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CHAPTER 4

Gesetz als Gegensatz

The Modern Halachic Language Game

Irene Zwiep

Law is not law which alters when it alteration finds. This, I admit, is a rather cheap pun on lines two and three of Sonnet 116, Shakespeare's famous ode to constancy in love. Still, the phrase kept going through my head, with and without a question mark, while I was working on this paper. In William Shakespeare's (1564–1616) rhyme, love is a rock-solid foundation, celebrated as 'not Time's fool' but 'an ever-fixed mark' that is never shaken. Jewish law, by contrast, though in many respects ever fixed, was shaken by time or, better perhaps, by its historical collision with modernity. By the end of the eighteenth century, the immobile history (as French micro-historian Le Roy Ladurie would call it) of the Jews in Western Europe had come to an end, and with it a relatively sovereign period in the development of its communal legal corpus, known as the halacha. But in the fray of the modern experiment, was there any room left for that hoary mix of divine statutes and human jurisprudence, which had demarcated Jewish life for so many centuries?

The socio-political changes of the eighteenth and nineteenth centuries did not fundamentally alter the rules and principles of traditional Jewish legal practice. They did, however, affect the ways in which Jewish law was perceived, practiced, and obeyed, triggering a wealth of – more often than not conflicting – Jewish reactions. On the one hand, the (gradual) dismantling of the pre-modern Jewish semi-autonomy in favour of individual citizenship limited its span of control, sparking reflection on the status and validity of Jewish law *as law*. In parallel, processes of integration and assimilation called for a restyling of the pre-modern Jewish habitus – of which halacha supplemented by *minhag*, or Jewish (legal) custom, had been a central ingredient. In the course of that procedure, the reigning Protestant paradigm of inward piety put pressure on Jewish 'legalism', with its aura of collective obedience and accountability, as a suitable vehicle for modern personal *religiosity*. The critical historicism that dominated nineteenth-century scholarship did little to ease the pain. The *Wissenschaft des Judentums*, especially the classical branch as initiated by Leopold Zunz (1794–1886), came close to excluding the law from its model for Jewish *national* belonging altogether. Turning its lens on the ancient sources,

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Christian higher criticism relativized, and thus undermined, the authority of Mosaic law as a divinely inspired *system of belief*. Part of the groundwork for this high-brow demolition act had been laid by Kantian philosophy and its rejection of revealed religion as a source of *moral inspiration*. In the main part of this chapter I will return to these issues in somewhat more detail.

All things considered, it seems fair to say that in its confrontation with modernity Jewish law, both as a concept and as a practice, did find alteration. The question how this confrontation affected the Jewish framing of 'the law' is the starting point of this paper. Needless to say, the modern rethinking of that law as a defining aspect of the Jewish *modus vivendi* has been the subject of intense research. Much effort has gone into reconstructing its role as a catalyst in the fragmentation of Judaism into the various denominations we know today.[1] The aim of this chapter is not to revisit the case of Zacharias Frankel (1801–1875) versus S.R. Hirsch (1808–1888) versus Abraham Geiger (1810–1874) and remap its communal and cultural implications.[2] The reflection on halacha's divine or human nature, its aptitude for governance or guidance, and its role in modern public and private life and religion have been thoroughly explored. Instead, I propose a much more modest conceptual analysis of the nineteenth-century discourse on law-based Judaism as an inherently problematic combination of legal procedure and normative religion. As we shall see, it was this ancient combination that distinguished Judaism from its Christian counterpart but simultaneously reduced it to an anomaly, a legal and religious relic in a new order that was built on the separation of church and state and, accordingly, of (private, moral) religion and national legislation.

In her 2011 monograph *How Judaism Became a Religion*, Leora Batnizky described the transformation of the pre-modern Jewish polity into a religious system known as Judaism, juxtaposing the new religion to the competing

1 Major milestones are Jay M. Harris, *How Do We Know This. Midrash and the Fragmentation of Modern Judaism.* SUNY Series in Judaica: Hermeneutics, Mysticism, and Religion (New York, 1995); Andreas Gotzmann, *Jüdisches Recht im Kulturellen Prozeß. Die Wahrnehmung der Halachah im Deutschland des 19. Jahrhunderts*, Schriftenreihe wissenschaftlicher Abhandlungen des Leo Baeck Instituts 55 (Tübingen, 1997); David Ellenson, 'Antinomianism and its Responses in the Nineteenth Century', in *The Cambridge Companion to Judaism and Law*, ed. Christine Hayes (Cambridge, 2017), 260–86; Michael Meyer, *Response to Modernity. A History of the Reform Movement in Judaism*, Studies in Jewish History (Oxford, 1988); Mordechai Breuer, *Modernity within Tradition: The Social History of Orthodox Jewry in Imperial Germany* (New York, 1992); Andreas Brämer, *Rabbiner Zacharias Frankel. Wissenschaft des Judentums und konservative Reform im 19. Jahrhundert*, Netiva 3 (Hildesheim, 2000).

2 See further Judith Frishman's chapter in this volume.

conceptual domains of culture, nation, reason, and secularity.[3] Seven years before, Simone Lässig documented the process of cultural embourgeoisement that accompanied this religious transformation, facilitated by school, synagogue, and community and broadcast via a new – emphatically Jewish – public sphere, in which traditional halacha played a less than prominent role.[4] The present chapter hopes to unravel a small additional thread by examining how the modern Jewish mind tackled the problem of Judaism's inner contradiction, *viz.* its legal core which, in nineteenth-century terms at least, constituted at once the essence and the embarrassment of Jewish religiosity, besides giving ground to legal disqualification. More specifically, we shall have a closer look at what, for want of a better term, I have dubbed 'the halachic language game', i.e. the ways in which authors tried to affect current perceptions of Jewish law by absorbing its old vocabulary into novel contexts and usages, thus creating new types of meaning. Before we turn to the actual analysis, I will briefly explain this – inevitably somewhat vulgarized – use of Wittgenstein's idea of linguistic usage as *Sprachspiel*, as language game.

The contested convergence of law and religion seems epitomized in the German term *Gesetzesreligion*, an originally Pauline notion which gained renewed import in nineteenth-century religious polemics. Initially the term was coined to denote a difference in theological outlook, with Christianity seeking release from sin through grace and Judaism seeking justice before God by performing his commandments. In the nineteenth century this opposition was increasingly framed as an opposition of religious group mentalities, with the Jews as the embodiment of calculated judgement and Christians representing love and mercy. In addition, the post-Kantian primacy of (non-enforceable) private moral conscience clashed with Judaism's reliance on (enforceable) halachic justice. It was, then, Jewish *Gesetz als Gegensatz*: in short, the antithesis of the Christian doctrine of redemption and of the processes of *Verinnerlichung* and *Versittlichung* (internalization and civilizing/ethicizing) that shaped modern bourgeois piety and morality, if often only on paper.[5]

One might add that, from the Enlightenment onwards, Jewish educators readily embraced this ideal of internalization and moralization, with the

3 Leora Batnitzky, *How Judaism Became a Religion. An Introduction to Modern Jewish Thought* (Princeton, 2011).

4 Simone Lässig, *Jüdische Wege ins Bürgertum. Kulturelles Kapital und sozialer Aufstieg im 19. Jahrhundert* (Göttingen, 2004).

5 Cp. Lucian Hölscher, 'Die Religion des Bürgers. Bürgerliche Frommigkeit und Protestantische Kirche im 19. Jahrhundert', *Historische Zeitschrift* 250 (1990), 595–630.

anesthetization of Jewish religious practice as one natural corollary.[6] Across the board, i.e. from radical Reform to restorative Orthodoxy, they turned to the Hebrew Bible as the *summa* of Jewish ethical edification, passing over the esoteric legal corpus as a source of Jewish morality and devotion.[7] In a pioneering article on the place, or rather on the absence, of halacha in nineteenth-century children's textbooks, Andreas Gotzmann defined this development as a 'process of delegalization', during which definitions of halacha faded while its juridical contours became increasingly blurred. In the formulation of modern Jewish belief, the divine will as laid down traditional halacha was almost unanimously discarded as a viable normative system.[8] It took a thinker of the devotional and philosophical calibre of Rabbi Joseph Soloveitchik (1903–1993) to eventually reappropriate Jewish religiosity through law and to rehabilitate, with the help of scientific reasoning, halachic observance as a source of Jewish spirituality.[9]

Unlike the field of elementary education, Jewish theological-political thinking could not afford the luxury of tacitly relinquishing the halachic heritage. In an era of religious transformation and secular state formation, the lingering presence of an ancient law-based religion raised multiple questions. Though originating from new debates, these questions often tied in with old clichés. Some touched upon Judaism as a superseded, redundant religion (building on Friedrich Schleiermacher's [1768–1834] famous image of Judaism as *eine unverwesliche Mumie*, an imperishable mummy), while others targeted the Jews' empty legalism as opposed to Christian piety, or their habit of keeping double, in-group and out-group, standards (as in Weber's no less famous allusion to Jewish *Binnen-und Außenmoral*, to internal and external morality). The

6 For the latter aspect, see Uta Lohmann, 'Das bürgerliche Leben als humanistisches Kunstwerk. Reflexionen zum universal-ästhetischen Selbst-und Gesellschaftsbild des jüdischen Kaufmann's David Friedländer und zur Ikonographie der Haskala', *Trumah* 22 (2012), 39–68.

7 Andreas Gotzmann, 'The Dissociation of Religion and Law in Nineteenth-Century German-Jewish Education', *Leo Baeck Institute Year Book* 43 (1998), 103–26; Uta Lohmann, 'Wissensspeicher, Lehrbuch, Erkenntnisquelle: Zur Rolle der Hebräischen Bibel im Bildungskonzept der Berliner Haskala', in *Deutsch-jüdische Bibelwissenschaft. Historische, exegetische und theologische Perspektiven*, eds Daniel Vorpahl, Sophia Kähler, and Shani Tzoref, Europäisch-jüdische Studien 40 (Berlin, 2019), 77–92; Dorothea Salzer, *Mit der Bibel in die Moderne. Entstehung und Entwicklung der Gattung jüdische Kinderbibel*, Studia Judaica 122 (Berlin, 2023).

8 Gotzmann, 'The Dissociation of Religion and Law', 110ff.

9 Joseph B. Soloveitchik, *Halakhic Man*, trans. Lawrence J. Kaplan (Philadelphia, 1983). For a thorough exposé, see Dov Schwartz, *Religion or Halakha: The Philosophy of Rabbi Joseph B. Soloveitchik* (Leiden, 2007).

need to respond to these old-new biases prompted a wealth of speculation on the meaning of law for Jewish civil and religious life. In this chapter I will look at some of the main stakes in the debate. Ignoring obvious nodes and overlap, I have lumped together these concerns into three rubrics, which roughly cover the arena of the modern halachic language game, each with its own approach of the triad religion-law-morality: (1) actual legal practice; (2) the juncture between moral and religious philosophy; and (3) legal history and its interface with theological-political thinking. In the remainder of this chapter, we will take a closer look at the dynamic of that language game by revisiting three classic sample texts[10] and looking at their framing of Jewish law in relation to each of these – again, never mutually exclusive – categories. But first an ultra-short note on Wittgenstein's theory of language and meaning, and its political implications, is in place.

1 Meaning beyond the Lexicon

He is a man, but not a man. It was phrases like this that convinced Ludwig Wittgenstein (1889–1951) of the shortcomings of logic in determining the meaning of any given utterance. To be a man and not to be a man is a logical impossibility. Within the social setting of human communication, however, the statement is not only possible but can also be effective, because it forces us to rethink precisely how we define 'man'. Language, in other words, is not a closed circuit; words do not have one single denotation but acquire meaning by being used, by being 'woven into actions', as Wittgenstein himself put it. Outside this active setting words are meaningless. It is their context or, more precisely, it is the particular language game that is being played – each with its own grammatical rules – that determines whether a word, or a string of words, makes sense and, if so, what sense it makes. When cited in a logic textbook, the phrase 'law is not law' will be a contradiction. At the beginning of an academic paper, however, it may become the starting point of historical reflection.

It is here that the political implications of the language-game come in. Whether or not we call somebody 'a man' follows from our perception of the person in question, but that perception is shaped by our expectations regarding 'man-hood'. Our definitions thus to a large extent determine what we see and what we see is what we name. Still, there is always room for reconsideration, a

10 I take Heymann Steinthal's *Allgemeine Ethik* (Berlin, 1885) and Moritz Lazarus's closely related *Die Ethik des Judentums*, 2 vols (Frankfurt, 1898–1911) as one representative text.

fact which Wittgenstein illustrated by referring to the 'rabbit-duck illusion': an ambiguous figure taken from an 1892 German cartoon and later used in experimental psychology (Figure 10). Either you identify the animal drawing as a rabbit and you name it a rabbit, or you see a duck and you name it a duck. If someone tells you the duck is a rabbit, you will see the rabbit, but it does take some additional mental work. In a similar vein the concept of 'man-hood' is ambiguous, and this ambiguity leaves room not just for perception (seeing a man) but also for interpretation (seeing a person *as* a man, which involves reflection on why we use the word 'man'). It is in this interpretative space that definitions are challenged, perceptions alter, and words can change. As the current shift in discourse on sex and gender shows, it is possible to rebel successfully. While the phrase 'he is a man, but not a man' will always be a logical impossibility, its meaning – being culturally contingent – is transient and language-game dependent.

FIGURE 10 Earliest known illustration of the 'rabbit-duck illusion'
PRINTED IN 1892 IN THE GERMAN MAGAZINE FLIEGENDE BLÄTTER; ARTIST UNKNOWN; IMAGE IN PUBLIC DOMAIN, AVAILABLE ON WIKIMEDIA COMMONS

When Jewish scholars joined German-language scholarship, they faced an unprecedented opportunity to observe and tweak the rules of the game. Reconceptualizing Judaism was an obvious priority, with the word *Gesetzesreligion* as perhaps the ultimate test. Throughout the exercise, the need for cross-cultural translation proved a bonus. New disciplines, media, and styles of prose forced them to adopt a relative outsider perspective to their own tradition, from where they could locate new ambiguities and try to reverse established connotations. As Wittgenstein teaches us, the meaning of words like *Mosaismus* and *Rabbinismus* – Mosaism and Rabbinism – is not a matter of lexicography. It resides in the lapse between perception and interpretation, where the rabbit is the duck, religion equals law, and, with the right argumentation, the two become morality.

2 Legal Pluralism and Religious Tolerance

In the early days of emancipation, one domain in which Judaism had to reassert itself was that of the everyday reality of legal practice and its intersections and overlap with other judicial systems. New forms of interaction with other legal systems and corpora prompted Jewish reflection on the individuality and limits of halacha, especially (but, as we shall see, not exclusively) in the field of family law and private law and on the nature and scope of Jewish legal expertise. No less importantly, it provided an impetus for Jewish thought on the possibility of legal pluralism and on halacha's place between church and state, on the hand, and within Jewish life in civil society, on the other.

An early prototype of the genre was the brochure *Ritualgesetze der Juden* (*The Ritual Legislation of the Jews*), completed in 1776 and published in Berlin in 1778.[11] It was the result of a collaboration between chief rabbi Hirschel Lewin (1721–1800), who supplied the impetus and halachic approbation, and Moses Mendelssohn (1729–1786), who had been asked to execute the project because of his German competence and fluent prose. The book, in later editions often ascribed to Mendelssohn only, was a belated answer to a request by the Prussian justice department, issued in 1770, for information on Jewish legal

11 Moses Mendelssohn, and Hirschel Lewin, *Ritualgesetze der Juden, betreffend Erbschaften, Vormundschaften, Testamente, und Ehesachen, in so weit sie das Mein und Dein angehen* (Berlin, 1778). On Lewin and his intellectual contacts with Mendelssohn, see the *Biographisches Handbuch der Rabbiner*, vol. 1, *Die Rabbiner der Emanzipationszeit in den deutschen, böhmischen und großpolnischen Ländern, 1781–1871*, ed. Carsten Wilke (Munich, 2004).

procedures, more specifically on rabbinic jurisprudence regarding marriage, tutelage, inheritance, donations, and legacies in as far they touched upon property issues: *in so weit sie das Mein und Dein angehen*, the title page read ('in so far as they concern what is mine and what is yours'). Seven years after its publication, Mendelssohn reported in a letter to his relative Elkan Herz (d. 1816) that the book was now for sale in virtually all Berlin bookshops. Despite its technical, esoteric nature, it apparently enjoyed considerable exposure.[12]

As an early prototype in German, *Ritualgesetze* showed due sensitivity to matters of language, especially in relation to genre and audience. On multiple occasions the authors emphatically positioned themselves outside the living legal tradition. This book is not a code (*Gesetzbuch*), they warned their readers, let alone a manual compiled to streamline the act of dispensing justice. Rather, it was meant as a first introduction to the Jewish legal system, written for the gentile professional who wished to learn about Jewish legal principles (*Urteilsgründe*) rather than how to apply them. In cases of doubt regarding the text and validity of the law in question (*dubium iuris*), they cautioned, a judge should always have access to the sources and spirit of his legal material. Accordingly, those who wished to engage in Jewish jurisdiction should know Hebrew, in order to consult independently the Pentateuch and Talmud (i.e. the agreed core of the legal canon) as well as the rabbinic jurisprudence that provided additional argumentation through individual case law rulings. For this type of active legal engagement, the current book simply offered too slim a base. In fact, the authors confessed, they were not sure if their German rendition always did full justice to the scope and meaning of the technical Hebrew idiom.[13]

Ironically, it was the act of translation that facilitated the language game that allowed Mendelssohn to reposition the Jewish legal apparatus *vis-à-vis* current perceptions of law and society. In his German recapitulation, the process of *psiqah*, or 'doing halacha', was translated as *Rechtsgelehrsamkeit* (jurisprudence), the term *Rechtswissenschaft* (legal science) having yet to become common property. The entanglement of written and oral Torah became straightforward *Gesetz*, while post-Mosaic additions were presented as *Satzungen* (normative regulations), and the *takkanot* – rabbinic repeals of obsolete or impracticable biblical laws – were introduced as *Schonungsgesetze*, as laws of preservation. Together with the nationally accepted *Religionsgebräuche*

12 M. Wishnitzer, 'Moses Mendelssohn', *Jewish Quarterly Review* 25 (1935), 307–10, esp. 308f.

13 *'[Aber] wie wir aufrichtig gestehen müssen, selbst nicht versichert sind, daß die Worte in der deutschen Sprache genau von derselben Bedeutung und von demselben Umfange sind, als die hebräischen'* (*Ritualgesetze*, xix).

(*minhagim*) and '*übrigen Schriftsteller*' (other authors, notably the medieval codices and early modern *poskim*), they made up the corpus of Jewish *Ritualgesetz*, a container concept that failed to become a household word in subsequent legal speak, despite the book's attested circulation.[14] As Daniel Krochmalnik has pointed out, the choice of the term was by no means coincidental. It had been politically motivated, he writes, to preclude any association of Jewish law with political autonomy, i.e. with the Jewish polity as a sovereign, self-ruling state within a state. As subjects of a strictly *religious* law, the term signalled, the Jews were fully deserving of enlightened *religious* tolerance.[15]

Choosing the right German equivalents for the Hebrew terminology obviously meant highlighting certain properties and, possibly, shifting a priori perceptions in a certain direction. In the eye of the eighteenth-century gentile beholder, the picture that emerged from Mendelssohn's description of Jewish *Ritualgesetz* will have been that of a Hebrew *ius canonicum*, a body of laws and regulations developed and enforced by the ecclesiastical authorities. Like canon law, Mendelssohn's halacha was a combination of divine law and human, positive law: the latter formulated by legal scholars in under constant reference to the *ius divinum*.[16] Like its Catholic counterpart, halacha consisted of a universally accepted central code, supplemented by a continuous and varied commentary tradition.[17] Both traditions included customary law (*ius non scripture*, Hebrew *minhag*) alongside written, expert law, and both were subject to periodization (compare *ius antiquum*, *novum*, *novissum* with the division of Jewish legal scholars into *tannaim*, *amoraim*, *geonim*, *rishonim* [early] and *acharonim* [late authorities]). The judicial hierarchy, too, resembled that

14 As Gotzmann's studies suggest, nineteenth-century (popular) authors rather employed the term *Zeremonialgesetz*, i.e. ceremonial law; Gotzmann, *Das jüdische Recht*, 25ff., and idem, 'The Dissociation of Religion and Law', 111.

15 Daniel Krochmalnik, 'Mendelssohn's Begriff "Zeremonialgesetz" und der Europäische Antizeremonialismus. Eine begriffsgeschichtliche Untersuchung', in *Recht und Sprache in der deutschen Aufklärung*, eds Ulrich Kronauer and Jörn Garber (Tübingen, 2001), 129–60, at 155f.

16 Witness the emphasis on the apostolic nature of the oral Torah, its ordinances as well as its exegetical rules; *Ritualgesetze*, esp. p. iii.

17 Importantly, Mendelssohn's differentiation of legal doubt into *dubium iuris* (see above) and *dubium facti* (doubt of fact) also points at canon law as his source of inspiration. Finally, the injunction to consult the original sources mirrors the importance of *fontes iuris cognoscendi*, to know the material and formal sources of canon law in the Latin tradition. For the relevant terminology, see Charles G. Herbermann et al., eds., The Catholic Encyclopedia*: An International Work of Reference on the Constitution, Doctrine, Discipline, and History of the Catholic Church*, 16 vols (New York, 1907–14), entries 'Canon Law' and 'Doubt'.

of canon law, where old law prevailed over new (no *lex posterior* principle here) and legal commentary would never acquire the status and authority of law. Likewise, in Mendelssohn's summary the combination of (revealed) written and (apostolic) oral Torah was presented as the legally binding core, while the authors of later codices such as the Shulchan Arukh, highly esteemed and holy though they were, lacked actual legislative power.[18]

Despite these final reservations, the *Ritualgesetze* was essentially an introduction to those parts of the Shulchan Arukh – notably the orders *Even ha-'Ezer* (*Stone of Help*) and *Choshen Mishpat* (*Breastplate of Judgement*) – that overlapped with gentile private law.[19] Public law was obviously left out of the discussion. By framing the halacha in question as the Jewish equivalent of canon law, Mendelssohn managed to present it not as the competing legal system of a parallel society but as a *ius vigens*, the complex of ecclesiastical laws in force alongside state legislation. If there was any overlap, as inevitably there must be between non-state and state legislation when it comes to everyday civil matters, that overlap was thus embedded in different zones of competence and rooted in distinct, yet equally solid, legal traditions. In thus stressing the authenticity of the Jewish legal system, the book was more than a simple halacha for dummies. Within the context of the enlightened *Toleranz*-debate it became a plea for legal pluralism and, in its wake, for religious toleration.

To be sure, as a manual intended for professional outsiders the *Ritualgesetze* was a novum, and the format offered by canon law will have created a fruitful patch of common ground between Mendelssohn and his gentile readership. Still, although the choice of a Christian clerical template may have been partly pragmatic, its implications were of a more fundamental nature. If endorsing legal pluralism had been the book's implicit sub-goal, portraying the Jewish polity as a positive, law-based religion alongside Christianity was its implicit, yet by no means accidental, result. Precisely how to define that positive, revealed religion, and how to harmonize it with the demands of enlightened natural theology, was the subject of much of Mendelssohn's oeuvre, first and foremost of his *Jerusalem oder über religiose Macht und Judentum* of 1783 (*Jerusalem, or On Religious Power and Judaism*).[20] For Mendelssohn halacha

18 *'Da indessen die Verfasser des Schulchan Aruch zwar als Männer von sehr erleuchteten Einsichten und heiligen Sitten in großen Ansehen bey der Nation stehen, aber doch keine gesetzgebende Gewalt haben'* (*Ritualgesetze*, x).

19 Ibid., ix–x, xiii.

20 The literature on Mendelssohn's reconceptualization of Judaism is endless. For varying assessments of its embeddedness in Jewish thought, Spinozism and Wolffian-Leibnitzian thinking, see Alexander Altmann, *Die trostvolle Aufklärung. Studien zur Metaphysik und politischen Theorie Moses Mendelssohns* (Stuttgart-Bad Cannstatt, 1982); Allen Arkush,

would always remain a key ingredient, both for the preservation of the eternal truths of rational universalism (Judaism as revealed legislation was, if anything, conveniently praxis-oriented and blissfully undogmatic) and for keeping the Jewish nation together in times of civic integration.[21] On the pages of the practical *Ritualgesetze* there was no room for explaining this curious merger of natural theology and national religion as encapsulated in Jewish law. In subsequent post-Kantian philosophy, however, the obvious tension between the two would prove one of the toughest nuts to crack.

3 Lex as ius: Jewish Law as the Principle of Humanism

'*Vernunft, Humanität, Idee, Sittlichkeit – es sind Synonyma*'. Reason, humanism, transcendent ideas, morality: these were, in the words of philosopher and *Völkerspychologe* Heymann Steinthal (1823–1899), the central ingredients of moral philosophy according to Immanuel Kant (1724–1804).[22] In modern ethics, morality encompassed the totality of humankind; it was motivated by human reason and proceeded from the – non-enforceable, private – *Wille zum Guten*, the benevolent resolve to do the right thing by one's neighbour. Moral humanity was, literally, autonomous, obeying only to self-imposed laws that lacked both ulterior motive and hidden purpose.[23] Its moral compass was self-evident, in the sense that it was not validated by a higher order, *in casu* by revealed religion, nor steered by a holy writ that conveyed the will of God. This lack of divine sanction was what distinguished the *Vernunftreligion* (the natural – and

Moses Mendelssohn and the Enlightenment (Albany, 1994); David Sorkin, *The Religious Enlightenment: Protestants, Jews, and Catholics from London to Vienna* (Princeton, 2008); Michah Gottlieb, *Faith and Freedom: Moses Mendelssohn's Theological-Political Thought* (Oxford, 2011).

21 For this reconstruction of Mendelssohn's argumentation and its inherent tensions, see, e.g., Robert Erlewine, *Monotheism and Tolerance. Recovering a Religion of Reason* (Bloomington, IN, 2010), esp. ch. 3, 'Mendelssohn and the Repudiation of Divine Tyranny', 43–68. For an analysis of Mendelssohn's stance on halachic observance and ceremonial practice (*Uebung*) as forces of historical preservation, see Elias Sacks, *Mendelssohn's Living Script: Philosophy, Practice, History, Judaism* (Bloomington, IN, 2016).

22 Heymann Steinthal, *Allgemeine Ethik* (Berlin, 1885), 412 (§ 262). For an extensive analysis and contextualization of the work, see Ingrid Belke, 'Steinthals *Allgemeine Ethik*', in *Chajim H. Steinthal: Sprachwissenschaftler und Philosoph im 19. Jahrhundert*, eds Hartwig Wiedebach and Annette Winkelmann, Studies in European Judaism 4 (Leiden, 2002), 189–236.

23 See, e.g., Jerome B. Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (Cambridge, 1997) part IV 'Autonomy and the Divine Order', 429–530.

thus universal – moral religion) from the various *Offenbarungsreligionen* (the particular belief systems built on historical experience, such as the revelation of a set of – enforceable – laws on Mount Sinai). Being grounded in the empirical rather than in the rational, such revealed laws lacked moral substance in the Kantian sense. Being obeyed not for their own sake but from fear of divine retribution, they also lacked the selflessness of true morality. For Kant, one should add, revealed religions, first and foremost Christianity, had not been completely pointless. As long as humankind continued working towards the bliss of natural religion, he believed, their mutable forms could play a role in the transmission of the abstract, immutable truths of reason by tying them to concrete experience. Their ultimate destination, however, was to collectively dissolve into the one moral religion during the enlightened eschaton.[24]

It takes no genius to see that the stress on moral self-governance put considerable pressure on law-based Judaism as a source of moral thought and action. Its central corpus of divinely revealed legislation, which in the Lewin-Mendelssohn brochure had been the binding core of Jewish canon law, was rendered not just morally meaningless but became an actual obstacle on the road to moral perfection. After Kant, Jewish practical philosophy had to reconcile moral autonomy with Jewish 'heteronomy' ('law from the other side') and reflect on the mediating role of Judaism. Given the primacy of ethics, this invariably meant to drastically redefine (often synonymous with reduce) its legal substance to meet the criteria of modern morality. It should not surprise us that neither God nor Moses, the divine lawgiver and his human legislator, emerged from this exercise quite unscathed. Nor did the law. In this corner of the modern halachic language-game, the interest shifted from law as *lex* to law as *ius*, i.e. from halacha as binding practice to Jewish law as the embodiment of justice and a suitable base for Jewish religion.

Heymann Steinthal devoted a mere three paragraphs of his *Allgemeine Ethik* to religion, in the section in which he outlined the socio-political order in which human moral life takes shape.[25] In a distinctly utopian mode, he pictured society as the place where the ideal intelligible realm was put into practice. For Steinthal, religion was but a minor part of the required equipment, a mere moment – important but fleeting – in the totality of morality, as he put it. All good religions, he wrote, were concretizations of the *Liebe zum Guten*, i.e. of the enthusiasm for goodness, truth, and beauty that inspired morality and

24 A lucid, user-friendly summary of the relevant passages in Immanuel Kant's *Die Religion innerhalb der Grenzen der bloßen Vernunft* (1793) and *Der Streit der Facultäten* (1798) is Saskia Wendel, 'Religionsphilosophie nach Kant', *Colloquia Theologica* 2 (2001), 203–14.

25 Steinthal, *Allgemeine Ethik*, 225–29 (§§ 147–149).

expressed itself in empathy and altruism. In that capacity, he conceded, religion was a form of ethical life. And while Judaism and Christianity each served as particular 'personifications' of 'the intelligible realm of humanism', atheism (for Steinthal literally 'religion without a God') cultivated the same humane benevolence without the need for such mediating personification.

As Ingrid Belke suggests, it was in all likelihood the atheist Steinthal who added this final observation.[26] In his discussion of the central concept of benevolence (*Wohlwollen*), however, it was the Jew Steinthal who unexpectedly spoke out. When trying to grasp the essence of this most noble form of altruism, he found well-tried terms such as 'love' and 'sympathy' fell short. In two lengthy *Anmerkungen* he identified the Hebrew word *chesed* (perhaps best translated as 'unconditional affinity') as the archetypal equivalent of German *Wohlwollen*, invoking the biblical injunction to love thy neighbour (Lev 19:18) and the inclusive legislation regarding the stranger and the enemy, together representing the ultimate 'neighbour', by way of illustration.[27] 'Equality before the law for the native and the stranger', he concluded, 'is what Leviticus 24:22 asserts with such emphasis that today's legislators would do well to marvel. Monotheism not only managed to add love to justice; it also apprehended justice much more thoroughly than polytheism ever did'.[28] Or German legislature, for that matter. Steinthal's utopian *Ethik* had been triggered by the loss of his two children, by the epistemological shock of Darwinism, and by recent academic antisemitism and its disqualification of Jewish citizenship.[29] It is the latter challenge that echoes through his short paean of Torah's strict egalitarianism, which Steinthal – far from accidentally – reduced to the Golden Rule of moral cosmopolitanism. It was a rare partisan moment in what was otherwise a testimony to pure practical reason.

The serial, partly posthumous publication *Die Ethik des Judentums* by Steinthal's fellow *Völkerpsychologe* and former brother-in-law, the Reform

26 Belke, 'Steinthals *Allgemeine Ethik*', 207.

27 Steinthal, *Allgemeine Ethik*, 122–24 (§§ 82–83).

28 Ibid., 123.

29 Belke, 'Steinthals *Allgemeine Ethik*', 225. For Jewish responses to Darwinism, see Daniel Langton, *Reform Judaism and Darwin: How Engaging with Evolutionary Theory Shaped American Jewish Religion*, Studia Judaica 111 (Berlin, 2019), who mentions Steinthal in passing (p. 76) when discussing US rabbi Emil Hirsch, the son of German Reform thinker Samuel Hirsch. For the legal background of contested citizenship in Germany, see Dieter Gosewinkel, 'Citizenship in Germany and France at the Turn of the Twentieth Century: Some New Observations on an Old Comparison', in *Citizenship and National Identity in Twentieth-Century Germany*, eds Geoff Eley and Jan Palmowski (Stanford, 2008), 27–39.

rabbi Moritz Lazarus (1824–1903), can be read as a Jewish supplement to the *Allgemeine Ethik*.[30] Lazarus' choice to approach the universal via the particular was a brave one, and it involved hard work and a heady dose of rhetoric, sometimes bordering on sophistry. Where Steinthal had glossed over Jewish law and reduced religion to a simple personification of moral principle, Lazarus knew that in adding Judaism to the equation he had to thematize the combination. In doing so he would have to walk, in the words of Alan Mittleman, 'a narrow line between Judaism as a form of autonomous moral conscience and Judaism as a heteronymous [*sic*] religious system'.[31] Walking that line meant addressing a few obvious stumbling blocks, including the law, the people of Israel who were its primary addressees, and the respective roles of God and Moses, each of which were subjected to a thorough revision. As Mittleman writes, Lazarus's strategy of merging old Jewish texts with modern insights did not make for a coherent philosophical system.[32] Yet if his method of preserving the traditional idiom and charging it with new meaning was flawed, it did produce a new perception of Judaism as a robust moral religion that could be experienced collectively, in the presence of God and the law, and with open arms towards the rest of ethical humanity.

The 'Jewish essence' of Lazarus's argumentation can be recapped in a short but far from simple formula: *Heiligung ist Versittlichung ist Gesetzlichkeit*, i.e. the hallowing of life equals its ethical realization, which in turn implies compliance with the law.[33] It is in this (in modern terms problematic) equation that the gap between Jew and Judaism – i.e. between private moral conscience and public moral involvement – was bridged. In Lazarus's system, the collective public dimension was crucial. As he reminded us elsewhere, all commandments were given in the second person singular, but the *mitzvah* to be holy – issued five times in the book of Leviticus – was always cast in the second

30 Moritz Lazarus, *Die Ethik des Judentums*, 2 vols (Frankfurt, 1898–1911). For a technical introduction, see David Baumgardt, 'The Ethics of Lazarus and Steinthal', *Leo Baeck Institute Year Book* 2 (1957), 205–17. For its place within Lazarus's life and thought, see Hanoch Ben-Pazi, 'Moritz Lazarus and the Ethics of Judaism', *Daat: A Journal of Jewish Philosophy and Kabbalah* 88, Special Issue: 'Wissenschaft des Judentums: Judaism and the Science of Judaism. 200 Years of Academic Thought on Religion' (2019), 91–104. For an excellent summary of its central ideas and argumentation, see Alan L. Mittleman, *A Short History of Jewish Ethics: Conduct and Character in the Context of Covenant* (Chichester, 2012), 181–84. On Steinthal and Lazarus, cf. also the chapter by Carlotta Santini in this volume.

31 Mittleman, *A Short History of Jewish Ethics*, 182.

32 Ibid; Baumgardt, 'The Ethics', uses the word 'eclectic'.

33 Lazarus, *Ethik* vol. 2 (1904), ch. 5 ('Versittlichung is Gesetzlichkeit'), 220–240 (§§ 203–209).

person plural, a sure sign of its being a communal assignment.[34] It was the law that facilitated this shared mission to try to be a holy nation, Lazarus wrote, by absorbing the individual into an overarching totality (*Gesammtheit*). And it was in this moral-legal *Gesammtgeist* – the Jewish equivalent of Steinthal's more neutral *Wir* (We) – that *die wahre Heiligung des Lebens* took place, the true hallowing of life.

At this point, various elements in Lazarus's argumentation need qualification. First of all, there is his notion of enforceable *Gesetz* and its relation to non-enforceable morality. Jewish law, Lazarus argued, should not be seen as a source of mandatory moral teaching. It was a goal in itself, in the sense that its only purpose was to instill *Gesetzlichkeit*, i.e. a mentality of compliance with the law. Through that single purpose it became a source of freedom (*Quelle der Freiheit*) rather than control.[35] Being obliged by law in all aspects of life, he explained, the Jews were prevented from ever acting out of base self-interest.[36] As an agent of gallant selflessness, their *gesetzliches Handeln* (legal dealings) thus closely resembled moral autonomy. In a paragraph devoted to the head-on confrontation between the apparent opposites *Gesetzlichkeit und Autonomie* ('Legality and Autonomy') Lazarus found their compatibility confirmed by the longstanding rabbinic preference for obedience over voluntarism. Among the Sages, he wrote, the *metzuvveh ve-'oseh* (the one who is commanded and performs the deed for no other reason than having been ordered to do so) ranked higher than the one who performed it voluntarily (read: out of hope for benefit or reward). Legal obedience as the moral superior of (potentially unreliable) free will: what at first sight must have looked like a rabbinic paradox turned out to be a higher form of truth. It was in the shared selflessness of Jew and law, of the commanded and the commandment, that law begot freedom and compliance acted like autonomous will. Lazarus had achieved the near-impossible: in his summary of Jewish ethics there was no longer any either/or. He had created

34 Ibid., 312.

35 In a rare reference to revelation, Lazarus stressed that Israel had been delivered not on the shores of the Red Sea, but 'only at Sinai, and with Israel the totality of humanity' (ibid., 25).

36 In ch. 6, on 'Naturgesetz und Sittengesetz', Lazarus brought in his psychological expertise when speaking of *das vom Naturtrieb erlösende Gesetz*, the law that helps us channel our natural urge (§ 239). Judaism's ritual laws (*Zeremonialgesetze*) in particular fulfilled the mediating, didactic role which Kant had allotted to all revealed religions. By hallowing daily routine, they reminded the Jews of their dual state, i.e. of their being part of this world *and* of the realm of transcendent ideas; Mittleman, *A Short History of Jewish Ethics*, 184.

a linguistic territory where religion equalled law equalled morality: where the rabbit, one might say, *was* the duck.[37]

Although he had succeeded in shifting the perception of Jewish law as ethics, Lazarus conceded that those ethics came 'in a completely different format than Kant's absolute morality'.[38] One such difference was the presence of the divine. In Kant's practical reason, the primacy of the autonomous individual had evolved out of the failure to prove God's existence in metaphysical terms. In Lazarus's adaptation, by contrast, that divine existence was an indisputable, if awkward, axiom. In a book on the ethics of Jewish religion there was no way of avoiding the 'ultimacy language' of religious philosophy.[39] In the paragraph in which he defended his Jewish understanding of moral autonomy, he therefore reintroduced God as a generic framework, a décor almost, for Jewish ethical behaviour. God, he explained, was the archetype (not the source, mind you) of holiness and morality, created humankind in his likeness, and had encoded them to imitate his holiness.[40] Simultaneously, as an ethical being, each individual was his own creator (*Selbstschöpfer*), spurred by his own will and tapping into his own natural resources. Yet for all his independence, the *Grund*, i.e. the efficient cause for his moral actions, resided elsewhere, in the opaque ultimacy of the divine creator in whose image humankind had been created.[41]

In the process of moral auto-creation, the letter of the law as received by Moses on Sinai was of course irrelevant, a conviction Lazarus shared with countless Reform thinkers before him. What mattered, if one chose to uphold the law in the functional mode of *Gesetzlichkeit*, was its spirit, which scripture itself had managed to condense into a single legal principle. Unlike Steinthal, Lazarus did not refer to the universal Golden Rule but instead identified the prophet Habakkuk's adage that 'the righteous shall live by his faith' as the

37 Lazarus, *Ethik* vol. 2, 228 (§ 208).

38 Ibid., 102.

39 For the expression, see Robert Neville, 'Philosophy of Religion and the Big Questions', *Palgrave Communications* 4/126 (2018), https://doi.org/10.1057/s41599-018-0182-9 (accessed 6 December 2022).

40 In Lazarus's representation, God's holiness was ontological, i.e. part of his divine essence. Israel's pursued holiness, by contrast, was relational. Through the commandment to be holy, they could aspire to a holiness that was greater than, and thus *relative to*, their own original state and that of other nations. For the distinction, see Alan L. Mittleman, 'Introduction: Holiness and Jewish Thought', in *Holiness in Jewish Thought*, ed. idem (Oxford, 2018), 4.

41 Lazarus, *Ethik* vol. 2, 103–111 (§ 101).

one dominant norm behind the 613 commandments.[42] *Tzaddik be-munato yichyeh*: justice through faith and, again, Jewish law as *ius* rather than *lex*. For Lazarus too, biblical righteousness, not halachic tradition, was the key to the marriage of religion, law, and morality.

With the law thus transformed into a moral instrument and God into a holy exemplum, what remained was to redefine the role of his earthly legislator. In a passage devoted to the importance, or rather to the irrelevance, of genealogy for Jewish morality, Lazarus introduced Moses as little more than a dialectical moment in a much broader argumentation.[43] The Sages, he argued, taught that spiritual and moral achievement were unrelated to lineage and should be admired over birth, descent (*Stamm*), and race (*Blut*). The highest moral post to be held, by gentile and Israelite alike, was prophethood, with Moses as the undisputed paragon of prophets. Therefore, if scripture says that no prophet arose *in Israel* after Moses (Deut 34:10, emphasis mine), this must necessarily mean that gentile Balaam, known only for his ambiguous appearance in Num 22–24, should be identified as his rightful heir and successor. Following this surprising argument, Lazarus continued with an equally programmatic paragraph on proselytes as the spiritual heroes of Judaism who, by voluntarily embracing Jewish *Gesetzlichkeit*, became the pinnacle of Jewish ethics – moral autonomy squared, one might say.[44] This generous stance on conversion was but one expression of Judaism's inherent humanism, he concluded. The other was its natural inclination towards universalism, which had set it apart from the other nations to such a degree that Israel had been driven into particularism to protect its early humanist creed.[45]

Heteronomy as autonomy, Balaam as Joshua, particularism as the protective husk of universalism – at first sight there is every reason, with Baumgardt and Mittleman, to charge Lazarus with dilettante eclecticism. In his defense,

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42 Ibid., 105–108. Lazarus's argumentation follows the gist of bMakkot24a, where R. Simlai reduced the 613 Mosaic commandments first to eleven (Psalm 15), then to six (Isaiah 33:15), three (Micah 6:8), two (Isaiah 56:1) and finally one legal principle (Habakuk 2:4).

43 Ibid., 158–159 (§ 155), based on a tendentious reading of *Ba-Midbar Rabba*, ch. 14. On the dialectics of universalism in early rabbinic exegesis, see Marc Hirschfeld, 'Rabbinic Universalism in the Second and Third Centuries', *Harvard Theological Review* 93 (2000), 101–15.

44 Lazarus, *Ethik* vol. 2, 159–161 (§ 156). NB: in 1895, Lazarus had entered a second marriage with the convert Nahida Remy. For a portrait, with a focus on philo-semitism and feminism, see Alan T. Levenson, 'An Adventure in Otherness: Nahida Remy-Ruth Lazarus (1849–1928)', in *Gender and Judaism: The Transformation of Tradition*, ed. Tamar M. Rudavsky (New York, 1995), 99–111.

45 *'[U]m diesen Vorzug zu pflegen … musste Israel sich absondern'* (Lazarus, *Ethik* vol. 2, 164 [§ 159]).

however, it could be said that he was trying to serve (too) many masters at once. In ranking religiosity above halachic practice, he joined a long line of Reform thinkers who had attacked Mendelssohn's idea of Judaism as revealed legislation and had tried to replace it with a more dynamic Jewish *Geist*.[46] In choosing to define that spirit through a mixture of rabbinic idiom and modern philosophical ideas, he appealed to an educated class whose knowledge of Judaism was waning, as was its appetite for a socially demanding *Gesetzesreligion*. In explaining Jewish particularism as a retreat on behalf of universalism, he endorsed the spirit that had enlightened his lecture 'Was heißt und zu welchem Ende studirt man jüdische Geschichte und Litteratur' ('What Is Jewish History and Literature, and Why Does One Study It'), deliberately named after Schiller's *Antrittsvorlesung* of 1789.[47] And finally, in stressing the importance of the Jewish collective but dismissing the tribal and the racial, he reissued the call for ethnic pluralism (*Mannigfaltigkeit*) that had echoed through his address 'Was heißt national?' ('What is the National?'), delivered and published in 1880 at the height of the Berlin *Antisemitismusstreit*, or Antisemitism Controversy.[48]

Much had changed in German politics since 1778, when Mendelssohn had promoted straightforward legal pluralism in order to excite straightforward religious tolerance. Writing in a different climate, Moritz Lazarus knew he had to play a more subtle, less exclusively legal card. So he traded the Mosaic authority of canon law for the prophetic principle of righteousness, proposed rabbinic *Gesetzlichkeit* as a tool for private moral conscience, and succeeded in upgrading law-based Judaism into an open, egalitarian humanistic enterprise. If ever a circle had been squared, it was on the 400-plus pages of Lazarus's theoretically flawed, perhaps, but at the same time bracingly creative reconstruction of the *Ethics of Judaism*.

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46 Daniel Schwartz traces the origins of this critique back to Saul Asher (1767–1822), whose 1792 *Leviathan* renounced Mendelssohnian legalism and located the core of Judaism in fourteen (*sic*) principles of faith; Daniel B. Schwartz, *The First Modern Jew: Spinoza and the History of an Image* (Princeton, 2012), 60.

47 Published as Moritz Lazarus, *Was heißt und zu welchem Ende studirt man jüdische Geschichte und Litteratur*, Populär-wissenschaftliche Vorträge über Juden und Judentum 1 (Leipzig, 1900).

48 The address was reprinted in Lazarus's collected essays, *Treu und Frei. Gesammelte Reden und Vorträge über Juden und Judentum* (Leipzig, 1887), 53–113. I have given a short characterization in 'Nation and Translation. Steinschneider's Hebräische Übseretzungen and the End of Jewish Cultural Nationalism', in *Latin-into-Hebrew*, vol. 1, *Studies*, eds Resianne Fontaine and Gad Freudenthal, Studies in Jewish History and Culture 39/1 (Leiden, 2013), 421–45, esp. 432–34.

4 Law as Right. Legal History and the Perfect Synthesis

Though ultimately sharing the objective of reconciling Jewish nomism with moral cosmopolitanism, Mendelssohn and Lazarus found themselves at opposite ends of the scale in their evaluation of the law. Mendelssohn ended up with a Jewish version of canon law, Lazarus with a liberating legal principle, each in its own way compatible with the tenets of natural religion. Needless to say, there were acres of middle ground between them, in the heart of which we find Rabbi Zacharias Frankel (1801–1875), architect of Conservative Judaism and founder of its first theological seminary in Breslau (Figure 11). Navigating between the extremes of Reform and Orthodoxy Frankel was, as Andreas Brämer phrased it, a man of the *juste milieu*.[49] In Frankel's case middle ground did not, however, mean compromise. On the contrary, it became a centre space where all possible perspectives converged and where Jewish law, not as *Gesetz* but as *Recht*, was transformed into an academic subject in its own right. As we shall see, Frankel's Jewish *Rechtswissenschaft* revealed a legal corpus that could stand the comparison with model Roman law, enlightened *Vernunftgesetz*, *and* superior revealed religion, all at once. A whole set of circles to be squared indeed, which Frankel managed to do with the help of his newly devised positive-historical methodology.

As indicated above, the early *Wissenschaft des Judentums* had come close to excluding the study of the halachic archive from its agenda. In *Etwas über die rabbinische Literatur*, published in 1818, Leopold Zunz had built his new research programme around a universal knowledge order that consisted of three clearly demarcated domains: the realm of (human, social) culture; the realm of (divinely created) nature, which included the material worlds of commerce, technology, and the arts; and finally, the transcendent, immaterial realm of the divine itself. In the latter section he placed, besides such disciplines as theology, dogmatics, and liturgy, the categories of legislation and ethics. In grouping them under the heading of the divine sciences, Zunz effectively eliminated law and morality from the definition and study of Jewish national culture that was at the heart of his academic programme. *Wissenschaft des Judentums* was to be all about '*Literatur und Bürgerleben* (literature and civil life)', and philology and statistics were perfectly adequate for tackling the combination.[50]

49 Andreas Brämer, 'The Dilemmas of Moderate Reform: Some Reflections on the Development of Conservative Judaism in Germany 1840–1880', *Jewish Studies Quarterly* 10 (2003), 73–87, at 75, 84. See idem, *Rabbiner Zacharias Frankel,* for an exhaustive intellectual biography.

50 Thus Immanuel Wolf, 'Über den Begriff einer Wissenschaft des Judenthums', *Zeitschrift für die Wissenschaft des Judentums* 1 (1822), 1–24, 23.

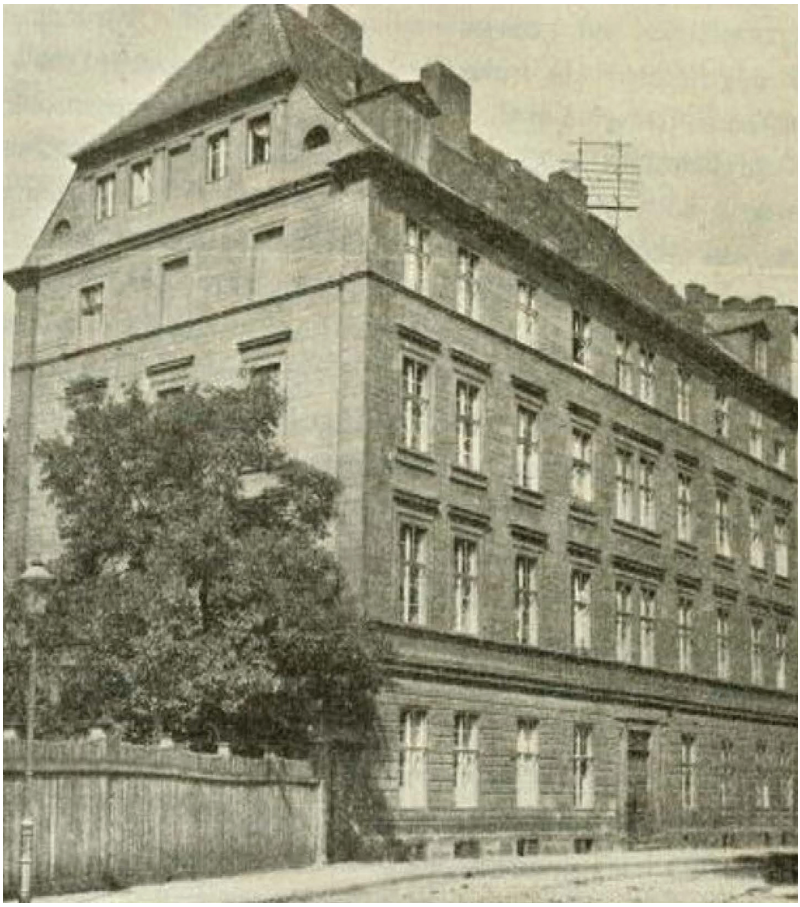

FIGURE 11 Photograph of the Jüdisch-theologisches Seminar zu Breslau (Frankel'sche Stiftung)
CREATOR UNKNOWN; IMAGE PUBLISHED IN MARCUS BRANN, GESCHICHTE DES JÜDISCH-THEOLOGISCHEN SEMINARS (FRAENCKEL'SCHE STIFTUNG) IN BRESLAU, FESTSCHRIFT ZUM FÜNFZIGJÄHRIGEN JUBILÄUM DER ANSTALT (*BRESLAU: SCHATZKY, [1904]*), *P. 74, NOW IN THE PUBLIC DOMAIN AND AVAILABLE ON ARCHIVE.ORG.*

In reaction to this omission Zacharias Frankel founded the so-called historical-positivist school, which advocated the integration of critical and theological methods and introduced oral law and halacha as viable topics of

academic research.[51] In response to Reform modernization, he adopted the term 'positive' as a 'defiant reassertion of Judaism's fundamental legal character'. The adjective 'historical', in its turn, was added in order to stress the importance of 'the past as a source of values, inspiration, and commitment', i.e. of living, human history, as the second defining aspect of Jewish religious life.[52]

Scattered over many publications, Frankel's treatment of Jewish law was rich and erudite, and much can be, and has been, said about it – especially in relation to the religious breakup of modern Judaism.[53] In the final section of this chapter, I will briefly look at one text to explore what happens when a rabbinical scholar applies the apparatus of German secular *Rechtswissenschaft* to Jewish religious law. As several scholars have pointed out, the Romantic *Historische Rechtsschule*, or Historical School of Jurisprudence, founded by Berlin professor Friedrich Carl von Savigny (1779–1861), was an obvious source of inspiration.[54] Its central notion of law as an organic part of national life, its attention to historical evolution, and its stress on the importance of early 'folk' sources for current legislation were useful strategies in the battle against the Reform's rejection of oral law as bad exegesis and Orthodoxy's insistence on Sinaitic origins.[55] But they did not suffice to solve the other issues that had nagged Jewish scholars from Mendelssohn to Lazarus, especially the tension between divine and natural law and morality and between Jewish legislature, statehood, and citizenship. It is the conceptual-linguistic framing of these two topics that we will briefly look into here. For a better appreciation, it is worth sketching the contemporary German context first.

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51 See, e.g., Zacharias Frankel's address 'Das Talmudstudium', *Monatsschrift für Geschichte und Wissenschaft des Judentums* 18 (1869), 347–57, esp. 355–56. In addition to Braäer, *Rabbiner Zacharias Frankel*, see Ismar Schorsch, 'Zacharias Frankel and the European Origins of Conservative Judaism', *Judaism* 30 (1981), 344–54; Roland Goetschel, 'Aux origines de la modernité juive: Zacharias Frankel (1801–1875) et l'école historico-critique', *Pardès* 19–20 (1994), 107–132; and Andreas Brämer, 'Jüdische "Glaubenswissenschaft" – Zacharias Frankels rechtshistorische Forschung als Herausforderung der Orthodoxie', in *Die Wissenschaft des Judentums. Eine Bestandsaufnahme*, eds Thomas Meyer and Andreas Kilcher (Paderborn, 2015), 79–94.

52 Schorsch, 'Zacharias Frankel', 346–47.

53 See the literature mentioned in fn. 2, 49 and 51.

54 Most recently Theodor Dunkelgrün, 'The Philology of Judaism: Zacharias Frankel, the Septuagint, and the Jewish Study of Ancient Greek in the Nineteenth Century', in *Classical Philology and Theology: Entanglement, Disavowal, and the Godlike* Scholar, eds Catherine Conybeare and Simon Goldhill (Cambridge, 2020), 63–85, 75–76, and the publications listed in fn. 53.

55 For an engaging introduction to Von Savigny's work, see Susan Gaylord Gayle, 'A Very German Legal Science: Savigny and the Historical School', *Stanford Journal of International Law* 18 (1982), 123–46.

German legal thinking after 1814 had been dominated by the *Kodifikationsstreit*, a debate on the nature and future of German civil law between Anthon Friedrich Justus Thibaut (1772–1840) and Friedrich Carl von Savigny.[56] In this controversy, Thibaut stressed the need for one general civil law for Germany, as the title of his 1814 publication indicates.[57] Against this French-style national codification, von Savigny pleaded for a deferral and for a German legislation based on the careful reconstruction of its historical foundations. On one level it was a debate about top-down statutory law imposed by a legislative body versus 'bottom-up' customary law sanctioned by a common consciousness or *Volksgeist*. Simultaneously, it was a confrontation between the idea of natural law (*Vernunftrecht* as grounded in the permanent, universal natural order) and positive law, human-made, organically grown and therefore historically variable. Proponents of the former found themselves united in the philosophical school, the 'armchair version' of legal scholarship,[58] where theorists postulated rational axioms and built a system *more geometrico*, i.e. with the help of logical deduction. Their opponents formed the historical school that concentrated on tracking down historical sources and extrapolating their legal principles. Always in the background loomed Roman law, no longer normative but converted into a methodological prism for all who engaged in contemporary *Rechtswissenschaft*.[59]

Echoes from these developments trickled into Frankel's analysis of Jewish law, with one important proviso. For all their differences, the German scholars were united in their secular approach to the law. Frankel, by contrast, examined the Jewish legal corpus through the combined lenses of history and theology,[60] two conflicting disciplines with incompatible truth claims. An example of how he managed to reconcile those claims can be found in the section on *mosaisch-talmudisches Recht* ('Mosaic-Talmudic Law') that served

56 See the entry 'Kodifikationsstreit' by Joachim Rückert in *Handwörterbuch zur deutschen Rechtsgeschichte*, 2nd ed., 16th instalment (2012), https://www.hrgdigital.de/HRG.kodifikationsstreit (accessed 6 December 2022).

57 Anthon Friedrich Justus Thibaut, *Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* (Heidelberg, 1814). In response Savigny wrote his famous *Vom Beruf unserer Zeit für Gesetzgebund und Rechtswissenschaft* (Heidelberg, 1814). On its reception and influence, see Benjamin Lahusen, *Alles Recht geht vom Volksgeist aus. Friedrich Carl von Savigny und die moderne Rechtswissenschaft* (Berlin, 2012).

58 Gayle, 'A Very German Legal Science', 125–127.

59 Von Savigny extolled paradigmatic Roman law in his 1814 *Vom Beruf* (*passim*) and developed the paradigm in his *System des heutigen Römischen Rechts* (Berlin, 1840); Gayle, 'A Very German Legal Science', 133–134.

60 Witness the title of Zacharias Frankel, *Die Eidesleistung der Juden in theologischer und historischer Beziehung* (Dresden, 1840), on the Jewish taking of the oath before a court.

as an introduction to his 1846 study of Jewish procedural law. The book, which dealt with the weighing of legal evidence, was written as a proof of competence in Jewish *Rechtswissenschaft* and as an attempt to put Jewish legal expertise on a par with its German equivalent. Written towards the end of emancipation, it was a plea for full equality before the law.[61] As a work of scholarship, it was an explicit emulation of the work of John Selden (1584–1654), Johann David Michaelis (1717–1791), and Moses Mendelssohn, whose *Ritualgesetze* Frankel dismissed as inadequate and makeshift.[62] Its bottom-line argument was that in pairing principle to equity, and strictness to moderation, Jewish law was the perfect synthesis of Roman and German law and, as such, worthy of academic attention and legal esteem.[63] The question remained, of course, how to blend God into the mixture.

Frankel began his exposé by saying the Mosaic and Talmudic legal systems had become so entwined (compare his persistent, deliberate use of the composite '*mosaisch-talmudisch*') that it was hard to define the idea of *rein mosaisch* ('purely Mosaic'). As we have seen, in Mendelssohn's 'makeshift' resumé the difference between the two had been that of revealed versus apostolic tradition, together constituting one *ius divinum*. In Frankel's system the hierarchy was reversed: the folkish, historical positive law of the Sages became the prism through which the entire law was perceived, in simultaneous refutation of Geiger's accusations of artificiality and of Hirsch's claim to revealed origins.[64]

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61 In this aspiration the book continued the political aims of *Die Eidesleistung der Juden* of 1840, which had been part of a current debate on the humiliating tradition of the oath *more judaico*. For a survey of contemporary Jewish publications on the topic, see David Philipson, 'The Rabbinical Conferences, 1844–6', *Jewish Quarterly Review* 17 (1905), 656–89, 674 fn. 2.

62 '*[N]ur ein zu unzulänglicher Nothbedarf*' (Frankel, *Der gerichtliche Beweis nach mosaisch-talmudischem Rechte. Ein Beitrag zur Kenntnis des mosaisch-talmudischen Criminal-und Civilrechts. Nebst eine Untersuchung über die Preussische Gesetzgebung hinsichtlich des Zeugnisses der Juden* [Berlin, 1846], v [Vorwort]. A more exhaustive, and critical, list of previous studies ended up in a footnote on p. 112). Further to Michaelis, see the essays by Ofry Ilany, Carlotta Santini, and Michael Ledger-Lomas in this volume.

63 '*[A]ber auch in ihnen schon gewahrt man eine eigenthümliche Verschmelzung des Characters des römischen und des deutschen Rechts: die mit strenger Consequenz durchgeführte Folgerung aus einem Grundsatz, und die die Lebensverhältnisse würdigende Billigkeit, die vermittelnd zwischen das strenge Recht und die Forderungen der Menschlichkeit tritt*' (ibid., v-vi, quoting from Carl Joseph Anton Mittermaier's *Grundsätze des gemeinen deutschen Privatrechts*, 3rd ed., 2 vols [Landshut, 1827]). In 1834, Mittermaier had written an influential study on evidence and the examination of witnesses in criminal procedural law. For Frankel's contact with Mittermaier, see Andreas Brämer, '"Wissenschaft des Judentums" und "Historische Rechtsschule": Zwei Briefe Zacharias Frankels an Carl Josef Anton Mittermaier', *Aschkenas. Zeitschrift für Geschichte und Kultur der Juden* 7 (1997), 173–79.

64 See esp. Harris, *How Do We Know This*, chs. 6–8.

In legal philosophical terms, the search for the 'purely Mosaic' amounted to a reconstruction of the earliest principles on which that incremental legal system had been built. Given the trends in contemporary discourse, the revealed nature of those principles needed vindication, a task which Frankel readily took to hand.

One way or the other, he stated, the Mosaic constitution was divine legislation or, at least, announced itself as such. Through its many details, the will of God penetrated every part of the human – public as well as private – realm. This had led people to conclude that Mosaic law was not the product of internal reason but had been externally motivated, and hence did not qualify as *Vernunftgesetz*. Upon closer inspection, however, the divine will as laid down in Mosaism appeared to operate in a much more subtle, far less absolutist manner. Rather than demanding legal submission, its aim was to alert humanity to its innate ideas of truth and justice and bring these ideas from potentiality to actuality. Revealed yes, dictated no, in other words. If we are to believe Frankel, the realization of Mosaic justice was a process of gentle anamnesis, of, literally, re-cognizing true ideas and stirring them into consciousness. What at first sight may have looked like external motivation was thus in fact double immanence. On the one hand God represented, or better, *was* the *höchste Idealität des Rechts* ('highest ideality of law'). Simultaneously, this supreme Idea of Right was the innate substrate of all worldly affairs and social relations in the Mosaic republic.[65] It should be added here that, in *Der gerichtliche Beweis* (*The Judicial Evidence*), Frankel never explicitly identified Mosaic law with natural law. We can nevertheless deduce this identification, inter alia, from his use of the adjective '*natürlich*', natural, for example in his assertation that Mosaic law introduces itself as divine legislation but 'adheres to natural ground' when it comes to law and justice.[66]

As this summary shows, Frankel's identification of *mosaisches Recht* with *Vernunftgesetz* owed more to the idiom of Hegelian Idealism than to Romantic legal historicism.[67] Following the gist of G.W.F. Hegel's (1770–1831) *Phenomenology*, Frankel situated the highest idea (c.q. the objective *Geist*) of *Recht* in an abstract outer world, from where it emanated into the subjective, this-worldly *Geist* of human society. There it found its particular, concrete

65 Frankel, *Der gerichtliche Beweis nach mosaisch-talmudischem Rechte*, 8–10.

66 '*Sie kündigt sich, wie oben bemerkt wurde, als eine göttliche an, und wenn sie auch hinsichtlich des Rechts auf natürlichem Boden bleibt*' (ibid., 52).

67 For the early *Wissenschaft des Judentum*'s encounter with Hegelian philosophy, see Sven Erik Rose, *Jewish Philosophical Politics in Germany, 1789–1848* (Waltham, MA, 2014), ch. 3, 'Locating Themselves in History: Hegel in Key Texts of the Verein', 90–145, esp. 70–71.

expression in the *principia* of Mosaic law. In Frankel's summary, God appears – again, never explicitly but between the lines – not as the vengeful God of the Hebrews but in the form of Hegel's *absoluter Geist*, or Absolute Spirit. In this absolute, highest manifestation of the spirit, natural law did not just coincide with the divine will, but in fact constituted its very being.[68] For Hegel, religion, alongside art and philosophy, had been one way of accessing the absolute *Geist* and bringing it to actualization. With the Mosaic God equaling (natural) law, Frankel saw the study and practice of that law as the highest, most effective form of Jewish religion, ranking it higher than the 'so-called purely religious deed', i.e. than the rites and rituals of cultic worship.[69] By thus putting the commitment to law and justice at the heart of the Jewish religion, Frankel managed to elevate the idea of Judaism as an ancient *Gesetzesreligion* (a word which, I should add, does not occur in the pages of *Der gerichtliche Beweis*) to a whole new philosophical level.

If Mosaic law had its ultimate origins in a God who was the absolute *Geist*, its legal content and procedures were very much of this world. Likewise, although this treasure was best accessed via the Jewish religion, its norm for what was good and right did not derive from religious values but remained a within the confines of the legal. Religion, in other words, was the instrument – not the substance – of Mosaism. 'Its laws', Frankel summarized, 'are thus grounded in legal principle itself, in the ethics (*Sittlichkeit*) and free esteem for the True and the Good, they dwell on legal ground, deriving their legitimacy from the Idea of Right, without ever crossing over into religious territory'.[70] Mosaic law, in short, was rooted in morality; its practice constituted the core business of Jewish religion. Like Lazarus, we may conclude, Frankel managed to reconcile the three. Only this time it was not the law but religion that was forced into an instrumental role.

Free esteem for the True and the Good: almost by way of an afterthought did Frankel make room for the modern moral subject within the collectivity of the ancient Mosaic polity. Again following Hegel, he claimed that the only type of government suitable for this combination of civic legislation and morality had been the republic, with God as its invisible ruler (*das unsichtbare Oberhaupt*)

68 *'[I]hm inhärirend und sein eigenes Wesen bildend'* (Frankel, *Der gerichtliche Beweis nach mosaisch-talmudischem Rechte*, 10).

69 Ibid., 9.

70 *'Die Rechtsgesetze sind also im Rechtsprincipe selbst, in der Sittlichkeit und der freien Achtung vor dem Wahren und Guten begründet, sie verbleiben auf dem Rechtsboden, leiten ohne auf das Religionsgebiet hinüberzuschlagen ihre Legitimität aus der Idee des Rechts ab'* (ibid., 10).

from whose divine being all right proceeded.[71] Michaelis, among others, had been wrong to mistake this kind of republic for a theocracy, Frankel argued.[72] More than anything, Mosaic law had been anthropocentric, tailored to the here and now, helping humanity to move through this world, not prepare for the next. Christian doctrine, by comparison, was tuned towards the afterlife and closed its eyes to earthly realities. Accordingly, it advocated passive virtue, not active jurisdiction (*nicht Rechtsgesetze, sondern Tugendverschriften*) and told its followers to turn the other cheek (read: to surrender justice, in anticipation of better times to come). In political terms, this was a choice which, in Frankel's view, totally disqualified church law as modern state legislation. What with Christianity putting itself above state and legal principle, he concluded, a Christian state was a contradiction in terms.[73] In the Mosaic republic, however, virtue and right, i.e. moral conduct and law, had been balanced in perfect harmony, ensuring a superior form of justice in which stringent right would always be mitigated by ethical considerations.[74]

The central principle upon which this superior form of justice was built was that of retributive justice (*die Wiedervergeltungstheorie*), a theory which, Frankel was happy to announce, had often been misunderstood but had recently been reestablished.[75] In Mosaic law, he explained, crime was considered an injury both to the person who was injured and to the principle of justice that had been violated. Therefore, the dual goal of punishment was to compensate the individual damage as well as restore the collective respect for the law, which in turn would strengthen society's disinclination from evil.[76] By

71 Ibid., 10–11. Frankel's argumentation seems to mirror, mutatis mutandis, Hegel's position that in the modern state representative legislative bodies were to formulate the law, which the constitutional monarch should then ratify by issuing them as his 'will': in G.W.F. Hegel, *Elements of the Philosophy of Right: A Critical Guide*, ed. Allen W. Wood, trans. H.B. Nisbet (Cambridge, 1991), 275–380 (the section on 'the state'). For a characterization of Hegel's republicanism in relation to civic virtue and the autonomous personality, see Andrew Buchwalter, 'Hegel, Modernity, and Civic Republicanism', *Public Affairs Quarterly* 7 (1993), 1–12.

72 In the footnote on page 12–13, Frankel referred to Michaelis, *Mosaisches Recht*, vol. 1, § 35.

73 Ibid., 13–14.

74 Ibid., 15–16.

75 Ibid., 23–24. In a footnote Frankel referred to the relevant paragraphs (§§ 96–104) of Hegel's *Grundlinien der Philosophie des Rechts* (1821) as the basis of his interpretation.

76 Frankel explicitly related this disinclination to society's religious sense: *'So lange also der religiöse Sinn im Volke lebt und die Achtung vor diesen geoffenbarten Vorschriften aufrecht erhält, wird das Verbrechen geflohen: die Religion lehrt es verabscheuen, und was der innere Rechtssinn nicht vermag, wird an der Hand des als göttlich und heilig geachteten Gesetzes erlangt werden'* (ibid., 53).

and large, Frankel's summary of Jewish legal principle followed Hegel's theory of retribution-as-annulment, in which punishment was believed to somehow cancel the crime and, in doing so, to serve as an affirmation of right. Hegel being Hegel, modern commentators have struggled to understand the precise nature of his 'opaque' theory of annulment through punishment.[77] Frankel's version certainly was a lot more straightforward. In his adaptation, punishment was portrayed as a psychological instrument that enabled the state to deter crime and boost the people's moral resolve not to transgress the law. At the risk of overinterpreting (Frankel was never one to share his underlying theories), one could say that this final allusion to the people's collective moral sensitivity reflected Hegel's definition of *Sittlichkeit* as 'conventional ethical order' (from *Sitte* meaning 'custom'), as opposed to rational, individual morality *à la* Kant.[78] This might explain Frankel's minimal, cursory reference to the Kantian 'free esteem for the True and the Good'. In a similar way, Frankel's unapologetic identification of 'an eye for an eye' as the central principle of *das Mosaische* is a far cry from the centrality of the 'cosmopolitan' Golden Rule in the philosophical ethics of Steinthal and Lazarus.

Talmudic law, Frankel stated at the end of his introduction, related to these Mosaic foundations as positive law did to canon law. By using exegesis, it hoped to capitalize on Mosaism's revealed status. Simultaneously, in filling the gaps and addressing new realities it enjoyed a validity of its own, independent from the divine will: comparable, in a way, to natural law in the strict sense of the word. Mosaic and Talmudic law were inextricably linked, however, in their religious colouring (*religiose Färbung*) and in the *moralische Wirkung* described above, which relied on the sanctity of the law and the public endorsement of its holiness. It would be wrong, Frankel cautioned in good historical-positivist fashion, to mistake the Talmud for law in decline, running contrary to the will and spirit of the modern nation.[79] Such anachronistic thinking should be avoided. Deeply rooted in its own particular time and place, it had developed a unique character that was best described not in terms of rise and fall but through a synchronic comparison with model, exemplary Roman law. For all

77 See, among many others, Thom Brooks, 'Is Hegel a Retributivist?' *Hegel Bulletin* 25 (2004), 113–26, and the vast corpus of recent studies listed in footnote 1.

78 For this dichotomy as a critique of the ethics of Kant and Fichte, see Wood, *Elements of the Philosophy of Right*, 58–76, ch. 3, 'Hegel on Morality'.

79 Cp. Kristiane Gerhardt, 'Frühneuzeitliches Judentum und "Rabbinismus". Zur Wahrnehmung des jüdischen Rechts in den Zivilisierungsdebatten der Aufklärung', *Trajectoires* 4, 'Postkolonial' (2010), https://journals.openedition.org/trajectoires/473 (accessed 5 December 2022).

the material parallels, we learn, it was an encounter of two completely different legal worlds, where Roman principle was balanced by Jewish creativity, Latin *Tiefsinn* by Semitic *Scharfsinn*, and synoptic standardization by casuistic fragmentation. A meeting, in short, of the systematic, methodical Occident and the inventive, adventurous Orient that was the ultimate home of the Jewish legal heritage.[80]

5 Afterword

In the words of the British writer George Orwell (1903–1950), prose should resemble a freshly cleaned windowpane: transparent, near-invisible, allowing the beholder an honest, unspoilt view of what is behind the glass. For philosopher Ludwig Wittgenstein, honest prose was but a language game, a moment of action during which words acquire meaning and their referents – be they concrete or abstract – are subject to interpretation. In the sample texts discussed above, we have watched an intricate language game enfold, when the ancient Hebrew concept 'halacha' became the object of inter-cultural translation.[81] On the one hand, the process enabled authors to reposition and universalize this traditional Jewish 'walk through life' by framing its contents in terms of law, religion, and morality. By the same token, the effort to match halachic properties with these Western categories, and to find all three united in modern Judaism, proved a tour de force. At a time when religion was turning inward, when laws were based on the moral codes of nations, and when morality was an effect of personal will, a divinely inspired law-based religion was an oxymoron.

Fortunately, the idiom of both the source and the target language was conveniently open and ambiguous. The act of cultural translation was a language game in which the interplay of lexicon, discipline, genre, and audience transformed meanings on both sides of the language divide. In different ways, all texts discussed in this chapter were about legal and religious pluralism and equality before the law. Within that framework, Judaism's legal component was singled out and defined either as legislation (Mendelssohn), righteousness (Lazarus), or – ideal and actual – *Recht* (Frankel). Its moral foundations, the absolute principles of the Good behind the Right, were located in God's

80 Frankel, *Der gerichtliche Beweis nach mosaisch-talmudischem Rechte*, 55–62.

81 The notion of the *Wissenschaft des Judentums* as a 'translation act' was first articulated in Ismar Schorsch, *From Text to Context: The Turn to History in Modern Judaism*, Tauber Institute for the Study of European Jewry Series (Hanover, NH, 1994), 151–176.

essence, in the human faculty of reason, or, preferably, in both. Patently contradicting modern conceptions of law and morality, the religious dimension was hard to accommodate. In the context of the *Ritualgesetze*, Mendelssohn identified it as the ecclesiastical zone of competence in which Jewish canon law had evolved. For Lazarus, it was the open Jewish spirit under which humanistic morality blossomed, in collective imitation of God's holiness. In Frankel's Jewish legal science, it served as the locus of transcendentally sourced legal practice and as a prop for society's legal sensitivity. What emerged from each of these efforts was more than the sum of law, ethics and religion; more, too, than arcane halacha or biased *Gesetzesreligion*. What emerged was Judaism, staunchly defying secularization and delegalization, inviting us to a never-ending language game and, never-fixed, altering when it alteration finds.