

From Politics to Law: Modern Jewish Thought and the Invention of Jewish Law

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A basic and ever present theme of modern legal theory, in both its analytic (American and British) and continental (European) variations, is the attempt to carve out a space for the autonomy of law that is immune to the reduction of law to politics, on the one hand, or to morality, on the other. In analytic jurisprudence, H. L. A. Hart remains, after more than half a century, the seminal figure seeking this foothold just as Hans Kelsen, also after more than half a century, remains the signal figure in the continental context. Hart sought to give an account of “the concept of law” while Kelsen attempted to develop what he called “the pure theory of law.”¹ Both of these phrases indicate their shared endeavor to claim autonomy for the intellectual subject and practical sphere of law, a task that is of course replicated in the development of modern law schools and modern legal practice. In this paper I consider a parallel development in modern Jewish thought to claim autonomy for law. It is in this sense, as the title of my paper

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1 H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961); Hans Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1967). I do not mean to suggest that Hart’s and Kelsen’s remain the only models for contemporary legal theory, but more minimally that they remain influential. Their positivist models are also important for the purposes of this paper since contemporary secondary literature on Jewish law has drawn upon them. See n. 7 below.

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suggests, that I mean to claim that the concept of Jewish law was invented in modern Jewish thought.

Of course, in calling this an invention I am not denying that there is and historically was something called Jewish law. Instead, my suggestion is that the modern concept of Jewish law (halakhah) is particularly modern in its attempt to claim autonomy for law, especially from politics. The separation of law from politics and the move from politics to law is one of the defining features of modern philosophical attempts to define a conception of law. Whether advocating legal positivism (the claim that law and morality are separate realms), the new natural law theory (the claim that law and morality necessarily overlap), or something in between, mainstream modern legal theorists, despite their disagreements with one another, all agree that law constitutes its own distinct sphere.²

Yet as Ronald Dworkin has succinctly remarked, “any theory of law, including positivism, is based on some particular normative theory.”³ The very claim that the concept of law is independent of political authority and power has political implications. In the context of modern legal theory, these political implications have to do with different understandings of the import and limitations of law as the legal realm relates to liberal democracy. So too, modern Jewish arguments about a distinct sphere of Jewish law also tell us much about the political situation and implications of Jewish modernity for liberal and traditionalist Jews alike. While the concept of law in modern Judaism is often used to mark the continuity between the Jewish past and the Jewish present, it is ironically the modern concept of law (again, for both Jewish traditionalist and liberals alike) that actually demarcates the difference, or discontinuity, between the pre-modern Jewish past and Jewish modernity.

- 2 The critical legal studies movement, of course, provides the most in depth criticism of this position. See Duncan Kennedy, *A Critique of Adjudication* (Cambridge, Mass.: Harvard University Press, 1998).
- 3 “A Reply,” in *Ronald Dworkin and Contemporary Jurisprudence*, ed. Marshall Cohen (Lanham, Md.: Rowman & Littlefield, 1984), 254.

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What is today referred to as “Orthodox Judaism”⁴ claims that the law is eternal and not subject to change. While Orthodoxy has historically defined itself against liberal Judaism, I argue that its concept of law, particularly in the thought of the founder of German-Jewish Orthodoxy, Samson Raphael Hirsch (1808-1888), is predicated not on a rejection but on an intensification of the premises of liberal Judaism. For this reason, much of this paper focuses on Hirsch’s concept of law. In recent years there has been a growing body of literature on the modernity of modern Orthodoxy, much of which stems from the seminal work of the eminent historian of the Jews, Jacob Katz (1904-1998).⁵ Attention has been paid to the modern Orthodox conception of law, but almost exclusively in the context of debates about the relevance or irrelevance of historiography for making claims about what Jewish law is. Just as some contemporary legal theorists have urged that arguments about the concept of law move from narrowly conceived philosophical debates to broader considerations of political theory, so too I suggest that arguments about Jewish law should move from what has become a too narrowly conceived debate about the historicity of Jewish law to broader questions of political theory.

The paper proceeds as follows. Part one briefly surveys the usual story told about modern Jewish conceptions of law, which, I suggest, wrongly eclipses questions about politics. In part two, I consider Moses Maimonides’ (1135-1204) political conception of Jewish law, both because he articulates an important pre-modern theoretical model for thinking about Jewish law and because Maimonides has been so important for modern Orthodoxy’s self-identity. Part three examines

- 4 Hirsch and others rejected the term “Orthodox.” See in particular his essay “Religion Allied to Progress,” in *Judaism Eternal*, trans. and ed. Isadore Grunfeld (London: Soncino Press, 1956). But because of its eventual widespread acceptance I use the term throughout this paper to refer to the strand of Orthodoxy influenced by Hirsch.
- 5 I have benefited greatly from Katz’s historical work, as well as from much of the work of his intellectual heirs. I refer to Katz and other historians influenced by him below.

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conceptions of law in modern Jewish thought to show that modern Orthodoxy's concept of law, as exemplified by Hirsch, does not reject but affirms the presuppositions of liberal Judaism. In this context, I draw parallels between the political implications of Hirsch's claim that Jewish law is not political and the political implications of this same claim in some strands of modern legal theory. Part four turns in more detail to the Orthodox concept of law and particularly to the notion of *halakhah le-Moshe mi-Sinai* (law received by Moses at Sinai), which, I suggest, in its modern incarnation is subject to the same conceptual weakness as legal positivism. The point of this analysis is not to undermine the Orthodox concept of law but to show that it can only be understood within the context of the political framework of the modern *Rechtsstaat*. In part five, I develop this argument further by showing how Orthodoxy, and its concept of law, at least in its classical German form, epitomizes the very modern (and indeed Protestant) definition of religion as a private sphere, a definition that also only makes sense within the context of the modern nation state. The conclusion draws out the beginnings of the implications of this analysis for understanding the concept of law in ultra-Orthodoxy, which, I contend, ought to be understood as a kind of post-modern return to politics based on an explicit rejection of the modern attempt to make the categories of "law" and "religion" autonomous from politics.

Part One: The Usual Story

The dominant story about Judaism and the modern west focuses on different Jewish interpretations of the meaning of Jewish law in the modern world. On this standard reading of the history of modern Judaism, "Orthodoxy" is defined as the movement that recognizes the eternal, unchanging status of Jewish law, while the "Reform" movement rejects Jewish law in favor of the universal, ethical contribution that Judaism makes to culture at large. A middle position of sorts, "Conservative" Judaism, claims to honor the authority of Jewish law

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while recognizing the necessity of historical change. All three movements share the claim that theirs is the true, original Judaism: Orthodoxy because Judaism is defined as law, Reform because Judaism is defined as ethics, and Conservative because Judaism is defined by the dynamic tension between tradition and change.⁶

Some scholars have attempted to show parallels between trends in modern legal theory and Jewish law.⁷ The Orthodox view that law, or halakhah, is an autonomous realm whose dynamic structure can only be understood from an internal perspective seems to share much with some strands of legal positivism and formalism.⁸ While the terms “positivism” and “formalism” remain hotly debated in contemporary legal theory, here and throughout this paper I use the term “positivism” to refer to the claim that law is autonomous from politics and “formalism” to refer to the added claim that the law is internally coherent and self-generating.⁹

- 6 For the purposes of this paper, I leave aside discussion of Reconstructionist Judaism which should, as Mordecai Kaplan claimed, be viewed as the logical implication of the Conservative movement. For some interesting comments by Kaplan on modern Jewish views of law, see *Judaism as a Civilization* (Philadelphia: Jewish Publication Society, 1934), 159.
- 7 See, for instance, Ze'ev W. Falk, “Jewish Religious Law in the Modern (And Postmodern) World,” *Journal of Law and Religion* 11 (1994-95): 465-98, and Tamar Ross, *Expanding the Palace of Torah: Orthodoxy and Feminism* (Hanover: Brandeis University Press, 1994).
- 8 This view of halakhah is often used to justify a number of seemingly unjust Jewish laws, including, for instance, the requirement that even when there are just legal grounds, a woman cannot divorce her husband without his consent. This is known as the problem of the *agunah* (bound woman). For more on this issue see Ross, *Expanding the Palace of Torah*.
- 9 Of course, there are positivists who deny they are formalists (H. L. A. Hart, *The Concept of Law*, 124-54), formalists who deny they are positivists (Ernest Weinrib, “Legal Formalism: On the Immanent Rationality of Law,” *Yale Law Journal* 97 [1988]: 949-1016), and positivists who claim they are also formalists (Frederick Schauer, “Formalism,” *Yale Law Journal* 97 [1988]: 509-48). Of these three positions, as discussed below, I find Weinrib’s definition of formalism most helpful but his denial that he is a positivist

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In contrast to what seems to be this positivist or formalist approach of modern Orthodox Jewish thinkers, it might seem that what Reform Jewish approaches to law and contemporary natural law positions have in common is the claim that a law is only a law when it is ethical.¹⁰ From the point of view of both Reform Judaism and contemporary proponents of natural law, an unjust law simply does not have any ethical or legal status.¹¹ Finally, given Conservative Judaism's simultaneous emphasis on, to use its motto, "tradition and change," the concept of law of Conservative Judaism might seem to map fairly neatly onto recent arguments about law as an autopoietic system, which view the legal system as both unified and dynamic.¹² In keeping with the

very problematic. I discuss the latter in n. 87 below. The definitions I am using of positivism and formalism suggest only that formalism can be an extension of positivism, though I make no claim for the coherence of the position that embraces both positivism and formalism as I have defined them in this paper, but use these terms only as descriptive categories. At the same time, it should be noted that there are no doubt differences between positivism and Orthodoxy, particularly on the issue of the source of law. The affinity lies in the shared claim that the question of what the law is remains independent of political judgment.

- 10 See, for instance, John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).
- 11 Already in the 19th century, Jewish reformers allowed *agunot* to remarry without a *get* [the legal document of a Jewish divorce]. On this issue, see David Ellenson, "Traditional Reactions to Modern Jewish Reform," in *After Emancipation: Jewish Religious Responses to Modernity* (Cincinnati: Hebrew Union College, 2004), 165. It is not hard to find modern ethical warrant for such a position both in terms of the *agunah's* personal autonomy but even more so in terms of the children born to an *agunah* who are considered bastards [*mamzerim*]. From a halakhic perspective, *mamzerim* can only marry other *mamzerim* and are thus marked for life by choices for which they certainly have no personal responsibility.
- 12 Witness in this context Conservative Judaism's solution to the problem of the *agunah*, which is to leave the halakhic requirement that a husband must consent to a divorce intact while appending a pre-nuptial agreement of sorts to the traditional marriage contract stating that the husband will indeed consent to a divorce.

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theoretical framework of autopoietic theories of law, the impetus for changes in the law may come from an “irritation” outside of the legal system, but the legal system maintains its integrity by responding only on the basis of the legal system’s own history, structure, and communicative possibilities.¹³

Orthodox and liberal (which includes Reform and Conservative) views of Jewish law might seem to fall neatly into the categories of positivist, natural law, or even autopoietic theories, but it would be a mistake to leave discussion of modern concepts of Jewish law and legal theory at this. Orthodox and liberal approaches to law are more alike than they are different. Both approaches, whether the categories of positivism, natural law, or autopoiesis fit entirely or not, share the supposition that Jewish law is not political. And it is here that liberal Judaism and Orthodoxy **both** break with pre-modern Jewish conceptions of law. While an understanding of modern Jewish concepts of law should go beyond the labels of contemporary philosophy of law (such as legal positivism and natural law), a consideration of analogies between modern concepts of Jewish law and modern legal theory can be useful for appreciating the political uses to which concepts of Jewish law are put **precisely when** the political dimension of Jewish law is denied. But before turning to this, it is helpful to consider briefly what Jewish law looks like in a pre-modern context.

Part Two: Jewish Law before Modernity

Maimonides is the first to present a comprehensive picture of what we might call a Jewish political theory. To be sure, Maimonides’ framework is one among a number and it may even be objected that Maimonides exercised little influence on and in fact was rejected by his

13 Niklas Luhmann, *Law As a Social System*, ed. Fatima Kastner, Richard Nobles, and David Schiff, trans. Klaus Ziegert (New York: Oxford University Press, 2004).

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contemporaries and many of those who followed them.¹⁴ Yet I focus on Maimonides not just because he offers a **theory** of law and politics but also because of his importance for modern Orthodox thinkers who embrace him despite the fact that his view of law as political is in direct tension with their non-political conception of halakhah.

The political framework of Maimonides' concept of law is absolutely explicit.¹⁵ As he puts it in the *Guide of the Perplexed*, "The Law as a whole aims at two things: the welfare of the soul and the welfare of the body. As for the welfare of the soul, it consists in the multitude's acquiring correct opinions... As for the welfare of the body, it comes about by the improvement of their ways of living with one another ... This cannot be achieved in any way by one isolated individual. For an individual can only attain all this through a political association, it being already known that man is political by nature."¹⁶ For Maimonides, the political nature of law includes the divine law: "Although it [the divine law] is not natural, [it] enters into what is natural."¹⁷

The political nature of Maimonides' conception of law is not only abstract but practical. We see this clearly from an example in the *Mishneh Torah*. Strikingly in the context of some contemporary Orthodox

14 At the same time, as discussed in n. 54, Maimonides does not differ from his medieval contemporaries in conceiving of the sages as well as himself as politically authoritative, but in his view of the source of that authority.

15 For a comprehensive discussion of Maimonides' political philosophy and his view of law, see G. J. Blidstein, *Political Concepts in Maimonidean Halakhah* (Hebrew) (Ramat Gan: Bar-Ilan University Press, 1983). See also Menachem Lorberbaum, *Politics and the Limits of Law: Secularizing the Political in Medieval Jewish Thought* (Palo Alto, Calif.: Stanford University Press, 2001). While beyond the scope of this paper, it should be noted that Maimonides' view of the political dimension of Jewish law is far more moderate than the views of others, especially Nissim b. Reuben Gerondi (1320-1380). Gerondi's thought is often used by the ultra-Orthodox today. Lorberbaum's book is largely a comparison of Maimonides and Gerondi.

16 *Guide of the Perplexed*, trans. and ed. Shlomo Pines (Chicago: University of Chicago Press, 1963), 3:27.

17 *Ibid.*, 2:40.

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rabbis' claims that the law simply does not require a husband to grant his wife a divorce if he does not consent to do so,¹⁸ Maimonides justifies using physical force to get such a husband to "consent" to a divorce. It is helpful to quote Maimonides at length:

When a man whom the law requires to be compelled to divorce his wife does not desire to divorce her, the court should have him beaten until he consents, at which time they should have a *get* [legal document of divorce] written. The *get* is acceptable. This applies at all times and in all places....

Why is this *get* not void? For he is compelled ... [to divorce] against his will [and a *get* must be given voluntarily].

Because the concept of being compelled against one's will applies only when speaking about a person who is being compelled and forced to do something that the Torah does not obligate him to do – e.g., a person who was beaten until he consented to a sale, or to give a present. If, however, a person's evil inclination presses him to negate [the observance] of a mitzvah [commandment] or to commit a transgression, and he was beaten until he performed the action he was obliged to perform or he dissociated himself from the forbidden action, he is not considered to have been forced against his will. On the contrary, it is he himself who is forcing [his own conduct to become debased].

With regard to this person who [outwardly] refuses to divorce [his wife] – he wants to be part of the Jewish people, and he wants to perform all the mitzvot and eschew all the transgressions; it is only his evil inclination that presses him. Therefore, when he is beaten until his [evil] inclination has been weakened, and he consents, he is considered to have performed the divorce willfully.¹⁹

18 These contemporary rabbinic authorities often quote Rabbenu Tam (1100-1171) to the effect that it is better for a woman to remain an *agunah* than to produce a *get* (Jewish divorce) that is not legal. For more on this issue see Ross, *Expanding the Palace of Torah*.

19 *Mishneh Torah, Hil. Gerushin* 2:20, trans. Eliyahu Touger (New York: Moznaim, 1987).

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Maimonides offers a theological explanation for his notion of “consent,” which is that a Jew cannot freely choose not to follow the commandments and could only do so if his evil inclination forced him. Therefore, when a man consents after being beaten for the sake of the fulfillment of the commandments his consent is real. Maimonides’ justification that a man “wants” (*rotseh*) to be part of the Jewish people is of a piece with his view that the evil inclination to not follow the commandments is not a free choice. For Maimonides it is not a choice for a Jew to be part of the Jewish people just as it is not a choice for a Jew not to follow the law. Or, put another way, being part of the Jewish people and following the commandments are choices that admit of only one option. Maimonides’ justification of coercion is not merely instrumental, just as his view of politics is not instrumental. Both are at the core fundamentally pedagogical because they are in the service of furthering a life devoted to goodness and truth.²⁰

It is important to note that Maimonides’ theoretical account of the political dimension of Jewish law is historically accurate. Far from having no political power, pre-modern Jewish communities were governed in large part by Jewish law, which was interpreted and applied by Jewish religious leaders who exercised political authority and power despite, **but also because of**, their complicated relation to external political authorities.²¹ While the extent of the rabbis’ political power in the rabbinic period remains historically ambiguous, what cannot be doubted is that the rabbis, at least rhetorically, claimed political authority for themselves.²² So too, it cannot be doubted that

20 *Guide* 3:28.

21 For what remains, in my view, the best summary of these issues, see Salo Baron, “Ghetto and Emancipation,” *The Menorah Journal* 14 (1928): 515-26. On the issue of divorce law in historical context, see ChaeRan Freeze, *Jewish Marriage and Divorce in Imperial Russia* (Hanover, N.H.: University Press of New England, 2001).

22 On the rabbinic issue, see Catherine Hezser, *The Social Structure of the Rabbinic Movement in Roman Palestine* (Tübingen: Mohr Siebeck, 1997).

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Jewish leaders increasingly exercised a significant amount of political power over the members of their communities. The modern era reflects the stripping away of Jewish political authority and power from the point of view of the Jewish collectivity.²³ The concept of law in modern Jewish thought expresses this modern movement away from politics to an apolitical conception of law.

Before turning to modern Jewish conceptions of law, it is important to say something about terminology. Throughout the *Guide*, and in the quotations mentioned above, instead of the term “halakhah,” Maimonides uses the term “Torah” to refer to the law, and when he refers to what is translated as the “divine law” he uses the term “*torat Moshe Rabbenu*” (the Torah of Moses our teacher) and not the term Hirsch would come to use, *halakhah le-Moshe mi-Sinai*.²⁴ In the original Judeo-Arabic, Maimonides uses the term “*sharia*,” as opposed to “*fiqh*,” the former corresponding to Torah, the latter to halakhah.²⁵ So too, Maimonides does not use the term “halakhah” as a free-standing category; instead, in the *Mishneh Torah*, written originally in Hebrew, he uses the term “*hilkhot*,” meaning laws of, as in, as we saw above, “laws of divorce.” Law (as halakhah) is not an autonomous category but rather a subcategory of the larger category of the political (as Torah). For Maimonides and pre-modern Jewish thinkers generally, Torah is a

23 This point remains obscured by the figures discussed in the next section as well as by scholars writing on the modern period. Two immediate reasons come to mind: the equation of politics with state politics and the view that Zionism is the only Jewish political expression in the modern period. There are differences between these two views but what they share is the premise that, in contrast to the pre-modern era in which Judaism and Jews were not political, modernity is the era in which Judaism and Jews become political, either as equal citizens of the modern nation state or as Zionists. This assumption obscures the historical reality and Jewish theological justification of pre-modern Jewish political life as well as the modern political implications of the very claim that Jewish law is not and never was political.

24 *Moreh Nevukhim le-Rabbenu Moshe ben Maimon*, trans. Mikhael Shvarts (Tel Aviv: Tel Aviv University, 2002), 3:27, 2:40.

25 *Dalālat al-hairīn*, ed. Solomon Munk (Jerusalem: Y. Yunovits, 1929), 3:27.

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comprehensive category, referring not only to politics and law, but to any and all Jewish teachings as well as to human knowledge broadly conceived. Here it is important to emphasize again that Maimonides' justification of coercion does not amount to an equation of politics or law with coercion but to a teleological vision of what constitutes the good and true life. We turn now to consider modern Jewish conceptions of Jewish law which, despite their ideological, temporal, and geographical distances from one another, all share the twin claims that Jewish law is by definition both an autonomous category and fundamentally apolitical.

Part Three: The Concept of Law in Modern Jewish Thought

As with many other issues, to understand the concept of law in modern Judaism it is necessary to turn to the famous Jewish heretic Benedict de Spinoza (1632-1677). As is well-known, Spinoza was excommunicated from the Amsterdam Jewish community in 1656. The fact of his excommunication testifies to the political power of the pre-modern Jewish community as described in the previous section of this paper, while his ability to live an independent life free of any religious community anticipates Jewish modernity in which the Jewish community does not exercise political power over individual Jews. Even more important for our purposes, however, the contours of Spinoza's view of Jewish law, even if (intentionally) historically inaccurate, set the parameters for philosophical discussion of Jewish law in the modern period. Spinoza famously contended that the laws of the Hebrews are pertinent only in the context of their original, political meaning: "Ceremonial observances ... formed no part of the Divine law, and had nothing to do with blessedness and virtue, but had reference only to the elections of the Hebrews, that is ... to their temporal bodily happiness and the tranquility of their kingdom, and ... therefore they

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were only valid while that kingdom last.”²⁶ Because the ceremonial law no longer corresponds to a political kingdom, Spinoza’s argument concludes that Jewish law is not the divine law and that post-biblical Jewish law is meaningless.

As Spinoza knew full well, and as his excommunication shows, Jewish law did not disappear in the post-biblical period. In fact, what we call “Judaism” and “Jewish law” today developed post-biblically. Yet, however one reads Spinoza (an enormous subject and industry in and of itself), he is right that it is hard to understand what Jewish, or any, law is outside of a political context. The fact that we don’t necessarily find it strange to think about law apart from political arrangements shows, I think, how internalized the concept of a non-political law has become in discussions of both modern legal theory and modern Judaism. When Spinoza wrote, the Jewish community still had political power over its members. The fact that Spinoza could live apart from this community without converting to Christianity also reflected the beginnings of the twin developments of Jewish modernity: the simultaneous development of the modern nation state and the disintegration of Jewish communal power.

Beginning with Moses Mendelssohn (1729-1786), German-Jewish philosophers accepted Spinoza’s framework for thinking about politics and Jewish law even when they attempted to reject his conclusions. Mendelssohn followed Spinoza in maintaining that the ceremonial law makes no claims on contemporary politics but he denied, against Spinoza, that the meaning of the Jewish ceremonial law was political. Mendelssohn claimed in *Jerusalem: Or on Religious Power and Judaism* that “Judaism knows of no revealed religion in the sense in which Christians understand this term. The Israelites possess a divine legislation – laws, commandments, ordinances, rules of life, instruction in the

26 *Theologico-Political Treatise*, trans. R. H. M. Elwes (New York: Dover, 1951), 69. Spinoza uses the Latin term “lex divina” for “divine law.” The term has a long history in Christian theology, especially in the work of Aquinas.

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will of God as to how they should conduct themselves in order to attain temporal and eternal felicity.”²⁷ On the one hand, according to Mendelssohn, Judaism is not a religion because Judaism demands action, not belief (this is where it differs from Christianity). But on the other hand, Mendelssohn defines Jewish law in completely apolitical terms, which he contrasts to the laws of the state. As he puts it: “[Judaism] as religion, knows of no punishment, no other penalty than the one the remorseful sinner voluntarily imposes on himself. It knows of no coercion, uses only the staff [called] gentleness, and affects only mind and heart.”²⁸

Like Spinoza, Mendelssohn knew that his description of Jewish law was not historically or even, as we saw in the case of Maimonides, theologically accurate. Unlike Spinoza, Mendelssohn was dedicated to preserving the vitality of Judaism for modern Jews. While Jews did not yet possess civil rights when Mendelssohn wrote, he anticipated the need to justify the continued survival of Jewish law to both non-Jews (who demanded that the Jewish people not constitute a nation within a nation) and Jews (who would not be compelled politically to follow Jewish law) when individual Jews would possess political rights. What is remarkable about Mendelssohn’s description of the voluntary nature of Jewish law is not that those who reformed Judaism in accord with modernity agreed with it, but that this argument was used as the basis for what became Orthodox Judaism.

It is not surprising that a century after Mendelssohn wrote and after Jews had been granted some though not all civil rights, Abraham Geiger (1810-1874), the Reform Movement’s spiritual founding father,

27 *Jerusalem: Or on Religious Power and Judaism*, trans. Allan Arkush (Hanover: University of New England Press, 1983), 89-90; in German: “Die Israeliten haben göttliche **Gesetzgebung** – Gesetze, Gebote, Befehle, Lebensregeln, Unterricht vom Willen Gottes,” *Jerusalem: oder über religiöse Macht und Judentum* (Hamburg: Felix Meiner Verlag, 2005), 90 (emphasis in the original). The terminology will be relevant below.

28 *Ibid.*, 130.

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would claim that the study of Judaism can only be a history of “spiritual achievements” because “it is precisely to its independence from political status that Judaism owes its survival.” Geiger’s notion of the spiritual achievement of Judaism went hand in hand with his attempt to rid the Judaism of his day of any notion of collective politics or messianic hope and to affirm what Geiger called “the free spirit of the Reformation” to which the German nation had given birth. Judaism’s essence, according to Geiger, is its “religious-universal element.”²⁹ Aspects of the Jewish tradition not conforming to this universal essence were, Geiger maintained, the product of external historical circumstances and could and should be discarded. And chief among these products of historical circumstance was Jewish law.

The traditionalists who responded to Geiger and the Reformers laid the foundations for what we call today Orthodoxy. What is striking about the Orthodox response to Reform in Germany is that they made their claim for the endurance of Jewish law for Jews on the basis of a deepening of Mendelssohn’s basic premise: that Judaism and in particular Jewish law was by definition not political. The concept of law put forward by the Orthodox was their core response to Reform, both theologically and, as we will see, politically.

Like their liberal counterparts, the Orthodox also argued that Jewish law was not political and they also did so for particular and perhaps surprising **political** purposes. As Jacob Katz has shown, the political predicament for Jewish traditionalists was stark: “The observance of the Jewish tradition could and would be enforced by the organs of the Jewish community. The authority to do so was conferred on the Jewish community by the state, and constituted a part of communal autonomy. There was also a measure of control over the ideas.... The post-traditional Jewish community was denied the right to

29 Abraham Geiger, “A General Introduction to the Science of Judaism,” in *Abraham Geiger and Liberal Judaism: The Challenge of the Nineteenth Century*, ed. Max Weiner (Philadelphia: The Jewish Publication Society, 1962), 155.

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impose its will concerning thought and action on the individual.”³⁰ Hirsch recognized and accepted the grave implications of emancipation for Jewish communal authority. As Ismar Schorsch has noted, Hirsch quickly “dropped all demands for judicial autonomy and continuance of Jewish civil law.”³¹ Moreover, there were no courses on Jewish civil law included in the curriculum at the Berlin Orthodox Seminary which was founded in 1873.

Hirsch’s theological and political response to this political crisis was as creative as it was ingenious. Drawing on the very modern concepts that usurped traditional Jewish identity and authority, Hirsch agreed with Mendelssohn in arguing that the Jewish religion is not coercive but concerns only heart and mind. In making this claim, however, Mendelssohn had recognized that historically the Jewish community had used coercion but, he contended, this betrayed the true meaning not only of Judaism but also of the religion more broadly defined.³² This argument in fact was part and parcel of Mendelssohn’s effort to reform the traditional Jewish community. In an attempt to maintain the traditional community, Hirsch went further than Mendelssohn, claiming not only that coercion had never existed within the Jewish community but that the traditional community only existed by virtue of “those loyal to the divine law and the obligation to belong and to support the local congregation.”³³ It was this “unity of religious outlook” and not political life that, Hirsch contended, linked Jewish communal life throughout the ages.³⁴ Hirsch welcomed the separation between church

30 Jacob Katz, ed., *Toward Modernity: The European Jewish Model* (New Brunswick, N.J.: Transaction Books, 1987), 1.

31 Ismar Schorsch, *Jewish Reactions to German Anti-Semitism* (Philadelphia: Jewish Publication Society, 1972), 10.

32 On this issue, see especially *Jerusalem*, 41.

33 S. R. Hirsch, “Die Trennungsfrage in Carlsruhe,” *Jeschurun* 25 (1870): 128. See Katz’s discussion of this publication in *A House Divided: Orthodoxy and Schism in Nineteenth Century European Jewry*, trans. Ziporah Brody (Hanover: University Press of New England, 1998), 239.

34 Hirsch, “Jewish Communal Life,” in *Judaism Eternal*, 100.

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and state in which the traditional Jewish community's "timeless principles ... will move and guide the genuine Jew, without compulsion ... in every fiber of his heart and every stirring of his will."³⁵ Based on this argument, Hirsch petitioned for a Prussian Bill that was eventually passed in 1876 which allowed the Orthodox to establish a separate community by seceding from the Jewish community recognized by the state.³⁶

The separatism that Hirsch advocated in the name of a non-political Jewish law was not one from society at large but from non-Orthodox Jews. In fact, Hirsch reiterated Geiger's claim that Judaism concerned spiritual and not political matters in his affirmation of Orthodox Judaism's relation to civil society: "It is certainly possible for us to attach ourselves to the State, wherever we may find ourselves, without harm to the spirit of Judaism. After all, our former independent statehood did not represent the essence or the purpose of Israel's national existence but merely a means to the fulfillment of its spiritual task... It is precisely the purely spiritual nature of Israel's nationhood that makes it possible for Jews everywhere to tie themselves fully to the various states in which they live..."³⁷ Hirsch maintained that Orthodox Judaism could not only tolerate but ought to embrace the non-Jewish state: "Outward obedience to the laws [of the State] must be joined by an inner obedience, i.e., to be loyal to the State with heart and mind."³⁸ What

35 Hirsch, *The Collected Writings* (New York: P. Feldheim, 1984), 6:75.

36 For a comprehensive history of this issue and the events leading to it, see Robert Liberles, *Religious Conflict in Social Context: The Resurgence of Orthodox Judaism in Frankfurt am Main, 1838-1877* (Westport, Conn.: Westport Press, 1985).

37 Hirsch, *Nineteen Letters*, trans. Karin Paritzky (Jerusalem: Feldheim, 1995), 224.

38 Hirsch, *Horeb*, trans. I. Grunfeld (London: Soncino, 1962), 462. Rather poignantly, from the perspective of German-Jewish history, Hirsch continues: "This duty is an unconditional duty and not dependent upon whether the State is kindly intentioned towards you or harsh. Even should they deny your right to be a human being and to develop a lawful human life upon the soil which bore you – you shall not neglect your duty."

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couldn't be tolerated was non-Orthodox Jews. Hirsch never denied that non-Orthodox Jews were Jewish. But, as will be discussed further below, he distinguished between being Jewish and "the genuine Jew" who belonged to the true Jewish congregation.³⁹

Chief among those from whom Hirsch wished to separate himself was Heinrich Graetz (1817-1891). Their relationship is telling in that Graetz initially was Hirsch's student and a sharp critic of Geiger. The young Graetz was moved by Hirsch's critique of the Reform tendency to lop off pieces of Jewish life in order to preserve a narrow sphere that they then called "religion."⁴⁰ Graetz actually went further than Hirsch in rejecting the notion that Judaism is a religion. For Hirsch, "Judaism is not a religion, the synagogue is not a church, and the rabbi is not a priest. Judaism is not a mere adjunct to life: it comprises all of life. To be a Jew is not a mere part, it is the sum total of our task in life."⁴¹ Nevertheless, as we have seen, Hirsch, like Geiger and Mendelssohn before him, denied that Judaism, and Jewish law, was in anyway political. In contrast, Graetz argued not only that Judaism is not a religion but that Judaism is political:

Judaism is not a religion of the individual but of the community. That actually means that Judaism, in the strict sense of the word, is not even a religion – if one understands thereby the relationship of man to his creator and his hopes for his earthly existence – but rather a constitution for a body politic.⁴²

It is certainly true that Graetz earned Hirsch's ire by using the Reformers' own historical method to argue for the whole of Jewish life.

39 Hirsch, *Collected Writings*, 6:75.

40 Graetz dedicated his dissertation to Hirsch. I discuss Hirsch's heated reply to Graetz in n. 57.

41 Hirsch, "Religion Allied to Progress," in *Judaism Eternal*, 243.

42 Heinrich Graetz, "The Structure of Jewish History," in *The Structure of Jewish History*, trans. Ismar Schorsch (New York: Jewish Theological Seminary of America, 1975), 70.

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But Graetz's description of Judaism as a body politic, which he believed was the proper historical and theological implication of Hirsch's position, was equally threatening to Hirsch's Orthodoxy because, as Hirsch recognized, the Jewish community and its leaders, such as Hirsch, simply no longer had political authority because the state no longer gave it to them.

Somewhat counter-intuitively, in order to gain a new kind of authority in an age in which the rabbinic establishment had lost its political authority, Hirsch's Orthodox theology centered on the claim that Jewish law was not political. Yet, this strategy makes sense given Hirsch's political constraints and it also makes sense by considering the formally parallel, though substantively different, political uses made by modern liberal arguments that law in a liberal democracy is not political. Legal positivists argue that law constitutes a separate and autonomous realm apart from both morality and politics because they believe that law should "provide a settled public and dependable set of standards for private and official conduct, standards whose force cannot be called into question by some individual official's conception of policy or morality."⁴³ Just as legal positivists seek to preserve the sphere of law from the twin threats of power relations and what they consider ultimately subjective notions of morality, so too modern Jewish Orthodoxy inspired by Hirsch seeks to preserve the autonomy of Jewish law from the political authority of the modern nation state and from the claims of Jewish Reformers that for moral reasons Jewish law ought to change with the times.⁴⁴

43 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), 347. Dworkin of course is not a positivist but is providing a description of positivism conducive to the positivist's own point of view.

44 Again, there is of course a difference between positivist and Orthodox conceptions of the law's source. Where positivism and Orthodoxy overlap is in the shared claim that law is an autonomous category. For my definitions of "positivism" and "formalism," to be discussed in more detail below, see part one of this paper as well as n. 9 above.

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Part Four: Orthodoxy and the Autonomy of Law

In the previous section we considered the question of the source of the law's authority for those who follow the law. While there are obvious differences between them, like contemporary positivists, Hirsch denies that the source of the law's authority is political. We turn now to the question of the source of a judge's or rabbi's authority to decide what the law is. In answering this second question, Hirsch once again stresses the apolitical character of the law. Like some contemporary formalists, Hirsch claims that the authority to decide the law is not political but comes from the law's inner form.

Hirsch's conception of Jewish law is summed up in his assertion that "the beginning of the Revelation of the law at Sinai is the guarantee of the completeness of the law through Moses... for the law, both written and oral, was closed with Moses at Sinai."⁴⁵ The "written law" refers to the Hebrew Bible. The "oral law" refers to the Talmud (even though the Talmud is written down) but also to any commentary on the Bible, legal or otherwise. Hirsch's statement means that the Bible and the Talmud as well as any commentary were given at once and not subject to historical change. This also means, as we will see below, that there is an internal coherence between the written and oral law.

Before considering the content of Hirsch's conception of law in more detail, it is necessary to return again to terminology. Hirsch follows Mendelssohn in translating the term "Torah," again a very broad concept that includes not only the five books of Moses but any and all Jewish teachings as well as human knowledge more generally, into the more limited concept of "law" (*Gesetz*).⁴⁶ The Hebrew terms for what are

⁴⁵ Hirsch, *Horeb*, 20.

⁴⁶ See n. 27 on Mendelssohn's use of "Gesetz" in *Jerusalem*. On Mendelssohn's translations generally see Carola Hilfrich, *Lebendige Schrift. Repräsentation und Idolatrie in Moses Mendelssohns Philosophie und Exegese des Judentums* (München: Fink, Wilhelm, 2000).

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translated as “written law” and “oral law” are “*torah she-bikhtav*” and “*torah she-be’al peh*,” and not “halakhah,” from Moses or otherwise. In the above quotation, Hirsch consistently uses the term “Gesetz” to translate these terms.⁴⁷ Elsewhere in this same text, Hirsch does use the term “Torah,” but in reference to general principles and not when referring to law.⁴⁸ Despite his arguments against “religion,” Hirsch is closer to Mendelssohn than he is to Maimonides in understanding law in religious, in fundamental distinction to political, terms.⁴⁹

Significantly, describing the ideals of “genuine” Judaism, Hirsch uses the phrase “*Gesetz und Wahrheit*,” in which law substitutes for Torah.⁵⁰ The conjunction between “law” and “truth” also follows Mendelssohn in separating law from truth. As Mendelssohn had argued in *Jerusalem*, Judaism consists of divine legislation that does not contradict but complements eternal truth. For Mendelssohn, it is a category error to worry about whether Judaism, as divine legislation, contradicts truth because Judaism concerns action, while truth concerns knowledge. Needless to say, this distinction is in tension with any classical conception of “Torah,” which encompasses action, political and legal, and truth, scientific and otherwise.

In narrowing Torah to law, Hirsch came up with a novel term that became important for German Orthodoxy: “*gesetzestreues Judentum*” (something like “faithful-to-the-law Judaism”), which corresponded to

47 *Horev Versuche über Jissroéls Pflichten in der Zerstreung: zunächst für Jissroéls denkende Jünglinge und Jungfrauen* (Altona: J. F. Hammerich, 1837), 27-28. See also the Hebrew translation in which “*hoq*” is used, *Horev* (Tel Aviv: Avraham Tsiyoni, 1964), 22.

48 In his *Nineteen Letters*, 15, Hirsch defines “Torah” as “‘instruction’ – directing and guiding us within God’s world and among humanity, making our inner self come alive.”

49 Whereas Mendelssohn uses the term “göttliche Gesetzgebung,” Hirsch prefers “mosäische Gesetzgebung.”

50 See especially “Die offene Antwort an Herrn Dist. Rabbiner S. B. Bamberger” in *Gesammelte Schriften* (Frankfurt am Main: Sanger and Friedberg, 1902), 4:331-426.

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his view of the loyalty to the law that he claimed constituted the traditional Jewish community as well as to his conception of all law (written and oral) coming from Moses at Sinai (*halakhah le-Moshe mi-Sinai*).⁵¹ The history of this term is beyond the scope of this paper.⁵² But it is important to appreciate two basic points. First, the term *halakhah le-Moshe mi-Sinai* is not always associated with the oral law. For instance, Maimonides differentiated between the oral Torah and *halakhah le-Moshe mi-Sinai*, claiming that the oral Torah was everything passed down from tradition while *halakhah le-Moshe mi-Sinai* referred only to the small portion of laws for which there was no apparent rational explanation.⁵³ Second, without delving into this history, we need only note that in the pre-modern period, even rabbinic sages who disagree bitterly with one another as to the scope of *halakhah le-Moshe mi-Sinai*, all agree most basically that the rabbis are active mediators in deriving the law.⁵⁴ Hirsch's conception of *halakhah le-Moshe mi-Sinai*

51 See J. Wohlgemuth, "Etwas über die Termini, Orthodoxes und gesetzes-treues Judentum," in *Festschrift zum siebenzigsten Geburtstag David Hoffmann*, ed. S. Epstein (Berlin, 1914; repr. New York: Arno Press, 1979), 2:435-58.

52 The term *halakhah le-Moshe mi-Sinai* is used in the Talmud and beyond to claim authority for laws with no textual, that is, scriptural, warrant. Yet in rabbinic literature, there is no clear-cut position on the authority of such a claim in relation to the authority of a scriptural source, with some rabbinic sources suggesting a literal equivalence between the two and others not. For a comprehensive analysis of the term "*halakhah le-Moshe mi-Sinai*" in rabbinic literature as well as for a very good bibliography on this subject, see Christine Hayes, "Halakhah le-Moshe mi-Sinai in Rabbinic Sources: A Methodological Case Study," in *The Synoptic Problem in Rabbinic Literature*, ed. Shaye J. D. Cohen (Providence, R.I.: Brown Judaic Studies, 2000), 61-118. For a comprehensive picture of the term "*halakhah le-Moshe mi-Sinai*" in the context of Jewish religious interpretation and authority from the rabbinic period through the modern period, see Jay Harris, *How Do We Know This? Midrash and the Fragmentation of Modern Judaism* (Albany: State University of New York Press, 1995).

53 Maimonides, *Commentary on the Mishnah*, trans. and ed. Yosef Kafih (Jerusalem: Mossad ha-Rav Kook, 1976), 1:11.

54 In the medieval period, Maimonides and Moses Nahmanides (1194-1270) express two conflicting positions on this issue. Maimonides posits an ab-

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denies precisely any such mediation. For Hirsch, the oral law is not a supplement to the written law and the law does not develop historically.⁵⁵ Instead, the entire law originates at Sinai. The rabbis did not and do not play an active role in deciding the law but only find the oral tradition's scriptural sources.⁵⁶ Hirsch even goes so far as to claim that

solute distinction between rabbinic and scriptural authority while Naḥmanides, explicitly rejecting Maimonides' position, denies such a distinction, maintaining instead that the warrant for rabbinic exegesis and any resulting law is found in Scripture itself. See Maimonides as above and Naḥmanides, *Hasagot 'al Sefer ha-Mitzvot*, ed. H. Chavel (Jerusalem: Mossad ha-Rav Kook, 1981). But neither of these positions, it should be noted, denies the political right and subsequent political authority of the rabbis to interpret Scripture and derive laws for the masses. For Maimonides, the distinction between scriptural and rabbinic authority is an epistemological and not a political one. That is, Maimonides' distinction rests on an epistemological point about the difference between God and human beings because, he claims, Scripture expresses God's word and rabbinic exegesis and tradition express finite human thought. But rabbinic tradition, for Maimonides, is, as we have seen, politically authoritative. So too, while Naḥmanides denies Maimonides' distinction between scriptural and rabbinic authority, he does so precisely in order to bolster the rabbis' interpretive and indeed political authority to expound the law for the masses. See also n. 60.

- 55 For an incisive historical criticism of Hirsch's conception of *halakhah le-Moshe mi-Sinai*, see Zecharias Frankel, *Darkhe ha-Mishnah* (Berlin: L. Lamm, 1923; reprint of Leipzig edition, 1859), especially 20-21. For Hirsch's response and defense of his use of the term, see *Collected Works*, 5:209-330.
- 56 As Haym Soloveitchik has argued in the contemporary context, this "shift of authority to texts and their enshrinement as the sole source of authenticity has had far reaching effects." Among these effects, argues Soloveitchik, is that the Orthodox community has lost confidence in their own authenticity. Authority has thus shifted, in a way unprecedented in the pre-modern context, to rabbinic authorities who interpret texts. To return to Hirsch (whom Soloveitchik does not discuss explicitly), we see that Hirsch's claim that Jewish law is not political increases the individual rabbi's authority in the modern context because if written texts and their interpretation are the only source of truth, expertise to read these texts is required. In contrast, as Soloveitchik, drawing on Katz's work, shows, power and authority were "broadly distributed in traditional Jewish society." See Haym Soloveitchik, "Rupture and Reconstruction: The Transformation of

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within rabbinic literature there are no substantive differences of opinion on what the law is.⁵⁷

Herein we find the basic conceptual commonality between Hirsch's concept of law and formalism: both insist that law is a self-generating, internally coherent, autonomous system. In his commentary on Exodus 21:1-24:18, the weekly portion that contains the first body of civil legislation in the Hebrew Bible, Hirsch offers an analogy for understanding the relation between the written and oral law:

The Written Law is to the Oral Law in the relation of short notes on a full and extensive lecture on any scientific subject. For the student who has heard the whole lecture, short notes are quite sufficient to bring back afresh to his mind at any time the whole subject of the lecture. For him, a word, an added mark of interrogation, or exclamation, a dot, the underlining of a word etc., is often quite sufficient to recall to his mind a whole series of thoughts, a remark etc. For those who had not heard the lecture from the Master, such notes would be completely useless. If they were to try to reconstruct the scientific contents of the lecture literally from such notes they would of necessity make many errors. Words, marks, etc., which serve those scholars who had heard the lecture as instructive guiding stars to the wisdom that had been taught and learnt, stare at the uninitiated as unmeaning sphinxes.⁵⁸

Contemporary Orthodoxy," *Tradition* 28 (1994): 64-130, citations at pp. 87, 96. For discussion of the distribution of pre-modern Jewish political power see Jacob Katz, *Tradition and Crisis: Jewish Society at the End of the Middle Ages* (New York: New York University Press, 1993).

57 See especially Hirsch's trenchant response to Graetz's emphasis on the plural nature of Jewish legal opinion in *Collected Writings*, 5:161-89. Hirsch concludes, "The disagreements cited by our author are either fictitious or only matters of form; nowhere do they touch in depth upon the substance of the Law" (*ibid.*, 189).

58 S. R. Hirsch, *Pentateuch: Translation and Commentary*, trans. Isaac Levy (Gateshead: Judaica Press, 1973), 288. In the original German edition, Hirsch includes the Hebrew terms "*Torah she-bikhtav*" and "*Torah she-be'al peh*,"

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This analogy suggesting that the written law is shorthand for the oral law explains how rabbinic law does not differ from but is internally consistent with biblical law. In the weekly portion to which this is the preface, Hirsch seeks to explain among other things how rabbinic tort law is not a break with the Bible but the true meaning of “an eye for an eye” (Exod. 21:24). Hirsch is especially at pains to distance Judaism from the laws of slavery with which this portion begins, claiming that freedom in the law, and not slavery, is the meaning of these laws.

Hirsch’s concept of law bears a remarkable similarity to Ernest Weinrib’s affirmative statement that “[i]n the formalist conception, law has a content that is not imported from without, but elaborated from within.... Legal creativity here is essentially cognitive, and it is most naturally expressed in adjudication conceived more as the discovery than as the making of law.”⁵⁹ Hirsch’s denial of rabbinic mediation and indeed of rabbinic interpretation in making the law (his claim that the law is discovered and not created) goes hand in hand with his apolitical conception of the law. If the rabbis were active mediators in deciding the law then they would be making political judgments. Drawing on traditional sources, the Reformers, and Geiger particularly, made precisely this argument in order to claim that contemporary Jews could also make such judgments in nullifying the law in light of new historical circumstances.⁶⁰

though he also translates “*Torah she-be’al peh*” as “mündlichen Gesetz-Tradition” and uses “Gesetz” as well as “mosäische Gesetzgebung” throughout his commentary. See *Der Pentateuch: übersetzt und erläutert* (Frankfurt am Main: J. Kauffmann, 1903), 251.

59 Weinrib, “Legal Formalism,” 956.

60 In his response to the Orthodox, Geiger drew especially on Nahmanides’ claim that God intended the rabbis to interpret Scripture and hence the law as they did. But Geiger argued that once this claim was subject to historical examination it became clear that the rabbis used exegesis to respond to the demands of their times. Consciousness of the historical development of Jewish law, Geiger contended, meant that reform was not anomalous to the Jewish tradition, as his traditional opponents would have it, but its very

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While most of the discussion of the Orthodox concept of law continues to focus on the Orthodox denial that Jewish law is subject to historical change, I have tried to show that both in his view of what constitutes the Jewish community (individual loyalty to the law) and in his hermeneutical view of law (“the completeness of the law through Moses”), Hirsch’s conception of law is more broadly predicated on a definition of law as an autonomous category (*Gesetz*), separate first and foremost from politics. This separation of course is one of the central themes of modern legal theory, and of positivism (whether formalist or not) most generally.

The parallelism between Hirsch’s concept of law and legal positivism is due to the fact that both are premised on an implicit endorsement of the modern *Rechtsstaat*. Indeed, Hirsch’s claim that Jewish law is not political is susceptible to the exact same conceptual weaknesses as legal positivism, which is always in danger of being undermined by the very two forces it seeks to keep at bay: morality and political power. In the Anglo-American context, Dworkin has clearly articulated the moral dilemma posed to legal positivism in simply pointing out that in penumbral or “hard” cases judges must decide the case by turning to principles already inherent in the law.⁶¹ In the continental European context, intellectual followers of Carl Schmitt have continued to point out the political problem with Dworkin’s approach because if there is no consensus about principles in hard cases,

core. See Geiger, *Nachgelassene Schriften* (Breslau: W. Jacobsohn, 1885), 52-112. So too, Graetz, in his monumental *Geschichte der Juden* (Leipzig: Leiner, 1853), vol. 4, had embraced what he called Rabbi Akiva’s “revolutionary” view of the oral Torah together with Rabbi Ishmael’s more “moderate” voice in order to show, contra Geiger, the dynamic and indeed plural structure of the law. From Graetz’s point of view, this was a defense of the enduring value of Jewish law. Hirsch responded otherwise by denying that there ever was any plurality within Jewish law. See n. 54.

⁶¹ See especially *Taking Rights Seriously* and *Law’s Empire* (Cambridge, Mass.: Belknap Press, 1986).

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then what the law is will depend upon a political decision.⁶² This of course is just an extension of Schmitt's claim that positivism "solved the problem of sovereignty by negating it"⁶³ and hence did not and cannot account for political decision at all. In both the moral and the political cases, law cannot be understood, as positivists claim, as justifying itself because law always depends on extra-legal criteria, be they moral or political.

Jewish Reformers and their critics such as Graetz tried in different ways to make the moral case against the emerging Orthodox concept of law on the extra-legal ground of historical analysis.⁶⁴ But more telling perhaps is the internal problem that resulted from Hirsch's non-political concept of Jewish law. Again, the political implication of Hirsch's denial that Jewish law is political was that Jews who did not follow the law were not part of the genuine Jewish congregation. The concrete result of this position played itself out perhaps most poignantly when Hirsch refused in 1872 to join Graetz in establishing an orphanage in Palestine for Jewish children who were susceptible to being converted to Christianity because, in Hirsch's words, "the idea to establish an orphanage in Israel both to rescue the orphans from the hands of the missionaries and to raise the level of culture is the idea of Graetz."⁶⁵

62 See, for instance, David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford: Clarendon, 1997).

63 *Political Theology*, ed. George Schwab (Chicago: University of Chicago Press, 2006), 21. The reference is to Kelsen. I refer to Schmitt here and throughout this paper not to endorse his conception of sovereignty but only to lay out some conceptual problems with the claim that law constitutes a sphere wholly autonomous from politics and morality. Schmitt's views of law and political decision are beyond the scope of this paper but here I will only suggest that his account is the reverse of the position he seeks to criticize and hence merely reverses the terms of the debate without moving beyond the very framework he seeks to overcome.

64 Graetz and others formed what is called the "positive-historical" school, which today is known as Conservative Judaism.

65 Azriel Hildesheimer, ed., "Hiluf mikhtavim bein ha-rav Azriel Hildesheimer u-vein ha-rav Shimshon Raphael Hirsch al inyanei eretz yisra'el," in *Ha-*

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Hirsch once more distinguishes between being Jewish and being a member of the genuine Jewish congregation. Refusing to join with Graetz was consistent with Hirsch's general policy that the Orthodox should not cooperate with the non-Orthodox. But in this case Hirsch went so far as to indicate that he preferred that Jewish orphans be converted to Christianity rather than cooperate with non-Orthodox Jews.

Ironically, as some of Hirsch's Orthodox contemporaries pointed out in connection with his refusal to join Graetz's effort, the rejection of non-Orthodox Jews as part of the genuine Jewish congregation in the name of the eternal veracity of Jewish law is in tension with Jewish law.⁶⁶ From a halakhic perspective of course, a Jew is born a Jew and is part of the congregation of Israel regardless of whether he follows the law or not. In this sense, Jewish law is founded on an extra-legal political moment, which is the event of God's giving the law to the people of Israel and demanding their adherence to it, regardless of their consent to follow the law. The implication of God's imposition of Jewish law for human freedom is of course a perennial question of Jewish theology but Hirsch's traditionalist critics recognized the theological problem that arises from the claim that loyalty to the law is the defining feature of the law. At the same time, Hirsch's denial of the political dimension of Jewish law which results in his construction of Jewish law as a matter of individual consent, or loyalty, would seem to lead right into the argument of the Reformers that Jewish law ought to accommodate itself to modern times because Jews are now modern individuals.

Ma'ayan (1954), 2:45, as quoted by David Ellenson, "Traditional Reactions to Modern Jewish Reform," in *After Emancipation*, 179.

66 In particular, Rabbi Esriel Hildesheimer (1820-1899) criticized Hirsch directly for his position, claiming that he was "throwing the baby out with the bath water" ("Hiluf mikhtavim," 2:55, as quoted in Ellenson, "Traditional Reactions to Modern Jewish Reform," 181). See also Ellenson, *Rabbi Esriel Hildesheimer and the Creation of a Modern Jewish Orthodoxy* (Tuscaloosa, Ala.: University of Alabama Press, 1990).

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We have seen then that Hirsch's concept of halakhah is vulnerable to criticism from the perspectives of both political power and morality, just as legal positivism is. The aim of this analysis is not to argue about the coherence of the Orthodox conception of halakhah but to ask what political purpose this concept of law serves. Here I am in complete agreement with Liam Murphy when he suggests that "We must approach the traditional question about the concept of law as a practical aspect of political theory."⁶⁷ I have suggested throughout this section that Hirsch's conception of Jewish law must be understood as part of a broader political theory that implicitly accepts the modern Rechtsstaat.⁶⁸ As I will argue in the next section, one of the implications of this embrace is an acceptance of a particularly modern conception of religion that goes hand in hand with modern western legal orders. This is also obviously the case for different forms of liberal Judaism but, again, I attempt to show that Hirsch's conception of Jewish law is built not upon a rejection of the premises of liberal Judaism, as the standard story would suggest, but upon an intensification of these premises.

Part Five: From Politics to Law to Religion

I have argued in this paper that in modern Jewish thought there is a movement from politics to law. But this movement from politics to law is equally a movement from politics to religion in which law, formerly a political concept, becomes a religious one. The concept of religion as a sphere separate from politics is a modern construct just as the concept of law as an autonomous realm is a modern construct.⁶⁹ Modern concepts of law and religion are born together.

67 "The Political Question of the Concept of Law," in *Hart's Postscript: Essays on the Postscript to the Concept of Law*, ed. Jules Coleman (Oxford: Oxford University Press, 2001), 373.

68 This doesn't mean that Hirsch or Orthodoxy accepts all the values of liberal democracy such as egalitarianism. For more on this see Ross, *Expanding the Palace of Torah*.

69 For the classic statement of this modern position see Friedrich Schleier-

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I have tried to show some conceptual parallels between the modern Orthodox notion of law and legal positivism in order to suggest that just as contemporary positivists' claim that law is not political has political implications so too do modern Orthodox claims that law is not political. The political implication of this argument is both an implicit endorsement of a modern political order that separates church from state but also an argument for Jewish sectarianism that turns Judaism into a religion based not on political identity but on personal conviction. Here an historical comparison is helpful for appreciating the distinctly modern nature of this Orthodox argument.

The destruction of the second temple in 70 C.E. brought with it political and theological challenges to the definition of Judaism on par with the advent of the modern nation state. Yet it is in that period that sectarianism was rejected. As Martha Himmelfarb has recently argued:

The decline of the significance of priestly ancestry among Jews was followed by the widespread and thorough embrace of a definition of the Jewish people based on ancestry. This definition served as an implicit rejection of sectarian definitions restricting membership to the worthy alone ... The most important cause of the whole-hearted embrace of ancestry ... was the rise of Christianity. As Christians claimed to have taken the place of the old Israel, some rejected the language of ethnicity altogether ... while others claimed that they constituted a new people defined not by genealogy but by merit.

macher, *On Religion: Speeches to its Cultured Despisers*, trans. Richard Crouter (New York: Cambridge University Press, 2006). While Hirsch continually criticizes the liberal concept of religion, his conception of Judaism and Jewish law particularly as a sphere distinct from politics fits well into Schleiermacher's framework. As Schleiermacher puts it, "religion maintains its own sphere and its own character only by completely removing itself from the sphere and character of speculation as well as from that of praxis" (ibid., 23). If we understand speculation as *Wahrheit* and praxis as politics, then Hirsch's conception of Judaism and Jewish law does indeed fit this definition. It is hard to imagine that Hirsch was not familiar with Schleiermacher (*Speeches* was originally published in 1799).

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Against these claims, Jews insisted – as much to themselves as to Christians – on the continued viability of the old Israel and the guarantee of redemption inherent in the descent from Abraham.⁷⁰

In contrast to the classical rabbinic model, we have seen that modern Orthodoxy is defined precisely by sectarianism, which means “restricting membership to the worthy alone.” If the classical rabbis sought, as Himmelfarb convincingly argues, to differentiate Judaism from Christianity by emphasizing ancestry over merit, Hirsch made Judaism more like the Christianity of his times which, in connection with the advent of the modern nation state, was relegating itself to private, confessional status. To be sure, this is a surprising conclusion simply because Orthodoxy presents itself as Orthodox, i.e., as continuity and not rupture. Yet the historical irony is that Hirsch’s Orthodoxy is not only modern but, in a certain sense, the most modern of modern Judaisms in its molding of itself as a religion on the German Protestant model.

To appreciate this point, we must return to Maimonides one last time. Throughout this paper I have contrasted modern Jewish thinking about law as non-political with Maimonides’ explicitly political conception of law. I have done so not only because Maimonides offers a theoretical framework for considering modern Jewish concepts of law but also because Maimonides has been such an important figure for modern Jewish thought, liberal and Orthodox alike. This should be surprising for two reasons. First, because Maimonides’ views were considered heretical by many of his contemporaries as well as those who followed him and second, because of his explicitly political framework which is precisely what modern liberal and Orthodox Jewish thinkers want to deny.

No doubt there are a number of reasons for Maimonides’ modern popularity. Yet there also seems to be a simple if counterintuitive reason

⁷⁰ Martha Himmelfarb, *A Kingdom of Priests: Ancestry and Merit in Ancient Judaism* (Philadelphia: University of Pennsylvania Press, 2006), 165.

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why Maimonides has been so important in the modern period, especially for Orthodox Jews. The reason for the appeal of Maimonides is the same reason he was so problematic historically for traditional Jews, which is his dogmatic expression of Jewish theological belief.⁷¹ We need not consider in any detail Maimonides' thirteen principles of belief (which include, among other things, belief in God's unity, non-corporeality, and eternity). Marc Shapiro has recently shown both the pervasive embrace of Maimonides' thirteen principles in modern Orthodoxy and that many, if not most, pre-modern Jewish sources actually reject these principles.⁷² Again, it is not surprising that modern proponents of liberal Judaism might find the theological element of Maimonides attractive because they explicitly embrace a view of Judaism as a modern religion.⁷³ But again, as in the case of the definition of law, modern Orthodoxy's affirmation of the theological dimension of Maimonides and disregard for the explicitly political dimension of his thought is not a rejection but a heightening of the premises of liberal Judaism.

Hirsch actually draws on Maimonides in support of his arguments for secession. In his use of Maimonides we see the movement from politics to law to religion. Hirsch focuses on the theological dimension of Maimonides' discussion of heresy while subverting the political dimension of this discussion. In a manner reminiscent of the Christian distinction between hating the sin but loving the sinner,⁷⁴ Hirsch continually returns to a distinction between "heresy and skepticism" (*minut va-apikorsut*) and "heretics and skeptics" (*minim va-apikorsim*), acknowledging that he is "deliberately using terms to describe the

71 In *Nineteen Letters*, Hirsch, like Mendelssohn, denies that Judaism has any dogmas. Yet he also continually refers to Maimonides and equates Judaism's theological concepts with humanism.

72 Marc Shapiro, *The Limits of Orthodox Theology: Maimonides' Thirteen Principles Reappraised* (Portland: The Littman Library of Jewish Civilization, 2004).

73 See in particular Hermann Cohen, "Charakteristik der Ethik Maimunis," in *Jüdische Schriften III*, ed. B. Strauss (Berlin: C. A. Schwetschke & Sohn Verlagsbuchhandlung, 1924).

74 Augustine, *City of God* (Garden City, N.Y.: Image Books, 1958), 304.

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system (*minut va-apikorsut*) rather than individuals (*minim va-apikorsim*) who adhere to it.”⁷⁵ This is because “Nowadays we no longer have *minim* and *apikorsim* as defined in our legal codes...[but] present-day fellow Jews who subscribe to *minut* and *apikorsut* in practice.” Hirsch draws on Maimonides (*Hil. Mamrim* 3:3) to argue that “it is worthwhile to bring those [heretics] back in penitence and attract them through words of peace until they return firmly to the Torah.” As if to bring home the point that voluntary belief, as opposed to ancestry, defines “*gesetzestreues Judentum*,” Hirsch justifies his distinction between heresy and heretics by implying that the relation between Orthodox Jews and non-Orthodox Jews is not any different than the relation between Jews and non-Jews: “Even the most stringently observant Jew is free to maintain contacts and friendly relations with individuals adhering to the most diverse assortment of religious persuasions – Christians, Moslems, heathens...”⁷⁶

Just as Hirsch denies that coercive measures were ever part of Jewish law by claiming that the traditional congregation was founded on individual consent, so too he emphasizes that membership in the Jewish congregation is predicated on voluntary belief. In contrast, and as we saw before, for Maimonides there is not a contradiction between consent (i.e., voluntary belief) and coercion. In fact, sometimes the former requires the latter. Just as Hirsch distinguishes between being a member of the congregation (adherence to “*gesetzestreues Judentum*”) and being a Jew, so too he distinguishes between heresy as belief and the political dimension of heresy in identifying someone as a heretic.

75 Hirsch, *Collected Writings*, 6:206-207. See Adam S. Ferziger, *Exclusion and Hierarchy: Orthodoxy, Nonobservance, and the Emergence of Modern Jewish Identity* (Philadelphia: University of Pennsylvania Press, 2005), for a discussion of Hirsch’s distinction as well as for a nuanced consideration of the debates between Hirsch and other Orthodox rabbis on the relationship to non-Orthodox Jews.

76 Hirsch, *Collected Writings*, 6:299. Hirsch argued that Orthodox Jews could interact with individual non-Orthodox Jews, but that there could be no cooperation with non-Orthodox organizations.

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Neither of these distinctions makes sense from a Maimonidean point of view nor for that matter, as Himmelfarb shows, from a classical rabbinic point of view. Hirsch has moved from politics to law to religion in suggesting that law is, as the term “gesetzstreues Judentum” implies, primarily a matter of faith and not political allegiance. Or, put another way, the political allegiance required by law is closer to religious conviction than it is to any conception of political power.

In form, Hirsch’s conception of Jewish law bears a striking similarity to Dworkin’s view that law as a domain distinct from politics requires a certain attitude, which Dworkin aptly calls “protestant”: “Law’s empire is defined by attitude, not territory or power or process ... It is a protestant attitude that makes each citizen responsible for imagining what his society’s public commitments to principle are and what these commitments require in new circumstances.”⁷⁷ One could conclude that this similarity is the result of Hirsch and Dworkin independently arriving at the true concept of law. But this is the sort of conclusion and analysis that, in my view, should be resisted. Concepts of law reflect particular political (as well as historical and cultural) arrangements. If there is a formal similarity between Hirsch and Dworkin suggesting that law requires, or perhaps truly **is**, a kind of religious attitude, this is because, despite their very significant differences, both their conceptions of law reflect what Leo Strauss called the theologico-political predicament of modernity, in which “the bond of society is universal human morality, whereas religion (positive religion) is a private affair.”⁷⁸ As modern conceptions of law and religion are both defined in contradistinction to politics, it should not be surprising that these constructs flow into one another.

77 Dworkin, *Law’s Empire*, 413.

78 Leo Strauss, *Spinoza’s Critique of Religion* (Chicago: University of Chicago Press, 1965), 3.

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Conclusion: From Law Back to Politics

In an important article, Ze'ev Falk argues that modern Orthodoxy is both "pre-modern and post-modern." He makes this argument on the basis of Orthodoxy's "perception of religion, history and the humanities" that has "remained unaware of modern scholarship. Hence, it closes its eyes vis-à-vis biblical and other historical criticism of Judaism and opposes any reform of Jewish law."⁷⁹ I have argued in this paper to the contrary: that the Orthodox conception of law is neither pre-modern nor post-modern but in fact very modern. Of course, Falk, along with many others, is not incorrect to locate the disagreement between Orthodoxy and non-Orthodoxy in terms of their acceptance or rejection of modern historical methods. Yet this focus on debates about the historicity of law misses, in my view, the larger issue, which is that arguments about law are arguments about politics, even when, or perhaps especially when, the claim is that law is not political.⁸⁰ We have seen that Hirsch's claims about *halakhah le-Moshe mi-Sinai* as an autonomous self-generating realm leaves room for secular politics and also for a kind of religious pluralism, despite Hirsch's disdain for non-Orthodox Jews. In the same way, positivist arguments about law as an autonomous self-generating realm leave room for politics and morality. Hirsch, like contemporary legal positivists, moves from politics to law in order to allow law and politics to exist side by side. Ultra-Orthodoxy is the rejection of a distinction between politics and law and of the authority of the modern nation-state. Contra Falk, it is not Orthodoxy but ultra-Orthodoxy that is both pre-modern and post-modern.

To appreciate this point, I conclude by considering very briefly the concept of law of Hirsch's grandson, Isaac Breuer (1883-1946), one of

79 "Jewish Religious Law in the Modern (And Postmodern) World," 472.

80 At the same time, the focus on debates about historiography really only makes sense in the German-Jewish and perhaps early twentieth-century American contexts.

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the founders of Agudat Yisrael, which today is an ultra-Orthodox Israeli political party advocating for state enforcement of religious laws. Although there are undeniable and important links, I do not mean to equate Breuer's early twentieth-century concept of law with Agudat Yisrael today. So too, while a consideration of Breuer's concept of law in relation to pre-modern Jewish sources is beyond the scope of this present paper, it is fair to say that, historically conceived, his view of law is as much a modern innovation as Hirsch's view of law is.⁸¹ Nevertheless, a brief discussion of Breuer allows us to see that one of the advantages of considering modern Jewish concepts of law from the perspective of political theory is that this focus helps to make sense not just of the common ground between liberal Judaism and modern Orthodoxy but also of the intimate relation between ultra-Orthodox conceptions of law and their rejection of liberal democracy.

While Hirsch's historical moment required a response to liberal Judaism, the internal Jewish challenge Breuer encountered was the rise of political Zionism. Just as Hirsch's conception of *halakhah le-Moshe mi-Sinai* is based on a deepening of the premises of liberal Judaism, so too Breuer's concept of law is based on a heightening of the premises of political Zionism. Breuer called himself a national Jew and outlined a program that "demands the preparation [*Bereitstellung/hakhsharah*] of God's nation and God's land for their reunification in a *Gottesstaat* ruled by God's rights."⁸² He did not turn away from Hirsch's Orthodoxy but believed that he was "activating" Hirsch's principles which had developed in an era of passivity.⁸³ Among other things this meant that

81 On this issue see Jacob Katz, *The Unhealed Breach: The Secession of Orthodox Jews from the General Community in Hungary and Germany* (Hebrew) (Jerusalem: Merkaz Zalman Shazar, 1994).

82 Isaac Breuer, *Die Idee des Agudismus* (Frankfurt am Main: J. Kaufmann, 1921), 5.

83 See especially Breuer, *Der neue Kusari: Ein Weg zum Judentum* (Frankfurt am Main: J. Kaufmann, 1934). The title is a reference to Judah Halevi (1075-1141). The relation between Breuer and Halevi deserves further consideration. Here I note only that it is significant that Breuer's focus is on Halevi and not Maimonides.

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Breuer came to believe that a fully Jewish life was not possible in Germany where Judaism had been relegated to a religion. He eventually emigrated to Palestine in 1936. There Breuer also abandoned the Jewish sectarianism that defined his grandfather's Orthodoxy by following Rabbi Abraham Isaac Kook⁸⁴ in accepting secular Zionism and Zionists as part of a larger political vision of a Torah state.

The difference between grandfather and grandson is summed up in Breuer's claim that "Judaism is not a religion of Law [Gesetzesreligion], but the Law (Gesetz) as such."⁸⁵ For Breuer, there is nothing outside of the law because the law as such rejects any notion of religion and secular politics.⁸⁶ Whereas Hirsch's movement from politics to law affirms the modern Rechtsstaat as well as the modern categories of law and religion, Breuer's move from law back to politics is an attempt to overcome the categories of religion and any notion of the Rechtsstaat.⁸⁷

In conclusion, I suggested above that Hirsch's Orthodox conception of law is subject to the exact same conceptual weakness as legal positivism: the twin threats of political power and morality. Bracketing the establishment of the State of Israel in 1948 and the subsequent complicated relationship between ultra-Orthodoxy and religious Zionism since then, we see that Hirsch's concept of law already led, in the thought of his grandson, to the return of political theology that

84 Kook (1865-1935) is considered by many to have been a religious Zionist. While this is debatable, his thought has had and continues to have a tremendous influence on religious Zionism today.

85 Breuer, *Judenproblem*, 3rd ed. (Halle: J. Kaufmann, 1918), 81.

86 See especially Breuer, *Die Welt als Schöpfung und Natur* (Frankfurt am Main: J. Kaufmann, 1926).

87 While aspects of Hirsch's concept of law share affinities with Weinrib's formalism, Breuer's view is closer to Weinrib's in not merely separating law from politics but in eclipsing modern political institutions entirely. Here Joseph Raz's well-known criticism of Weinrib's formalism is particularly apt. Breuer's and Weinrib's views of law are different but they both claim that law's justice is an internal (a term both use) feature of law. Raz ("Formalism and the Rule of Law" in *Natural Law Theory*, ed. Robert P.

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Schmitt claims follows from the breakdown of liberal accounts of law.⁸⁸ The movement from grandfather to grandson is already a movement away from the theologico-political predicament of modernity toward political theology, in which, to paraphrase Schmitt, all political concepts are theological. None of this is to equate Breuer with Schmitt but only to point out that what the concept of law in modern Jewish thought shows is not the undisrupted link between the present and the past but the very political problem of Jewish modernity.

George [New York: Oxford University Press, 1984], 334) has cogently argued that “[t]he idea that the essential properties of law determine its content leaves no room for politics.” By politics Raz means more specifically democratic institutions. This is a problem for Weinrib because he does indeed claim that formalism accounts for democratic institutions. But it is not a problem for Breuer and in fact it is exactly the point: Breuer’s concept of law is a rejection of not just democratic institutions but of any notion of a Rechtsstaat.

⁸⁸ For a helpful overview of this issue, see Heiner Bielefeldt, “Deconstruction of the Rule of Law: Carl Schmitt’s Philosophy of the Political,” *Archiv für Rechts und Sozialphilosophie* 82 (1996): 379-96.