

*R. Menachem HaMeiri, Interfaith Relations, and Progressive Halakhah*

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The subject of interfaith relations, the topic of this volume, poses some familiar and difficult challenges to us Jewish religious liberals. On the one hand, our liberalism commits us to the proposition that all human beings are created equal and to the notion that the religious communities within our societies ought to approach one another in the spirit of pluralism and tolerance. On the other hand, our Jewish textual tradition – in particular the *halakhic* tradition that is our particular interest at the Freehof Institute – is anything *but* pluralistic and tolerant when it comes to the non-Jew. Our texts portray the non-Jew – the Gentile, the *nokhri*, the *goy* – as the classic Other, at worst a threat to our life and limb and at best a foreign entity against whom we define ourselves and from whom we must always keep separate and apart. There are any number of historical and sociological reasons for this tension. But I want to focus in this essay specifically upon the *halakhah*. Although classical Jewish law assumes a negative, standoffish, and at times discriminatory position toward the non-Jew, the legal reason<sup>1</sup> for this is

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1. By “legal reason” I mean an explanation of a legal rule or other phenomenon that would be given by a legal actor, one whose perspective is *internal* to the practice of law (a lawyer, a judge, or in this case a halakhist) rather than by an observer (presumably a social scientist or historian) whose interpretative stance is *external* to that practice. The researcher must choose one perspective or the other, and this essay proceeds from the internal point of view. I do not doubt the validity of the external perspective. The historian and the social scientist can teach us much about how law functions in society on the basis of data and findings that the jurist, working in the splendid isolation of the law library, will not encounter. But while law (and, for that matter, *halakhah*) is a social and historical phenomenon, it is much more than that. In the words of the legal philosopher Ronald Dworkin, “Legal practice, unlike many other social phenomena, is *argumentative*. Every actor in the practice understands that what it permits or requires depends on the truth of certain

neither racial/ethnic hostility nor a response to hatred and persecution directed against Jews by a Gentile majority. The accepted explanation is that since Biblical times the non-Jew has with rare exceptions been perceived as a pagan, an idol worshiper, an *oved avodah zarah*. This, of course, is in direct violation of the covenant between God and the *b'nei Noah*, the descendants of Noah, which prohibits idolatry.<sup>2</sup> The classical *halakhah* therefore instructs Jews to keep themselves separate and distinct from these pagans; we are not to learn from their ways, nor are we in any way to aid and abet the non-Jew in the performance of his forbidden religion.<sup>3</sup> These demands resulted in the creation of a host of halakhic rules that distance the Jew from the *nokhri*. These *halakhot*, discussed primarily but not exclusively in the Mishnaic and Talmudic tractate *Avodah Zarah*, restrict Jews' economic and social contact with non-Jews, particularly on and prior to non-Jewish festival days, out of concern that a gift or successful business transaction at that time

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propositions that are given sense only by and within the practice; the practice consists in large point in deploying and arguing about these propositions"; *Law's Empire* (Cambridge, MA: Belknap/Harvard University Press, 1986), p. 13 (emphasis in original). Dworkin expands upon the internal/external distinction at pp. 11-15, stressing that theories of law which ignore the internal character of legal argument are "impoverished and defective." In the field of Jewish law, it was Jacob Katz, the great social historian of the medieval and early modern Jewish community, who famously criticized his fellow historians for looking past the halakhic argumentation that comprises the bulk of responsa texts in order to discover the "true" motivations of their rabbinical authors; *Halakhah v'kabbalah* (Jerusalem: Magnes, 1984), pp. 213-214, and see below in the text at note 38. (For a consideration of Katz's inconsistencies on this point see Mark Washofsky, "Halakhah in Translation: The Chatam Sofer on Prayer in the Vernacular," *CCAR Journal*, 51 [2004], pp. 127-148.) In short, neither perspective should enjoy exclusive domination; each has its proper place in the study of law. "One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence"; H. L. A. Hart, *The Concept of Law*, second edition (Oxford: Clarendon Press, 1994), p. 91. For a full discussion see Douglas E. Litowitz, "Internal Versus External Perspectives on Law: Toward Mediation," *Florida State University Law Review* 26 (1998), pp. 127-150.

2. The seven Noahide commandments (שבע מצוות בני נח) are listed in *Tosefta Avodah Zarah* 8:4 (ed. Zuckerman), *B. Sanhedrin* 56a, Rambam, *Hil. M'lakhim* 9:1. The prohibition against *avodah zarah* appears in each.
3. The halakhic tradition identifies the source of the prohibition against "aiding and abetting" as Exodus 23:13 ("Make no mention of the names of other gods; they shall not be heard *on your lips*"), where the italicized phrase (על פיה) is read "on your account; by your causation." See *B. Sanhedrin* 63b; Rashi, *Avodah Zarah* 6a, *s.v. mishum har'vahah*; Rambam, *Hil. Avodah Zarah* 4:1.

would lead the non-Jew to worship and offer sacrifices to his idols.<sup>4</sup> The halakhic drive for distance and separation from the non-Jew, moreover, at times led to the creation of rules that impose unfair or inequitable treatment upon him under Jewish law.

All of this, perhaps, worked well in theory, particularly in the context of the Jewish commonwealth in Eretz Yisrael as imagined by the Mishnah, where the pagans are a decided minority within a predominantly Jewish population. It does *not* work so well, however, as legal instruction for the Diaspora, where for obvious economic and social reasons the Jews could not seal themselves off from the sorts of contact proscribed by the classical halakhic rules. And indeed, the halakhic writers testify that the relaxation of those rules, especially the prohibitions against various types of commerce with Gentiles, had become the accepted *minhag* (practice) outside the land of Israel. As is often the case, these authors seek to construct halakhic theories to justify the practice *ex post facto*. Some of these theories can be classified as *religious* or *theological* in nature, in that they express an evaluation that “the Gentiles in our midst” are not, in fact, *ovdei avodah zarah* so that the Mishnah’s prohibitions were never meant to apply to them. These efforts tend to begin with the statement of the Babylonian *amora* Shmuel, who drastically shortens the Mishnah’s four-day period of forbidden commerce surrounding every major pagan festival (the three days preceding the festival along with the festival day itself) to only one day in the Diaspora (the festival day itself), a ruling that some later authorities explain on the grounds that non-Jews outside the land of Israel are “not so fervent” in their idolatrous practices and are therefore unlikely “to go and offer thanks” to their idols for the successful transaction.<sup>5</sup> And Shmuel’s student Rav Yehudah sent a gift to a Gentile acquaintance on the

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4. See *M. Avodah Zarah* 1:1 and the traditional commentaries *ad loc.*

5. *B. Avodah Zarah* 7b and Rashi *ad loc.*, *s.v. bagolah*.

latter's festival day, justifying that otherwise prohibited act by saying "I know him; he doesn't engage in idolatrous worship."<sup>6</sup> Extending the logic behind these individual exceptions, a series of medieval Ashkenazic halakhists hold that commerce with *all* of "our" Gentiles is permitted even on non-Jewish festival days because "the Gentiles in our midst" are not truly pagans – "they are not fervent (*adukin*)" in their idolatrous beliefs but are simply "following their ancestral custom" - so that even Shmuel's truncated one-day prohibition is now irrelevant.<sup>7</sup> A similarly "theological" theory is that advanced by the 12<sup>th</sup>-century Tosafist Rabbeinu Yaakov Tam, who permits Jews to require a Gentile to swear an oath (a common feature of partnership and other business arrangements), even though the non-Jew – a Christian, in this case – will swear that oath in the names of various saints. This act of *shituf* (שיתוף, *i.e.* "joining" the names of other heavenly personalities to that of "the Maker of Heaven and Earth") is not forbidden to the Gentile, he declares, because the Gentile "does not conceive of (the saints) as divine beings" and therefore is not does performing *avodah zarah* when he invokes their names. Rather, "their intention is toward (God), and even though he joins another entity to the divine name... the *b'nei Noach* are not prohibited from doing this," even though such "joining" is forbidden to Jews.<sup>8</sup>

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6. *B. Avodah Zarah* 65a. A similar act and explanation are attributed to the *amora* Rava, who lived two generations after Rav Yehudah.

7. This position is commonly associated with Rashi. See *Resp. Rashi* (ed. Elfenbein), no. 327, as well as his comment to *B. Avodah Zarah* 7b, *s.v. bagolah*, in explaining Shmuel's ruling that limits the prohibited period of commerce to the festival day itself. There, he cites R. Yoḥanan's statement that Gentiles living outside the land of Israel are not truly idolaters but are merely following the customs of their ancestors (*B. Hulin* 13b). On the other hand, Rashi is not the first northern European authority to rely upon the statement of R. Yoḥanan; see *Resp. Rabbeinu Gershom Me'or Hagolah* (ed. Idelberg), no. 21. See also *Hil. Harosh, Avodah Zarah* 1:1 and *Sefer Hat'rumah* (ed. Venice), ch. 134 ("Rashbam in the name of his grandfather Rashi." Rashba, *Hidushim, Avodah Zarah* 2a, quotes the passage from *Sefer Hat'rumah* without the name "Rashbam".)

8. *Tosafot, B'khorot* 2b, *s.v. shema*; *Tosafot, Sanhedrin* 63b, *s.v. asur*; *Sefer Ha'agudah, Sanhedrin* 7:56. R. Moshe Isserles accepts this theory; *Shulḥan Arukh Oraḥ Ḥayyim* 156:1.

We should not minimize the importance of these halakhic theories. Where the classical sources make no distinctions among Gentiles and declare them all, with a few individual exceptions, to be worshipers of idols, the medieval authorities find a way to rule that “our” Gentiles – all of them, it would seem – are no longer to be considered pagans, *ovdei avodah zarah*. It is therefore tempting to see in these theories the first halting steps toward a halakhic stance of religious tolerance. But, for at least three reasons, we should resist that temptation. First, this lenient attitude toward the religious status of contemporary Gentiles is anything but universal. Maimonides, for one, unequivocally defines the Christians (but, significantly, not Muslims<sup>9</sup>) as idol worshipers,<sup>10</sup> a definition that, as we shall see, survives among Orthodox halakhists to this day. Second, these medieval Ashkenazic authorities were not truly focused upon “tolerance” of the religions (particularly Christianity) of their neighbors. We can see this in the rather diffident way in which they frame their theological theories. To permit commerce with Christians because “they are not so fervent” in their religious devotion, that they simply follow their ancestral custom and, in effect, do not know what they are doing belittles them as religious

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9. *Mishneh Torah, Hil. Ma'akhalot Asurot* 11:7: Muslims are “Gentiles who do not practice idolatry.” He attributes this ruling to “all the *ge'onim*.” On the Geonic roots of this ruling see R. Sh'lomo b. Adret (Rashba, Catalonia, d. 1310), *Torat Habayit*, 5:1 (40a).

10. *Mishneh Torah, Hil. Avodah Zarah* 9:4 in the uncensored texts. See the edition of David Kafih (Jerusalem, Makhon Mishnat HaRambam, 1983). See also Rambam's *Commentary to the Mishnah, Avodah Zarah* 1:3, ed. David Kafih (Jerusalem: Mosad Harav Kook, 1965), where Maimonides explains in detail that Christians are *ovdei avodah zarah*. While this ruling may reflect Rambam's own considered judgment based upon his observations of Christian worship, it is also supported by explicit Talmudic evidence: *B. Avodah Zarah* 6a, ת"ש, דאמר רב תחליפא בר אבדימי אמר שמואל: יום א' לדברי רבי ישמעאל לעולם אסור, where יום א' is obviously a reference to Sunday, the Christian holy day. Most manuscripts and uncensored early printed editions of the Talmud read נוצרים (“Christians”) or some variant thereof in place of יום א'. In other words, Christians are the sort of idolaters with whom it is forbidden to do business on or around their festival day. See Rafael N. Rabinovicz, *Sefer Dikdukei Sofrim* vol. 10 (Munich, 1879), p. 8a at note 8. See also the manuscripts Jewish Theological Seminary – Rab. 15 and Paris, Bibliotheque Nationale – Suppl. Heb. 1337, available at the National Library of Israel website, <http://web.nli.org.il/sites/nli/Hebrew/collections/jewish-collection/Talmud/Pages/default.aspx> (accessed February 12, 2019). For a Geonic precedent see *T'shuvot Hage'onim Sha'arei T'shuvah*, no. 246.

people and denies to them the sincerity of their faith. And even if the act of *shituf* is not prohibited to Gentiles (a conclusion not universally shared among halakhists),<sup>11</sup> this hardly constitutes a positive evaluation of Christian religion. At the very least, to associate other divine beings with God borders upon idolatry; otherwise, why would such association be forbidden to Jews? Rather, as is often the case with Ashkenazic halakhists of the period, these authorities are seeking *teirutzim*, technical arguments that serve to resolve contradictions. The contradiction in this case was the evident gap between the accepted *minhag*, to which Ashkenazic sages often extended a *prima facie* assumption of correctness,<sup>12</sup> and the received legal tradition.<sup>13</sup>

Specifically, the long-established *minhag* was for Jews to do business with Gentiles every day of the year (along with other leniencies) despite the clear restrictions imposed by the Mishnaic and Talmudic sources. The medieval rabbis had to rationalize these apparently forbidden practices, and it was for that reason – and *not* out of any desire for understanding of or dialogue with non-Jews – that they developed their theological theories. Third, these authors combine their theological justification for leniency with other, decidedly *non*-theological justifications that accomplish the same halakhic goal – to justify the established *minhag* – whether or not “our” Gentiles are viewed as idolaters.<sup>14</sup> This combination of differing argumentative strategies raises

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11. See R. Yehezkel Landau (18<sup>th</sup>-century Bohemia), *Resp. Noda Bi'hudah*, vol. 2, *Yore De'ah* no. 148.

12. On the complex relationship between *halakhah* and established custom among the northern European authorities during this time see Yisrael Ta-Shema, *Minhag ashkenaz hakadmon* (Jerusalem: Magnes, 1999), as well as his collected studies in *Halakhah, minhag, um' tzi'ut b'ashkenaz, 1000-1350* (Jerusalem: Magnes, 1996).

13. See *Tosafot, Avodah Zarah 2a, s.v. asur*:. "וקשה על מה סמכו העולם לשאת ולתת ביום איד", and *Hil. HaRosh, Avodah Zarah 1:1*: "ותימה על מנהג שלנו שאין אנו נמנעין מלישא וליתן עמהן... אפי' ביום אידם". In other words, according to *halakhah* the Jews should not be trading with Gentiles on non-Jewish festival days. The *minhag* to do business is in apparent violation of the law, and the theological justifications come to resolve that problem.

14. Thus, Rashi (note 7, above) concludes his theological justification with the phrase רעוד דמסתפינן מינייהו, “another reason: we fear them (the Gentiles)” and so are not in a position to refrain from commerce on the

the distinct possibility that the medieval halakhists, to say nothing of their readers, did not find the theological theories truly persuasive. They offered it rather as part of a larger argumentative strategy that relied on a variety of alternative approaches – “if this theory doesn’t work, try the next one” – that would support the halakhic leniencies that their communities had already adopted. This is a far cry from an unequivocal declaration for religious tolerance.

*Meiri as Halakhic Revolutionary.*

The great exception to this tendency is R. Menachem HaMeiri (d. 1315), of the town of Perpignan in Provence. Meiri (or “the Meiri”), as he is called, crafted a theoretical approach to the status of Gentiles that the great social historian Jacob Katz goes so far to describe as *sovlanut datit*, religious tolerance.<sup>15</sup> While Meiri’s more accepting stance toward non-Jews is familiar today, its scope became widely known with the discovery and publication (beginning in the 19<sup>th</sup> century) of his long-disappeared Talmud commentary, *Beit Hab’hirah*. Katz portrays Meiri as something approaching a halakhic revolutionary, and, indeed, anything resembling “religious

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forbidden days. In this, he echoes the Talmud’s own justification for leniencies with respect to contact with Gentiles משום איבה, “in order to avoid hostility with them” (*B. Avodah Zarah* 26a, a theme adopted by a number of medieval authorities). In the parallel passage, *B. Avodah Zarah* 11b, s.v. *bagolah*, Rashi omits the theological justification entirely, justifying the *minhag* on two other grounds: first, ופרנסתנו מהם, “our livelihood depends upon doing commerce with them,” and second, משום יראה, “out of our fear of the Gentiles,” as in the previous passage. We find another statement of the “livelihood” justification in the commentary of R. Yehonatan of Lunel (Provence, d. 1211) to Alfasi, *Avodah Zarah*, fol. 1a: in view of the principle that “we do not impose an edict upon a community unless the majority of its residents can abide by it” (*B. Avodah Zarah* 36a and parallels), the Sages did not apply their prohibitions to Diaspora communities which are wholly dependent upon commercial activity with Gentiles. Meanwhile, Rabbeinu Tam, who permits a Jew to accept an oath from a Gentile, does so on several grounds besides the suggestion that Gentiles do not commit idolatry when swearing an oath in the names of their “saints” (see the *Tosafot* passage in note 8, above, and the text).

15. Jacob Katz, “Sovlanut datit b’shitato shel R. Menachem HaMeiri b’halakhah uv’filosofiah,” *Zion* 18 (1953), pp. 15-30 / Jacob Katz, *Halakhah v’kabalah* (Jerusalem: Magnes, 1984), pp. 291-306.

tolerance” would count as a revolutionary step in the history of medieval Jewish law. At any rate, there is much that is new and unique in Meiri’s attitude toward the Gentiles of his day. Katz underscores that uniqueness by pointing to four distinct elements in Meiri’s approach that distinguish him from the other *rishonim* (medieval halakhic authorities).

1. *The Linguistic Formula.* Meiri created a new term for the Gentiles of his day. He referred to them as “peoples defined by a religious pattern of life” (עמים הגדורים בדרכי הדתות).<sup>16</sup> This term is unique, notes Katz, not only in that Meiri is the only author who uses it but also in its positive connotations. While the other authorities describe the Gentiles as “*not* idolaters” or “no longer do they practice *avodah zarah*” (whether, in reality, these writers believed that assertion), Meiri’s term depicts them in terms of what they have and actually do practice rather than simply as the absence of idol worship.

2. *The Formula is Unequivocal.* Unlike the other authors, whose words convey a sense that the permit comes reluctantly, out of a necessity to resolve the conflict between the *minhag* and the *halakhah*, Meiri expresses no doubt as to the correctness of his formula in principle. “In these times nobody pays any attention to these things (i.e., the halakhic prohibition of commerce with non-Jews on or around the Gentile festival day) – neither rabbi, nor sage, nor student, nor the pious one (*hasid*), nor the one who wishes to appear pious.”<sup>17</sup>

3. *The Exclusive Use of the Formula.* Other authorities, as we have seen, do justify the relaxation of various halakhic stringencies regarding contact with non-Jews on theological grounds: “the Gentiles in our time are not *ovdei avodah zarah*.” Yet this determination is always

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16. I choose the word “defined” - *g’durot* - to connote a sense of “limitation, restriction,” after the Latin *definio*.

17. Meiri, *Beit Hab’hirah , Avodah Zarah* (ed. A. Sofer, Jerusalem, 1944), p. 3.



accompanied by other halakhic theories in favor of leniency, arguments that apply even if we were to regard “our” Gentiles as idolaters. I have suggested – and Katz certainly precedes me in this! – that in citing these other justifications the halakhists signal a definite lack of confidence in the force of their theological theories. The Meiri, by contrast, relies exclusively upon his formula: none of these halakhic restrictions apply to the non-Jews of our time and place inasmuch as they are “peoples defined by a religious pattern of life.” Thus, he explicitly rejects as superfluous and pilpulistic the search for other grounds to justify the removal of the old restrictions.<sup>18</sup> Importantly, Meiri’s *heter* (permit) for contact with Gentiles is based upon principle and not expediency. He does not come, *ex post facto* (*b’di’avad*, in halakhic terminology) to justify an existing *minhag*; rather, his is a sweeping declaration that the halakhic restrictions do not apply in the world of medieval Europe.

4. *The Expanded Application of the Concept.* In Katz’s view, there is no better example of the unique nature of Meiri’s stance regarding non-Jews than his readiness to apply his conception and his terminology to issues where his predecessors did not see fit to utilize their theological justification. See, for example, *Tosafot, Avodah Zarah 21a, s.v. af*, where the text struggles to find a theory to explain why the Jews generally ignore the halakhic prohibition against renting houses to Gentiles. Nowhere does it mention the theological justification, namely that “our” Gentiles are not idol worshipers and are therefore not suspected of using those houses for prohibited cultic purposes. Meiri, for his part, omits the ideas advanced by Tosafot: “This prohibition was restricted to those idolaters who would conduct their worship in their homes”<sup>19</sup> and is therefore no longer relevant.

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18. See Meiri, *Beit Hab’hirah, Avodah Zarah* (note 17, above), p. 28: "ולפיכך אין צורך לדקדק הים בדברים שדקדקו בחידושי'ן ישנים ובתוספות כלל".

Not everyone agrees with Jacob Katz as to the significance of Meiri's achievement. Efraim Urbach dismisses Meiri's linguistic formula – “peoples defined by a religious pattern of life” – as little more than a restatement of the theological justification already offered by earlier authorities. The latter had for all practical purposes already determined that Christians were not *ovdei avodah zarah*; Meiri simply provides his own expression for the *heter* that they had devised. On substantive grounds too, writes Urbach, there is much less to Meiri's “tolerance” than meets the eye, given that he does not utilize his formula to justify new leniencies. He permits nothing with respect to contact with non-Jews that his predecessors (or, more precisely, long-standing *minhag*) had already permitted. Were he truly committed to the notion that Gentiles “nowadays” are not idolaters, he would have declared as superfluous many of the legal boundaries separating Jews from non-Jews, including those that prohibit intergroup marriage. Since Meiri leaves those boundaries in place, Urbach concludes, his new linguistic terminology lacks any real halakhic punch.<sup>20</sup> In response, both Katz<sup>21</sup> himself and Yaakov Blidstein<sup>22</sup> argue that Meiri does in fact utilize his new terminology to justify specific halakhic leniencies that his predecessors do not mention. Katz emphasizes that Meiri's intent was never to erase all distinctions between Jews and non-Jews but rather to exempt monotheists – that is, the Christians and Muslims of his day – from the disabilities that Toraitic and Rabbinic legislation place upon

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19. Meiri, *Beit Hab'hirah, Avodah Zarah* (note 17, above), p. 48.

20. Efraim E. Urbach, “Shitat hasovlanut shel R. Menachem Hame'iri: m'korah umigb'loteihah,” in E. Etkes and Y. Salmon, *P'rakim b'toldot hahevrah hay'hudit bime'i habeinaiyim uva'eit ha'hadashah* (Jerusalem: Magnes, 1980), pp. 34-44.

21. Jacob Katz, “Od al 'sovlanuto hadatit shel R. Menachem HaMeiri,” *Zion* 46 (1981), pp. 243-246 / *Halakhah v'kabalah* (see note 15, above), pp. 307-311.

22. Yaakov Blidstein, “Ya'haso shel R. Menachem HaMeiri lanokhri: bein apologetiah l'hafnamah,” *Zion* 51 (1986), pp. 153-166.

Gentiles qua *pagans*, as worshipers of idols. (I will return to this point at the conclusion of this essay.)

Moshe Halbertal endorses Katz's approach as well,<sup>23</sup> offering further support for the latter's portrait of R. Menachem HaMeiri as a religious revolutionary. Halbertal locates Meiri within the intellectual world of the "philosophical rabbis" (i.e., those who wrote in the spirit of Maimonidean rationalism<sup>24</sup>) who flourished in 12<sup>th</sup>-13<sup>th</sup> century Provence. That spirit, which perceived Christians and Muslims as monotheists and as potential partners in religious dialogue and understanding, lies behind an important distinction that Halbertal identifies in Meiri's writing. Halbertal notes that there are two types of traditional halakhic legislation concerning contact between Jews and Gentiles that the Meiri found problematic: laws prohibiting various types of commercial contact with non-Jews and laws imposing disabilities upon Gentiles in the area of legal rights and responsibilities. Meiri does *not* apply his linguistic formula to laws that fall in the first category. He permits commerce with Gentiles on and around their festival day, for example, for *negative* reasons, that is, because they are *not* idolaters. He reserves his formula for the second category: Gentiles today should be treated as equals under the law – put differently, they should not be subject to unethical discrimination – for *positive* reasons, because of what they *are*, "peoples defined by the ways of religion." That is to say, as participants in religious

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23. Moshe Halbertal, *Bein torah l'hokhmah: R. Menachem HaMeiri uva'alei hahalakhah hamaimoni'im b'frovence* (Jerusalem: Magnes, 2001), esp. pp. 80-108; *idem.*, "'Ones Possessed of Religion': Religious Tolerance in the Teachings of the Me'iri," *The Edah Journal* 1:1 (Marḥeshvan 5761/2000), pp.1-24.

24. This is not to say that Maimonides himself shared these tolerant sentiments. We have already seen that Rambam defines Christians as *ovdei avodah zarah*, in part because the Talmud, his authoritative source of *halakhah*, defines them as such. Halbertal (2001; see preceding note), p. 83, note 8, points to numerous *halakhot* in the *Mishneh Torah* that maintain the unequal legal treatment accorded to non-Jews by the Talmudic tradition. He notes that the reliable manuscripts of the *Mishneh Torah* in these places read גוי (Gentile) rather than עכו"ם (idolater), suggesting that the legal discrimination stems from the fact that the Gentile – even the monotheist – is not part of the covenantal community and therefore enjoys no right to equal ethical treatment.

traditions that enjoy *legitimacy* on grounds of reason and ethics, they ought not be subject to the inequitable treatment that the classical halakhic sources mete out to the *goy*, the Gentile whom they assume to be an idolater. In this perspective, Meiri is most definitely an advocate of the sort of religious tolerance and dialogue practiced in communities where the differing religious traditions regard each other with mutual respect as *fellows*, as travelers upon a common path. “Meiri therefore does not content himself with providing a systematic explanation for the various leniencies in matters economic and functional. His conceptual approach expands toward the reduction of hostility, reaching toward a transformation in consciousness.”<sup>25</sup>

*The Talmudic-Halakhic Source of Meiri’s Position on the Status of Non-Jews*

I don’t have anything to add to the controversy over Jacob Katz’s portrayal of Meiri as a Jewish pioneer of religious tolerance. That controversy, I take it, is over; the record speaks for itself, as the writings Katz, Blidstein, and Halbertal make abundantly clear. Nor do I seek to contest Halbertal’s explanation of Meiri’s stance as an outgrowth of the rationalist philosophical culture of contemporary Provence. My goal, rather, is to argue that the approach of Halbertal and the others is a bit one-sided. I will suggest that the roots of Meiri’s “religious tolerance” lie not exclusively in his cultural milieu – though obviously we cannot understand Meiri without reference to the philosophical tendencies among the rabbis of his time and place - but also in the sources of the *halakhah*. This should not be a surprise to anyone. Meiri, after all, is a rabbi, a halakhist as well as a rationalist. His *Beit Hab’hirah* is a work of Talmudic commentary, and it

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25. Halbertal (2001; note 23, above), p. 90.

displays a clear halakhic bent. He concludes his discussion of each *sugya* with a consideration of the *p'sak halakhah* (the authoritative halakhic understanding of the Talmudic text), in which he unfailingly cites his great post-Talmudic predecessors<sup>26</sup> as well as giving his own opinion. As one who writes as a Talmudist and a halakhist, Meiri works within a discipline that demands that every claim of meaning be substantiated or argued by way of the application and interpretation of the authoritative texts of the Jewish legal tradition. He therefore must present his unique, even revolutionary approach to Jewish-Gentile relations not only as a conclusion of his philosophical bent but as an interpretation of the halakhic sources. Meiri, in other words, cannot simply assert that “our” Gentiles are no longer idolaters and, even more, that their monotheistic religions qualify as “legitimate” in Jewish terms; he must *prove* these assertions in terms that are acceptable to the practitioners of Talmudic-halakhic discourse (whether or not his colleagues are ultimately persuaded by his argument). I think that the scholars who have written on Meiri have largely overlooked this more classically halakhic expression of his approach to the status of the non-Jew. What follows offers, I hope, a small corrective, a contribution toward filling that lacuna.

What sounds like a straightforward task is, at first glance, anything but that. Indeed, when Meiri in his commentary addresses the halakhic restrictions upon and barriers against Gentiles, he most often does *not* undertake the sort of Talmudic-halakhic discourse to which I allude. He rather tends to dismiss those restrictions with a simple, declarative statement of his general theory: these Biblical and Talmudic laws applied only in ancient times, to peoples who were

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26. An interesting quirk in Meiri is that he cites these authorities not by name but by nicknames he has derived for each. These nicknames are expressed in the plural, even though they refer in each case to a single individual. Thus, Rashi is *g'dolei harabanim* (“the great rabbis”), Rabad of Posquières is *g'dolei ham'farshim* (“the great commentators”), Rambam is *g'dolei ham'habrim* (“the great codifiers”), etc.

truly *ovdei avodah zarah*, but they do not apply to the Gentiles of our time and place who are either a) not idolaters, or b) “peoples defined by the ways of religion.” He presents this statement as obviously true and undisputed, without bothering to support it with text-based argument. Finding the Talmudic-halakhic “roots” of Meiri’s religious tolerance can be difficult if he never talks about them. But there is one place, a comment upon one Talmudic passage, in which Meiri does give his readers such an indication. It is brief, a mere four Hebrew<sup>27</sup> words. But as a matter of *halakhah*, as I shall argue, those four words contain multitudes.

We begin with a *mishnah* (*M. Bava Kama* 4:3):

A. שור של ישראל שנגח שור של הקדש ושל הקדש שנגח לשור של ישראל פטור, שנאמר "שור רעהו" ולא שור של הקדש.

B. שור של ישראל שנגח לשור של עובד כוכבים פטור, ושל עובד כוכבים שנגח לשור של ישראל בין תם ובין מועד משלם נזק שלם.

A. When an ox owned by an individual Jew (*Yisrael*; i.e., a private owner) gores an ox owned by the Temple, or when an ox owned by the Temple gores an ox owned by an individual Jew, in either case there is no liability, for the Torah says “(When one person’s ox injures) the ox owned by his fellow (*r`eihu*; Exodus 21:35)” – that is, and not an ox owned by the Temple.

B. When an ox owned by a Jew gores an ox owned by a non-Jew,<sup>28</sup> the (Jewish) owner is exempt from liability. When an ox owned by a non-Jew gores an ox owned by a Jew,

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27. A second interesting quirk in Meiri is that he writes his commentary in good Maimonidean Hebrew rather than in the Hebrew-Aramaic dialect familiar among medieval (and most modern) Talmudists.

28. Again (see note 10, above), the printed version of the text as reproduced here shows the effects of censorship. In place of the words עובד כוכבים (“pagan,” “idolater”), the manuscripts of the Mishnah read נכרי, “non-Jew.” The same is true of the text of the *mishnah* as it appears in printed versions of the

the (non-Jewish) owner is liable for full damages, whether the ox was *tam* (not considered dangerous) or *mu`ad* (considered likely to attack other animals).

Clause B of this *mishnah* contains one of the most blatantly discriminatory rules in the Jewish legal tradition. Simple justice demands (and, in ordinary cases, Jewish law provides) that the owner of the animal that causes damage bears liability and therefore must compensate the other owner. In Jewish law, if the ox that committed the attack was *tam* – that is, was not already presumed to be dangerous by reason of its previous behavior – its owner pays fifty percent of the assessed damage – rather than full damages – to the other owner. The rationale is that the owner of the offending ox was under no obligation to exert tight control (*sh`mirah m`ulah*) over a presumably non-violent animal. If, however, the attacking ox was *mu`ad*, already known as likely to attack other animals, its owner is liable for full damages, given that he should have penned up an ox known to be violent. The legal question is one of negligence: did the owner of the attacking ox exercise the requisite degree of control over his animal? The religious identity of either owner should be irrelevant to the legal outcome of the case. Yet this text specifies that if the attacking ox belongs to a Jew, the owner *never* pays any compensation, even if his ox was *mu`ad* and the Jewish owner was negligent in allowing it to roam freely. Conversely, if the owner of that ox is a non-Jew, he *always* pays full compensation, even if his ox was *tam* and he had no legal obligation to keep it fenced in. The inequity here is palpable; the Jewish owner, whether or not he is at fault, always enjoys a legal advantage over the Gentile.

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Babylonian Talmud (*Bava Kama* 37b), which read כנעני (“Canaanite”) in place of עובד כוכבים. The manuscripts have נכרי.

One potential explanation for this inequity lies in the *mishnah*'s first clause (A), the one concerning an altercation between an ox owned by an individual Jewish owner and an ox belonging (= consecrated) to the Temple. There, the *halakhah* assigns no liability, no matter which ox is the attacker, because Exodus 21:35, the controlling Biblical verse, specifies that the requirement of compensation applies when one's ox attacks the ox of one's "fellow" – *r'eihu*, another Jew (*yisrael*). From this, it can be derived that the rules concerning liability for property damage are in force only when both owners belong to the ethical-legal community of Israel and not when one of the owners is the Temple, the physical representative of God's realm on earth. If such is the law in clause (A), we might deduce that the same principle governs clause (B): the non-Jew is similarly exempted from the system of liability for property damage because he, like the Temple, is not *r'eihu*, one's fellow Jew.

The Talmud, however, rejects this possibility as a logical inconsistency (*mimah nafshakh*). If on the one hand you say that *r'eihu* is an absolute standard – that the law of property damage applies here, as it does in clause (A), only among Jewish litigants – then the non-Jewish owner should not be held liable when his ox gores an ox owned by a Jew. Both litigants should enjoy equal status; in this case, equality would mean that *neither* would collect from the other. That conclusion, as we have seen, is at odds with the rule in the *mishnah*. Conversely, if you say that *r'eihu* is not the standard in clause (B), so that the Jewish law of property damage controls the outcome even when one of the litigants is a non-Jew, then the Jewish owner should be held liable when his ox is the one that attacks. Yet this conclusion, too, is contradicted by the *mishnah*'s rule. Thus, we cannot explain the inequity in our *mishnah* - the non-Jew loses both ways, whether he is the plaintiff (*nizak*) or the defendant (*mazik*) - on the technical legal grounds of "citizenship," that the non-Jew lacks standing in a Jewish court. What



we need is an *ethical* rationale, one that directly confronts and attempts to justify the evident injustice in the *mishnah*. The Talmud supplies such a rationale by quoting the Amora Rabbi Abahu, who cites a *midrash* (on Habakuk 3:6) that declares: “God saw that the non-Jews (the *b’nei Noah*) had failed to observe the seven *mitzvot* of their covenant,”<sup>29</sup> one of which is the obligation to establish the rules and procedures of justice (*dinim*). As a punishment<sup>30</sup> for this, God “permitted their property to the Jews” – that is, God decreed that when a case such as this arises in a Jewish court, the Jewish litigant should always prevail.<sup>31</sup> Rabbi Yochanan, the teacher of Rabbi Abahu, learns the same lesson from a *midrash*<sup>32</sup> on Deuteronomy 33:2: the punishment comes because the Gentile nations rejected the Torah when it was offered to them at Sinai.<sup>33</sup> According to both midrashic narratives, the rule in the *mishnah* is not an inequity at all but simple justice: non-Jews lose both ways in a Jewish court, whether as plaintiff or defendant, because they are deservedly paying the penalty for their failure to live up to their legal and ethical commitments.

The Rabbis, it seems, were not entirely comfortable with this ethical rationale. Both Talmuds, the Bavli and the Yerushalmi, cite in connection with this passage an *agadah* recounting a visit paid by Roman legal scholars to the Rabbinic academy in order to learn the

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29. See above at note 2.

30. See the comment of R. Yehonatan of Lunel to Alfasi, *Bava Kama*, fol. 19a: the non-Jews are indifferent to their responsibility under the Noahide *mitzvot* to do justice. Therefore, this punishment is a fine (*k’nas*) aimed at inducing them to reform their ways.

31. Does this penalty apply in other area of the law besides property damage? See *Tosafot*, *Bava Kama* 38a, *s.v. amad*.

32. See Rashi, *Bava Kama* 38a, *s.v. miparan*.

33. The same *midrashim* appear in the form of a *baraita*, a Tanaitic source, which the Talmud proceeds to discuss. See also *Yersushalmi Bava Kama* 4:3 (4b).

Torah. At the conclusion of their studies the Romans praise the laws of the Torah, but they pointedly make several exceptions, these concerning rules the Romans perceive as unfair to non-Jews. The rule codified in our *mishnah* is one of these. And, significantly, according to the story the Rabbis do not bother citing the *midrashim* cited above (“the Gentiles are getting what they deserve”). This agadic tradition demonstrates the Rabbis’ ability to perceive a text as it were from the outside, from the interpretive standpoint of a non-Jew. And given that perspective, the Rabbis realize the ethical rationale does not “sell,” that the non-Jew would find those *midrashim* unpersuasive as a justification for a manifestly inequitable rule. Whatever their discomfort, however, the Rabbis do explain the *mishnah* in accordance with this rationale, which becomes a fixture in the later halakhic sources. Thus, Rambam writes that the Gentile defendant always pays full damages because “this is a penalty levied upon the Gentiles, who do not observe the *mitzvot* and who do not take proper precautions to keep their animals from damaging the property of other.”<sup>34</sup> The rule appears in the *Tur* and the *Shulḥan Arukh*, albeit without the rationale; the major commentaries do supply that explanation.<sup>35</sup> In all these works, the Mishnaic rule is presented as the *halakhah* that applies in our own day and age. There is no suggestion that the non-Jew of whom the Talmud speaks is the non-Jew of ancient times and that the discriminatory rule is therefore no longer in force. The clear impression is that the non-Jew – the *goy*, *k’na`ani*, *nokhri* – mentioned in the text is the non-Jew of today and that the inequity codified in the *mishnah* is still the applicable law.

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34. *Mishneh Torah, Hil. Nizkei Mamon* 8:5. Compare to Rambam’s *Commentary to M. Bava Kama* 4:3: since Gentiles have not perfected their “human qualities,” they do not partake of the ethical community and do not deserve justice. Again, a question of just deserts. For a similar approach see R. Yehonatan of Lunel to Alfasi, *Bava Kama* fol. 19a.

35. *Tur* and *Shulḥan Arukh Hoshen Mishpat* 406:1. The commentaries are *Bayit Ḥadash* to the *Tur* and the *Sefer Me’irat Einayim* to the *Shulḥan Arukh*.

Let us now read this Talmudic passage through the eyes of Meiri, in his *Beit Hab'hirah* to *Bava Kama* 37b-38a [paragraph division and emphases are my own – MW]:

שור של ישראל שנגח שור של נכרי פטור מדין רעהו ושל נכרי שנגח של ישראל בין תם בין מועד משלם נזק שלם מתוך שאין חסים על ממון זולתם קונסין אותם שלא ירגילו עצמם להזיק.  
ולפי מה שנאמר בגמרא דוקא בעממים שאינם גדורים בדרכי דתות ונימוסים כמו שאמר עליהם בגמרא ראה שבע מצות שקבלו עליהם בני נח שלא קיימום עמד והתיר ממונם כל שעה שהדין מחייבם בכך. הא כל ששבע מצות בידם דינם אצלנו כדינו אצלם ואין נושאים פנים בדין לעצמנו ומעתה אין צריך לומר שכן באומות הגדורות בדרכי דתות ונימוסים.

When an ox owned by a Jew gores an ox owned by a non-Jew, the Jew is exempt from paying compensation on the grounds of *r'eihu*.<sup>36</sup> When an ox owned by a non-Jew gores an ox owned by a Jew, whether that ox was *tam* or *mu`ad*, the non-Jew pays full damages, because the non-Jews do not take care to avoid damaging the property of others. The Torah therefore levies this fine upon them, so that they will not fall into the habit of negligence.

**According to the Talmud**, the above applies exclusively to peoples who are not defined by religious patterns of life. As the Talmud says of them: “God saw that the *b'nei Noaḥ* had failed to observe the seven *mitzvot* of their covenant, so God permitted their property to the Jews” *for as long as the law requires this of them*. Thus, any non-Jews who do observe the seven Noaḥide *mitzvot* enjoy equal status with us in our courts, and we no

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36. Meiri echoes the approach of some *rishonim* who explain the Jew's exemption from liability on the grounds of *r'eihu* while explaining the Gentile's obligation to pay damages on the grounds of the ethical rationale. See R. Yehonatan of Lunel to Alfasi, *Bava Kama* fol. 19a; *Nimukei Yosef* to Alfasi, *Bava Kama* fol. 4a.

longer favor Jewish litigants over them. And this obviously is the law with respect to those nations that are defined by religious patterns of life.

The first paragraph consists of a summary of the law concerning the altercation between oxen owned by Jew and Gentile, one that largely follows the *p'shat* (literal sense) of the passage as read by the commentators and codifiers: the apparent inequity of the rule in *M. Bava Kama* 4:3 is the result of the punishment imposed upon the Gentiles' for their failure to fulfill the obligation to establish courts and enforce rules of justice. The second paragraph, by contrast, shows Meiri's unique approach as Talmudist as well as philosopher. Note the four boldface words: Meiri understands the Talmud to say that this punishment is conditional, dependent upon time and circumstance. It applies not to all Noahides for all time but rather only to those Gentiles who remain stubborn in their non-observance and who deserve the penalty "*for as long as the law requires this of them,*" that is, only during the time that "they fail to observe the seven *mitzvot* of their covenant." On this reading of the Talmudic text, should the Noahides ever change their ways, the legal disadvantage described in the *mishnah* will no longer apply to them. And given Meiri's definition of Christians and Muslims as "peoples defined by religious patterns of life," it follows that the rule *never* applied to the members of those communities.

This, as I have indicated, is the specifically *halakhic* foundation of R. Menachem HaMeiri's doctrine of "religious tolerance": the rule in *M. Bava Kama* 4:3 and *B. Bava Kama* 37b-38a, a clear legal inequity against non-Jews, is suspended whenever the non-Jews in question are good monotheists. We might say that Meiri translates this *halakhah* from a question of law into a question of fact: the text itself, in his reading, provides that the rule be suspended when we observe that the facts (i.e., the religious proclivities of the non-Jews) have changed. He

is the only one among the *rishonim* who interprets the Talmudic passage in this way. All the others read it as offering an ethical justification for an unchanging rule, a penalty that the *mishnah* imposes in perpetuity upon the Gentiles. Thus my argument: on the question of religious tolerance, Meiri has produced a *hidush* in *halakhah* as well as in philosophy.

A critic, I expect, would suggest that I have found a molehill and labeled it a mountain. This passage of *Beit Hab'hirah*, s/he would say, is not an example of true halakhic reasoning but rather halakhic window-dressing that Meiri supplies for a conclusion that he has drawn on the basis of his rationalist philosophical values. His words here are an example of what we might call eisegesis: he is reading his religiously tolerant conclusion into a Talmudic passage that, on the level of *p'shat* and in the eyes of all other commentators, does not support that conclusion. Such criticism is a commonplace among academic scholars of medieval Judaism who, as an observer once remarked, “have more interesting things to attend to” than to consider the halakhic ideas and writings of the sages of the period.<sup>37</sup> They would rather focus upon the “real” – read “intellectual” or “socio-economic” - motivations behind the halakhists’ words. The problem with that focus, as Jacob Katz himself once wrote, is that the medieval halakhists were – well, *halakhists*, legal scholars who took their legal discourse seriously.<sup>38</sup> Yes, halakhic discourse is influenced by outside factors. The atmosphere of philosophical rationalism in which Meiri and his Provençal colleagues operated is one such factor, and it obviously deserves the attention of researchers. At the same time, halakhic discourse, like all intellectual disciplines, works

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37. Haym Soloveitchik, “Rabad of Posquières: A Programmatic Essay,” in Etkes and Salmon, eds. (note 20, above), p. 18.

38. Katz, *Zion* 16:3-4 (1951), pp. 28-29 / *Halakhah v'kabalah* (note 1, above), pp. 2-3 and 213-214. On this point, see Mark Washofsky, “*Halakhah* in Translation: The Chatam Sofer on Prayer in the Vernacular,” *CCAR Journal*, Summer, 2004, pp.127-148.

according to its own immanent procedures, and the halakhic writer seeks to make meaning in conversation with other rabbis by way of those procedures. The present-day academic observer cannot hope to penetrate the mind of the medieval rabbi by ignoring the so-called smokescreen of halakhic verbiage in search of what that sage “really” thinks. *Halakhah* is no smokescreen. It is what that rabbi *does*, his primary medium of communication. And however advanced and enlightened was Meiri’s philosophical-theological approach to the religions of his non-Jewish neighbors, that approach would have meant little in practical terms had he been unable to forge a halakhic theory with which to support it.

*Meiri on the Status of the Non-Jew: Lasting Impact?*

For us, the principal question concerns the lasting impact – if any – of Meiri’s stance toward the Gentiles of his era. As noted above, Meiri’s *Beit Hab’hirah* was largely unknown to subsequent scholars until its relatively recent discovery and publication.<sup>39</sup> It is never mentioned, for example, by the giants of the “Nachmanidean” school of Catalonia – Ramban himself, R. Shlomo b. Adret (Rashba), R. Aharon Halevy (Ra’ah), R. Yom Tov ibn Ishbili (Ritva), and R. Nissim Gerondi (Ran) – whose *hidushim* (along with those of the northern European Tosafist academies) set the stage for all future Talmud study. Why did succeeding generations ignore the *Beit Hab’hirah*, if indeed they knew of its existence? Halbertal, noting that a similar fate befell other contemporary Provençal halakhic works, points to the cultural gap between the

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39. The great exception to this is R. Bezalel Ashkenazi’s 15<sup>th</sup>-century *Shitah M’kubetzet*, an anthology of commentaries on various tractates of the Talmud. Meiri is included in this collection, and his formula “peoples defined by religious patters of life” appears in Ashkenazi’s co0mpendium on *Bava Kama* 113a.

Maimonidean-rationalist tendencies of the rabbis of Provence and the anti-philosophical bent that prevailed in northern Spain.<sup>40</sup> The Catalonians, he postulates, had little interest in circulating the writings of rabbis to whom they were opposed on deep intellectual grounds. Whatever the cause, the virtual disappearance of their works meant that Meiri and his colleagues exerted next to no influence upon future halakhic thought. And specifically, Meiri's unique approach to the status of the non-Jew is almost entirely absent from the writings of halakhists until the twentieth century.

Meiri's "disappearance" may help explain the predominance on the contemporary scene of Rambam's position, namely that Christianity is a species of *avodah zarah* while Islam is spared that designation.<sup>41</sup> Contemporary *g'dolim* such as R. Moshe Feinstein,<sup>42</sup> R. Eliezer Yehudah Waldenberg,<sup>43</sup> R. Ovadyah Yosef,<sup>44</sup> and R. Zvi Yehudah Kook<sup>45</sup> continue to speak of Christianity as a form of idolatry. And those Orthodox authorities who entertain a more positive view of Christianity sometimes express their opinion with reluctance. A case in point is R.

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40. Halbertal (2001; note 23, above), pp. 217-222.

41. *Shulḥan Arukh Yore De`ah* 124:6 and *Beit Yosef ad loc.*: while non-Jews (*goyim*) disqualify our wine from both drinking and commercial use, the *ger toshav* disqualifies it from drinking only. And the *ger toshav* is identified as a Muslim. See also *Shulḥan Arukh Yore De`ah* 129:11. The absence of any explicit reference to Christians indicates that the latter are classified as idolaters and not as *gerei toshav*. A possible exception is *Shulḥan Arukh Yore De`ah* 146:5, in the note at the end of the paragraph, which adds "our Gentiles" to "the Ishmaelites who do not perform *avodah zarah*." But a comparison between that note and its putative source (the *Beit Yosef ad loc.*), as well as between the printed text and earlier, more reliable editions, shows that the words "our Gentiles" were added later, most likely by a printer.

42. *Resp. Ig'rot Moshe, Yore De`ah* 2:56 and 3:43.

43. *Resp. Tzitz Eliezer* 13:12.

44. *Resp. Yabi`a Omer*, vol. 2, *Yore De`ah*, no. 11; vol. 7, YD 12; and *Resp. Y'haveh Da`at* 4:45. See also *T'humim* 10 (1989), pp. 37, his reference "the Gentiles who worship idols and who dwell in our midst," as distinguished from "the Ishmaelites who are not *ovdei avodah zarah*." And see *Resp. Yabi`a Omer*, vol. 10, *Yore De`ah* 41, section 5, where Rabbi Yosef describes Muslims as "defined by a religious pattern of life" (גדורים בדרכי הדתות) while saying nothing of Christians. Yosef was obviously familiar with the position of Meiri, but unlike Meiri he applies that concept to Muslims and *not* to Christians.

45. See Sh'lomo Aviner, "Shitat Harav Zvi Yehudah b'limud parashat hashavu`a," *Sh'matin* no. 183 (2013), p. 28: "To ascribe divinity to a human being is *avodah zarah*."

Yitzhak Halevy Herzog (d. 1959), the first Ashkenazic chief rabbi of Israel, in his proposed “halakhic constitution” for the Jewish state.<sup>46</sup> In the second chapter of his book, Herzog considers the question of religious minorities: do non-Jewish residents of the state qualify for equal citizenship along with Jews according to the *halakhah*? Indeed, are they even permitted to live in the land of Israel?<sup>47</sup> For Muslims, the answer is clear. Since Muslims are not idol worshipers, they enjoy the status of *ger toshav* – i.e., a Gentile who observes the seven Noahide commandments – and are permitted to dwell in the land. With respect to Christians the question is more difficult, says Herzog, given the widely-accepted halakhic position that Christianity is *avodah zarah*. Ultimately, and in consideration of the fact that the United Nations (which granted the independence of Israel) would hardly remain silent were the state to discriminate against ethnic and religious minorities within its borders, Herzog accepts the theory of Rabbeinu Tam that Christians are not idolaters because *shituf* is not prohibited to Gentiles.<sup>48</sup> As we have noted, this theory – like R. Herzog’s ruling here – was produced out of socioeconomic necessity and in no way expresses a positive evaluation of Christian religion. There is no trace of such a positive evaluation – which is to say, of Meiri - in Herzog’s halakhic constitution.

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46. Yitzhak Isaac Halevy Herzog and Itamar Warhaftig, *T’hukah l’yisrael al pi hatorah* (Jerusalem: Mosad Harav Kook, 1989), vol. 1, pp. 16ff.

47. The prohibition against the settlement of idolaters in the land of Israel is found in *B. Avodah Zarah* 20a, based upon a midrash of Deuteronomy 7:2. See *Mishneh Torah, Hil. Avodah Zarah* 10:1 in the uncensored texts (which read לעובדי עבודה זרה rather than לשבעה עממין as in the regular printed editions), and 10:4. In 10:6, Rambam rules that the *ger toshav* may settle in the land, but he adds that the institution of *ger toshav* is no longer practiced in the absence of the Jubilee year. R. Avraham b. David (Rabad) *ad loc.* seems to argue that the non-idolatrous Gentile is nonetheless entitled to dwell in the land of Israel even though the institution of *ger toshav* is in abeyance. R. Yosef Caro (*Kesef Mishneh* to 10:6) argues that Rambam agrees with Rabad on this latter point. Herzog relies on Caro’s comment to permit the settlement of non-pagans in the Jewish state.

48. See at note 8, above.



A significant outlier among Orthodox *poskim* is R. Hayyim David Halevy (d. 1998), who served as chief Sefardic rabbi of Tel Aviv-Yafo. In a comprehensive paper on the subject,<sup>49</sup> Halevy argues that the non-Jews of our time – including Christians - are not to be considered idolaters. Unlike all those other contemporary *poskim*, Halevy emphasizes the linguistic formula of R. Menachem Hameiri that today’s Gentiles, as “peoples defined by a religious pattern of life,” are exempted from the discriminatory legislation that the Torah and the Sages aimed at the worshipers of idols. On the other hand, Halevy’s permissive attitude toward Christians is not based *exclusively* upon Meiri. Rather, he begins with the leniencies invented by the medieval Ashkenazic authorities (e.g., that Gentiles are not prohibited from *shituf*; that “the Gentiles in our day are not truly idolaters but are following their ancestral custom”) in order to argue that the majority of *poskim* have held against Rambam that Christianity is not *avodah zarah*. Thus, while Meiri’s stance of “religious tolerance” plays a significant role in Halevy’s thinking, it is simply one of a number of different arguments and does not constitute what we might call a general halakhic approach. Halevy himself concedes as much in his response (printed at the end of his *t’shuvah*) to the comments of Professor (and Israel Supreme Court Justice) Menachem Elon. Elon notes that, although Meiri’s leniency toward Christians flowed from such a general approach (*maskana hilkhait kolelet*), “all the other *poskim* disagree with him” – that is, they do not adopt his characterization of Christians and Muslims as “peoples defined by a religious pattern of life,” even though they find other ways to permit various types of commercial contact with Christians. How, therefore, can one rule according to Meiri and against the preponderant halakhic consensus? Halevy answers that while Meiri is indeed the only authority who uses his

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49. *Resp. Aseh L’kha Rav* 9:30.

linguistic formula and adopts this general halakhic approach, the other Ashkenazic *poskim* at least agree with him that Christians are not to be treated as idolaters.

The weakness of Halevy's argument, at least from our perspective, is obvious. As I suggest above, "the other Ashkenazic *poskim*" created their halakhic leniencies with respect to Christians because they saw no alternative, because economic necessity demanded *teirutzim*, ex post facto halakhic justifications for leniencies that their communities had long since adopted in practice. Their approach was *negative* in its essence: beginning from the accepted presumption that Christianity is *avodah zarah*, they searched for reasons ("they are not so fervent in their beliefs as were their ancestors"; "*shituf* is not forbidden to them"; etc.) why the Christians of their day might be exempt from that designation. Such theories, again, are best classified under the heading of "grudging concessions." They hardly express a positive evaluation of Christianity and of Christians as potential dialogue partners with Jews. That more positive approach is the achievement of Meiri, whose revolutionary linguistic formula, as Jacob Katz reminds us, served as his exclusive and sufficient basis for liberating Christians and Muslims from the discriminatory strictures of the classical *halakhah*. By mixing his citations of Meiri with the other, much narrower and more limited theories of the medieval Ashkenazim, Halevy concedes that he is unwilling to rely upon Meiri's formula as that exclusive theory. By thus combining these two very different approaches to the religions of the non-Jews, one positive and one negative, Halevy blunts the otherwise progressive thrust of his argument.

*The Role of Progressive Halakhah*

We should not, I think, be so hard on R. Ḥayyim David Halevy. As an Orthodox rabbi writing for an Orthodox audience, he would have found it difficult to rule in favor of Meiri against Rambam and (in Professor Elon's phrase) "all the other *poskim*." The weight of precedent is such a powerful factor in Orthodox halakhic thought that Halevy could hardly have argued for his comparatively tolerant position toward Christians before such an audience without citing and relying upon the rulings of the medieval Ashkenazic authorities, even though those rulings are limited in scope, are negative in approach, and do not in fact express an attitude that we would identify as "tolerance."

That, perhaps, may be the best that a lenient Orthodox approach can do. Those of us who work in the field of progressive *halakhah*, on the other hand are not hindered by the stumbling blocks that litter the path of Rabbi Halevy and our other Orthodox colleagues. In this specific instance, this means that we are not dissuaded from reaching what we consider the correct answers simply because they conflict with the weight of precedent. While a halakhist certainly ought to consult the rulings of past authorities for guidance and inspiration, she is under no obligation to accept those rulings merely because they *precede* her own and even if they constitute a preponderant majority of the rabbinical opinion on the subject. Every halakhist, rather, is entitled – and, in our view, expected – to confront the sources and to decide the question in accordance with his understanding of their best and most persuasive interpretation. This understanding of the halakhic process, we emphasize, is not ours alone; it echoes the position

enunciated by Rambam,<sup>50</sup> by R. Asher b. Yehiel,<sup>51</sup> and by Professor Elon<sup>52</sup> that precedent exercises no formal binding power in Jewish law.<sup>53</sup> Thus we, unlike Rabbi Halevy, consider ourselves free to ignore precedent when we think that it is wrongly decided. Progressive halakhists decide each halakhic question on the basis of the sources and the history of their interpretations, all of which we examine through the lens of our commitment to liberal and progressive values.<sup>54</sup>

Applying the above to the question before us, it is obvious that Meiri – and *not* Rambam and *not* the medieval Ashkenazic authorities – has the better take on the meaning of Jewish law. This is not simply because we favor his more liberal and broad-minded *p'sak* but rather and more to the point because his interpretation of the sources makes more sense. While the sources oblige us to keep our distance from *avodah zarah* and its practitioners, it is unreasonable to read them as imposing that label upon any specific group, community, or nation for all time, regardless of the religion they are actually practicing. Meiri understands the Talmud to require that we make an empirical judgment as to the nature of the religion of our neighbors - is it or is it not idolatry? – and to decide the *halakhah* on the basis of those findings. Thus, if in our judgment the

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50. See the Introduction to the *Mishneh Torah*: וכן אם למד אחד מהגאונים שדרך המשפט כך הוא ונתבאר לבית דין אחר שעמד אחריו שאין זה דרך המשפט הכתוב בגמרא, אין שומעין לראשון אלא למי שהדעת נוטה לדבריו בין ראשון בין אחרון

51. *Hilkhot Harosh, Sanhedrin* 4:6.

52. Menachem Elon, *Jewish Law: History, Sources, and Principles*, translated by Bernard Auerbach and Melvin J. Sykes (Philadelphia: Jewish Publication Society, 1994), pp. 983-985.

53. See Mark Washofsky, "Taking Precedent Seriously: On Halakhah as a Rhetorical Practice," in Walter Jacob and Moshe Zemer, eds., *Re-Examining Reform Halakhah* (New York: Berghahn Books, 2002), pp. 1-70, [https://www.academia.edu/7544761/Taking\\_Precedent\\_Seriously\\_On\\_Halakhah\\_as\\_a\\_Rhetorical\\_Practice](https://www.academia.edu/7544761/Taking_Precedent_Seriously_On_Halakhah_as_a_Rhetorical_Practice) (accessed March 15, 2019).

54. For an argument that these values are a legitimate factor in the making of halakhic decisions, see Mark Washofsky, "Kiddushin as a Progressive Halakhic Concept: Toward a Theory of Progressive Halakhah," Walter Jacob, ed., *The Modern Family and Jewish Law*. Pittsburgh: Rodef Shalom Press, 2018, pp. 27-80.

Christians alongside whom we live are not in fact “idolaters” but “peoples defined by religious patters of life,” then it would be both incorrect and immoral to follow the *p’sak* of Rambam – despite his enormous halakhic prestige - that Christians are *ovdei avodah zarah*. It would also be wrong to support our decision with the halakhic theories devised by the medieval Ashkenazic authorities. Those rationales, as we have noted, originated in the need to justify existing custom and not out of any positive evaluation of Christianity or Islam. Their statements do not express any sort of desire for religious tolerance but rather a grudging willingness to overlook the idolatrous features of the religions of “our” Gentiles. Of all the halakhic theories concerning the religions of the non-Jews of our time, only that of Meiri coheres with our own understanding of those faiths as well as the attitude of mutual respect that is essential to the hope for a peaceful and honorable coexistence with them. It is high time that those other theories be consigned to the museum of halakhic history. We progressives ought to say this loud and clear.

The phrases “mutual respect” and “peaceful and honorable coexistence” raise a final point. Religious tolerance requires that we put an end to invidious discrimination and that we remove all barriers to intergroup understanding and open communication. It does *not* imply that we are obliged to obliterate the lines and boundaries that allow each religious community to define its own distinct and unique existence. As the disagreement between Efraim Urbach and Jacob Katz reveals,<sup>55</sup> this distinction lies at the heart of Meiri’s own conception of religious tolerance. Urbach, let’s remember, argues that Meiri’s linguistic formula did not mark a radical or even substantive departure from the halakhic stance toward Gentiles adopted by earlier medieval authorities. As evidence for this, he cites what he calls a basic inconsistency of in the application of the formula, which Meiri utilizes to justify the removal of some – but not all –

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55. On the following see at notes 20 and 21, above.

traditional *halakhot* that enforced the separation of Jews from their Gentile neighbors. Katz responds that the distinction is quite consistent. Meiri intended his formula as a means of setting aside halakhic restrictions based in the understanding of the religion of the Gentile as *avodah zarah*, but he never meant it to annul those laws that tend toward the preservation of the Jewish people as “a separate national-religious community” (עדה דתית-לאומית נפרדת). In the same way, a modern liberal or progressive approach to our subject needs to keep in mind the essential lines of separation. Our non-Jewish neighbors, to say nothing of the non-Jews who are part of our own families and congregations, are most certainly not to be regarded as *ovdei avodah zarah*. Indeed, they represent communities “defined by a religious pattern of life.” But for all that, they are not Jews, and it would be an insult to our own Jewish religious integrity to relate to them as Jews. To say that only Jews can make up a *minyan*, are entitled to lead Jewish communal worship, are expected to perform ritual *mitzvot* and may be called to the Torah – these measures are not to be seen as an example of “othering,” of unjustifiable discrimination against non-Jews but as the obvious, logical, and requisite conclusions to be drawn from our existence as a distinct community covenanted with God. That distinction, that separateness is essential to our self-definition as a people. Meiri, for all his openness to his Gentile neighbors, insisted on leaving it in place. And, to the extent that he offers a halakhic model for our own relationship toward non-Jewish religions, so should we.