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THE GENTILE AND RETURNING LOST PROPERTY ACCORDING TO JEWISH LAW: A THEORY OF RECIPROCITY

by

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I. *Introduction*

Theories of legal exclusion are among the most difficult for those outside any given legal system to grasp. They appear to the foreigner as simply naked chauvinism by the system in favor of its own "citizens." Upon examination, however, one sees that, in fact, all legal systems engage in some form or another of exclusion based on citizenship.[1] This article argues that in the area of financial rights, duties and obligations, Jewish law frequently excluded Gentiles from the full benefits of Jewish law because Jewish law did not consider them to be bound by the obligations of Jewish law. Thus, for example, Jewish law

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This article is the second part of a study of the laws of lost property in Jewish law. For the first part, see *Journal of Law and Religion* 12 (1995–96), 225–253.

1 For example, the laws of the United States prohibit the ownership or operation of commercial fishing vessels under the American flag by non-American citizens. While the origin of this law might be based on security concerns, it is now used only to ensure that certain economic opportunities go only to American citizens; see "18th-century law snares Vietnamese fishermen," *New York Times*, Nov. 26 1989, page A1; "Of citizens, and poachers," *New York Times*, Oct. 18 1989, page A14. For a complete listing of the scope of discrimination that may legally be practiced against resident non-citizens, see Lawyers Co-operative Publishing House, "Annotation, validity of state law denying aliens living in the United States rights enjoyed by citizens," 47 *L.Ed.*2d 876 (1988) (Constitutional infirmities, §1–4; discrimination in employment, §7; exclusion from specific trades and professions, §9–10).

did not compel the return of the lost property of a Gentile, since he was not legally obligated to return lost property belonging to others. Exclusion was based on a failure of reciprocity — the privileges of Jewish law were given only to those who were fully obligated by and thus accepting of Jewish law, in this case, the laws of lost property.

Jewish law rules that a Jew is not obligated to return the lost object of a Gentile.[2] Indeed, Jewish law rules that a person who loses an article in a location where most of the people are not legally obligated to return lost property is assumed to have abandoned hope of reclaiming his object, and the item then belongs to the finder.[3] The reason for this is that Jewish law assumes that Gentiles do not return lost objects and that thus even a Jew who loses an object abandons hope for its return when he loses the object in a community where most are Gentiles. This is so even if it turns out that, in fact, both the finder and the loser are Jewish and aware of each other's identity and loss.[4] So too, according to Jewish law, Gentiles are not obligated, upon seeing a lost object, to stop and take possession of it in order to return it to its proper owner, Jew or Gentile.[5] Indeed, Jewish law posits that the typical Gentile does not in fact do so, an assumption born out by the common law's rule, which does not require one to stop and take possession of lost property.[6] Jewish law also recognizes, however, that a Gentile or Jew who takes possession of such an object cannot claim ownership of it until after abandonment, and until that time must return it to its owner.[7] Since the mislaid property of a Gentile is not

2 R. Joseph Caro, *Shulhan Arukh*, HM 266:1; see below.

3 *Shulhan Arukh*, HM 259:3.

4 Ibid. As explained in our "The Return of Lost Property in Jewish and Common Law: A Comparison" (unpublished), section X, it would be proper to return that item, although such conduct is beyond the technical obligation of the law.

5 *Encyclopedia Talmudit*, "Gentile," 5:359; *Responsa Beit Shlomo*, OH 57; Mordechai Gross, *Mishpat Haaveida* (Bnei Brak: 1982), Introduction, ¶ 11, Shaarei Tzedek 47. If most people returned such property, Jewish law would not assume one abandons hope of its return upon losing property in a place where a majority of the people are Gentiles.

6 For a comparison of Jewish law and common law, see "The Return of Lost Property," n. 4 above.

7 *Encyclopedia Talmudit*,"Gentile," 5:359; *Mishpat Haaveida*, Introduction, ¶ 11; *Pithei Hoshen*, 1:18 and note 55; *Responsa of Radbaz* 2:610. Thus, Jewish law would also recognize the common law rule that one is not a finder until one takes possession, as correct for the common law.

lost and no abandonment has occurred, it may not be retrieved. One who retrieves this mislaid object as his own has committed a theft.[8]

The general rule is as follows. Conduct that is prohibited based upon the prohibition of "theft" must be avoided by all. Conduct that is mandated only by Jewish law's requirement that lost property be returned is obligatory only for those who fall within the jurisdiction of Jewish law and only with regard to the lost property of those who fall within the jurisdiction of Jewish law.[9]

Indeed, the fairness of the rules of Jewish law can be demonstrated by a simple model of four possible societies:

(1) A society where all observe Jewish law's rules in this area, and return all lost property.
(2) A society where none observe Jewish law's rules in this area.
(3) A society where 30% of the people observe Jewish law's rules in this area.
(4) A society where 70% of the people observe Jewish law's rules in this area.

In society (1) all lost non-abandoned objects are returned to their owners. Integrated over time, all are treated equally, as everyone loses objects and everyone finds and returns them. In society (2), no lost objects are returned to their owners and either the owners find them

8 R. Jacob Linderbaum, *Netivot Hamishpat*, 260:4; R. Jacob Blau, *Laws of Loans and Lost Property*, vol. 1 of *Pithei Hoshen* (Jerusalem: 1983), 1 n. 55. So too, while there is no obligation for a Jew to return a Gentile's lost object, one who takes possession of the lost property of a Gentile prior to that Gentile's abandonment of his rights (*yeush*) does not take valid possession of the object; *Bah* YD 146; OH 556; *Divrei Mishpat* 259; Blau, *Pithei Hoshen*, 1 n. 55.

9 The Talmud (bBaba Kama 113b) states the basic rule:

> Rav stated: From where can we derive that the lost article of a Gentile is permissible [i.e., not subject to the obligation to return]? Since it says, "so you should do with anything that your brother loses and you find" (Deut. 22:3.) It is to your brother that you make restoration, but you need not make restoration to a Gentile. Perhaps this applies only where the lost property has not yet come into the possession of the finder, in which case he is under no obligation to search after the owner; whereas if it has already entered the possession of the finder perhaps he should return it? Rabina said, "And you find," [this] surely implies that the lost article has already come into his possession.

or abandonment occurs and others find and keep them. Integrated over time, all are treated equally, as everyone loses objects and everyone finds them.

In society (3) an injustice occurs if the 30% have to return the lost objects of all members of the population. The 30% who faithfully return lost objects would not have their objects returned to them, while the 70% who do not return lost objects would benefit from the conduct of the 30% who do. Jewish law ruled twofold in this case: one does not have to return the lost objects of those not legally obligated to return lost objects belonging to others, and, in an environment where most people do not return lost objects, one may assume that the person who loses property immediately abandons any hope of recovery, and thus the finder may keep the object.[10] In effect, these two rules turn society (3) into society (2). Indeed, this second rule is needed so as to release the 30% from the obligation ordinarily mandated by the law that these objects be picked up and their true owners sought.

In society (4) an injustice also occurs, as the 70% who faithfully return lost objects would not have their objects returned to them by the 30% who do not, while the 30% who do not return lost objects would benefit from the conduct of the 70% who do. In this society Jewish law accepts only the first rule promulgated in society (3), and maintains that one is not obligated to return the lost object of a person who does not feel obligated to return objects to others. This does not completely solve the "free-rider" problem, as the 30% who do not return lost objects still benefit from the 70% who pick up lost property, advertise its loss and return it to anyone who can prove original ownership. However, since most of the populace adheres to the "rule of return," no other solution is reasonable.[11]

In sum, there is no fair way to run a society absent reciprocal obligations or reciprocal non-obligation.[12]

10 See sources cited in n. 5. The fairness analysis presented here is original to this paper and is intended only to provide logical support for the rules of the Talmud.

11 Indeed, it is possible that this problem could be solved through secular law in such a case or even a legislative act (*takana*) of the community.

12 For a similar application of the same jurisprudential theory of reciprocity to the area of saving lives, see *Concrete Problems in Light of the Halakha* (Hebrew), (Jerusalem: 1994), 1–5, letter by R. Jacob Avigdor.

II. *Monotheistic Gentiles*

The starting point of Jewish law is, then, that no obligation is imposed on the Jew to restore the lost property of a Gentile, or vice versa. Although at first glance one might be uncomfortable with the rule, in reality, a strong case can be made that any other rule would have been bad jurisprudence and unworkable in practice. A legal system's civil law does not exist in the abstract. If the system is to promote justice, those who would benefit by its privileges must accept its duties. Justice is not served if the burdens fall on one group and the advantages on another. Jewish law's obligation to restore lost property if the owner is a "brother," but not if the owner is not a "brother," is, undoubtedly, connected to the fact that the latter feels he is under no obligation to reciprocate. It would be patently unfair to compel the return of the lost property of another absent the ability to compel reciprocity by the loser in the future.[13]

Proof of the fact that reciprocity, and not religious identity, is the key legal element here can be found in the fact that Jewish law does not compel returning the lost property of a Jew who deliberately declines to observe Jewish law, since such a Jew lacks legal fidelity to the system and would not necessarily accept as binding the rules of Jewish law, which require one to take possession of and return to the true owner all lost property one encounters.[14] The talmudic ruling that appears to require returning lost property even to a Jew who does not observe Jewish law is, in fact, understood by nearly all the commentaries as limited to the non-ideological occasional violator of Jewish law, who, when given the option of easily complying with Jewish law, does so.[15]

13 It is not unfair, however, to require that finders not pick up lost property and claim it as their own prior to its abandonment by its owner, as such an action is theft, and stealing — even from a thief — is prohibited.

14 *Shulhan Arukh*, 266:2. Indeed, one authority entitles his discussion of this issue "The lost property of a Gentile or a Jewish sinner ... , " see R. Ezra Basri, *Returning Lost Property*, vol. 3 of *Dinei Mamonot*, second edition (Jerusalem: 1990), 5:1.

This explanation is reinforced by the uncensored *Beit Yosef* commenting on HM 266, discussed below.

15 See Meiri, Avoda Zara 26b; *Shulhan Arukh* HM 266:1–2, YD 151:1–2, and commentaries ad loc. See particularly the remarks of R. Moses Sofer, *Hatam Sofer* 6:67 (Likutim), R. Abraham Isaac Kook, *Daat Kohen* YD 8, and R. Eliezer Waldenberg, *Tzitz Eliezer* 8:18, all of whom reach this conclusion.

Indeed, this is generally accepted to be true even if the (Jewish) individual's lack of fidelity is not his own fault, and is recognized as such by Jewish law.[16] This is expressed most directly by R. Eliezer of Metz, in his *Sefer Yereim Hashalem*. He states:

> If a Jew deliberately sins regarding any of the commandments found in the Torah, and does not repent, one is not obligated to preserve his life or to lend him money, since it states "your brother shall live" and regarding loans it states "one of your bothers [you shall lend to]." Once one sins deliberately, one relinquishes the status of brother, since brotherhood means brotherhood in observance of the commandments.[17]

Indeed, a broad range of commentaries accept this approach.[18]

Thus, the status of "brother" appears to be limited to a Jew[19] who is generally observant of Jewish law. One who routinely violates Jewish law — even if he does so for non-ideological reasons — loses

16 Such as a *tinok shenishba*, a child who has been taken prisoner, or a *mumar leteiavon*, a consistent violator of the law due to moral weakness; see *Responsa Mabit* 37. This formulation forces one to accept that the statement of R. Caro (HM 266:2) requiring one to return property to a *mumar leteiavon* is limited to an occasional violator who remains loyal to Jewish law even while sometimes violating it. It would not be applicable to a continuous public violator; this would be consistent with the ruling of R. Caro in YD 151:1–2.

17 R. Eliezer of Metz 156. See also R. Abraham Aba Minsk, *Tosafot Reem* 156:4. *Sefer Mitzvot Gadol* (Semag), Positive commandment 162, adopts a position similar, but not identical, to that of R. Eliezer of Metz — it views this ruling as limited to not giving something to an intentional sinner, but not including taking something from him.

18 See *Teshuvot Maimoniot* to Mishpatim 36; *Shakh* YD 159:6; HM 388:62; *Shulhan Arukh*, YD 251:1–2; *Taz* YD 251:1; *Teshuvot Rabbenu Haim Or Zarua* 116; *Tosafot* Avoda Zara 26 s.v. *ani* (one possibility); *Atzei Levona* YD 151:1.

19 See e.g., *Encyclopedia Talmudit*, "brother," 1:434, which states without dispute that "a Gentile is not in the category of brother." As noted in that article, there are categories of people whose status for the purposes of this issue are unclear, such as a "Canaanite slave" (*eved kenaani*). The same dispute seems to be present concerning a male in the process of conversion who has been circumcised, but not yet immersed in a mikva; see R.J. David Bleich, "One who has been circumcised but not immersed," *Tradition* 25 (1990), 46–62. For a general discussion of the various types of incomplete Jewishness, see R. Howard Jachter, "On partial *'kedushat yisrael'*" (Hebrew), *Beit Yitzhak* 24 (1972), 425–427.

his status of "one's brother"[20] even as he remains a full Jew for the purposes of many other laws within Judaism.[21]

In addition, this theory of reciprocity can find support in R. Isserles' statement that in a society where the general secular law (binding on all citizens) requires that one return lost property to its owner under any circumstances, Jewish law, through the principle of "the law of the land is the law," requires that one do so too.[22] It seems, at least according to this view, that the governmental decision to mandate the return of lost property creates a general obligation to do so according to Jewish law too. Thus, these authors view legal reciprocity as the cardinal principle governing Jewish law on this matter. One must return the property of all who are legally compelled to

20 Rema, YD 251:2; *Shakh* ad loc.; and *Responsa Mabit* 37; but see *Hazon Ish*, YD 2:28. Such an individual would be equivalent to the monotheistic Gentile for the laws of lost property — it is permissible to return his lost object, but not obligatory. On the view of these authorities, even the Shakh would admit that secular law could compel the return of the lost object of a Gentile by a Jew.

21 Thus, for example, the marriage of a Jew who is not a "brother" is completely valid; see e.g., *Yereim Hashalem*, 156. This means that the formal status of *mumar lehakhis* (defiant violator) or *apikores* (heretic), applied only when the offender's motivation is ideological, need not obtain in order to deprive a person of his status as "one's brother" — it is sufficient for the purposes of this rule that reciprocity be functionally absent. In sum, a consistent *mumar leteiavon* is a complete Jew, but is not "one's brother." This difference is significant, as according to many authorities, in contrast to the occasional violator, to whom, as we saw, one certainly has to return lost property, the defiant violator and the heretic are to be treated as Gentiles for all purposes of Jewish law; see Maimonides, *Code*, Laws concerning Repentance; HM 24:22. (But see *Yehave Daat* 5:65, where in the penultimate paragraph a contrary definition of "brother" is perhaps suggested; it may, however, be possible to harmonize this definition with our own.)

This would, incidentally, also explain why there is no obligation to rebuke a person who is knowingly violating Jewish law, even if that person is not either a *mumar lehackhis* or an *apikores*; see *Mishnah Berura*, Shaar Hatziyun 608:13.

22 Rema, HM 259:7. The Shakh, HM 356:10, disagrees with the Rema's rationale, asserting that it is only because such conduct is otherwise encouraged by Jewish law, and has been incorporated into Jewish law as custom, that it is binding according to Jewish law. He rejects the incorporation of this principle based on secular law; see Blau, n. 8 above, 2:22, and n. 53. And see n. 47 below.

return lost property.[23] Similar sentiments can be found in the writings of R. Isser Zalman Meltzer, who states:

> It is obvious that the return of lost property ... is subject to the laws of the land (*dina demalkhuta*) and the reason for this is that the decree made by the government is not contrary to Jewish law.... Thus this matter is subject to the law of the king and falls under the rubric of "Noahides obligated [to observe] laws (*dinim*)," since Noahides are also obligated to decree laws based on fairness and not theft or fraud.[24]

It is important to clearly distinguish between the issue discussed here — the obligation internally mandated by Jewish law to return a lost object to a monotheistic Gentile — and the more general issues related to choice of law problems in litigation between a Jew and a Gentile, where other rules are apparently employed.[25] Here, the issue is not a choice of law problem but rather a matter of substantive rules of law employed by Jewish law without reference to any other legal system.

There are, however, some authorities who rule that the talmudic rule exempting one from returning the lost property of a Gentile applies only to idolatrous pagans, and not to those Gentiles who accept a monotheistic Deity. The most complete statement of this position is that of R. Menachem Meiri, who resided in Provence in the fourteenth century:

> Whoever belongs to the nations which are disciplined by religio-moral principles and are worshippers of the Deity in some way, although the dogmas of their faith are far removed from those of ours ... is like a full

23 This is consistent with the Talmud's assertion that those who are commanded and thus observe the law are on a higher level than those who are not commanded and observe the law anyway. Their voluntary compliance does not create an obligation; see bKidushin 31a. For more on this, see *Mishpat Haaveida*, cited n. 5 above; Moznei Tzedek 266:3, where the principle of "the law of the land" is clearly used to require the return of lost property to Gentiles.

24 *Even Haezel*, commenting on Maimonides, *Code*, Laws concerning Damage by Chattels 8:5.

25 See generally Maimonides, *Code*, Laws of Kings 10:12, the comments of R. Abraham Isaiah Karlitz ad loc., and Berachyahu Lifshitz, "The rules governing conflict of laws between a Jew and a Gentile according to Maimonides," *Mélanges à la mémoire de Marcel-Henri Prevos; droit biblique, interpretation rabbinique, communautés et société* (Paris: 1982), 180–189.

> Israelite in respect of the law of lost property and of all such matters without any distinction whatsoever.[26]

So too, R. Judah the Pious states that a Gentile who accepts the seven Noahide commandments is to be treated as a "brother" with regard to the law of lost property.[27]

Indeed, as has been noted by R. J. David Bleich,[28] the opinion of the Meiri contains two distinctly different insights. The first is that Gentiles of his day are not considered idol worshippers, but rather, monotheists, even though their faith is not completely monotheistic. The second is that such a person is within the parameters of "brother" for the purpose of the laws of lost property. This second insight is very difficult to accept, as the simple understanding of the Talmud is that Jewishness is a necessary (but not sufficient) requirement for "brotherhood."[29] Thus, even if one accepted without reservation the theological insight of Meiri, it provides no proof of the proposition that monotheistic Gentiles have the status of "brother" in Jewish law. As cogently noted by R. Bleich, the Tosafists reached the same conclusion on the status of the contemporary Christians as non-idol worshippers as did Meiri without even considering the possibility that this gave them the legal status of "brother."[30] Indeed, R. Isserles, and

26 Quoted in *Shita Mekubetzet* on bBaba Kama 113b and in Meiri on bAvoda Zara 2b, translated in R. Isaac Halevi Herzog, *Main Institutions of Jewish Law* (London: 1965–1967), 393 n. 2. See also *Beer Hagola*, HM 266 and 348, which may adopt the Meiri's position as normative. However, a close reading of the two texts indicates that *Beer Hagola*'s actual assertion is that it is permissible (and good) to return lost objects, and not that it is obligatory. This is clearly indicated in 348, and 266 is consistent with that understanding. This is also consistent with the understanding of *Sefer Hasidim* discussed in n. 30 below, and the approach of Maimonides and Rashi discussed below in n. 36 and 37. It is not the practice of *Beer Hagola* — a bibliographic work — to put forward novel explications of Jewish law, and any reading of his comments beyond that advanced here would be doing precisely that.

27 *Sefer Hasidim* §355. See also the *Makor Hesed*, *Mishnat Avraham*, and *Kneset Hagdola* commentaries ad loc.

28 J. David Bleich, "Divine unity in Maimonides, the Tosafists and Meiri," in Lenn E. Goodman (ed.), *Neoplatonism and Jewish Thought* (Albany: 1992), 237–254.

29 See n. 9 above for the talmudic text.

30 Bleich, n. 28 above, 239–242; Rema, OH 156:1. See *Tosafot* on bBekhorot 2b and bSanhedrin 63b.

many other normative Jewish law authorities, have little difficulty accepting the possibility that the opinion of *Tosafot* is correct without ever reaching Meiri's contention that such Gentiles are "brothers" for legal purposes.[31]

The recently-published uncensored version of R. Caro's *Beit Yosef* clearly rejects the second point argued by Meiri. Commenting on R. Jacob b. Asher's apparent assertion in the *Tur* that one is only not obligated to return the lost property of an idol worshipper, R. Caro states:

> It is obvious that all Gentiles are the same for this law [in that one does not have to return their lost property] whether they worship idols or they do not, since they are not one's "brother." The reason the Tur wrote "idol worshippers" — it is not meant specifically. It is possible that in the Edomite lands[32] the Jews were oppressed by the king because of this law or the like and thus the wise men of Israel[33] replied that this phrase was used by the writers of the Talmud to denote worshipers of idols who denied the single Creator of the world, but Gentiles of this day, who acknowledge the single Creator, do not have this status.

In short, R. Caro thinks that the ruling of Meiri that Jews must return the lost property of Gentiles who are pious monotheists is apologetics written solely for the benefit of the anti-Semitic rulers of Christian Europe.

An additional factor in favor of the view that Meiri's remarks cannot mean what they state if taken literally — that one must return the lost property of all monotheistic Gentiles — is that Meiri himself, in his explanation of bKetubot 15b, asserts that the talmudic rule

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Sefer Hasidim states that "a Gentile who observes the seven commandments ... should have his lost objects returned, should be not mocked, and should be honored more than a Jew who does not study Torah." Given the context of *Sefer Hasidim* generally, it would seem that the author's intention is that this statement expresses, not a legal principle, but a moral one, designed to encourage people to return lost objects in situations were the technical halakha does not compel one to do so. This reading of *Sefer Hasidim* is in harmony with the uncensored formulation of the rule found in Maimonides, n. 37 below. According to this understanding, *Sefer Hasidim* is encouraging conduct that is legally permissible, but not mandatory, within Jewish law. (This would be consistent with the general theme of the work.)

31 See sources cited in n. 40.

32 This seems to be a synonym for Christian countries.

33 See bPesahim 95a. This phrase does not denote the Rabbinic Sages.

allowing discrimination against Gentiles regarding certain financial regulations is limited to those Gentiles whose laws of liability are not the same as the rules of Jewish law. However, adds Meiri, if the law is the same and the obligations are reciprocal, then according to Jewish law there is no difference in treatment. Given the inclination of Meiri in this case to focus on reciprocity, it is difficult to accept that he would impose the obligation to return lost property **without a reciprocal obligation.**[34]

That Meiri's assertion concerning returning lost property is likely inauthentic does not imply, and indeed is conceptually unrelated to, the correctness of his first insight — that Christianity is a monotheistic religion. Rather, even accepting the correctness of that insight, it is very difficult to rule that these ethical monotheists must therefore have their lost objects returned. R. Caro could not even consider the possibility that there was an authentic opinion within Jewish law that rules that a monotheistic Gentile is deemed a brother. It is important to realize that R. Caro clearly did consider tenable the opinion of the Tosafists that some contemporary Gentiles were monotheists.[35]

It is our thesis that nearly all authorities rejected this rule **obligating** one to return the lost property of a Gentile — even for pious Gentiles who clearly are monotheistic and fully in compliance with Jewish law's understanding of the proper conduct for a Gentile — because of the legal theory problem of reciprocity. One cannot run a legal system equating the **legal** obligations a Jew has to a fellow Jew with the obligations a Jew has to a pious Gentile and a pious Gentile has to a Jew. Such an approach can be found in Rashi's commentary on the Talmud, which addresses the issue of reciprocity and the differential obligations to return lost property to a "brother" in Jewish law.[36] It is implied in Maimonides' classification of the commandments to

34 One could thus understand Meiri concerning lost property in a completely different light. One could argue that the Meiri is referring to "nations which are disciplined by religio-moral principles and are worshippers of the Deity in some way," who also return lost property as a matter of religious belief or secular law. We have attempted to investigate both the secular law of Provence at that time and the religious beliefs of the Christian Arians, but to no avail. This possibility cannot, however, be ruled out.

35 *Beit Yosef*, OH 156, YD 147.

36 Rashi on bKetubot 15b, s.v. *lehahzir aveida*.

return lost property.[37] Reciprocity was the guiding principle of most of the Early Authorities.[38] Indeed, logic directs one to accept the claim of R. Moses Sofer, and the inclination of R. Bleich, that Meiri's view on this issue was placed in the text to placate the censor, and is not authentic even within the opinion of Meiri[39] — even though the Meiri's opinion concerning the monotheistic nature of Christianity is authentic to Meiri.[40] Certainly this was the opinion of R. Caro.

37 See Maimonides, *Code*, Laws concerning Robbery and Lost Property 11:1,3. Maimonides divides the law into two separate categories. There is a general biblical obligation to return lost property to Jews, and there is a prohibition against returning lost property in situations where returning lost property strengthens the hand of evil-doers; see also Blau, *Pithei Hoshen*, n. 8 above, 1, 18–19. The proper understanding of Maimonides' position is that there are three categories of cases. There is an obligation to return the lost property of a Jew. It is permissible, but not obligatory, to return the property of Gentiles. It is prohibited to return the property of evil doers (Jewish or Gentile). This analysis is strengthened when one examines the terms used by Maimonides in the uncensored versions of the *Code*, which systematically apply the terms *nokhri* and *oved avoda zara* to denote these different categories.

38 Basri, *Dinei Mamonot* 5 n. 1, speculates to the contrary of our conclusion and perhaps appears to indicate that a pious Gentile has the status of a Jew for the purposes of returning lost property. However, his textual rules are consistent with our analysis. All agree that it is permissible to return the lost objects of pious Gentiles, the question is whether such conduct is mandatory according to Jewish law. Blau, *Pithei Hoshen*, n. 8 above, 1: 55, does not even acknowledge that such a distinction exists, for reasons that we are at a loss to explain.

39 See R. Moses Sofer, *Kovetz Sheeilot Uteshuvot Hatam Sofer*, 90 and R. Bleich, n. 28 above.

We are inclined to view the comments of R. J.M. Epstein, *Arukh Hashulhan*, HM 348, in the same light. A close read of the HM volume of this work clearly reveals a fear of censorship. In particular, this can be noted from the introduction to the work praising the Czar of Russia, and his frequent notes, marked by asterisks, to various chapters within HM, asserting that the section in question is not applicable to Jewry in Russia because of secular law. An examination of these notes reveals they are not to be understood as authentic halakhic discourse, as they are appended to matters that are indeed clearly applicable in the Diaspora. The use of such notes intended to satisfy the censor can also be found in *Mishnah Berura*, see R. Israel Meir Kagan, *Mishnah Berura*, vol. 3, 339, 340.

40 See generally the comments of Rema on OH 156, and comments of the Shakh on YD, for further discussion of this issue.

III. *Sanctification of God's Name and Desecration of God's Name*

Thus far this article has addressed the rules relating to the return of lost property belonging to a Gentile independently of any rules not relating specifically to lost property. The practical application of the former is curtailed by two fundamental principles of Jewish law unrelated to the rules of lost property, namely, profanation of God's name, and sanctification of God's name. The former is the grave sin of causing people to think ill of Jews and Judaism, and the latter is the commandment to sanctify God's name and Judaism.

Immediately following the passage which imposes no duty of restoration of the Gentile's lost property, the Talmud quotes the statement of R. Pinchas b. Yair: "Whenever the danger of causing a desecration of God's name exists, even the retaining of a lost article [of a Gentile] is forbidden."[41] Both Maimonides and the classic code, the *Shulhan Arukh*, incorporate this statement into Jewish law as **limiting the general rule**, and requiring one to return such property.[42] Moreover, the *Shulhan Arukh* states that the return of a Gentile's lost property where such an act would be likely to result in sanctification of God's name, reflecting credit upon the Jew and his faith, merits the highest religious praise.[43] In a situation where the Gentile's property is going to be destroyed, rather than lost, Jewish law, on the basis of

41 bBaba Kama 113b.

42 Maimonides, *Code*, Laws concerning Robbery and Lost Property 11:3; HM 266:1.

43 The Palestinian Talmud recounts several instances of such conduct by the Sages as an example of a course of conduct to be followed by all Jews. The story of Simeon b. Shetah, Chief of the Great Sanhedrin, is representative. He was an extremely poor man who eked out a subsistence living as a peddler of linen. To lighten his burden, his disciples purchased a donkey for him from an Ishmaelite. After concluding the sale, they found a precious gem hanging from the animal's neck. Full of excitement, they hastened to their master to tell him of his good fortune, as he would now be able to devote all his time to study. Simeon b. Shetah's immediate query quickly dispelled their excitement. "Did the former owner know of the gem? If not, let us go immediately and return it." When they returned the gem to the owner, he exclaimed, "Praise to the God of Simeon b. Shetah!", whereupon the Talmud observes, "To hear the Gentile exclaim, 'praise be the God of the Jews!' was worth more to Simeon b. Shetah than all the wealth in the world" (jBaba Metzia 2:5).

proper manners in a civilized society, a lower-level principle, imposes an obligation to salvage the property.[44]

Even the rules of sanctification or desecration of God's name have a clear element of reciprocity in them. In a society where no one returns lost objects, a Jew who does not return the lost property of another, in a situation where Jewish law allows the finder to keep the property, does not create a desecration of God's name, as no one will even notice that action — it is the norm. The desecration occurs when a Jew does not return an object in a situation where such objects are generally returned, or are encouraged to be returned, by society at large. This is a form of reciprocity: it desecrates God's name to behave in a manner perceived to be less moral than that prevailing in society at large. Indeed, one only sanctifies God's name when one returns lost objects in a situation where society looks on it as morally proper to do so and encourages the return of all such property.[45]

IV. *Conclusion*

One can now fully comprehend the importance of personal status and reciprocity in the law of lost property. The unmodified talmudic rule for property of a person who does not consider himself bound by Jewish law is that one is under no obligation to return the lost property of such a person, since that person — honest as he might be — does not consider himself reciprocally legally obligated to return such property. Jewish law ruled that one may, but need not, return his property, just as he may, but need not, return found property.[46] On the other hand, in the case of property of an individual who considers

44 *Shulhan Arukh*, HM 266:1. For an explanation of the differences between *eiva* and *darkhei shalom*, see Walter Wurzberger, "*Darkei Shalom*," *Gesher* 6 (1977), 80. These authors note that while *eiva* is not based on reciprocity in any form, the concepts of *darkhei shalom*, *hilul hashem* and *kidush hashem* are.

45 Thus, for example, if one found pirate's treasure from the year 1600 buried in the ground, it would be no sanctification of God's name to return it to the pirate's heirs, were they determinable.

This insight concerning the sanctification of God's name was first imparted to us by Rabbi Howard Jachter.

46 An evil person's lost objects may not be returned for reasons unrelated to this discussion; see *Tur*, HM 267 and Maimonides, n. 37 above.

himself bound by Jewish law to return lost property, one is obligated to return the property of such a person precisely because the person feels legally obligated to do the same. Indeed, the same rule is true for the lost property of a person who is legally bound by secular law to return lost property to others. Jewish law would require that his property be returned, as he would do the same for a Jew.[47]

47 This follows logically from Rema's assertion that *dina demalkhuta* mandates the return of lost property even in situations where its return is not required by Jewish law; Rema, HM 259:7. It is analytically impossible that Rema means that the principle of *dina demalkhuta* requires that one return property to a Jew and not to a Noahide, as there can be no instances where *dina demalkhuta* is a binding principle governing relations between Jews and not those between Jews and Noahides. The very essence of *dina demalkhuta* would otherwise be destroyed. (The reverse situation is subject to dispute; see *Hazon Ish*, HM 15–16.)