Hoshen Mishpat 2:86 and *Raza de-Shabti Bava Metzia* 56b, p. 500, s.v. *Rashi d.h. Davar*:

מבואר דס"ל דליכא איסורא כלל.

See also Tosafot *Bava Metzia* 6a s.v. *ela*. For commentators who interpret Tosafot as holding that there is no prohibition at all for price gouging real property, see *Mishneh le-Melekh*, Malveh 4:1:

מדברי התוס' בריש פרק איזהו נשך בדיבור המתחיל אלא לאו דגזל... משמע דסבירא להו דמאי דממעטינן קרקעות מאונאה היינו מאיסור לאו.

See also *Minhat Hinukh*, Mitzvah 229:1 and *Raza de-Shabti Bava Metzia* 61a, p. 541:

משמע דקרקעות נתמעטו גם מאיסור לאו בגזל ואונאה...

In his Commentary on the Torah (Vayikra 25:14-15), Ramban acknowledges that the straightforward reading of the Talmud implies that real property is excluded entirely from all price gouging regulations.<sup>595</sup> Yet, he notes that this appears to force an awkward reading of the biblical verses. Verse 14, which states the general price gouging prohibition, is surrounded by two verses (13 and 15) that deal with real property. Verse 16 also discusses real property, and the next verse, 17, once again takes up the price gouging prohibition. Ramban notes that the juxtaposition and intermingling of the price gouging prohibition with the verses dealing with real property implies that the price gouging prohibitions in verses 14 and 17 apply to the real property sales discussed in the neighboring verses 13, 15 and 16.<sup>596</sup>

Ramban contends that the talmudic interpretation excluding real property entirely from the price gouging regulations does violence to the plain meaning of the biblical verses, breaking up the verses as if they were dealing with unrelated topics.<sup>597</sup> Ramban therefore sets out to reconcile the talmudic interpretation excluding real property from price gouging with the biblical verse that appears, based on context, to apply the price gouging prohibition to real property. Ramban's solution is to distinguish

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<sup>595</sup> Ramban Vayikra 25:14-15:

אבל רבותינו אמרו (ב"מ נו א) שאין אונאה לקרקעות, שנאמר או קנה מיד עמיתך, דבר הנקנה מיד ליד

<sup>596</sup> Ibid:

אל תונו - זו אונאת ממון, "במספר שנים אחר היובל". פשוטו של מקרא על אופניו, על האונאה בא להזהיר. כשתמכור או תקנה קרקע, דע כמה שנים יש עד היובל, ולפי השנים ימכור המוכר ויקנה הקונה שהרי סופו להחזיר לו בשנת היובל, ואם יש שנים מועטות וזה מוכרה בדמים יקרים הרי נתאנה לוקח, ואם יש שנים מרובות ויאכל ממנה תבואות הרבה צריך לקנותה לפי הזמן, וזהו שנאמר "במספר שני תבואות ימכר לך", לפי מנין שני התבואות שתהא עומדת ביד הלוקח תמכור לו. ורבותינו דרשו (ערכין כט ב) מכאן שהמוכר שדהו אינו מותר לגאול פחות משתי שנים, אפילו יש שלש תבואות באותן שתי שנים. ואינו יוצא מפשוטו, מספר שנים של תבואות ולא של שדפון ומעוט שנים שתיים, לשון רש"י. ובאמת שהוא הנכון בישוב המקרא.

<sup>597</sup> Ibid:

אבל רבותינו אמרו (ב"מ נו א) שאין אונאה לקרקעות... על כרחנו נצטרך להטות מקראות מפשוטו, ונאמר שיהיה כל פסוק עומד בעצמו. יאמר וכי תמכרו ממכר לעמיתך או קנה מיד עמיתך דבר הנקנה מיד ליד אל תונו איש את אחיו, ויחזור ויאמר, במספר שנים אחר היובל תקנה מאתו התבואות וכמספר שני התבואות ימכרם לך, כפי השנים תרבה ותמעט כי על כל פנים תשיבנו לו ביובל. וכל זה אזהרה ביובל שיזהרו בו לעולם, וחזר ואמר ולא תונו איש את עמיתו, בדברים.

between the price gouging *prohibition* (issur) and the price gouging *rules* that either rescind the transaction or compel the seller to disgorge the exorbitant portion of the sale price.

Ramban argues, on the basis of his interpretation of the biblical verses, that the price gouging prohibition *does* apply to real property. The talmudic exclusion of real property is limited to the *rules of repair*--of rescinding the sale and disgorging the excessive payment. Thus, someone who price-gouges on the sale of their real property violates a biblical prohibition, even though they have no duty of repair after the fact.<sup>598</sup> Ramban even offers a detailed reading of the verses to demonstrate that the verse itself intends to distinguish between the prohibition which applies to both real and personal property, and the rules of repair that apply only to personal property.<sup>599</sup>

Note that Ramban derives an important normative halakhic conclusion from his novel analysis of the biblical verses. According to Ramban, a biblical prohibition enjoins a seller from selling his real property above its market value. Ramban's analysis and legal conclusion was accepted by later commentators

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<sup>598</sup> Ibid:

ואני חושב עוד סברא, שודאי המאנה את חבירו לדעת עובר בלאו, בין במטלטלים בין בקרקעות, שבהן דיבר הכתוב אל תונו איש את אחיו במספר שנים אחר היובל, שהוא מזהיר שיקנו וימכרו לפי השנים ולא יונו איש את אחיו. אבל רבותינו חדשו באונאה תשלומים בשתות המקח, וביטול מקח ביותר משתות, ומזה בלבד מעטו הקרקעות לפי שהאונאה בהם אפילו ביתר משתות, מחילה, כמו שהיא מחילה במטלטלים בפחות משתות, אף על פי שהוא אסור להונות כן לדעת, אבל אין דרך בני אדם לבטל ממכרם מפני אונאה מועטת כזו.

<sup>599</sup> Ibid:

ודרשו חכמים מפני שאמר הכתוב וכי תמכרו ממכר לעמיתך או קנה דבר הנקנה מיד ליד אל תונו איש את אחיו, למדנו שיש באונאה דין מיוחד במטלטלים שאינו נוהג בקרקעות, והוא חזרת הממון, אבל אזהרת הלאו נוהגת בכלן. ולכך אמר "וכי תמכרו ממכר" לשון רבים, למוכר קרקעות ולמוכר מטלטליו, "או קנה מיד עמיתך", היחיד מהם המוכר המטלטליו מיד ליד, ואמר לכולן "אל תונו", וכיון שייחד והפריש המטלטליו ריבה בהן דין אונאה, והיא בחזרת התשלומין. וזה דבר נכון כפי המדרשים שקבלו רבותינו ברמזי התורה.

and halakhic authorities.<sup>600</sup> R. Akiva Eger in his glosses to *Shulhan Arukh* cites Ramban's conclusion in the Commentary on the Torah as authoritative.<sup>601</sup>

<sup>600</sup> See, for example, *Sefer ha-Hinukh*, Mitzvah 337:

(א) שלא להונות אחד מישראל בין זכר בין נקבה במקח ובממכר, שנאמר [ויקרא כ"ה, י"ד] וכי תמכרו ממכר לעמיתך או קנה מיד עמיתך אל תונו איש את אחיו. ואמרו זכרונם לברכה בספרא, אל תונו איש את אחיו, זו אונאת ממון. ובגמרא [ב"מ נ"ו ע"ב] אמרו זכרונם לברכה, מיד עמיתך, דבר הנקנה מיד ליד, כלומר מטלטלין. ואין כוונת המדרש שלא יזהיר הכתוב על אונאת הקרקעות כמו כן, אלא הענין הוא לומר שדיני האונאה, כגון החילוקין שאמרו זכרונם לברכה [שם נ' ע"ב] באונאה שהיא חוזרת ביתר משתות, ודיניה בפחות משתות ובשתות אינן נוהגין בקרקעות אלא במטלטלין.... ואולי זה שדקדקו בכאן להיות דיני האונאה במטלטלין לבד, לפי ששנה הכתוב בלשון זה, שאמר וכי תמכרו ממכר, דמשמע כל ממכר בין קרקע בין מטלטל, ואחר כן ייחד האזהרה במטלטל שאמר או קנה מיד, דמשמע דוקא מטלטל שהוא נקנה מיד ליד, למדו מזה לומר שיש במטלטל דין מחודש שאינו בקרקע וזהו חזרת הממון בקצת צדדין שבו. אבל עיקר האזהרה בין בקרקע בין במטלטל הוא באמת, שהזוהרנו שלא להונות הבריות לדעת. אבל החילוק שביניהן הוא שאם נמצאת אונאה במטלטל ביתר משתות שיבטל המכר, שדעת הבריות שלא לסבול אונאה יתירה מכן במטלטלין, אבל בקרקע לפי שהקרקע דבר קיים לעולם דרך הבריות למחול בו כל אונאה אחר שלקחו אותו, וכעין מה שאמרו זכרונם לברכה [ב"ק י"ד ע"ב] על דרך ההפלה שהקרקע דבר השווה כל כסף הוא. והראיה לדברינו אלה, כלומר שאיסור אונאה אף בקרקע, שהרי עיקר אזהרה זו בקרקעות הוא דכתיבא, וכמו שמפורש בפרשה. זהו דעת הרמב"ן זכרונם לברכה בענין זה, וכמו שכתב בפירוש החומש.

See also Rabbenu Yonah, *Bava Batra* 78a:

ו"ל, דכל הני דאין להם אונאה ודאי עובר בהן בלאו דלא תונו, ולא נתמעטו אלא מחזרת אונאה, וכן הפרשה מוכחת דכתיב לפי רוב השנים תרבה מקנתו ולפי מעט השנים תמעיט מקנתו ולא תונו וגו', אלמא גם בקרקעות הזוהרנו על האונאה.

While Rabbenu Yonah does not cite Ramban as the source for this interpretation of the verses, it would be an extraordinary coincidence if the two scholars--who were closely related and in correspondence with each other--wound up with identical positions and interpretations. And while it is conceivable that Rabbenu Yonah had the formulation first, Ramban's own formulation suggests that it was he who originated the theory, as he prefaces his remarks in the Commentary on the Torah with: ואני חושב עוד סברא.

Note, however, Ta-Shma's claim in "Rabbenu Yonah Gerondi: ha-Ish u-Fo'alo", p. 122, regarding Rabbenu Yonah in general:

ואת ספרו של הרמב"ן בוודאי לא הכיר, כי טרם נתחבר. אדרבה, השפעתו הוא על חידושי הרמב"ן אינה מוטלת בספק.

Ta-Shma does not offer any evidence for his claim, and it needs to be evaluated carefully.

<sup>601</sup> R. Akiva Eger *Hoshen Mishpat* 227:29:

[שו"ע] שאין להם אונאה. נ"ב הרמב"ן בפ"י החומש והרא"ה בספר החינוך כ' דמ"מ גם הלאו עובר גם באלו ולא מיעט הכתוב אלא מדין תורת אונאה וביטל מקח.

See also *Pithei Hoshen*, Gezeilah ve-Ona'ah 10:4 note 6.

### *First Born's Double Portion in the Estate*

Jewish law provides that a first-born son is entitled to receive a double portion in the estate of his deceased father. Further, the Talmud rules that, in contrast to other heirs, the father cannot disinherit the first-born from his double portion.<sup>602</sup> This ruling is accepted as normative by the halakhic codes.<sup>603</sup> Ramban himself counts the positive obligation to grant the first born son his double portion as one of the 613 biblical commandments in addition to a negative prohibition to deny the first born his double share.<sup>604</sup>

Yet in his Commentary on the Torah, Ramban offers the following legal analysis and halakhic conclusion based on his novel interpretation of the biblical verse. Ramban opens his analysis by acknowledging the biblical prohibition of denying the first born his double share. He also acknowledges that any attempt by the testator to do so will be legally ineffective.<sup>605</sup>

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<sup>602</sup> Bava Batra 130b:

מה תלמוד לומר לא יוכל לבכר? לפי שנאמר: והיה ביום הנחילו את בניו, שיכול והלא דין הוא: ומה פשוט שיפה כחו, שנוטל בראוי בממוחזק - התורה נתנה רשות לאב להנחיל לכל מי שירצה, בכור שהורע כחו, שאינו נוטל בראוי בממוחזק - לא כל שכן! תלמוד לומר: לא יוכל לבכר.

<sup>603</sup> See, e.g., Rambam Nahalot 6:3; Shulhan Arukh Hoshen Mishpat 281:4.

<sup>604</sup> See Ramban, *Hassagot to Sefer ha-Mitzvot*, Shikhat ha-Lavin:

המצוה הי"ב שנמנענו בהנחילנו הבנים מהעביר הבכורה מן הבן הגדול אל יתר אחיו אבל נחיל אותו פי שנים כמשפט הבכורה. והוא אמרו ית' (ר"פ תצא) לא יוכל לבכר את בן האהובה על פני בן השנואה הבכור כי את הבכור בן השנואה יכיר לתת לו פי שנים. ובגמר יש נוחלין (קל ב) אמרו לא יוכל לבכר את בן האהובה מה תלמוד לומר לפי שנאמר והיה ביום הנחילו את בניו התורה נתנה רשות לאב להנחיל לכל מי שירצה יכול אף זה כן תלמוד לומר לא יוכל לבכר... והנראה שיש בזה עוד מצות עשה שאמר יתעלה כי את הבכור בן השנואה יכיר לתת לו פי שנים. וגם זו מצוה שהוא חייב להכירו ולתת לו פי שנים. והנה המעביר בכורה מן הגדול עובר בעשה ולא תעשה.

<sup>605</sup> Commentary on the Torah, Devarim 21:16-17:

וכן כי את הבכור בן השנואה יכיר לתת לו פי שנים - מצות עשה שינחילנו פי שנים. והנה המשוה את הבכור לאחיו בנחלתו עובר בלא תעשה ועשה ואף על פי שאין דבריו קיימים בדיון, וכל שכן אם לא רצה להודיע שהוא הבכור וטען שהוא פשוט והנחילו כאחד מבניו מדעתו שהוא הבכור שעובר בהן.

But Ramban argues, based on his interpretation of the verse, that these rules hold true only if the first-born son is alive when the testator dies. If the first born predeceases the father, then there is no biblical injunction against denying the heirs of the first born son the double portion that the Torah allots to them.<sup>606</sup> Ramban's argument is based directly on his novel reading of the verse. The verse (Devarim 21:16) prohibits the father from favoring the second child "over (*al penei*)" the first-born son. Ramban contends that the phrase "*al penei*" is used throughout scripture only when referring to living people.<sup>607</sup> On this basis, Ramban concludes that the biblical prohibition of denying the first-born son his double share applies only during the lifetime of the first-born son.

Ramban's analysis constitutes an extraordinary limitation on the halakhic rules governing the first-born son's inheritance right.<sup>608</sup> And it appears to run contrary to what would otherwise be the straightforward application of the rules of first-born inheritance as presented in the Talmud. Note that R. Yosef Trani (1568–1639), who was apparently unaware of Ramban's interpretation in the Commentary on the Torah, ruled on exactly the type of case discussed by Ramban--where the first-born son predeceased his father but was survived by his own child--and held that the first-born son's child has the same entitlement as the first-born himself in the deceased (grandfather's) estate. According to R. Yosef Trani, the grandchild (the son of the deceased first-born) cannot be denied the double portion

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<sup>606</sup> Ibid:

וממה שאמר הכתוב "על פני בן השנואה הבכור", יראה לי שאין המצוה הזאת והדין הזה נוהג אלא בחיי הבכור. אבל אם מת הבכור בחיי אביו, אף על פי שהוא יורש חלק בכורתו בקבר ומורישו מן הדין לבניו, אם רצה הזקן ואמר יירשו בני כך וכך בנכסי ובניו של בני הבכור יטלו כך וכך בנכסי, דבריו קיימין כדרך שהם קיימים במקום שאין שם בכור. וכן איננו עובר בלאו הזה אם לא הכיר הבכור לאחר מותו.

<sup>607</sup> Ibid:

כי לא מצאתי "על פני" רק בחייו, על פני אהרן אביהם (במדבר ג ד), על פני תרח (בראשית יא כח), וכן כולם

<sup>608</sup> Note the exclamation in the *Pithei Teshuva*, Hoshen Mishpat 281:1 regarding Ramban's interpretation:

אמנם אתן הודע"ה על העבר כי עד היום לא מצאתי חידוש דין זה באחד מן המחברים אשר לפני היו עוברים, עכ"ל ע"ש.

in his grandfather's estate that his father would have received.<sup>609</sup> Yet Ramban arrives at a different halakhic conclusion based entirely on his novel interpretation of the biblical verse. Remarkably, halakhic authorities adopt Ramban's legal conclusion as normative.<sup>610</sup>

## II. Political Authority

### *Communal Authority and Power to Punish*

Ramban's *Mishpat ha-Herem* is a short, halakhic epistle on communal legislation and authority to punish. After clarifying some of the basic rules of *herem* and *shevu'ah*, Ramban explains that a community has the power to enact rules sanctioned by the threat of punishment, even without the consent of each individual town member.<sup>611</sup> As Menachem Lorberbaum correctly observes, the *herem*

<sup>609</sup> *Responsa Maharit Hoshen Mishpat* no. 71:

שאלה יעקב היו לו ב' בנים שם הבכור ראובן ושם השני שמעון ונפטר ראובן הבכור והשאיר אחריו בן אחד ואחר זה נפטר יעקב אביו ונשארו אחריו נכדו בנו של ראובן הבכור ובנו שמעון וכו' לפני מותו שיחלקו כל נכסי עזבונו קרקעות ונכסים בין שניהם לחצאין ולא היו עדים בשעת צוואתו עתה נכדו של יעקב תוב' פי שנים בנכסי זקנו ר' יעקב הנד' כי לו משפט הבכורה מכח אביו ראובן שהיה בכור... תשובה בן הבכור נוטל פי שנים שזכתה לו התורה לא מבעיא היכא דליכא עדים בדבר אלא אפילו יש עדים שאמר האב כן בשעת מיתה לא אמר כלום ששנינו בפרק יש נוחלין המחלק נכסיו לבניו על פיו ריבה לאחד ומיעט לאחד והשוה להם את הבכור דבריו קיימים וקי"ל כר' יוחנן בן ברוקה שהתורה נתנה רשות לאב להנחיל לכל מי שירצה דכתיב והיה ביום הנחילו את בניו דוקא בחלק פשיטות אבל בחלק בכורה לא...

<sup>610</sup> See *Ketzot ha-Hoshen*, 281:4:

אבל בבכור אם אמר יירש כפשוטו. כתב בתשובת מוהרי"ט חלק חו"מ סי' ע"א....  
אמנם הרמב"ן כתב בפירושו לתורה פרשת תצא (דברים כא, טז) וז"ל... וא"כ בנדון מוהרי"ט כיון שמת הבכור ליתיה להך דינא דבכור והו"ל כמו במקום שאין בכור. וכיון דמוהרי"ט לא הביא דברי הרמב"ן ולא ראה דבריו בזה נראה דודאי אילו הו' שמיע ליה דברי הרמב"ן לא היה חולק".

See also *R. Akiva Eger Hoshen Mishpat* 281:4:

[שו"ע] אבל בבכור. נ"ב הרמב"ן בפ"י על התורה כתב דזהו דוקא בחיי הבכור אבל אם מת הבכור בחייו אף שמוריש חלק בכורתו לבנו מ"מ יכול האב הזקן לומר עליו שירש כך וכך ופלוני בני כך וכך. והובא בתשו' הרא"ם פדאווע סי' מ"ד.

See also *Pitchei Teshuva* 281:1.

<sup>611</sup> *Mishpat ha-Herem* (ed. Hirshler) p. 294-295:

ויש צד חמור בחרם זה שאין בשבועות, שהמושבע מפי אחרים ולא ענה אמן אינו כלום בשבועת ביטוי, אבל בחרם אף על פי שלא קבל עליו ואפי' לא היה שם בשעת הגזירה כיון שב"ד רשאים להחרים כדכתיב ואקללם ואשביעם באלהים הרי החרם חל עליו ואסור הוא

was “the main legal technique used to make communal charters and enactments binding.”<sup>612</sup> The natural question that follows is: what kind of punishment can the community adopt to punish offenders of its *herem*?

Ramban argues that if the *herem* was issued by either a king of Israel or the High Court (Sanhedrin), or even if it was issued by the people themselves in a public assembly of the Jewish people, violators may be punished with the death penalty.<sup>613</sup> Although no clear talmudic statement or ruling supports this conclusion, Ramban cites several verses upon which he bases his argument. First, Ramban cites the verses in Joshua 6, where Joshua issues a *herem* proscribing the spoils of Jericho.<sup>614</sup> When Akhan confesses that he violated the *herem*, Joshua sentences him to death.<sup>615</sup>

Second, Ramban cites a verse in Samuel (I 14:44). There King Saul had imposed a *herem* on his soldiers, prohibiting them from eating before the enemy had been defeated. When Saul discovers that Jonathan had violated the ban, he declares him liable to be punished by death.<sup>616</sup>

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לעבור על אותה גזירה כמושבע מפי עצמו. וכן הדין באנשי אותה העיר אם הסכימו כולם או רובם במעמד טובי העיר והחרים כיון שהם רשאים להסיע על קיצתן ולהחרים בדבר, החרם שלהם חל על כל החייבים לילך בתקנתם, ונמצא העובר על קיצתן מכל אנשי העיר עובר על החרם והוא כעובר על שבועה, והחרם נכנס לו ברמ"ח איבריו וכלתו את עציו ואת אבניו והרי הוא כמנודה לבני עירו.

<sup>612</sup> Menachem Lorberbaum, *Politics and the Limits of Law* (Stanford 2001), p. 106.

<sup>613</sup> *Mishpat ha-Herem*, p. 296:

ואם החרים אותו החרם מלך ישראל או סנהדרין במעמד רוב ישראל הרי העובר עליו חייב מיתה ורשאים הם המלך או הסנהדרין להמית אותו באיזו מיתה שירצו... וכן ישראל בימי פלגש בגבעה הרגו אנשי יבש גלעד....

<sup>614</sup> *Ibid*:

וזוהו דינו של יהושע שדן עכן בדיני נפשות לפי שפשט ידו בחרמי שמים.

<sup>615</sup> See Joshua 6: 16-19; Joshua 7:20-25.

<sup>616</sup> *Mishpat ha-Herem*, p. 296:

כן בחרמי שבועת ביטוי מצינו שאמר שאול מות תמות יהונתן.

See I Samuel 14, verses 24, 27, 43, and 44.



Third, Ramban cites the verse in Judges (21:5) where, after the tragedy of the Levite's concubine, the people of Israel gather at Mizpah to deliberate about their response to the tribe of Benjamin. The Israelites declared a *herem* punishing with death anyone who didn't show up to the national assembly. Indeed, the people of Jabesh-Gilead did not attend the assembly and were punished.<sup>617</sup> Note that in this instance, the *herem* was not declared by a king or by the Sanhedrin but by the assembly of people themselves.<sup>618</sup> In his Commentary on the Torah, Ramban offers further support for his argument. Ramban contends that since the assembly of Israel sanctioned the sentence against the members of Jabesh-Gilead and participated in executing that sentence, it would be absurd to think that the entire assembly acted in error.<sup>619</sup>

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<sup>617</sup> Ibid:

וכן ישראל בימי פילגש בגבעה הרגו את אנשי יבש גלעד שנא' כי השבועה הגדולה היתה לאשר לא עלה אל ה' במצפה לאמר מות יומת, ותניא בילמדנו בשם ר"ע וכי שבועה היתה שם אלא ללמדך שהחרם הוא השבועה והשבועה הוא החרם, אנשי יבש גלעד לא עלו ונתחייבו מיתה.

<sup>618</sup> Hence Ramban's formulation: וכן ישראל בימי פלגש בגבעה, which suggests that this power resides in the assembly of people itself.

Note also Ramban's formulation, *Mishpat ha-Herem* p. 295, explicitly extending this *herem* power to the townspeople themselves:

וכן הדין באנשי אותה העיר אם הסכימו כולם או רובם במעמד טובי העיר והחרימו כיון שהם רשאים להסיע על קיצתן ולהחרים בדבר, החרם שלהם חל על כל החייבים לילך בתקנתם, ונמצא העובר על קיצתן מכל אנשי העיר עובר על החרם והוא כעובר על שבועה, והחרם נכנס לו ברמ"ח איבריו וכלתו את עציו ואת אבניו והרי הוא כמנודה לבני עירו.

See also Lorberbaum, *Politics and the Limits of Law*, p. 107: "Nahmanides returns to the political sphere in which this authority originates--the townspeople, and not just the courts, are empowered to impose a *herem*." And p. 108, where Lorberbaum describes Ramban as holding that "even the court's authority to impose a ban is described as derived from that of the public. The court stands for a public."

<sup>619</sup> Commentary on the Torah, Vayikra 27:29:

ומצינו אנשי יבש גלעד שעברו על שבועת הקהל ולא באו אל המצפה, וכתוב (שופטים כא י) וישלחו שם העדה שנים עשר אלף איש מבני החיל ויצוו אותם לאמר לכו והכיתם את יושבי יבש גלעד לפי חרב, ואין הסברא נותנת שעשו כל העדה רעה כזאת להמית אנשים רבים מישראל שאינם חייבים מיתה, ופנחס היה שם ועל פיו נעשה כל הענין ההוא.

From these three biblical narratives, Ramban derives an important normative conclusion. He concludes that a king or Sanhedrin or an assembly of people has the power to impose a *herem* whose violation carries the penalty of death. The most remarkable part of Ramban's analysis is his novel interpretation of the biblical verse in Vayikra 27:29. The verse reads:

כל חרם אשר יחרם מן האדם לא יפדה מות יומת.

As Ramban himself notes, the talmudic tradition offers two interpretations of the verse. The first interpretation holds that the verse is referring to the market value of a person sentenced to death. Thus, if someone sentenced to death declares that he wishes to donate the value of his person to the Temple, he is not obligated to donate anything, since a person sentenced to death "has no worth."<sup>620</sup> On the second interpretation, the verse blocks someone sentenced to death from "buying" his way out of the punishment.<sup>621</sup>

Yet Ramban interprets the verse differently. He argues that it actually refers to the power of a community (or king or Sanhedrin) to enact a *herem* whose violation carries the death penalty.<sup>622</sup> Fully cognizant of the fact that the Talmud interprets the verse differently--and that no talmudic or legal source endorses or supports Ramban's interpretation--Ramban insists that the biblical verse can never lose its plain meaning and that the verse can sustain multiple interpretations simultaneously.<sup>623</sup> Based

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<sup>620</sup> Ibid:

כל חרם אשר יחרם מן האדם - היוצא ליהרג ואמר אחד ערכו עלי לא אמר כלום. "מות יומת", הרי הוא הולך למות לפיכך לא יפדה אין לו דמים ולא ערך, לשון רש"י. ורבותינו נחלקו בדבר (ערכין ו ב).

<sup>621</sup> Ibid:

ויש מהם אומרים שהוא אזהרה לחייבי מיתות שאין לוקחין מהן כופר לפטרן.

<sup>622</sup> *Mishpat ha-Herem*, p. 296:

ואני אומר בשמא לאחר בקשת המחילה, שזהו פשט הכתוב בתורה כל חרם אשר יחרם מן האדם לא יפדה מות יומת, כלומר מה שהסכימו עליו הכל והוחרם לדעתם העובר עליו לא יפדה בממון אלא חייב מיתה.

<sup>623</sup> Ibid, pp. 296-297:

on his interpretation, Ramban contends that this verse is the source of the community's authority to punish violators of the *herem*.<sup>624</sup> As Ramban notes, if this verse cannot serve as the source for the *herem* punishment, there would be no legal basis for it.<sup>625</sup>

In this extraordinary example, Ramban develops a whole area of halakhic jurisprudence--communal authority to legislate and punish violators with the death penalty--through his analysis of the biblical

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ואל תהיה חוסם פינו בזה מפני שרבותינו ז"ל דרשו המקרא הזה לענין אחר, מהם מי שאומר (ערכין ו' ב') למעריך היוצא ליהרג, ומהם מי שאומר שאין חייבי כריתות וחייבי מיתות ב"ד נפטרים בממון כדאיתא בכתובות (ל"ה א'), שאעפ"כ אין מקרא זה יוצא מידי פשוטו, דכתיב אחת דבר אלהים שתים זו שמעתי משמש הוא הכתוב לזה ולזה, בוא וראה שהרי רז"ל דרשו לא יומתו אבות על בנים בעדות בנים ובנים לא יומתו על אבות בעדות אבות, ולא תחשוב שזו אסמכתא אלא עיקר הגמ' הוא, ומכאן יצא לקרובים שהם פסולים לעדות מן התורה (סנהדרין כ"ז ב'), ואעפ"כ אין מקרא יוצא (נ"א אין בנו כח להוציא מקרא) מידי פשוטו, דכתיב ואת בני המכים לא המית ככתוב בספר תורת משה לא יומתו אבות על בנים ובנים לא יומתו על אבות (מ"ב י"ד) הא למדנו שכמה פנים של אמת לתורה.

Professor Halbertal has pointed out to me that Rabad also relies on the straightforward interpretation of the biblical verse, citing the doctrine that "the verse cannot lose its plain meaning", to limit the halakha's license to kill a thief who sneaks into one's home during the daytime. Rabad (Geneivah 9:8) writes:

אעפ"כ אין מקרא יוצא מידי פשוטו ביום אינו רשאי להרגו שאין גנב ביום אלא להשמטה שומט ובורח מיד ואינו מתעבב לגנוב ממון גדול ולעמוד על בעליו להרגו אלא גנב בלילה מפני שגנב לילה יודע שבעל הבית בבית או בא להרוג או ליהרג אבל גנב יום אין בעל הבית מצוי בביתו ושמוטה בעלמא הוא וחיי ראשי כל מבין די לו בזה.

Professor Halbertal noted that Ramban may have been influenced by Rabad in his commitment to the plain meaning of the verse.

<sup>624</sup> Commentary on the Torah, Vayikra 27:29:

ולכך אני אומר כי מן כתוב הזה יצא להם הדין הזה...

<sup>625</sup> Ibid:

ומהיכן נתחייבו אלו מיתה מן הדין חוץ מן המקום הזה...

verses.<sup>626</sup> Ramban's students, especially Rashba and Ran, built off the foundation laid by Ramban and continued to develop and expand this area of halakhic theory.<sup>627</sup>

### *Priests and Kings*

In his commentary to Bereshit 49:10, Ramban addresses the legitimacy of a non-Judean monarch.

Ramban interprets the verse "the scepter shall not pass from Judah" as Jacob's designation of the tribe of Judah as the exclusive rightful rulers over the other tribes.<sup>628</sup> Therefore, Ramban explains, the non-Judean Jewish monarchs were in violation of Jacob's final will and testament, and it is for this reason that they were punished.<sup>629</sup> Ramban then contends that the Hasmonean kings were similarly punished--even though they were otherwise pious and worthy Torah leaders--for usurping the Judean throne.<sup>630</sup>

<sup>626</sup> See also Ramban's discussion in his Commentary on the Torah, Shemot 15:25; Lorberbaum, *Politics and the Limits of Law: Secularizing the Political in Medieval Jewish Thought* (Stanford, 2001), pp. 109-111; and Halbertal, *By Way of Truth*, p. 286.

<sup>627</sup> See generally, Lorberbaum, *Politics and the Limits of Law*, pp. 112-159, especially the discussion of *Derashot ha-Ran* no. 11 on pp. 124-149. For Rashba's enormous contribution to this area of halakhic theory, see generally Menachem Elon, *Jewish Law: History, Sources, Principles*, vol. II, pp. 558-768.

<sup>628</sup> Ramban Bereshit 49:10:

והכתוב הזה רמז כי יעקב המליך שבט יהודה על אחיו והוריש ליהודה הממשלה על ישראל. והוא מה שאמר דוד ויבחר ה' אלהי ישראל בי מכל בית אבי להיות למלך על ישראל לעולם כי ביהודה בחר לנגיד ובבית יהודה בית אבי ובבני אבי בי רצה להמליך על כל ישראל (דה"א"א כח ד). ואמר לא יסור, לרמוז כי ימלוך שבט אחר על ישראל, אבל מעת שיחל להיות ליהודה שבט מלכות לא יסור ממנו אל שבט אחר. וזה שנאמר (שם ב יג ה) כי ה' אלהי ישראל נתן ממלכה לדוד על ישראל לעולם לו ולבניו...

<sup>629</sup> Ibid:

ולפי דעתי היו המלכים המולכים על ישראל משאר השבטים אחרי דוד עוברים על דעת אביהם ומעבירים נחלה, והם היו סומכים על דבר אחיה השילוני הנביא שמשח לירבעם ואמר ואענה את זרע דוד למען זאת אך לא כל הימים (מ"א יא לט). וכאשר האריכו ישראל להמליך עליהם משאר השבטים מלך אחר מלך ולא היו חוזרים אל מלכות יהודה עברו על צוואת הזקן ונענשו בהם, וכמו שאמר הושע (ח ד) הם המליכו ולא ממני...

<sup>630</sup> Ibid:

וזה היה עונש החשמונאים שמלכו בבית שני, כי היו חסידי עליון, ואלמלא הם נשתכחו התורה והמצות מישראל, ואף על פי כן נענשו עונש גדול, כי ארבעת בני חשמונאי הזקן החסידים המולכים זה אחר זה עם כל גבורתם והצלחתם נפלו ביד אויביהם בחרב. והגיע

Thus far the moral wrongdoing that Ramban characterizes is the wrongful violation of Jacob's last will and testament. "Jacob designated the tribe of Judah over its brothers and bequeathed to Judah the right to rule over Israel."<sup>631</sup> "In my opinion, the kings from the other tribes who ruled over Israel after David violated their father's will and corrupted his last testament..."<sup>632</sup> "And when Israel continued to appoint non Judean kings, one after the next, and they did not return to the Judean kingdom, they violated the last will and testament of the elder [Jacob] and were punished."<sup>633</sup>

Ramban then develops his argument further. He contends that the Hasmoneans' wrongdoing went beyond violating Jacob's last will and testament: they also violated a divine command that specifically forbids priests from ruling as monarchs. Ramban appeals to a biblical verse which he interprets as an injunction against the priests serving in the monarchy. The verse in Bamidbar 18:7, addressing the priests, declares that "you and your sons with you, you shall keep your priesthood for every matter of the altar and for inside the curtain, and you shall do the work." Ramban argues that this verse commands the priests to exercise their authority within the temple and through performing the divine service--to the exclusion of exercising political rule (*ve-lo hayah lahem limlokh rak la'avod et 'avodat Hashem*).<sup>634</sup>

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העונש בסוף למה שאמרו רז"ל (ב"ב ג ב) כל מאן דאמר מבית חשמונאי קאתינא עבדא הוא, שנכרתו כלם בעון הזה. ואף על פי שהיה בזרע שמעון עונש מן הצדוקים, אבל כל זרע מתתיה חשמונאי הצדיק לא עברו אלא בעבור זה שמלכו ולא היו מזרע יהודה ומבית דוד, והסירו השבט והמחוקק לגמרי, והיה עונשם מדה כנגד מדה, שהמשיל הקדוש ברוך הוא עליהם את עבדיהם והם הכריתום.

<sup>631</sup> Ibid:

יעקב המליך שבט יהודה על אחיו והוריש ליהודה הממשלה על ישראל.

<sup>632</sup> Ibid:

ולפי דעתי היו המלכים המולכים על ישראל משאר השבטים אחרי דוד עוברים על דעת אביהם ומעבירים נחלה.

<sup>633</sup> Ibid:

ובאשר האריכו ישראל להמליך עליהם משאר השבטים מלך אחר מלך ולא היו חוזרים אל מלכות יהודה עברו על צוואת הזקן ונענשו בהם.

<sup>634</sup> Ibid:

Ramban's interpretation of the verse in Bamidbar 18:7 is entirely novel. Nowhere in the Talmud or *midreshei halakhah* is this verse interpreted as excluding the priests from the monarchy. And Ramban is willing to derive normative halakhic conclusions--barring the priests from exercising even short term political leadership--directly from his novel interpretation of the biblical verse.<sup>635</sup>

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ואפשר גם כן שהיה עליהם חטא במלכותם מפני שהיו כהנים ונצטוו (במדבר יח ז) תשמרו את כהונתכם לכל דבר המזבח ולמבית לפרכת ועבדתם עבודת מתנה אתן את כהונתכם, ולא היה להם למלוך רק לעבוד את עבודת ה'.

<sup>635</sup> For interesting contemporary normative applications of Ramban's analysis, see *Shu"t Tzitz Eliezer* 18:81; Rabbi Shlomo Daykhovsky, "Beit Din Ha-Gadol Be-Yerushalayim", *Torah She-Ba'al Peh* 38 (5757), p. 86; R. Shlomo Goren, "Malkhut Beit ha-Hashmona'im le-Or ha-Halakhah", *Torat ha-Mo'adim*, p. 165.

After offering his interpretation of the verse, Ramban also cites the discussion in the Yerushalmi (*Horayot* 3:2), which appeals to a different verse with rationales distinct from his own. According to one view in the Yerushalmi, the problem with priests serving as kings flows from the fact that it dishonors the tribe of Judah. According to the second view, it has to do with the priests not receiving an inheritance in the land of Israel. Serving as reigning monarchs would constitute a kind of inheritance in the land:

וראיתי בירושלמי במסכת הוריות (פ"ג ה"ב) אין מושחין מלכים כהנים, אמר רבי יהודה ענתוריא על שם לא יסור שבט מיהודה, אמר רבי חייא בר' אבא למען יאריך ימים על ממלכתו הוא ובניו בקרב ישראל (דברים יז כ), מה כתיב בתריה לא יהיה לכהנים הלויים (שם יח א). הנה שנו בבאן שאין מושחין מלכים מן הכהנים בני אהרן, ופירש תחלה שהוא לכבוד יהודה, שאין השררה סרה מן השבט ההוא, ולפיכך אף על פי שישראל מקימים עליהם מלך משאר השבטים כפי צורך השעה אין מושחים אותן שלא יהיה עליהם הוד מלכות, אלא כמו שופטים ושוטרים יהיו. והזכירו הכהנים שאף על פי שהן בעצמן ראויים למשיחה, אין מושחין אותן לשם מלכות, וכל שכן שאר השבטים, וכמו שאמרו בגמרא (הוריות יא ב) שאין מושחין אלא מלכי בית דוד. ורבי חייא בר אבא פירש שהוא מנוע מן התורה שלא יהיה לכהנים הלויים כל שבט לוי חלק ונחלה במלכות. והוא דבר ראוי והגון.

Note that the normative conclusions drawn from Ramban's analysis by the authorities cited earlier in this note are unique to Ramban's rationale. These normative conclusions pertain to the separation of ritual worship and political leadership, which follows from Ramban's analysis that sees ritual worship as inconsistent with political rule. The same conclusions could not follow from the analysis of the Yerushalmi.

### III. Administration of Justice and Civil Procedure

#### *An Obligation to Subpoena more than Two Witnesses*

In the Commentary on the Torah to Devarim (17:6), Ramban offers a novel interpretation of the verse and points to the halakhic consequences of his interpretation. The verse states that “a person shall be put to death only on the testimony of two or three witnesses.” Ramban cites Rashi’s interpretation, which follows the Talmud in equating the legal efficacy of three witnesses with that of two witnesses. The testimony of three witnesses carries with it the same legal and evidentiary weight as that of two witnesses.<sup>636</sup>

Ramban also cites R. Sa’adia Gaon who thought that the plain meaning of the verse distinguished between “two” witnesses who are required to testify and “three” judges required to hear the testimony of the witnesses. Ramban rejects the Gaon’s interpretation on the ground that the verse appears to refer only to *witnesses*, not the tribunal receiving their testimony.<sup>637</sup>

Ramban then offers his own novel interpretation of the verse. According to Ramban, the verse refers to “two” witnesses to establish that the testimony of two witnesses is legally sufficient to convict. But the verse refers to three witnesses to establish that whenever more witnesses can be summoned to testify,

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<sup>636</sup> Commentary on the Torah, Devarim 17:6:

על פי שנים עדים או שלשה עדים - אם מתקיימת עדות בשנים למה פרט לך בשלשה, להקיש שלשה לשנים, מה שנים עדות אחת אף שלשה עדות אחת, ואין נעשין זוממין עד שיזומו כולן, לשון רש"י. וכן אם נמצא אחד מהם קרוב או פסול העדות כולה בטלה, והם כולם נהרגים ומשלמים ממון בהזמתן, שעיקר הכתוב להקיש שלשה לשנים בכל דבריהם כדעת רבותינו (מכות ה ב).

<sup>637</sup> Ibid:

ועל דרך הפשט אמר הגאון רב סעדיה, שנים עדים, או שלשה מקבלי עדות השנים. ואין בכתוב קבלת עדות, רק עדים...

the court has an obligation to subpoena them and hear their testimony.<sup>638</sup> On this basis, Ramban suggests that the verse is here explicating the court's duty "to make a thorough inquiry" (*ve-darashta heitev*) before rendering a decision.<sup>639</sup> Therefore, Ramban argues, whenever the court ascertains that the wrongdoing was committed in the presence of more than two witnesses, the court has a duty to subpoena all of them. For when the court hears testimony from *all* of the witnesses--not just two--the court will be in a stronger position to ascertain the true facts of the case.<sup>640</sup>

Note that whereas the Talmud generally stresses that two witnesses are equivalent to one hundred witnesses (*trei ke-me'ah*),<sup>641</sup> and that there is no greater legal power to a larger group of witnesses over a smaller group of two, Ramban's analysis, based on his interpretation of the verse, requires a court to at least seek out the testimony of as many witnesses as possible in order to best reconstruct the facts of the case. Indeed, several commentators adopt Ramban's normative halakhic conclusion as part of the court's Torah obligation "to make a thorough inquiry."<sup>642</sup>

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<sup>638</sup> Ibid:

אבל פשוטו של מקרא, לאמר שיומת המת על פי שנים עדים כשאין שם יותר, או על פי שלשה אם ימצאון שם שלשה.

<sup>639</sup> See Devarim 17:4.

<sup>640</sup> Ramban Devarim 17:6:

יאמר הכתוב כאשר הוגד לך ושמת תדרוש הדבר היטב על פי כל העדים הנמצאים שם. והנה אם שמענו שעבר בפני שלשה, נשלח בעבורם ויבואו לב"ד ויעידו כולם, והוא הדין למאה, כי בשמענו דברי כולם יתברר האמת, ואם לא היו שם יותר או שהלכו להם ואינם נמצאים שם, בשנים די.

<sup>641</sup> See, e.g., Shevu'ot 42a.

<sup>642</sup> See, e.g., R. Yeruham Fischel Perlow, *Sefer Mitzvot Rav Sa'adia Gaon*, no. 65:

...מש"כ כאן ויחקרו היטב.... כוונתו ע"פ מש"כ הרמב"ן ז"ל (פרשת שופטים) שם ... וכוונתו לומר דזהו ביאור המשך הכתובים דכתיב והוגד לך ושמת ודרשת היטב והנה אמת וגו' ע"פ שנים עדים או ע"פ שלשה עדים וגו'. ... ע"פ שני עדים ויחקרו היטב במלאם. כלומר אין גומרין את הדין בפחות משני עדים. ומ"מ אפילו באו שנים לפני ב"ד. עדיין חייבין לחקור היטב אם לא נמצאו עוד עדים יותר בדבר.



### *A Litigants Right to a Five-Judge Panel in a Monetary Dispute*

In his commentary to Devarim 1:12, Ramban discusses the number of judges that a litigant can request or demand for a standard monetary trial. The relevant talmudic passages imply that a monetary dispute is presided over by a panel of three judges.<sup>643</sup> Ramban, however, cites the *Sifrei* which expounds on the word *torhakhem* in Devarim 1:12 characterizing the Jewish people as “troublesome”. The *Sifrei* explains that this characterization refers to a litigant stalling the litigation process by demanding that extra judges join the panel presiding over the dispute.<sup>644</sup>

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ואם שמענו שהיו הרבה עדים בשעת מעשה. חייבין לשלוח אחריהם ולהביאם כולם במילואם לפני ב"ד להעיד בדבר. כי מדברי כולם תתברר האמת.

See also R. J.B Soloveitchik, “Likutei Torah al ha-Parshiyot”, *Beit Yitzchak* 25 (5753), p. 20, who argues that the source for the talmudic principle *tzarikh le-varer* (Sanhedrin 23b) is grounded in Ramban’s interpretation of the verse:

על פי שלשה עדים. סהנדרין כג: תניא הבא לידון בשטר ובחזקה נידון בשטר, דברי רבי, רשב"ג אומר נדון בחזקה... וקיי"ל דצריך לברר פליגי. וכן לעיל באותה סוגיא, בבעל דין שטוען ואמר שביכלתו להביא שתי כתי עדים, אף דמדינא סגי בכת אחת. ותרי כמאה, ואין תוספת בירור כלל במה שיביא ד' עדים ולא ב' מכ"מ ס"ל לחד מ"ד דצריך לברר....  
ונראה לומר דהמקור לדיעה זו הוא מהפסוק בתורה ע"פ שני עדים או ע"פי שלשה עדים יקום דבר, ושאלו במשנה (פ"א דמכות) אם מתקיימת העדות בשנים למה פרט הכתוב שלשה, ונאמרו ע"ז כמה דרשות... וברמב"ן בפ"י עה"ת כתב דאין המקרא יוצא מידי פשוטו, ולפי פשוטו יש לבאר בכונת הפסוק, דאם הבי"ד יודעים שהיו שמה ג' עדים, עליהם לדרוש ולחקור את שלשתם כדי שיתברר העובדא על נכון, והכא בסוגיין ס"ל להני תנאי ואמראי, דאפילו אם אין הבי"ד יודעין בעצמם שהיו שמה ד' עדים, אלא שכך טען אחד מהבעלי דינים, גם כה"ג נכלל בכלל פשוטו של מקרא להצריך את כל הבירור שאמר שביכלתו להביא.

See also Rama, *Shulhan Arukh*, Hoshen Mishpat 13, citing a similar principle from Ramban’s commentary on the Torah with respect to the number of judges deciding the case:

ויש אומרים ה) {ט} דאם הנתבע אומר שהוא יברור שנים והתובע גם כן שנים, והם יבררו חמישי, הרשות בידו, דכל זמן שהדיינים רבים יותר יוצא הדין לאמתו (רמב"ן בפירושו לתורה).

For the relationship between these two rulings of Ramban, see *Shu"t Shem mi-Shim'on* Hoshen Mishpat 3 and 6.

<sup>643</sup> See, e.g., *Sanhedrin* 2a.

<sup>644</sup> Commentary on the Torah, Devarim 1:12:

Ramban acknowledges that there is no talmudic basis for a litigant's right to a five-member judicial panel.<sup>645</sup> Yet Ramban argues, on the basis of this verse and the *Sifrei's* interpretation of it, that a litigant has the right to select two judges and compel his adversary to select two other judges, the four of whom then select a fifth judge. As for the Talmud's assumption of three-judge panels, Ramban argues that this applies only to a litigant who attempts to evade litigation. A litigant who is willing to litigate can compel his adversary to appear before a panel of five judges.<sup>646</sup>

To bolster his argument, Ramban appeals to the biblical verse in Devarim 16:20 "justice, justice shall you pursue." The Talmud (*Sanhedrin* 32b) interprets this verse as granting a litigant the power to compel his adversary to appear before a superior court over a local court. The duty to pursue the most excellent form of justice empowers a litigant with the right to appear before a superior court. Ramban extends this talmudic principle to include a court with a greater number of judges, since a "greater number of scholars is [equivalent to] an excellent court" (*ribuy hakhamim beit din yafeh hu*).<sup>647</sup>

Thus, on the basis of his reading of the verses in Devarim 1:12 and 16:20 and supported by the *Sifrei's* interpretation, Ramban arrives at the halakhic conclusion that a litigant can compel litigation before a

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ולשון רש"י מספרי (דברים יב), טרחכם, מלמד שהיו טרחנין, היה אחד מהם רואה את בעל דינו נוצח בדין אומר יש לי עדים להביא יש לי ראיות להביא מוסיף אני עליכם דיינין.

<sup>645</sup> Ibid:

והדין הזה לא ידעתי אותו, שיהא בעל הדין יכול להוסיף דיינין יותר על שלשה בדיני ממונות, וכל שכן לאחר שטען בפניהם וראה שחברו נוצח בדין, שאלו קבל עליו קרוב או פסול יכול לחזור בו עד לאחר גמר דין, אבל הכשרין לדון אינו יכול לחזור בו.

<sup>646</sup> Ibid:

ושמא נלמוד מכאן, שיכול אדם לומר שני דיינין אני בורר לי ותברור אתה שנים אחרים והם יבררו עוד אחד, ויהא הדין נגמר בחמשה או ביותר, כמו שאמרו, אינו דומה דין הנגמר בה' לדין הנגמר בי'. ואף על פי שג' כופין לדון בפניהם, בשאינו רוצה לקבל עליו לדון, אבל רוצה לברור יותר בורר.

<sup>647</sup> Ibid:

אבל רוצה לברור יותר בורר, דהוה ליה כאומר נלך למקום הועד ששומעין לו במקום שאין שם טורח. שבכך נצטוינו, שנאמר (להלן טז כ) צדק צדק תרדוף, הלך אחר ב"ד יפה (סנהדרין לב ב), ורובי חכמים ב"ד יפה הוא.

panel of five judges. Ramban states this same legal position in his *Hiddushim* on the Talmud.<sup>648</sup>

Ramban's ruling was adopted as normative by Rama as well as other commentators on the *Shulhan Arukh*.<sup>649</sup> Rama and Gra both cite Ramban's commentary on the Torah as the basis for this novel ruling.<sup>650</sup>

### *The Supreme Court of the Tribe*

In his commentary to Devarim 16:18, Ramban notes that the standard understanding of the Jewish court system cannot explain the biblical verse's commandment to establish courts "according to your tribes (*lishvatekha*)." The Talmud envisions a system of lower courts established in each city throughout the different tribes and a supreme court in Jerusalem presiding over them.<sup>651</sup>

<sup>648</sup> Ramban *Bava Batra* 167b:

נראה לי לגבי בירורין של ב"ד שאמרתי שיכול להוסיף על שלשה עד שיכתובו, כדאתמר בספרי (פ' דברים) טרחכם מלמד שהיו טרחנין היה אחד מהם רואה את בעל דינו נוצח בדין אומר יש לי עדים להביא יש לי ראיות להביא מוספני עליכם דיינים. ואף על פי ששנינו דיני ממונות בשלשה, לומר שכופין אותו לברור להן זה אחד וזה אחד, הא אלו אמר לפני רבים אני רוצה לדון מוסיפין שנים [נ"א שנים] זה בורר אחד וזה בורר אחד.

<sup>649</sup> See *Shulhan Arukh Hoshen Mishpat* 13:1:

ויש אומרים ה' (ט' ט') דאם הנתבע אומר שהוא יברור שנים והתובע גם כן שנים, והם יבררו חמישי, הרשות בידו, דכל זמן שהדיינים רבים יותר יוצא הדין לאמתו (רמב"ן בפירושו לתורה).

<sup>650</sup> See *Bi'ur ha-Gra Hoshen Mishpat* 13:7:

(ליקוט) וי"א דאם כו'. בספרי פ' דברים והביאו רש"י שם טרחכם מלמד שהיו ישראל טרחנין כו' מוסיף אני עליכם דיינין וכ' הרמב"ן שם הדין הזה לא ידעתי שיהא הבע"ד יכול להוסיף דיינין יותר על ג' בד"מ וכ"ש לאחר שטען בפניהם וראה שחבירו נוצח בדין שאלו קבל עליו קרוב או פסול יכול לחזור עד ג"ד אבל שלשה הכשרים לדין א"י לחזור בו ושמא נלמוד מכאן שיכול אדם לומר ב' דיינין אני בורר לי ותברור אתה ב' דיינים אחרים והם יבררו עוד א' ויהא הדין נגמר בה' או יותר כמ"ש אינו דומה דין הנגמר בה' לנגמר ב' ואף על פי שג' כופין לדון בפניהם כשאינו רוצה לקבל עליו לדון אבל רוצה לברור יותר בורר דה"ל כאומר נלך למקום הועד ששומעין לו במקום שאין שם טורח [שבכך נצטוינו] שנא' צ"צ תרדוף הלך אחר ב"ד יפה ורבו החכמים ב"ד יפה הוא כו' (ע"כ):

<sup>651</sup> See *Sanhedrin* 16b.

Ramban, however, notes that this conception of the court system is inconsistent with the verse's emphasis on establishing a court system "according to your tribes." After all, once a court is established in each city, as the Talmud requires, it follows that there is a court in each tribe (indeed, numerous courts in each tribe) since every city falls within the jurisdiction of a given tribe. Thus, when the city requirement is satisfied, the tribe obligation is superfluous.<sup>652</sup>

Ramban cites Tosafot's suggestion that the tribe-court commandment becomes relevant in the special case of a city that straddles the border of two different tribes, such as Jerusalem which sits on the border between the tribes of Judah and Benjamin. In such a case, Tosafot argue, the city must establish two separate courts, one for each tribe within its boundaries.<sup>653</sup>

Tosafot's technical solution does not quite capture the emphasis the verse places on the tribal court.

Ramban therefore offers a different interpretation of the verse's tribal court. Ramban suggests--on the basis of his reading of the verse--that each tribe was governed by a Supreme Court that possessed powers comparable to the Sanhedrin ha-Gadol in Jerusalem. Just as the Sanhedrin ha-Gadol ruled over the entire Israel, each tribal Sanhedrin ruled over its tribe.<sup>654</sup>

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<sup>652</sup> Ramban Devarim 16:18:

וטעם לשבטיך - מוסב על תתן לך, מלמד שמושיבים ב"ד בכל שבט ושבט ובכל עיר ועיר, לשון רש"י, וכן במסכת סנהדרין (טז ב). ולא ידעתי פירוש דבר זה, כי כיון שמנינו ב"ד בכל עיר ועיר הרי בתי דינין רבים בכל שבט ושבט.

<sup>653</sup> Ibid:

אולי בא לומר, שאם היתה עיר אחת לשני שבטים כירושלים שיש בה חלק ליהודה ובנימין שיושיב בה שני בתי דינים, וכך העלו בפרק חלק (שם קיא ב) שחולקים עיר אחת לשני שבטים, וכן ירושלים היתה ליהודה ובנימין.

See Tosafot *Sanhedrin* 16b s.v. *shoftim*:

שופטים לכל שבט ושבט - אם יש בעיר אחת מב' שבטים עושין ב' סנהדראות.

<sup>654</sup> Ramban *ibid*:

ויתכן לפרש, שחייב הכתוב למנות ב"ד על כל השבט והוא ישפוט את כולם, ואחרי כן נמנה ב"ד בכל עיר ועיר שישפוט את העיר, ואף על פי שכולם שוים במנין שהם כ"ג בדיני נפשות וג' בדיני ממונות, אבל הגדולים שבהם בחכמה יתמנו על כל השבט ותחתיהם לכל עיר ועיר... כדרך שסנהדרי גדולה ממונה על כל בתי דינין של כל ישראל, כך יהא ב"ד אחד ממונה על כל שבט ושבט.

Ramban draws normative halakhic conclusions from his analysis. First, Ramban holds that this tribal Sanhedrin, like the Sanhedrin ha-Gadol in Jerusalem, has the power to compel any litigant within its jurisdiction to appear before it, even if the litigants live in a distant city.<sup>655</sup> Second, the tribal Sanhedrin is to be consulted by the lower courts on all matters of legal uncertainty.<sup>656</sup> Third, the tribal Sanhedrin has the power to enact legislation, *gezeirot* and *takanot*, that is legally binding on all the people within its jurisdiction, just as the Sanhedrin ha-Gadol can legislate for all of Israel.<sup>657</sup>

Ramban's interpretation of the verse and the normative conclusions he draws are accepted by the *Arukh ha-Shulhan* in his code of Jewish law.<sup>658</sup>

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Note how Ramban employs a legal analogy (*ke-derekh.... kakh....*) in characterizing the tribal Sanhedrin. This is a recurring method that Ramban employs in articulating new legal principles and concepts. See above, chapter five. Note that this example is also an excellent illustration of Ramban offering conceptual distinctions where Tosafot offer technical ones. For Tosafot, the problem is solved by the technical case of a city that straddles the border of two tribes. For Ramban, the problem is solved by postulating a new type of court and distinguishing it both from the Sanhedrin ha-Gadol and from the lower courts.

<sup>655</sup> Ibid:

ואין בעלי הדין יכולין לכופו זה את זה לדון אלא בפני ב"ד שבעירם לא בפני ב"ד שבעיר אחרת, ואפילו היו שני בעלי הדין בעיר אחרת יכול לומר נלך לפני ב"ד שבעירנו. אבל ב"ד השבט יכול לכופו כל אנשי שבטו לדון לפניו, ואפילו היו הנדונים בעירם יכול לומר לב"ד הגדול של שבט אזילנא.

<sup>656</sup> Ibid:

וכן אם נסתפקו בתי דינין של עיירות, יבאו לפני ב"ד הגדול של שבט וישאלו.

<sup>657</sup> Ibid:

ואם הוצרכו לתקן ולגזור דבר על שבט שלהם גוזרין ומתקנין והיא לשבט כגזרת סנהדרי גדולה על כל ישראל.

<sup>658</sup> *Arukh ha-Shulhan* Hoshen Mishpat 1:16

הב"ד הגדול שבירושלים הוא על כל ישראל והב"ד שבכל עיר ועיר הוא על אותה העיר ועוד היה ב"ד של כ"ג לכל שבט ושבט... והב"ד של השבט היה מהמופלגין בחכמה שבכל השבט והוא לכל ערי השבט כב"ד הגדול שבירושלים ויכול אחד מהבע"ד של אותו השבט להזמין להאחר לב"ד השבט אף על פי שדרים בעיר אחרת [רמב"ן פ' שפטים].

#### IV. Ritual Sacrifice in the Temple

##### *Vigilance for Temple Sacrifices*

In chapter five, we saw Ramban's conceptual distinction (*Hiddushim Hullin 2b*) between the rules of uncertainty for ritual impurity (*safek tum'ah*) and the rule of extra vigilance for Temple sacrifices (*shemirah*). Ramban grounds his distinction in his novel interpretation of Bamidbar 18:8. The verse requires "safekeeping" (*mishmeret*) of Temple donations (*terumotai*). Without much talmudic support, Ramban interprets the verse (*mishmeret terumotai*) as requiring absolute certainty regarding the ritual status of Temple sacrifices. According to Ramban, Temple sacrifices are invalidated when their ritual status fails the standard of absolute "*mishmeret*".<sup>659</sup>

#### V. Marital and Family Law

##### *Recording Names in the Bill of Divorce*

In his *Hiddushim* to Tractate *Kiddushin* (9a s.v. *bein*) Ramban considers whether a document (*shetar*) used to effect a Jewish marriage needs to state the names of the parties getting married. According to Ramban, the question turns on whether the requirement for a bill of divorce (*get*) to state the names of the parties is of biblical or rabbinic origin. If the requirement for a bill of divorce is biblical in nature, then, Ramban contends, the obligation carries over to the marriage document as well.<sup>660</sup>

Ramban notes that the Talmud implies the requirement to record the names of the parties in the bill of divorce is only rabbinic.<sup>661</sup> It was enacted by Rabbi Gamliel so that the divorce document could serve as

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<sup>659</sup> *Hiddushim, Hullin 2b*:

אין הקושיא כלום דבמוקדשין בבי האי גונא לאו בספק טומאה דיינינן דהא בעו שימור דכתיב משמרת תרומותי, אלא צריך שיהא ברי לו שהן טהורין ואם לאו אסור להקריבן.

<sup>660</sup> See Ramban *Kiddushin* 9a s.v. *bein*:

דהא אקושי מקשינן להו לגיטין

<sup>661</sup> *Ibid*:

evidence of the divorce in addition to effectuating it. With the names of the parties recorded in the document itself, the *get* can serve as evidence that this woman is in fact divorced.<sup>662</sup>

Against this perspective, Ramban argues that the requirement of recording names in the *get* is biblical. Based on his own novel interpretation of the biblical verse, Ramban offers a source for his contention. The verse refers to the bill of divorce as *sefer keritut*. Ramban argues that *sefer* implies “narrating a story” of the divorce (“*sippur devarim she-kortim beineihen*”). Now, the *get* could only narrate the story of the divorce if it included the names of the parties involved (“*ve-i efshar belo shem shelahem*”).<sup>663</sup> Thus, Ramban argues that the verse’s characterization of the *get* as *sefer keritut*--which Ramban interprets as *sippur devarim shekortim beineihen*--is the biblical source for the requirement to record the names of the parties in the *get*.<sup>664</sup>

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שאפילו במגרש ואומר תן גט זה או התקבל לבתך או לאחותך מגורשת, ואף על פי שבגט עצמו צריך לפרש שמה, התם מתקנת ר"ג בגיטין היא (גיטין ל"ד ב'), אבל מן הדין מגורשת.

<sup>662</sup> See *Gittin* 34b.

<sup>663</sup> Ramban *Kiddushin* 9a, s.v. *bein*:

עוד יש לפרש ולומר דסיפא דרב נחמן דוקא היא, שאם כתב לאביה בתך מקודשת לי לא אמר כלום, דגבי גט בעינן שמו ושמה דאורייתא דכתיב ספר כריתות בעינן סיפור דברים שכורתים ביניהן ואי אפשר בלא שם שלהם, ולא מתקנת ר"ג היא אלא מדאורייתא  
Note how this example also exemplifies Ramban’s conceptual reasoning (see above, chapters four and five), since Ramban here distinguishes between two different conceptions of the names requirement. The first conception pertains to the need to evidence the divorce. The second conception pertains to the biblical requirement to narrate the divorce as a necessary condition in executing it.

<sup>664</sup> Note how Ramban’s novel interpretation is taken up by his students. See Rashba, *Gittin* 9a s.v. *katav*; Ritva, *Gittin* 9a s.v. *u-le-inyan*; and Ran, *Kiddushin* (Alfasi) 5a. Note, though, that Ramban’s theory takes on a slightly different color in these later commentaries. Rashba writes:

בעינן שיכתבו שמותיהן בגט ומדאורייתא היא משום דכתיב ספר כריתות ספירת דברים הכורתין בינו לבינה ובאין שמותיהן מפורשין בגט אין מוכיח מתוך הגט שיהא גט זה כורת בין ראובן זה ללאה אשתו זו.

And Ritva:

איכא מאן דאמר דכיון דהוייה ליציאה מקשינן בעינן בשטר קידושין שמו ושמה, דשמו ושמה בגט לאו מתקנת רבן גמליאל (גיטין ל"ד ב') היא אלא מדאורייתא דבעינן ספר כריתות שיהא מוכיח מתוכו שיהא עושה כריתות, וכיון שכן אף בקידושין כן.

And Ran:

Note that Ramban derives an important legal conclusion from his interpretation of the biblical verse. Since the requirement to record names in a bill of divorce is biblical, it follows, on his analysis, that a document (*shetar*) used to effect a marriage (*kiddushin*) must also record the names of the parties, given the biblical connection (*hekesh*) between the two documents.<sup>665</sup>

### *The Permissibility of Concubinage*

Jewish law prohibits prostitution, but commentators disagree whether the prostitution injunction also prohibits concubinage.<sup>666</sup> Rambam held that, excluding the exceptional case of a monarch, a concubine relationship is prohibited.<sup>667</sup> In his view, any sexual relationship not sanctioned by marriage falls under the prostitution injunction.<sup>668</sup>

R. Yonah b. Abraham of Gerona sent a letter to Ramban soliciting his view regarding the halakhic permissibility of concubinage.<sup>669</sup> Ramban responds that concubinage is permissible.<sup>670</sup> Ramban begins by arguing that the prostitution injunction is primarily designed to avoid uncertainty about the paternity

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בעינין שמו ושמה כדאיתא בפרק המביא תניין [דף כ א] וטעמא דמילתא דכתיב ספר כריתות דהיינו ספירת דברים הכורתיים בינו לבינה וכל שאין שמותיהן מפורשין בגט אין מוכיח מתוך הגט שיהא גט זה כורת בין ראובן זה ללאה אשתו.

<sup>665</sup> Ramban *Kiddushin* 9a, s.v. *bein*:

גבי גט בעינין שמו ושמה דאורייתא ... הלכך גבי קדושין נמי צריך לכתוב הרי את פלונית מקודשת לי ואם כתב לאביה בתך פלונית אינה מקודשת... דהא אקושי מקשינן להו לגיטין.

Whereas on the assumption that the names requirement is rabbinic, the *shetar kiddushin* would not require the names of the parties to be specified.

<sup>666</sup> See Devarim 27:18 and Vayikra 19:29 for the prostitution injunctions.

<sup>667</sup> See Rambam *Melakhim* 4:4.

<sup>668</sup> See Rambam *Ishut* 1:4; and *Kesef Mishnah Melakhim* 4:4:

מאחר שרבינו סובר שהבא על פנויה שלא לשם קידושין לוקה כמ"ש א"כ הדיוט אסור בפלגש.

<sup>669</sup> *Responsa Ramban* (ed. Chavel) no. 105. Ramban reports:

איש אלקים קדוש הוא, הרב החסיד רבי יונה... הגיעני מצותך בענין הפלגש. להודיעך בה דעתי על דרך אמת לא כנושא ונותן.

<sup>670</sup> *Ibid*:

לא ידעתי במה יסתפקו בה דודאי מותרת היא כיון שיחדה לעצמו.



of children conceived out of prostitution. Such uncertainty, Ramban contends, can lead to the marriage of siblings who are unaware of their familial relation. Ramban explains that this concern does not arise in a concubinage relationship because the concubine moves in with her partner and the relationship is known to the public.<sup>671</sup>

To support his halakhic position, Ramban appeals to the biblical verses. First, Ramban notes that the biblical verse refers to the concubine of Caleb (I Chronicles 2:46) and to the concubine of Gideon (Judges 8:31). Here Ramban's argument from the verses is primarily historical. The fact that the great leaders of Israel had relationships with concubines suggests that such relationships are permissible.<sup>672</sup>

Second, Ramban offers a careful analysis of the verses describing the incident of the Levite's concubine to buttress his halakhic position. Ramban notes that the verse (Judges 19:3) refers to the Levite as the "husband" (*ishah*) of the concubine and argues that the verse would not have used such a proper, formal designation if the relationship was illicit.<sup>673</sup> Ramban further observes that the verse (Judges 19:5) refers to the Levite as the "son-in-law" (*hatano*) of the concubine's father. Such a characterization (*hatano*) would be unthinkable if the relationship was halakhically illicit and shameful.<sup>674</sup> Finally, Ramban notes that the verse (Judges 20:6) narrating the Levite's report to the Israelites, characterizes

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<sup>671</sup> Ibid:

שלא נאסרה אשה בזנות לישראל אלא ממדרשו של רבי אליעזר בן יעקב. נמצא אח נוסא אחותו ואב נוסא בתו. ועל זה נאמר ומלאה הארץ זמה. אבל כשנכנסה בביתו והיא מיוחדת וידועה לו בניה נקראים על שמו ומותרת.

<sup>672</sup> Ibid:

ומצינו גדולי ישראל נושאים אותה. שנאמר ועיפה פילגש כלב ילדה. וגדעון שופטן של ישראל שדבר בו ה' כתיב בו ופילגשו אשר בשכם ילדה לו.

<sup>673</sup> Ibid:

ופילגש בגבעה אילו היתה אסורה עליו לא אמר הכתוב ויקם אישה וילך אחריה.

<sup>674</sup> Ibid:

וכתיב ויאמר אבי הנערה אל חתנו. וגם הוא מתבייש בזמתו. אלא שהיה הדבר מותר ונהוג בישראל.

the atrocity as “a foul and scurrilous” act of depravity (*‘asu zimah u-nevalah be-yisra’el*). Ramban contends that the verse implies that the Levite’s own actions--his ongoing sexual relationship with the concubine--were permissible: “neither foul nor scurrilous” (*lo zimah ve-lo nevalah*).<sup>675</sup>

Ramban’s analysis of the verses in Judges is central to his halakhic conclusion permitting concubinage--even though the verses at the heart of Ramban’s analysis are not utilized at all in the Talmud’s discussion of concubinage.<sup>676</sup>

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<sup>675</sup> Ibid:

והוא אמר ואוחד בפילגשי ואנתחה כי עשו זמה ונבלה בישראל. מכלל שהוא לא היה עושה לא זמה ולא נבלה.

<sup>676</sup> For R. Yonah Gerondi’s position on concubinage, see *Sha’arei Teshuvah* 3:94. R. Yonah Gerondi holds that a concubine relationship is generally forbidden. A sexual relationship is permissible only in the context of marriage, with *kiddushin* and *ketubah*. See *Sha’arei Teshuvah* 3:94:

ולא הותרו פילגשים בלא כתובה ובלא קידושין אלא למלך

For a discussion of concubinage in Spain, see Yom Tov Assis, *The Golden Age of Aragonese Jewry* (Oxford, 2008), pp. 265-266. Assis writes “From the correspondence of Nahmanides with R. Jonah Gerondi we may assume that concubinage was not uncommon among the Jews in the Crown of Aragon.” There is, however, little support for this inference. The mere fact that Ramban addressed the halakhic question of concubinage does not shed light on the frequency of the phenomenon. See also Ephraim Kanarfogel, “Rabbinic Attitudes Toward Nonobservance in the Medieval Period,” in Jacob J. Schacter, ed., *Jewish Tradition and the Nontraditional Jew* (Northvale, NJ: Jason Aronson, 1992), pp. 3-35.

Yom Tov Assis also writes that

“the surprisingly tolerant attitude of Nahmanides towards concubinage must be understood in the context of the norms and mores prevalent in Spain at the time. Nahmanides thought that a prohibition might have driven men to find sexual satisfaction with many women outside the community. He considered a relationship with one woman who would be exclusively his more tolerable.”

This is a curious statement. Ramban states explicitly that a designated, permanent relationship with one woman is preferable, from the perspective of Jewish law, to fleeting sexual relationships with many women. It is not clear, then, what role the “norms and mores prevalent in Spain at the time” are supposed to play in Assis’s analysis.

## VI. Sabbath and the Holidays

### *Public Celebration of Jewish Festivals*

The Talmud's exposition of the laws of the Sabbath and the festivals focuses on the prohibitions of labor (*melakhah*). The Talmud also mentions an obligation to dress in clean clothing on the festivals as well as an obligation to celebrate the holiday with meat and wine. In his Commentary on the Torah (Vayikra 23:2), Ramban develops a further obligation of the Jewish festivals which he derives directly from his novel interpretation of the biblical verse.

The verse (Vayikra 23:2) elusively refers to the festivals as *mikra'ei kodesh*. Ramban's predecessors interpreted the verse as reflecting known talmudic principles. Rambam and *Sefer ha-Hinukh*, for example, interpret *mikra'ei kodesh* as referring to the prohibition of labor (*issur melakhah*) on the festivals.<sup>677</sup> Tosafot interpret the phrase as referring to the requirement of wearing clean clothing on the festivals.<sup>678</sup>

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If Assis means that Ramban looked to communal practice to inform his normative interpretation of halakhah, then here we have another example of Ramban, like the tosafists, interpreting normative texts in light of communal practice. Such an instance would run counter to Soloveitchik's claim that this phenomenon was unique to Ashkenaz and did not extend to Ramban in Christian Spain. (See the discussion above, chapter five, and below, regarding sailing on Shabbat.

<sup>677</sup> Rambam *Sefer ha-Mitzvot*, aseh 159:

והמצוה הקנ"ט היא שצונו לשבות ממלאכה ביום ראשון שלפסח והוא אמרו ית' (בא יב אמור כג פינחס כח) ביום הראשון מקרא קדש. ודע זו ההקדמה. והיא כל מה שנאמר בו מקרא קודש בא בפירושו (ר"ה לב א מכדרשב"י פ' בא ת"כ אמור) קדשהו. וענין קדשהו שלא תעשה בו מלאכה

See also aseh no. 160, 162, 166, 167. See also *Sefer ha-Hinukh*, no. 297 and onward.

<sup>678</sup> Tosafot *Keritut 7a* s.v. *ve-kar'o*:

וקראו מקרא קדש - פי' בכסות נקייה כדאמר במכילתא מקרא קדש וכו'.

Ramban disagrees with these interpretations and argues that the phrase *mikra'ei kodesh* denotes a convocation or assembly.<sup>679</sup> Ramban points to other verses where some variation of the word *k-r-a* denotes a convocation or assembly. Ramban points to Bamidbar 1:17, where the phrase *keru'ei ha'edah* connotes the congress of representatives. Ramban also points to I Samuel 9:1, where the verse uses the word *ha-keru'im* to refer to the assembled guests. Finally, Ramban cites Isaiah 4:5, where the verse uses *mikra'eha* to denote the "assembly place" where the elected representatives gather to legislate.<sup>680</sup>

Ramban then employs his novel interpretation of the verse to derive a normative halakhic conclusion. Ramban argues that *mikra'ei kodesh* refers to an obligation to celebrate the festivals through a public assembly that offers a public expression of celebration and rejoicing. This includes a biblical obligation incumbent upon a community to gather in houses of worship on the festivals, to sanctify the day in public through communal prayer and *hallel*.<sup>681</sup> Thus, on the basis of his interpretation of the verse, Ramban derives a new halakhic obligation that was never characterized or noted by his halakhic predecessors.

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<sup>679</sup> Commentary on the Torah, Vayikra 23:2:

מקראי קדש - שיהיו ביום הזה כולם קרואים ונאספים לקדש אותו.

<sup>680</sup> Ibid:

והנה "מקרא קדש", מלשון קרואי העדה (במדבר א טז), אחרי כן יאכלו הקרואים (ש"א ט יג), וכן על כל מכון הר ציון ועל מקראיה (ישעיה ד ה), המקומות שנקראים שם שיתקבצו בהם קרואי העדה.

<sup>681</sup> Ibid:

וטעם מקראי קדש - שיהיו ביום הזה כולם קרואים ונאספים לקדש אותו, כי מצוה היא על ישראל להקבץ בבית האלהים ביום מועד לקדש היום בפרהסיא בתפלה והלל לאל בכסות נקיה.

Ramban's halakhic conclusion is adopted as normative by later halakhic authorities, such as R. Yosef Karo and the *Peri Megadim*. In the *Beit Yosef* (Orah Hayim 487), R. Yosef Karo adopts Ramban's conclusion to solve the following difficulty. Different customs emerged as to whether the holiday 'amidah prayers need to specify "mikra kodesh" in addition to stating "yom tov" and the specific name of the holiday. The custom in Ashkenaz was to omit "mikra kodesh" while the custom in Sefarad was to include it. The argument raised against the sefardic custom is that it seems arbitrary to single out the "mikra kodesh" dimension of the festival for mention in the 'amidah prayer. Why not also mention the melakhah prohibition or other aspects of the holiday?<sup>682</sup> R. Yosef Karo defends the sefardic custom by appealing to Ramban's analysis. According to Ramban, *mikra kodesh* refers to the obligation for the community to assemble together for public prayers to mark and celebrate the festival together. Thus, since "mikra kodesh" refers to the obligation of communal prayers, it is uniquely appropriate to mention the *mikra kodesh* obligation in the text of those very prayers.<sup>683</sup>

R. Yosef Teomim in his *Peri Megadim* (Orah Hayim 490:2) also adopts Ramban's analysis and derives two halakhic conclusions. First, *Peri Megadim* writes that even if prayers during the year are only a rabbinic obligation, the prayers during the festivals constitute a biblical obligation, based on Ramban's

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<sup>682</sup> See Tur, Orah Hayim 582:

ונוהגין בספרד לומר את יום חג פלוני הזה את יום טוב מקרא קודש הזה ובח"ה לומר את יום חג פלוני הזה את יום מקרא קודש הזה...  
ובאשכנז אין נוהגין לאומרו והכי מסתבר דכיון שאומר את יום חג פלוני הזה הכל בכלל דמאי שנא להזכיר מקרא קודש טפי מאיסור  
עשיית מלאכה ושאר כל הלכותיו....

<sup>683</sup> *Beit Yosef*, Orah Hayim 487:

ולי נראה כמנהג ספרד... ומה שטען רבינו דמאי שנא להזכיר מקרא קודש טפי מאיסור עשיית מלאכה ושאר כל הלכותיו י"ל דשנא  
ושנא דמקרא קודש מורה על שצריך להזכירו בתפילה וכמו שכתב הרמב"ן בפרשת אמור (כג ב) טעם מקרא קודש שיהו כולם קרואים  
ונאספים ביום הזה לקדש אותו כי מצוה היא על כל ישראל להקבץ בבית אלהים ביום מועד לקדש היום (בתפילה) בפרהסיא בתפילה  
והלל לאל עב"ל.

interpretation of *mikra'ei kodesh*.<sup>684</sup> Second, Peri Megadim argues that since Ramban's analysis requires a "public" (*parhesya*) gathering to celebrate the festival, there is a biblical obligation to recite these holiday prayers in the company of ten adult men--distinct from the general virtue of praying with a quorum.<sup>685</sup>

### *Sailing outside of the Shabbat Boundary*

In his commentary on the Talmud (*Eruvin* 43a), Ramban discusses the Sabbath boundary (*tehum*) as it pertains to a passenger on board a ship on the Sabbath. One pressing question is if the ship arrives at port on Sabbath from outside of the *tehum*, can the passenger disembark and travel about the city? Under the normal rules of *tehum*, someone who traveled beyond their Sabbath boundary is confined to their four cubits and must shelter in place for the remainder of the day. Indeed, Ramban reports

<sup>684</sup> *Peri Megadim* Orah Hayyim 490:2:

והנה טעם מקרא קודש עיין ב"י תפ"ז בשם הרמב"ן ז"ל פרשת אמור [ויקרא כג, ב] דתפלה בחול דרבנן (דלא כהר"מ ז"ל תפילה א, א עיין סימן ק"ו סעיף ב), וביום טוב י"ל תפלה דין תורה להקבץ בית ה' לקדש היום בתפלה "בפרהסיא", יע"ש.

See also *Peri Megadim* Eshel Avraham 106:3:

יש אומרים בשבתות וימים טובים תפלה מן התורה, ועיין מה שכתבתי בפתיחה מזה [סוף פתיחה כוללת]:

And in the Petihah Kolelet (section 5):

י"ל שבת ויו"ט [תפילה] דין תורה להרמב"ן.

<sup>685</sup> *Ibid*:

משמע דבעינן מן התורה עשרה גדולים י"ג שנה וב' שערות, הענין פרהסיא באה"ע [סימן טז סעיף ב] הבא על עכו"ם, וכן ויקח בועז עשרה אנשים [רות ד, ב], כל פרהסיא עשרה משמע (רבים הוה שלשה), ולפי זה ראוי לחוש לזה ולהדר אחר גדולים שידוע שהביאו ב' שערות. עיין מ"א סימן נ"ה [ס"ק] ז' וסימן קצ"ט [ס"ק] ז' דבדין תורה בעינן בידוע שהביאו ב' שערות. ואי"ה במ"א [אות] ב' יבואר עוד.

observing Jewish passengers who refused to disembark when their ship arrived at port on Sabbath. Other passengers, Ramban reports, would ask a gentile to “throw” them off the ship onto the dock so as not to violate the Sabbath boundary prohibition.<sup>686</sup>

Ramban argues that these stringencies are unnecessary.<sup>687</sup> Citing the talmudic position that “there are no Sabbath boundaries above ten *tefahim*”,<sup>688</sup> Ramban notes that a ship generally sails at a height of at least ten *tefahim* over the ocean floor. Ramban then cites Tosafot’s position that the Sabbath boundary limitations only apply to someone who had “acquired a place” (*kanah shevitah*) at the onset of Sabbath; a passenger who spent the duration of Sabbath ten *tefahim* above the ground had no “resting place” and therefore acquires one, along with the two-thousand *amah* travel allowance, only when he arrives

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<sup>686</sup> *Hiddushim Eruvin* 43a:

ראיתי במפרשי ימים כשמגיעין ליבשה בשבת מהן שאין יוצאין מן הספינה ומהן שבעלי ספינה גוים משליכין אותן לחוץ ואין זדין מד' אמות שלהם.

<sup>687</sup> *Ibid*:

ואני תמה על מה שראיתי במפרשי ימים כשמגיעין ליבשה בשבת מהן שאין יוצאין מן הספינה ומהן שבעלי ספינה גוים משליכין אותן לחוץ ואין זדין מד' אמות שלהם, ולא ידעתי מי הנהיג אותם בחומר זה.

Note that here Ramban reports of a Sephardic practice that is *more stringent* than Jewish law requires in his view. Compare with Soloveitchik’s claim that Ramban perceived the general populace in Spain as unscrupulous and substandard in their religious observance. See the discussion above, chapter five. Recall also Ramban’s letter to the northern French tosafists, discussed in chapter three, n. 90, that the community in Spain was quite scrupulous in their observance of the commandments. See *Kitvei Ramban I*, p. 342:

אנו קבלנו גזרתכם ונזהר מחרב פיכם... כי אין סביבותינו פחים, אין בארצותינו נודד כנף ופוצה פה ומצפץ כנגד קבלתנו, אין פרץ ואין יוצאת ואין צווחה ברחובותינו.

For a discussion of traveling by boat on Sabbath and an overview of the halakhic challenges and responses associated with it, see Jacob Katz, *The Sabbath Gentile* (Hebrew; Jerusalem, 1983), 33-43 and Ta-Shma, *Ritual, Custom and Reality in Franco-Germany 1000-1350* (Hebrew; Jerusalem, 1996) pp. 168-189.

<sup>688</sup> See *Eruvin* 43a.

at port. Thus the disembarking passenger can now travel the standard Sabbath boundary (2,000 *amot*) from the port where he arrived.<sup>689</sup>

Tosafot, however, provide no argument for their claim that the *tehum* boundary prohibition is limited to someone who has “acquired a place” (*kanah shevitah*). Tosafot do not explain why the person traveling above 10 *tefahim* is not obligated to rest in place when he arrives at port.

To motivate Tosafot’s view, Ramban appeals to the biblical verse which serves as the basis for the *tehum* prohibition (Shemot 16:29): “*shevu ish tahtav al yetze ish mi-mekomo*.”<sup>690</sup> Ramban contends, without any talmudic support, that the verse should be read as conveying that only someone who qualifies for the second part of the verse is bound by the first part of it. That is, only someone who qualifies for “*al yetze ish mi-mekomo*”--who has acquired a place (*makom*)--is obligated to shelter in place (“*shevu ish tahtav*”) when they travel beyond the Sabbath boundary (*makom*). But one who spends the beginning of Sabbath above ten *tefahim*, and thus never acquired a place (*makom*), does not qualify for *al yetze ish mi-mekomo* (he has no *makom*) and therefore is not bound by *shevu ish tahtav* to shelter in place.<sup>691</sup> Ramban provides this novel interpretation of the biblical verse to support Tosafot’s legal conclusion despite the fact that this interpretation/*derashah* does not appear anywhere in the Talmud or halakhic literature.

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<sup>689</sup> *Hiddushim Eruvin* 43a:

ובתוספות מצאתי שאמרו כיון שבתחלת היום היו למעלה מי' ולא קנו שביתה בשום מקום כשבאין תוך י' קובין שם שביתה ויש להם אלפים אמה לכל רוח.

<sup>690</sup> See *Eruvin* 51a.

<sup>691</sup> *Hiddushim Eruvin* 43a:

ואפשר כדבריהם דגבי ישן לרבנן כיון שאינו קונה אלפים אמה שלא מדעת קונה לו ד"א, לא זכה מקומו דאל יצא איש ממקומו, יתקיים בו שבו איש תחתיו, אבל מהלך בים שאינו בכלל מדה ואין שם לא דין אלפים אמה ולא דין ד"א לפי שאין כאן תחומין כלל, כשיצא ליבשה הוא קונה אלפים [ד] זהו תחלת היום שלו וקונה לו עירוב.



Ramban then turns to consider the halakhic basis for the stringent behavior of the sailors. At one point in his analysis, Ramban suggests that the stringent behavior may derive from Rabad's position that is concerned for the opposing talmudic opinion holding that the Sabbath boundary *does* apply above ten *tefahim*.<sup>692</sup> Ramban rejects Rabad's position and offers two arguments against it, both of which appeal to the language of the biblical verse.

First, Ramban argues that the verse's "*al yetze ish*" should be interpreted as prohibiting trekking. *Yetze ish*, Ramban contends, implies a type of *hilukh*, i.e. the walking/trekking of a person. Thus, the Sabbath boundary prohibition is violated only when it is traversed by foot, not by a passenger at rest relative to the movement of the ship or other vehicle. Consequently, Ramban concludes, even if there are *tehum* boundaries above ten *tefahim*, the prohibition can only be violated by a person traveling on foot.<sup>693</sup>

Second, Ramban notes, the biblical verse defines the *tehum* prohibition as limiting a person to his "place" (*makom*). Ramban contends, a passenger on a moving ship has never acquired a "place" because the ship is in constant motion. Such a passenger, Ramban argues, does not qualify for the

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<sup>692</sup> Ibid:

ומצאתי להראב"ד ז"ל שכתב בפירושו בבעיא דאין תחומין למעלה מעשרה מסתברא דעבדינן לחומרא חדא דאמרין הכא תנא ספוקי מספקא ליה ולחומרא... ושמא דברי הרב ז"ל הם שהנהיגו חומרא זו שהזכרנו במקומות הללו במפרשי ימים...

<sup>693</sup> Ibid:

וגם זה אינו נכון ולא ראוי לחוש מפני שהליכתן בספינה בים בין למעלה בין למטה ודאי מותרת היא... ואין אני קורא בזה אל יצא איש ממקומו כיון שלא הלך ג' פרסאות ברגליו שהרי הלך הספינה אינו קרוי הלך כלל, ותמה על עצמך הוא יושב ברשות היחיד שלו שהספינה רשות היחיד היא גבוה עשרה ורחבה ארבעה וכדאיתא בפרק הזורק ואתה חושש לו משום מהלך שלש פרסאות, איהו מינח נייח וספינה הוא דקא מסגי, וחצר מהלכת היא ולא אדם מהלך כלל.

It is possible the interpretation of the biblical verse is not doing the heavy lifting here and that Ramban is only referring to it as a proxy for the *tehum* prohibition. But note first that Ramban appeals directly to the verse and states that he would not "call this" (*ve-ein ani kore ba-zeh*) *al yetze ish mi-mekomo*, which implies that it is the language of the verse that excludes travel by boat. Second, there is no independent talmudic basis to focus on "*hilukh*" or "*mehalekh*". Thus Ramban is relying entirely on his interpretation of the verse's "*al yetze ish*".

biblical prohibition since the verse itself presupposes a “*makom*” [*shevitah*] in its delineation of the prohibition. Based on this interpretation of the verse, Ramban concludes that the sailing passenger is not bound by the Sabbath boundary prohibition.<sup>694</sup>

Thus, three times throughout his analysis of the *tehum* prohibition in his *Hiddushim* to the Talmud, Ramban appeals directly to his interpretation of the biblical verse to derive normative halakhic conclusions. First, to argue that one must be capable of having a resting place to qualify for the *shevu ish tahtav* shelter in place requirement, excluding a passenger traveling above ten *tefahim*. Second, to establish that the prohibition is only violated by a form of *yetze ish*, trekking/walking. Third, to establish that a boat in motion is not considered to have a defined place *makom*, and therefore a passenger on such a boat is exempt from the *tehum* boundary.

#### *The Melakhah Prohibition of Sabbath and the Holidays*

In his Commentary on the Torah (Vayikra 23:7), Ramban draws attention to the different formulations used in the biblical verse to characterize the *melakhah* prohibition of Sabbath and the holidays. For the Sabbath prohibition, the verse prohibits “*kol melakhah*”, whereas for the holiday prohibition it prohibits “*meleket ‘avodah*”. Ramban argues that these different formulations reflect two fundamentally distinct types of *melakhah* prohibitions for the different days. On Sabbath, the verse prohibits all types of

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<sup>694</sup> Ibid:

ועוד נ"ל שאפילו בפחות מעשרה בספינה מהלכת אין בה תחומין כדאמרין לקמן גבי שביתת אוקיאנוס מיא באוקיאנוס נמי מינד ניידי לומר שלא קנו מים שביתה באוקיאנוס וכל שכן ספינה המהלכת בהן דניידא ולא קניא שביתה, וכדאמרין נמי לענין מהלכת את כולה במהלכת דכ"ע לא פליגי דכיון דספינה שנוטלתו מתחלת ד"א ומניחתו בסוף ד"א לא העמידוהו בד"א שלו, והילכך כיון שלא קנה שביתה ולא ד"א בין השמשות במקומו בים, כשיצא ליבשה אי נמי כשהספינה שלו עומדת בפחות מעשרה משם מודדין לו אלפים אמה ואין אני קורא בו אל יצא איש ממקומו ולא שבו איש תחתיו שאין לו לזה מקום ולא שביתה כלל כל זמן שמהלכת, הוה לי' כנהרות המושכין ומעיינות המושכין שאין המים קונין שביתה במקומן משום דניידי וקונין שביתה ברשות הזוכה בהן ויש להם משם אלפים אמה.

*melakhah*. By contrast, on the holidays, it prohibits only a subset of *melakhah* defined by *melekheth 'avodah*.

How does *melekheth 'avodah* differ from *kol melakhah*? Ramban argues that *melekheth 'avodah* does not prohibit work required for one's personal benefit and enjoyment (*melekheth han'ah*), specifically that which is related to preparation of food for personal consumption and enjoyment. In Ramban's view, based on his reading of the biblical verse, the holiday prohibition--*melekheth 'avodah*--only prohibits productive work.<sup>695</sup>

Ramban appeals to this distinction twice in his talmudic writings. In the *Milhamot (Beizah, Alfasi 13b)*, Ramban explains that the *melakhot* listed in the Mishnah that precede kneading (*lishah*) are by definition productive work (*melekheth 'avodah*) and are therefore prohibited even when they are performed for the sake of preparing food.<sup>696</sup>

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<sup>695</sup> Ramban Vayikra 23:7:

פירוש "מלאכת עבודה", כל מלאכה שאינה לצורך אוכל נפש, כענין שנאמר ששת ימים תעבוד ועשית כל מלאכתך (שמות כ ט), ובכל עבודה בשדה (שם א יד), ונעבדתם ונזרעתם (יחזקאל לו ט), וקין היה עובד אדמה (בראשית ד ב), ומלאכה שהיא באוכל נפש היא מלאכת הנאה לא מלאכת עבודה... ולא יאמר הכתוב לעולם באחד מכל שאר ימים טובים "כל מלאכה" ולא יפרש בהם היתר אוכל נפש, כי "מלאכת עבודה" ילמד על זה... פירוש "מלאכת עבודה" מלאכה המשתמרת לעבודת קנין כגון זריעה וקצירה וחיפירה וכיוצא בהם, אבל אוכל נפש אינה מלאכת עבודה... הבא בטורח גדול בדומה לעבודה יהיה בכלל איסור והבא בנקל כמנהגו של אדם לעצמו יהיה מותר. או מקצתו כדי חייו, וכולו תבשילין מרובין לתענוג. והכלל במלאכת עבודה שהוא להיתר אוכל נפש.

Note how Ramban's analysis here also exemplifies his conceptualism, as discussed in chapter five. Where other commentators draw *ad hoc* distinctions to explain the difference between the *melakhah* prohibition of Sabbath and the holidays, Ramban distinguishes between two different types, or conceptions of, *melakhah* prohibitions: *melekheth 'avodah* and *kol melakhah*.

<sup>696</sup> *Milhamot Beizah Alfasi 13b*:

הוּ יודעים שלא כל המלאכות הותרו ביום טוב אלא הכשר המאכלים לאכלן כגון אפייה ובשול וכיוצא בהן אבל לצוד בעלי חיים שאינן ברשות אדם וכן לעקור דבר מגדולו כגון קצירה ותולדותיה אלו וכיוצא בהן אסורין והן בכלל מלאכת עבודה... למעט טחינה והרקדה וכל שכן קצירה ותלישה... לדברי הכל נתמעטו טחינה והרקדה שלא התירה תורה ביום טוב אלא מלאכות של יומן כגון שחיטה אפייה ובשול אבל אלו תקון הן ודרך בני אדם לתקן מהם לימים הרבה אמרה תורה יתקן כדרכו מחול ליום טוב שלא יתקן מיום טוב לימים הרבה של חול ואף על פי שמצינו היתר במלאכות הללו טוחנין את הפלפלין בריחים שלהן וכל הנדוכין כדרכן נמי טחינה היא ונותנין לתלויה ביום

In his *Hiddushim to Shabbat* (117b s.v. *ha de-tani*), Ramban offers the same interpretation of the biblical verse, distinguishing between the Sabbath prohibition of *kol melakhah* and the holiday prohibition of *meleket 'avodah*,<sup>697</sup> and notes that his analysis can solve a difficulty that has perplexed prior commentators. While the biblical verse is clear that it is permissible to perform *melakhah* necessary for food preparation on Passover (*hetter okhel nefesh*), it never explicitly extends this license to the other holidays. Yet the Talmud takes it as axiomatic that the food preparation allowance applies equally to all the holidays. Commentators scramble to explain the basis of the Talmud's extension to the other holidays.<sup>698</sup> Ramban argues, based on his analysis of the biblical verse, that the verse's use of *meleket 'avodah* (in contrast to *kol melakhah*) for each of the holidays establishes that *meleket hana'ah*, which includes food preparation, is permissible on each of these days. Thus, according to Ramban's analysis, the verse itself is clear about the food preparation license for all of the holidays.<sup>699</sup>

Further, Ramban's analysis of the biblical verse has important conceptual implications for the nature of the holiday food preparation license. Earlier commentators had understood that *all* *melakhah* is in principle prohibited on the holidays, and the food preparation license is an external concession to the need to prepare meals to celebrate the day. In their view, *hetter okhel nefesh* is a kind of "override"

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טוב והויא תולדה דבורר הנהו מלאכות דיום נינהו ומכל מקום נתמעטה קצירה ותולדותיה כגון תולש פירות הנאכלים שלא התירה תורה אלא להכשיר אוכלין שברשותו אבל לעקור דבר מגדולו לא ואפילו לפירות הנפגמים מיום לחבירו כגון תאנים ותותים וכל שכן צידת בעלי חיים שהוא בכלל מלאכת עבודה.

<sup>697</sup> *Hiddushim*, Shabbat 117b:

ול"נ דהכי פירושו דמתוך שהשבת אסורה בכל מלאכה ואפי' באוכל נפש כתיב בה לעולם כל מלאכה וכן ביום הכפורים, ומתוך שיו"ט מותר באוכל נפש כתיב בו כל מלאכת עבודה לא תעשו דאוכל נפש אינה מלאכת עבודה אלא מלאכת הנאה.

<sup>698</sup> See, e.g., *Yere'im* 305 and 306; *Hagahot ha-Ramakh* Hilkhoh Yom Tov 1:1.

<sup>699</sup> *Hiddushim Shabbat* 117b:

ומן הענין הזה נתרץ מה שרגילין לשאול מהיכן למדו היתר אוכל נפש בשאר ימים טובים חוץ מחג המצות, וכבר נתפרש שהוא נלמד מלשון מלאכת עבודה והדבר ברור הוא ממה שכתוב בכולן כן.

where the need to celebrate the holiday “overrides” (*doheh*) the *melakhah* prohibition.<sup>700</sup> By contrast, Ramban holds that food preparation (*okhel nefesh*) was never included in the holiday *melakhah* prohibition in the first place.<sup>701</sup>

### *The Traveler’s Sukkah Exemption*

This example, drawn from Ramban’s commentary to Vayikra 24:42, differs from the previous ones in that Ramban does not here attempt to *derive* new normative rules from the biblical verse. Instead, Ramban attempts to *source* a talmudic rule directly in a biblical verse, even though the Talmud presents no biblical source for the rule in question.

The Talmud (*Sukkah* 26a) holds that travelers are exempt from the sukkah obligation during the course of their travels.<sup>702</sup> The Talmud does not explicitly offer a source for this exemption, but from the context of the Talmud’s discussion, Rashi suggests that the exemption flows from the *teshevu ke-’ein taduru* principle.<sup>703</sup>

<sup>700</sup> See Tosafot *Megillah* 7b and *Sha’agat Aryeh* Responsa 102.

<sup>701</sup> As one commentator observes (see the notes in *Hiddushei ha-Ramban al ha-Torah*, ed. Machon ha-Ma’or Vol 3, p. 151):

דפירשו [תוס' ורש"י] שגדר ההיתר של מלאכת אוכל נפש ששמחת יום טוב דוחה את האיסור מלאכה... [אך] לדרכו של רבינו [הרמב"ן] מלאכת אוכל נפש אינה כלל בכלל מלאכת עבודה.

See also Rabbi Michael Rosensweig “be-Inyan Isur Melakhah ve-Hiyuv Shevitah be-Shabbat u-ve-Yom Tov”, *Beit Yitzchak* p. 108:

הרמב"ן עצמו מציע הסבר יסודי לביטוי "מלאכת עבודה". לפיו, ביטוי זה מגדיר עצם איסור מלאכה ביו"ט לעומת שבת... חילוק זה בין איסור מלאכה בשבת וביו"ט אינו מוגבל רק לפרטים טכניים. הנה עצם ההגדרה ותיאור האיסור שונה--בשבת "כל מלאכה" אסורה, ואילו ביו"ט "מלאכת עבודה גרידא אסורה...."

R. Rosensweig discusses several halakhic questions that may turn on Ramban’s analysis.

<sup>702</sup> *Sukkah* 26a:

הולכי דרכים ביום ובלילה - פטורין מן הסוכה בין ביום ובין בלילה.

<sup>703</sup> *Ibid*:

שומרי גנות ופרדסים - פטורין בין ביום ובין בלילה, - וליעבדי סוכה התם וליתבו! - אביי אמר: תשבו כעין תדורו.

Rashi *Sukkah* 26a s.v. *Holkhei*:

In his commentary on the Torah, Ramban offers a different, novel source for the traveler's exemption. The verse that establishes the sukkah obligation (Vayikra 24:42) states "You shall live in sukkot for seven days: all citizens (*kol ha-ezrah*) in Israel shall live in sukkot." Ramban notes that the verse itself appears to limit the sukkah obligation to "citizens (*kol ha-ezrah*)" and suggests that "citizens" implies someone "who is like a citizen, refreshed in his own home, which excludes travelers."<sup>704</sup>

In one sense, this example is less significant than the earlier ones, as Ramban is not relying on the verse to derive a novel halakhic rule. On the other hand, this example demonstrates how central the biblical verse was to Ramban's jurisprudence: Ramban was scouring the biblical text not only to locate new laws but also to locate new *sources* for established laws.

Ramban himself does not explain why the *teshevu ke-ein taduru* principle is insufficient to explain the talmudic ruling and why he needed to source the exemption in the biblical verse's "*ezrah*." But Ritva, a disciple of Ramban's academy, in his talmudic novellae (*Sukkah* 26a s.v. *Pirzah* and 28b s.v. *Rava*) adopts as normative Ramban's analysis in the Commentary on the Torah and puts it to work to solve certain difficulties that arise in the Talmud's halakhic discussion.<sup>705</sup>

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הולכי דרכים ביום פטורין מן הסוכה ביום - דכתיב בסוכות תשבו - כעין ישיבת ביתו, כשם שכל השנה אינו נמנע מלכת בדרך בסחורה - כך כל ימות החג שאינו יום טוב לא הצריכו הכתוב למנוע.

See also Ritva ad loc s.v. *Pirzah*.

<sup>704</sup> Commentary on the Torah Vayikra 24:42:

ויתכן שיאמר כל אשר כאזרח רענן בביתו, להוציא מפרשי ימים והולכי על דרך.

<sup>705</sup> See Ritva *Sukkah* 28b s.v. *Rava*:

ויש לשאול למה נכתב האזרח כלל, שמעתי בשם רבינו הגדול הרמב"ן ז"ל שבא לומר שלא יתחייב בסוכה אלא מי שהוא כאזרח רענן פרט להולכי דרכים ושומרי פירות ומצטער וכיוצא בהן, וכל מאי דאמרין בכל דוכתא תשבו כעין תדורו מהכא נפקא לן, דהאי קרא גלי לן דמאי דכתיב תשבו אינה ישיבה כל דהוא אלא ישיבה כעין דירה, כענין וישב יעקב בארץ מגורי אביו ואחרים בכתוב.

See also Ritva *Sukkah* 26a s.v. *Pirzah*:

*The Positive Commandment of Sabbath Resting (Shevitah)*

In his Commentary to Vayikra 23:24, Ramban develops a novel interpretation of the positive commandment to “rest” on the Sabbath and holidays. The biblical verse characterizes these holidays as “*Shabbaton*”, which the Talmud interprets as a positive commandment (*‘aseh*) to refrain from *melakhah*. For most commentators, this positive commandment has the exact same extension as the *melakhah* prohibition. The positive commandment simply *reinforces* the negative commandment of *melakhah*. What was previously prohibited as a negative commandment is now prohibited by both a negative and positive commandment.<sup>706</sup>

Ramban develops a different interpretation of the verse, with minor support from the *Mekhilta*. Ramban contends that the “*Shabbaton*” verse prohibits activities that would not be covered by the *melakhah* prohibition. Ramban notes that, in certain conditions, it is possible for a person to spend the entire Sabbath consumed by his weekday work and involved in market transactions without technically violating any of the *melakhot*. Ramban notes that this would undercut the very essence of the Sabbath

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תמיהה מילתא וכי לית ליה לרבא תשבו כעין תדורו והא טעמא דחולה ומצטער והולכי דרכים משום הכי הוא, ולקמן נמי דרשינן תשבו כעין תדורו מכאן אמרו כל שבעת הימים אדם עושה סוכתו קבע, ותו היכי פטר ליה מסוכה משום חשש הפסד ממון וכי יש אדם נפטר מן המצוה בכך, וי"ל דתרווייהו משום תשבו כעין תדורו אלא דאביי דריש ליה טפי דפטר ליה אפילו שלא במקום הפסד כיון שאין דרכו לעשות דירתו שם, ורבא סבירא ליה דכולי האי לא דרשינן תשבו כעין תדורו שלא לעשות סוכה אלא במקום שדרכו לקבוע שם ביתו, אבל כשיש לו הפסד בדבר ואית ליה צערא ופסידא בהא פטרינן ליה משום תשבו כעין תדורו, ומאי דדרשינן בכל דוכתא תשבו כעין תדורו לאו מלישנא דתשבו נפקא לן דאדרבה מדלא כתיב תדורו וכתוב תשבו משמע איפכא, אלא שאנו למדין כן מכונת המצוה שאמרה תורה בסוכות תשבו שבעת ימים כלומר כמו שהייתם יושבים בבתיכם, אי נמי מדכתיב האזרח בישראל דמייתר להכי כדבעינן למימר קמן.

<sup>706</sup> Commentary on the Torah (Vayikra 23:24):

יהיה לכם שבתון - שיהיה יום שביתה לנוח בו. ואמרו רבותינו (שבת כד ב) שבתון עשה הוא. והנה העושה מלאכה בי"ט עובר בלאו ועשה.

as a day of rest.<sup>707</sup> The verse therefore prohibits, Ramban contends, as a positive commandment distinct from the *melakhah* prohibition, any activity that would render the Sabbath a day of toil.<sup>708</sup>

Ramban's legal conclusion--prohibiting all sorts of (non-*melakhah*) work as a biblical prohibition based on his interpretation of the verse--is adopted as normative by later commentators. Ritva, for example, adopts Ramban's conclusion in his talmudic novellae to tractate *Rosh Hashanah*.<sup>709</sup> Hatam Sofer also adopts Ramban's conclusion as normative when he declares someone who opened his store for business on Sabbath as a "desecrator of the Sabbath (*mehalel shabbat*)" even though the person did not

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<sup>707</sup> Ibid:

ונראה לי שהמדרש הזה לומר שנצטוונו מן התורה להיות לנו מנוחה בי"ט אפילו מדברים שאינן מלאכה, לא שיטרח כל היום למדוד התבואות ולשקול הפירות והמתנות ולמלא החביות יין, ולפנות הכלים וגם האבנים מבית לבית וממקום למקום, ואם היתה עיר מוקפת חומה ודלתות נעולות בלילה יהיו עומסים על החמורים ואף יין וענבים ותאנים וכל משא יביאו בי"ט ויהיה השוק מלא לכל מקח וממכר, ותהיה החנות פתוחה והחנוני מקיף והשלחנים על שלחנם והזהובים לפניהם, ויהיו הפועלים משכימין למלאכתן ומשכירין עצמם כחול לדברים אלו וכיוצא בהן, והותרו הימים הטובים האלו ואפילו השבת עצמה שבכל זה אין בהם משום מלאכה...

And later in the same discussion:

פירוש שבתון כך הוא שתהיה לנו מנוחה מן הטורח והעמל כמו שביארנו, והוא ענין הגון וטוב מאוד. והנה הוזהרו על המלאכות בשבת בלאו ועונש כרת ומיתה והטרחים והעמל בעשה הזה.

<sup>708</sup> Ibid:

לכך אמרה תורה "שבתון" שיהיה יום שביתה ומנוחה לא יום טורח. וזהו פירוש טוב ויפה.

<sup>709</sup> Ritva *Rosh Hashanah* 32b:

צריך את למידע דכל מאי דאמרין בכל דוכתא שבות דרבנן לאו למימרא שאין לנו שבות מן התורה כלל, דא"כ נמצאת שבת כחול מן התורה שהחנניות פתוחות ואוצרות תבואה ויין, ומטלטלין חפצים מבית לבית דרך כרמלית ומודדין ושוקלין ומונין, ואינו בדין שאסרה תורה הוצאה כגרוגרת והתירה העמל הגדול הזה שא"כ אין זה יום מנוחה, אלא כך עיקרן של דברים כי בכלל מצות עשה שבות של תורה לשבות ממלאכות יש לשבות מכל שבות דרך כלל שלא לעשות שבת כחול, אבל בכל פרט ופרט כי עביד לי' וזהיר באידך דלא היו שבת כחול היו שבות דרבנן, נמצא שיש לשבות עיקר מן התורה, ולפיכך העמידו בו חכמים דבריהם במקומות הרבה לדחות מצוה של תורה, וזו מרגליות שבידינו מרבינו הרמב"ן מפי מורינו ז"ל.



technically violate any of the 39 prohibited *melakhot*.<sup>710</sup> Other commentators also adopt Ramban's conclusion as normative.<sup>711</sup>

As we shall see in the next example, Ramban's novel interpretation of the "Shabbaton" commandment derives from a more general theory of normative biblical interpretation that Ramban advances elsewhere.

## VII. Meta-Legal Principles of Jurisprudence

In his commentary to Vayikra 19:2, Ramban develops a fundamental principle of halakhic jurisprudence based on his reading of the biblical verse, with far reaching halakhic ramifications. Ramban contends that "you shall be holy" (Vayikra 19:2) commands individuals to refrain from activities that would otherwise appear to be technically permitted by the law even though they run contrary to its spirit. Thus, whereas the Talmud might imply that a non-nazirite need not limit his wine consumption, or that one can eat kosher food as gluttonously as he desires, or that one can indulge in excessive sexual

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<sup>710</sup> *Responsa Hatam Sofer* 5:195:

אי נושא ונותן בחנותו בכלל מחלל שבת ויו"ט הוא: הרי הוא ככל מחללי שבת באיסורי הכתובי' בקרא כמ"ש הרמב"ן פ' אמור בפסוק שבתון זכרון תרועה ע"ש וז"ל הרמב"ן שנצטוינו מן התורה להיות לנו מנוחה ביום טוב אפי' מדברי' שאינן מלאכה לא שיטרח כל היום למדוד התבואות ולשקול... היוצא לנו מכל הנ"ל שאסור לשום מי אשר בשם ישראל יכונה לפתוח חנותו או לסחור במרכולתו ומסחרתו או לטעון ולפרוק מעגלה שלו בשבת וי"ט ואם לא שמע וא"א לכופו ע"י שרי המדינה הרי הוא מופרש ומובדל מעדת ישראל ואין לו דת כלל ופסול לעדות ולשבועה ולכל דבר ושחיטתו אסורה וכל מאכליו ומשקיו בחזקת איסור כי אבד נאמנות שלו ואין חילוק בין פותח חנותו מקצתו או כלו או חלונותיו וכדומה...

<sup>711</sup> See for example, *Yalkut Yosef Shabbat* vol 2, siman 306, note 1.

relations so long as no specific Torah prohibition is violated,<sup>712</sup> Ramban contends that the verse in fact prohibits all of these through the sweeping injunction “you shall be holy”.<sup>713</sup>

Further, Ramban argues that the “you shall be holy” injunction reflects a general jurisprudential principle of biblical interpretation. According to Ramban’s theory, the biblical verse will often enumerate a series of specific injunctions prohibiting particular activities followed by a general formulation that captures the underlying general principle that unifies the specific injunctions. The formulation of the underlying principle, Ramban suggests, generates a constellation of novel, normative obligations.<sup>714</sup> In the “you shall be holy” example, the general formulation prohibits excessive sexual relations, gluttonous consumption of food, excessive consumption of wine, the use of foul language, and more. Although none of these activities are explicitly enumerated as biblical prohibitions in the Talmud or any halakhic

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<sup>712</sup> Commentary on the Torah Vayikra 19:2:

והענין כי התורה הזהירה בעריות ובמאכלים האסורים והתירה הביאה איש באשתו ואכילת הבשר והיין, א"כ ימצא בעל התאווה מקום להיות שטוף בזמת אשתו או נשיו הרבות, ולהיות בסובאי יין בזוללי בשר למו, וידבר כרצונו בכל הנבלות, שלא הוזכר איסור זה בתורה, והנה יהיה נבל ברשות התורה.

<sup>713</sup> Ibid:

לפיכך בא הכתוב, אחרי שפרט האיסורים שאסר אותם לגמרי, וצוה בדבר כללי שנהיה פרושים מן המותרות. ימעט במשגל, כענין שאמרו (ברכות כב א) שלא יהיו תלמידי חכמים מצויין אצל נשותיהן כתרנגולין, ולא ישמש אלא כפי הצריך בקיום המצוה ממנו. ויקדש עצמו מן היין במיעוטו, כמו שקרא הכתוב (במדבר ו ה) הנזיר קדוש, ויזכור הרעות הנזכרות ממנו בתורה בנח ובלוט. וכן יפריש עצמו מן הטומאה, אף על פי שלא הוזהרנו ממנה בתורה, כענין שהזכיר (חגיגה יח ב) בגדי עם הארץ מדרס לפרושים, וכמו שנקרא הנזיר קדוש (במדבר ו ח) בשמרו מטומאת המת גם כן. וגם ישמור פיו ולשונו מהתגאל ברבוי האכילה הגסה ומן הדבור הנמאס, כענין שהזכיר הכתוב (ישעיה ט טז) וכל פה דובר נבלה, ויקדש עצמו בזה עד שיגיע לפרישות, כמה שאמרו על רבי חייא שלא שח שיחה בטלה מימיו:

<sup>714</sup> Ibid:

באלו ובכיוצא בהן באה המצוה הזאת הכללית, אחרי שפרט כל העבירות שהן אסורות לגמרי, עד שיכנס בכלל זאת הצוואה הנקיות בידיו וגופו, כמו שאמרו (ברכות נג ב) והתקדשתם אלו מים ראשונים, והייתם קדושים אלו מים אחרונים, כי קדוש זה שמן ערב. כי אף על פי שאלו מצות מדבריהם, עיקר הכתוב בכיוצא בזה יזהיר, שנהיה נקיים וטהורים ופרושים מהמון בני אדם שהם מלכלכים עצמם במותרות ובכיעורים:

וזה דרך התורה לפרוט ולכלול בכיוצא בזה, כי אחרי אזהרת פרטי הדינין בכל משא ומתן שבין בני אדם, לא תגנוב ולא תגזול ולא תונו ושאר האזהרות, אמר בכלל ועשית הישר והטוב (דברים ו יח), שיכניס בעשה היושר וההשויה וכל לפני משורת הדין לרצון חבריו, כאשר אפרש (שם) בהגיעי למקומו ברצון הקדוש ברוך הוא.

literature, Ramban concludes that all of them are biblically prohibited by (his interpretation of) the sweeping “you shall be holy” injunction.

Armed with this theory of interpretation, Ramban is able to deduce a host of new halakhic obligations from the biblical verse. In addition to the obligations deduced from “you shall be holy”, Ramban cites his interpretation of “*Shabbaton*” (see the above example) as an application of the same interpretive principle. After prohibiting the specific *melakhot*, the verse mandates “*Shabbaton*” more generally to prohibit any kind of work or labor or weekday-like activity that would compromise the Sabbath as a day of rest.<sup>715</sup> Ramban’s interpretation generates a host of novel Sabbath prohibitions.

Ramban provides a third example in his commentary to Devarim 6:18. Commenting on the verse “you shall do the right and good”, Ramban explains that it would be impossible for the verse to enumerate all of the rules necessary and sufficient to govern society. For that reason, after the verse enumerates specific regulations governing interactions between members of society, it commands “you shall do the right and good” as a general principle to guide interactions between individuals in society. According to Ramban, this biblical commandment includes a halakhic obligation to waive one’s halakhic rights and settle disputes civilly, without pressing one’s claim or asserting one’s rights according to the strict letter of the law.<sup>716</sup>

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<sup>715</sup>Ibid:

וכן בענין השבת, אסר המלאכות בלאו והטרחים בעשה כללי שנאמר תשבות.

<sup>716</sup>Commentary on the Torah, Devarim 6:18:

ועשית הישר והטוב בעיני ה'... זו פשרה ולפנים משורת הדין. והכוונה בזה, כי מתחלה אמר שתשמור חקותיו ועדותיו אשר צוך, ועתה יאמר גם באשר לא צוך תן דעתך לעשות הטוב והישר בעיניו, כי הוא אוהב הטוב והישר...

וזה ענין גדול, לפי שאי אפשר להזכיר בתורה כל הנהגות האדם עם שכניו ורעיו וכל משאו ומתנו ותקוני הישוב והמדינות כלם, אבל אחרי שהזכיר מהם הרבה, כגון לא תלך רכיל (ויקרא יט טז), לא תקום ולא תטור (שם פסוק יח), ולא תעמוד על דם רעך (שם פסוק טז), לא תקלל חרש (שם פסוק יד), מפני שיבה תקום (שם פסוק לב), וכיוצא בהן, חזר לומר בדרך כלל שיעשה הטוב והישר בכל דבר, עד שיכנס בזה הפשרה ולפנים משורת הדין, וכגון מה שהזכירו בדיני דבר מצרא (ב"מ קא א), ואפילו מה שאמרו (יומא פו א) פרקו נאה ודבורו בנחת עם הבריות, עד שיקרא בכל ענין תם וישר:

In these three examples--"Shabbaton", "you shall be holy", and "you shall do the right and good"--Ramban derives novel normative halakhic content from his interpretation of the biblical verses.<sup>717</sup>

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<sup>717</sup> For further discussion of these examples, see Halbertal, *Nahmanides*, pp. 274-280.

Professor Berger has commented to me that he is not convinced that these three examples (Shabbaton, "you shall be holy", and "you shall do the right and good") rise to the level of biblical prohibitions in a technical sense. But I would counter that Ramban believed that they do. Consider the example of Shabbaton, Ramban appears to hold that one who engages in laborious and toilsome activities on Sabbath violates the Shabbaton injunction:

הוזהרו על המלאכות בשבת בלאו ועונש כרת ומיתה והטרחים והעמל בעשה הזה

Indeed, Hatam Sofer was willing to declare someone who opened his store for business on the Sabbath as a *mehalel Shabbat* on the basis of Ramban's position. Furthermore, the core of Ramban's jurisprudential theory is that it would be impossible for the Torah to enumerate all of the specific rules necessary to realize the kind of society (or day of rest or personal perfection) it envisions. By necessity then, Ramban contends, the Torah must also legislate by means of conveying general principles that bear normative content. Therefore, the normative content of these general principles and their biblical status is on par with that of the specific prohibitions enumerated in the Torah that precede the statement of the general principle. Put differently, the whole thrust of Ramban's analysis is that there is an important symmetry in the normative valence of the specific injunction enumerated in the biblical verse and the general principle explicated in the verse immediately afterwards.

As Moshe Halbertal notes, *Nahmanides* p. 276-277:

"This charge [do what is right and good]... does add normative content of its own that pertains to a field otherwise unregulated by halakhah.... [Nahmanides] posits that any rule-based system, however successful, cannot possibly account for the entire gamut of potential human interactions... in which people must make decisions: "it is impossible for the Torah to mention all of man's conduct with his neighbors and fellows, all of his business dealings, and all of the conventions of civilized society." Piling on additional details and distinctions to the existing set of rules would not solve this problem... The limitation of the written law can be overcome only by way of a general directive that appeals to humans' judgment and establishes the need to do what is good and right.... The commandment of doing what is good and right therefore carries normative content..."

## Conclusion: the Biblical Verse as a Source of Halakhic Jurisprudence

At the outset of this chapter, we surveyed the scholarly debate over the place of the biblical verse in determining normative halakhah. This chapter has shown that Ramban consistently derives normative halakhic conclusions from his interpretation of the biblical verse. There is no doubt that the biblical verse was an important and active component of Ramban's halakhic jurisprudence. In many cases, the normative conclusions reached by Ramban are significant and far reaching. In one example, we saw Ramban conclude that a community has the power to enforce its legislation with the death penalty. In another example, Ramban significantly limits the first-born's right to a double portion. In a different example, Ramban finds a biblical prohibition against overcharging for real property. In another, Ramban finds a constellation of biblical obligations pertaining to the Sabbath. In yet another, Ramban derives sweeping allowances for passengers travelling by boat on the Sabbath.

As the survey of the scholarly literature at the outset of this chapter reflects, there is widespread disagreement about the role of the biblical verse in determining normative halakhah. This chapter clarifies Ramban's stance on this important question. Ramban made extensive use of the biblical verse as a source of normative halakhah in both his *Hiddushim* on the Talmud and his commentary on the Torah.<sup>718</sup>

The goal of this chapter has been to demonstrate the manner in which Ramban utilizes the biblical verse in his normative jurisprudence, which the above fifteen examples have documented. While we can only speculate as to *why* Ramban should find the biblical verse so relevant to his normative jurisprudence--while other Rishonim did not--such an orientation appears to be consistent with Ramban's comments elsewhere about the fecundity of the biblical verse, its ontological significance and completeness, and its

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<sup>718</sup> For an additional example involving the Hiddushim on the Talmud, see Ramban, Hiddushim Megillah 2a.

manifold layers of meaning. For example, in the context of his debate with Rambam over the divide between rabbinic and biblical authority, Ramban adopts a very broad interpretation of biblical authority. According to Ramban, rabbinic derivations from the biblical text by means of *derashot* are considered part of the biblical meaning of the verse and are therefore considered to be endowed with biblical authority.<sup>719</sup>

To counter the objection that rabbinic *derashot* are not part of the text's original meaning, Ramban argues that the biblical text is teeming with different layers of meaning. At one point, Ramban lists four different layers of biblical meaning: "*ha-torah tezaveh u-tefaresh ve-todi'a ve-tirmoz.*"<sup>720</sup> Ramban contends that the biblical verse includes *derashot*, interpretations, literary allusions, and numerical hints--and that biblical verse simultaneously contains all of these different meanings ("*ha-katuv yikhlol ha-kol*"). Ramban grounds this contention in his conception of the biblical text's completeness: *Torat Hashem Temimah.*<sup>721</sup> Ramban makes a similar declaration in his introduction to the *Commentary on the*

<sup>719</sup> See *Hassagot to Sefer ha-Mitzvot*, Shoresh 2:

ואנו לא מצינו דעת חכמים בזה. שהמדות כולן אצלם כדבר מפורש בתורה ודורשים אותן מדעתם... שהמדות האלה כדבר מפורש בתורה הם.

On this debate, see Halbertal, *People of the Book*, Chapter 2.

<sup>720</sup> Ibid:

והתימה שתמה הרב מן תורה צוה לנו משה שירמוז למגלה ונר חנוכה בגימטריא אינו גדול. שכבר דרשו (מגיל' ז א) כתוב זאת זכרון בספר כתוב זאת מה שכתוב כאן ובמשנה תורה, זכרון מה שכתוב בנביאים, בספר מה שכתוב במגלה. כי התורה תצוה ותפרש ותודיע ותרמוז. ... וכן אמרו בפרק ראשון שלברכות (ה א) מאי דכתיב ואתנה לך את לוחות האבן והתורה והמצוה אשר כתבתי להורותם לוחות האבן זו המקרא והתורה זו המשנה והמצוה כמשמעה אשר כתבתי אלו נביאים להורותם זה התלמוד מלמד שכולם ניתנו למשה בסיני. והנה זו המימרא מתרצת לבעל הלכות כל קושיות הרב שהרי הם אומרים בכולם ניתנו למשה בסיני.

<sup>721</sup> Ibid:

והנה הרב תלה הר נופל הזה בחוט השערה. אמר [עמ' נג - ד] העיקר אשר הועילונו בו עליהם השלום והוא אמרם אין מקרא יוצא מידי פשוט והיות לשון התלמוד מחפש בכל מקום ואומר גופיה דקרא במאי משתעי. וחס ושלום כי המדרשים כולם בענין המצות אין בהם מקרא יוצא להם מידי פשוטו אלא כולם בלשון הכתוב נכללים אף על פי שהם מרבים בהם בריבויים. ואין מדרש כבוד תלמידי חכמים

*Torah* to the effect that all of the wisdom given to Moshe is embedded in the biblical text in one form or another.<sup>722</sup> It stands to reason that Ramban's wider and more dynamic conception of the biblical verse's meaning partly explains his attempt to unearth novel halakhot, and to locate novel sources for established halakhot, in the biblical text itself.

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מלשון את י"י אלהיך תירא מוציא הכתוב מפשוטו. וכן אם נאמר בכי יקח איש אשה שהוא בכסף אינו מוציא ממשמעו ופשוטו. ולא כל אתין וגמין וריבויין ומעוטין ואכין ורקין ושאר המדרשים כולם. אבל הכתוב יכלול הכל כי אין הפשט כדברי חסרי דעת הלשון ולא כדעת הצדוקים. כי ספר תורת י"י תמימה אין בה אות יתר וחסר כולם בחכמה נכתבו.

<sup>722</sup> Introduction to the Commentary on the Torah:

כל הנאמר בנבואה ממעשה מרכבה ומעשה בראשית והמקובל בהם לחכמים תולדות עם ארבע הכחות שבתחתונים כח המחצבים וכח צמח האדמה ונפש התנועה והנפש המדברת בכלם נאמר למשה רבינו בריאתם וכחותם ומהותם ומעשיהם ואפיסת הנפסדים מהם והכל נכתב בתורה בפירוש או ברמז...

וכל הנמסר למשה רבינו בשערי הבינה הכל נכתב בתורה בפירוש או שרמוזה בתיבות או בגימטריאות או בצורת האותיות הכתובות כהלכתן או המשתנות בצורה כגון הלפופות והעקומות וזולתן או בקוצי האותיות ובכתריהם.

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