

## On the Nuances of Reading Tosafist Literature and Other Medieval Rabbinic Texts for Trends in Religious Observance

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**Abstract** In recent years, historical scholarship has increasingly turned to the literature of the Tosafists and other medieval talmudists and halakhists in order to establish or support trends in religious observance among the laity. However, the extraction of accurate societal patterns from these rabbinic writings, which is a most welcome development, must take into account the often complex thought processes, methods, and proclivities of the authors, along with the precise textual histories and scope of the literature itself. This methodological study provides examples of the possible pitfalls that can emerge if interpretive strategies, textual provenance, and breadth of erudition are not fully considered.

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The period and geographic scope of the Tosafist oeuvre are fairly circumscribed, even though much of the extensive literature of this corpus was produced in circles of rabbinic scholars rather than by individual authors. The earliest Tosafists in Germany and northern France, represented by Isaac b. Asher (Riba) ha-Levi of Speyer (d. 1133) and Jacob Tam (Rabbenu Tam) of Ramerupt and Troyes (1100–1171), commenced a process that ended with figures such as Meir b. Barukh (Maharam) of Rothenburg (d. 1293) and Perez b. Elijah of Corbeil (d. 1297). The multiplicity of authors and their locales can render the determination of the precise origins of a particular passage something of a challenge, but the dynamic flow and coverage offered by this material as a whole can provide the historian with a rich basis from which to extract useful information. This is a particularly welcome possibility, given the relative paucity of archival and other materials of popular culture that carry or even reflect the voices of the non-elites in medieval Ashkenaz.

The same is true, *mutatis mutandis*, for the talmudic *ḥiddushim* that were composed in northern Spain at roughly the same time. The voluminous commentaries on the Talmud produced by Nahmanides (Ramban, 1194–1270) and Solomon ibn Adret (Rashba, d. ca. 1310) can potentially yield quite a bit of historical information, not only about how these rabbinic figures arrived at

their conclusions and integrated earlier materials but also about the social and religious practices among their communities in Catalonia if not elsewhere within the Spanish orbit.<sup>1</sup> To be sure, one who seeks to discover historical trends within medieval rabbinic literature must first determine whether a passage in that literature reflects mainly or even exclusively talmudic or halakhic reasoning and development (which can contribute, in any case, to a discussion of the history of halakhah) or whether there are, in addition, historical or societal details and considerations that stand behind these formulations.

### Interpretive Strategies and Depth of Analysis

In *Reconstructing Ashkenaz: The Human Face of Franco-German Jewry, 1000–1250*, David Malkiel puts forward the thesis that medieval Ashkenazic Jewry was no more religiously devoted than its Spanish counterpart. In the sixth chapter (titled “Deviance”), Malkiel highlights the application in Ashkenaz of the talmudic dictum (Beizah 30a) “ela hanah la-hen le-Yisra’el, mutav she-yihyu shogegin ve-‘al yihyu mezidin” (rather, leave the nation of Israel alone, better they should transgress unwittingly rather than intentionally) especially with regard to the practices of women.<sup>2</sup> Thus, for example, Isaac b. Moses Or Zarua’ of Vienna (d. ca. 1250) invokes this rule to justify women wearing jewelry on the Sabbath in the public domain, despite concern that they might remove the pieces to show them off (158–59), just as Rabbenu Tam had done in the twelfth century to support his decision to permit women to wear rings on the Sabbath (159). A *tosafot* passage, along with another in *Mahzor Vitry* (165), asserts this principle to justify the common practice of women and children rolling nuts or apples on the Sabbath for entertainment, even though this activity could entail the transgression of several Sabbath prohibitions,<sup>3</sup> as does R. Eli’ezer b. Nathan (Raban) of Mainz (d. ca. 1160) in allowing women to plait their hair on the Sabbath, a practice that appears to run afoul of a talmudic prohibition (163).<sup>4</sup>

<sup>1</sup>Note in this regard Israel Ta-Shma’s methodological critique of Y. Baer’s *History of the Jews in Christian Spain* (Philadelphia, 1961) in Ta-Shma, *Kneset Mehqarim* (Jerusalem, 2004), 2:279–96, originally published as “Halakhah, Qabbalah u-Filosofyah bi-Sefard ha-Nozrit,” *Shenaton ha-Mishpat ha-‘Ivri* 18–19 (1992–94): 479–95.

<sup>2</sup>David Malkiel, *Reconstructing Ashkenaz* (Stanford, CA, 2009), 148–99. The page numbers cited parenthetically in the text refer to Malkiel’s discussion of specific passages.

<sup>3</sup>See *Tosafot ‘Eruvin* 104a, s.v. *hakhi garis*; *Mahzor Vitry*, ed. S. Hurwitz, 291–92, sec. 94; ed. A. Goldschmidt, 2:450, sec. 16; *Semag, lo ta’aseh* 65 (Venice, 1547), fol. 22b.

<sup>4</sup>The prohibition is that of “building” (*boneh*), and it constitutes at least a violation of rabbinic law in this instance, if not more. Cf. I. Ta-Shma, *Ritual, Custom, and Reality in Franco-Germany, 1000–1350* [in Hebrew] (Jerusalem, 1996), 131 n. 1.

Indeed, Raban also invokes this talmudic formulation in allowing women to immerse in a *mikveh* that is supplied by a series of pipes, a structural feature that raises doubts as to whether the water has sufficiently moved away from the status of “drawn water” (*mayim she’uvin*), in which immersion is considered to be ineffective (171). Similarly, Raban’s grandson, Eli’ezer b. Joel ha-Levi (Rabiah, d. ca. 1225), allowed women to immerse in situations where not all of their (glued) hair would come in contact with the waters of the *mikveh*, expressing a seeming variation of the aforementioned talmudic principle in commenting “Leave them alone; if they are not prophetesses, they are daughters of prophetesses” (172). Malkiel makes a number of other arguments and assumptions in this chapter about the difficulty that Ashkenazic rabbinic authorities had in regulating the religious behavior of women, suggesting that Tosafists in both northern France and Germany simply “threw up their hands” in this regard on more than one occasion in the face of the women’s unwillingness to change their problematic behavior.

My goal here is not to analyze or critique Malkiel’s presentation as a whole. Rather, it is to examine more closely the use and valence of the concept of *mutav she-yihyu shogegin* within the literature of the Tosafists and to compare this usage to that of contemporary Spanish rabbinic authorities (which Malkiel does not do, either in chapter 6 or in chapter 9, the book’s final chapter, entitled simply “Sepharad”). The results of this examination will suggest that the different uses of this principle in Ashkenaz and Sefarad point to the very conclusion that Malkiel sought to avoid—that the general level of religious observance in Ashkenaz was assumed, at least by its rabbinic authorities and even with regard to women’s practices, to be higher than the level of observance in Sefarad assumed by the rabbinic leadership of Spain.<sup>5</sup>

In short, the Tosafist passages involved appear to be significantly more nuanced than Malkiel has indicated, employing a type of multileveled conceptualization that is often present within Tosafist formulations.<sup>6</sup> Tosafists in both Germany and northern France applied the principle of *mutav she-yihyu shogegin* in two distinct ways, and there is a significant difference between them. A brief review of some of the sources Malkiel cites, along with a number of other sources, will delineate how the principle of *mutav she-yihyu*

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<sup>5</sup>The concerns expressed in Haym Soloveitchik, *Collected Essays* (Oxford, 2013), 1:83–93, about Malkiel’s ability to define and assess real deviance within his sources are not the issue here.

<sup>6</sup>See, e.g., Jacob Katz, *Exclusiveness and Tolerance* (Oxford, 1961), 30–36; Ephraim Kanarfogel, “Rabbinic Authority and the Right to Open an Academy in Medieval Ashkenaz,” *Michael* 12 (1991): 233–50; Ta-Shma, *Ritual, Custom, and Reality*, 22–23; Rami Reiner, “Rabbenu Tam and His Contemporaries: Relationships, Influences, and Methods of Interpretation of the Talmud” [in Hebrew] (PhD diss., Hebrew University of Jerusalem, 2002), 194 n. 155.

*shogegin* was applied in medieval Ashkenaz, and how its application in Spain was not the same.

A central aspect of Tosafist scholarship during the twelfth century and beyond was to consider and evaluate popular observances and practices against the full sweep of the Babylonian Talmud. In the majority of cases, Ashkenazic practices did comport with the teachings of the *Talmud Bavli*, and there was no need for the Tosafists to offer significant interpretive adjustments. For those instances in which the practices of Ashkenazic society do not appear to be so easily justified—and these often involved economic activities and other interactions with Christians—Tosafists in both northern France and Germany worked to rectify these practices by utilizing their newly sharpened senses of talmudic interpretation and dialectic, especially since many such practices had the approbation of earlier Ashkenazic rabbinic authorities and were considered to be authoritative.<sup>7</sup>

On occasion, however, it proved too difficult to find justifications for particular societal practices, or the prohibitions involved proved to be intractable. In such cases, the Tosafists were forced to concede that the popular practice was not actually permitted in their view, but they also made an important distinction. Where there was evidence that people had adopted this practice under the guidance of some prior rabbinic authority or figure, and it would therefore have been difficult to convince people that this practice should be abandoned, Tosafists allowed such a practice to continue under the rubric of *mutav she-yihyu shogegin*. They recognized that although the practice could not be justified according to the full extent of Jewish law as they understood it, earlier authorities had apparently thought otherwise. Indeed, on occasion, Tosafists proposed a form of resolution or justification for this practice, even as it was still not considered to be fully acceptable according to their own halakhic analyses and guidelines.

Yet at the same time, in the relatively few instances in which a questionable practice had not been accepted or approved by any earlier authorities even as members of the Ashkenazic communities continued to espouse it, the Tosafists applied a lowbrow version of the principle of *mutav she-yihyu shogegin*. There was no real justification in their eyes or in the eyes of any of their predecessors for the popular custom in question, but it could not effectively be eliminated since it had become an entrenched habit and a part of societal life. Not surprisingly, only this lower form of the *mutav she-yihyu shogegin* accommodation also carried with it (on occasion) a call to dissuade people from continuing the practice if there was a way the matter could be broached without causing undue unpleasantness or friction.

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<sup>7</sup>Katz, *Exclusiveness and Tolerance*, 24–29.

Raban of Mainz, the earliest medieval Ashkenazic authority cited by Malkiel, appears to have been the first to make this distinction. Raban identifies two types of situations in which the Talmud applies the principle of *mutav she-yihyu shogegin*, signifying that the rabbis did not formally protest a particular behavior but instead turned a blind eye toward it. The first type (described in tractate Beizah 30a) is associated with those who continued to eat until just before the beginning of Yom Kippur without observing the addendum (*tosefet*) of *Yom ha-Kippurim*, which mandates that the act of fasting begin a bit before the technical time when the day of Yom Kippur begins. There is no justification for this lapse on any level. However, people's natural sense of impending hunger and the stringency of the day caused them to take advantage of the possibility to eat as long as Yom Kippur had not actually begun, and there was little if anything that could be done to stop them. Similarly, the talmudic *sugya* (pericope) describes those who sat holding their utensils (according to some readings, especially women) in a permitted domain on the Sabbath, but too close to a domain where carrying is prohibited. This careless conduct meant that if people were unwittingly to drop their utensils into the restricted domain, they would in all likelihood retrieve them without thinking, thereby transgressing a Sabbath prohibition. Nonetheless, because this was a deeply ingrained habit (or matter of creature comfort) and it would thus be very difficult to dissuade people from acting in this way—and because the violation in both of these cases does not involve a strong or especially dire Torah prohibition—the principle of *mutav she-yihyu shogegin* should be applied, since it is better that these people transgress unwittingly.<sup>8</sup>

The second type of situation Raban identifies in which the Talmud applies the principle of *mutav she-yihyu shogegin* is associated with another case described in that same *sugya* in tractate Beizah, in which the rabbis did not protest (*ve-lo amrinan lehu ve-lo midei*) a problematic popular practice, even though it might lead to a Sabbath violation as per a subsequent mishnah in tractate Beizah (36b). The mishnah there asserts that dancing and clapping should not be done on the Sabbath (even though these are fundamentally permitted activities), lest these acts lead (as explained by the Talmud) to the use of instruments for musical accompaniment. Using instruments on the Sabbath is prohibited since they might break, which would in turn cause the Sabbath to be violated in order to fix them. On this *sugya*, Raban notes that the practice in his own day (*ha-idna*), which allowed people to clap at a wedding celebration being held on the Sabbath, was permitted for a variety of reasons, and not simply because the people would not listen to attempts to stop them (and it was therefore better that they should transgress unwittingly). Earlier

<sup>8</sup>See *Sefer Raban (Even ha-'Ezer)*, ed. D. Deblitzky (Bnei Brak, 2002–), 2:528 (= ms. Wolfenbüttel, Aug. 5.7, fol. 141a).

authorities had likely also explained that there was a fully permitted way to clap on the Sabbath (using the back of the hand, for example) that would not be mistaken for genuine musical accompaniment—even as their advice was subsequently ignored in practice—and may even have allowed clapping outright because there is a great *mitzvah* to gladden the bride and groom.

Similar to the policy that obtained within the precincts of the Temple in Jerusalem (according to which purely rabbinic principles were not in force), the *mitzvah* dimension involved in this practice meant that there was little or no concern with the possible violation of a rabbinic law. Indeed, Raban continues, the beadle who bangs on peoples' doors (and generates a rhythmic sound) to wake them in order to attend the synagogue on the Sabbath is not stopped from doing so precisely because of the *mitzvah* involved. Only clapping or noisemaking for non-*mitzvah* purposes is prohibited on the Sabbath, Raban argues, even though it is not entirely clear that he feels that these activities are completely permitted even in *mitzvah* situations. Nonetheless, the people who engage in these practices need not be stopped, because some form of rabbinic justification had been proposed in an earlier period. For Raban, practices of this type are treated according to the second or 'loftier' level of *mutav she-yihyu shogegin* as found within talmudic law.<sup>9</sup>

In his *Sefer Rabiah* (*Avi ha-'Ezri*) on tractate Beizah, Raban's grandson, Rabiah, makes precisely the same distinction that his grandfather did, providing in his comments on Beizah 36b additional justification for the door-knocking activity of the beadle. Moreover, Rabiah suggests that it would even be permissible for a non-Jew to play instruments at a wedding celebration on the Sabbath (even though having a non-Jew perform a prohibited Sabbath activity on behalf of a Jew is typically prohibited according to rabbinic law), since the conflation of two rabbinic prohibitions is allowed when a *mitzvah* is involved (*shevut di-shevut be-maqom mitzvah*), even though Rabiah, like his grandfather, was not prepared to allow the outright violation of one rabbinic prohibition in this instance.<sup>10</sup>

<sup>9</sup>See *Sefer Raban*, 2:532–33 (= ms. Wolfenbüttel, Aug. 5.7, fol. 141d). The standard *tosafot* to Beizah 30a (s.v. *tenan 'ein metaphin*) appear to permit clapping on the Sabbath, although these are *tosafot* that were produced in the study hall of R. Perez of Corbeil (d. 1297). Writing in the same period, R. Avigdor Katz of Vienna also permits this practice a priori at a wedding on the basis of a passage in the Jerusalem Talmud. See Machon Harerei Qedem, ed., *Perushim u-Pesaqim 'al ha-Torah le-R. Avigdor* (Brooklyn, NY, 1996), 99, sec. 128: “mi-kan pesaq de-shari be-nissu'in be-Shabbat le-tappeah yad 'al yad, ve-khen nohagot nashim zidqaniyyot le-sameah hatan ve-kallah.” Cf. *Semag, lo ta'aseh* 65, fol. 22b (and *Semag, lo ta'aseh* 75, fol. 27d), where clapping only with the back of the hand is permitted, even in non-*mitzvah* contexts.

<sup>10</sup>See *Sefer Rabiah*, ed. D. Deblitzky (Bnei Brak, 2005), 2:317–18, sec. 772, 2:325–27, sec. 796, recorded also in *Sefer Mordekhai 'al Massekhet Beizah*, secs. 689, 696 (= ed. Y. Klein-

Raban of Mainz embraces this same dichotomy elsewhere in *Sefer Raban*, in several actual cases that were presented to him. With regard to women wearing jewelry outside of the home and braiding their hair on the Sabbath, he invokes the loftier level of *mutav she-yihyu shogegin*, noting in each instance that earlier authorities had supported explicitly or at least tacitly the popular practice in question, or that there was actually some level of justification for the practice, even as Raban himself was not convinced that this leniency was compelling.<sup>11</sup> Similarly, despite the talmudic instruction (Shabbat 19a) that one ought to board a boat no less than three days prior to the Sabbath to insure reaching one's port and destination before the Sabbath, Raban again countenances the common practice of boarding a boat bound for Worms or Cologne on the eve of the Sabbath—a practice with which he did not actually agree—by applying the loftier version of *mutav she-yihyu shogegin*. Earlier authorities had arranged the hiring of the boat in a way that would properly permit the passenger to stay on board over the Sabbath if it did not reach its destination before then, even though subsequent generations did not fully adhere to these precautions. In addition, the shallower depths of the Rhine (and other rivers in this area) might further support a more lenient approach here. Moreover, Raban maintains that “when one boards a boat for purposes of trading and conducting business, this constitutes a *mitzvah*, which allows for boarding the boat even on Friday itself.” Since there was a recognized rabbinic allowance that had been prevalent in Ashkenaz in earlier times—and there were perhaps additional halakhic strategies that could be offered in support—Raban deemed it inadvisable to demand the stricter approach that he himself favored, invoking instead the higher-level model and ruling of *mutav she-yihyu shogegin*.<sup>12</sup>

Raban applies the less lofty form of *mutav she-yihyu shogegin* in two instances, stressing that the popular custom in these situations developed without any rabbinic justification whatsoever. First, he decries the uninformed

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man [Jerusalem, 1973], 103, 116–17). Malkiel notes the more restrictive Rabiah passage on Beizah (30a) but not the second (36b), and he discusses Raban's formulations on clapping at a wedding on the Sabbath (n. 9 above) but not the more restrictive one (n. 8 above). Malkiel, *Reconstructing Ashkenaz*, 182, 187–88.

<sup>11</sup>On the wearing of jewelry, see *Sefer Raban*, tractate Shabbat, 2:339–40, sec. 349 (= ms. Wolfenbüttel, Aug. 5.7, fols. 113d–114a). Cf. Malkiel, *Reconstructing Ashkenaz*, 156. Regarding women plaiting or braiding their hair, see *Sefer Raban*, Shabbat, 2:351, sec. 354 (= ms. Wolfenbüttel, Aug. 5.7, fols. 115b–c); and cf. Malkiel, *Reconstructing Ashkenaz*, 163. Note the caustic assessment of the late fourteenth-century Spanish authority R. Isaac bar Sheshet (*Teshuvot ha-Rivash* [Jerusalem, 1968], sec. 394, fol. 582): “I never saw or heard anyone who had the temerity to permit combing the hair and no one who brazenly attempted to do so, neither young men or young women, child or elder.”

<sup>12</sup>See *Sefer Raban*, responsa, 1:225–31, sec. 60 (= ms. Wolfenbüttel, Aug. 5.7, fol. 42v). Regular river travel was likely more common for men than for women. Cf. Bitha Har-Shefi, “Mutav she-Yihyu Shogegot ve-‘al Yehu Meizidot,” *Madda’ei ha-Yahadut* 44 (2007): 23.

practice by which a bride who experienced a menstrual period close to her marriage was permitted to immerse herself as soon as her period ended, without having to wait the additional “seven clean days” following the cessation of the menstrual flow that married women are required to observe. Raban makes it quite clear that this custom had no earlier rabbinic approbation: “I have heard that people are lenient in this matter,” seemingly on their own initiative, even as it was in all likelihood practiced in earlier generations as well. Moreover, Raban writes that the incorrectness of this practice should be publicized, if possible, in order to prevent a serious violation of Jewish law. Even though the Talmud invokes the rule of *mutav she-yihyu shogegin* to look away from the common practice of people eating too close to Yom Kippur at a time when they should already be commencing their fast, the punishment that is immediately incurred in that case is not as severe as the potential punishment in this instance.<sup>13</sup>

In a second instance, in a responsum found at the beginning of his work dealing with a ritual bath that receives its water through a series of pipes (and thus the water may not be considered to be “flowing”), Raban does not seek to eliminate the prevailing custom of using such a bath, despite the fact that this configuration had never received any level of rabbinic approbation. Since the potential breach involved in this instance was not so severe (given that immersion in such a *mikveh* was acceptable according to the halakhah at least on some level), Raban allows the women to continue to do what they had been doing, applying the lower-level form of *mutav she-yihyu shogegin* as outlined by the Talmud.<sup>14</sup>

This same distinction between different modes of *mutav she-yihyu shogegin* is again made by R. Eli’ezer b. Joel ha-Levi in cases that came before him. He applies the lower-level usage regarding the method women used to seal wine pitchers, where the particular defective practice in vogue had no halakhic basis whatsoever. Indeed, as noted above for Raban in such situations, Rabiah thought it appropriate to make an attempt to guide and instruct the women in the correct procedure. They might listen in this instance precisely because “they had not been schooled [or supported] in this practice by their parents [or ancestors; *kevan she-lo hurgalu me-avoteihem (be-)kakh*],” and there was no source that allowed it.<sup>15</sup>

At the same time, however, Rabiah rules in two other places that although women’s practice of wearing a type of hairpiece on the Sabbath in the public

<sup>13</sup>See *Sefer Raban*, tractate Niddah, 2:307–8, sec. 336; and cf. Malkiel, *Reconstructing Ashkenaz*, 188.

<sup>14</sup>See *Sefer Raban*, 1:94–96, sec. 25; and cf. Malkiel, *Reconstructing Ashkenaz*, 171.

<sup>15</sup>See *Sefer Rabiah*, 2:317–18, sec. 772.



domain was strongly prohibited by leading German rabbinic authorities (including Raban's son-in-law and Rabiah's father, R. Joel ha-Levi) and by leading Sefardic authorities (including R. Isaac Alfasi [Rif, d. 1103] and Rabbenu Hanan'el [d. 1056]), since Rabbenu Tam allowed this to be done in northern France, the women may continue to do so according to the higher-level application of *mutav she-yihyu shogegin*. There was at least some rabbinic justification for this practice, even as Rabiah (and his father) strongly disagreed with it.<sup>16</sup>

In a responsum, Rabiah permitted those women whose hair was tied up or glued in a way that might well constitute a *hazizah* (an impediment that prevents the waters of the *mikveh* from reaching a piece of the skin) to continue nonetheless to perform their immersions in the ritual bath, based on the higher level of *mutav she-yihyu shogegin*. Rabiah concludes that although this is not an ideal situation, the women should be "left alone" and allowed to immerse (*hanah lahen*) because "if they are not prophetesses, they are the daughters of prophetesses [*bnot nevi'ot hen*]." As he explains, the women in that locale surely must have asked the local rabbinic authorities at some point about immersing with their hair in this state. Despite the seriousness of the prohibition involved, they continued to do so with some degree of rabbinic approbation. Indeed, Rabiah adds his own awareness that a number of women with the same kind of hairstyle also immersed in Cologne where his father, R. Joel ha-Levi, and other rabbinic authorities of the day resided, and yet no objection was ever raised by them.<sup>17</sup> As was the case for Raban, there are more instances in which, because of the higher-level application of *mutav she-yihyu shogegin*, Rabiah allowed women to continue practices with which he was not fully at ease than there were instances in which he thought that such practices had no basis but that since the women would likely not stop what they had been doing, the lower-level mode of the *mutav she-yihyu shogegin* justification should be applied.

Not surprisingly, this same two-tier system concerning *mutav she-yihyu shogegin* was also espoused by leading Tosafists in northern France. Rabbenu Tam developed the justification attributed to him by Rabiah for women wearing hairpieces in the public domain on the Sabbath (which could also be applied to their jewelry) precisely because a lenient view is recorded by the Talmud in the name of the Amora R. 'Anani (or 'Eynoni) bar Sasson. Although Rabbenu Tam did not consider this view to be the halakhah (rather,

<sup>16</sup>See *Sefer Rabiah, hilkhot Shabbat*, 1:237–39, sec. 216, 1:337, sec. 391 (end); and cf. Malkiel, *Reconstructing Ashkenaz*, 157.

<sup>17</sup>See *Sefer Rabiah*, 3:317, sec. 991 [= *Sefer Or Zarua' le-R. Yizhaq b. Mosheh me-Vienna* (Zhitomir, 1862), *hilkhot niddah*, pt. 1, sec. 362 (end) = ed. Machon Yerushalayim (2010), 1:289–90]; and cf. Malkiel, *Reconstructing Ashkenaz*, 172.

he favored the more stringent view of the Amora Rav), he nonetheless put it forward since it could support the behavior and practice of those many women who wore their jewelry in the public domain on the Sabbath. According to several passages, however, Rabbenu Tam based his allowance on the principle of *mutav she-yihyu shogegin* as well.<sup>18</sup>

Some of Rabbenu Tam's closest students, including his nephew and successor R. Isaac (Ri) of Dampierre (d. 1189) and R. Joseph b. Moses, known also in Tosafist texts as R. (Yosef) Porat, thought that their teacher had gone too far here, since the practice was in fact prohibited according to talmudic law in its final ruling. Indeed, R. Porat suggests that since the women will not listen and there is no halakhic basis for what they are doing, the applicable level of *mutav she-yihyu shogegin* in this instance is the lower one. The women should not be told openly about the prohibition since they will not accept it, "but whoever can effectively issue a warning which will be heeded shall be blessed."<sup>19</sup> Rabbenu Tam, however, thought that the women did have a halakhic leg on which to stand; perhaps other authorities had ruled in accordance with R. 'Anani at some point. Although Rabbenu Tam was not prepared actually to rule in this way himself a priori, he was comfortable with invoking the principle of *mutav she-yihyu shogegin* in its loftier valence.

Ri of Dampierre was unable to find convincing talmudic justification for yet another practice of women (and children) on the Sabbath, that of rolling nuts or apples on the ground (as a means of entertainment), which carried with it several halakhic problems. He was able to countenance this common practice only through the lower-level application of *mutav she-yihyu shogegin*, since he thought that the women would not listen to any attempt to curtail this seemingly harmless form of Sabbath entertainment.<sup>20</sup> However, Ri's strong tendency toward stringency in this regard was fairly unique

<sup>18</sup>See *Tosafot ha-Rosh le-Massekhet Shabbat* 64b, s.v. Rav 'Anani; *Sefer Mordekhai le-Massekhet Shabbat*, secs. 354–55 (= ed. S. Engel [Jerusalem, 2013], 161–62); *Teshuvot u-Pesaqim*, ed. E. Kupfer (Jerusalem, 1973), 111; *Haggahot Maimuniyot, hilkhot Shabbat*, 19:5 [6]; *Pisqei ha-Rosh* to Shabbat 6:12.

<sup>19</sup>See *Tosafot Shabbat* 64b, s.v. Rav 'Anani for Ri's objections, and the defense of Rabbenu Tam's view provided by R. Barukh (b. Isaac, author of *Sefer ha-Terumah*) and R. Samson (of Falaise). See also *Tosafot 'Eruvin* 69, s.v. *keivan*; *Tosafot Ri ha-Zaqen ve-Talmido ve-Rishonei Ba'alei ha-Tosafot 'al Massekhet Shabbat*, ed. A. Shoshana (Jerusalem, 1997), 803–5 (to Shabbat 62a), 832–34; *Teshuvot u-Pesaqim le-Ri ha-Zaqen*, in *Shitat ha-Qadmonim 'al Massekhet 'Avodah Zarah*, ed. M. Blau (New York, 1991), 3:222, sec. 100. For R. Porat's concerns, see *Sefer Or Zarua'*, ed. Machon Yerushalayim, pt. 2, sec. 84 [16], 2:115–16.

<sup>20</sup>See the sources cited in n. 14 above; and see also *Teshuvot u-Pesaqim le-Ri ha-Zaqen*, ed. M. Blau, 242, sec. 133; *Sefer Mordekhai 'al Massekhet Shabbat*, ed. Engel, 180, sec. 378; *Shibbolei ha-Leqet*, sec. 121. Cf. *Tosafot 'Avodah Zarah* 4a, s.v. *she-hayah be-yadam*; *Tosafot Bava Batra* 60b, s.v. *mutav she-yihyu*; *Tosafot Shabbat* 55a, s.v. *ve-af 'al gav*; *Teshuvot Rashi*, ed. I. Elfenbein (New York, 1942), 181–82 (#159); *Sefer Mitzvot Gadol*, 'aseh 11 (end), fol. 97c.

among the Tosafists, as will be seen further below. As has been shown, other Tosafists, in both Germany and northern France, were able to invoke the higher level of this principle at times, based on their sense that there had been some type of support for the practice in question from earlier rabbinic authorities, even though their own analytical standards would not now allow it. This higher level of *mutav she-yihyu shogegin* was invoked more frequently overall than was the lower level within northern France as well.

At the same time, however, no such dichotomy regarding the interpretation and implementation of the principle of *mutav she-yihyu shogegin* can be detected in the writings of leading thirteenth-century rabbinic authorities in northern Spain, even among those such as Ramban, Rashba, and Ritva (R. Yom Tov b. Abraham Ishvili, d. ca. 1325) who were otherwise quite indebted to the teachings and methodology (and texts) of the Tosafists. Thus, for example, these authorities uniformly decried the wearing of jewelry in the public domain on the Sabbath, suggesting that this can be allowed only because people are unaware that they are sinning in this regard and will likely not take heed of any suggestion or guidance not to do so. This single-minded approach is applied to other Sabbath practices and patterns as well, on both theoretical and practical levels.<sup>21</sup> Ramban notes the suggestion made by R. Barukh b. Isaac, author of *Sefer ha-Terumah* and a student of Ri of Dampierre, that there is no real public domain according to Torah law in our current habitats, thereby weakening substantially the Sabbath violation incurred when wearing the jewelry—a position that is attributed by some Tosafist texts to Rabbenu Tam himself. Ramban, however, summarily rejects this justification, characterizing it as baseless (*ve-'elu divrei havai*).<sup>22</sup>

Ritva notes the leniency suggested by Rabbenu Tam (based on the talmudic view of R. 'Anani) that allowed women to wear their jewelry outside on the Sabbath. However, he then cites the objections to Rabbenu Tam's approach raised by Ri of Dampierre (as noted above) and concludes that women are simply doing the wrong thing. For that reason, the allowance in this instance can be based only on the lower-level version of *mutav she-yihyu shogegin*—they are doing the wrong thing and they will not listen. Indeed, Ritva goes on to reject the solution of the *Sefer ha-Terumah* as well, and he further notes a Tosafist passage (which is not otherwise found in any extant *tosafot* to the Talmud) indicating that R. Judah Sirleon, a leading student of

<sup>21</sup>See *Hiddushei ha-Rashba 'al Massekhet Shabbat* 59b, ed. Y. Broner (Jerusalem, 1986), 271–73; and cf. *Hiddushei ha-Rashba 'al Massekhet 'Avodah Zarah* 15a, ed. Y. L. Zaks (Jerusalem, 1966), 25. See also *Hiddushei ha-Ritva 'al Massekhet Sukkah* 28b–29a; *Hiddushei ha-Ritva 'al Massekhet Pesahim* 50b; and cf. *Hiddushei ha-Ritva 'al Massekhet Makkot* 20b.

<sup>22</sup>See *Hiddushei ha-Ramban 'al Massekhet Shabbat* 57a, ed. M. Hershler (Jerusalem, 1973), 112.

Ri, in fact told his wife (as she later reported) not to wear her jewelry in public; this was also the position taken by another of Ri's students, R. Samson of Coucy (d. ca. 1220).<sup>23</sup>

Moreover, a striking formulation attributed to Ritva (on the talmudic *sugya* in Beizah 30) considers the rule of *mutav she-yihyu shogegin* to be a lowly defense of last resort, which should be used only when it appears that the people will not change their ways or listen to rabbinic exhortations and adopt a fully defensible practice. Ritva asserts that he heard in the name of a leading Ashkenazic rabbi (*rav gadol be-Ashkenaz*) that his leading northern French predecessors (*rabbotav ha-Zarefatim*) Ri of Dampierre and Maharam of Rothenburg (who had studied extensively in northern France) believed that the principle *mutav she-yihyu shogegin* was applicable only during the talmudic period. "But in our generations, in which quite a number of leniencies in law and practice have already been applied, we ought to protest and even fine people so that they do not transgress at all, whether wittingly or unwittingly."<sup>24</sup>

The Ashkenazic rabbinic approach characterized in this formulation did not wish to allow any practices that had no real basis, even under the rubric of *mutav she-yihyu shogegin*. This attitude comports with the evidence we have seen thus far: most of the Ashkenazic applications of *mutav she-yihyu shogegin* were made in situations where the questionable practice did have some talmudic or rabbinic support or approbation. In northern Spain, however, as Ritva's own *hiddushim* indicate, this principle was formulated and invoked exclusively to cover cases in which the popular practice appears to have had no meaningful justification, as a means of last resort.

Further verifying Ritva's report, we have seen that Ri of Dampierre hesitated to apply this principle even with regard to the allowance that Rabbenu Tam had suggested for women to wear their jewelry in the public domain on the Sabbath. Rather, he applied only the lower-level form of *mutav she-yihyu shogegin* in this instance, as he did as well regarding the games that women played on the Sabbath and festivals.<sup>25</sup> Moreover, Maharam of Rothenburg also "practiced what he preached" according to the formulation reported by Ritva. Maharam did not want to rely at all on the allowance of *mutav she-yihyu shogegin* for women who rolled nuts on the Sabbath, which had no real justification, even as Ri himself did allow this based on the lowbrow usage of

<sup>23</sup>See *Hiddushei ha-Ritva 'al Massekhet Shabbat* 64b, ed. M. Goldstein (Jerusalem, 1990), 380–82.

<sup>24</sup>See *Shitah Mequbbezet le-Beizah* 30a, ed. H. G. Zymbalist (Tel Aviv, 1986), 465.

<sup>25</sup>See nn. 19–20 above.

the principle.<sup>26</sup> Similarly, Maharam decried the apparently common Sabbath practice of inserting a house key into a belt in a temporary way in order for the homeowner to keep the key on his person, refusing to rely even on the low-level conception of *mutav she-yihyu shogegin* in this instance as well.<sup>27</sup> He also expresses the same concern (in similar terms) with regard to lending charity funds at a fixed rate of interest, even though this too was a somewhat common practice in his day.<sup>28</sup>

The following comparative case study clearly reflects the differences in the conception and application of the principle of *mutav she-yihyu shogegin* between Ashkenaz and Sefarad. In a responsum composed in Spain (as were most of his extant responsa), R. Asher b. Yehi'el (Rosh, d. ca. 1325), who had been Maharam's leading student in Germany until he was forced to flee in 1304 when he was in his fifties (reaching Toledo in 1305), writes that the practice in both Germany and northern France is not to sweep the floors on the Sabbath because this caused channels to be formed in the dirt flooring. In Spain, however ("this land," in the words of the Rosh), they relied on an opinion of R. Isaac Alfasi (Rif) that permitted sweeping. Rosh notes that he did not have the temerity (*lo mela'ani libbi*) to prohibit this practice, since the community would not have listened to him. In addition, they are "hanging themselves on a big tree," that is, they have a significant rabbinic figure (Rif) on whom they rely. Rosh therefore judges this to be a high-level instance of *mutav she-yihyu shogegin*, even though he acknowledges that at least some of the people do have an idea of the halakhic issues at stake, and they nonetheless continue to sweep the floors a priori.<sup>29</sup>

Ritva—who was Rosh's contemporary in Spain—also writes that while Jews in northern France, southern France (Provence), and even northern Spain (Catalonia) do not sweep the floors in their homes on Sabbaths and festivals, sweeping is done in his region in accordance with the view of Rif. Ritva provides additional support for this practice, since not sweeping will lead to unpleasant—if not unsanitary—conditions (characterized as *geref*

<sup>26</sup>See *Haggahot Maimuniyyot, hilkhoh Shabbat* 23:4 [2]; *Sefer Tashbez Qatan*, ed. S. Engel (Jerusalem, 2011), 46, sec. 79; *Teshuvot, Pesaqim u-Minhagim shel Maharam*, ed. Y. Z. Kahana (Jerusalem, 1957), 1:235, sec. 316. See also *Semaq*, sec. 280 (end of *zorea'*); *Teshuvot Maharam ve-Haverav*, ed. S. Emanuel (Jerusalem, 2013), 276, sec. 42. In his glosses to *Sefer Tashbez* (sec. 61, end), Maharam's contemporary, Rabbenu Perez of Corbeil, also supports this allowance.

<sup>27</sup>See *Teshuvot Pesaqim u-Minhagim*, ed. Kahana, 1:91–92, sec. 78.

<sup>28</sup>See *Teshuvot Maharam*, ed. Prague, #73, end (= ed. Lemberg, #478; ed. Cremona, #101); see also ms. Bodl. 672, fol. 41v (in the margin).

<sup>29</sup>See *She'elot u-Teshuvot le-R. Asher b. Yehiel*, 22:15–16, ed. Y. S. Yudlow (Jerusalem, 1994), 116. See also *Pisqei ha-Rosh 'al Massekhet Shabbat*, 10:3; and *Tosafot Shabbat* 95a, s.v. *ve-haidna*.

*shel re'i*), an allowance associated with Ramban as well. Ritva insists, however, that sweeping should not be permitted in the entranceways or courtyards of the home, as people in some locales were also now doing, against the halakhah. Nonetheless, Ritva was still prepared to apply to this completely unacceptable practice the justification of *mutav she-yihyu shogegin*.<sup>30</sup>

Rosh, who was trained in Ashkenaz, was prepared to allow the widespread practice of sweeping the home in Spain under the aegis of the high-level *mutav she-yihyu shogegin*. Because Rif had permitted something like this, people in Spain may continue the practice even though there are many subsequent rabbinic decisors who did not allow it. The Spanish-trained Ritva had no problem in relying on the lone view of Rif that allowed sweeping within the home; he in fact sought to strengthen this allowance. Ritva does not apply in this instance the only level of *mutav she-yihyu shogegin* that he had at his disposal, since he had no need to do so at this point. At the same time, he countenances *ex post facto* the practice of sweeping the entrance outside the home—which was not permitted by any rabbinic authority—on the basis of the lowbrow version of *mutav she-yihyu shogegin*, which was the only level of allowance available to him here.

In sum, the complex or multilayered use of this principle in Ashkenaz does not demonstrate, as Malkiel has argued, that “deviant halakhic behavior” was as widespread in Ashkenaz as it was in Sefarad, or that Ashkenazic rabbinic authorities simply “threw up their hands” and allowed a wide array of deviant practices based on this principle. To the contrary: a careful review of the rabbinic literature from both Ashkenaz and Sefarad indicates that the rabbinic authorities, along with the people whom they led, had a very different series of attitudes when it came to determining and allowing public practices. In Ashkenaz, Tosafists maintained that even where they could not approve a particular practice, there were often earlier authorities who did approve, and there were sometimes additional reasons to explain the practice in question. Rarely did Ashkenazic Jews, women or men, widely adopt a practice that had little if any justification. In Spain, on the other hand, the assumption of the rabbinic authorities was that when they encountered a widespread but halakhically unproven practice, it might still have to be tolerated because the laity would not be able to accept a change.

No one can maintain that there were no sinners in Ashkenaz—or that there were no saints in Sefarad—since there is ample evidence for both of

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<sup>30</sup>See *Hiddushei ha-Ritva 'al Massekhet Shabbat* 124b, ed. Goldstein, 806–8. See also *Shitah Mequbbezet 'al Massekhet Beizah* 22b, ed. Zymbalist, 440–41, in the name of Nahmanides (Ramban). Ritva, who may have hailed from Seville, studied in Catalonia, but he later served as a rabbinic leader in Saragossa (a capital of Aragon), which, like Toledo, had a significant Muslim past.

these types of people in both these societies. Levels of popular religious observance and sensitivity appear to have differed significantly between them, however. Whether Spanish rationalism played a role here as some have suggested, or whether there was a higher degree of fealty to rabbinic authority in Ashkenaz among the laymen as Jacob Katz has argued,<sup>31</sup> the notion that the lay strata in these societies were on a very similar level of religious observance and sensitivity is not supported by the different rabbinic approaches in these two regions concerning the conceptualization and application of *mutav she-yihyu shogegin*. Suffice it to say that the depth and complexity of the Tosafist approach—and the fully intentioned yet relatively simple Spanish model—can only be discerned and appreciated through a thorough and thoughtful reading of the relevant rabbinic corpora in their plenitude.

### The Provenance and Dating of Tosafist Texts

In an article that appeared more than twenty years ago, Yaakov Spiegel suggests, on the basis of manuscript evidence, that although Moses of Coucy took the position in his *Sefer Mitzvot Gadol* (*Semag*, composed in the 1240s) that a woman was permitted to perform a ritual circumcision, copyists of the *Semag* during the later thirteenth century and beyond blurred or even tampered with the text in order to support the conclusion that a woman could not serve as a *mohelet*, which was the view held by the standard *tosafot* gloss to tractate 'Avodah Zarah.<sup>32</sup> The question of whether a woman can circumcise a child was treated by the talmudic *sugya* through an analysis of biblical verses that focuses on whether one may perform the precept of circumcision only if one had oneself been circumcised, or whether a Jewess could play this role as well. The *sugya* identifies these two exegetical positions as a dispute between Amoraim, with R. Yohanan maintaining that a woman may serve as a *mohelet*, while Rav held that a woman cannot. The *tosafot* concludes that the law should be decided here in accordance with the view of Rav.

To contextualize the changes found within the manuscripts of *Sefer Mitzvot Gadol*, Spiegel surveys the approaches of earlier medieval halakhists. He notes that while several Geonim and leading Sefardic halakhists, including Rif and Maimonides (d. 1204), put forward a kind of middle position—that a woman can serve in this capacity only if a qualified male was unavailable—the consensus within France (and much, but not all, of Germany) through the twelfth century and into the thirteenth, as represented by

<sup>31</sup>See E. Kanarfogel, "Rabbinic Attitudes toward Nonobservance in the Medieval Period," in *Jewish Tradition and the Non-Traditional Jew*, ed. J. J. Schacter (Northvale, NJ, 1992), 3–35.

<sup>32</sup>See Y. S. Spiegel, "Ha-Ishah ke-Mohelet: Ha-Halakhah ve-Gilgulehah ba-Semag," *Sidra* 5 (1989): 149–57.

Rabbenu Tam's student Eli'ezer b. Samuel of Metz (d. 1198) in his *Sefer Yere'im* and by Isaac b. Moses in his *Or Zarua'*, was to rule in accordance with R. Yohanan. This was the view of Moses of Coucy as well.<sup>33</sup>

As Spiegel notes, however, the standard *tosafot* to tractate 'Avodah Zarah, which were composed or redacted in the late thirteenth century in the study hall of R. Perez of Corbeil, ruled in accordance with Rav that a woman may not serve as a *mohelet*,<sup>34</sup> as did Isaac b. Joseph of Corbeil (quite emphatically) in his *Sefer Mitzvot Qatan*, which was composed around 1270. Spiegel seems to suggest that it was this change in halakhic direction during the late thirteenth century that engendered the imprecise copying of *Sefer Mitzvot Gadol* at that time, in order to make it appear that R. Moses of Coucy had already ruled stringently as well. Others have also highlighted this trend. While Tosafists during the twelfth century allowed women to serve as circumcisers (at least in theory), there was a noticeable change during the thirteenth century that caused the restrictive position to become prevalent by the end of that century.<sup>35</sup>

Spiegel also notes in passing, however, that the stringent view of Rav adopted by the standard *tosafot* to 'Avodah Zarah was also supported by other collections of *tosafot* to this tractate (in slightly sharper terms), including those produced by Elhanan, son of Rabbenu Tam's leading student, Ri of Dampierre, as well as the *tosafot* of Ri's leading student, Samson of Sens. This textual sequence, however, shatters the fairly neat historical trend that had been proposed, for it indicates that the stringent view of Rav was already in play (and perhaps even dominant) in northern France nearly a century earlier than its inclusion within the standard *tosafot* to 'Avodah Zarah—and well before Moses of Coucy's *Sefer Mitzvot* was composed. Elhanan, son of Ri, died a martyr's death in 1184; an explicit reference within Elhanan's *tosafot* to tractate 'Avodah Zarah indicates that this work was composed in 1182.<sup>36</sup> Similarly, Samson of Sens immigrated to the land of Israel circa 1210, where he died in 1214. As Israel Ta-Shma has shown, Samson generally produced

<sup>33</sup>In light of these developments, it is worth noting that *Sefer Yere'im* was a source for *Sefer Mitzvot Gadol*, and that Isaac Or Zarua' studied in Paris with R. Judah Sirleon, who was the major teacher of Moses of Coucy. See E. E. Urbach, *Ba'alei ha-Tosafot* (Jerusalem, 1980), 1:438, 466, 474.

<sup>34</sup>See *Tosafot* 'Avodah Zarah 27a, s.v. *ishah*. On the composition and dating of these *tosafot*, see E. E. Urbach, *Ba'alei ha-Tosafot* (Jerusalem, 1980), 2:654–57. This *tosafot* passage also cites (and disagrees with) the lenient view of the *Halakhot Gedolot*.

<sup>35</sup>See Avraham Grossman, *Hasidot u-Mordot* (Jerusalem, 2001), 331–32; Elisheva Baumgarten, *Mothers and Children* (Princeton, NJ, 2004), 65, 88. It should be noted that both Isaac b. Joseph and Perez b. Elijah of Corbeil studied in the the Tosafist *beit midrash* at Evreux; see Urbach, *Ba'alei ha-Tosafot*, 2:571, 576.

<sup>36</sup>See Urbach, *Ba'alei ha-Tosafot*, 1:254.



his own *tosafot*. He did not rely on his students to compile his materials as other Tosafists often did, since he wished to record verbatim the formulations of his teacher Ri, as well as those of Ri's main teacher, Rabbenu Tam.<sup>37</sup>

These *tosafot* variants to tractate 'Avodah Zarah present a significant halakhic view that was already expressed in northern France during the mid- to late twelfth century, and therefore the suggestive societal pattern of a pronounced difference between the twelfth and thirteenth centuries that Spiegel and others have pointed to cannot be sustained. Variant texts often have a different developmental chronology (and point of origin) when compared to the *tosafot* texts found in the standard editions of the Talmud. And these seemingly small details can loom large in accurately formulating the history of halakhah and of Jewish practice.<sup>38</sup>

### The Breadth and Erudition of the Tosafists

In arguing further for this kind of societal pattern or trend, Elisheva Baumgarten points to the fact that Maharam sought to eliminate the custom that allowed women to serve as *sandeka'ot* (who held the child while he was being circumcised), a high religious honor. He had concerns about this practice because it meant that a well-dressed, bejeweled woman had to enter the men's synagogue where the circumcision typically took place, raising the specter of immodesty. A second reason given by Maharam for the need to curtail this practice, "that women should not 'snatch' the commandment from the men," leads Baumgarten to observe that "the expression he uses, '*lahtof ha-mitzvah*' (to snatch the commandment), is one that is not common in the medieval sources. It appears in the Talmud as well as in the Midrash in a completely different context, one far more positive than the context here." Baumgarten goes on to suggest that Maharam's charge that women are "snatching the commandment" is meant to convey that they are "taking over an area that is not meant for them," and she proceeds to examine women's participation in rituals at this time in Ashkenaz.<sup>39</sup>

<sup>37</sup>See Israel Ta-Shma, *Ha-Sifrut ha-Parshanit la-Talmud* (Jerusalem, 2000), 2:103–7.

<sup>38</sup>Cf. Daniel Sperber, *Minhagei Yisra'el* (Jerusalem, 1989), 1:66 n. 18. In light of the evidence adduced by Y. M. Peles that Moses of Coucy produced at least two *mahadurot* of his *Sefer Mitzvot* (making various adjustments and corrections on the basis of additional materials that he received in the interim), it may also be possible to account for at least some of the manuscript changes noted by Spiegel along these lines. See Peles's introductions to *Sefer Mitzvot ha-Gadol ha-Shalem* (Jerusalem, 1993–2003), 1:17–24, 2:17–23. See also E. Kanarfogel, "The Image of Christians in Medieval Ashkenazic Rabbinic Literature," in *Jews and Christians in Thirteenth-Century France*, ed. Elisheva Baumgarten and Judah Galinsky (New York, 2015), 156–67.

<sup>39</sup>See Baumgarten, *Mothers and Children*, 87–88.

Baumgarten makes her case, namely, that women were being barred at this time from participating in rituals that they had been allowed to undertake previously, based in part on the fact that the concept of “grabbing the *mitzvot*” was turned by Maharam from being a fundamentally positive one in talmudic and midrashic parlance—to pursue actively, literally to grab, and to seek proactively to perform a precept whenever and wherever possible—into a negative description of someone who has entered a religious realm to which he or she does not belong. Indeed, Rashi’s comment on Numbers 23:24 (which expresses one of the blessings of Bilaam), “they arise in the morning like lions, to grab [*laḥtof*] the *mitzvot*, to wear *zizit*, recite Shema and don *tefillin*,” can be added to the rabbinic sources adduced by Baumgarten that demonstrate the highly positive connotation of this phrase.<sup>40</sup> Given the earlier, more positive use of the phrase, Maharam, through his inventive rhetoric, apparently wished to emphasize a developing problem with women serving as *sandeka’ot* aside from the issue of modesty: that women were entering into a religious arena that was not rightly theirs.

Baumgarten’s overall argument may yet be proven to be correct, but her analysis of Maharam’s phrasing and the implications of this change need to be reconsidered. A talmudic passage in tractate Bava Qamma (91b)—which does not employ any form of the phrase *laḥtof et ha-mitzvot*—nonetheless has much to say about someone who usurps the *mitzvah* of another to which he is not entitled (thereby seeking to receive the reward for it as well). The Talmud records that Rabban Gamliel fined a person who had stepped in and quickly covered the blood of a slaughtered nondomesticated animal (a *ḥayyah* or a bird, for which the covering of the blood is required), a *mitzvah* that is normally vouchsafed to the one who had slaughtered the animal.

The *tosafot* to that *sugya* discuss the practical ramifications of this policy, pointing to a situation in which one person had been called up to read a portion of the Torah publicly but then another person “came along ahead of him” (*u-ba aher ve-qadam lo*) and proceeded to make the blessing over the Torah, thereby taking over the *‘aliyyah* to the Torah in his place. Rabbenu Tam was asked about appropriate compensation for this loss, and he suggested that the one who usurped this *mitzvah* (and blessing) opportunity must provide his fellow with a fowl that can be ritually slaughtered by (or on behalf of) the second individual. As noted, slaughtering a fowl generates two blessings (to be made by the person who slaughters it), one for the act of slaughtering and a second for covering its blood, just as an *‘aliyyah* to the Torah generates two blessings for the one receiving it, before and after the reading of the Torah. Ri of Dampierre suggested that a monetary fine was perhaps more appropriate

<sup>40</sup>Rashi’s comment is based on a passage in *Midrash Tanhuma* (14). See also *Qohelet Rabbah*, 7:7.

here, in accordance with what Rabban Gamliel had himself imposed. In any case, the fact is that this *tosafot* from the days of Rabbenu Tam and Ri deals with the negative connotation (and consequences) of “grabbing” a *mitzvah* from another person close to a century before Maharam addressed it, even though the specific idiom of *ḥatifat mitzvah* is not employed to characterize these situations.<sup>41</sup>

Maharam cannot be expected to have had a record of every twelfth-century *tosafot* passage or ruling at his disposal—nor did he, even though he studied with several leading northern French Tosafists of the mid-thirteenth century, including Yehi’el of Paris, Samuel of Falaise, and Samuel of Evreux. Nonetheless, it is difficult to maintain in light of this *tosafot* passage that Maharam was the first to put forward the negative conception of “grabbing a *mitzvah*,” as Baumgarten has suggested. Moreover, variant collections of *tosafot* to Bava Qamma and to a parallel *sugya* in tractate Hullin record that Rabbenu Tam also ruled in much the same way regarding a *mohel* who stepped in and usurped a circumcision rite from another who had been appointed to perform it (*ve-qidmo aher*).<sup>42</sup>

Already in the mid-twelfth century, Rabbenu Tam and his Tosafist associates were concerned about the proper allocation of *mitzvot* with respect to a number of commandments, including circumcision in particular. Maharam’s interpretation and application of this principle (which he expressed in terms of *ḥatifat mitzvot*) to women serving as *sandeka’ot* may, therefore, have been nothing more than an expression of further concern for the proper distribution of roles and prerogatives in *mitzvot* rather than a position that he took (or an interpretation that he developed) specifically with regard to gender roles. To be sure, Rabbenu Tam applied his reasoning in the case of someone who had already grabbed away the *mitzvah* of another. The issue of a woman holding the baby during a circumcision is not precisely identical, since the woman chosen for this role does not intend to “grab the *mitzvah* away” from anyone else. Nonetheless, Maharam is asking whether it is appropriate to call someone into the men’s synagogue to hold the baby when there were surely men available in the synagogue who could do so, an approach that would avoid any issue of immodesty as well. Maharam’s formulation in this matter

<sup>41</sup>See *Tosafot Bava Qamma* 91b, s.v. *ve-hiyyevo*.

<sup>42</sup>See *Hullin* 87a and *Sefer Mordekhai*, sec. 655. See also *Tosafot ha-Rosh ‘al Massekhet Hullin*, ed. E. Lichtenstein (Jerusalem, 2002), 414–16; *Tosafot Talmidei Rabbenu Tam ve-R. Eli’ezer*, in *Shitat ha-Qadmonim le-Bava Qamma* (91b), ed. M. Blau (New York, 1977), 302 (the passage concludes with the abbreviation פ”ר, suggesting that Ri is the one reporting this in the name of his teacher Rabbenu Tam). Cf. Urbach, *Ba’alei ha-Tosafot*, 2:639–45. The *tosafot Talmidei Rabbenu Tam* and the *Mordekhai* passages also make reference to the similar approach in these matters taken by Rabbenu Tam’s older German contemporary, Riba ha-Levi of Speyer.

appears at its core to reflect not so much the larger issue of gender roles as it does a concern that no one who can properly perform a precept should be bypassed, male or female.

In this instance as well, keeping track of variant *tosafot* passages, as well as recognizing the Tosafists' sweeping awareness of material throughout the talmudic corpus that might be relevant to the matters of Jewish law and custom at hand, is crucial. In sum, the historian who wishes to glean dimensions of religious observance and related values within medieval Jewish society from rabbinic literature (which can surely be done in a wide range of instances) must inquire as fully as possible into the often innovative interpretational strategies that figures such as the Tosafists (and their counterparts in Spain) employed. Suggestive rabbinic formulations often had their roots not in the realia of the day, but in the vast and complex corpus of talmudic literature and allied texts. In addition, the texts of the Tosafists and their contemporaries developed along geographic and chronological lines that also must be carefully identified and traced.

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