

HALAKHA AND METZIUT (REALIA) IN MEDIEVAL  
ASHKENAZ: SURVEYING THE PARAMETERS AND  
DEFINING THE LIMITS

EPHRAIM KANARFOGEL\*

I

Even a cursory perusal of the literature of the *rishonim* brings the reader face to face with the ways in which medieval halakhists dealt with social realia that appeared, *prima facie*, to conflict with talmudic law. On the very first page of tractate Avoda Zara, for example, *Tosafot* poses a brief but weighty question. In light of the clear Mishnaic (and talmudic) restrictions enunciated in regard to doing business with idolaters on the days preceding their holidays or religious observances (and certainly on these days themselves), how is it that Jews do business with Christians on Christian holy days as a matter of course? Or, to put it more precisely, upon what authority does the Jewish community rely?<sup>1</sup>

*Tosafot* and other parallel Ashkenazic rabbinic texts<sup>2</sup> suggest a series of explanations, which can be broken down into two basic categories or approaches. One approach maintains that societal conditions or attitudes had changed since the talmudic period (for example, Christians are not genuine or dedicated idolaters; refusal to do business with the Christians would generate unmitigated enmity). Moreover,

\* E. Billi Ivry Professor of Jewish History, and Chair, Rebecca Ivry Department of Jewish Studies, Stern College for Women/Yeshiva University. An earlier version of this study was presented at the tenth annual conference of the Yeshiva University Orthodox Forum (New York, 1998).

1 "על מה סמכו העולם לשאת ולתת ביום איד העבודת כוכבים עמהם" *Tosafot*, Avoda Zara 2a s.v. *asur laset velatet imahem*, and *Tosafot R. Elhanan*, ed. David Frankel (Husiatyn: 1901), ad loc.

2 See, e.g., *Sefer Or Zarua*, part 4, Piskei Avoda Zara, secs. 95–102; *Sefer Raban*, sec. 288 (at the beginning of Avoda Zara); R. Barukh b. Isaac, *Sefer Hateruma*, Hilkhhot Akum, sec. 134; and cf. *Hidushei Talmidei Rabeinu Yona Al Masekhet Avoda Zara*, ed. H. Zarkowsky (NY: 1995), 2–4. *Sefer Hateruma*, sec. 134, was partially censored; see Israel Ta-Shma, *Ritual, Custom and Reality in Franco-Germany, 1000–1350* (Hebrew), (Jerusalem: 1996), 245, n. 17.

accommodation for these types of changes was anticipated and provided for by the Talmud itself, allowing ample justification for the prevailing Ashkenazic practices.

A second approach, espoused in this case (and in other instances as well) by Rabbenu Tam, suggests that the underlying Mishnaic and other rabbinic texts in question can be (re-)interpreted in a way that obviates the problem entirely. According to Rabbenu Tam, the primary concern of the Mishnah and its attendant texts was to ensure that Jews did not provide idolaters with animals or materials that could then be offered in idolatrous service (מיירי דתקרות). *Tosafot* asserts that for Rabbenu Tam, even if Christianity and Christian worship are judged to be forms of idolatry, the only thing that can be considered an offering is money. Only if a Jew were to lend or give a Christian money, without interest, would a problem arise. All other business exchanges and transactions were permitted, without any restriction. As *Tosafot* concludes, "there is no reason to wonder, according to the approach of Rabbenu Tam, at the common Jewish practice of doing business with Christians, even on Christian holy days" (ולפי פר"ת אין לתמוה על מנהג העולם).<sup>3</sup>

Significant attention was focused on the interplay between realia (*metziut*) and halakha in Ashkenaz by a series of Israeli scholars writing in the mid-1950s and early 1960s, including Shalom Albeck,<sup>4</sup> E.E. Urbach,<sup>5</sup> Haim Hillel Ben-Sasson,<sup>6</sup> and Jacob Katz.<sup>7</sup> Almost all the cases investigated and treated by these scholars were in the realm of economic or monetary law,<sup>8</sup> and involved interactions with non-Jews.

3 Ri's son R. Elhanan (a grand-nephew of Rabbenu Tam) maintains (see above, n. 1) that even monies given to Christian clergymen (collection offerings) were not being given principally for idolatry itself, but for the personal benefit of these individuals.

4 "Rabbenu Tam's attitude to the problems of his time" (Hebrew), *Zion* 19 (1954), 104–141.

5 *The Tosafists* (Hebrew) (Jerusalem: 1955), esp. 55–80 (1980 ed., 1:60–93).

6 In his review of Urbach's *The Tosafists*, entitled "Torah leadership" (Hebrew), *Behinot Bevikoret Hasifrut* 9 (1956): 46–49.

7 *Exclusiveness and Tolerance* (Oxford: 1961), esp. chs. 3–5. Cf. idem, *Halakha and Kabbala* (Hebrew), (Jerusalem: 1986), 2–3, 344–346.

8 Albeck, "Rabbenu Tam's attitude," n. 4 above, 105, raises the possibility that Rabbenu Tam's position on counting a minor as the tenth person in a *minyan* was related to the small size of the northern French communities, but he then acknowledges that this factor may not have been decisive. Cf. I. Ta-Shma, "By the power of the Holy Name — the history of a forgotten custom" (Hebrew), *Sefer Bar Ilan* 26–27 (1995), 389–399.

They considered questions such as the following: how did the communities of medieval Ashkenaz, which had extensive and vital business dealings with Christians, square their practices and interactions with talmudic passages that restricted the ability of a Jew to accept the oath of a non-Jew, and restricted, for related reasons, the types of commodities that could be bought or sold? How did Jews, whose involvement in money-lending became more entrenched and pervasive as the Tosafist period progressed, justify this in light of talmudic *sugyot* that appeared to look down on any form of interest-bearing or usurious loans, including those between Jews and non-Jews? How did Jews involved in viticulture deal with the unavoidable (and often necessary) presence and activity of non-Jews during various phases of the production process, which could easily render the wine unfit both for consumption by Jews, and as a source of livelihood and profit?

The ability of halakhists to deal effectively with these types of societal situations and economic realities might be viewed simply as a partial or modified *pikuah nefesh* argument. If Jews had to be involved in certain professions in order to survive, it was necessary that they be given the means to do so. This goal is most easily achieved when the immediate prohibitions are fundamentally rabbinic in nature, and where talmudic law itself appears to make provisions for economic exigencies.<sup>9</sup> *Tosafot* argues, for example, that the high levels of taxation imposed by kings and other noblemen or feudal rulers render all economic initiatives extremely vital for one's livelihood (לפי שיש עלינו מס מלך ושרים והכל כדי חייו). Thus, lending money to non-Jews at interest need not be curtailed in any way, despite the rabbinic notion (expressed by R. Nahman in the name of R. Huna) that usurious transactions with non-Jews may have a corrupting effect on the Jewish lender. The Talmud itself maintains that this possible effect is not to be taken into consideration if the Jew's livelihood is in jeopardy.<sup>10</sup> Similarly, Rabbenu Tam, who permitted one Jew to lend money to another at interest by using a non-Jew as a middleman (so that the first Jew was actually lending to the non-Jew, who in turn became the lender to the second Jew), made the following statement in support of

9 Any changes in realia whose impact was measured in purely economic terms could also be addressed more easily, utilizing the principle of "valid confiscation by a rabbinical court" (*hefker beit din hefker*).

10 See *Tosafot*, Baba Metzia 70b s.v. *tashikh lo sagi delav hakhi*; *Sefer Or Zarua*, part 3, Piskei Baba Metzia, secs. 207–208; and *Tosafot*, Kidushin (below, n. 17).

his view: "It appears to me to be completely permitted, and indeed a meritorious act that provides sustenance for Jews, to have the borrower transfer the pawns to a non-Jew who will then interact with the lender. This is not a subterfuge but is perfectly legal. ... In order that all know that this is completely permitted, I have expressed myself on this matter at length."<sup>11</sup>

And yet, Rabbenu Tam's formulation points in a direction other than pure economic survival. Rabbenu Tam stresses the fact that his ruling renders the practice completely permitted (*heter gamur*). His answer is not couched as a concession to financial exigencies or other temporal realities.<sup>12</sup> Rabbenu Tam also upholds, in strong terms, the rights or prerogatives of the individual in other situations that are essentially economic but which have wider implications, such as the power of the majority in matters of communal government, and the applicability or scope of the *herem hayishuv* (ban on settlement) in his day.<sup>13</sup>

Moreover, Rabbenu Tam and other Tosafists dealt with issues of social concern related to ritual practices and customs with no economic implications. In a pioneering study, Jacob Katz traced the solutions proposed by Ashkenazic halakhists to justify the widespread custom (prevalent throughout medieval Europe, as it had been already in the Geonic period) of praying the evening service before the stars came out, which appears to run counter to talmudic law. Katz demonstrates that unlike Geonic, Spanish and Provençal halakhists, who tended to maintain that the correct procedure was to pray after the stars had come out, and did not try in a meaningful way to justify the practice of their communities, Tosafists, including Raban, Rabbenu Tam and Ri, offered interpretations and constructions that defended the existing

11 "Venire beeinai heter gamur umitzva min hamu'har latet mihya livnei brit shemutar lalove velamalve sheyiten halove hamashkonot leyad goy...ki ein ze haarama ela din gamur...lemaan daat kol adam shehu heter gamur heerakhti badavar." See *Sefer Or Zarua*, sec. 202, and *Responsa Maharam Rothenburg* (Prague ed.), #796.

12 Note too the phrase in R. Tam's *Sefer Hayashar* (Helek Hasheelot Utshuvot), ed. Shraga Rosenthal (Berlin: 1898), 131: "We may not invent reasons, but must proceed only on the basis of law" (*veein lanu levadot taamim ela al pi hahalakha*).

13 See Urbach, n. 5 above, 1980 ed., 1:91; and my "The development and diffusion of unanimous agreement in medieval Ashkenaz" in I. Twersky and J. Harris (eds.), *Studies in Medieval Jewish History and Literature III* (Cambridge, MA: 2000), 21-44.

custom as authentic and accurate. Indeed, Rashi himself had already provided a measure of justification for this custom. It should be noted that the justifications suggested by the various Tosafists differ, with Rabbenu Tam, once again, offering the most innovative approach.<sup>14</sup>

This case further demonstrates that the Tosafists who resolved possible conflicts between *metziut* and halakha were not simply trying to extricate the people of their day from difficult societal and economic situations. Also at stake for the Tosafists in this instance, and in most of the situations described above, was the fact that established Ashkenazic custom, which pre-dated the twelfth century and reflected the practices of a bona fide "holy community" (*kehila kedosha*), appeared to be at odds with the corpus of the Oral Law. Both Rabbenu Gershom and Rashi were aware of certain discrepancies, and occasionally offered their own solutions. It fell to the Tosafists of the twelfth century, however, and to their students, to not only systematically reconcile divergent talmudic and rabbinic sources, but also to reconcile these sources with accepted contemporary usage.<sup>15</sup>

Interestingly, Tosafists offered justifications and resolutions even in instances where the precise origins of the customs and practices in question were not indicated, suggesting that veneration of pre-Crusade customs was not predicated solely on any specific approbation given them by earlier rabbinic scholars. The nature and dedication of the Ashkenazic community itself, both before the First Crusade and after, played a role in the positions taken by its halakhic leaders. Jacob Katz has suggested that lay members of the medieval Ashkenazic community

14 See J. Katz, "Alterations in the time of the evening service: an example of the interrelationship between religious custom, halakha, and the social background" (Hebrew) *Zion* 35 (1970), 35–60 (also in *Halakha and Kabbala*, n. 7 above, 175–200). In his *Goy Shel Shabat* (Jerusalem: 1984), 43–56 [also available in English translation], Katz outlines the accepted (permissive) practices with regard to the services non-Jewish servants could perform in Jewish homes on the Sabbath. In this instance, there was a difference between northern French and German customs within Ashkenaz. See also Ta-Shma, n. 2 above, 149–167. For additional examples of halakhic adjustments due to realia in ritual and other non-economic contexts in medieval Ashkenaz, see Eric Zimmer, *Society and its Customs* (Hebrew), (Jerusalem: 1996), 163–167; E. Kanarfogel, "The 'aliyah of 'three hundred rabbis' in 1211: Tosafist attitudes toward settling in the land of Israel," *JQR* 76 (1986), 191–215; idem, "Rabbinic authority and the right to open an academy in medieval Ashkenaz," *Michael* 12 (1991), 233–250; and see n. 8 above.

15 See Katz 1961, n. 7 above, 28–29.

can be characterized by both a strong “ritual instinct,” an intuitive ability to avoid overstepping the boundaries of Jewish law, and a high degree of fealty to their rabbinic authorities (*kefifa lasamkhut*), that is, by a strong likelihood that they would follow what was prescribed by their rabbinic decisors.<sup>16</sup>

These tendencies were less prevalent, however, in non-Ashkenazic societies of the Middle Ages, which helps explain the differing profiles adopted by Ashkenazic and non-Ashkenazic *rishonim* in dealing with social and human concerns in the application of halakha. As the case of the time for the evening service indicates, Spanish and Provençal halakhists, and their Geonic predecessors, did not generally manifest a desire to find solutions to conflicts between *metziut* and halakha, as did the Tosafists.<sup>17</sup> In underscoring (and accounting for) this difference, Haym Soloveitchik has written:

They [the scholars of Provence and Spain] never imagined that contemporary conduct was informative of talmudic law, that the deeds of the common folk were revelatory of Divine intent. 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.<sup>18</sup>

## II

Israel Ta-Shma has recently compared and contrasted the views of modern scholars on the string of lenient rulings offered by Ashkenazic

16 See Katz 1984, n. 14 above, 173–183, and see also Zimmer, n. 14 above, 232–233. Katz’s approach assumes that the practices in question were never undertaken for dishonorable reasons, thereby minimizing any differences between practices adopted, initially, by rabbinic figures, and those of laymen. Cf. my “Rabbinic attitudes toward nonobservance in the medieval period,” in Jacob Schacter (ed.), *Jewish Tradition and the Non-Traditional Jew* (Montvale, NJ: 1992), 30–35.

17 This is largely true even for those Spanish and Provençal *rishonim* who are considered students of the Tosafists. See, e.g., my “Rabbinic attitudes,” *ibid.*, 17, n. 43, 33; and see n. 18 below. Cf. *Tosafot*, bKidushin 41a s.v. *asur laadam*; *Mordekhai*, Ketubot, sec. 179; Maimonides, *Code*, Laws concerning Marriage 3:19; and Ta-Shma, n. 2 above, 151–160, 241–253.

18 H. Soloveitchik, “Religious law and change: the medieval Ashkenazic example,” *AJS Review* 12 (1987), 211–212, 221, and see also *idem*, *Pawnbroking: A Study in the Inter-Relationship Between Halakha, Economic Activity and Communal Self-Image* (Hebrew), (Jerusalem: 1985), 111–112, 119.

halakhists, and by Rabbenu Tam in particular, in situations of social need that were occasioned by changes or developments in the realia of their day.<sup>19</sup> Ta-Shma groups the views into two broader classes. The first includes solutions (proposed by Urbach, Albeck and Ben-Sasson) that attempt to identify Rabbenu Tam's intentions in his lenient rulings (that is, to ascertain how much weight, if any, should be given to societal needs, economic realities and the like), in light of his insistence (against the claims of R. Meshulam of Melun and others) that entrenched ritual customs and popular religious practices ought not be modified or streamlined, even when there was some halakhic basis for doing so.<sup>20</sup>

The second class, represented principally by Jacob Katz, stresses that Rabbenu Tam and the Tosafists were not the initiators of the lenient rulings and changes. Rather, the Ashkenazic community as a whole gradually accepted certain customs and usages over a period of time. The primary role of the Tosafists was to ratify those changes that were acceptable within traditional bounds, and to rule out any violations. As such, the focus was not so much on the broad halakhic tendencies or sensitivities of Rabbenu Tam and his colleagues, but rather on the nature of the community and the direction in which it was moving.

This is also the approach taken by Haym Soloveitchik, who maintains that it was the self-image of the medieval Ashkenazic community that allowed it to adopt practices and customs that appeared, prima

19 "Halakha and reality — the Tosafist experience," in Gilbert Dahan et al. (eds.), *Rashi et la culture juive en France du Nord au moyen age* (Paris: 1997), 315–329. This article is essentially an English translation, and partial re-working, of the third and fourth sections of the opening chapter of Ta-Shma 1996, n. 2 above, 19–35.

20 See above, nn. 4–6. According to Urbach, where vexing economic problems were involved, Rabbenu Tam sought to find lenient solutions, even as he wished to preserve the more stringent practices in other areas of Jewish law and ritual where such problems did not arise. It is therefore impossible to speak only of lenient tendencies with regard to Rabbenu Tam. Albeck maintains that Rabbenu Tam purposely pursued lenient rulings as a matter of common patterns of logical thinking, as well as the sense of justice prevalent in his day. Ben-Sasson argues, on the other hand, that while Rabbenu Tam understood that his lenient rulings would impact favorably on the people, he arrived at the interpretations that led to these conclusions without any pre-conceived notions or agenda. Rabbenu Tam believed that his interpretations and novellae (*hidushim*) penetrated the core of the meaning of the talmudic text, bringing the beneficent intentions of the Talmud to the fore.

facie, to conflict with talmudic law. The Ashkenazic community, due to a strong sense of its own religiosity, was confident that there were ultimately no disparities between its practices and Jewish law, and its halakhists were committed to aligning the law with accepted practice and tradition.<sup>21</sup>

Ta-Shma himself favors an approach that lies somewhere between the two categories just described. Employing interpretational models found among jurists in Pavia during the eleventh and twelfth centuries, as analyzed in the work of Charles Radding, Ta-Shma contrasts the methodology of pre-Crusade talmudic scholarship with Tosafist methodology. Pre-Crusade scholarship is characterized by extreme attention to linguistic and grammatical details and questions, and a desire to interpret texts according to their own narrow conceptions. The Tosafists, on the other hand, like the later Pavian jurists, were able to be more flexible in their interpretation of talmudic texts, and to examine the meanings of individual laws against more general legal conceptions.<sup>22</sup> The Tosafists' ability to address issues of *metziut* and halakha, and the lenient rulings that emerged, were not the result of a commitment on their part to resolve halakhic dilemmas along the lines of some particular pattern. Rather, these developments resulted from a new interpretive direction that elevated dialectic and harmonizing casuistry to a central position. In addition to their impact on direct textual interpretation, these methodologies opened new avenues and possibilities with regard to the interface between interpretation and practical application.

The wide range of views we have encountered in discussing various aspects of *metziut* and halakha in medieval Ashkenaz is ample evidence of the subtleties and complexities that pervade this subject. Indeed, as the first section of our study has shown, it is difficult to completely separate the various approaches described by Ta-Shma. Nevertheless, we have sketched the basic parameters involved, and outlined the theories that modern scholarship has put forward to

21 See Soloveitchik 1987, n. 18 above, 205–221. Ta-Shma 1996, n. 2 above, does not discuss Soloveitchik's view, though he mentions (p. 35, n. 22) that he is publishing a critique of it in a forthcoming study. See his, "The attitude of German halakhists to Aggadic sources: suicide and the killing of others as *kidush hashem*" (Hebrew) in Y.T. Assis et al. (eds.), *Facing the Cross* (Hebrew), (Jerusalem: 2000), 150–157.

22 Cf. my *Jewish Education and Society in the High Middle Ages* (Detroit: 1992), 69–74.



explain some rather interesting halakhic developments in medieval European Jewish society.

In the remainder of this study, I would like to move beyond these established parameters and discuss two additional questions. First, is there any evidence for stringent tendencies with regard to halakha and realia (מצוות והלכה להזמרא) in medieval Ashkenaz? That is, do Tosafists and other Ashkenazic halakhists accept and justify popular practices that appear to be more stringent than talmudic law, and if so, what strategies do they employ in so acting? The case for this part of the discussion will be the Ashkenazic responses to challenges of martyrdom (*kidush hashem*), which often entailed suicide or even the killing of others in the face of persecution, actions not easily countenanced by talmudic law.<sup>23</sup> Second, given the evidence for medieval Ashkenazic halakhists who, in light of various societal concerns, suggested or ratified customs and practices that appeared, at first blush, to diverge from talmudic law, do we find similar attitudes in cases involving more narrow human concerns or dilemmas? To address this question, a series of rulings by the Tosafist R. Tuvyah b. Elijah of Vienne<sup>24</sup> will be examined.

### III

A number of recent studies have reopened and refocused the question of how Ashkenazic Jewry justified the responses of suicide and the killing of family members in the face of severe persecution by Christians. In the perceived absence of bona fide halakhic discussion of these matters, two overarching theories have emerged. One proposes that the Ashkenazic community, with its high degree of piety and religious fervor, and the self-image these attitudes engendered, extended the parameters of the precept of *kidush hashem* to include not only voluntary martyrdom, but also suicide and the killing of others. To express

23 See Maimonides, *Code*, Laws concerning the Fundamental Principles of the Torah 5:1–5, and below, n. 42. Cf. Ta-Shma 1996, n. 2 above, 201–215, for the sustained stringency in medieval Ashkenaz concerning the status of the first-born offspring of a non-kosher animal in the Diaspora (*bekhor beheima tmeia behutz laaretz*).

24 Vienne is located in central eastern France, and is considered part of *Tzarfat*. It should not be confused with the Austrian city of Vienna. R. Tuvyah was a contemporary and close colleague of R. Yehiel of Paris. See Urbach 1980, n. 5 above, 1:486–492, and below, n. 93.

this development another way, the actions of Ashkenazic martyrs were considered, by their community, to represent Divine intent. These actions were therefore not only fully justified, but even worthy of emulation.<sup>25</sup>

A second view argues that Ashkenazic Jewry accepted as halakhic dicta the various models and guidelines for responses in situations of *kidush hashem* that are found in Midrashic and Aggadic literature. Although a number of medieval authorities did not consider Aggadic literature to be an appropriate source for halakhic practice,<sup>26</sup> it is possible to demonstrate that there were Ashkenazic rabbinic scholars who looked to the corpus of talmudic Aggada as an authentic legal source.<sup>27</sup> To be sure, instances of suicide in the name of *kidush hashem* can be documented more easily than situations involving the killing of others.<sup>28</sup> Interestingly, two pieces of manuscript evidence suggest that R. Judah Hehasid, among other Pietists, considered the ending of one's life through suicide to be a valid form of expiation of sin in certain circumstances.<sup>29</sup>

25 See Soloveitchik 1987, n. 18 above.

26 See, e.g., *Encyclopedia Talmudit* (Hebrew), v.1 (Jerusalem: 1973), 132; Menahem Elon, *Jewish Law* (Hebrew), (Jerusalem: 1988), 1:85–86.

27 See Avraham Grossman, "The origins of *kidush hashem* in early Ashkenaz" (Hebrew) in I. Gafni and A. Ravitzky (eds.), *The Sanctity of Life and Martyrdom* (Hebrew), (Jerusalem: 1993), 99–130; Ta-Shma, n. 21 above. In a paper presented recently at Tel Aviv University, Ta-Shma made this point with respect to a responsum of Ri regarding an informer that is preserved in Rabad's *Temim Deim* (Warsaw: 1897), sec. 203.

28 Cf. Louis Rabinowitz, "The Massada martyrs according to the halakhah," *Tradition* 11 (1970): 31–37; idem, "The zealots' suicide at Massada" (Hebrew), *Sinai* 55 (1964), 329–332; R. Shlomo Goren, "The bravery at Massada in light of the halakha" (Hebrew), *Mahanayim* 87 (1964), 7–12; M.S. Neriah, "Suicide: the heroes of Massada in light of the halakha" (Hebrew), *Or Hamizrah* 8 (1961), 8–12.

29 See ms Bodl. 682, fol. 370r, and cf. Shlomo Spitzer, "Responsa of R. Judah the Pious on matters of repentance" (Hebrew), *Memorial Volume for R. Samuel Baruch Verner* (Hebrew), J. Buksbaum (ed.), (Jerusalem: 1996), 202; Simcha Emanuel in Avraham David (ed.), *From the Archives of the Institute for Microfilmed Manuscripts* (Hebrew), (Jerusalem: 1995), 105; and Ta-Shma 2000, n. 21 above. See also ms Paris (Bibliothèque Nationale) 1408, fol. 31 (sec. 88), and cf. Ephraim Kupfer, "A contribution to the chronicles of the family of R. Moses b. Yom-Tov 'the Noble' of London" (Hebrew), *Tarbiz* 40 (1971): 384–387; Urbach, n. 5. above, 2:498–499; Grossman, n. 27 above, 126–127; and idem, *The Early Sages of France* (Hebrew), (Jerusalem: 1995), 503–504. On suicide as a form of expiation of sin, see also R. Jacob Reischer, *Responsa Shevut Yaakov*, 2:111; idem, *Iyun Yaakov* on bKidushin 81b s.v. *salik veka yativ begave*; and Hida, *Birkei Yosef*, YD 345:2.

To properly assess the role of rabbinic decisors in this regard, we must consider several Tosafist formulations that have not, to my mind, received sufficient attention or analysis. Although these formulations address different aspects of martyrdom, what is common to them, and to their authors, suggests that at least some members of the rabbinic leadership of Ashkenaz did attempt to relate to these issues in conventional halakhic terms. These rabbinic scholars may well have been primarily interested in justifying the actions of their predecessors during the First Crusade and in similar contexts, but their formulations reflect more than self-image or the amassing of Aggadic texts.

Rabbenu Tam offers a cryptic justification of suicide in the face of conversionary efforts, a justification predicated on the effectiveness of torture. Rabbenu Tam was commenting on the talmudic passage describing the harsh death of R. Hanina (Hanania) b. Tradyon during the Hadrianic persecutions.<sup>30</sup> R. Hanina was tied up and set on fire, tufts of wool that had been soaked in water having been placed near his heart to prolong his fiery death. When his students asked R. Hanina why he did not open his mouth and allow the flames to end his life more quickly, he responded that Jewish law prohibits suicide even in this situation — “Better that the One who gave life should take it, but a person should not harm himself (*veal yahbol hu beatzmo*).”

The comment of Rabbenu Tam reads: “Rabbenu Tam stated that when a person harms [and kills] himself ( *הרעיל והורג את עצמו* ) because he is fearful that non-Jews may compel him to transgress the Torah through torture or blows or a cruel death that he will not be able to withstand, he fulfills a religious precept when he harms himself ( *מצוה לחבול בעצמו* ).”<sup>31</sup> This ruling proposes that in a case unlike that of R. Hanina b. Tradyon, who was headed toward certain (albeit slow) death, if a Jew is concerned that a Gentile will resort to torture or other harsh physical means to compel him to violate cardinal sins (such as

30 bAvoda Zara 18a.

31 “Omer rabeinu tam deheikhi dehovet vehoreg et atzmo mihamat shemityare shelo yahfuhu goyim al yedei yisurim umakot umita raa yoter laavor al divrei tora veyira shelo yukhal laamod bahem — mitzva lahbol beatzmo.” See *Tosafot*, Avoda Zara 18a s.v. *veal yahbol hu beatzmo*. *Tosafot R. Elhanan* (see above, nn. 1, 3) attributes this ruling simply to R. Jacob. More significantly, in *Tosafot R. Elhanan*, the passage concludes with the phrase “he is **permitted** to harm himself ( *מותר לחבול בעצמו* ).” On the use of Aggada as a source for halakhic practice in the thought of Rabbenu Tam, see *Sefer Hayashar*, n. 12 above, 81, 85.

idolatry or adultery, which must be avoided even on pain of death), and the Jew is fearful he will be unable to maintain his convictions in face of the impending onslaught, he is permitted to take his own life (in advance, as it were) to avoid being compelled to commit any of these cardinal sins.

Rabbenu Tam's apparent extension of the talmudic passage to cover a situation different than that faced by R. Hanina b. Tradyon is fairly common in Tosafist methodology.<sup>32</sup> Nonetheless, *Tosafot R. Elhanan* considers the talmudic proof-text adduced by Rabbenu Tam in support of his ruling to be somewhat lacking. The proof-text<sup>33</sup> is the account of how 400 young men and women (*yeladim*) who had been taken captive in order to be violated (נשבר לקלוין), cast themselves into the sea to avoid the illicit acts that would be demanded of them.<sup>34</sup> *Tosafot R. Elhanan* notes that in this case, the young people had no other way to avoid committing the illicit acts, as they were being held captive. This is not necessarily so, however, in the situation addressed by Rabbenu Tam. *Tosafot R. Elhanan* goes on to ratify Rabbenu Tam's ruling despite the distinction raised. At the same time, the weight or authority of this ruling is characterized as logical inference (*svara*), suggesting to some that Rabbenu Tam considered the permissibility of suicide in the face of persecution to be axiomatic, even in the absence of any firm talmudic proof-texts.<sup>35</sup>

And yet, two other elements of Rabbenu Tam's formulation, which have not been discussed by modern scholars, suggest that Rabbenu Tam proceeded with an eye to maintaining the standard halakhic character (and weight) of his ruling. Variant *Tosafot* texts cite an additional source, a passage in *Genesis Rabbah*, in support of R. Tam's view. The *Midrash* views King Saul's plan to kill himself rather than to allow

32 See, e.g., Urbach, n. 5 above, 2:676–680, 734–744.

33 bGitin 57b.

34 A parallel passage in *Lamentations Rabbah*, Buber ed. (Vilna: 1899), 81 on the verse "For these things I weep" (Lam. 1:13), characterizes this incident and its participants as follows: "Vespasian filled three ships with men and women from the finest families of Jerusalem, to participate in mortifying acts" (*aspasianus ... mile shalosh sfinot anashim venashim migdolei yerushalayim lehaamidan lekalon beromi*). On the nature of the acts that were being demanded, see R. Elijah Joseph Rivlin, *Ohalei Yosef* (Jerusalem: 1868), 1b–2a.

35 See Soloveitchik 1987, n. 18 above, 210, n. 8, and Robert Chazan, *European Jewry and the First Crusade* (Berkeley: 1987), 156–157.

himself to be captured by the Philistines as a proper act.<sup>36</sup> This act is seen by the *Tosafot* texts as another example of permissible suicide, in that its goal is *kidush hashem*.<sup>37</sup>

Nonetheless, using the case of Saul to justify suicide in face of persecution has several palpable weaknesses. First, did Saul wish to kill himself to avoid being tortured by the Philistines into committing illicit acts, or did he do so to avoid the desecration of the Name of Heaven (*hilul hashem*) that would occur were a king of Israel captured and degraded by his enemies in front of his subjects? The latter purpose would provide less of a justification for the common Jew facing religious persecution. In addition, as other medieval Ashkenazic texts note, there is a dissenting rabbinic view that holds that King Saul acted inappropriately in seeking to end his life.<sup>38</sup> A close analysis of the *Tosafot* texts that cite the Midrash Rabbah passage about Saul shows that Rabbenu Tam himself never offered this passage as proof for his ruling,<sup>39</sup> thereby avoiding the difficulties just described.

Moreover, the core of Rabbenu Tam's formulation reflects an additional talmudic construct, on which it appears to have been based. The notion that torture may cause a Jew to succumb to an idolater's demands and commit idolatry (in the standard *Tosafot* Avoda Zara text, "lest the idolaters cause him to transgress through torture that he cannot withstand

36 See Midrash Rabbah 34 (on Gen. 9:5, "And even your blood of your lives will I require; at the hand of every beast will I require it" (*veakh et dimkhem lenafshoteikhem edrosh miyad kol haya edrashenu*)): "'Even' (*akh*) — to include one who strangles [kills] himself. Does this also include [King] Saul? No, this is excluded by 'even.' Does this include Hanania, Mishael and Azaria? No, this is excluded by 'even'" (*akh lehavi et hahonek [et] atzmo yakhol keshaul talmud lomar akh yakhol kehanania mishael veazaria talmud lomar akh*). See also Midrash Shmuel, parasha 24 (Lev. Rabbah, parasha 26:7).

37 See *Tosafot Harash Mishanz* (R. Samson of Sens) on Avoda Zara 18a (in *Shitah Hakadmonim Al Masekhet Avoda Zara*, ed. M.Y. Blau [NY: 1969], 65); *Gilyonei Hatosafot* cited in *Hidushei Haritva Lemasekhet Avoda Zara*, ad loc.; and *Tosafot Hakhmei Anglia Al Masekhet Avoda Zara*, ed. S. Sofer (Jerusalem: 1971), 151. See also R. Isaac of Corbeil, *Sefer Mitzvot Katan*, commandment 3; and R. Abraham b. Azriel, *Arugat Habosem*, ed. E.E. Urbach (Jerusalem: 1939), 1:222.

38 See *Sefer Orhot Haim Lerabi Aharon Hakohen Milunel*, part 2, vol. 1, ed. Moses Schlesinger (Berlin: 1899), 26 (sec. 4, the law of loving and fearing the Almighty); *Tosafot Hashalem*, ed. Jacob Gellis (Jerusalem: 1982), 262; and Chazan, n. 35 above, 155–156.

39 See above, n. 37.

(פן יעבידום עובדי כוכבים עניניה כגון ע"י יסורין שלא יוכל לעמוד בהם) " is more than a personal observation by Rabbenu Tam about human nature and potential. The Talmud records the Amora Rav's statement that had Hanania, Mishael and Azaria been beaten, they would have bowed to King Nebuchadnezzar's idol (אלמלי נגדוה לחנניה מישראל ועזריה [הוון] פלחו לעלמא) and would not have sanctified God's Name by jumping or being pushed into the fire, as recorded in the Book of Daniel.<sup>40</sup>

This talmudic formulation was certainly known to Rabbenu Tam. Rabbenu Tam offers his own analysis of it when he interprets a talmudic passage earlier in tractate Avoda Zara, fifteen folio pages before, but in the same chapter as, the story of R. Hanina b. Tradyon's death.<sup>41</sup> The case of Hanania, Mishael and Azaria, as understood by Rav and supported by the talmudic *sugya* in Ketubot, unequivocally testifies to the power of torture in situations of *kidush hashem*, and places it in a halakhic framework. Although the story of Hanania, Mishael and Azaria is anecdotal, rather than a reflection of talmudic legal theory per se, the fact that this story is found in the biblical corpus gives it much greater weight in the halakhic context than the purely Aggadic rendition of the fate of the 400 young people. Indeed, Maimonides too supports his conception of *kidush hashem* (which was markedly different from that of his Ashkenazic contemporaries in that he did not recognize voluntary martyrdom of any kind) by citing Hanania, Mishael and Azaria as role-models who were prepared, appropriately, to give up their lives rather than submit to forced idol-worship.<sup>42</sup>

A possible difficulty with this analysis is that Rabbenu Tam does not mention the case of Hanania, Mishael and Azaria explicitly, even as he enunciates and employs its underlying principle. To be sure, a *Tosafot*

40 See bKetubot 33a–33b.

41 See below, n. 48.

42 See *Code*, Laws concerning the Fundamental Principles of the Torah 5:4; idem, *Book of Precepts*, positive commandment 9; *Igrot Harambam*, ed. Y. Shilat (Jerusalem: 1987), 1:41 (*Igeret Hashmad*), and cf. 1:24 (*Igeret Teiman*), and below, n. 46. Hanania, Mishael and Azaria are also assigned a significant role in the Crusade Chronicles. See, e.g., Chazan, n. 35 above, 117–121, 162–163, 220–221; Ivan Marcus, "From politics to martyrdom," *Prooftexts* 2 (1982), 45. See also the Aramaic liturgical poem about Hanania, Mishael and Azaria, and commentary thereon, in *Mahzor Vitry*, ed. S. Hurwitz (reprinted Jerusalem: 1969), 320–323, 337–338, and cf. Ta-Shma, "The commentary to the Aramaic *piyutim* included in the *Mahzor Vitry*" (Hebrew), *Kiryat Sefer* 57 (1982), 701–705.

text in Gitin that is clearly parallel to the Rabbenu Tam passage does cite the case of Hanania, Mishael and Azaria.<sup>43</sup> *Tosafot* Gitin opens with the position of R. Hanania b. Tradyon, which appears to contradict the response of the 400 young people (he did not commit suicide; they did). The *Tosafot* text resolves the apparent contradiction by maintaining that, “here [in Gitin, in the case of youngsters], they were fearful of the torture (*yereiim hayu miyisurin*), as demonstrated [by the *sugya*] in Ketubot that Hanania, Mishael and Azaria would have bowed to the *tzelem* had they been struck.” In the case of the young people, they were susceptible to being beaten and tortured as a means of coercion rather than simply killed if they resisted. They had not been captured in order to be killed; they were taken in order to be violated. In *Tosafot* Gitin, then, the case of Hanania, Mishael and Azaria is being used precisely as intimated in the formulation attributed to Rabbenu Tam in *Tosafot* Avoda Zara. But *Tosafot* Gitin does not mention the name of Rabbenu Tam.<sup>44</sup>

43 See *Tosafot* Gitin 57b s.v. *kaftzu kulan*. See also *Tosafot* Harosh ad loc., and ms Parma (Palatina) 325, fol. 198v.

44 R. Alexander Suslin Hakohen of Frankfurt (d.1349), in his *Sefer Aguda* on Gitin ad loc. (ed. E. Brizel, 73), attributes the *Tosafot* Gitin passage to R. Isaac of Dampierre (Ri):

כ"י הגא דאמר בע"א מרוב שיטלנה מי ושנתנד ואל יחבד הוא נעצמו הכא יראים מיסודים  
כדאמרין אלמדה אנדו רבו .

The *Sefer Aguda* version concludes with the observation that “from here is a proof for those who kill themselves and their beloved children at the time of persecution” (*umikan semakh leotan shehorgin et atzmam veet beneihem bar minan beshaat gzeirot*). Ri was undoubtedly aware of R. Tam’s position, as suggested, also, by its inclusion in *Tosafot* R. Elhanan and *Tosafot* Shanz on Avoda Zara. See above, nn. 31, 37, and R. H.J.D. Azoulay (Hida), *Responsa Haim Shaal*, #46, but cf. *Tosafot* Baba Kama 91b s.v. *ela hai tana*; *Yam Shel Shlomo*, Baba Kama 8:59; and Soloveitchik, n. 35 above. The standard *Tosafot* Gitin are of French origin; see Urbach, n. 5 above, 2:633–634. The *Tosafot*’s comment in Gitin is also similar to one in Avoda Zara re the precision of its proofs; see text above at n. 39.

An anonymous Tosafist biblical compilation adduces a passage in Midrash Rabbah that construes the actions of Hanania, Mishael and Azaria as an allowance for an individual who is afraid he will be unable to withstand pressure to commit suicide; see nn. 36, 38 above, and n. 59 below.

Nonetheless, there are two ways to explain the fact that Rabbenu Tam does not refer explicitly to Hanania, Mishael and Azaria in *Tosafot Avoda Zara*. First, there is another talmudic passage, in *bBaba Metzia* 86a, which openly presumes the coercive powers of torture, and is interpreted in this manner by Rashi. The Talmud describes how Rabbah bar Nahmani, while being pursued by tax officers, stopped to help an innkeeper in need. Rabbah later asked the innkeeper not to disclose to the authorities that he had seen Rabbah. In his gratitude to Rabbah, the innkeeper stated that “if they threaten me with death, I will not reveal your presence. But if they torture me [in the Aramaic of the Talmud, “*vei negidei menagdin li*,” which Rashi interprets in Hebrew as “*veim yisruni*”], I will be forced to reveal the information.” This suggests that the effects of torture were readily known or assumed by the Talmud and its best-known interpreter. As such, the possible effects of torture, which the Talmud itself regards as self-evident, do not require additional proof.<sup>45</sup>

There may also be a more subtle reason why Rabbenu Tam was content to refer only to the concept that informed the actions of Hanania, Mishael and Azaria, without mentioning them by name.

45 R. Eliezer of Metz, a leading student of Rabbenu Tam, is cited in *Shita Mekubetzet* on *Ketubot* 33b s.v. *uvakuntresin katuv*, as holding the unusual view that one must give up only his life *al kidush hashem* (as per the literal reading of the biblical phrase, “with all your soul” (*bekhol nafshekha*). Torture (*yisurim*) is so harsh, however, that there is never an obligation to submit to it. This is the meaning of the talmudic passage — Hanania and the others would have submitted in the face of torture (beatings). Rabbenu Tam apparently responded to R. Eliezer’s claim with the description of what was done to R. Akiva, “they raked his skin with combs of iron and he did not submit” (*shesarku et besaro bemasreikot shel barzel velo palah*). R. Akiva endured both torture and death in the name of *kidush hashem* (and see also *Tosafot Ketubot*, n. 47 below). For R. Eliezer of Metz, the type of torture perpetrated on R. Akiva contributed directly to his impending death. Any form of sustained torture, such as lashes and beatings administered over a period of time (*haka sheein la kitzba*), need not be endured in the name of *kidush hashem*. The *Shita Mekubetzet* passage ultimately rejects the view of R. Eliezer, in favor of that of Rabbenu Tam. Cf. *Hidushei Haritva Lemasekhet Ketubot*, ed. M. Goldstein (Jerusalem: 1982), 281; *Tosafot Rid Al Masekhet Avoda Zara*, ed. N. Zaks (Jerusalem: 1979), 5–7, n. 24; *Responsa Maharik*, #24 s.v. *asher taan*; R. Elijah Joseph Rivlin, *Ohalei Yosef*, fols. 24a–25b; Ta-Shma, “Aspects of heroism in the halakha” (Hebrew), *Mahanayim* 87 (1964), 74–75; Edward Peters, *Torture*, NY: 1985, 40–73; n. 57 below.



There are talmudic *sugyot* which suggest that Hanania, Mishael and Azaria were acting *lifnim mishurat hadin*, doing more than what was obligatory according to the letter of the law.<sup>46</sup> In light of these *sugyot*, Rabbenu Tam interprets the *tzelem* to which they were being forced to bow down by Nebuchadnezzar as a representation of the ruler rather than an actual object of idolatry. Hanania, Mishael and Azaria were committing a voluntary act of *kidush hashem* for something that was not technically idolatry. In accordance with this view, Rabbenu Tam interprets Rav's statement that had Hanania, Mishael and Azaria been tortured they would have succumbed to the pressure and bowed to the *tzelem*, to mean that since torture can be more painful than death, they would not have acted *lifnim mishurat hadin* in the face of torture, but would have bowed down to it, since the *tzelem* was not really an idol in any event.<sup>47</sup>

On this interpretation, the power of torture, as indicated by the case of Hanania, Mishael and Azaria, is still presupposed. But the case itself could not be cited to justify suicide at a time of persecution, where actual idolatry was at stake, because the situations were not the same. Nonetheless, the key element for Rabbenu Tam in *Tosafot* Avoda Zara is the power of torture, which might cause simple Jews to succumb and commit cardinal sins, just as it would have persuaded the exceptionally righteous and steadfast Hanania, Mishael and Azaria to waver, at their own level, in a *lifnim mishurat hadin* context.<sup>48</sup>

46 See bPesahim 53b: "What caused Hanania, Mishael and Azaria to give themselves to the fiery furnace as a sanctification of the Name?" This implies that their response was not mandatory. See also bSanhedrin 93a, "And now I grasped just the one bough (*sinsan ehad*) of Hanania, Mishael and Azaria"; and cf. bTaanit 18b, "Hanania, Mishael and Azaria were totally righteous and were worthy that a miracle should have been done for them."

47 See *Tosafot* Avoda Zara 3a s.v. *shelo histahavu latzelem*; *Tosafot* Pesahim 53b s.v. *ma rau hanania mishael vaazaria*; *Tosafot* Ketubot 33b s.v. *ilmale nigduhu*; *Tosafot Harashba Mishanz Al Masekhet Ketubot*, ed. Abraham Liss (Jerusalem: 1973), 62; *Sanhedrei Gedola*, v. 6 (Likutei Tosafot Shanz), ed. Y. Lifshitz (Jerusalem: 1974), 242 (sec. 289). Cf. *Hidushei Harashba Lemasekhet Ketubot*, ed. Moshe Hershler (Jerusalem: 1973), 102, citing Midrash Hazita (Song of Songs Rabbah), 7:8; and *Hidushei Haramban Lemasekhet Ketubot*, ed. Ezra Chwat (Jerusalem: 1990), 148.

48 *Nimukei Yosef*, Sanhedrin, ch. 8 at the end, writes that Hanania, Mishael and Azaria represent a paradigm (at least for devoted religious leaders) for giving up one's life for *kidush hashem*, even in situations where there is no obligation to do so: "But if a leading figure who is pious and Heaven-fearing

This explanation yields another important point. Had Rabbenu Tam wished to adduce an explicit, air-tight proof-text for suicide, he could have interpreted the *lifnim mishurat hadin* aspect of the case of Hanania, Mishael and Azaria as R. Isaac of Dampierre (Ri) did. According to Ri, genuine idolatry (*avoda zara*) was at stake (the *tzelem* was an actual figure of an idol and not merely a representation of the ruler), but Hanania, Mishael and Azaria could have escaped at some earlier point (as Daniel did). It was their decision to remain and to prepare themselves to die *al kidush hashem* that was beyond the letter of the law.<sup>49</sup>

Due to other considerations of talmudic exegesis, however, Rabbenu Tam preferred his approach.<sup>50</sup> Thus, even as Rabbenu Tam (in *Tosafot Avoda Zara*) sought to justify the actions of those who committed suicide, he did so according to his usual high standards of talmudic interpretation, relying on the acknowledged power of torture (*yisurim*) that emerges from the case of Hanania, Mishael and Azaria (and is presumed in other *sugyot* as well), while being careful to preserve what was unique about their act by not mentioning them by

---

sees that his generation is loose, he is permitted to sanctify the Name and give himself [to death] even over a simple precept, so that the people will see and will learn to fear the Name and to love Him with all their hearts (*aval im hu adam gadol vehasid yire shamayim veroe shehador parutz hakha reshai lekadesh hashem velimsor atzmo afilu al mitzva kala kedei sheyiru haam veyilmedu leyira et hashem Leahavo bekhlo libam vehainu deamrinan ma rau hanania mishael veazaria shehepilu et atzmam leavoshan haesh*)."

The approach of *Nimukei Yosef* can also shed light on the Maimonidean perspective on the actions of Hanania, Mishael and Azaria (above, n. 42). See Ta-Shma, "Giving up one's life out of devotion in Jewish law" (Hebrew), *Mahanayim* 41 (1960): 101–105; Efrat Yakovson, "Premeditated suicide" (Hebrew), *Michlol* 1 (1991): 53–54.

49 For Ri's interpretation, see *Tosafot Pesahim* 53b s.v. *ma rau*. See also *Sanhedrei Gedola*, n. 47 above, 241 (sec. 288); *Arugat Habosem*, n. 37 above; and cf. above, n. 44. For the interpretation of R. Meir, father of Rabbenu Tam, see also *Sefer Hayashar* (Helek Hahidushim), sec. 354, and *Tosafot Rashba Mishanz Al Masekhet Pesahim*, ed. M.Y. From (Jerusalem: 1956): 139.

50 For example, the *sugya* in *Avoda Zara* 3a compares Hanania, Mishael and Azaria (among other righteous figures) with Abraham. Abraham is credited with not committing idolatry (and allowing himself to be thrown by Nimrod into the furnace rather than so acting), while Hanania, Mishael and Azaria are credited with not bowing to the *tzelem*. This comparison clearly suggests that actual idolatry was not at stake in their case (as it was for Abraham).

name. Rabbenu Tam did not manipulate talmudic texts to serve his purpose when he sought to justify contemporary practices. Rather, he achieved his aim through incisive interpretation.<sup>51</sup>

#### IV

Ritva on Avoda Zara 18a, citing an otherwise unidentified marginal note or text in *Gilyonei Hatosafot*, indicates that those who killed their children and other family members at times of religious persecution, to prevent them from being compelled to convert to Christianity, did so, in part, on the basis of Rabbenu Tam's formulation. Although the coercive power of torture would certainly be applicable to children and other dependents, Rabbenu Tam himself never discussed the killing of others *al kidush hashem*. Indeed, there are virtually no medieval halakhic sources that discuss this type of action. Ritva notes unnamed "great scholars of France" (*gdolei tzorfat*) who ruled that it was permissible, but their rulings are not extant.

One of the only extant rabbinic statements of justification for killing others is a formulation attributed by R. Moses of Zurich to the leading German Tosafist of the late twelfth and early thirteenth centuries, R. Eliezer b. Joel Halevi (Rabia): "Those holy martyrs, who slaughtered themselves and their children when put to the test, because they did not want to rely on themselves [as the Rabbis said, do not trust yourself [not to sin] until the day of your death], and they were afraid lest they desecrate the Name of Heaven due to the pressure of compulsion, have all earned a share in the world to come, and are considered completely holy."<sup>52</sup> The fact that this ruling is found, however, in R. Moses of Zurich's fourteenth-century commentary on R. Isaac of Corbeil's *Sefer Mizvot Katan* (*Semak* of Zurich) raises questions

51 Cf. above, n. 20, and text at n. 22, and my "Unanimity, majority and communal government in Ashkenaz during the High Middle Ages," *PAAJR* 58 (1992), 79–106.

52 *Sefer Semak Mitzurikh*, ed. Y. Har Shoshanim, v.1 (Jerusalem: 1973), 57–58, cited by A. Grossman, n. 27 above, 115–116.

האיננו יתקיימים ששוחטו אנו עצמנו ורעים כשדאדו לירי וחינו תחיי שלא תפז כסמין עב דעתם  
 האמר רובתנו אל תאמין בעצמך עד יום פיתוי והוא יאמר שאל ידי אונס יהא שח שיחיה מרייל  
 על דעת רובת יש לתת חלקו לעולם הנה וכן יאמר גמור יאמר.

Rabia is referred to in this text by the name of his work, *Avi Haezri*.

about its authenticity, or at least about its attribution to Rabia.<sup>53</sup> Even if there are no other texts of its kind, confirming the attribution of this text to Rabia would give it great significance.

Recent manuscript research has revealed that this formulation by Rabia also appears in the work of a northern French Tosafist from the mid-thirteenth century, composed within one generation of Rabia. R. Abraham b. Ephraim (a student of the Tosafist R. Tuvyah of Vienne) authored a halakhic work, based on R. Moses of Coucy's *Sefer Mizvot Gadol*, entitled *Sefer Simanei Taryag Mitzvot*.<sup>54</sup> In discussing the precept of *kidush hashem*, R. Abraham reproduces the Rabia passage. It should be noted that *Semak* of Zurich cites a number of comments from the *Sefer Simanei Taryag Mitzvot*, and it is likely that the Rabia text reached the *Semak* of Zurich from R. Abraham's work.<sup>55</sup>

To be sure, R. Meir of Rothenburg, in his understated yet poignant responsum in defense of a Jew who had killed his family in anticipation of conversionary efforts during a pogrom in Koblenz, only to have his own life spared, does not cite the formulation of Rabia.<sup>56</sup> This would not be the only instance, however, in which a later Tosafist was unaware of a predecessor's formulation, even a momentous ruling such as that under discussion. Indeed, Maharam does not mention the formulation of Rabbenu Tam, discussed above, either, even as he presents elements of common material. R. Meir bases his defense, for the most part, on the imperative of not casting aspersions on (the positions

53 The very existence of the phenomenon indicates that there were Ashkenazic rabbinic leaders who approved, at least tacitly, of killing others at a time of religious persecution. On the other hand, unnamed as well as otherwise unknown rabbis are mentioned as holding that such actions are prohibited. See *Tosafot Hashalem*, n. 38 above, and Soloveitchik, n. 35 above.

54 See ms Paris 392 (Ashkenaz, 1271), fol. 5r; ms Paris 1408 (Ashkenaz, fourteenth century), fol. 175v. This passage was transcribed, as part of a larger selection, by Abraham Havazelet, "R. Abraham b. Ephraim's *Sefer Simanei Mitzvot*" (Hebrew), in David Lau (ed.), *R. Isaac Yedidya Frankel Memorial Volume* (Hebrew), (Jerusalem: 1992), 290–291. A later manuscript cluster omits the reference to *Avi Haezri*. For a description of the manuscripts and their interrelationship, see Havazelet's introduction to his transcription, 286–287. On the provenance and dating of this work, see also Ivor Wolfson. "The Parma colophon of Abraham b. Ephraim's *Book of Precepts*," *Journal of Jewish Studies* 12 (1970), 39–40.

55 See Havazelet, *ibid.*, 285, and cf. n. 60 below.

56 See R. Meir of Rothenburg, *Teshuvot, Pesakim Uminhagim*, ed. Y.Z. Kahana, v. 2 (Jerusalem: 1960), 54, sec. 59.

espoused by) predecessors (*hotzaat laaz al harishonim*), a principle that carried a degree of halakhic valence in twelfth and thirteenth-century Ashkenaz.<sup>57</sup> Since earlier Ashkenazic scholars of great stature (*gedolim*) killed their children in the face of persecution, for Maharam to intimate that the Jew of Koblenz acted inappropriately in any way would cast aspersions on the actions of these venerable earlier figures.<sup>58</sup>

Although R. Meir of Rothenburg does not mention the ruling of Rabia, a gloss by the Tosafist R. Peretz b. Elijah of Corbeil (a contemporary of Maharam) on the discussion of the precept of *kidush hashem* in *Sefer Mitzvot Katan*, cites an abbreviated version of the Rabia passage verbatim (albeit without attribution). This gloss provides additional evidence that this ruling was not unfamiliar in thirteenth-century Ashkenaz.<sup>59</sup>

57 On the reasoning behind the reponsum of Maharam, cf. David Berger, *The Jewish-Christian Debate in the High Middle Ages* (Philadelphia: 1979), 25–26; Chazan, n. 35 above, 156–158; and Soloveitchik 1987, n. 18 above, 208–209. Like Rabbenu Tam, R. Meir of Rothenburg considers the situation of Hanania, Mishael and Azaria evidence that sustained torture (*yisurin sheein lahen kitzva*) is worse than death, and may cause one to succumb to idolatry. See *Responsa Maharam*, ed. Prague, #39, 938, and n. 45 above. Interestingly, Maharam held that martyrs feel no pain at the time of their death, see #517; and see David Tamar in *Kiryat Sefer* 33 (1948), 376; and my ‘Peering Through the Lattices’: *Mystical, Magical and Pietistic Dimensions in the Tosafist Period* (Detroit: 2000), 123–124. For another example of Maharam’s (initial) unawareness of an important position held by Rabbenu Tam, see his responsum #941 (at the end).

58 See Eliav Shochetman, “The concern for *la’az ‘al ha-Rishonim* as a consideration in determining the halakha” (Hebrew), *Sefer Bar Ilan* 18–19 (1981), 170–195, and *Responsa R. Haim Or Zarua*, #167.

59 See *Hagahot Rabeinu Peretz Lesefer Mitzvot Katan*, commandment 3 (gloss 5): “Those holy people who slaughtered themselves and did not rely on themselves are completely holy, as can be proven from [King] Saul. And one cannot raise a question from [the case of] R. Hanina b. Tradyon, who did not open his mouth, etc., since he knew that the Name of Heaven would not be defiled by him”

ואותם הווישעים ששחטו עצמם שלא סמכו זיתם ליעמוד בנסיון רדושים נסויהם החרימה  
 משאחלואין להקשות נמי חכמה בן תרדין שלא דעה לפתוח פיו ירוי ישיעי היל בעצמו שלא  
 יתחלה עמים על ידי

(On R. Peretz’s view, akin to that of R. Meir of Rothenburg, that martyrs feel no pain, see Kanarfogel, n. 57 above, 124.) See also the *Orhot Haim* and *Tosafot Hashalem*, cited above, n. 38, which present an (anonymous) justification for the killing of others from the Hanania, Mishael and Azaria, and King Saul, cases. The subsequent objection recorded in these texts discounts both cases, although the rejection of the possible proof from King Saul is more strongly worded. Cf. Soloveitchik, n. 35 above.

A further look at the Rabia passage, and its placement in *Sefer Simanei Taryag Mitzvot*, is in order. Following his initial statement about the permissibility of killing others at a time of persecution if their ability to withstand torture is uncertain, Rabia supports his view by citing the case of the 400 young people in Gitin, and the scriptural derivation found in the Midrash Rabbah to justify suicide in the face of torture, without mentioning the specific case of King Saul.<sup>60</sup> Rabia also cautions that one should not question these actions on the basis of the case of R. Hanina b. Tradyon, who did not take his own life, because R. Hanina knew that there was no chance that he would be untied and then coerced into committing an act of desecration of the Name of Heaven. The *Semak* of Zurich version of the Rabia passage mentions an additional justification for killing the young children, not found in *Sefer Simanei Taryag Mitzvot*. Just as in the case of a stubborn and rebellious son (*ben sorer umore*), where the Torah allowed for the disobedient son to be put to death, so that he would die innocently rather than be allowed to accrue the collection of grave sins he almost inevitably would were he to live, it was appropriate to kill these young children now as innocents, since we are fearful that if they were forcibly converted, they would then live the rest of their lives as Christians.

Leaving aside the unusual *ben sorer umore* analogue (whose appearance only in the derivative *Semak* of Zurich version suggests that it was not part of Rabia's original formulation), there is an obvious similarity between the Rabia passage and the formulation of Rabbenu Tam discussed above. The Aggadic proof-texts are the same, or rather, selectively limited in the same way. Rabia also presumes the terrible impact of torture: "they were afraid that they would be compelled to desecrate the Name of Heaven" ( יראים שעל ידי אונס יהא שם שמיים מחולל על ידם ), adding the rabbinic aphorism "do not trust yourself until the day of your death" (*al taamin beatzmekha ad yom motkha*) found in Ethics of the

60 The reference to Saul is omitted only by the earliest manuscripts of the *Simanei Taryag Mitzvot* text, which attach the scriptural derivation found in Midrash Rabbah to "the case that we have mentioned" (*kemaase sheamarnu*). See Havazelet, n. 54 above, 290 n. 32, and n. 54 above. As will be discussed below, the antecedent case in *Simanei Taryag Mitzvot* (also referred to by Midrash Rabbah; see n. 36 above) is that of Hanania, Mishael and Azaria. Saul's name is included, however, in the later *Hagahot R. Peretz* and *Semak Mitzurikh* versions. The only other significant difference between the *Sefer Simanei Taryag Mitzvot* and *Semak Mitzurikh* passages concerns the reference to *ben sorer umore*; see below.

Fathers (mAvot 2:4) and cited in bBerakhot 29a. Even more noteworthy, however, is the way R. Abraham b. Ephraim inserts the Rabia passage into his work.

In discussing the precept of *kidush hashem*, R. Abraham begins, as is his wont, with a paraphrase of this precept as it appears in *Sefer Mitzvot Gadol*.<sup>61</sup> R. Abraham concludes his paraphrase of the *Semag* with the notion that a person who is prepared to meet his death as a martyr should not do so relying on the possibility that a Divinely ordained miracle will spare him at the last moment: "When one gives himself [to martyrdom], he should not rely on a miracle's occurring, for anyone who relies on a miracle will not have a miracle performed for him (ובשמס" עצמו, לא יהא סמוך על הנס. שכל הסומך על הנס אין עושין כו נס)." This point is supported by a passage from Sifra<sup>62</sup> which asserts, based on verses in the third chapter of the Book of Daniel,<sup>63</sup> that Hanania, Mishael and Azaria were careful to demonstrate their readiness to give up their lives without any expectation of a miraculous intervention.

R. Abraham then cites the Rabia passage: "And those holy martyrs, who slaughtered themselves and their children ... (ואותם הקדושים ששחטו את עצמם ורצעם וכו')." In the manuscripts of *Sefer Simanei Taryag Mitzvot*, this passage is not set off from the preceding one, and it begins with a conjunction **ואותם**. The juxtaposition of the *Semag* and Rabia passages by R. Abraham (also found in the *Semak* of Zurich version)<sup>64</sup> yields the following line of argument. The behavior of Hanania, Mishael and Azaria serves as a paradigm for the behavior of other Jewish martyrs. Hanania, Mishael and Azaria were prepared to accept their fate without relying on miracles, as must all martyrs. Other

61 See *Semag*, positive commandment 5, and cf. Havazelet, n. 54 above, 282.

62 Sifra, ed. I.H. Weiss (NY: 1946), fol. 99b (Emor), on Leviticus 22:32: "Do not defile My Holy Name, and sanctify Me in the midst of the children of Israel"; cf. bShabat 32a; bTa'anit 20b; and above, n. 46.

63 Daniel 3:17–18: "If our God whom we serve, is able to deliver us, He will deliver us from the fiery furnace and out of your hand, O king. But if not, be it known to you, O king, that we will not serve your gods nor worship the golden image which you have set up."

64 In *Semak Mitzurikh*, the *Semak* text (commandment 6) concludes with the notion that one who is prepared to give his life for the sanctification of the Name of Heaven may not do so with the expectation that a miracle will occur. The *Semak Mitzurikh* gloss (sec. 19) cites the proof from Hanania, Mishael and Azaria, and then continues with the defense of those martyrs (*kedoshim*) who killed themselves and their children for the sanctification of the Name of Heaven.

Jews in situations of *kidush hashem* were likewise to be commended for accepting their fate, and, lest they falter, not relying on themselves to resist the various forms of compulsion and coercion that could be employed. The possibility of wavering (or of being co-opted against their will) would be especially true for children. It appears that R. Abraham b. Ephraim, like Rabbenu Tam, wished to utilize the biblical example of Hanania, Mishael and Azaria to buttress his halakhic position in support of martyrdom.<sup>65</sup>

Similarly, his juxtaposition of “do not rely on a miracle” (לֹא יִהְיֶה סוּמְךָ עַל הַנֶּסֶךְ) from his paraphrase of *Semag*, and “they did not want to rely on themselves” (שְׁלֵא רִצּוּ לְסוּמְךָ עַל דַּעְתֶּךָ) from the Rabia passage, is not merely a literary device. The pairing of these texts suggests that knowing one’s limitations when faced with death, especially when confronted by coercive forces (אִונָס), is a talmudic or rabbinic imperative. Whether this was Rabia’s view as well, or only that of R. Abraham b. Ephraim, cannot be determined with absolute certainty.

In sum, Tosafists in northern France and Germany during the high Middle Ages endeavored to present well-based halakhic support for the actions of the martyrs. They chose their proof-texts carefully, adducing similar arguments and avoiding the more speculative Aggadic material, while highlighting the response of Hanania, Mishael and Azaria, just as did Maimonides. These carefully crafted Tosafist formulations demonstrate the existence of a measure of halakhic justification by leading rabbinic scholars for the phenomenon of medieval Ashkenazic martyrdom, in addition to any considerations of devotion or piety.<sup>66</sup>

## V

The following ruling by R. Tuvyah of Vienne, issued in a widely-discussed case of domestic law, is recorded in *Sefer Simanei Taryag Mitzvot*, the halakhic compendium of his student R. Abraham b. Ephraim:

There was an incident in which a woman gave her son to [the care of] a nursemaid. A very stringent oath that has no means of being renounced was administered to the nursemaid, enjoining her from stopping to nurse

65 See also n. 60 above.

66 Cf. Israel Yuval, “Vengeance and damnation, blood and defamation: from Jewish martyrdom to blood libel accusations” (Hebrew), *Zion* 58 (1993), 66–75, and Abraham Gross, “On the Ashkenazi syndrome of Jewish martyrdom in Portugal in 1497” (Hebrew), *Tarbiz* 64 (1995), 96–97, n. 34.



the child until 24 months [had passed]. Following this [binding oath], the mother married a *kohen* named R. Jacob Sevara of Cracow in Poland, who was a great scholar with vast knowledge of the Talmud. The greatest scholars of the generation challenged his position and almost wished to place a ban on him. They sent responsa [supporting their position] far to the west and to the south, and his [R. Jacob's] words reached my teacher R. Tuvyah. My teacher ruled that since it is clear that the nursemaid will not back out [quit] because of the very severe oath, he should not be compelled to divorce her. And even if he has not yet married her, he may do so without any impediment, as the Talmud [in a chapter of tractate Ketubot] relates that Rav Nahman allowed the house of the Exilarch to act thus, because once they give their children to a nursemaid, she would never quit. And the matter requires further study.<sup>67</sup>

There are no remnants of the exchange of letters referred to in this passage. A responsum by R. Isaac b. Moses *Or Zarua* is preserved, in which R. Isaac sides with the view of the rabbinic majority against the position held by R. Jacob Hakohen Sevara of Cracow (and R. Tuvyah of Vienne). Neither a binding oath — nor even a sizable security bond (*eravon gadol*) — can guarantee that the nursemaid will remain at her post (and not depart at some point in order to marry or for some other personal reason). The material in *Sefer Or Zarua* indicates that R. Moses b. Hisdai (Taku) of Regensburg, and other scholars of the region, also ruled against R. Jacob, as did an unnamed northern French scholar (*gaon ehad migeonei tzorfat*), who concluded that “there are no grounds to permit” the arrangement suggested by R. Jacob.<sup>68</sup>

According to the Talmud, a nursing widow may not remarry within twenty four months of the birth of her child, because this may cause her to stop nursing the child (which is not in the child's best

67 Ms Vatican 176, fols. 50v–51r; Moscow 1, fol. 22v; ms Parma 813, fol. 43r:

השניה היה ראשונה בנתינתו לנשיא רבנים בעמלקו על דעת רבנים בעמלקו דאורייתא טביעה חקירה טאין ביה  
 התרה. שלא תחזור בה מלדניק הבן עד כ"ה חודש ואח"כ נישאתו נאמס לכתו אינו נשחר הרב יעקב  
 טבוח גיטין ויחשב במלמית חכם גדול ודקי גדל החלמות. תחלכו עליו גדולי הדור ובענין  
 רבנו לרבינו ושלח משניות לקצות יסודים ודמיעו דבורו עד מורו הרב מנחם והיה מורו  
 נאמר דפשיטא קן דלא תירדה מחוק חומרי השנועה אין היפין אותי להנציח. יאכל אם לא כנס  
 יכנסו לבתוליה. כדאמר ר' פפוס אף על פי רב נחמן ויבא לבי ריש גלותא חלוטא בי יתובי בנייה  
 למינקח כה הר ליה ור"ע

For other versions and citations of this passage, see Ta-Shma, “On the history of Polish Jewry in the twelfth and thirteenth centuries” (Hebrew), *Zion* 53 (1988), 353.

68 See *Sefer Or Zarua*, part. 1, Responsa, sec. 740, and Ta-Shma, *ibid.*, 354–355. Ta-Shma suggests that rabbinic reports and discussion of this incident were subject to internal censorship. He maintains that the incident occurred between 1225 and 1234, while Urbach dates the incident to 1245.

interests). Although there is a Tannaitic dispute as to how long she must wait, with some advocating a shorter period of time, both Rav and Samuel agree to the twenty-four month waiting period.<sup>69</sup>

Rashi explains more precisely the concern for the child that mandates the waiting period. If the woman is allowed to remarry, she may become pregnant, which will, in turn, force her to wean the first child. Since the new husband is not the father of the first child, there is concern lest the husband refuse to provide his wife's child with the (additional) milk and eggs that are necessary for his nutrition if he can no longer nurse.<sup>70</sup> The Talmud maintains that even if the mother gave the child to a nursemaid, or if she had already weaned him, she may not remarry before the twenty-four month period ends. As Rashi explains, these provisions are a precaution to prevent the mother from purposely weaning the child in order to be able to remarry.<sup>71</sup> The Babylonian Talmud suggests that perhaps they must be adhered to even if the first child dies, lest a mother be tempted to kill her child in order to remarry. Although the Babylonian Talmud rejects this last possibility as extreme (and this is the view codified by Maimonides),<sup>72</sup> the parallel passage in the Jerusalem Talmud retains the restriction, even where the first child has died.

---

See R. Abraham b. Azriel, n. 37 above, v. 4, 120–121. R. Meir of Rothenburg was also among those who ruled strongly against the position of R. Jacob, although perhaps not at the time of the incident itself. (The *Mordekhai*, Jebamot, sec. 19, records the ruling from northern France as a responsum of Ri the Elder; see also *Beit Yosef*, EH 13 s.v. *afilu im gemala hanaar*. This attribution is problematic, however, in light of the dating of the incident, and the other rabbinic figures involved.)

69 A passage in a responsum of R. Moses Halawa (who studied with Rashba, ca. 1310; see *Responsa of Maharam Halawa*, ed. Moshe Hershler [Jerusalem: 1987], 146), suggests that R. Yehiel of Paris was the source of R. Tuvyah of Vienne's lenient ruling (*veani amarti ki harav tuvya z"l hora beshem harav yehiel z"l sheim tishava shevua hamura ...*). According to this version, however, the oath was to be taken (somewhat implausibly) by the mother herself, to "guarantee" that she would continue to nurse her son in any event. Cf. Ta-Shma, n. 67 above, 354, n. 25; and n. 73 below. See bKetubot 60a-b, and bJebamot 43a.

70 See Rashi, bKetubot 60b s.v. *ad esrim vearbaa hodesh*. Maimonides (*Code*, Laws concerning Divorce 11:25), explains that the pregnancy may affect the quality of the mother's milk, and her second husband may not take the appropriate (medical/financial) steps to improve the quality of the milk.

71 Rashi, bKetubot 60b s.v. *bigzeirotav*, and s.v. *gemalato asur*.

72 Laws concerning Divorce 11:27.

Nevertheless, a handful of later Sefardic decisors suggested the possibility of leniency. The Talmud records that R. Nahman permitted members of the household of the Exilarch to retain a nursemaid for a nursing child whose father had died (thereby allowing its mother to remarry). According to R. Nahman, it may be assumed that the nursemaid would not relinquish her position at any time, due to her fear of (the prestige and power of) the Exilarch. Since the child is assured its proper nutrition, the mother may remarry. Similarly, the remarriage of the nursing mother should be permitted whenever it is possible to guarantee and to ensure that the hired nursemaid will not shirk her responsibilities.<sup>73</sup>

This appears to have been the reasoning of R. Tuvyah of Vienne (and R. Jacob of Cracow as well), and indeed, R. Tuvyah's ruling may have been the impetus for the Sefardic decisors.<sup>74</sup> If the nursemaid were to submit to a very strong, biblically ordained oath (*shvua min hatora*), which would bind her to her responsibility and position, R. Tuvyah felt that this would more than suffice to prevent her from backing out: "It is clear to us that she could not quit due to the severity of the oath" (*pshita lan delo tihadar mihomer hashvua*). On the other hand, the Tosafists and other Ashkenazic halakhists who rejected R. Tuvyah's position stressed that any comparison to the house of the Exilarch was inaccurate and unacceptable. The power and influence of the Exilarch was unique, and widely known to all.

In maintaining their unyielding position, it is possible that the Ashkenazic halakhists were influenced by the Jerusalem Talmud, which allowed no leniency of any kind in this matter, even in the case where the child had died.<sup>75</sup> It is also possible that the Ashkenazic halakhists, who displayed remarkable sensitivity to the physical and emotional needs of infants and children generally, felt that it was necessary to protect the child in this case by favoring a more stringent

73 For references to these Sefardic decisors, see *Magid Mishne*, Laws concerning Divorce, 11:26; *Responsa Rashba*, 1:723; *Responsa Ran*, #58; and *Beit Yosef*, EH 13 s.v. *afilu im nishbea leadam gadol*. Rabbenu Yona, Rashba and other Spanish *rishonim* specifically reject this view. Both Rif and Rambam omit any reference to the case of the Exilarch, suggesting that they too did not consider it a viable model for others. See also R. Menahem Hameiri, *Beit Habehira*, Ketubot, ad loc.

74 See *Responsa Rosh*, 53:1–2; *Responsa Ran*, #12; and the preceding note.

75 Cf. Urbach, n. 5 above, 2:704–712; Ta-Shma, *Early Franco-German Ritual and Custom* (Hebrew), (Jerusalem: 1992), 61–85; and Grossman, n. 29 above, 384–386, 428–430.

interpretation.<sup>76</sup> To paraphrase a popular rabbinic aphorism, they were not being overly harsh in terms of the mother, but rather, acting as advocates on behalf of the child.

In any event, the more conservative approach to this case is certainly well grounded in talmudic law and interpretation. R. Tuvyah's intuitive extension or extrapolation, "it is clear to us" (*pshita lan*), ostensibly based on the case of the house of the Exilarch, is more speculative. And yet, R. Tuvyah not only rules that the second husband could not be compelled to divorce the mother if they had already married, he insists that they may marry without any hesitation.<sup>77</sup> The comment, "And the matter requires further study" (*vetzarikh iyun*) that follows R. Tuvyah's ruling was added by his student R. Abraham b. Ephraim, who was undoubtedly aware of the fact that his teacher's view was very much in the minority.<sup>78</sup>

R. Tuvyah's approach is to identify a human response or concern as a significant factor in resolving a halakhic dilemma. Another instance where R. Tuvyah evinces this approach is in regard to oaths taken by inveterate gamblers. Such individuals sometimes took oaths promising that they would stop gambling, as a deterrent. A gambler often found, however, that he could not keep his oath, and asked for a rabbinic release from it. A passage in the Jerusalem Talmud proscribes release from an oath where the one who had taken the oath could, were he released, resume a sinful activity, even something prohibited only according to rabbinic law.<sup>79</sup>

Rashba ruled, on the basis of the Jerusalem Talmud, that vows made by gamblers should not be nullified: "We do not respond to him, because gambling is sinful, and we cannot nullify a vow that will allow him to transgress [once again] (*veein nizkakin lo sheshok hu aveira veein*

76 See my "Attitudes toward childhood and children in medieval Jewish society," in David Blumenthal (ed.), *Approaches to Judaism in Medieval Times*, v. 2 (Chico, CA: 1985), 1–34, and Ta-Shma, "Children of medieval German Jewry: a perspective on Aries from Jewish sources," *Studies in Medieval and Renaissance Studies* 12 (1991), 269–270.

77 To be sure, the specific case of R. Jacob Hakohen of Cracow had an additional measure of urgency to it. In a situation where the second husband was a non-*kohen*, even were he compelled to divorce the mother, he could remarry her after the twenty-four month period (assuming, of course, that she married no one else in the interim). In this case, however, R. Jacob, as a *kohen*, could not divorce and remarry her.

78 See Urbach, n. 5 above, 1:191.

79 jNedarim 5:4. Cf. *Tosafot*, Gitin 35b s.v. *kasavar*.

*metirin lo neder laavor*).<sup>80</sup> This was also the position of a number of early Tosafists, including Rabbenu Tam and R. Isaac b. Asher Halevi of Speyer.<sup>81</sup> R. Tuvyah of Vienne and his northern French Tosafist colleague, R. Samuel of Evreux, were the first to take a different direction. According to R. Tuvyah, "Now, in this era, the vow [of abstention from gambling] should be nullified, for it is a virtually involuntary act, since they cannot control themselves."<sup>82</sup> Similarly, R. Samuel asserted that, "If it is certain that [the gambler] will not be able to restrain himself and will violate his oath, it is better to release him from it."<sup>83</sup> Here again, R. Tuvyah (and R. Samuel of Evreux) rendered a lenient halakhic decision that demonstrated great sensitivity to human responses and needs.<sup>84</sup>

Several other formulations by R. Tuvyah reflect his sensitivity to personal issues and concerns as a crucial factor in determining halakhic practice. R. Tuvyah is cited by R. Meir of Rothenburg as criticizing those who would not touch their menstruant wives during an illness (so as to render them assistance): "Those who are careful not to touch their menstruant wives when they are sick, are acting out of foolish piety (*חסידות של שטות*)."<sup>85</sup> R. Meir also appears to have cited R. Tuvyah as advocating a position which he endorsed, namely, that a woman

80 See Rashba, *Responsa*, 1:755, 3:305, 7:4; *Responsa Rashba attributed to Nachmanides*, #252. Cf. Rosh, *Responsa*, 12:5–6; *Responsa Zikhron Yehuda*, #71; Ran, *Responsa*, #51.

81 See *Mordekhai*, Gitin, sec. 374, Shevuot, secs. 756, 787 (glosses); ms Paris BN 1408, fol. 68r (*upasak rabeinu tam deein lehatir neder shel mishak*); *Beit Yosef*, YD 228 (fol. 147a); Kanarfogel, n. 16 above, 29, n. 75.

82 See *Mordekhai*, Shevuot, sec. 787:

תתיר בזה"ש בהתיר נדר של קביא כי כמו שנתראה כי אינם יכריעם להקיאם ולא יחזירו וכו' :

Cf. Rashba, *Responsa*, 7:537; *Responsa Rashba attributed to Nachmanides*, #281; *Shiltei Hagiborim* on *Mordekhai*, Shevuot, sec. 756, n. 1; *Nimukei Yosef Al Masekhet Gitin* (35b), ed. Moses Stern (Jerusalem: 1963), 88 (in the name of Ritva); *Responsa Mahari Bruna*, #125; and *Responsa Rema*, ed. Asher Siev (Jerusalem: 1971), 440 (#103).

83 See *Sefer Orhot Hayim*, n. 38 above, part 2, v. 3, 495, and cf. Leo Landman, "Jewish attitudes toward gambling: the professional and compulsive gambler," *JQR* 57 (1967), 302.

84 R. Samuel's formulation is couched in the language of "better they sin inadvertently than deliberately" (*mutav sheyihiyu shogegin veal yihiyu mezidin*). In R. Tuvyah's case, there is the barest whisper of this principle (*ki kmo shagega hi*).

85 See *Shiltei Hagiborim* on *Mordekhai*, Shabat, sec. 238, para. 5, who notes dissenting opinions as well. See also Urbach, n. 5 above, 1:488 n. 37; and *Darkhei Moshe*, YD 195:6. The lenient ruling issued by R. Tuvyah for drinking

should not be designated as the *sandak*, the person selected to hold the baby during a circumcision, since this would require her presence in the main section of the synagogue, which might in turn lead to inappropriate distractions and behavior there.<sup>86</sup>

In one instance where R. Tuvyah ruled on the basis of social constraints, he refers to an earlier Tosafist: "I heard from R. Tuvyah, in the name of Riva, that any foods which young men (*bahurim*) take from one another [from Purim eve until the next evening], even without permission, on account of the Purim celebration, are not considered stolen and cannot be adjudicated, provided they do not overstep the guidelines of the seven good men of the city (*shiva tuvei hair*)."<sup>87</sup> There are several Tosafists who are referred to as Riva. It is likely that Riva in this case denotes R. Isaac b. Abraham of Dampierre (referred to more often as Ritzba), whose funeral was attended by R. Tuvyah.<sup>88</sup> In any event, both Riva and R. Tuvyah were comfortable rendering their ruling in light of prevailing social norms, without explicit talmudic support.

A final example brings us full circle in our discussion of R. Tuvyah's rulings. The Tosafists argued over whether a non-Jew was allowed to warm the central living quarters of a home (the so-called *beit hahoref*, lit., winter house)<sup>89</sup> by tending to the hearth on the Sabbath.<sup>90</sup> Several twelfth-century northern French Tosafists already permitted this to be done by a non-Jewish maidservant if she herself was cold, and also

---

wine or water after the four cups at the Passover Seder may also be relevant in this regard. See Urbach, 1:490, n. 47, and cf. *Hagahot Maimuniot*, Laws concerning Leavened and Unleavened Bread 8:10 [ר"י, ר"י]; *Peirush Harosh*, Pesahim 118a (sec. 33); *Beit Yosef*, OH 481 s.v. *katav adoni avi*.

86 See R. Samson b. Tzadok, *Sefer Tashbetz*, sec. 357; *Sefer Minhagim Devei Maharam Mirotenburg*, ed. Israel Elfenbein (NY: 1938), 80; Kahana, n. 56 above, 49 (secs. 155–156); and Daniel Sperber, *Minhagei Yisrael*, v. 1 (Jerusalem: 1989), 64–65.

87 See *Responsa Trumat Hadeshen*, #110 (based on *Sefer Mordekhai Hakatzar*), and Urbach, n. 5 above, 1:487, n. 35.

88 See Urbach, 1:271, and cf. Henri Gross, *Gallia Judaica* (Paris: 1897), 193. (Note that the early German Tosafist Riva (R. Isaac b. Asher Halevi) was among those who held, against R. Tuvyah, that gamblers' vows could not be nullified; see n. 81 above.)

89 On this structure, see Mordechai Breuer, "Toward the investigation of the typology of western *yeshivot* in the Middle Ages" (Hebrew), in E. Etkes and Y. Salmon (eds.), *Studies in the History of Jewish Society in the Middle Ages and in the Early Modern Period* (Hebrew), (Jerusalem: 1980), 51–52.

90 See n. 14 above.

because of the principle that “all can be rendered ill by exposure to the cold” (*hakol holim etzel kor vetzina*).<sup>91</sup> This leniency was not accepted, however, by German rabbinic authorities, due perhaps in part to differences in climate, in addition to other halakhic concerns. The following account was related by a son of R. Isaac b. Meir of Dura. R. Isaac was, as the text indicates, a student of R. Tuvyah of Vienne:

I heard from my father and teacher, R. Isaac, that when he studied Torah with R. Tuvyah in France, and R. Yehiel came there, he [R. Yehiel] saw that many important students were studying with R. Tuvyah. And the [non-Jewish] nursemaid was sitting near the fire with R. Tuvyah’s son. Then our teacher R. Tuvyah said to R. Yehiel: see how many good things this child does for us. The fire has been made for him, and we can warm ourselves by virtue of him. R. Yehiel responded, but perhaps [the nursemaid] will increase the size of the fire on their account [which is prohibited]. There were many German students there, and they said that if so, it should nonetheless be permitted for them to warm themselves in the winter rooms of their home on the Sabbath, when the maidservant has warmed the room for a young child. R. Yehiel asked how their winter rooms were warmed. They responded that the heat required for one person is no different from that required for many people. R. Yehiel answered and said, if so, I would have warmed myself in such a room were I there...<sup>92</sup>

The halakhic principle behind R. Tuvyah’s lenient ruling is that if the lingering cold can cause illness (even if not severe), involving a non-Jew (*amira laakum*) may be permitted. What is most interesting and suggestive about R. Tuvyah’s ruling, however, is that he based it solely on the presence of his (or any) child. He was not prepared to allow the room to be heated by the non-Jew simply because the cold might prove to be detrimental to the occupants in general. Rather, the cold would certainly pose a problem for an infant or child, and it was the responsibility of the maidservant to see to the child’s well-being.

R. Yehiel of Paris was still troubled by the fact that the maid might add extra wood, or expend additional effort in fanning the fire, on

91 See the sources in Ta-Shma, n. 2 above, 163–164.

92 Ms Cambridge Add. 377, fol. 114r (in the margin). See also Urbach, n. 5 above, 1:487, and Ta-Shma, *ibid.*, 165.

שמעתי מאבא בני הרב ר' יצחק ט"ו. כשילמד תורה לפני אבא ר"ה אביה נצטרפת. ובא בשם רב  
 יחיאל מפריש יראה שר"ה יושבים אצל הרב תלמידים וישובים. ר' עובדיה נשאל על ידי ר' יצחק ט"ו  
 של ר' טוביה ומה אמר ערבינו הר"ה טוביה לר' יחיאל. תראה כמה סובלת עושה לנו זה המע  
 שהאבא נראה בשבילי יאנו כרחמין באכותו והשנים לר' יחיאל שיחא ירבה כשדולת זהני עם  
 הרבה תלמידים אשכנזיים, ואמר, אם כי עושר לתרם בבתי חורף עיקר בשבת שהחמה השפירה  
 יאנו ועליון ושאל הר"ה יחיאל היאנו מרחמין אנו ר' עובדיה שלמה וישנו על שביל אחד  
 צריכה ר' יצחק כמו בשביל הרבה בני אדם יענה ואמר להם ר' יחיאל, אם כי אני בעצמי רייתי  
 נאמרו נא אינו רייתי שט...

behalf of other Jews in the room who were not young children. Nevertheless, both he and R. Tuvyah's German students accepted R. Tuvyah's premise that any heating done for the infant was permissible. Thus, for a structure where the heat, once adjusted, would remain at a constant temperature no matter how many people were in the room, which was apparently the case in certain German homes, R. Yehiel would agree fully with R. Tuvyah.<sup>93</sup>

R. Tuvyah based his leniency on a usual occurrence in, and typical need of, the Jewish household, again reflecting his tendency to focus on human concerns and responses. Since the nursemaid was expected to tend to the child's needs, she could also tend to the fire, regardless of whether others benefitted as well. Although we would expect every halakhic decisor to be aware of the facts of a situation before him, R. Tuvyah's ability to formulate halakhic categories and issue lenient rulings, and rather unique ones at that, based in no small measure on his assessment of human concerns and proclivities, is noteworthy. It should also be noted that R. Tuvyah cannot be characterized as a lenient decisor overall. A comparison of his positions with those of R. Moses of Coucy in the areas of permitted and prohibited substances and practices (*isur veheter*), such as *taam lifgam*, the nullification of leaven before Passover and the baking of matza, and the laws of mourning (a comparison facilitated by R. Abraham b. Ephraim's *Sefer Simanei Taryag Mitzvot*), shows R. Tuvyah to be stricter than *Semag* in his rulings on these matters.<sup>94</sup>

To be sure, R. Tuvyah's methods were not widely copied in medieval Ashkenaz, as far as we can tell.<sup>95</sup> Nevertheless, it is reasonable to suggest that at least some of the approaches to halakha and *metziut* in Ashkenaz discussed above, with regard to widespread social needs and societal issues, impacted on the halakhic methodology of R. Tuvyah of Vienne as well, or perhaps evolved from a common mindset.<sup>96</sup>

93 Note the convergence of the views of R. Tuvyah and R. Yehiel mentioned in n. 68 above. Like R. Tuvyah (above, n. 85), R. Yehiel was also outspoken in regard to customs or practices he considered frivolous (*minhagei shlut*). See, e.g., *Hagahot R. Peretz Lesefer Mitzvot Katan*, 93:4 (where R. Samuel of Evreux concurs); *Beit Yosef*, OH 553, s.v. *veyesh osrim* (where R. Samuel of Evreux disagrees). Cf. Urbach, n. 5 above, 1:459, 463–464; and n. 20 above.

94 See Urbach, n. 5 above, 1:490.

95 Cf. *Hagahot Maimuniot*, Laws concerning Prayer, 8:4[6], and *Sefer Mitzvot Katan*, commandment 11, with regard to constituting a quorum for but one person who has not yet prayed. See also Eleazar of Worms, *Sefer Rokeiah*, sec. 320.

96 Differences between the rabbinic scholars of northern France and Germany on some of the larger issues of halakha and realia can occasionally be discerned. See above, nn. 3, 8, 14, 68–69, 85, 88, 93.



# THE JEWISH LAW ANNUAL

VOLUME FOURTEEN

THE INSTITUTE OF JEWISH LAW  
BOSTON UNIVERSITY SCHOOL OF LAW