

Talmud Oversimplified?
A Partial Review of Talmud Reclaimed:
An Ancient Text in the Modern Era, by
Shmuel Phillips (Mosaica Press, 2023)

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I. Updating the Talmud

Talmud Reclaimed, Rabbi Shmuel Phillips' latest work, is a well-written and boldly argued overview of some major topics related to Talmud study, including the basis for the Talmud's authority and ways the Talmud has been studied through history. The focus of this "partial review" is Rabbi Phillips' thesis regarding the difference between how Talmud was studied in Ashkenaz and Sepharad, specifically on an alleged dichotomy between the Tosafists and Rambam. This is the subject of Chapter 6 of the book, as well as its Appendix G, which presents twenty-nine case studies in support of the book's thesis.

Rabbi Phillips points to some fundamental discrepancies between the approaches of the Tosafists and Rambam: First, he argues that the Tosafists exhibit greater flexibility and willingness to "update" the Talmud, while Rambam is fully bound by Talmudic authority (p. 149). Phillips gives several examples of laws in the Talmud that the Tosafists write no longer apply, including the prohibition against clapping and dancing on Shabbat, the obligation of *mayim aharonim*, the prohibition against benefiting from gentile wine, and some others.¹

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¹ See also Rav Asher Weiss, *Shu"t Minbat Asher* 3:22, who cites some additional cases where Tosafot write that a prohibition no longer applies: the prohibition of *mayim megulim*, the requirement to wash one's hands before feeding a child, the prohibition against doing business with an idolator before his holiday, and the obligations of *atfat ha-rosh* and *kefiyat ha-mitab* for mourners. Rav Asher Weiss surveys some approaches that have been offered to explain these views of Tosafot and offers his own.

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However, this does not provide a full picture of the issue. From this presentation, one may get the impression that the Tosafists were amenable to discarding any Talmudic rule which they viewed as no longer relevant. But, as already noted by *Pri H'adash* (*Yoreh De'ab* 116:2), in several places the Tosafists write explicitly that *takanot* remain binding even when their original reasons no longer apply—for example, the prohibition of *melakhah* on Erev Pesach, which Tosafot write still applies, even though it is rooted in the *korban pesah*. The *Pri H'adash* therefore distinguishes between a *takanah* which initially had universal application, which remains in force even when the reason does not, and a *takanah* which from the start had only limited application, which applies only when the reason is still applicable.² Regardless, while it is true that Tosafot are willing to entertain the possibility that a Talmudic *takanah* no longer applies, this should not be presented as a blanket principle without qualification.

A related topic discussed by Phillips is the adjustment of Talmudic laws to contemporary realities. Phillips refers to Chanukah lighting as an example of the divergent approaches of Tosafot and Rambam: The Gemara (*Shabbat* 21b) identifies the time for lighting as *עד שתכלה רגל מן השוק*, meaning “until traffic in the marketplace ceases.” According to Phillips (pp. 438-439): “Rif and Rambam understand the duration of this window of fulfillment of the commandment to be approximately half an hour. Once this time has elapsed, the Talmud tells us, there is no longer an obligation to light (and, as a corollary, any blessing recited over the lights after this time may be biblically prohibited as a *berak'bah le-vatalah*, a blessing in vain).” Phillips translates Rambam as saying, “Should one forget, or even if one purposely did not light at sunset, one may light afterwards until there are no longer any passers-by in the marketplace. How long a duration of time is this? Approximately half an hour or **slightly more**

² פר"ח יו"ד קטז:ב: ועכשיו שאין נחשים מצויים בינינו מותר. צריך לעיין בענין זה שהרי בפרק קמא דעבודה זרה [ה, ב] כתבו התוספות [ד"ה והתנן] שאף עתה שאין לנו קרבן שואלין בהלכות פסח קודם לפסח שלשים יום אף שעיקר התקנה על הקרבן נתקנה. וכן לענין עשיית מלאכה בערב פסח אחר חצות כתבו התוספות בריש פרק מקום שנהגו [פסחים ג, א] שאף שעיקר הטעם משום קרבן אף בזמן הזה דליכא הקרבה כיון שנאסר אז אסור לעולם... אלא שיש להקשות על זה דבפרק קמא דעבודה זרה [ב, א] קתני לפני אידיהן של גוים שלשה ימים אסור לשאת ולתת עמהם ואפילו הכי גרסינן התם בפרק בתרא [סוף סד, ב] רב יהודה שדר ליה קורבנא לאבידרנא ביום אידו אמר קים ליה בגויה דלא פלח לעכו"ם, וכן רבא שדר קרבנא לבר ששך ביום אידו מהך טעמא, ואמאי לא אמרינן דלא פלוג רבנן ואף שבטל הטעם לא בטל התקנה. וכן בפרק אין מעמידין [שם כט, ב] קתני דמוריים של גוים אסור משום חשש תערובת יין, ומבואר שם בגמרא [לד, ב] דבמקום שהיין דמיו יקרין מן המוריים מותר. וצ"ל דבהני מעיקרא כי תקון הכי תקון שלא אסרו לשאת ולתת אלא במי שעובד עכו"ם וכן לא אסור המוריים אלא במקום שהיין בזול, ואם כן מעולם לא נאסר בענין דנצטרך להתירו.

than that” (emphasis added). Yet this is not an accurate presentation of Rambam who writes (*Hilkebot Hanukah* 4:5):

שכה או הזיד ולא הדליק עם שקיעת החמה, מדליק והולך עד שתכלה רגל מן השוק. וכמה הוא זמן זה, כמו חצי שעה או יתר. עבר זמן זה, אינו מדליק.

R. Velvel Soloveitchik noted that Rambam states that the time is about half an hour following sunset “or more” (או יתר), because according to Rambam this is not a fixed *shiur* but dependent on the reality of time and place.³ If so, it is then incorrect to say that Tosafot “take a very different approach to this law, assessing how it should apply within the context of post-Talmudic realities of Jewish life,” while “Rambam’s strict methodology of recording simple Talmudic conclusions does not permit him to make this innovative alteration to the Talmudic rule, even if he might have thought it logical to do so.” According to both Rambam and Tosafot, the law depends on the context because the law was formulated to reflect the context. Neither one is “updating” the Talmud.⁴

³ Quoted by R. Chaim Aharon Turchin, *Kuntres Hanukah U-Megillah*, p. 23. In fact, this interpretation of Rambam was previously given by R. Tzvi Elimelech of Dinov, *Hiddushei Mahartz’a, Shabbat* 21b. This is also how R. Moshe Feinstein (*Dibberot Moshe, Shabbat*, p. 459; *Iggerot Moshe, Orach Hayyim* 6:49) and R. Joseph B. Soloveitchik (S. Z. Pick, *Moadei Ha-Rav*, pp. 91-92) understood Rambam, and this is how the Ritva explains the Gemara. Even if one were to accept that Rambam means “slightly” more, it is a misrepresentation to insert a word into one’s translation without any indication that one is doing so. See also *Hil. Sukkah* 6:6, *Hil. Kiddush HaHodesh* 1:2, *Hil. Issurei Mizbe’ah* 7:7, *Hil. Avadim* 3:10, *Hil. Shekhenim* 10:5 and 13:2—in all these cases Rambam writes או יתר מעט in order to say “or slightly more.” (My thanks to Rabbi Craig Berkowitz for suggesting this point.)

⁴ Phillips argues that:

Like Rif before him, Rambam interprets the Talmud’s phrase “until there are no longer passers-by in the marketplace” to represent a specific measure of time after sunset rather than making the time span for fulfilling the commandment practically dependent on the actual presence of passers-by to witness the lights. In this he is supported by the use of the identical phrase elsewhere in the Talmud, regarding the law of wearing *tefillin* after sunset—a commandment which is wholly unconnected to the publicizing of a miracle to passers-by.

However, this seems to misunderstand the Gemara about *tefillin* (*Menahot* 36a) as well. The Gemara presents three opinions about the latest time for wearing *tefillin*:

ועד מתי מניחין? עד שתשקע החמה. רבי יעקב אומר: עד שתכלה רגל מן השוק. וחכמים אומרים: עד זמן שינה.

As Tosafot note there, according to R. Yaakov and the *Hakhamim*, one is allowed to wear *tefillin* at night; the reason for the time limit is the concern that one will

Another case discussed by Rabbi Phillips (pp. 435-436) does not relate to *takanot de-Rabbanan* but to Biblical law: the definition of a public domain (*reshut ha-rabim*) for Shabbat. According to Phillips, “The Talmudic distinction between a *karmelit* and a public domain focuses primarily on their size and structural features. . . . A minority of *Rishonim* subsequently introduced a novel and highly significant limitation into the definition of public domain, stipulating that it must be an area through which 600,000 people pass.” Phillips, noting that this latter position was adopted by Tosafist Ri, argues that “This law therefore reflects a major ramification of the gulf between the legal philosophies of the Tosafist and Maimonidean schools regarding the degree of flexibility available to post-Talmudic authorities when determining Talmudic law.”

As we have noted, however, this is not merely a question of Rabbinic law but of one of the most severe categories within Biblical law, *melakhot Shabbat*. Does Phillips intend to say that Tosafists viewed themselves as capable of redefining Biblical law, even in contradiction to the Talmud (note the word “subsequently” in the quote above)? I do not think that any traditional Talmudist has ever understood this to be the position of Tosafot or the *rishonim* who adopt this view. Rather, these *rishonim* maintain that this was a Geonic tradition about how to understand the Talmud, even if it is not stated explicitly in the Talmud.⁵

fall asleep in his *tefillin*. If so, we can well understand why the *shiur* depends on *עד שתכלה רגל מן השוק*—because at a time when people are still out and about, we are not concerned that one will fall asleep. According to the *Hakhamim*, one has until actual bedtime for the same reason. This does not prove anything about this being a fixed *shiur*.

⁵ See R. Ovadiah Yosef, *Yabia Omer* 9:33, who argues that the lenient view is actually the position of the majority of *rishonim*, including *Behag*, Rashi, Tosafot, Rosh, *Sefer Ha-Itim*, *Sefer Ha-Eshkol*, R. Tam quoted in *Shibbolei Ha-Leket*, Rokeach, Raavan, Raavyah, *Ohr Zarua*, *Sefer Ha-Ittur*, R. Yeshayah Di Trani, *Sefer Ha-Terumah*, *Semag*, *Semak*, Maharam Mi-Rottenburg, Recanati, Maharil, *Terumat Ha-Desben*, and others. In a note, R. Ovadiah adds:

והנה הלום ראיתי להרה"ג רבי רפאל בירדוגו בספר תורות אמת (סי' שמה), שכתב לתמוה על רש"י וסיעתו, שאיך מכח עיון וסברא בעלמא כתבו להקל באיסור שבת החמורה, לתלות דין ההוצאה לרה"ר בתנאי דששים רבוא, שזהו דבר שאינו מתקבל וכו', וגם על הט"ז שכתב שהממיר יחמיר לעצמו, ואין בידו למחות על מה שנוהגים כדעת המקילין, יש לתמוה הפלא ופלא, שהרי באיסור סקילה עסקינן וכו', ע"ש. ואשתמיט מניה שדבר זה נאמר לא מכח עיון וסברא, אלא יסודתו בהררי קודש הוא בעל הלכות גדולות, שדבריו דברי קבלה, ורוב הפוסקים כתבו ג"כ כמוהו להקל. וא"כ מה לו כי יזעק על הט"ז בזה. וע' במחצית השקל (סי' שמה סק"ז). שאף שע"פ הכלל סתם וי"א הלכה כסתם, נראה דס"ל למרן להחמיר, שא"צ ס' רבוא, מ"מ המנהג הוא כדעת הי"א, וכמ"ש בש"ע (סי' שג סי"ח) וכו', ע"ש. וכ"כ בשלחן ערוך הגר"ז (סי' שמה סעיף יא), שאחר שהביא דברי הי"א דבעינן ס' רבוא, כתב, ועל פי דבריהם נתפשט המנהג

In addition, the discussion of the Tosafists' defense of common practice should make note of Professor Haym Soloveitchik's explanation of this phenomenon:

The Franco-German community was permeated by a profound sense of its own religiosity, of the rightness of its traditions, and could not imagine any sharp difference between its practices and the law which its members studied and observed with such devotion. The Provencal Jewish community and the Spanish ones, on the other hand, wrestling as they were with, or with what they thought to be, widespread religious laxity, had no such self-image, and it never occurred to the scholars of these communities... that the deeds of the common folk were revelatory of the 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. If the new dialectical method, with its sweeping collation of the most varied sources, with its constant juxtaposition of contradictory passages, discovered that among the contradictions uncovered was one, not simply between a passage in the first volume of the Talmud and another passage in the last, but between a passage in the Talmud and the practice of a God-fearing community, to the tosafists the problem was one and the same.⁶

במדינות אלו להקל ולומר שאין לנו עכשיו רשות הרבים גמורה, ואין למחות בידם שיש להם על מה שיסמוכו, שכן דעת גדולי הראשונים וטעמם ונימוקם עמם. וירא שמים יחמיר לעצמו.

⁶ Haym Soloveitchik, "Religious Law and Change," *Collected Essays*, vol. 1 (Littman Library, 2013), pp. 246-247. Rabbi Benzion Buchman pointed out that this principle is already made explicit in a *teshuvah* of R. Hai Gaon (*Temim De'im* no. 119): ודברי הרבים הוא המוכיח על כל משנה ועל כל גמרא, ויותר מכל ראיה, מזה – פוק חזי מה עמא דבר (ברכות מה ע"א), זהו העיקר והסמך, ואחר כך אנו מביטים בכל הדברים שנאמרו במשנה או בגמרא בענין הזה ומה שיעלה מהם, ויתרץ כאשר את נפשותינו מוטב, ואם יש בה כלום שלא יתכוין כאשר בלבבנו ולא יתברר בראיה, אינו עוקר את העיקר....

See also Rambam, *Hil. Shemitah Ve-Yovel* 10:6: שהקבלה והמעשה עמודים גדולים: בהוראה, ובהם ראוי להיתלות.

For an example of a more recent *posek* who adopted a view similar to the one outlined by Prof. Soloveitchik, see Eytan Kobre, "Mesoras Rav Moshe: Rav Michel Shurkin Shares an Insider's View," in *Mishpacha*, March 2, 2011, regarding Rav Moshe Feinstein's approach (my thanks to Rabbi Avi Harari for bringing this source to my attention):

I ask whether Rav Moshe was supportive of the trend towards being *machmir*, even if there was a mesorah otherwise. Rav Michel answers with a story, of course. "During the 1970s, Kissinger sold a lot of wheat the US had stockpiled to Russia. The reason people are not so careful about eating *chadash* is based on a *sfek-sfeikab* [double doubt] recorded by the Rema,

In other words, the Tosafists were not interested in “updating” the Talmud but rather viewed communal practice as an important data point for properly understanding the Talmud.

II. Talmudic Contradictions

This brings us to the second part of Phillips’ thesis, namely the different approaches of Rambam and Tosafot to Talmudic contradictions. Following in the footsteps of many others, Phillips notes that Rambam rules in accordance with the major *sugya* about a topic (*sugya de-shmata*), even when it is contradicted by other, minor discussions. Tosafot, on the other hand (as a general rule), seek to resolve contradictions, even if this requires re-interpreting a passage in departure from its straightforward meaning. Here as well, although this schematic is itself valid, when applied too broadly it can lead to gross distortion—in this case, particularly with regard to Rambam.

First, we must understand what does and what does not constitute a contradiction. Phillips points to the *sugya* of Hallel on Rosh Hodesh as an example of this methodological difference between Rambam and Tosafot. He claims that the dispute about whether a *berakbah* is recited depends on whether one considers only the primary *sugya* of Hallel, which is in *Arakbin* (10a-10b), or whether one admits evidence from other *sugyot*—

which relies on uncertainty that the grain is *chadash*. HaGaon HaRav Meiselman (Rosh Yeshivah of Toras Moshe) came to Rav Moshe with statistics proving that the grain in the US after they gave away the stockpiles was certainly *chadash*. Rav Moshe was not impressed. ‘In Lithuania we ate grain that was certainly *chadash*,’ he said. After about an hour of discussion, Rav Moshe finally said, ‘*Efsber iz es a sheineh minbag*—maybe it is a nice custom.’ But that’s as far as he would go because, whether stringent or lenient, mesorah was mesorah.”

In a similar vein, Rav Moshe was certain that a community in Klal Yisrael could not be guilty of doing something wrong en masse. “I recently heard that a *gadol* ruled a certain way,” says Rav Michel, “and someone asked, ‘But doesn’t everyone do the opposite?’ The *gadol* replied, ‘There’s plenty of room in Gehinnom.’ Rav Moshe held there was no way that the entire public would go to Gehinnom. There must be a reason why what they were doing was permissible, and he would find that reason. He held that just as you have to have *emunah* in Hashem, you have to have *emunah* in Klal Yisrael.”

See also R. Yaakov Hagiz, *Halakhot Ketanot* 1:9, in the name of his teacher:

וזה כלל גדול שהיה מוסר בידינו אם הלכה רופפת בידך פוק חזי מה עמא דבר, כי פשוט הוא אשר באהבת ה' את עמו ישראל יסיר מכשול מדרכיהם ולא יטו כל העולם אחר היחיד אילו סברתו דחוייה.

And see the comment of R. Yosef Engel in *Gilyonei Ha-Shas, Rosh Hashanah* 15b.

because R. Tam proves that one says a *berakhab* from a *sugya* in *Ta'anit* (28b). However, in this case, there is no contradiction at all between the sources. Both R. Tam and Rambam are in agreement that Hallel on Rosh Hodesh is only a custom—as stated in *Ta'anit*. The question is only whether *minbagim* receive a blessing, which is not discussed at all in either of these two sources. If Rambam would have found R. Tam's inference from *Ta'anit* compelling, then the *sugya* in *Arakbin* would do nothing to undermine that position.

Rather, the dispute about whether a *berakhab* is recited on a *minbag* depends largely on how to understand a third source, the Gemara in *Sukkah* 44b which says that R. Elazar b. Tzadok and Rav did not recite a *berakhab* on *hibut aravah* because they maintained that it is a *minbag nevi'im*. Note that the Gemara does not formulate a principle that no *berakhot* are recited upon *minbagim*. It is rather Rambam who generalizes from this case to formulate a rule that *minbagim* have no *berakhab* (*Hil. Berakhot* 11:16):

כל דבר שהוא מנהג, אף על פי שמנהג נביאים הוא, כגון נטילת ערבה בשביעי של חג, ואין צריך לומר מנהג חכמים, כגון קריאת הלל בראשי חודשים ובחולו של פסח, אין מברכין עליו.⁷

R. Tam, however, maintains that one should not generalize from this case to all *minbagim*, and he proves from various sources that a *berakhab* is recited upon certain *minbagim* (Tosafot, *Sukkah* 44b):

ור"ת אומר דאין ראייה מערבה להלל דערבה אינה אלא טלטול וכיון דלא תקנתא היא אלא מנהגא לא חשיבא למיקבע לה ברכה, אבל קריאת ההלל לא גרע מקורא בתורה, ודכוותיה אשכחן דמברכין אשני ימים טובים של גליות ואינו אלא מנהג בעלמא...

This *mabloket* then is about how to interpret an ambiguous source—is the Gemara in *Sukkah* expressing a broad principle or is it a localized *halakhab*? It is not about whether we rule in accordance with the primary *sugya*. That Geonic rule applies only when there is an actual contradiction between sources; it does not mean that according to Rambam, *halakbot*

⁷ Note as well that for Rambam, this principle is problematic. Rashi (*Sukkah* 44a s.v. *minbag*) explains the view that there is no *berakhab* on a *minbag* because *minbagim* are not included in *lo tasur*, but Rambam himself (*Hil. Mamrim* 1:2) includes *minbagot* within the purview of *lo tasur*, as the Brisker Rav notes (*Hiddushei Maran Rit' Ha-Levi*, *Hil. Berakhot* 11:16).

are derived only from one primary source and that other sources are neglected.⁸ Although this does not need any proof, it is nevertheless illustrated clearly by a story Rambam told about himself in his letter to R. Pinḥas Ha-Dayyan (*Iggerot Ha-Rambam*, R. Shilat ed., pp. 444-445):

...שחבור זה לא יכיר יגיעתי בו אלא חכם גדול כמותך, אבל שאר התלמידים ידמו שהוא כמו הלכות הרב הולך על סדר התלמוד ומסיר הקושיא והפירוק בלבד. אני נשבע שיש בו כמה פרקים יהיו באותו הפרק הלכות פסוקות מעשרה מקומות או יותר, מן התלמוד והירושלמי ומן הברייתות, שאיני מהלך לא על סדר התלמוד ולא על סדר המשנה אלא כל ענין וענין מקבץ כל הדינים שנאמרו בו בכל מקום שהן, עד שלא יהיו הלכות אותו הענין מפוזרות ומפורדות בין המקומות. וזו היתה סוף מגמתי בזה החבור, שאין כח באדם בעולם להיות זוכר כל התלמוד, בבלי וירושלמי והברייתות שלשתן שהן עיקר הדינים. ואני אומר לך מה אירע לי עתה בדבר זה. בא אלי הדיין החסיד וקונטרס מן החבור בידו, יש בו הלכות רוצח מספר נזיקים, והראה לי הלכה אחת, אמר לי: קרא זו. קראתי אותה. אמרתי לו: מה ספק יש בזו? אמר לי: באי זה מקום נאמרו דברים אלו? אמרתי לו: במקומן או באלו הן הגולין, או בסנהדרין בדיני הרוצח. אמר לי: כבר חזרתי על הכל ולא מצאתי. אמרתי לו: שמא בירושלמי? אמר לי: בקשתי ולא מצאתי, לא בירושלמי ולא בתוספתא. השתוממתי כמו שעה ואמרתי לו: אני זוכר שבמקום פלוני מגיטין נתפרשו דברים אלו. הוצאתי גיטין וחפשתי ולא מצאתי. תמהתי ונבהלתי ואמרתי: היכן נאמרו דברים אלו? הנח עתה, עד שאזכור מקומן. הוא יצא ואני זכרתי. שלחתי שליח והחזרתיו, והראיתי לו

⁸ Note that Rif (*Shabbat* 11b) cites the Gemara in *Ta'anit* that Hallel on Rosh Ḥodesh is only a *minbag*, and yet he implies that a *berakhab* is recited on Rosh Ḥodesh when Hallel is said with a *tzibbur*.

אבל הלל דר"ח לאו דאורייתא אלא מנהגא הוא ומשום הכי לא גמרינן ביה הלילא אלא מדלגי דלוגי דאמרינן [תענית כ"ח ע"ב] רב איקלע לבבל חזא דקא קרו הלל בר"ח סבר לאפסוקינהו כיון דשמעינהו דמדלגי ואזלי אמר ש"מ מנהג אבותיהם בידיהם. תנא יחיד לא יתחיל ואם התחיל גומר, הילכך אי בעי יחיד למיקרי הלל בראש חדש קרי ליה בלא ברכה ומדלג דלוגי.

Phillips (p. 443) writes that Rif's divergence from Rambam on this issue "does not appear to be due to a different methodological approach. Rather it is due to an alternative reading of the same primary source which emphasizes the word 'yachid.'" If Phillips means to say that Rif is not basing himself on the *suḡya* in *Ta'anit* or that Rif does not consider Hallel on Rosh Ḥodesh to be a *minbag*, this is clearly incorrect. Likewise, Phillips writes that Ran (on Rif, *Sukkah* 22a) "challenges the creative way in which [R. Tam] distinguished between the cases" of *hibbut aravah* and Hallel. However, Ran in fact concludes that the practice is to recite a *berakhab* and explains this based on R. Tam's distinction:

ור"ת ז"ל אומר שאין ראיה ערבה להלל דערבה כיון דאינו אלא טלטול בעלמא כיון דלא הויא תקנתא אלא מנהגא לא חשיבא למיקבע לה ברכה אבל קריאת ההלל חשיבא ומברכין עלה... אבל מ"מ ראייתו איני מכיר... ומיהו כבר פשט המנהג שמברכין עליו וכיון שכן יש לנו לומר דדוקא על חבוט ערבה שאינה אלא חבטה בעלמא הוא שאין מברכין אבל בהלל דר"ח מברכין וכבר כתבתי מזה במקומות אחרים.

הדברים מפורשין בגמ' יבמות אגב גררא. תמה והלך. וכן תמיד אני בצער מזה שיבוא השואל וישאל: היכן נאמרו דברים אלו? פעמים אומר לו מיד: במקום פלוני, ופעמים לא, וחידך, לא אזכור מקומן עד שאחפש אחריהן. ועל זה אני מצטער הרבה שאני אומר: הרי אני המחבר ויתעלם ממני מקום דבר זה, מה יעשו שאר בני אדם?

Rambam emphasized the painstaking labor involved in assembling the *Mishneh Torah* from every possible source, to the extent that he himself could not find the far-flung and tangential source on which he based the ruling in question.⁹ Obviously, the *Mishneh Torah* was not written based only on “major *sugyot*.”

In another case, Phillips sees Rambam, in contrast to Tosafot, as picking one of two contradictory sources, when in fact Rambam rules in accordance with both. In *Berakhot* 49b, the Gemara states that one who forgets *Ya'aleh Ve-Yavo* on any Yom Tov must repeat *Birkat Ha-Mazon* because one is required to eat a meal on all these days. Rambam codifies this in *Hil. Berakhot* 2:12. Tosafot point to a contradiction from the Gemara in *Sukkah* 27a, which states that one is obligated to eat a meal only on the first night of Sukkot and the first night of Pesah. Phillips writes that Rambam, following the principle of choosing the primary *sugya*, rules in accordance with the passage in *Berakhot* and against the passage in *Sukkah*, but he strangely does not note that Rambam codifies the passage in *Sukkah* as well, in *Hil. Sukkah* 6:7:

אכילה בלילי יום טוב הראשון בסוכה, חובה. אפילו אכל כזית פת, יצא ידי חובתו. מכאן ואילך, רשות, רצה לאכול סעודה, סועד בסוכה, רצה אינו אוכל כל שבעה אלא פירות או קליות חוץ לסוכה, אוכל, כדין אכילת מצה בפסח.

Obviously, this is not an example of Rambam rejecting one *sugya* in the face of a contradiction. Seemingly, the solution is that the two *sugyot* are discussing two distinct obligations: The Gemara in *Sukkah* is discussing the Biblical *mitsvot* of sukkah and matzah, which indeed require one to eat bread or matzah only on the first night of each respective holiday. The Gemara in *Berakhot*, however, says that one is obligated to eat meals on Yom Tov because of the obligation *mi-divrei kabbalah* of *oneg Yom Tov* (see *Hil. Shevitat Yom Tov* 6:16). Instead of demonstrating a basic methodological dispute, this instead seems to be a case where Rambam, implicitly and without fanfare, resolves a question raised by the Tosafists. This is far from the only example of such a phenomenon, which highlights not the divergent goals of Rambam and Tosafot but their commonality.

⁹ See R. Matityahu Strashun, *Miḥar Ketavim*, pp. 110-111, who identifies *Hilkhot Rotze'ah* 5:2 as the *halakha* under discussion.

Another case Phillips cites in an attempt to accentuate the difference between Tosafot and the Geonim/Rambam which instead illustrates their shared approach relates to the *berakhab* on *tevilah*. The Gemara (*Pesahim* 7b) states that on all *mitzvot*, the *berakhab* is recited before the *mitzvah* except for *tevilah*. The simple meaning of the Gemara is that for all *tevilot*, the *berakhab* is recited after immersion, and this is how Rashi explains the Gemara. However, Rif and Rambam (*Hil. Berakhot* 11:7) limit the Gemara to one case of immersion only: *tevilat ger*, in which the subject of the *mitzvah* is not yet Jewish before immersion. Rif, citing his predecessors, explains why he reinterprets the Gemara:

ומפרשי לה רבנן בטבילת הגר בלבד אבל שאר חייבי טבילות מברכין ואחר כך
טובלין דהא קיימא לן (בכורות כו ע"א) נדה קוצה לה חלה ומיחייבא לברוכי
להפריש חלה.

In other words, the simple meaning of the Gemara, that the *berakhab* for all *tevilot* follows immersion, conflicts with another source which says that a woman who is impure may nevertheless recite a *berakhab*, and therefore Rif and Rambam reinterpret one source to resolve the conflict. Tosafot likewise cite this interpretation in the name of R. Hananel, however Tosafot add that we nevertheless do not protest against women who recite the *berakhab* following immersion for *niddah*, because the Rabbis did not distinguish between different forms of *tevilah*. In other words, while Tosafot accept the reasoning of R. Hananel and Rif, they nevertheless uphold the simple meaning of the Gemara based on the principle of *lo plug*—since in one case, it is impossible to recite the *berakhab* before *tevilah*, in all cases the *berakhab* may be recited after *tevilah*—and Tosafot include *netilat yadayim* in this *lo plug* as well (see Maharsha). While Phillips (pp. 430-431) presents this as an example of the “flexible” approach of the Tosafists, an honest appraisal shows that this is actually an example of Rif/R. Hananel/Rambam school employing “Tosafist methodology” of reinterpreting one Talmudic passage to resolve a contradiction with another passage.¹⁰

¹⁰ Meiri notes the difficulty with Rif’s interpretation and therefore rules in accordance with the simple meaning of the Gemara, as per Tosafot, but with a somewhat different explanation:

ואני אומר שמן הדין אין ראוי לברך אלא אחר הטבילה, וכדתני סתמא חוץ מן הטבילה, ולא אמר חוץ מטבילת גר או בעל קרי, וכן קתני סתמא טבל ועלה בעלייתו אומר ברוך אשר קדשנו וכו' על הטבילה. ואע"ג דנדה קוצה לה חלה ומברכת, בזה לא הגיע זמן טבילתה, ומאחר שהיא עושה את המצוה אין ראוי להפקיע את ברכתה מכל וכל, אבל טבילה שהיא באה עכשו לטהר נוח לנו שתמתין

III. Maimonidean Contradictions

This brings us to another, even more fundamental point. Phillips claims that Rambam's methodology consists of "recording contradictory Talmudic conclusions rather than attempting to reconcile them," and that this is "attested to by his son, R. Avraham" (p. 159). In other words, according to Phillips, we should not attempt to resolve contradictions in Rambam because Rambam himself was not troubled by inconsistency. In a note, Phillips cites R. Avraham b. HaRambam (*Birkat Avraham* no. 34) regarding Rambam's view about *mitzvot tzerikhot kavanah*, "who emphasizes that the contradiction is indeed a powerful question but one that should be asked of the Talmud rather than of his father. Rambam, according to his son, was simply recording the individual Talmudic conclusions without seeking to innovate a way of harmonizing them." The suggestion that we should not attempt to resolve apparent contradictions between two rulings of Rambam is, simply put, shocking. It is worth quoting the great scholar of Maimonidean *halakhab* Gerald Blidstein who addresses this very claim and dismisses it out of hand:

If the paragraphs of the Code merely represent an arrangement of sources held to be authoritative in the different pericopes of the Talmud, rather than an internally consistent reading of the Talmud, then many of our problems would of course be solved—if not those of outright contradictions, at least those involving contradictory assumptions and implications. While this approach would solve many problems (much in the style of the Queen's "Off with their heads"), it does not seem consistent with the evidence at hand: the systematic character of Maimonides' work is apparent in the literally hundreds of rulings which are adapted to other, congruent rulings; it is testified to by Maimonidean responsa disentangling seemingly contradictory rulings and Talmudic sources; and by *Sefer HaMitzvot*, whose introduction is a veritable anthem to consistent systematization and whose substance represents a heroic attempt to achieve this goal. The famous response of R. Abraham to the charge that his father ruled inconsistently on the issue of intention (*kavanah*) is most in-

עד שתטבול ותהא הברכה תכופה לטבילה קודם שתתנגב, שכל שאפשר לה בנקיות יישר כחה. והראיה שהרי נטילת ידים תקנו הגאונים שלא לברך עד שיטול ויברך אחר הנגוב, ואע"פ שלדעת האוסר בנטילת ידים בתשעה באב וביום הכפורים אינו נמנע משאר ברכות, מ"מ כל שהוא בא ליטול אינו מברך עד שיטול שכל שאפשר לו בנקיות, כך הוא בראוי. ואע"פ שאמר דאכתי גברא לא הזי, לישנא רויחא כלומר שאינו נקי לגמרי ואינו ראוי לברך עד שיתנקה הואיל והוא סמוך לנקיותו, וכן עיקר.

structive on this point; immediately after retorting that the contradiction between the two rulings simply reflects two contradictory Talmudic sources, he proceeds to suggest a way to cut the Talmudic knot, so as to say that, even if his father recorded two contradictory Talmudic rulings, this was done in the assumption that the contradiction could be resolved. Indeed, since Maimonides clearly eliminates some rulings because they contradict other sources, one may argue that he held to some criteria of coherence which guided his work as a codifier. Parenthetically, let us note that R. Abraham resolved the contradiction on intention by distinguishing between intention accompanying a physical act and that accompanying a mental act. If *that* rather abstract solution characterizes the ghost in the Maimonidean machine, then we have a good deal of latitude indeed.¹¹

As Blidstein notes, R. Avraham does not simply claim that Rambam rules in accordance with two contradictory sources; he explains why these two sources are not in contradiction, which is also a feature of Rambam's own *teshuvot*. In fact, R. Avraham's *teshuvah*, in which he states that this question troubled him for a long time after his father's death until he found a solution, and that the solution is not based on the Gemara but is instead derived from the question, proves exactly the opposite of what Phillips imputes to Rambam based on this *teshuvah*.

ברכת אברהם סי' לד: ואי קשיא לך מאי שנא שופר ומגילה משאר מצות, זו ודאי קושיא עמוקה היא, והיא על הגמרא לא על אבא מארי זכרו לחיי העולם הבא. וכמה זמן נתקשית לי קושיא זו אחר פטירת אבא מארי ז"ל עד דאשכחתי בה טעמא והוא שהמצות דאמרינן בהו מצות אינן צריכות כוונה מצות שקיומן בעשיית מעשה שגוף אותה העשייה היא המצוה כגון אכילה וטבילה וקריאה וכיוצא בהן אבל שופר הואיל וגוף המצוה שמיעת קול בעלמא היא כי לא מיכוין מאי קא עביד מן המצוה? אינו [כאוכל] מצה וטובל, דאע"פ שלא כיון לבו בעת העשייה כבר קיים המצוה בעת העשייה שגוף המצוה היא שיאכל או יטבול... ואע"פ שלא נתפרש הכי בגמרא מהקושיא גמרינן ליה ועוד שלא ראינו אותם הצריכו כוונה לצאת אלא בשומע בלבד וכמה טעם ברור הוא זה ודקדוק יפה למבינים וכבר גילינו אותו לכל התלמידים בבית המדרש מכמה שנים.¹²

¹¹ Blidstein, "Where Do We Stand in the Study of Maimonidean Halakhah?" *Studies in Maimonides*, Isadore Twersky ed. (Harvard University Press, 1991), p. 10.

¹² In his article "Tefisot Yesod be-Havanat ha-Talmud be-Mizrah u-ve-Maaran," *Mehkerei Talmud* 4, Prof. Yerachmiel (Robert) Brody gives this same (mis)interpretation of R. Avraham's *teshuvah*, as well as of R. Hananel, cited below. However, as Rambam has already taught us, "when something has been demonstrated, the correctness of the matter is not increased and certainty regarding it is not strengthened by the consensus of all men of knowledge with regard to it. Nor could its correctness be diminished and certainty regarding it be weakened even if all the people on earth disagreed with it" (*Guide* II:15).

To support his contention that Rambam has no problem codifying contradictory halakhot, Phillips quotes the introduction to *Moreh Nevuchim* where Rambam enumerates the “seven causes of contradictions,” the first of which is:

The author has collected the remarks of various people with differing opinions, but has omitted citing his authorities and has not attributed each remark to the one who said it. Contradictory or contrary statements can be found in such compilations because one of the two propositions is the opinion of one individual while the other proposition is the opinion of another individual.

Rambam then writes that:

The contradictions that are to be found in the Mishnah and the Baraithoth are due to the first cause. Thus you will find that they constantly ask: Does not the beginning [of the passage] constitute an objection against its end [קשיא רישא אסיפא]? In such cases the answer is: The beginning is the opinion of a certain rabbi and the end that of another rabbi [רישא ר' פלוני וסיפא ר' פלוני]...¹³

Citing this passage, Phillips writes: “This being so, it is easier to see why Rambam (and those who shared his approach) considered it to be neither necessary nor in the interests of accuracy to attempt to reconcile apparently contradictory statements from different Talmudic passages” (p. 159). However, this too is a distortion of Rambam. Even according to Phillips, does Rambam quote two contradictory halves of a Mishnah which the Gemara explains reflect the views of two different *tannaim*? Obviously not, because the purpose of the Gemara is to resolve these contradictions. By pointing to the Gemara as resolving contradictions in the Mishnah, Rambam is in no way stating that his codification of the Gemara is full of contradictions.¹⁴

¹³ *Guide of the Perplexed*, S. Pines trans. (University of Chicago Press, 1963), vol. 1, pp. 17-18 [the bracketed Hebrew words were written by Rambam in Hebrew].

¹⁴ In addition, Phillips quotes a passage from R. Ḥananel’s commentary in support of his contention that the Geonic tradition of Rambam ruled in accordance with two contradictory *sigyot*. In this case as well, however, the citation is missing critical context. R. Ḥananel is discussing the specific scenario where the Gemara asks a question on a position and concludes with the word קשיא — “this is difficult.” Citing a tradition transmitted by R. Hai Gaon, R. Ḥananel distinguishes between the Talmudic conclusions קשיא and תיובתא. Although both indicate a question that has not been resolved, תיובתא means that the position is refuted, while קשיא means that the Gemara “did not find an answer at that time” but the

A final example to illustrate the problems with Phillips' approach: The Gemara (*Bava Metz'ia* 26b) discusses one who takes a lost object with intent to steal it—if one took the object before the owner gave up hope on recovering it (*ye'usb*), he violates three *mitz'vot*: *lo tigzol*, theft; *bashev teshivem*, the obligation to return a lost object; and *lo tukhal lehit'alem*, the prohibition against ignoring a lost object. Even if one returns it after *ye'usb*, the Gemara states, “it is merely a gift that he gave him; and the transgression that he performed, he performed (ואיסורא דעבד עבד).”

The simplest meaning of the Gemara would seem to be that returning the object after *ye'usb* does not help to rectify any of the prohibitions that one has violated. However, Tosafot ask: with regard to stolen property, the obligation of *ve-beshiv et ha-gezelah* applies even after *ye'usb*; citing *Hullin* 141a, Tosafot note that *gezelah* is an example of a *lav ha-nitak la-aseh*, in which the fulfillment of the *aseh* rectifies the *lav*. Furthermore, since there is an obligation to return the object due to *ve-beshiv et ha-gezelah*, one should still fulfill the *mitzvah* of *bashev teshivem* as well. Therefore, Tosafot explain that in the case where one returns the object after *ye'usb*, he has irreparably violated the *lav* of *lo tukhal le-hit'alem*, but he has in fact rectified the other two violations (note the singular, ואיסורא דעבד עבד). Rambam, however, cites the Gemara according to its simpler meaning (*Hil. Gezelah Va-Avedah* 14:6):

הרואה חבירו שנפל ממנו דינר על הארץ ולא ידע בו, ונטל הדינר קודם ייאוש,
עובר על עשה ועל שני לאוין, כמו שביארנו. ואפילו החזיר לו הדינר לאחר
שנתייאש, זו מתנה היא, וכבר עבר על האיסורין.

position stands and is not rejected. It is only in this case that R. Hananel says that we will rule in accordance with two statements that seem contradictory, because by using the term קשיא the Gemara indicates that this is not a true contradiction. This statement of R. Hananel cannot be applied elsewhere.

ר"ה, נדפס בשיטת קדמונים לב"ב דף נב ע"א: זו השמועה כתבה רבינו האיי גאון ז"ל, נקיטין מרבתינו ז"ל, כל היכא דאמור בתלמוד תיובתא דפלוני תיובתא, בטלו דברי מי שהתיובתא עליו לגמרי. אבל היכא דעלתה בקשיא – לא בטלו דבריו, דאמרינן לא הוה ברירא להון דבטלה שמועה זו לגמרי, אלא לא אשתכח להו פירוקא בהיאי שעתא, ותליא וקיימא. והיכא דקשיא תרוייהו אהדדי בטעמייהו ולא מפרק קושיא – עבדינן כי הא בדוכתא, וכי הא בדוכתא, ולא חיישינן לאשכוחי בהו טעמא ולפרוקינהו. כגון הא דאמר שמואל, ומודה לי אבא שאם מת על האחין להביא ראיה שאלו האונות והשטרות מן הממון של אמצע הן. אלא, בהא מילתא עבדינן כשמואל, ולענין דברים העשויין להשאיל ולהשכיר עבדינן כרבא, דהיכא דידיע בראיה דהיא מידעם דתובע הוא, ונהיגי בני אדם להשאיל ולהשכיר כי הני [גוני], ומי שבידו הן טוען: לקוחין הן בידי – אינו נאמן, אלא מפקינן מיניה סרבלא או ספרא דאגדתא, אפילו גבי יתמי קטנים וכיוצא בהן – מפקינן להו מינייהו, ומהדינן להו למרייהו. אבל זולתי כי האי מילתא – לא, אלא טענינן להו ליתמי מאי דלא טעין אבוהון.

Phillips views this as an example of Rambam ignoring a secondary passage which conflicts with the primary *sugya* (pp. 455-456):

The *Lehem Mishneh* commentary to Rambam's *Mishneh Torah* attempts to bridge the gap between Rambam and Tosafot by suggesting that Rambam accepted both Talmudic sources but nevertheless understood that once *ye'ush* has occurred, it is too late for a *nitak* to be effective. While this is certainly feasible, based on what we have seen from Rambam's methodology in determining the law from Talmudic sources, it is simpler to conclude that Rambam identified what was clearly the primary passage on the subject and ignored indications derived from conflicting passages.

However, this is another misapplication.¹⁵ Rambam in the beginning of *Hil. Gezealah* (1:1) writes that *gezealah* is a *lav ha-nitak la-aseh*:

כל הגזול את חברו שוה פרוטה עובר בלא תעשה, שנאמר "לא תגזול" (ויקרא י"ט:י"ג). ואין לוקין על לאו זה, שהרי הכתוב נתקו לעשה, שאם גזל חייב להחזיר, שנאמר "והשיב את הגזלה אשר גזל" (ויקרא ה':כ"ג), זו מצות עשה.

Rambam does not reject the "tangential" passage in *Hullin* which states that *gezealah* is a *lav ha-nitak la-aseh*. It is literally the first *balakhab* in the section of *Hilkhot Gezealah Va-Avedab*. Thus, unless we maintain that Rambam is contradicting himself, we have no choice but to address the question of Tosafot. Often, the fact that Rambam did not simply reject or reinterpret a problematic passage forces one to look more deeply into the issue to understand Rambam's interpretation of the sources and thereby gain a better understanding of the sources themselves, but to do so one must first acknowledge that there is a problem.¹⁶

¹⁵ In addition, Phillips misinterprets the *Lehem Mishneh*. The *Lehem Mishneh* does not say that after *ye'ush* it is too late to fulfill the *aseh*. Rather, he writes that even when one fulfills the *aseh* portion of a *lav ha-nitak la-aseh*, this does not undo the violation of the *lav*.

מתנה היא זו וכבר עבר על האיסורים – לשון הגמרא בפי' אלו מציאות מתנה הוא דיהיב ליה ואיסורא הוא דעבד עבד. והקשו שם בתוס' ז"ל והלא לאו דלא תגזול מקרי ניתק לעשה פי' שלוח הקן א"כ כיון דלענין גזילה לא מקרי מתנה גם השב תשיבם למה לא תקן ותירצו דלא קאי אלא על לאו דלא תוכל להתעלם שעבר שלא החזיר קודם יאוש ע"כ. ואחריהם נמשך הטור ז"ל בסי' רנ"ט. אבל רבינו ז"ל כתב וכבר עבר על האיסורים. ונ"ל טעמו מפני שאע"פ שמתקן אח"כ הלאו דלא תגזול בהשבת גזילה כדכתיב והשיב את הגזילה מ"מ כבר עבר על לא תגזול וכן האיסור של השב תשיב שהיה לו להחזיר קודם יאוש ואח"כ הוא מתקן שכל מי שעובר לאו ואח"כ קיים העשה שנתקו הכתוב, לא בשביל כן מקרי שלא עבר לאו וצריך תשובה גמורה.

¹⁶ For one insightful solution, see the explanation given by my grandfather R. Nachum Eliezer Rabinovitch in his *Yad Pesbutah*. See also his essay "What is 'Emunat Hakhamim'?" in *Hakirah*, vol. 5, and now in *Pathways to Their Hearts: Torah*

Phillips concludes this section of his book with an enigmatic criticism (p. 192):

There is an all-too-common tendency among those who analyze Jewish law to compile collections of rulings from across a range of traditions and eras. The impression is often created that the rabbis and commentaries who produced these rulings broadly shared a common halachic methodology, with their disputes emerging from subtle variations in their interpretation of Talmudic sources.

Who are these compilers to whom he refers? Seemingly, this critique applies to almost every work written on the Talmud and Jewish law since the dissemination of the *Mishneh Torah* eight centuries ago. Has Phillips come to “reclaim” the Talmud from its interpreters of the last eight hundred years? Yet this critique is misplaced because, as we have seen, Phillips’ dichotomy between Rambam and Tosafot is greatly overstated. The Tosafists do not exhibit the level of freedom from Talmudic authority Phillips attributes to them, nor is Rambam merely a stenographer who transmits a pristine Talmud in code form. Both Rambam and the Tosafists must reckon with the same ambiguities and conflicting sources, and both offer creative interpretations of these sources, even if, in the *Mishneh Torah*, this is done implicitly rather than explicitly. In the words of Gerald Blidstein,

The geonic-Maimonidean project is, then, a continuation of the Talmudic discussion, in the Talmudic mode. Tensions are discovered between sources, and the ideas presented by the *sugya* are held up to evaluation—eventually, sometimes, they will be rejected. The Tosafist project, it is true, undertakes a broader synthesis and conceives of bolder and more novel solutions. But both projects do in fact continue, each in its own way (and sometimes in the same way), the Talmudic model.¹⁷


Similarly, in his classic work on the *Mishneh Torah*, Professor Isadore Twersky writes:

In short, some explication (*perush*), often invisible, whether inherited, adapted, or totally original, is at the base of every normative formulation [in the *Mishneh Torah*]. This too is clearly recognized by RABD and his followers and stands as a warning against, and corrective for, glib generalization or hurried reliance upon simple characteristics.

Perspectives on the Individual (Maggid Books, 2023), ch. 5, regarding how to approach difficult texts.

¹⁷ Blidstein, “Where Do We Stand,” p. 12; I have quoted a brief excerpt but the entire article is highly relevant to this discussion.

The *Mishneh Torah*, qua commentary, warrants meticulous investigation, for this aspect substantially alters the contours of the Maimonidean Code and its scholarly impact. This may indeed be the major thrust of his remarks in the introduction to the *Mishneh Torah* that his book was intended for “small and great.” The unlearned will understand and benefit from a clear and comprehensive formulation, while the learned will be stimulated by its implicit interpretive insights or methodological assumptions. An halakhic summation that will seem simple to an unscholarly or insensitive reader will strike the scholarly and sensitive reader as original, multifaceted, and suggestive.¹⁸

Focus on broad methodological differences should not overshadow the *sugya*-by-*sugya* issues of interpretation which are rightly seen as the bread and butter (or bread and meat; see *Hil. Yesodei Ha-Torah* 4:13) of Talmud study. Reliance on the former at the expense of the latter tends to lead to overgeneralization, lack of nuance, and plain misinterpretation. In short, to paraphrase one insightful non-Talmudist, “There are more things in Rambam and Tosafot, Horatio, than are dreamt of in your methodology.” 

¹⁸ Isadore Twersky, *Introduction to the Code of Maimonides* (Yale University Press, 1980), pp. 161-162; see also p. 157:

This commentatorial aspect, generally undocumented, is crucial for a correct understanding of the *Mishneh Torah*, and for the most part critics and commentators alike acknowledge that Maimonides the authoritative codifier is also a versatile commentator. They are aware, moreover, that those original statements clearly labeled by the phrase “it appears to me” are a minuscule part of the *Mishneh Torah*’s all-permeating originality. It was recognized that the *Mishneh Torah* was not a mechanical scissors-and-paste compilation, that curt normative formulations reflect Maimonides’ latent explanation of Talmudic texts or halakhic concepts, and incorporate his inferences, deductions and interpretive tours de force. Although Maimonides claimed to have reproduced only those Talmudic statements whose meaning is indisputable, the *Mishneh Torah* abounds with instances of originality of interpretation, harmonistic summation of disparate passages... and the like.