Digitales Brandenburg

hosted by Universitätsbibliothek Potsdam

Beyond the letter of the law

Jacob, Walter

Pittsburgh, Pennsylvania, [2004]

GERMAN ROMANTICISM AND THE JEWS: The Intellectual Basis for Halakhic Reform

urn:nbn:de:kobv:517-vlib-10650

Visual Library

Chapter 2

❖ ❖ ❖

GERMAN ROMANTICISM AND THE JEWS:
The Intellectual Basis for Halakhic Reform

Peter Haas

For the rise of Reform Judaism in Germany, one of the "red letter" events was the appointment of Abraham Geiger in 1838 as associate rabbi and *dayyan* in Breslau. What was so striking about this appointment was that it was made over the resolute and unequivocal opposition of the traditionalist senior rabbi of the community, Salomon Tiktin. Ismar Schorsch has used this incident to symbolize the emergence of the modern rabbi, that is, the replacement of the traditional Ashkenazi talmudic scholar with a university-trained preacher and pastor. What Geiger's appointment also demonstrates is that even an authority with the stature of Tiktin could at best delay, but not prevent, the course of Jewish religious development in mid–eighteenth century Germany.[1]

The massive change in the notion of the rabbinate that was spreading across Central Europe during this period was, of course, part of a much broader shift in how German Jews were coming to understand their Judaism. Part of this metamorphosis was, naturally enough, a reevaluation of the content, structure, and even validity of *halakhah*. The connection with a reevaluation of the office of the rabbi was clear and direct. We know from numerous sources that the role of the rabbi in the Jewish communities of pre-Enlightenment Germany was almost entirely judicial. Consider, for example, the description of the job as penned by Hirschel Levin, the last *Oberlandesrabbiner* of Berlin. In about 1798, complaining about the demands of his position he wrote to Friedrich Wilhelm III, King of Prussia, that his post

> requires, in addition to the most exacting execution of all religious prescriptions, an ever watchful eye for maintaining the purity of the faith

> among the nation settled here, resolution of all related questions and doubts, responsibility for the continuation of talmudic learning, and finally the most extensive jurisdiction over a large number of juridical cases arising among the nation such as inheritance, divorce, etc.[2]

The shift in perception of the rabbi, at least in the lay community, is impressively illustrated by a comment made barely a generation later, in 1820, by a leading lay member of the Berlin Jewish community, Ruben Gumpertz. Asked by the government of Saxony for input as to what the appropriate functions of a rabbi in Prussia should be, Gumpertz responded that "quite properly and fittingly, therefore, one could call the rabbis... *kosher* supervisors, since as indicated above, their functions relate primarily to decisions regarding permitted and forbidden foods, the *kashrut* of foods and drinks and what pertains to them.[3] Clearly the role and stature of the rabbis were undergoing a revolutionary shift. As university-educated elites rose to positions of leadership within the Jewish community, as Geiger had in Wiesbaden and then Breslau, these men had to define themselves and their positions within this new context. Were they even rabbis at all, and if so, in what sense? If they took on the title of rabbi, then how did the content of the term need to change to accommodate them? These are the issues that stand constantly behind the debates of the 1840s.

When we think about these kinds of questions and changes with German Judaism of the nineteenth century, we tend to think of them in terms of developments internal to Judaism. But as I shall argue below, the reality was more complex. As university-trained intellectuals gradually took over leadership positions in the German Jewish community, the debate over these issues moved out beyond the limits of the traditional talmudic literature. My claim is that these deliberations among the new university trained rabbis were in fact conducted more or less as extensions of controversies that were just then also animating the German academic world. In short, philosophical discussions of the nature of nation, law, and ethics in general were being applied by these men to Judaism in particular.

The transfer of these discussions to the case of Judaism was in

fact quite straightforward. As I have just noted, the issue of the new rabbis' relation to the old legal tradition, the *halakhah*, was of central concern. But theories about the origin and nature of law had special urgency at this time in the German-speaking lands of central Europe because of the area's struggle to define itself as a nation-state with its own distinctive cultural, religious and social norms. In other words, as the diverse peoples of German-speaking Central Europe were coming gradually to a common idea of nationality, they found themselves contending with the diversity of their political and economic cultures. The various German legal patrimonies would have to coalesce into a coherent system. While it was clear to nearly everybody that the old medieval legal structure would simply have to go, it was hardly obvious what would replace it. But it was apparent that whatever did replace it would have to be authentic to the nation, or *Volk*. So it turns out that the reformers of Judaism were facing very much the same obstacle as the creators of modern Germany were in theirs. That is, just as people of German nationality were trying to define themselves and their nationality, so were Jews within that population. In fact, the debates in both the general German and the Jewish communities reached a sort of peak in the 1840s, signaled by the revolutions of 1848 on the one hand and the Reform "synods" on the other. My point is that not only did Jews define themselves in the larger context of nationalistic self-definition in central Europe, the terms of semantics and syntax of the debates crossed social and national lines.

In significant part, the development of the philosophy of law (*Rechtsphilosophie)* in the German-speaking lands was provoked by Napoleon's attempt to remake France, and then the rest of Europe, in line with Enlightenment rationality and liberal political principles. One major legal development was, of course, the dissolution in 1806 of the Holy Roman Empire. In the wake of this collapse, the German lands were reorganized as a series of more or less independent kingdoms (Bavaria, Würtemberg, Hanover, Saxony) or Grand Duchies (Baden,

Mecklenburg, Saxony-Weimar). Thus began a series of consolidations that would reach completion only under the premiership of Otto von Bismarck. But along with these political unifications came legal reforms as well, as different economies, social classes, tax structures and the like had to be reconciled and merged. In some cases, German legal reformers looked to the Napoleonic Code as a model. Now, the point of the French codifiers was to exclude from the legal process what they saw as the arbitrary use of power by the elites of the *Ancien Règime*. Instead they proposed to establish a system by which the judges operated as sort of rational computers, applying a complete, stable, and seamless system of rules.[4] For some German philosophers of law, this was just what Germany needed. In fact, Anton Thibaut, a German professor of law at Heidelberg University, publicly proclaimed the need for such a code of law in Germany. But with the fall of Napoleon in 1815 and the rise of German nationalism and anti–French sentiment, reaction against his social and legal reforms set in. It thus turned out that Thibaut's essay "On the Necessity for a General Civil Code for Germany" rather than leading to the adoption of a Napoleonic–type code provoked the exact opposite reaction, and is generally credited with sparking the emergence of a romantic notion of law that came to be called the historical school, to which I shall return in a moment.

The logic of its argument was roughly as follows. One alternative to the Napoleonic code was, of course, to go back to the laws of the pre-Napoleonic period. While calls to do so may have attracted some sympathy from the conservative-minded established estates, this was clearly not a workable solution. First of all, the political landscape had changed dramatically, as we just noted. Second, as the pace of change in Europe quickened and belief in modern science and progress spread, European thinkers came more and more to see the classical period not as one to which a fallen humanity had to return, but one that modern people should overcome, transcend, and move beyond. Certainly the experience of both the

American Revolution and the French Revolution, in which the classical legal systems inherited by medieval Europe were destroyed to make way for new legal structures devised in the light of reason, encouraged the idea that law was a product of the human mind and that different ages produced legal cultures according to the level of their insight into the truths of nature and human society.[5] This conviction came to be reflected in a new historical critical approach to the Roman legal heritage, an approach that was sensitive to the cultural matrix out of which Roman law emerged. The harbinger of this view was a study by Christian F. Glueck entitled *Ausführliche Erläuterung der Pandecten nach Hellfeld*, the second edition of which was published in 1797.[6] Unlike earlier medieval studies, this was not a mere scholastic rearrangement or systematization of Roman law but an attempt to adduce the original meaning and intent of Roman law by paying attention to its cultural and linguistic background.

This view of law led directly to what came to be known as "positivism," which is generally traced back to Gustav Hugo and his *Lehrbuch des Naturrechts als einer Philosophie des positiven Rechts,* published a year later, in 1798. In this study, Hugo set out to prove that what had been claimed by legal scholars of the past to be part of, or derived from, natural law were in fact historically bounded legal enactments. That is, what Hugo adduced from the Roman case was that all legal enactments are "positive" in the sense that they are the results of human institutions that had the power to enact, or posit, laws. There was not a givenness to law to which individual pieces of legislation had to conform, but law is part of the historical development of a people. This notion of law was of course tremendously powerful, and empowering, in the climate of early–nineteenth–century Germany. It gave tremendous intellectual weight to the idea that the legal traditions of the various German states and principalities were legitimately open to change at the hands of a new generation of leaders. But there were two different interpretations as

to exactly what mandate this positive character of law gave to the current political leadership. It could be taken to mean that law could simply be made up anew on the basis of scientific reason, much as Napoleon's lawyers presumably had done. German law could thus be rethought and fashioned on the basis of modern science and rationality. One cannot help but think here of the position of some of the more radical religious reformers concerning the positive nature of Jewish law.

But there was a strong reaction against this, which brings me back to what has come to be called the historical school, the acknowledged intellectual light of which was Friederich Karl Savigny. In his 1814 pamphlet, penned in answer to Anton Thibaut, *Vom Berufe unserer Zeit für Gesetzgebung und Rechtswissenschaft*, von Savigny set forth the groundwork for a different view of law. Here he claimed that sudden and arbitrary legislative enactments by politically motivated legislative bodies could never produce true law for the people.[7] Rather, all authentic law had to conform with what he called the *Volkseele* (national soul), which is the source of inspiration of all national characteristics. In other words, law always in the end had to unfold along lines laid down and maintained by the inherent genius of the culture as it underwent historical development. Thus, while new German law could of course be posited willy-nilly, it would be authentic German law only if it grew out of a continuity with the historical law and traditions of the German people. What Savigny called for was a thorough examination of the legal heritage of Germany from Roman times forward as the intellectual basis for any future revision of basic German law. One cannot help but think here of Zacharias Frankel's call for historical positivism in Jewish law. In all events, Savigny went on to make his own contributions to this massive project, publishing studies of both medieval and present-day Roman law.[8] The historical study of the origin and development of folk law that he launched continued to occupy legal scholars in German universities for the greater part of the nineteenth century.

The civil code of law for the German Empire (the so-called *bürgerliches Gesetzbuch*), which was based on this historical study, finally went into effect only in1900.

The relevance of these nationalistic and philosophical deliberations in the university for the reform of German Jewry hardly needs spelling out. While the first generation of reformers saw reform largely in terms of ad hoc changes in the liturgy and relaxation of halakhic requirements in public, the university-trained rabbis who had taken over leadership by mid-century clearly saw the need for a thorough, systematic, and philosophically rigorous revision of the whole halakhic system. To be sure, there were a few early attempts to tinker with the halakhic system, attempts that included the publication of a number of early reform responsa justifying various specific halakhic reforms. But it soon became clear that not only would this approach not change the mind of anyone not already convinced, but it also missed the real question. The problem was not with this or that particular norm, practice, or *minhag*, but with the system as a whole. Change could not be incremental but would have to be systemic. The contemporary legal experience of Europe, I am arguing, served as an instructive model here. The French revolution was not able to bring France into the forefront of the modern world by tinkering with the statutes of the *Ancien Règime*. Rather, the entire medieval legal legacy had to be thrown out and a whole new system of law set forth. Germany itself was now undergoing this same process, albeit in slower motion. Reform Judaism now came to see itself in precisely the same situation. It should hardly come as a surprise, then, that the debates within the Reform Jewish synods of the 1840s should have echoed the disputes raging at exactly the same moment in the halls of the universities.

There is another aspect of all this that bears mentioning because there is a connection with religion here, as well. This period also saw the beginning of what has come to be called "High Biblical Criticism." This in turn was linked to a significant extent to the need

on the part of the German *Volk* to define itself. Northern Germans saw themselves as comprising a Christian, specifically Protestant, nation. In the task of state–building, they had to define themselves against their Catholic counterparts in France, Austria, and Poland, not to mention the Orthodox Christians in Russia. In other words, part of the search for the soul of Germany was the search to recover in its pure form the *religious* heritage that defined the nation or, more precisely, was one of the expressions of the *Volkseele*. One element of this effort took the form of a reexamination of the legal and moral teachings of the Bible. The interest here was threefold. First, Protestant theologians wanted to know what the Bible "really" was saying as opposed to what the Catholic Church was claiming it to be saying. Second, Protestant teachers wanted to uncover the principles behind biblical law so as to be able to sort out the enduring core of biblical morality which was the duty of all Christians to fulfill, from the historically determined legislation that God needed to enact in order to rule the recalcitrant Israelites. And third, of course, Protestants wanted to be able to show why Judaism, as a continuation of the biblical legal tradition, was at best only a continuation in the flesh and not a continuation in spirit. For all three interests, biblical law stood at the center of attention and so, German Judaism also found itself situated at the intersection of three highly charged intellectual concerns. Thus Judaism inevitably became a subject of academic reflection, directly or indirectly, in scholarly circles. The emerging university–trained Jewish leadership was not only trained in these disciplines but also found they had to react to them. To restate my thesis, Jewish intellectuals shaping Reform Judaism in the middle of the century were actually caught up in a much larger discourse about law.

At this point I would like to use one brief example to point out the interconnectedness between the development of German legal studies on the one hand and scientific or critical studies of biblical, and by implication Jewish, law on the other. I refer you back for a

moment to Karl von Savigny. Savigny, you will recall, argued that law was not the result of a transhistorical rationality but was rather embedded in the folk. It was to be seen as an expression of the deep genius of a culture, on a plane with other products of the creative imagination such as art and literature. "Law," says Savigny, "has its existence in the common consciousness of the people." W. M. L. de Wette (1780-1849) carried these convictions over to the study of biblical law. He set out, like Savigny, to show that even the so-called Mosaic law was not really a product of a great classical "Golden Age" but actually reflects a later historical stage in the political development of the Israelite people.[9] Basing his argument especially on the presumed lateness of Chronicles, and on the concurrent assumption of the relative priority of the books of Samuel and Kings, de Wette claimed to be able to isolate an early stage of Israel's legal and religious heritage in Samuel–Kings, and a later stage given expression in Chronicles.[10] On the basis of this and other data, he concluded that the Israelite religion became progressively more complex and developed over time such that the more sophisticated laws ascribed to Moses must in fact be quite late. Conversely, the older material such as that found in the Pentateuch is largely mythical, and so must go back to such an ancient time that it is impossible to derive any reliable conclusions from it.[11]

The point for our purposes is that for de Wette biblical law is no longer treated as divine revelation but as a human creation firmly embedded in the historical reality of its community, just as legal scholars were now claiming for Roman law. One could see a development in law — whether Roman or biblical — a development that reflects the ongoing religious, spiritual, and intellectual life of the folk from which it emerges. This was not taken to mean, at least among the theology faculty, that all law is equally good. De Wette makes sure to point out that, in his view, in fact the later articulations of Hebrew law fail again and again to reach the spiritual heights of the Mosaic legislation. But not all scholars of biblical law saw only

decline. A good example is Johann Karl Wilhelm Vatke. Vatke, apparently influenced by Hegel, argued that biblical law actually moved in the expected Hegelian fashion from primitive to more developed. That is, for him, Judaism is not seen as a falling away from a more developed type, as de Wette supposed, but as a stage in the growth of the biblical heritage to a more mature state. In posing matters in this way, Vatke provided a useful model for Jewish scholars. He saw the evolution of law as a rational and thoughtful process in reaction to the concrete, indeterminate history of the community. In particular, he situates the development in Israel's religious life in the context of the community's on–going struggle against Canaanite worship. But in all events, the evolution of ancient Jewish religion and law, then, can be portrayed as a progressive struggle on the part of the people to overcome the limitations of their environment in order to enact more perfectly their cultural and religious heritage.

It is in light of these developments that we can make sense of the debates going on within the reforming community of Jewish intellectuals. Consider for a moment the following comments by Abraham Geiger:

> Not everything that has been handed down to us from ages past stems from hoary antiquity or from the very beginning of time. Later periods have grafted many a twig onto the ancient trunk, and have added many a new link to the chain of tradition. Only a dull and simple mind can believe that things have always been as they are now ... The mind which lives on in the present sees the structure only as it is now, apparently complete and grown together not a homogeneous whole, and views it as composed entirely of essentials, so that anyone who would dare touch the sanctuary thereby violates it.[12]

There are, as it were, two subtexts to this paragraph. To Jewish ears, Geiger is clearly addressing the Orthodox, that is, those who claim that the current state of *halakhah* is a "homogeneous whole" that is "composed of essentials" and was given to Moses from "ages past" in "hoary antiquity." In short, he is paraphrasing the notion that the *halakhah* is a timeless and unchanging construct given

at Sinai. Using this view, any change must be a turn away from perfection and truth, a view that leads directly to Moses Sofer's dictum that *"Kol hadash asur min hatorah."* But to the ear of a German legal academic, Geiger's statement sounds like the restatement of current progressive academic presuppositions as regards the study of law in general. What Geiger has done is to position Jewish legal reform within the larger context of German legal philosophy, showing at the same time that the Reform movement was in line with the latest academic insights. The rewriting of *halakhah* was not just an internal squabble within Judaism but a movement to rearticulate Jewish law in step with the rearticulation of European law in the modern age.

Within this conceptualization, of course, emerges the debate as to the extent to which a legislative body is free to construct modern law. For those more oriented around positivism, the legislators, or synods, had pretty much a free hand to enact what changes they saw as necessary in light of reason and current needs. The historicist movement was meant to counter this by requiring that the historical voice of the *Volk* be given a hearing. That is, modern legislators have to be constrained by what Savigny called "the common consciousness of the people."

This stance should sound familiar to anyone who has read the debates in the Reform synods of the mid-nineteenth century. Let me just cite one example, this one from Zacharias Frankel from his "On Changes in Judaism" (1845):

> True Judaism demands religious activity, but the people is not altogether mere clay to be molded by the will of the theologians and scholars. In religious activities, as in those of ordinary life, it decides for itself. This right was conceded by Judaism to the people. At such times as an earlier religious ordinance was not accepted by the entire community of Israel, it was given up. Consequently, when a new ordinance was about to be enacted it was necessary to see whether it would find acceptance by the people. When the people allows certain practices to fall into disuse, then the practices cease to exist.[13]

What I hope I have made clear is that the shaping of the German Jewish attitude toward *halakhah* and changes in *halakhah* is deeply

embedded in German legal science of the nineteenth century. The leaders of German Jewish reform were not operating in a vacuum but were extending intellectual debates from their university training directly into their Jewish communities. A fuller understanding of the forming forces of German Reform a century and a half ago depends on our looking not only at the Jewish thinkers themselves but also at the intellectual culture in which they were formed.

Notes

1. Ismar Schorsch, "*The Emergence of the Modern Rabbinate*" in Werner Mosse, Arnold Paucker and Reinhard Rürup (eds.), *Revolution and Evolution: 1848 in German-Jewish History* (Tübingen: J.C.B.Mohr, Paul Siebeck, 1981), pp. 205-7.

2. *Ibid.*, p. 207.

3. *Ibid.*, p. 229.

4. J. M. Kelly, *A Short History of Western Legal Theory* (Oxford: Clarendon, 1994), p. 312.

5. See for example, Stig Strömholm's discussion in his *A Short History of Legal Thinking in the West* (Stockholm and Littleton, Conn: Norstedts, 1985), pp. 266f.

6. *Ibid.*, 208.

7. *Ibid.*, 266.

8. *Geschichte des römischen Rechts in Mittelalter,* 7 volumes, 1815-1831 and *System des heutigen römischen Rechts*, 8 volumes, 1840-1849. See Strömholm, *Short History.* p. 266.

9. My analysis here revolves primarily around de Wette's *Einleitung in das Alte Testament* (Halle,:1806-7).

10. George Christie (ed.), *Jurisprudence: Text and Readings in the Philosophy of Law* (St. Paul: West, 1973) pp. 605-6.

11. A major influence on de Wette's theory of religion as described here was J. F. Fries, a professor of de Wette's at Jena and subsequently a life–long friend.

12. *"Present–Day Judaism and Its Intellectual Trends"* in *Wissenschaftliche Zeitschrift für Jüdische Theologie*, cited in Max Weiner (ed.), *Abraham Geiger and Liberal Judaism: The Challenge of the Nineteenth Century* (Philadelphia: Jewish Publication Society, 1962), p. 266.

13. Cited from Paul Mendes and Jehuda Reinharz (eds.), *The Jew in the Modern World* , 2nd ed. (New York: Oxford University Press, 1995), p. 196.