Chapter 3

Race, Religion, and Identity: the (Theo-)Politics of Kantianism and the Predicament of German Jewish Liberalism

In the century since their first, limited experience of emancipation in 1812, many German Jews gained an increasing awareness of the strengths and weaknesses of appealing to civic rights and individual freedoms to seek recognition in German public institutions. On the one hand, these liberal ideals of freedom and equality, duty and obligation to the rational legal state (Rechtstaat) gave German Jews a sense of belonging to the German Fatherland and held up the image of the rights-bearing citizen as an ideal to strive toward. But on the other hand, as we saw in the previous chapter, the Jewish Question was also increasingly framed as a problem implicit in the developing discourse of liberalism and gave rise to an anxiety over the secularization of political and moral public discourse about values, norms, and social ideals in Wilhelmine Germany. The Jewish Question, as I argued, was both an epistemological and a political predicament.

Whether all “Germans” acknowledged Jews as belonging to a community and fraternity of national identity is less important, however, than the diversity in normative goals represented by the introduction of a liberal philosophical worldview in Imperial Germany as the means for articulating a still inchoate national identity. And because the Jews, like many of their compatriots, participated in a collective imagining of what a “civic” identity could be, their engagement with both the liberalism and idealism of the late nineteenth century gives voice to the significant influence of
this intellectual worldview on the broader social and cultural moment. Aligned with the centrist liberals or social democrats, Jewish social and political advocacy should therefore be contextualized according to the underlying form of reasoning marshaled in support of such struggles and, as we have seen, Hermann Cohen’s account in particular provides an explicit account of such reasoning. Cohen represents one prominent Jewish voice seeking to balance commitment to an identity indelibly shaped by the historical struggle for recognition of religious difference with a new legal and civic sense of agency. Like Cohen, the German Jewish struggle for civic rights therefore articulated a set of intersecting norms of religious and civic engagement and their disproportionate requirement to be explicitly self-reflexive in their newfound German civic identity in Imperial Germany (1871-1918) should be interpreted as a significant practice of public reasoning in which “religion” played an explicitly epistemological role.

Civic recognition, where religious difference and social equality were each placed upon the scales of public discourse and Bildung,1 represents the implicit design if not the goal of modern liberalism, the culmination of German Protestantism as narrated by Cohen and Heine.2 And insofar as the German Jews openly expressed their commitment to this dimension of liberalism, they also became proponents of the Protestant modernity from which it stemmed. This minority narrative of Protestantism consequently placed the absoluteness and exclusivity, the limits and extent of Protestantism as a cultural and religious worldview, into question. This articulation of liberalism and its implicit secularity—that is, allowing Jews to become minor Protestants—had many

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critics, as is well known from the ensuing debates of the Weimar period. However, we need to understand the philosophical dimensions of Wilhelmine liberalism if we are to understand how someone like Cohen could give voice to a German-Jewish cultural ethos in the face of such criticisms and therefore anticipate, if not avoid, the problems of Weimar-era German Jewry.

As I explore in this chapter, the problem of secular reasoning, or the alleged disenchantment of value, identity, and legitimacy that I began exploring in the previous chapter, formed the basis of the critique leveled against liberalism—whether social democratic or centrist—long before Carl Schmitt gave it greater conceptual clarity in the early 1920s, and this same critique implicated the Jews as proponents of such “neutralizations.” In view of this attack on the positivity of law and civil rights, therefore, neo-Kantian philosophy in general, and Cohen’s in particular, became a lightning rod for anti-liberal philosophies in the later years of the Kaiserreich and well into the newfound Weimar Republic. Thus, in order to examine some of these looming anti-liberal arguments, I turn to the debate over the legacy of liberalism’s epistemology, best encapsulated in the thought of its most systematic proponent, Immanuel Kant. As the father of enlightenment subjectivity, the distinction between law and morality, and the modern ethos of critique, Kant’s philosophical importance to the liberal tradition is unquestioned, even today. But by examining the place of a Jew, such as Cohen, in the philosophical and cultural landscape of arguments over Kant’s legacy, we begin to see the degree to which idealism shifts the epistemological lever of a liberal vision of public reasoning, which, as Cohen shows might not necessarily result in a secularist separation of legality and comprehensive or religious morality at all. Rather, as I suggest, the idealist argument put forward by Cohen sought to retain a robust
morality of law while seeking to address other insidious conflations of civic identity with questions of race, theology, and identity in Imperial Germany.

In his own engagement with Kantianism, Cohen’s epistemological secularity outlines the possibilities for liberal religion, between the poles of what I broadly describe as a political theology and a politically liberal secularism. Negotiating a space between the political definition of partisan goods as exclusive norms of a majority tradition on the one hand, and the social formation in which religious groups are forced to appear as ghosts of themselves, masking the potential compatibility of a liberal and religious civil society on the other, Cohen’s neo-Kantian idealism therefore presents an alternative pathway for religious minority and difference by describing an implicit morality of law or what I refer to as public reasoning. Beyond politically irreconcilable difference, Cohen imagines a theory of consensus that navigates majority and minority at the level of sociality, or what he refers to as a theory of “ethical socialism.”

In this chapter, therefore, I argue that Cohen’s reformulation of Kantian practical philosophy—primarily his realignment of law and morality as a space of sociality—elaborates a self-reflexive public reasoning capable of articulating a modern civic and religious identity free from the essentializing and racializing prejudice of his critics. For Cohen, concepts must be justified according to their inner structure and generate moral content in such a justificatory process. Consequently, the stakes of Kantian philosophy center upon how conceptual clarity is emphatically ethical concern. Thus, in what follows I present Cohen’s ethics of law as the means for idealizing otherness and for negotiating between the neutralization of religious norms, as

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represented by strands of liberal thought on the one hand, as well as the mythologization of religious norms as absolutes, as represented by political theology on the other; a concern that will be more fully unpacked in the following chapter.

**Religion and Public Law**

One of the more vexed public debates surrounding Wilhelmine liberalism, as I have been exploring, was that surrounding the Jewish Question as a particular site of secular tensions. But Jews were not idle observers of the broader intellectual transformations of the German public sphere. Jewish social life was undergoing similarly dramatic reorganization. However, despite recognizing individual Jews as citizens, German law in the Kaiserreich did not recognize Judaism as a distinct “religion” benefitting either from state-appointed and compensated clergy or established spaces of worship. Rather, in Germany’s confessional order Catholicism and Protestantism were recognized as established religions, while Judaism was primarily considered a public association able to administer taxes. Judaism lacked a politically established structure as a “confession.” This tense atmosphere of bourgeois rights within a rapidly socializing state presented an opportunity to create new possibilities of collective identity, as a nation or a people, a religious community or a trade-union, and was one perception of how many Jews first publicly participated in debates in the German political landscape. Considered from the perspective of political society, the ideal of constitutional guarantees for individual and group-rights represents an interesting confluence of socialist and bourgeois rallying points in this period.

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4 On the lack of equal recognition of Jewish religion with the Christian confessions, see Lamberti “The Jewish Struggle for Legal Equality of Religions in Imperial Germany,” Leo Baeck Institute Year Book 23 (1978): 101-116. Established churches represented politically thick sources of value for determining political goods in Wilhelmine Germany. Consider the example of intra-Catholic tensions around 1900, when German Catholics also participated in popular organizations and associations, albeit as dissident manifestations of an established Church. See Nipperdey, “Religion und Gesellschaft,” 594

5 Lamberti, “The Jewish Struggle for Legal Equality,” 102; idem., Jewish Activism in Imperial Germany.

6 In contrast to the anti-socialist laws, Bismarck had conceded to a number of policies securing worker’s benefits, a 10hour workday and other social welfare laws.
Judaism differed dramatically, however, from other popular associations, lodges, or charitable associations formed under the aegis of the Catholic or Protestant Churches. Yet this public presence as an association helped German Jews negotiate the intersection of civic and religious identities without experiencing a compromise between them. With a guaranteed right to citizenship independent of “religious” affiliation, where religion primarily meant “Christianity,” German Jews therefore saw the private freedom of conscience granted them in Imperial Germany as the basis upon which to identify as true citizens of the Fatherland—citizens who did not need a common religion in order to find commonality with the ideal of the German nation.

Jewish organizations such as the largest, non-denominational, Centralverein deutscher Staatsbürger jüdischen Glaubens (Central Organization of German Citizens of the Jewish Faith, or C.V.) therefore emphasized the constitutional definition of citizenship and affirmed the right to an equal treatment under the law as part of their advocacy against antisemitic attacks and public defamations. To secure the freedom and guarantee of continued participation in the public sphere, many Jews in the Centralverein (C.V.) championed the nineteenth-century German Rechtsstaat as a social end in itself. Rather than mirror the social-democratic appeals for greater socialization of the state, the C.V. focused its advocacy around the minimal guarantee of rights secured by public law, undertaking legal advocacy in some instances for Jews as a “class” rather than as a “race” or even a religious organization. By protecting the rights that establish individual

7 While Jews certainly presented themselves as a “confession,” the legal realities were much more complex and have often been overlooked by historians. Cf. Weir, Religion and Secularism in Nineteenth-Century Germany, where “confessionalism” describes the religious plurality of the German public sphere; the secession controversy ignited within organized Judaism a shift from merely communal association toward something much more akin to the Protestant conception of religion, as a faith-based private experience. See Breuer’s references to R. Samson Raphael Hirsch’s political realism as an example, Ibld., 296-7. Cf. Leora Batnitzky, How Judaism Became a Religion, (Princeton, NJ: Princeton University Press, 2013), 42.


9 Reflecting upon the Weimar constitution’s recognition of freedom of association and religious distinctions, see Erich Eyck, “Die Stellung der Rechtspflege zu Juden und Judentum,” in Deutsches Judentum und Rechtskrisis, 31-66; 41. By contrast, Barkai notes the increasingly religious self-representation the C.V. inspired during the Weimar period. See idem. Wehr Dich!
citizens as “Germans,” a particularly private faith could remain unthreatening to the civic consciousness of Germanness afforded by legal rights. Belief in the law meant a belief in Germanness. Being Jewish was not contradictory to such a belief because being German meant believing in the legal recognition of citizenship as a path to such Germanness.

But the Christian confessional structure meant that many conservative Germans saw the separation of citizenship and religion as a symptom of a more sinister attempt to neutralize and secularize civic identity. While the C.V. understood Germans to be defined by law and not by religious affiliation or of any other historical interest, the legal and civic definitions of citizenship were often cited amidst the growing anxiety over national identity in which even the academic elite began questioning whether such citizenship represented a neutralization of the historical identity of Germany and its Protestant heritage.

It was this separation of citizenship from religion that the antisemitic political movement saw as the crux of modern Judaism’s “irreligious” power. Thus, as the foremost German-Jewish public intellectual, Cohen set himself the task of publicly accounting for the relationship between Judaism as a public religion and the confessional structure of Germany, if not to provide a justification of conservative critiques of liberalism and Jewish civic emancipation, then to demonstrate the degree to which religion and public law must be seen as epistemologically interwoven sites of value-formation and historical identity.

In a public address in Berlin, responding to the question of “what unites the confessions,” Cohen observed how foreign such a designation is for Judaism, since,

by “confession” German state law only understands the two main church bodies, which are united under the name of Christianity. Judaism, however, is in this official sense not a confession at all but its own religion.\(^{11}\)

Cohen invokes “religion” in the sense of a lived religious tradition, with ritual practices and communal obligations; Judaism is therefore not subsumable under the rubric of Christian religion as a confession. It is different. But this exclusion of Judaism from the designation of an official “confession” in Prussian state law presents an opportunity for Cohen. This legal classification reveals the process of historicization implicit in the law, whereby the state “fulfills the concentration of cultural consciousness,” a more general spiritual conception of norms and values, by providing “religious communities with not merely political security, but also freedom of conscience.”\(^{12}\) By protecting conscience in addition to confession, Cohen sees the beginning of a legal recognition that prior to the specificity of religious norms, the conceptual structure of law and judgment secures the objective possibility of reconciling different religions under a single public culture. In other words, law represents the sociality of reasoning as the dialectical origin of the state, rather than the will of the political sovereign, whose own religious denomination once reigned supreme as a norm for civic identity (\textit{cuius regio, eius religio}). Law becomes a site of public reasoning through which the formation of the citizen occurs. Thus he writes,

Let us consider, however, that the state never stands alone, although it is the focus of all cultural aspirations; rather, let us consider that to its side stands equally as drover, assistant, consoler: society. While the state assumes the fiction of inertia, since it embodies the law, which must always vouch for the prevailing condition, society on the other hand, concerns the principle of development, hence the self-dissolution of persisting rigidity in the state. From the concepts of society arise not only socialism, but all social reform policy as well, to develop civil law, to redeem the principle of property of its rigidity, and seek to agree with the principles of ethics. Thus it can seem as though the principle of society would be preferably the concern of ethics, and yet, even the state cannot be uprooted from the concern of ethics. So that this uprooting will not be actual, the principle of society, which therefore opposes that of the state, does not concern itself with defeating the latter, but rather to always continue to free it of the necessary fiction of rigidity in order to preserve its truthful vitality.

\(^{11}\) Cohen, “Was einigt die Konfessionen?,” 455.

\(^{12}\) Cohen, “Was einigt die Konfessionen?,” 456.
and incessant rejuvenation. This relation consists in politics, [transpiring] between society and state. Should it not also exist for religion? Thus it is now extremely surprising how society seems almost entirely to fail with respect to its political realization of the principle of the freedom of conscience. And yet society is here more than anything else not a latent potency, but the allegedly dominant power of public opinion. About which questions might the public sphere be called upon to judge, if not about the care of freedom of conscience, this most important bulwark of public morality?¹³

Society (Gesellschaft) stands in contrast to the state as the background against which the Rechtsstaat achieves its articulation of public norms. Society shows the state in its dynamism. Society’s fluidity rejuvenates the state’s rigidity. But politics remains a vehicle not unlike religion, as the passage between a narrow, if yet an abyssal strait separating society and state. This is why spiritual culture must begin with the sociality of law, in Cohen’s account.¹⁴ The sociality of law is a dynamic power of reasoning prior to the political because the idealization of difference is prior to the judgments of conflict and political partisanship. But society, as the space of public opinion and public reasoning, must be called upon as the site of ethical critique and ethical labour, where the law can be reshaped. Hence, the “freedom of conscience” and “religion” ought to be seen as another passage between society and state, capable of rejuvenating the rigidity of state law. Confession or religion must not be hypostatized as an attribute of the rigid state structure. So too, the “right to religion” must not encode difference as merely private affair of belief and conscience, isolating that set of reasons, beliefs, and practices away from public scrutiny. Rather, the “freedom of conscience” fundamental to the liberal constitutional regime, Cohen believes, must not limit religion in terms of private conscience. This obscures the socio-ethical potential of “religion” in the modern Rechtsstaat: a spirit of culture between state and society. If society confines the “right of religion” to private conscience then it fails to capitalize on this ethical differentiation of legal and

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¹³ Cohen, “Was einigt die Konfessionen? (1917)” 461-2
¹⁴ See Chapter 2
social belonging and integrate religion into the public reasoning that rejuvenates the state with a practice of critical justification and, if need be, revision of law from the vantage point of social rather than strictly “political” goods. Conscience and religion ought to secure a right to public reasoning.

Cohen’s articulation of the sociality of law and the recognition of religion in public also represents a normative response to the social transformations of his time. For example, in the continued debates over the secession controversy, in which German-Jewish orthodoxy successfully lobbied to secede from the mandatory taxation and belonging in the larger Jewish community, Samson Raphael Hirsch argued that the constitutionally defined freedom of conscience required the government to treat Judaism as a religion with its own confessions and denominations, a concern of private conscience. This was not due to a belief that Judaism was indeed a religion subject to such parsing out, but rather, as Mordechai Breuer notes, because “[t]he state, in fact, force[d] him into this position. He could win the ear of a Prussian deputy for the law of secession...only by using terms current among politicians and civil servants trained in the laws of church and state, and by applying such terms to the religious and political situation in the Jewish communities.”\(^{15}\) Compulsory membership in the Jewish community, Hirsch argued, was to require membership in “political” rather than “religious” entities, and “because this is the chief argument in favor of Jewish political and civil equality, one would expect that [the law of secession] would have been welcomed by all Jews, be they Orthodox or Reformist.”\(^{16}\) In other words, Hirsch cited the political classification of Judaism as a separate civil caste as justification to convert Jewish


“religion” into a denominational or confessional model. For Hirsch, the “freedom of conscience” was precisely the keyword that would convince Prussian civil servants of his political plea.

Cohen objected to this maneuvering of regnant political definitions of religion—not the term “religion.” Turning the basis of Hirsch’s argument on its head, Cohen claims that such an account of the freedom of conscience is willfully misunderstood as a right to privacy, such that when dealing with Jewish religion, a Jew invoking the freedom of conscience presents himself or herself as something other than a member of a social group. This, he writes,

is an apparent deception with which I accordingly activate opposition to the continuation of the Jewish religion by withdrawing from the community. And this opposition is said to be an act of freedom, freedom of conscience, conviction to loyalty. With such arguments one gives oneself an escape from the difficulties that arise for the individual in all matters of state-oriented, social, and historical existence, as compared with those of collective existence, out of which the individual itself commences, and in which alone it can assert itself. With his subjective freedom, the individual believes himself to possess a right, and is reliant on its assistance.17

By claiming this “private” right of conscience as prior to the communal and social order of norms, including the public status of a religious community such as the Jewish community, Cohen claims that secessionist Orthodoxy misunderstands the sociality of law in which the “I” of the individual originates. Indeed, as Cohen argued in his Ethik des reinen Willens, since consciousness is always a consciousness-of, and insofar as “two subjects belong to action, as we have seen in the legal action [Rechtshandlung],” to claim a right to “freedom of conscience” as prior to the recognition of a “self” on the part of a plurality of selves misunderstands what it means to be an “I” in the first place. In order to better understand Cohen’s critique of this account of a freedom of conscience, it may be helpful to understand first his account of self-consciousness.

In Cohen’s systematic philosophy, consciousness is complexly defined. The term cannot mean “consciousness of self,” or some kind of isolated enclosure of selfhood as a prior given.

Rather, “self-consciousness is in the first place conditioned by consciousness of the other. This union of the other with the one first generates self-consciousness as the self-consciousness of the pure will.”\textsuperscript{18} Consciousness is plural. There is always more than one. As Cohen claims, “there is no individual in the ethical sense without legal community (\textit{Rechtsgemeinschaft}).”\textsuperscript{19} Self-consciousness is therefore a product of plurality, of the legal community of practical willing that is always prior to my individuated consciousness. But self-consciousness is not simply an abstract principle of cognition of theoretical reason; rather, Cohen sees it as something practical, manifesting in the objective actions, and must be \textit{willed} into action.\textsuperscript{20} Consciousness therefore takes the objectively recognizable norm, the “self,” where the “self” is a task, or a goal claimed by the existence of actions outside myself.\textsuperscript{21} These actions accrue as legal norms, actions required by law, which configure the “I” not first of all as a self, but as an Other, as someone foreign to the law who must make the goal of \textit{willing} a self in accordance with the law. The law, as Cohen writes, is thus my origin:

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[...]he law is to be recognized as the groundlaying, which is laid in self-consciousness. The task of self-consciousness is indeed but a hypothesis of self-consciousness. And as the task, it signifies nothing other than the call to the self. Thus, the task of self-consciousness becomes the law of self-consciousness, because it is the groundlaying of self-consciousness. No external task can be the issue; it is rather the innermost development of the basic idea of the hypothesis, which is carried out in the requirement of the law. And it is simultaneously the clearest and most natural diversion from all egoistic, transitory, changeableness of the isolated individual, which is pursued and carried out by the law. How I my self am not given in the “I”, that originates to me already in the first impulse of the will, only by being performed in the action, I recognize self-consciousness as a law as I have recognized it in the state.

The concept of law ... must be the guiding star of my self-consciousness. Only thus can I be free from the suspicion that with all my will and acting I would still remain imprisoned in kind of metabolic circle, that I would remain only a purely isolated individual. For the law here means precisely the separate, the only law [\textit{das einzelne Gesetz}], and yet it is able to irrefutably substitute the concept of law. This goes beyond the authority of a natural law, which rules out pathological
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\textsuperscript{18} \textit{ErW}, 213
\textsuperscript{19} \textit{ErW}, 225
\textsuperscript{20} \textit{ErW}, 203
\textsuperscript{21} I will return to this sociality of the moral law below.
exceptions. Here, however, should the separate, the individual law, in all its wickedness nonetheless be a symbol of eternal and true law. So one can see from this that the concept of law, as the separate, the individual law, is necessary and irreplaceable for the pure will and self-consciousness.  

The law is the origin of my own enactment of the “I” because the law represents the objectivity of the pure will united with its subject, the willing agent of law.  

It is only in action that “I” recognize my self as acting in accordance with the law. The law calls “me” to act in accordance with a normative action, in accordance with the “hypothesis” that this “I” could be my own. This “I” becomes a task for me to achieve as a ground with which I wish to underlay my actions with that claim that they are “moral.” Hence, the legality of ethics is the grounding of self-consciousness. I become conscious of myself as a normative “I” of ethical actions. I am therefore never alone, never isolated, because my action originates with the task of becoming self-conscious. I must bring myself out of mythic awareness of my individuality and recognize myself in legal community. This is why Cohen turns to the idea of the state since the law as I recognize it in state-law provides a location upon which to act, a site of iteration as Judith Butler might describe a similar kind of performativity, whereby for Cohen I recognize that belonging to the state means belonging first to the structure of law.

Only by performing, only by generating [erzeugen] the self in action can I witness [bezeugen] my self. If this “self-legislation” is not predicated of a self-sufficient I, then it is always the law that is prior, and within the law an implicit Other within me, who always accompanies my “I” as a legal concept relative to other “I”s that are generated in action.  

No longer a principle of the self-conscious I, but the principle of law itself, “[a]utonomy itself is concerned with the origin of the

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22 ErW, 252


24 Zank, ibid., 293-302
law. The law is what makes action action; not the person, not the I." By becoming the law, autonomy now means the objectification of the objects of ethical cognition prior to the subject being produced. Self-consciousness is achieved only through my actions; my moral action based on law. Law therefore becomes an ideal normative order that produces the subject who is first objectivized by the law itself. In other words, “self-consciousness” does not produce its own law, but is itself generated from “a seemingly foreign one.”

Judith Butler’s theory of performativity provides a helpful analogue here. Like Cohen, Butler insists that the performativity of the “I” of subjectivity is a product of subjectivization or the kind of *asubjettissement* that Lacan describes in the imago and then subsequently in the law of the father. For Butler, the matrix of possibility for this “I” is traced by discursive power, or the normative possibilities that are pre-assigned to the “I.” I can “be” a man, “I” can be a woman. I can perform the subject position that sits askew with a “normative” performance and thereby subvert the presumption of an ontology to that I. For Lacan, this means that the “I” associated with my own self-representation is already attached to an agent position in language before I inhabit that self. Hence, for Butler subversion becomes a possibility inscribed into the structural fabric of the “I,” since my “I” must be performed and in each and every performance that (re)iterates this “I,” it does so with new attributes. “I” am young; “I” am dying. Each attribute modifies the specificity of

26 *ErW*, 266.
28 Butler writes, concerning the gendered “I”: “This suggests that “sexed positions” are not localities but, rather, citational practices instituted within a juridical domain—a domain of constitutive constraints. The embodying of sex would be a kind of “citing” of the law, but neither sex nor the law can be said to preexist their various embodyings and citings. Where the law appears to predate its citation, that is where a given citation has become established as “the law.” And further on, “Insofar as any position is secured through differentiation, none of these positions would exist in simple opposition to normative heterosexuality. On the contrary, they would refigure, redistribute, and resignify the constituents of that symbolic and, in this sense, constitute a subversive rearticulation of that symbolic.” Butler, *Bodies That Matter*, 108; 109
the pre-assigned agent and performs the subversive shifting in discursive meaning. Through performance, the “law” of the “I” adopts new representational baggage, connotation.

Similarly, Cohen proposes a self that is mandated by law, which I must inhabit. And like Butler, Cohen also insists that the “I” that is performed conditions the kind of ethical self that I aim to be; that I ought to be. Unlike natural law, the law underlying consciousness and the state, the origin of the I in the law, is not a set of norms. It is not a doctrine or a statute-based collection of rules. Rather, law signifies the unique, the only law. The concept of law is a law for self-consciousness and not the conscious production of any one law of the state. Law is therefore a generative concept. It generates my I because the law legislates that “I” ought to be and “what” I ought to be: I ought to be a moral self, a self that dutifully strives for humanity “in my person.” Cohen therefore redefines the meaning of moral autonomy as legislation of the moral self. This is the separate and unique character of “law.”

Returning to Cohen’s critique of Hirsch, therefore, we see that Cohen is working with a socially constituted understanding of the self and that legal rights are always predicated of this sociality. If the very origin of legal rights commences in the objectivity of the law which is always a community of legal persons before it is claimed as an individual right, then secessionist Orthodoxy’s use of “private conscience” to invoke a religious right akin to confessionalism is a political maneuver that claims a private right over and against the particularity of the Jewish community understood as a social sphere. Hirsch effectively privatizes Jewish conscience and makes Judaism irrelevant in the public sphere. Cohen’s critique is thus primarily philosophical in that it insists a private individual is only something recognizable to a community. But it is also a social critique in that withdrawal from the community is a political action that has less to do with
“religious belief” than with partisan and secular politics. Despite Hirsch’s claim to sustain “religion” by appeal to a political classification of conscience as prior to sociality, Cohen objects precisely to the introduction of a “privatized” conception of religion.

Cohen believed that the legal recognition of conscience enables a different potential for religion in the modern legal state, which we might describe as the birth of modern public religion. The freedom of conscience is not simply a right to religion, but represents the separation of religion from the requirements of citizenship. It is a freedom from state religion. Religion therefore becomes part of public culture but not a condition of legal rights. Thus, in his commemoration of the centenary of Jewish emancipation in Prussia, Cohen describes the public recognition of Jews as worthy of citizenship as the concomitant recognition of this new meaning of religion, insofar as

a great principle of momentous significance for all questions of culture is established in this recognition of our religion within public law. The concept of the modern state, which consists in and is placed in the ethically unique law of the state is confirmed and made certain by this expansion of religious horizons. The religion of the one unique God, the ur-religion of Monotheism, is therefore recognized as equal to the confession of Christianity under public law. The possible development of the concept [of the state] into the Protestant state-concept [i.e., a “Christian” state] is thereby uprooted. The state and the Jewish religion now become proportionate branches of a legal relation.

The legal relation Judaism now stands in regard to the state is not an equal relation. Cohen knows this. Rather the state remains a legal output, while the Jewish religion is placed within the triangulated relationship with Christian religion as a source of moral input for the law. Although the relation is not an equal one, it is nevertheless a dynamic one, because Monotheism becomes a term that secures a step beyond confessional distinction. In becoming a “publicly recognized religion,” Cohen is not advocating Judaism as a “political religion” but that legal recognition places

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29 Consider the Prussian Constitution of 1850 Article 12 on freedom of conscience and citizenship not being dependent upon religion and article 14 stating that the Christian religion is the basis of all religious institutions. See Lamberti, “The Jewish Struggle for the Legal Equality of Religion in Imperial Germany,” 102.

30 Compare with Cohen’s comments in “Der Religionswechsel in der neuen Ära des Antisemitismus,” JS II: 342-345.

31 Cohen, “Emanzipation,” 221.
Judaism and the state in a relation of legal idealization. If religion is a legal right and conscience can reframed as the right to help critique and rejuvenate the rigidity of state law with the resources of religion, then it is the sociality of law that enables this relation. Hence, the modern state, according to Cohen, can be understood as instituting a legal secularity, if we understand the freedom to offer religious reasoning in the public sphere as a kind of social practice, but this does not, however, require the secularization of Judaism to do so. This is why Cohen relies upon monotheism as the cultural thread of society. And because the religious confessions of Christianity recognized by state law are now juxtaposed with the term “religion” as something explicitly social and not simply an internal distinction between Christian groupings, the concept of the one, unique God, becomes a borderline concept between a plurality of “religions” in the state.

If God becomes a legal norm then the state is no longer the “Christian” State, but a state united under the idea of God. Law, as the purest idealization of culture, becomes the normative form in which the content of Protestant and Jewish cultural concepts can be debated, justified, judged, and acted upon, in order to bring about a more just state, a state in which legal norms help consolidate the history of our reasons and of our norms. This designation of religion as dynamically shaped by the social sphere, rather than an explicit political right, therefore reshapes the meaning of the right of conscience. Conscience now becomes a public concept and vehicle for the performance of social citizenship compatible with, yet irreducible to, membership in a public religion.

Yet Cohen knew that Germanism (Deutschtum) remained indelibly Protestant; its institutions were only nominally free of the influence of dogmatism and pleas for dialogue between Christian confessions were often met with ridicule and accusation while the authoritarian
state of Kaiser Wilhelm II discriminated against the Jews in both civic and military office. To therefore pretend that the freedom of conscience secured complete equality is naïve to say the least. Cohen knew this and was critical of just this illusory claim to legal protection. Rather, the significance of this legal right was that the public good it secured, and that had been laboriously outfitted to suit Protestant and Catholic “confessions,” might be reshaped as a way for Jews to be Jewish Germans. The right of religion and conscience articulated a right to religious reasoning, in Cohen’s view. And in the hands of a minority, such an abstract principle of private equality before the law vis-à-vis the more expressly public confessional structure, presented an opening for Jews to participate in public reasoning and the social rejuvenation of state law.

Cohen’s turn to law as the idealization of “individuals” and “citizens” therefore represented a rigorous attempt to develop a theory of civic recognition and belonging. As Cohen understood the problem, citizenship and national belonging first required a critique of any metaphysical presuppositions undergirding a would-be theory of cultural values, knowledge, or social normativity. This is because the social rejuvenation of state law must take place as both a conceptual and an ethical labour of critique. Thus, the various philosophical and scientific worldviews I discussed in the previous chapters, including pantheism, materialism, social Darwinism, myth, Volk, blood, etc., presented epistemological foils for Cohen’s account of law and civic identity. As worldviews that challenged the presumption of received moral and cultural norms of knowledge, they also failed to acknowledge the work that religious norms do in the public culture of the state. Hence, religious minority fared even worse to the extent that religion was increasingly relegated to the background of intellectual and scientific discourse. According to Cohen, however, such worldviews were unjustifiable because they relied upon flimsy reasoning
including assertions of intuition, metaphysics, and myth. If public law was to secure the rights worked out in social critique, therefore, a more compelling model of objective-practical norms would be required.

For Cohen a public ethic could be developed according to the model of a critique of knowledge (Erkenntniskritik). As I suggested in the previous chapter, Cohen’s idealist philosophy was the root of both a theoretical critique of science as well as a social-practical critique of politics. And we can now better understand his idealism as consistent with the vision of Jewish civic equality he shared with Jewish communal leaders of his time. For example, Eugen Fuchs, the co-founder of the Centralverein with whom Cohen co-edited the Neue jüdischen Monatshefte from 1916, shared Cohen’s commitment to philosophical idealism as a blueprint for advocating a harmonization of German and Jewish culture, which many have since ridiculed as naïve optimism. But Fuchs, along with many other leaders of the C.V., saw in Cohen’s systematic philosophy and its advocacy of neo-Kantian idealism a normative articulation of culture. But what these leading German Jewish intellectuals may have failed to see was that Cohen’s engagement with Kant was also a critical revision of the liberalism that many in the C.V. championed wholesale.

We can find beneath Cohen’s account of religion in public law, the legal form and moral content of the Kantian categorical imperative—a demand to respect the ideal of humanity within the very conception of an ethical self—as the philosophical basis for transforming the constitutional


definition of civic rights and national identity into a definition of “ethical self-consciousness.” The ethical self-consciousness that emerged from that legal “I” was no longer the natural person who would claim to be isolated as a self-consciousness being.\textsuperscript{34} Cohen therefore saw in the Kantian idea of humanity a way to correlate the plural definition of “self” with “other” under law and a norm for ordering a collectivity. Hence, Cohen employed the juridical fiction of the legal person as a quantitative, plural category. The person is therefore not presupposed as a natural self, nor even as having an ontology or substance that is not itself posited by the judgment of a plurality—the law—as giving the self “rights.” Cohen’s explicit acknowledgement of the citizen-subject as a legal fiction precludes native proximity to others from serving as the foundation of culture, society, and even nation.\textsuperscript{35} These are rather normative assertions resulting from a social endeavor of reasoning. This legal articulation of moral psychology allowed Cohen to model a civic identity for the Jews to articulate their German belonging as a matter of both public law and moral culture. Like Fuchs, Cohen insisted that this legal advocacy on behalf of the German Jews was not an attempt to establish their legal rights as a return to medieval “Schutzjuden” or “protected Jews,” but as German citizens.\textsuperscript{36}

But the perceived separation of civic and religious identity predicated of such a “pure” or a priori construction of legal personality struck many conservatives as the neutralization of German identity; and further evidence of Jewish secularization and liberalism. That Jews such as Cohen, Fuchs, and the German Jewish community continued to emphasize the constitutional definition of

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\textsuperscript{34} Ibid., 226.

\textsuperscript{35} Hermann Cohen, \textit{Ethik des reinen Willens}, (Berlin: Bruno Cassirer, 1904), 225-8 (1st ed.)

citizenship, it appeared as though they were also purporting a new regime of self-serving positive law as a more legitimate source of authority than historical norms of Christian or Teutonic communal identity. Cohen’s philosophy, however, presented the most sophisticated case for how law and morality, civic identity and religious belonging could be not only compatible sources of public culture, but that epistemologically they were always already intertwined. Indeed, Cohen revised the Kantian principles that he believed otherwise arrived at just such a problematic positivism and neutralization of civic normativity.

**The Kantian Formations of the Secular**

As we have seen in the previous chapters, Wilhelmine philosophy and natural science were deeply interwoven with the public discourse of the day, and amidst such social and political tensions were styled as measuring rods for assessing arguments about moral and political values for the public sphere. Because the Kantian ideals of publicity and critique were the epistemological roots that shaped the German public sphere,^37^ debates over its epistemic formations inevitably returned to the stakes of Kant’s legacy for German identity. Consequently, the emphatically professional academic professoriate dominated by neo-Kantianism played a crucial role in the shaping of public opinion.^38^ Indeed, the younger generation of Weimar thinkers who followed in their footsteps often disparaged the values and crises of Wilhelmine Germany as identical with those of the neo-Kantians.^39^

Yet there were significant political differences between various schools and individual neo-Kantians, and although the shared questions of the day concerning methodology and the

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relationship between natural and cultural sciences shaped the backbone of public debate, more than Kant’s philosophy was at stake: Marburg neo-Kantianism in particular represented a significant moment in the history of the German academy, in which Jews would achieve heretofore unknown success such as that of Hermann Cohen and Ernst Cassirer. Together with the many Jewish students and colleagues drawn to Marburg neo-Kantianism (including Nehemia Anton Nobel, Boris Pasternak, Kurt Eisner, Eduard Bernstein, Viktor Adler), a demographic shift in philosophy had occurred. But at base, the social question of who was a German citizen—a question of what and how belonging is constituted—was reflected in philosophical debates over who was permitted to interpret and how their interpretations affected the “nation of Kant.”

The return to Kant of the late nineteenth century was a result of philosophy’s crisis, in which the rescinded dominance of Hegelian idealism at mid-century left metaphysics and idealism in precarious positions, and philosophy now vied to keep pace with the growing strength of empirical methods and evidence in the natural sciences and history. Neo-Kantianism therefore emerged as a philosophical avenue of reaction, as we saw in chapter 2. Following the lead of Friedrich Albert Lange, whom Cohen succeeded as the chair of philosophy at Marburg, the idealist tone of Marburg neo-Kantianism was framed as a critique of “vulgar materialism.” That is to say, while Cohen and his school would describe themselves as idealist, this philosophical movement to secure ideas by wrenching them away from both metaphysical speculation and their reduction to the physiological nevertheless placed the greatest emphasis upon of scientific knowledge as the model of conceptual clarity and justification.40 With Cohen, a Jew, as the head of the Marburg school, however, this emphasis upon the ideal standpoint and the methodological paradigm of

science became the subject of methodological and political dispute.

Cohen’s success as an unbaptized Jew in the face of academic and popular antisemitism made explicit what had already been a longstanding Jewish veneration of Kantian philosophy, valued especially for promoting a Bildung or cultural formation that was accessible equally to all. But just as the Jews faced discrimination over their citizenship and belonging, Cohen faced similar challenges in the realm of Kant-interpretation. Indeed, it was the contested legacy of Kant that figured into the 1881 public condemnation of the liberal Jewish intelligentsia by the historian Heinrich von Treitschke, who mockingly invoked the image of the “nation of Kant”—a nation of enlightenment and moral education (Bildung)—as the shibboleth against any proper Jewish integration. As an indictment that forced Cohen’s hand to publicly defend the legitimate right of all Germans to invoke this legacy, whether Jewish or Christian, Treitschke’s attack also drew attention to a substantive philosophical problem: was Kantian idealism inherently normed by a genealogical link to a particular German stock of values of thinking, restricted to certain members of a historically constituted critical acumen—namely, real “Germans”? How might a Kantian define a German?

Such a philosophical question could easily be translated by neo-Kantians: the question at stake was whether Kant’s idealism was rooted in some kind of sensible “intuition” of natural stock

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41 Even orthodox Jews saw Kant’s legacy as a paramount citation in reflecting upon their civic identity. See Der Israelit: Ein Centralorgan für das orthodoxe Judentum, “Der Zeit” 1860, I 15.5


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or historical-tribal connection, or whether the neo-Kantian vision of pure idealism as a critique of reason, a “critique of culture” according to “a priori” principles independent of either nature or empirical perceptions, was a form of objective knowledge open to all.\footnote{Sebastian Luft, *The Space of Culture: Towards a Neo-Kantian Philosophy of Culture (Cohen, Natorp, and Cassirer)*, (New York: Oxford University Press, 2015), 3, quoting Ernst Cassirer’s *The Philosophy of Symbolic Forms*.} Should citizenship be defined in “vulgar materialist” terms or in “ideal” ones? Philosophically, this question stemmed from a longstanding debate in Kant’s reception history over the relationship between the seemingly dual spheres of knowledge, namely, sensibility and understanding, intuition and concept, with which interpreters had struggled to reconcile their interpretations of Kant’s critical philosophy since the publication of the first edition of the *Critique of Pure Reason* in 1781.\footnote{On this reception history and the search for variously dualistic and monistic solutions to Kant’s epistemological programme, see Paul W. Franks, *All or Nothing: Systematicity, Transcendental Arguments, and Skepticism in German Idealism*, (Cambridge, Mass.: Harvard University Press, 2005)} For Cohen, the questions of Kantian idealism were of the utmost importance to having a rigorous answer to the problems of civic identity and religious difference.

One way of understanding Cohen’s response to the problem of legitimating “German” values and identity is through his response to pantheism and myth, terms that Cohen frequently used to describe a constellation of metaphysical problems. In the previous chapters, we saw how pantheism intimated a metaphysical secularism in which a divinized human reason was cited as the unifying source of legal and moral values. However, the continued debates over materialism and social Darwinism created a distinctly racializing discourse that now sought the spirit of a people in blood and rooted belonging.\footnote{Mitchell Hart, for example, cites Werner Sombart’s *Jews and Modern Capitalism*, in which the latter linked the Jewish “spirit” to the anthropological or racial continuity of the Jews. See Mitchell Hart, *Social Science and the Politics of Modern Jewish Identity*, (Stanford, CA: Stanford University Press, 2000), 174}

As we will see below, the mythic union of public morality with a German community of blood, returns us to the problem of idealization as well as the critique of liberalism. At issue is the
legitimate source of law, civic right, and national identity; is it a norm or idea or something more
crude or even spiritually all encompassing? As we have seen, for Cohen the problem of
pantheism lay in its reduction of ideas to conditions of fact, of historical and natural
happening. Idealism, however, insists upon the rigorous critique of the conditions that make
judgments and ideas possible, and in the instance of post-Kantian thought, the condition of moral
judgments is the moral law. As the epistemological foundation of the Enlightened, “liberal” state,
the moral law converges upon the very problem I have been discussing in this chapter: how should
the moral legitimacy, the normative history of a people, be integrated into a theory of public law,
of state, and the securing of public institutions and public peace? In a forum of public
contestation, of public reasoning, what guarantee exists for the morality of positive law? The moral
law, according to Cohen, is the systematic key to justifying law as moral law; its structure of duty as
the morality of law. The moral law suggests that neither mythic blood nor purely positive legalism
was the only option. Indeed, Cohen’s revision of Kantian moral philosophy signals a third way.

As the most well known concepts of Kant’s moral philosophy, the moral law and the
categorical imperative altered the philosophical understanding of law in the modern world. While
a line of Protestant thinkers including Melancthon, Grotius, Pufendorff, Leibniz, and Thomasius
had all variously argued that “reason” was a legislative faculty, a source of law, Kant’s philosophy
sought to ground knowledge of positive and moral law in a priori judgments, that is, to rationally
determine moral principles without appeal to any empirical factor such as desire or emotion, or
the fact of tradition, custom, or command. Moral autonomy was the expression of enlightened
freedom. But Kant’s philosophy also imposes a foundational distinction between legality and
morality, which erects a strict partition between the public domain of positive state-law and the
internal, private sphere of duty to the moral law and the doctrine of virtues predicated thereof. In other words, positive law and moral law are, although both a priori, nevertheless considered distinctly determinative for human action. Kant understood the groundwork for a transcendental deduction of what he calls the practical a priori, or transcendental freedom, as predicated upon this very distinction. This freedom is the basis upon which a legal subject, a moral agent, and a citizen should be ideally constructed.

The moral law is the basic cognitive ground upon which we cognize freedom and construct the a priori citizen-subject, the subject of rights, but only insofar as freedom is understood as a “transcendental fact.” That is to say, freedom is not limited to any empirical determination, for Kant. The moral law is a “law” to the extent that it represents formally self-authorized duty. The moral law is the internal motivation and origin of the freedom of will, “the possibility of which we know a priori, though without having insight into it, because it is the condition of the moral law, which we do know.”

Freedom and the moral law are known a priori only to the extent that they are interdependent conditions of each other, where “freedom is the ratio essendi of the moral law, the moral law is the ratio cognoscendi of freedom.” Yet in the course of Kant’s philosophical trajectory, he would never fully carry out this deduction, relying instead upon this “assumption” of fact as the basic principle of moral autonomy. But the question of legitimacy, with which such a law commands and finds its commands obeyed a priori, without appeal to an external determining

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49 KprV, Ak. 5:5 note.

50 Thus Kant claims in his 2nd *Critique*: “Consciousness of this fundamental law may be called a fact of reason because one cannot reason it out from antecedent data of reason, for example, from consciousness of freedom (since this is not antecedently given to us) and because it instead forces itself upon us of itself as a synthetic a priori proposition that is not based on any intuition, either pure or empirical, although it would be analytic if the freedom of the will were presupposed; but for this, as a positive concept, an intellectual intuition would be required, which certainly cannot be assumed here. However, in order to avoid misinterpretation in regarding this law as given, it must be noted carefully that it is not an empirical fact but the sole fact of pure reason which, by it, announces itself as originally lawgiving (sic vollo, sic jubeo).” KprV, Ak. 5:31
factor such as a “heteronomous” command and is nevertheless formalized as a having ethical, legal, and social objectivity, remains a problem. This is what interests Cohen as a basis for understanding ethics as an objective science of social norms.

For Cohen, it is significant that Kant’s moral law and the freedom that presupposes it as a cognitive ground are considered internal and noumenal concepts, or put differently, as ideal grounds upon which to base practical actions, which can be known without appeal to empirical reality for its norm or principle. And yet, precisely because Kant sought to explain the autonomy of the will without connecting it to what he calls, “external, juridical” law, Cohen objected to the claim that freedom of the will is a “fact” of reason whereas the moral law is merely the stimulus for that discovery. Such an assumption fails to understand both freedom and law, insofar as freedom is defined solely through being “identical with the moral law,” and “law” becomes problematically modeled upon the very causally-described nature from which it is supposed to be free. This account of law and freedom would appear to be aporetic at best. At worst, however, such definitions rely solely upon a formal account of determination and freedom, leaving the two most exalted “facts” of reason as seemingly empty concepts. This indeed was something noted early on by Hegel. Cohen contends, however, that Kant’s original formulation has conceptual strength, but that content must be generated from out of the form of the moral law, enabling a proper deduction of freedom. Law and morality must be related in the sphere of ideality if the ideas of moral freedom and of ethical action are to have any real historical significance. This is the importance of “law” in Cohen’s interpretation: that it provides the end of freedom; it is a task (Aufgabe).

51 As a debate larger sparked by Cohen’s interpretation in his Kants Begründung der Ethik, contemporary debate continues. See Chapter 2 note 74.
As I discussed in the previous chapter, Cohen emphasizes the lawfulness of cognition within a set framework of the categories of the understanding and explains the transcendental method as an inquiry into the conditions that make a scientific canon possible. In the case of practical philosophy, therefore, the conditions that make the basic unit of legal cognition, “action,” possible must also be the laws of judgment applying to the autonomous will, rather than pure thinking alone. As the expression of “practical reason,” the will must be analyzable according to the transcendental method but the will must also be understood as pure action.

For Cohen, the object of ethical cognition is the will—the lawful will—and we can only discuss consciousness of the will through recognizing the actions that are willed. The law-abiding will, as the formal and analytic concept of “law” (Gesetz), the basis of the categorical imperative, cannot remain a strictly “formal universal” in which the “necessity” of the law is found solely in its abstraction from all content of ethical maxims. Rather, the formal character of “universal legislation” in Kant’s categorical imperative points to this requirement of action: legislation is an activity of will. The requirement that any representation of law begin with the principle that the legislated maxim of my will could hold as necessarily valid for all possible legislation as such, as a “universal law,” provides the objective validity of a “necessary” law. This kind of necessity expresses the logical form of “lawfulness” and gives the moral law its structural integrity and validity to be a categorical imperative: the criterion of universalization of a maxim in accordance with this standard of objectivity. This is its categorical function.

While the criterion of universal legislation provides the formal expression of legality, Cohen believes Kant had provided a point of access to legal content. This content, Cohen

51 KBE, 185
54 KBE, 186
55 KBE, 192
continues, is found in Kant's great “socialist” insight that the idea of humanity as an end in itself brings moral law into greater contrast and “distinction from the nature of experience,” and proposes another nature, a “rational nature” that emerges from out of the formal expression of the law to become “the idea of humanity” as an “an end in itself.” As Kant writes in the first formulation of the categorical imperative: “act only in accordance with that maxim through which you can at the same time will that it become a universal law.” In the *Groundwork*, Kant adds to this formulation: “act as if the maxim of your action were to become by your will a law of nature.” This is the formal criterion of legislation itself, that a law of nature represents the universal and necessary binding quality of law. But Kant coordinates this formulation with the following one: “So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.” As an end or Zweck, rational nature becomes the determining ground of the moral law, “as the sovereign limiting condition of all subjective ends,” which is to say this end in itself becomes a regulative ideal, a noumenal goal, which Cohen understands as the concept of freedom as a “legitimate lawfulness” (Gesetzemäßigkeit). In humanity, subjective and objective ends merge. Freedom is the goal of law, but not an isolated, individuated freedom. Rather, the idea of freedom is implicit to the idea of humanity. This is the social dimension of practical reason that Cohen credits to Kant.

But Kant insisted time and again upon a dualistic structure to cognition, distinguishing between sensibility and understanding in theoretical philosophy, empirical nature and rational

58 *Groundwork*, Ak. 4:421.
59 Ak. 4:429
60 KBE, 197
nature in practical philosophy. Returning to the original question of why Kant insisted upon separating legality and morality, we therefore see how Kant’s original insight into humanity within rational nature could have provided a keystone upon which to explain the relationship between ideality and actuality, theoretical and practical reason. Yet, according to Cohen, when Kant developed his theory of law in the *Metaphysics of Morals*, his “Doctrine of Right” (*Rechtslehre*) abandoned this legitimate lawfulness (*Gesetzmäßigkeit*) and jettisoned the intended deduction of practical freedom altogether.\(^{61}\) In Kant’s attempt to construct “pure right” in the noumenal or ideal sphere, distinct from any empirical or phenomenal determining conditions, he somehow abandoned the great insight of “humanity” as a piece of moral content, and instead relied solely upon the *formal distinction* between the legality and the morality of action. As Kant writes,

> In contrast to laws of nature, these laws of freedom are *moral* laws. As directed merely to the external actions and their conformity to law they are called *juridical* laws; but if they also require that they (the laws) themselves be the determining grounds of actions, they are *ethical* laws, and then one says that conformity with ethical laws is its *morality*. The freedom to which the former laws refer can only be freedom in the external use of choice, but the freedom to which the latter refer is freedom in both the external and internal use of choice, insofar as it is determined by laws of reason.\(^{62}\)

While Cohen endorses the modal distinction between laws of nature and laws of morality, he believes Kant’s understanding of “legality” is fundamentally flawed insofar as it is modeled upon a conception of cause and effect, internal motivation and external determination. While law must be understood in connection with action, which is truly the concern of ethics, Kant suggests that this conformity of action and law is merely an “external” use of freedom, suggesting that actions ultimately fall under the domain of physical laws. But Cohen insists that actions cannot be modeled upon sensible intuition or natural scientific cognition, since ethical actions are not *identical* with the law. Kant’s attempt to distinguish action from freedom therefore shifts his

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\(^{61}\) KBE, 188ff.

\(^{62}\) Kant, *The Metaphysics of Morals*, Ak. 6:214
account of the universality and necessity of the moral law away from its internal connection to the end of humanity and toward the focus upon “formal” causality instead.

This is the issue Kant sets out to address in his 2nd *Critique*. In the section treating of the “Typic of Practical Judgment,” in which the relationship between intelligible and sensible nature, or as Cohen would prefer, between natural scientific experience and ethical experience is articulated, Kant begins his discussion with the following distinction:

...whether an action possible for us in sensibility is or is not a case that stands under the rule requires practical judgment, by which what is said in the rule universally (*in abstracto*) is applied to an action *in concreto*. But a practical rule of pure reason *first*, as *practical*, concerns the existence of an object, and second, as a *practical rule* of pure reason, brings with it necessity with respect to the existence of an action and is thus a practical law, not a natural law through empirical grounds of determination but a law of freedom in accordance with which the will is to be determinable independently of anything empirical (merely through the representation of a law in general and its form); however, all cases of possible actions that occur can be only empirical, that is, belong to experience and nature; hence, it seems absurd to want to find in the sensible world a case which, though as such it stands only under the law of nature, yet admits of the application to it of a law of freedom and to which there could be applied the supersensible idea of the morally good, which is to be exhibited in it *in concreto*.63

According to Kant, the question of practical judgment concerns how actions are attributed to the free will, acting upon a “representation of a law in general and its form,” and yet transpire in the world of empirical causes and effects. An empirical determination, for example, might take shape as ‘willing’ to jump off of a bike because the brakes don’t work, or ‘willing’ to fix the electric circuit in my apartment building because my heater is no longer working. In other words, acting out of a reaction to another empirical state of affairs rather than acting based upon a principle, or the representation of a principle. But if I jump off of my bike in order to save someone about to be hit by a car, or I fix the circuit breaker in my building because the power is out and I want to help the older folks in my community who do not have heat, although empirical conditions may be cited as stimulus for my decision, I am acting based upon principles such as “help people” or “save a life in

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63 Ak. 5:68
need.” But Kant suggests that all possible actions must in some sense be ascribed to the laws of nature, so to attempt to cite other natural causes as the reason for acting should by definition preclude the possibility of inductively attributing any idea of the moral good to such an event. After all, the idea of the moral good is “supersensible,” not something that can be experienced, and so has no correlate in “sensible intuition.” How then should we describe the mechanism of judgment according to the laws of pure practical reason as applied to actions that belong to nature? How can laws of freedom apply to laws of nature? Is this merely a rephrasing of the antinomy of pure reason in Kant’s first Critique, with this introduction of a different focus for our analogy, namely, the typic of legality? Or might the very concept of law point us toward a different concern, namely, the removal of any transcending legitimacy from the sphere of human actions in ethics and politics? Does Kant’s formal distinction leave us with a technology of legal judgment, with a machine of legality set over and against a spirit of morality?

Kant claims to solve this problem of relating sensible and intelligible, action and ideal, with the use of the schema—the model or paradigm offered up by sensible intuition to the use of transcendental imagination to sketch the intelligible character of the action that should take place in nature. The schema is the result of an intuition of experience, a representation, which is worked over by the pure concepts of the understanding. This is the work of theoretical reason. However, in practical reason we have a different problem. In the case of practical laws, the schema is not provided through intuition, since the moral good has no intuition. Acting upon a principle such as “saving a life in need” does not point to the moral good as an intuition of “saving all possible lives in all possible needs,” or to “this particular kind of life in this particular kind of need.” Such experiences do not have an inherent value as morally good; they require a principle. And a
practical principle a priori cannot be a cognition based upon experience. Rather, the problem of identifying something like a moral good as imputable to an action is that Kant treats the idea of the supersensible as ontologically distinct from the kinds of practical ends that are ascribed to moral maxims and principles. Kant must therefore identify a different kind of “schema” that will render possible this application of supersensible to sensible.

In order to relate the ideal and the real, the supersensible and the sensible, Kant refers to a different schema, namely, the “schema of law itself.” Neither the moral law nor the moral good have intuitions because they are “forced upon us” as synthetic a priori principles. The imagination usually provides a schema for sensible cognition, but since there is no intuition of the moral law, law itself must be located in the understanding. By appealing to the understanding, Kant shifts the meaning of action toward the categoriality of judgment applied to objects of experience. Doing so removes the intimation of a self-originating intuition, a self-representation described by intellectual intuition, a product of the imagination. Instead, the understanding puts before reason the idea of such a law, however, as can be presented in concreto in objects of the sense and hence a law of nature, though only as to its form; this law is what the understanding can put under an idea of reason on behalf of judgment, and we can, accordingly, call it the type of the moral law.”

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64 ibid.
65 cf. KdU, Ak. 5:593-405; As early as the 1790s, many readers had come to differing conclusions about Kant’s philosophy. Karl Leonhard Reinhold, for example, sought to explain how sensibility is in fact nothing more than a mode of representation. Rather than seeing space and time as the conditions for our particular kind of cognition as finite human beings, Reinhold sees representation as the explanation for space and time as ideal. Reinhold’s “short” argument to idealism (See Ameriks, Kant and the Fate of Autonomy, p. 129) turns representation into a general faculty of mind (Vorstellungsvermögen; Gemüt). See Reinhold, Versuch, p. 239. Reinhold’s goal was to secure the spontaneity and self-determination of how the world is represented and known. See Reinhold, Fundament, 78. Cf. Ameriks, Kant and the Fate of Autonomy, 121). G.E. Schulze criticized Reinhold’s reading of Kant by asking how it is possible that the very faculty given causal and grounding status is not immediately representable itself? See G.E. Schulze, Aenesidemus, or Concerning the Foundation of the Philosophy of the Elements Issued by Prof. Reinhold in Jena Together with a Defence of Skepticism Against the Pretensions of the Critique of Reason (1792), trans. George di Giovanni and H.S. Harris, in Between Kant and Hegel: Texts in the Development of Post-Kantian Idealism, (Indianapolis: Hackett Publishing, 1985), 103. Fichte’s rebuttal of Schulze rests upon the practical upshot of representation and intellectual intuition (ibid., pp. 151-2). Fichte’s argument rests squarely upon the role of the moral law as the motor driving the self-positing action, or “striving after action”, of self-consciousness. This law is not directed toward a “physical force,” contra Schulze, but a “supra-physical power” of striving after an action. Hence, Fichte not only turns the idea of the moral law into a basis upon which the self-positing I enables us to represent the world of sensible appearances, but he does this precisely through the turn to what Kant had tried at all costs to avoid in the moral law: intellectual intuition.
66 Ak. 5:69
As a representation of the form of law, of the type of a law that can apply to actions in concreto, this type of law is modeled upon a law of nature. The form of a law of nature, however, suggests that the necessity and universality of this law is based upon another categorical form of the understanding, namely, causal necessitation.

By insisting upon the separation of law and morality, Kant attempted to provide the ideal foundations for a theory of public law and for a critically self-reflexive morality capable of deciphering justified norms and principles. However, in leaving open the door to model moral law upon the empirical law of causal necessity, he also left a legacy of perceived dualism, which was used by some to justify the appeal to empirical intuition in the formation of moral values. Indeed, as we will see, it was just this lingering dualism that Cohen feared both philosophically and culturally would lead to a certain curtailment of critical and justified accounts of moral norms.

**Secularization or Jewish Disenchantment?**

The Kantian separation of legality and morality, perceived by many as part of the heritage of German liberalism, exerted great influence upon constitutional theory in Imperial Germany and its emphasis upon public law in negotiating religious difference was implicit in the rationalism

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67 Kant wants us to think of nature as running a parallel track to that of the supersensible world of the understanding. The latter has its own form, which by virtue of being formal need not interrupt the "mechanism" of natural causality. Yet Kant’s idea of natural causality is also ascribed the function of the understanding to prescribe the form of laws. Hence, the two tracks run parallel in the same domain—namely, of the understanding. This is the source of the confusion. The natura archetypa is a kind of paradigm of pure autonomous determination of the will under the moral law. It is the world of the moral good, which would mean, the purely produced action according to the moral law. However, the natura ectypa would be the world of sensible experience in which the action actually transpires. As Kant says, the archetypal nature is a form that we transfer upon the ectypal nature, and in so doing assign a form of a whole of rational beings to the sensible world. The moral good therefore becomes a formal assignment from the one world to the other.

68 In the Critique of Practical Reason, Kant initially tried to distinguish between the laws of nature, which are causal, and the law of practical reason. Practical judgment concerns the action brought into being on the basis of a practical principle. Nevertheless the action, once determined, transpires in nature and so must be considered from the perspective of laws of nature as well. See Critique of Practical Reason, Ak. 5:43.

with which Hugo Preuss and Max Weber (more informally) framed the Weimar constitution.\footnote{Dana Villa, “The Legacy of Max Weber in Weimar Political and Social Theory,” in Weimar Thought: A Contested Legacy, 73-100; 78.} But even Kant had his critics. The quest to secure the validity of scientific knowledge was part of a larger cultural concern with the foundational values that might give German national identity—and its attribute of scientific acumen—a certain footing. Hence, many considered philosophical epistemology as more than a scholarly pursuit. It was a cultural vocation. And such a vocation, as Max Weber would later describe in 1919, was subject to the same anxieties as Wilhelmine society as a whole; anxieties over an age of “disenchantment” and “rationalization.”\footnote{Max Weber, “Science as Vocation” in The Vocation Lectures, trans. Rodney Livingstone, David Owen and Tracy B. Strong, eds. (Indianapolis: Hackett, 2004), 30} Weber’s decisive judgment on the “disenchantment of the world,” which has assumed canonical status as the contemporary formulation for secularization, reflects the epistemological and methodological developments of philosophy and the human sciences in the Kaiserrreich. As Weber himself knew well from his time in Heidelberg, in his close contacts with the neo-Kantian Heinrich Rickert, the rationalization and disenchantment of the world and the retreat of the “most sublime values” from public life, represented both the advantages and detriments of an age of critical self-reflexivity upon knowledge, its sources, and its scope of justified continuity. And because this work of critically delimited knowledge, or epistemology, was commensurate with the formation of the public sphere, this narrative centers on the philosophy of Kant—the great destroyer of metaphysics.

However, from the vantage point of conservative thinkers such as Paul de Lagarde, against whom Cohen publicly argued at the Marburg Talmud Trial of 1888, or Carl Schmitt, whom I discuss in the following chapter, what Kantian formalism and its separation of legality and morality had erected was a legal definition of citizenship that transformed citizenship and national identity.
into positive assertions on the part of a pure formalism. The self-reflexivity of the moral law, which Cohen believed to be Kant’s greatest contribution, was perceived by many anti-liberal thinkers on both the left and the right as empty formalism and what Strauss describes as “but one tendency, which is the political-apologetic tendency.”

Liberalism—whether Jewish or Protestant, political as well as hermeneutic—as Strauss paraphrases Lagarde, “sails under false colors” when it valorizes an abstract monotheism, the absence of dogmas, and, most significantly for our purposes, tolerance, which Strauss comments on in the voice of Lagarde, “is a sign of a lack of seriousness; [since] every religion is exclusive.” In other words, self-reflexivity and the attempt to critically justify knowledge with conceptual transparency struck conservative thinkers of Wilhelmine Germany as vacuous. But according to Lagarde, this was a ploy on the part of liberalism’s concerted effort to conceal for whom its equality and positive definition citizenship benefitted most, namely the Jews, since as Strauss paraphrases, according to conservatives like Lagarde, “liberalism is nothing but secularized Judaism.”

To suture the gap between legality and morality, new spiritual avenues were sought, but not all of them were the result of critical reflection.

As Cohen noted in his affidavit for the Marburg Trial, “Where racial hatred and defamation rage, there govern stereotypes (Phrase). Stereotypes and prejudices effect an epidemic and even infect the strict work of Wissenschaft with misunderstanding.” Such an epidemic was rapidly taking shape in the later years of the Kaiserreich and by the time of the early Weimar Republic, the thirst for enchantment had lead many thinkers to brew the theoretical equivalent of moonshine to overcome the rationalization of Imperial Germany. The perceived neutralization of

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73 Ibid, 94

74 Cohen, “Die Nächstenliebe im Talmud,” 35
the religious patrimony of the legal order and the state left the Jews once again open to attack and were represented by the antisemitic intelligentsia in a more robust historical, national, and philosophical interpretation as the perpetrators of this positivist neutrality and dissection of the morality of law: the Jews were now understood as the purveyors of an opposing worldview to that of Germany, an opposing Weltanschauung.75

By the 1920s, Wilhelm Dilthey’s hermeneutic conception of a philosophy of Weltanschauungen, as one attempt to forge a greater philosophical link between natural science and the humanities, became a constructive site for reworking values and validity, a related concern of neo-Kantian philosophy. Using the model of a hermeneutic “worldview,”76 the rising Nazi philosopher Max Wundt (1879-1963) would appeal to the forces of myth and the occultism of a “blood-consciousness” to bind the nation—and Kantian dualism—together in repair. The relationship between spiritual ethos and historical meaning, biological race and empirical human life, were conflated into one, immanent spiritual-material whole, with Wundt pleading for Germans to

...establish the connection, which for other peoples becomes the highest vocation of their people’s spiritual life such as the Greeks or the Hindus: the connection between their Mythos and their religion and their philosophy. We must establish this connection in new and artistic manners, since they were so fully torn up from the natural development of our history. From the spirit of Germanic myth must we clarify for ourselves the conceptual world of our great thinkers, from the spirit of Germanic myth must we understand their work. When we succeed in this, we will have fastened together our entire spiritual inheritance, which is ancestrally stamped in our blood and is inherited in our history, into one great unity.77

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76 The promotion of a “worldview” was considered a constitutionally recognized basis for religious corporations in Weimar. In the late Imperial period, “worldviews” were often code for classifying associations affiliated with Free Religious movement, such as the Monist’s League and the Ethical Culture Society as “religious groups” See Weir, Secularism and Religion in Nineteenth-Century Germany, 66-7. Cf. Kurt Nowak, Geschichte des Christentums in Deutschland—Religion, Politik und Gesellschaft, (München: C.H. Beck, 1995), 181-5; 207-11.

The consciousness of blood as history and the symbolic worldview of Germanic Myth, claimed Wundt, would reorient the entire structure of the state. Law and culture would be refit, their legitimacy drawn from the immanence of blood and history, in the “glory days [Blütezeiten]...in which the inner and outer life of a collective people achieves for itself the highest reign [Reichtum]” in which all aspects of life and culture, “economy and state are powerfully and all-encompassingly constituted and serve as the ground for a complete Spirit, in which all branches in equal measure come together in their best form, in art and poetry, in religion and science.”78

Wundt labeled himself an idealist, despite the biological material of blood figuring so prominently in his language of myth. It is therefore helpful to consider the anti-Semitic rhetoric upon which Wundt build his interpretation of the “German Spirit’s self-forged weapon” against the “foreign” threat to modern Germanism as a “spiritualist” worldview. Indeed, there is a palpable influence of theosophic “spiritualism” in the antisemitic attack on Jewish “materialism” and commercialism,79 and Wundt aims that spiritual weaponry against the “un-German effects of the new framing of the world brought about through the assumption of foreignness,” a foreignness of Spirit that had dissolved the “inner connection between the individual and the communal.” Having forgotten the goal of a “folk-consciousness [Volksbewusstsein]” the foreign spirit of liberalism and modernism leads these “individuals, on self-stitched together grounds, [to] elect freely assembled groups and are amply prepared to forget the health of the state in exchange for the health of the party.”80 Through legal protection of “free associations,” a legal privilege almost

78 Max Wundt, Vom Gesit unserer Zeit, (München: J.F. Lehmann, 1922), 17
80 Ibid. 38; Though he shared with Cohen an interpretation of Platonic philosophy as the birth of idealism, Wundt’s perversion of idealism with racial categories led him into conflict with Cohen’s longtime colleague in Marburg, Paul Natorp. On Cassirer’s relationship to Bauer and the broader context of the controversy, see Ulrich Sieg, “Deutsche Kulturgeschichte und jüdischer Geist;
unknown of in the Kaiserreich, people were positing themselves as groups without legitimacy, claims Wundt. The state, he continues, “is now nothing but a machine” a tool and instrument of the “individual.” The “individual” was nothing but a piston or cog in the machine of the state, reified in each member of these mechanical parties and associations. Such technology is a weapon of the “bankers and businessmen” to reach across their borders in service of foreign investment interests, because “Gold is bound by no national-borders.” Lest there were any doubt as to which foreigners Wundt has in mind, we need only look at the völkisch press for confirmation that these bankers and businessmen, the Rothschilds and the Rathenaus, are Jews.

Wundt’s criticisms were primarily inspired by the upheavals that brought the Weimar constitution into place, although such debates were not unique to Weimar. In Wilhelmine debates, the rational legal structure of the Rechtsstaat was often attacked for guaranteeing the rights of the individual at the expense of the communal or the national community. It was this emphasis upon the Rechtsstaat, the positivity of law, the security of private rights over and against the public institutions of the state, that fuelled the anti-Liberal and anti-modernist critique boiling over on the political right and in the antisemitic parties of the Kaiserreich. Wundt’s suspicions over this positive legal identity therefore centred upon the dissolution of a “folk-consciousness” and its replacement with individual rights as primary. Only a machine of iron and drained of its blood, to dissect Bismarck’s own policy, was left in this social state of legal rights. Wundt was therefore giving voice to anxieties that had beset the German public sphere well before the war.


81 ibid. 120.
82 ibid. 38-9.
This rhetoric surrounding the technologized state and the critique of individual protections was a focal point for the political right in the Kaiserreich. Christianity was the public memory and historic source of the “Christian German State” and the imperial court chaplain Adolf Stoecker (1835-1909) insisted that modernizing forces of secularization, stoked and spurred by the “liberal Jewish press’s” war against “religion,” were responsible for its demise, since modern Judaism is, all things considered, an irreligious power [irreligiöse Macht]; a power that bitterly struggles against Christianity, in the nations [Völkern] that are rooted in Christian faith just as much as in national feeling, and as a replacement seeks nothing other than the idolatrous worship [abgöttisch Verehrung] of Judaism just as it is, which has no other content than its own self-love.83

For Stoecker, Judaism represents the historicization of the state and the attempt to socialize the state as a space in which the power of “religion” is no longer hegemonic. Judaism seeks to insert its “idolatry,” in the form of a redefined national entity, into public discourse and secure for itself the recognition of a historical tradition, and its members as individual rights-holders independent of religious belonging. This neutralization of modern culture, Stoecker suspected, was built upon the technological power of modern Judaism, an “irreligious power.” It is the power of a neutral and positive state that has replaced religion with the liberal Rechtsstaat, or a veneration of legal rights. The power of the legal state, the Rechtsstaat, was yet another product of a “century of steam and electricity, of the railways and the machines”84 insofar as the economic dynamism of Imperial Germany was motored by this same opening up of citizenship that conditioned the erosion of “Christian” identity in German law. This technology, Stoecker intimates, was one expression of the power of the secular modern. Spirit and machine were locked in battle; law and morality were camped across front lines.

83 Adolf Stoecker, Das moderne Judenthum in Deutschland, besonders in Berlin, Zwei Reden in der christlich-sozialen Arbeiterpartei, (Berlin: Verlag von Wiegandt und Grieben, 1880), 12.
Stoecker, like Wundt and the many antisemitic voices to follow, understood the separation of law from the legitimating force of Christian moral religion as the decaying of “German” national identity. Hence, the role of the “young Germany” youth movements, the völkisch movements of the 1880s and 1890s, and the growing legitimacy of the anti-Semitic parties in reconstituting a “Christian” Germany, have led Shulamit Volkov to characterize antisemitism in the Kaiserreich as a “cultural code.” Following the work of Clifford Geertz, Volkov’s description attempts to provide an anthropological dimension to the rhetoric of the anti-Semitic parties, which cast all aspects of culture and everyday life in the symbolic rhetoric of an overall revitalization project of “re-Christianizing” and “re-Germanizing” the state. Such a cultural code of Germanism attempted to induce “moods and motivations,” as Geertz alternatively describes religious culture, with Christianity understood as something more than confessional difference. Indeed, in the immediate years preceding WWI, the Kulturkampf appeared something of ancient history with the treaties of mutual protection between Germany and Austria having mended whatever lingering symbolic borders that may have cut across the land of the mother tongue. Christianness, as opposed to any one confession, was fuel for a new conception of culture, a code in which the symbolic power of blood and spirit prevailed. This mythic Christianness, turning away from the machine of rationalism, dressed the metaphysics of the nineteenth century in new clothes: in Germanic mythos. Myth was the cultural code of the German völkisch movement.

86 For a sampling of organizations dedicated to just this re-Germanization, see Ludwig Holländer, Zeitfragen: Eine Broschürensammlung des Centralvereins deutscher Staatsbürger jüdischen Glaubens, (Berlin: Gabriel Riesser Verlag, 1919), 4.
88 Consider the Zweibundvertrag of 1879 and 1888 and realigned relationship between Germany and Austria.
The goal of the völkisch movement was to reoccupy “legal validity” with new moral “value,” to create a complete “code” with which to reshape German life. Kant’s separation, the bedrock of liberalism, left philosophy and culture with a crisis: how should law be legitimated if not from some authentic source of moral value? For many völkisch thinkers like Paul de Lagarde, Houston Stewart Chamberlain, and the young Wundt, this meant recognizing the union of blood and spirit, through which “the Germanic world, through racial blood and spiritual disposition,” might bring a new national religion to fruition; where “belief in the unmediated unity of spirit and actuality [Geist und Wirklichkeit], universal and particular...one spirit lives in the individual and the collective.” In so doing, the idealist spirit of a folk-consciousness, united with the materiality of blood and soil, might finally overcome the liberal separation of law and morality and give new legitimacy to authority. Hence, as the Weimar-era, anti-liberal thinker Hermann Meyer described, the völkisch movement’s rejoinder to the Kantian separation of law and morality was to argue for power, since “law extracts its force of value, not from moral law [Sittengesetz] rather from out of its own essence, this is called “power,” which can command, which can coerce...Law is power.” Only power can confront power, only the weapons of blood and spirit can combat the neutralized machine. In the language of the Völkischen Beobachter, the periodical organ of the early Nazi movement, the highest expression of this spiritual warfare is in law as power, for only law can subjugate the external inferiority of a foreign spirit, only law can make transparent the opacity of blood. In this respect, the law becomes an embodiment of the nation, of the law within the blood and soil of a people, of what the neo-Kantian philosopher and opponent of Cohen and

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90 Max Wundt, Vom Gesit unserer Zeit, 107
92 See Ludwig Holländer’s collection of citations from the anti-Semitic press in the late Kaiserreich, in idem. Zeitfragen, 7-9.
Ernst Cassirer, Bruno Bauch (1877-1942) insisted upon as the “Mitgeborenen” the native-born fraternity of the one that is “blood of my blood.”

Blood had become a spiritualized material, a pantheistic source of norms and history. But only if we acknowledge the status of blood as both a scientific and a metaphysical concept can we better understand the extent to which a blood-spirit nexus created new forms of secular powers. The positive distinction between law and morality, the eminently Kantian form of liberalism, had been united in a new value-system. But the stakes of Kantian philosophy were no mere addendum to this public shift in worldviews. Rather, Kantianism was the emphatic stage upon which such debates were given the greatest intellectual credibility.

For example, in 1917, Bauch’s “blood of my blood” would transform the pages of the eminent journal *Kant-Studien*, one of the most respected philosophical journals of the twentieth century, into what amounts to an appendix of the *Völkischer Beobachter*. Indeed, already in 1916 Bauch authored an open letter in *Der Panther* in which he explicitly charged that Cohen, as a Jew, could not understand Kant–Jews were merely “guests” in the German nation and the difference between national spirits precluded a proper interpretation by a foreigner. As a direct challenge to the very school of neo-Kantianism to which one of the previous issues of *Kant-Studien* was dedicated, Bauch implied that no degree of acculturation or of “idealized” performance of language or culture could establish the veracity of national belonging. Especially not language, for

Corporeal, just as spiritual, communal origin of the “born-in-common” [Mitgeborenen] however, finds its expression in the community of language. It is the decisive expression of the relationship of the

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94 The myth of blood would dominate national socialist language in the years following Cohen’s death. See Alfred Rosenberg, *Der Mythus des Zwanzigsten Jahrhunderts: eine Wertung der seelischen-geistigen Gestaltenkämpfe unserer Zeit,* (Munich: Hoheneichen Verlag, 1930)

nation. The folkish alien may live through generations among us and speak no other language more capably, than ours. Nevertheless, his language is not ours. From physical sound to the most delicate shading in the expression of the inner experiences that pour into the language, there remains something alien between him and us. Much evidence is palpable, from the jargon of the street to the most famous poems. Only where blood of our blood in language also pulses us forward, only there can the appeal from our lips strive: ‘O sweet voice! Much perfect sound / the mother tongue!’

Although not explicitly named, Cohen was the target of this indictment, and Bauch’s selection of this issue of *Kant Studien* for his essay was no coincidence; a recent issue of the journal had been almost entirely dedicated to Cohen’s neo-Kantian logic. All who read these words knew what was at stake. The philosopher from Jena had indicted the movement stemming from Marburg and if any doubt remained as to Bauch’s intensions, there was ample precedent for the sentiment. For example, in an article appearing in the eminent *Preussisches Jahrbuch* Max Hildebert Boehm criticized Cohen’s idealization of “Deutschum und Judentum” as nothing more than “Kantian moral-formalism,” a critique that met with great praise among members of the Zionist youth movement, Bar Kochba. The whole episode created a rift within the editorial board of the Kant Gesellschaft, with Ernst Cassirer eventually stepping down.

The significance of the event must be understood yet again through the lens of the history and intellectual debates I have been discussing throughout. Wissenschaft, now in the full-scale dominance of neo-Kantian philosophy, was summoned to account for the powers of the secular-modern. Values could be reconstructed and ideas could be retrofitted to serve material interests. To many, only a blood-spirit of language and ideas, a language of spirit-as-blood-as-history, could

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96 ibid. 144.
97 Max Wundt had cofounded the Deutschen Philosophische Gesellschaft as a reaction to the “Jewishness” in Kantian philosophy and for which Bauch essay had been a catalyst. Wundt would later publish an essay recording his own criticisms, See Sieg, “Deutsche Kulturgeschichte und jüdischer Geist”.
99 Sieg, “Deutsche Kulturgeschichte und jüdischer Geist.”
account for the truly scientific sources of the nation. Only such a properly grounded science could reunite the spheres of form and matter, spirit and history, in the unity of a nation.\footnote{On supernaturalism in 19th century popular scientific imagination, see John Lardas Modern, Secularism in Antebellum America; cf. Pamela Klassen, Spirits of Protestantism: Medicine, Healing, and Liberal Christianity, (Berkeley: University of California Press, 2011).}

The separation between legality and morality, as an extension of this discourse, was thus more than a technical philosophical problem; it represented a politics of cultural reform surrounding the so-called “crisis of modernism.”\footnote{Ulrich Sieg, Judische Intellektuellen in erster Weltkrieg, ibid.} While many scholars have marked the decline of neo-Kantianism’s influence in Weimar as a reaction to its idealism in the face of the sobering realities of the Great War, it is clear that the intellectual foment of Weimar has its roots deep within Wilhelmine polemics. And Kant’s legacy—as Heidegger and Cassirer’s famous debate at Davos revealed—was far from being a remnant of pre-war Germany’s halcyon days.\footnote{See Peter Gordon, Continental Divide.} Moving beyond historical context and attempting a philosophical description, however, reveals that the critique of this separation of legality and morality was not only a Weimar preoccupation, but a clear battle line drawn between liberals and conservatives in the Kaiserreich. Cohen’s entire ethical idealism, despite mischaracterizations by Ernst Troeltsch and Max Hildebert Boehm, was precisely concerned with correcting this Kantian “formalism.” Thus, to account for the crisis of legitimacy, the theologico-political predicament of Wilhelmine Germany surrounding this separation of law and morality, we must understand it through the lens of the crisis of secularization.

The attempt to re-unify legality and morality on the basis of a cultural code of blood, Volk, and nation reifies the structural description of secularization afforded by Hans Blumenberg, whereby the answer positions that blood and Volk reoccupy seek to hold back the perceived neutrality of legal and national identity. Secularization can therefore be understood in late
nineteenth- and early twentieth-century Germany as a social and historical process through which the social and political institutions of the public sphere sought epistemological, legal, and moral legitimacy by appealing to positive human knowledge and structures of power despite remaining in unconscious, dialectical tension with the traditional structures of belief undergirding those institutions. Because neo-Kantianism sought to critically delimit what knowledge and conceptual structures inherited from the past might still claim validity for themselves, secularization can be mapped as a process through which neo-Kantianism provided one avenue of “reoccupation of answer positions” to questions the past no longer sufficed to answer, while antisemitism and the völkisch philosophies provided another. But most importantly for our purposes, the debates surrounding neo-Kantianism should be understood as part of a larger polemic surrounding the modernizing changes implicit in cosmopolitan bourgeois culture, which had benefitted the Jews so much, and yet was also perceived as the epitome of Imperial German social tensions. Did the nation, did citizenship, have a historical origin or should this too be treated in abstract, disenchanted terms?

Rather than historically clarifying the conceptual problem of legality and morality being separated in practical reason, in the haste to unify them a new metaphysical mixture of spirit and matter was propped up with mythic grandeur. For if science remains enchanted, if the state remains enchanted, and if pantheism continues to feed off of the concept of value, then law and state are collapsed into yet another neutralizing totality of an individuated people, in this case, the “fate” of the Teutonic-German people.

103 On the relevance of secularization as a historical description leading to a better understanding of modern public religion, see Jose Casanova, Public Religions in the Modern World, (Chicago: University of Chicago Press, 1994)

Ethics as the Science of Law

We are now better equipped to understand Cohen’s concerns with the Kantian separation of legality and morality as multifaceted. As a philosophical problem of relying upon causal lawfulness, Cohen maintains such a model of law will not suffice for ethics because the kind of universality of a moral law does not determine actions in a physically causal manner. Indeed, no one would claim, even in a “formal” sense, that his or her actions were necessitated by a moral law or duty. For example, if I act out of a sense of duty to a moral law, my sense of duty cannot be said to “coerce” my action, such as the laws of gravity might be said to “force” a rock to fall to the ground at a determinable velocity. Rather, the law that conditions my will can be the “origin” of my action, but not the “cause” of my action. The relation between action and ideal, the world described by natural scientific models of experience and the world viewed through ethical ideas and their actualization cannot be collapsed together into one single form of “lawfulness,” because while laws of nature ascribe necessity and universality to their objects of knowledge, this is through a causal modality, describing how things came to be, while ethical laws are oriented toward the purpose of action, describing how things ought to be. Hence, true moral freedom would have to be detached from such a formal model of “legality.”

But we can also see how Cohen’s critique of the Kantian dualism and reliance upon sensibility in theoretical philosophy leaves open the door for the kind of materialism and spiritualism of the völkisch movement, and particularly of a thinker like Bauch. In his “Vom Begriff der Nation (Ein Kapitel zur Geschichtsphilosophie),” Bauch argued that we must distinguish between the “nation considered as a natural groundwork for the people’s unity (völkischer Einheit)

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105 Kant-Studien 21, (1917): 139–162
on the one hand and the historical unity of the people (Volkseinheit) on the other.”106 This distinction, however, does not mean that the historical unity of a people could completely reorient the meaning of natural unity to the point of its becoming neutralized. To the contrary, Bauch argues, it is the historical “labour of those born in common (Mitgeborenen) that sanctifies the [natural] land of the Vaterland and Heimat.”107 In other words, for Bauch the natural and historical meanings of national unity are inflections of a dialectic played out by historical actors’ unifying labour, shared language, and the blood and soil of that people whose spiritual purpose takes shapes as ethical ideals carried by the nation. Bauch was not strictly speaking a materialist, however. His description of how natural unity is sanctified by history and has its unity transposed into a higher octave indicates just how much ideas are still claimed as predominant. But Bauch’s insistence upon an irreducible “practical life” or “intuition” of a natural fact is not merely the scientific zero-moment of judgment; life and intuition gain their own value, even if only as the irreducible remainder left in the wake of idealization. It is this remainder of a natural value or intuitive bond between real and ideal that reveals the degree to which Bauch’s thought shifts away from Kantianism and into a confused relationship between naturalism and historicism.

The most charitable reading of Bauch’s argument must assume that the Kantian division between sensibility and understanding, between phenomena and noumena, is retained and that Bauch’s neo-Kantianism consists in his attempt to elaborate a theory of value-cognition that negotiates this dualism as nature and history. These concepts set the parameters for what we take as “true.” For example, in his previous publications in KantStudien dealing with natural science, Bauch argued that there should be no confusion between “sensation” and “experience”; to confuse

106 ibid.
107 Bauch, “Vom Begriff der Nation,” 147
them is to rely upon “naïve intuition, in the worst sense of the word.”108 Rather, much like Cohen and Cassirer, Bauch insists that natural experience and sensibility are based upon the lawful cognition of substance. In other words, a judgment is like a mathematical function that generates a map of the cognitive mess it encounters. In turn, the determination of how things are described in qualitative terms (colour, shape, texture, environment) is mapped onto a quantitative series of “objects” and helps grid those cognitions together.109 All cognition is of what Bauch claims to be “relation” (Beziehung).110 Yet despite claiming that there is “no graspability of nature without conceptuality [Keine Begreiflichkeit der Natur ohne Begrifflichkeit],”111 he nevertheless retains a notion of intuition or intuitability [Anschaulichkeit] as the necessary index of the indivisible remainder. In other words, Bauch maintains that function-like cognition of material or sensible experience is the cognition of “something” [Etwas] like a series that extends over time, and that the cognitive function of a “series” is to provide the intuited material change over time with unity. Cognition therefore reproduces the series as a sequentially divided set of attributes of what we call “experience.”112 However, in emphasizing its unity and lawfulness, Bauch also describes cognition as simultaneous with the moment of intuition. In other words, although the gap between sense and understanding, intuition and concept, is sutured, it nevertheless remains a gap.

The relationship between intuition and concept is therefore crucial to Bauch’s conception of natural and historical unity. Returning to his arguments about the concept of the nation, therefore, we can see how Bauch’s claims concerning the natural and historical “unity” of the nation extend this logic. When considering the intuition of natural unity, Bauch’s argument

109 Ibid. 103
110 Ibid. 65
111 Ibid. 73
112 Ibid. 80
culminates in a theory of representation or re-cognition of categories such as “blood,” “soil,” and “language”—the bedrock of romantic nationalism. However, Bauch seeks to idealize these natural elements while indexing their unification into a manifold of cognition. Thus, the natural unity of the nation (völkischer Einheit) persists as an index of the “value” of historical unity (Volkseinheit).

By contrast, Cohen insists that the very concept of law within ethics must be understood as an ideal that points toward the end of law, the idea of a universal, of “humanity.” Without such a schematization of universality out of the content of the law itself, even political theological law will remain strained as a formalism of decision or of the lurking racism and essentialism of intuition. Akin to Hegel’s critique of Kant, Cohen insists that the relationship between ideality and actuality, between law and morality, must be dialectically strengthened and the gaps filled in. Morality needs Sittlichkeit, or a conception of ethical culture including history and positive legal institutions. Law is not only a systematic concern, but resonates on a cultural-symbolic level as well. However, Sittlichkeit must be reinterpreted as “lawful” to the extent that it is not a “natural law” nor a “law in our members.” Law cannot rely upon intuition. Although Sittlichkeit represents “opinion,” and “opinion [Meinung] is, as the Hegelian expression goes, ‘my own’ [die Meinige],” the method of ethics, as Wissenschaft, treats the legal dimension of Sittlichkeit not as metaphysics or naturalism, but as the analogue of theoretical physics for the construction of culture. As Cohen writes,

the concept of the law finds its greatest difficulty develop on the very site upon which it has its deepest ground. Kant made law [Gesetz] a focal point of ethics. And yet, he distinguished legality [Legalität] from morality. Morality is rooted in the law [Gesetz], but it is not legality [Legalität]. One immediately sees from this, though it is invalid, the suspicion as though the law undermines ethics, making ethics insufficient unto itself and unfree. This is the suspicion concerning legality; not so with morality. It is precisely law that distinguishes morality from legality. But before we try to

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113 Hegel, Phenomenology, (BB): VI, para. 437-443.
illuminate this deeper potential to the sense of “law” any further, we ask above all for the sense of “legality.”

For Cohen, Kant’s distinction between legality and morality is animated by an antiquated suspicion concerning “legalism” in morality. This flawed understanding is associated with the kind of moral theology that had feared the deterministic reduction of free will and moral agency, which does not originate with Kant, but rather, “with Paul’s polemic against the Mosaic teaching, which he designated and recognized as “law” [Gesetz].” It is on account of this prejudice against legalism, which Cohen intimates as a prejudice against Jewish legalism, that Kant seems to fear any mixture of ethics and law. And yet, because of Kant’s fear of “legalism” his philosophy of law ended up reifying a causal model of physical law all the same. For Cohen, that morality is rooted in law means that the moral content of the law must be located in the form of law itself, in the conceptual structure of normativity. This is the science mandated by ethics, to discover what makes law possible.

Cohen, much like the Centralverein, advocated for a contractual model of citizenship, which in the eyes of the antisemitic press represented more than a demand for equal recognition under German law. Rather, they feared that citizenship was being tailored into a one-size-fits-all suit to accommodate Jewish citizenship—one freed of historical attachment to land and tribal values. So the basic element of developing an antisemitic cultural code was a mythology of deeper connection between those who could claim ownership to German belonging. In this sense, Cohen’s project, along with that of the C.V., represented a kind of “secular,” or at least “irreligious” force “irreligiöse Macht,” according to the imperial court chaplain, Adolf Stöcker. For if Todd Weir’s recent

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115 ErW, 253.
116 Ibid. Leora Batnitzky notes that Cohen’s criticism of Kant concerns the Pauline polemic and that this critique likewise demonstrates the Protestant categories of Cohen’s own envisaging of Judaism. See How Judaism Became a Religion, 55. I will return to this point in chapter 5.
assertion is correct that the developing German secularist organizations such as the Monisten, having identified a set of common values and norms—a “worldview”—aligned with German confessionalism, were not anti-clerical in scope, then the antisemitic movement must also be considered part of this confessionalism. In fact, we could even say that antisemitism was an attempt to bisect the intersectional identity of a Jew by drawing attention to their abstract citizenship, as a legally recognized individual, whose lack of recognized “religion” somehow made their citizenship implicitly otherwise than “religious.” “Jewishness” was consequently perceived as a kind of neutralizing force that advocated all individuals be detached from any “religion” implicit in their citizenship.

For example, when in 1916 the famed social economist Gustav Schmoller published a review of Hugo Preuss’ Das deutsche Volk und die Politik, he described Preuss’ arguments in favour of a democratic and social state—a state that recognizes its people in all their forms as the basis for a common legislative “state-will”—as less the influence of Otto von Gierke’s corporatist model of community (the organicist, Genossenschaft school of law) and more so the bias of “one of the chief representatives of the Berliner-communal freethinkers, who, upon the basis of the social and Semitic millionaire, more or less rule our capital city.”¹¹⁷ This sentiment, for which Schmoller came under intense criticism in the liberal press and which provoked a stern response from Cohen himself, no doubt stemmed from Preuss’ explicitly secular vision for a modern state in which the “identity of people and state” enables legal equality of citizenship that does not depend upon “lineage or religious confession [Abstammung oder religiöse Bekenntnis].”¹¹⁸ Preuss sought to identify the people with the laws of the state, noting that

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¹¹⁷ Schmoller, 424/2032
¹¹⁸ Hugo Preuss, Das deutsche Volk und die Politik, (Jena: Eugen Diedrichs, 1915), 194f.
There is hardly any other modern state, whose identity with its people has the effect of hindering its unification into a state-determined definition of peoplehood [Staatsvolks] because of its combination of state and church in the masses, as is the case in Germany.\textsuperscript{119}

Germany needed to forego the attachment to Christianity, particularly the Evangelical Protestant Church as a condition limiting social and legal equality. But it is significant that Schmoller indicts Preuss’ vision as a religiously “neutral” national belonging. While Preuss insisted upon a legal definition of citizenship, Schmoller’s criticisms focused upon the effect such a vision has upon the nature of political authority. Schmoller assailed the idea that the Jews were a minority in need of legal equality since the Jews of Imperial Germany had already demonstrated their predominance in positions of power, the press, medicine, and education.\textsuperscript{120} Schmoller accused Preuss of harboring an agenda within his rhetoric of collective sovereignty and people’s rights, secretly favoring the particular dominance of a Jewish minority. Thus, he half-heartedly acknowledges the truth of Preuss’ claim of “injustice” of authoritarian prejudice before the law by claiming Preuss is really interested in providing “unbaptized Jewish candidates who do not yet have access to public office” the very opportunity to gain admission.\textsuperscript{121} But Schmoller’s comments reveal something much deeper than rational criticism at work.

The fundamental obstacle to Jewish participation in the German public sphere was characterized as the imposition of a foreign spirit incapable of accomplishing the neutralizing move it advocates in securing legal rights. In other words, the incoherence of antisemitic rhetoric, which Schmoller here represents, is the claim that the Jews seek to neutralize the state of religious and

\textsuperscript{119} Hugo Preuss, \textit{Das deutsche Volk und die Politik}, 195


\textsuperscript{121} Schmoller, “Obrigkeitstaat und Volkstaat,” 425

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national values while they simultaneously impose a foreign spirit that is irrevocable. Thus, the natural and conceptual dimensions are blurred. The foreign spirit that haunts any pretension to elevate legal rights above natural ties of national unity must be answered with a bond of blood and belonging.

By contrast, Schmoller invoked race in order to highlight this conflict as a political tension between “peoples”—Völker. Yet Schmoller focused upon the threat of neutrality or secularization as the most significant concern, since he believed Jews could assimilate—convert to Christianity—by marriage. Cohen recognized the muddled conceptualism at work: despite basing his argument upon “racial difference,” Schmoller had politically abstracted religious differences from the fold of confessionalism, as Germans often conceived of religion—a difference of Christian degree rather than non-Christian kind—and had substituted Jewish religious difference with racial difference. In other words, Cohen accused Schmoller of complicity in the secularization and politicization of religion by trying to collapse race and religion, calling Schmoller to account for his weak reasoning, charging that

...all talk is disingenuous, superficial, and of poor conscientiousness when walking around this point and always speaking only of “race,” when “religion,” however, is really concealed underneath. You really are not against race at all, because you just want them to assimilate. And for this purpose have you primarily calculated your statistics about the increase in mixed marriages. But you know that it is no longer appropriate to lead the struggle openly against a religion—the “freedom of conscience” has become a similar keyword, just as “brotherly love”—, so you prefer to hold on to “race”, dealing with the Jewish Question from this point of view, which from this point of view can only become a political problem, while the real political problem truly could not have less to do with the religious question and the role of the Jewish religion in the development of a pure religion of culture [reine Kulturreligion].

According to Cohen, Schmoller muddles race and religion through his politicization of the very values that articulate religion as a historical spirit. In other words, Schmoller’s willingness to accept

122 Cohen, “Betrachtungen über Schmollers Angriff,” 397
assimilation as a solution to the Jewish Question points to the straw-man appeal to “nature” or “race.” Schmoller implicitly acknowledges his anxiety over the erosion of religion as the basic value grounding citizenship. Judaism is therefore synonymous with the threat of secularization. As a political problem, this version of the Jewish Question presents the Jews as a foreign nation, unable to become German without first being converted to the nation and its “Volksbewusstsein” of religion. This is the real source of Schmoller’s attack, as Cohen’s response reveals, which fails to address the real question of the national state as a social question of law, the most idealist of social spheres. If indeed Schmoller’s reasoning had been an appeal to race as anything more than cover for his anti-liberalism, perhaps Cohen would have levied a different set of criticisms.

For his own part, Cohen would continue to deny the philosophical admissibility of any arguments from natural fact as though such a theory of cognition could be justified as idealism. Socially, Cohen articulated this position in his response to antisemitic attacks such as Schmoller’s by demonstrating the idealizing history that law presents and insisting upon the legal source of national belonging. Noting that Jewish participation in the German war effort was strong, according to Cohen the war had revealed something instructive about the unity of a national state and a federal state (den nationalen Einheitstaat und für den Bundesstaat), namely that differences of nationality, of religion, do nothing to hinder the full-fledged duty of citizens to their national state. Although he understands patriotism and civic spirit as the explicitly ideal sources of national unity, Cohen does not endorse Preuss’ view of the Volkstaat, wary of the kind of “Volksbewusstsein” that Schmoller seeks as a rejoinder to affirm the authority of Christian identity to dictate civil belonging. But because Cohen does not seek metaphysical or political answers to the Jewish

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123 According to Oppenheimer’s Judenzählung, 100,000 Jews served as comrades in arms with their fellow Germans; 12,000 of which shed their blood and died for their country. See also Werner T. Angress, “The German Army’s ‘Judenzählung’ of 1916,” in Leo Baeck Institute Yearbook, vol. 23 (1978): 117-35.
Question, but an answer demonstrating how ethics are expressed in law, Cohen insists that the state’s legal recognition of Judaism in the “freedom of conscience” clears a space in which a cultural spirit surpasses the political machinations of authority and power. While Schmoller decries the “minority of race and of faith” he claims has risen to political dominance, and charges the authority of the state to inculcate a Volksbewusstsein, for Cohen the distinction between Jews and Germans becomes a false construct of politicized argumentation when law is taken as the norm prior to collective unity. The law of the state is the source of national belonging because

> [i]t is not Volkbewusstsein that may limit and constrict authority, but rather authority that has to educate the people and to enlighten Volkbewusstsein with the spirit of law.\(^\text{124}\)

For Cohen, the role of ethical socialism is not simply to hand over the legitimate authority of the state to the Volksbewusstsein, because this kind of direct democracy is a political maneuver in which the relative communities of the state are broken into parties. Such suspicion makes good sense in the era of populist advocacy for antisemitic Volkstum. Cohen insists that the state must maintain a legitimate authority in the form of cultural education, of Bildung and Wissenschaft.\(^\text{125}\) And it is precisely through the spirit of law that authority is legitimated because the law becomes the ritualized performance of citizenship, where “German citizens of the Jewish religion” can deepen the “pure religion of culture.” Law must educate all citizens to be disciplined and dutiful selves, ethical citizens who honour the idea of law, rather than the fact of authority or belonging. Duty to the law and the spirit of the law must be ritualized and performed by each and every citizen if the state is to function, if its authority is to be legitimate, and its people is to be constituted by this duty. A

\(^{124}\) Cohen, “Betrachtungen über Schmollers Angriff,” 410

\(^{125}\) cf. Wiedebach’s different reading in The National Element, 112-116. Wiedebach does not address the question of the political versus the social but examines Cohen’s claim concerning education as a problematic form of liberalism.
“religion of culture” (Kulturreligion), oriented around the idea of a law for all, a law of humanity, might just help negotiate between the poles of neutralization and mythologization.

In order to provide ethics with the fundamental principle with which to begin this construction of culture, therefore, Cohen must reinterpret the meaning of intelligibility and the moral good by refocusing the actualization of ethical ideals in temporal terms, that is, the law must be understood as that which provides action with purposiveness. As a revised account of the categorical imperative, Cohen’s emphasis upon the purpose of law provides him with critical leverage for his theory of citizenship and national identity. Drawing upon his critique of Kant’s Typic, or account of archetypal and ectypal natures, his shift of emphasis toward purposiveness of the law accounts for the production of an action from reason without grounding law in any kind of natural event, cause, or essence. Rather,

[t]he intelligible character [of ethics] does not mean an intelligible cause, but only an intelligible purpose, the purposive end [Endzweck], which is the essence of the moral. But in which being is its purposive goal realized? In the Ought [Sollen]. And which being signifies this Ought out of the being of the task? In what relation does it stand to the being of nature?  

The origin of an action is the idea and norm. But although actions may appear to be effects produced by causes, Cohen is interested in how a purposive determination of action attributes the action with meaning. Ethical norms provide a Sollen or “ought” as opposed to the natural-ontological Sein, the “is,” or as Cohen puts it, the “being of what ought to be [das Sein des Sollens].” As the basic problem of legal and ethical philosophy, which Cohen likewise identifies as the Humean catalyst for Kant’s transcendental idealism as a whole, the purposive end that is intelligible to ethics secures the modal distinction with regard to nature announced in ethics.

126 ErW, 371
127 ErW, 13; 249
Thinking and willing represent these modalities. Thinking concerns what is and willing concerns what ought to be. For Cohen, this modality expresses the particularly important relationship between logic and ethics within the system, which he refers to as the “basic law of truth.”

Insofar as truth, as we saw in chapter 2, is a concept that ethics generates out of its relationship to logical necessity and universality, logic provides the underlying conceptual fabric permeating the entire system of philosophy. But without ethics, the being of nature could not be properly idealized into the normative dimension that human actions require. Thus, Cohen cites the idea of nature as “creation,” crucial to his logic of origin, as an ethical conception of nature and experience.

Logic and ethics both share experience as the epicenter of their cognitive value. However, the natural world and the object of pure cognition cannot be schematized in the same way. Rather, the kind of “purity” of which Cohen constantly speaks is the idealization of these two worlds and two models of temporality: for logic, it is nature while for ethics it is law and history.

For as Cohen claims, “Will and eternity are the analogs to thinking and nature.”

In ethics, this temporal dimension to logical judgment (the infinite task of producing the object) is an act of judging, a decision to will an object on the basis of the future correlation of ideality and actuality. By opposing the idea of any “given object” and the insistence upon its pure production, Cohen

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128 ErW, 374-5: “We recognize, however, a new difficulty within our problem. The actuality of morality must be based on nothing other than nature and history. But at the same time, nature and history may not constitute the model of our desired actuality. The basic law of truth makes the claim of a correspondence between the two problems in the methodologically basic concepts of knowledge. But at the same time, it also preserves the distinction between them in the scope of this basic idea.”

129 Hence, Cohen writes: “nature and history inevitably form the presuppositions of [the method of] purity. It is not only the fundamental law of truth that places the ideal and nature in correlation; rather, it is the very first natural presupposition, from which the method of purity starts. The natural will is not the pure will. The natural man is not the pure man. The empirical I is not the pure I. But if there were no natural man with natural will and natural self-consciousness, then the method of purity could not begin; it would have absolutely no meaning.” ErW, 413.

130 ErW, 408
emphasizes the practical focus of his critical idealism. That is to say, in the Logik Cohen speaks of intuition’s attempt to suspend itself in an “eternal present” of logical judgment, while in the relationship between the logic of pure cognition and the ethics of pure willing, the only “present-time” of the judgment—its attempt to preserve the disparate moments within it—must be for the sake of what is to be, what is willed for the future. The goal of both logic and ethics is to generate the object of cognition. While in logic this object of cognition is thought of as having the value of a being in space and time, in ethics this object of cognition is the action willed in time.

Whereas Kant sought to unify the relationship between morality and political history by using causal nature as a model of successive time, Cohen acknowledges this theoretical use of reason as limited to nature as the unified object. But for Cohen, nature and history are the facts to be idealized by logic and ethics. This is not to say that an ontological separation obtains between the natural and the pure, because pure thinking and pure willing are not schematized through the intuitions of space and time. Rather, “infinitesimal reality [which is an infinite origin in thinking itself] is therefore the presupposition for the concept of law, which the term function now designates.” Even in the lawful cognition of nature, law must be understood as a function, as a “necessitation” rule. This rule applies infinitesimally, such that objects are outputs of the function

112 LrE, 61ff.
114 ErW, 415
115 LrE, 240. Ernst Cassirer would develop Cohen’s theory of science in his Substanzbegriff und Funktionsbegriff: Untersuchungen über die Grundfragen der Erkenntnistheorie, (Hamburg: Felix Meiner Verlag, 1910/2000); For the influence of this kind positivism upon state-law theory in the imperial period, see Georg Jellinek, Allgemeine Staatslehre (Das Recht des modernen Staates), vol. 1, (Berlin: Verlag von O. Häring, 1900), 153f. For the a general overview of the use of the terms substance and function in the idealistic philosophical milieu, see Rudolf Eisler, Wörterbuch der philosophischen Begriffe, vol. 3, (Berlin: Ernst Sigfried Mittle und Sohn, 1910), 1456f.
of cognition. Physical laws necessitate their described events because they are characterizations of mathematical laws, laws that operate as functions, whose input is worked over in an a priori fashion, necessitating a predicted output. Ethics, by contrast, consists of more than just logical concepts; ethics also consists of ethical ideas, sittliche Ideen, which are not based upon any intuition of space to coordinate them as ends. Rather than describe a sensible experience in retrospect, ethical law prescribes what should be the case, even if that which ought to be does not occur. Ethical judgments aim at a task, at a goal, and this goal provides an account of the logical concepts, a justification for their use. In Cohen’s words, “ethical ideas are distinguished from theoretical concepts; but this distinction may not permit their kinship to be their sublation.” This is the relationship between logic and ethics, concepts and ideas: ethics presupposes logic as its methodological skeleton, however, the conditions of all ethical ideas must not be sought in the historical and positive institutions of natural anthropological man. In deliberately mimicking Hegelian language, Cohen insists that these ideas (die Ideen) cannot be sublated (aufgehoben) into concepts (die Begriffe). Ethics is a method, in the sense of a plan or a blueprint to bring about a goal and a purpose, to bring about the ethical ideal. It is not enough just to know the law; we must justify it with purposive action.

By refocusing lawfulness around the purpose of ethical judgment and the pure will, upon the Sollen, theught, rather than causality, Cohen reorients the Typic-problem around how the will originates action on the model of an idealized, temporalized lawfulness, a law that brings us into the future. A lawfulness that does not determine coordinates, but infinitesimally approximates its goals, a law that is continuity as such. But as a law of continuity, the lawful will

136 ErW, 37/8 (1st/W)
137 Cohen argues that this is the shortcoming of Aristotelian ethics by contrast with those of Plato. See Charakteristik Ethik Maimunis (CEM) JS III.
provides a nexus between thinking and willing. Just as thinking must schematize the norms of knowledge with possible experiences, so too, the will must relate to the actualization of the norms of the law that mandate its actions. For Cohen, this is the problem of relating logic to ethics, of relating thinking to willing. And it is a problem that Kant was attempting to solve in the Typic. Thus,

One should also here note a sharpness in Kantian terminology, which has cast strong shadows in this primordial light. Kant dealt with our problem under the title of the typic of practical reason. The typic is distinguished from the schematism. In nature, the categories are realized. Kant describes this realization under the expression of schematization. The schema is the pure form, rather the pure configuration. This is possible in nature. Since space and time are the pliable areas in which the terms can be arranged. All requirement and every measure of reality is given here and provided. The terms are as pure forms, configuring forms. This is the concise sense of the schematism.\textsuperscript{138}

The difference between the Typic and the Schematism, according to Cohen, lies in the fact that the origin of action cannot be considered a fait accompli at any point in its origination. “Ethical concepts,” he writes, “do not have their methodological nature [Charakter] according to this relationship to scientific sensibility or the scientific representation of actuality [Wirklichkeit].”\textsuperscript{139}

The task of moral law, freedom, is never actual. Freedom is only intelligible because, in Cohen’s eyes, it remains a task, a goal, and a purpose that orients all action. And as an end or goal (Endzweck), the idea of freedom is also an origin (Ursprung), a beginning of action as the Sollen of freedom. By reconfiguring the emphasis of the Typic in contrast to the Schematism, Cohen is able to distinguish pure cognition of nature as the judgment of space and time constructed through the system of principles, from ethics, where space is not a factor. Indeed, since empirical causality is replaced with purposive end, the temporal dimension of ethics relies only upon the form of the Sollen, of the ought, which mandates its content as “what ought to be.” The future therefore

\textsuperscript{138} ErW, 392
\textsuperscript{139} Ibid. 393
becomes the proper domain of ethical action. Legality now achieves a noumenal status as a kind of temporal modality, to the extent that the law idealizes nature as an eternal nature, and eternal rational nature.

The social ramifications of Cohen’s critique should be apparent by now. If a law of nature is the determining form of all lawfulness then remains possible to reduce legitimate law to a natural “force” or “power” emanating from a people, from material fact, or even biological elements such as blood. If law is “caused” by something else, we lose the normative justification of the law and are left only with the necessity of law. Laws cannot be changed when they are necessarily the way we have inherited them. If law is merely the “form” of causality, then the content of the law can be justified by appeal to the successive past. But history is not the same as the past. Like ethics, as we saw in chapter 2, history identifies the norm that animates the past. History is a normative enterprise. Therefore, the history of law must be analyzed transcendentally, examining the conditions that made historical actions possible. This is already an idealization and law therefore expresses this rational nature of ethics and history. Rational nature is the idealized content of law. From this law neither one people’s past nor another’s is sufficient to explain the logic of legislation, to explain what citizenship or nation means. A mythic past relies upon this model of fate or necessity. Science must insist upon the ideal and upon the future.

Law is therefore the cornerstone of the project of idealizing religion and nation as correlated concepts. As a legal construct, citizenship, like all ethical ideas in Cohen’s thought, is not “merely” an idea. Rather, ethical ideas are intimately related to logical concepts, as we saw in chapter 2. The legal construction based upon an ethical idea is therefore a historical praxis, since at the heart of Cohen’s theory of law is a theory of action (Handlung), in which “all action is
reaction, process, redress [alle Handlung ist Behandlung].” The legal process is a relationship between past norm, present judgment, and future actions. The significance of this basic concept of legal cognition is that viewed through the law, an “action” is always a historical constellation. In this respect, Cohen’s insistence that Judaism is a religion of reason that can be justified in modernity stems from this conception of legal action, and in following from the conception of science and the transcendental method that I discussed in Chapter 2, action becomes the basic scientific fact of legal rights, a construct that must transpire in public. Action is the counterpart of the “norm.” Law therefore represents the process by which ethical ideas ground historically and socially actualized actions, and through this transition from ideal norm to actualizing action (an action striving to actualize an ideal), positive legislation in the state thereby constructs a nation. To the extent that positive statute laws are based upon ideal norms, Cohen is not advocating a form of legal positivism, whereby the meaning of legitimacy to the state and the spiritual bond of the nation is dissolved into the alienated “state-whole” as with the model of Cohen’s contemporary State-law theorist Paul Laband. Rather, Cohen insists upon the ideal relationship between morality and legality, the spheres Kant separated, as the means by which sittliche Geist, ethical spirit and the bedrock of culture, is actualized. And insofar as Cohen understands Judaism to have undertaken a process of auto-idealization of its positive ritual law, Cohen undertakes a revision of Kantian practical philosophy in turn according to which the moral law becomes a common normative framework for both Christians and Jews to secure public law as the true expression of Bildung. This is Cohen’s vision of ethical idealism, as a theory of normativity and socially justified expressions of

140 ErW, 35

141 The first Chairman of the Centralverein, Martin Mendelssohn, emphatically declared “the very principle upon which our goal of the organization to be the advocacy on behalf of Jewish Germans “the very principle upon which our entire organization is built is that of publicity.” Martin Mendelssohn, Die Pflicht der Selbstverteidigung: Jahresbericht des Vorsitzenden in der ersten ordentlichen Generalversammlung des Centralvereins deutscher Staatsbürger jüdischen Glaubens, (Berlin: 1894), 18.
ethical judgment, and solidifies Cohen's response to the Jewish Question: the law is the foundation of ethical and national self-consciousness.

If Cohen was able to refit Kantian morality upon a more robust foundation, bringing Kant's theory of law into more precise logical articulation and demonstrating the purposive emphasis of ethical law, a question nevertheless remains: is law but a technical instrument, a means to this greater end? If so, what remains of the legitimacy of law to the citizen? How should a “people” take shape if the law is a pure construction? And should a citizen merely follow every law?

Cohen’s account of law is not based upon a private/public distinction. Indeed, the entirety of ethical law is public, constructed in reasoning according to judgments about the history of our positive laws and the attempt to recognize the flaws in the logical structure of our judgments. By recognizing the universality of legislation as the purpose of law, Cohen therefore derives the most important content from his theory of law: its public and social nature. Law is the ethical spirit of the state; law is what conditions our political existence; law is the basis of our citizenship. This is the social content of the moral law, and Cohen therefore has no need of a sovereign to decide arbitrarily upon which miracle requires belief or which affirmation of private belief should be voiced. We must believe in law, because the scientific norm that grounds all public law is found within the moral law: humanity is the norm of ethical law. This is the universality of the moral law; this is the purpose of law; and this is why public reasoning about the law becomes a duty.