

**THE PHILOSOPHY OF LAW AND THE LEGAL STATUS AND ROLE OF
PHILOSOPHY: REFLECTIONS ON LEO STRAUSS, *PHILOSOPHIE UND
GESETZ***

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First, very rough draft: comments welcome

Note to the reader: this paper is designed to be a chapter in a book on Strauss's philosophy of law. To the extent I draw larger conclusions from the interpretation of *Philosophie und Gesetz*, these depend to some extent on analyses in other parts of the manuscript, which are directed towards Strauss's engagements with Schmitt and Kojeve on the problem of law and the "state", and towards the preliminary articulation of philosophical politics in his *Persecution and the Art of Writing*. Much of this material has however been published now as stand-alone articles. See R. Howse, "From Legitimacy to Dictatorship and Back Again—Leo Strauss's Critique of the Anti-Liberalism of Carl Schmitt", in David Dyzenhaus, ed., *Law and Politics: Carl Schmitt's Critique of Liberalism* (Durham, NC: Duke University Press, 1998); R. Howse, "Reading Between the Lines: Exotericism, Esotericism, and the Philosophical Rhetoric of Leo Strauss", *Philosophy and Rhetoric* 32 (1999), 60-77, and R. Howse and B-P. Frost, "Introductory Essay: The Plausibility of the Universal and Homogenous State", in B.-P. Frost, ed., Frost and Howse, eds., *Alexandre Kojeve, au., Outline of a Phenomenology of Right* (Lanham, MD: Rowman and Littlefield, 2000). I have benefited greatly from comments on my earlier writing on Strauss from, among others, Nasser Behnegar, Peter Berkowitz, Joseph Weiler, Steven Smith, Bryan-Paul Frost, the late David Charny, Duncan Kennedy, David Dyzenhaus.

I. Strauss's Introduction to *Philosophie und Gesetz*¹

Strauss's "Introduction" begins with a bold statement of the two aims of *PuG*.

The first aim is to awaken a prejudice that Maimonides' rationalism is the truly natural model, to be carefully guarded against any counterfeit, the obstacle on which modern rationalism runs aground (Meier, 9; Adler, 41).² The second aim, "much more" than the first, is to arouse suspicion against the powerful opposite prejudice. Thus, Strauss identifies his fundamental role in *PuG* as that of an *Aufklärer*—he is most more interested in subjecting prejudice *against* the tradition of Jewish rationalism to questioning, than in re-awakening a prejudice in favour of the tradition.

However, it turns out that one cannot counter the prejudice against the tradition, unless one can at least imagine the possibility that the tradition is right and modern rationalism is wrong. Even someone whose natural inclination is to believe in the superiority of the present to the past, cannot sustain such an approach except as a mere superstition or dogma, unless she is willing to test the

¹ This chapter focuses to a large extent on the Introduction and Ch. I of *PuG*, which set up the problem or question of law as it appears in its original or primary form. There is much less emphasis on the specifics of the interpretations of particular writers in medieval philosophy, which occur in chs. II and III. Strauss himself hinted that the Introduction and Ch. I would be of central interest to thinkers, as opposed perhaps to historians of ideas or of Judaism—it was those parts that, for example, he strongly commended to Alexandre Kojeve (letter to Kojeve, 9 May 1935, quoted in Meier, "Vorwort", p. XXVI, *infra* n. ?). In this letter Strauss also indicates his opinion that this is the best material he has yet written.

² The translations are mostly my own, although I have used those in the Eve Adler English version from time to time. Unfortunately, Adler's renderings often lose for example legal or forensic allusions or undertones in Strauss's original words. Given the theme of the book, these are important for appreciation both Strauss's rhetoric and subtle aspects of the substance. However, I give references both to the best German edition, Meier, and Adler's English version. I am grateful to my wife Denyse Goulet whose mastery of legal and literary German helped me with the rendering of a number of key passages. H. Meier, ed., *Leo Strauss: Philosophie und Gesetz—Frühe Schriften* (Stuttgart: Verlag J.B. Metzler, 1997). Eve Adler, tr., *Leo Strauss, Philosophy and Law: Contributions to the Understanding of Maimonides and his Predecessors* (Albany: SUNY, 1995).

thought of the present against an adequate adversary, without presupposition as to the result of the contest.

At the same time, the present predicament of *Judaism* cannot be solved without a direct confrontation between the original, medieval Jewish *rationalism* and the core of modern rationalism, the way of thinking initiated by the Enlightenment. While it is typically assumed that the dispute or conflict³ between the Enlightenment and religious orthodoxy has long been overcome, the lack of interest in the classic points of contention between modern rationalism and religious orthodoxy, represents not a stable truce with which both sides may live but a decisive concession to the Enlightenment in terms of the original self-understanding of Judaism. “If, . . . , the belief in the creation of the world, in the reality of the biblical miracles, in the absolute obligatoriness and essential unchangeability of the law reposing on the revelation at Sinai, is the fundamental basis of the Jewish tradition, then one must say: the Enlightenment has undermined the foundation of the Jewish tradition” (Meier, 10; Adler, 23)

Strauss claims that the major efforts of modern Jewish philosophy to save or re-establish Judaism on the plane of modern rationalism all entail the sacrifice or jettisoning of one or more of these elements of the foundation, and thus represent a decisive concession to the Enlightenment in the fundamental dispute between modern reason and revelation in so far as it affects the fundamental position of Judaism. Miracles, creation etc. are “internalized”, given a purely symbolic, spiritual or moral meaning that assumes their implausibility as

accounts of external reality. Even those contemporary Jewish thinkers such as Cohen and Rosenzweig, who are skeptical of the adequacy of such internalizations and seek to return to the Jewish “tradition”, nevertheless cannot assent to the fundamentals that the tradition demands. Instead they seek to rehabilitate the tradition based on “new thinking”, a dualism of man and nature/world that is, at its root, even more alien to the Jewish tradition than the thought of the Enlightenment.

In consequence, the dispute between the Enlightenment and orthodoxy, far from being overcome, has never even been dealt with. Thus the “victory” of the Enlightenment has been only an apparent, and tentative--a victory only inasmuch as, in two or three hundred years, no one has actually taken up the conflict, and adequately and forthrightly challenged the thinking of the Enlightenment on the basis of the Jewish tradition.

Such a challenge supposes that one “hear the arguments of both parties” (Meier, 17; Adler, 29). According to Strauss: “Only when one does this, when one has the completed proceedings before ones eyes, may one hope to be capable of insight, uncorrupted by prejudice, into the hidden presuppositions of both sides, and thereby, a reasoned verdict concerning the rights and wrongs of their dispute.”(Meier, 17; Adler, 29).

This passage marks a turning point in the “Introduction”. If the Jewish tradition cannot adequately defend itself against the challenge of the Enlightenment by techniques that depend on the premises of the Enlightenment

³ The word that Strauss uses is “Streit”, which can have the meaning of a legal dispute or lawsuit. I translate this mostly as dispute; again, Adler chooses a word in English, “quarrel”, which lacks any

(“internalizations”), nor can the tradition defend itself from within, either. Strauss now invites the reader who cares about the Jewish tradition to take the posture of not of a *parti pris*, but an impartial and distant judge, and to evaluate without prejudice the competing claims of Enlightenment and the tradition. In effect, Strauss has placed the would-be defender of the Jewish tradition on the same plane or level as the modern rationalist he seemed to be addressing at the outset of the “Introduction”, who was required to test the premises of this rationalism against those of medieval rationalism--without prejudice, as it were. Yet, while the ideal of *modern rationalism* might logically imply the need to assure oneself that the commitment to modern rationalism is not itself a prejudice or dogma, it is not obvious why the Jewish tradition, by *its* own ideal, is obliged to submit itself to such a trial against the Enlightenment, much less be judged by a judge who is indifferent or unbiased as between the tradition and the Enlightenment.

Further, Strauss suggests that the result of such a confrontation or trial need not be a simple victory for either litigant—each side may have “rights and wrongs”. Perhaps the conflict between reason and revelation as such cannot be *resolved* in principle and once and for all by an impartial judge or arbiter. But even if this were true, the conflict might still be reasonably and fairly assessed or evaluated, in whatever particular form it manifests itself at a given moment or within a given life-world.

In fact, Strauss goes on to provide just such an assessment. The first part of his verdict is that “there can be no speaking of” a refutation of the “externally” understood foundational tenets of the tradition, such as miracles and the

creation.(Meier, 17; Adler, 29) Not only does this mean that miracles, etc. are “possible” but also that “almost all” the arguments of the Enlightenment against the *reality* of miracles are faulty, since these arguments ultimately depend upon the premise that miracles, etc are *impossible*, a premise that cannot be demonstrated.

This part of the verdict would be a straightforward victory for the Jewish tradition against the Enlightenment (“the Enlightenment’s attack on Orthodoxy failed” (Adler, 30), but for Strauss’s decisive qualification that the fundamental project of the Enlightenment was not in any case the theoretical refutation of the external tenets of the tradition. Instead, the project was the creation of a new world, in which man would be the absolute master, over himself and nature. And this project did not even *require* the *refutation* of the external tenets of the tradition; it necessitated only that men’s belief in the tradition be shaken sufficiently to liberate their minds for the project of mastery by means of the new science. If the project succeeded its *effect* would be the refutation of the tradition, since man would then find himself living in a world perfectly intelligible without “an unfathomable God” (Meier, 20; Adler, 31), a world of his own artifice. But no prior theoretical refutation of orthodoxy was required to get the project underway.

This brings us to the second part of Strauss’s verdict in the conflict between the Jewish tradition and the Enlightenment. Not only did the Enlightenment succeed in shaking men’s beliefs in the tradition (if often only through the tendentious device of mockery), but according to Strauss, the

Enlightenment was actually able to “*demonstrate* the unknowability of miracles as such”. In consequence, the fundamental external tenets of the tradition were increasingly understood as mere articles of faith, as opposed to something that has the certainty of the known. This in turn, led to the conclusion that the teachings of the tradition are also unknowable. And this, according to Strauss had a very particular result. For the older science (*Wissenschaft*), at least, the *teachings* (*Lehre*) of the tradition were knowable. That is, these teachings could be accounted for by pre-modern rationalism. With the older science, there was at least a common ground on which it was possible to engage with the tradition, the common ground of “natural right” and “natural theology”. There was no comparable common ground or harmony between the new science and the tradition. Lacking a basis for an adequate engagement with the Enlightenment, Orthodoxy protected itself by simply disengaging from the world of created by the Enlightenment, the world of modern culture. But Strauss suggests the high cost of this defensive strategy: orthodoxy became a relic, an anachronism, something to be despised. Thus, the second part of Strauss’s verdict is largely unfavorable to the Jewish tradition. The Enlightenment seemed to have accomplished a pre-emptive strike against the tradition, leaving it without resources to come back and defend itself in a meaningful engagement with the tradition.

The third part of Strauss’s verdict judges the Enlightenment according to the Enlightenment’s own standard for its success, the production of a world in which man is fully at home as master and creator. Strauss observes that doubts

soon arose concerning the success of this project; at any event, the project has not recently 'prospered'. Indeed, it is in such trouble that one can even assert that the belief in the limitless conquest of nature is "perishing". This would seem to be a damning verdict against the Enlightenment, until one reflects on Strauss's earlier remark that, as it were, *Weltgeschichte* is *not* *Weltgericht* : if, as Strauss suggests, the initial success of the Enlightenment over Orthodoxy, indeed a success that lasted for several hundred years, does not prove the case *for* the Enlightenment, then the recent crisis of confidence in the Enlightenment surely does not prove the case *against* the Enlightenment.⁴

The fourth part of Strauss's verdict in the trial between the tradition and the Enlightenment seems to suggest (but, as we shall show, only *seems*) that the Enlightenment is the victim of its own success. The ultimate implication of the ideal, constructivist character of the project of the Enlightenment is that modern natural science itself is not an account of the world as it is, but rather just one worldview among others, a set of hypotheses. But to get the project going in the first place, did not modern natural science have to "demonstrate" the unknowability of miracles, did it not have to liberate men from the shackles of tradition? Has Strauss now finally, in this part of the verdict been able to declare a clear win for the tradition?

Although it turns out that a fuller self-consciousness on the part of the modern project leads to the conclusion that modern natural science cannot

⁴ This is all the more the case, since at least some of the leading thinkers of the Enlightenment contemplated the possibility that progress towards the full realization of the Enlightenment ideal would neither be rapid, nor simply linear, i.e. without setbacks or reversals along the way. See, Kant's writings on history, for example.

“demonstrate” anything about reality, Strauss implied earlier in the “Introduction” that a “demonstration” was not strictly necessary to get the modern Enlightenment project going—rather, it was sufficient for the Enlightenment, defensively, as it were to establish *doubt* about the external teachings of the tradition, that is to put in question their character as something *given* and *evident*. Now he suggests the possibility that what the self-consciousness of the contingency and relativity of modern natural science actually proves, is not that the modern ideal is hollow, but rather that modern natural science is in the service of the modern ideal and not the reverse. And indeed one can add, on the basis of many decades experience after Strauss’s writing these words, that self-consciousness of the contingency and relativity of modern natural science as an account of reality, has not impeded modern natural science from effectively serving the realization of the modern ideal, which as Strauss emphasizes through *Philosophie und Gesetz*, has a fundamentally practical orientation. If man can realize the project of building a world in which he is completely comfortable and at home, which is completely intelligible as something he builds, as his artifact, then why should he even need an adequate account of “reality” as such, whether provided by revelation *or* by science?⁵ At most, Strauss seems prepared to say that when the modern ideal was confronting a world where revelation remained evident or given to all human beings or almost all human beings, modern natural science needed a naïve faith in itself as the bearer of an alternative account of reality in order to serve the modern ideal, or to liberate human beings to serve that ideal. But when it *needed* that naïve faith, modern natural science *had* it. It is little comfort to the tradition,

⁵ See Kojeve, *Atheisme*, Kojeve, “Introduction”, *Concept, Etre, Temps*.

then, that this faith of modern science in itself as *theory* is now shaken, since at *this* stage that faith seems hardly necessary at all in order for the modern ideal to retain its vitality or dynamism.

This brings us to the fifth and final part of Strauss's verdict. He has now moved the confrontation between the Enlightenment and tradition to a confrontation between the *ideal* of the Enlightenment, a new conception of the right way of life for man, and the *Law*, which for the tradition stipulates the right way of life for man. The fundamental character of the Enlightenment ideal is mastery over or self-assertion against nature—it is not the autonomy of man as such, or his self-making as such (as is understood by the philosophy of culture), but rather his self-making *against* nature.⁶

This claim prepares the way for what appears to be a judgment in favor of the Jewish tradition. The Jewish tradition, Strauss argues, understands the modern ideal in the sense just described better than the modern philosophy of culture understands it. More specifically, the Jewish tradition understands defection from, or rebellion against, the Law as Epicureanism. Yet this statement of Strauss in favor of the Jewish tradition is fundamentally qualified by the analysis that follows, which shows that the modern rebellion against the Law cannot ultimately be understood adequately as Epicureanism, since the form of Atheism in which that rebellion culminates, its most radical and recent form, is the Atheism from conscience, which rejects God not for the sake of human comfort, but out of the kind of probity or courage that eschews any truth that

⁶ See also, Walter Benjamin, *Selected Writings*, “On Love and Other Matters”(1920): “. . . what history shows most powerfully are the revolutions in nature” (p. 229).

appears to attract by being comfortable or reassuring. Once the Enlightenment has transformed itself into this kind of Atheism, the tradition loses its final weapons against the Enlightenment, the weapons of morality. From the standpoint of morality, the new Atheism cannot be criticized as base, cowardly or motivated by pleasure seeking.

The end result then of Strauss's trial of the case between Enlightenment and Orthodoxy, is the clear victory of the Enlightenment. Of course, Strauss has brought to light many of the problematic or questionable features of the Enlightenment; however, as I have tried to show, none of these problematic or questionable features of the Enlightenment cash out in terms of an effective counter-attack against the Enlightenment. The Enlightenment, for Orthodoxy, not only proves a worthy opponent, but an elusive one. One is struck, in fact, by the amazing plasticity and resource of modernity—the capacity of the modern project to reinvent itself in another form, once insight is gained into the limits or problems thrown up by the previous articulation of the project and its premises.⁷

So, according to Strauss, the one hope for Judaism, or at least for the Jewish tradition is to call into service as its lawyer, as it were, Maimonides, medieval Jewish rationalism. On the one hand, as Strauss has already told us, pre-modern rationalism is not simply hostile to the Jewish tradition, and indeed claims to account for the teachings of the tradition, if not its external tenets, by human reason. On the other hand, as he has already suggested, medieval and

⁷ Indeed, the self-recognition of modernity of its own limits and indeed its poverty does not lessen the intensity of commitment to modernity, or the sense of its superiority to earlier ages—Walter Benjamin remarks in 1933, “A total absence of illusion about the age and at the same time an unlimited commitment to it—this is its hallmark.” “Poverty and Experience”, in *Selected Writings: Vol. II*, p. 733.

modern rationalism have a common ground that the tradition and modern rationalism evidently lack—both are forms of Enlightenment. As the very opening paragraphs of the “Introduction” suggested, the modern rationalist, committed to freedom from prejudice or illusion, cannot simply *dismiss* medieval rationalism as inferior, without submitting itself to a fair and impartial trial against medieval rationalism. To do otherwise would be to endorse the superiority of modern rationalism as a simple dogma or prejudice, and betray thereby the very ideal of rationalism.

However, the capacity of medieval rationalism to be an adequate opponent or adversary of modern rationalism has been affected by the understanding of medieval rationalism within modern Judaism, an understanding influenced by none other than the Enlightenment and its apparent victory against the Jewish tradition. Thus, it appears that the fundamental aim of *Philosophie und Gesetz* is affected by something like a Catch 22. Overcoming the prejudice against medieval Jewish rationalism as *the* model of rationalism depends on overcoming *interpretations* of medieval Jewish rationalism that seem reasonable if not compelling on the basis of that very prejudice.

Strauss’s solution to the Catch 22 is first adumbrated in a footnote to the “Introduction”, where he remarks that Nietzsche’s radicalization of the critique of the “tradition” (Greek and biblical) has permitted a recovery of the original or natural “cave”, despite our having fallen into the artificial “cave” dug out by the Enlightenment. This is the natural or original situation of man to which the principles of both the Bible and Greek philosophy address themselves. The

modern historical sensibility, which understands all principles not as abstract universals but as arising within an historical “horizon”, allows or in fact compels us to reconstruct the “horizon” from which the principles of the Bible and Greek philosophy emerge. But although historicism or the historical sensibility make insight into this “horizon” possible or necessary, the insight is at bottom philosophical not historical in nature—while an inquiry into the history, or pre-history of philosophy, it is not undertaken through historical researches.⁸ It is insight into the basic or fundamental human situation as it appears *prior* to the conflict between reason and revelation-- the original, given or natural, common ground from which the contending principles have emerged.

While philosophical, this insight is nevertheless protected against the radical modern attack on theory, precisely because, as Strauss described it, the insight itself results in a certain but decisive way from that very attack. One is thus able, without in the first instance rejecting or overcoming the modern prejudice, to grasp, in a philosophical manner, something of the basic intent or orientation of the Bible and pre-modern rationalism. And this is, in turn, is the first step towards overcoming *interpretations* of both “traditions” that are based

⁸ The failure to appreciate this distinction has led many interpreters of Strauss to greatly over-estimate the role of historical studies or inquiry in Strauss’s recovery of pre-modern thought. See for example, Ahrens Dorf, Janssens, Meier, and to a much more limited extent, Tarcov. All historical studies or inquiries into the history of thought presuppose some philosophical problem or question. Strauss actually admired the historical work of for example Julius Guttman, but the most competent historical work would not succeed in recovering or reaching an adequate understanding of pre-modern thought if one were mistaken or misguided in one’s intuition in the first place as to the problem or question to which pre-modern thought is directed, an intuition that, being the presupposition of adequate historical studies, cannot itself be derived from those studies. See the beginning of Ch. I, which I now proceed to explicate. On how one can have a philosophical intuition about the basic question or problem as seen by pre-modern thought even in the modern situation, see also, Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (New York: Free Press, 1976): “The outlook of classic political philosophy did not entirely vanish with that philosophy’s disappearance. It survives in the religious conception of the world, or in

on the modern prejudice. At the core of the discovery that constitutes this first step is, as well shall now see, the discovery of *Law* as the central theme and preoccupation common to the tradition of the Bible, as well as to both Platonic and medieval rationalism.

Chapter I: The Quarrel of the Ancients and Moderns in the Philosophy of Judaism

Most of Chapter I is an internal critique of the interpretation of medieval Jewish philosophy, and above all, Maimonides by Julius Guttman. Strauss begins the Chapter by recalling the every historical inquiry is also a philosophical inquiry. In Guttman's particular case, the philosophical problem or question that preoccupies him in his historical inquiry is the relationship of the sphere or domain of "religion" or "religious consciousness" to that of philosophy. Having begun from this philosophical orientation, Guttman almost inevitably ends up characterizing the fundamental achievement, indeed the core, of medieval Jewish philosophy, as "philosophy of religion". According to Guttman, the medieval Jewish philosophers regarded the communication of truths and not the proclamation of the law as the primary end of revelation. The task was, then, to harmonize the substance of those truths, with the substance of the truths yielded on the basis of (primarily Aristotelian) philosophy. The result is that the truths of revelation turn out to be, without exception, accessible to unassisted reason—albeit not in the form that they are originally presented in the revelation, but in the

everyday moral and political thinking , which refuses to draw sharp distinctions between facts and values and relies on more or less explicit ideals of man and his good" (p. 43).

form they take on once harmonized by the philosophers. The form in which they are originally presented in the revelation must, therefore, be directed solely towards the vulgar, those who do not have access through reason alone. The revelation is strictly speaking only necessary for men unable to think for themselves. In what can be fairly said to be a quite devastating internal critique of this interpretation, Strauss suggests that if this were actually true then it would be quite mysterious why these great philosophers would have any interest in revelation at all. “We grant that, even if someone believes that the revelation tells the philosopher nothing that he cannot tell himself, he can still “believe” in the revelation, that is take cognizance that there exists a documents of revelation and that all insights independently acquired by him are present, though more or less disguised, in this document, but, since he could not *re*-discover them in this document, if he had not first discovered them in the course of his own reflection, what *interest* the does he have in the revelation? To be sure the multitude is dependent on the revelation—but what concern is the multitude to the philosophers, and especially to the proud Islamic and Jewish Aristotelians of the Middle Ages?”(Adler, 64; emphasis in original)

Although, as Strauss is at pains to illustrate, Guttman as an historian of Judaism often displays sound intuitions, and is genuinely sensitive to the greatness of medieval Jewish thought, his interpretation ends up as largely absurd or incoherent, since he started from the wrong philosophical question or problem, a question or problem that was presupposed and derived from the modern prejudice. In particular, Guttman followed Schleiermacher, who

understood law apparently in terms of the sphere of the “moral consciousness”—the general or most basic principles of morality. The individual or particularistic stipulations of the Bible, are regarded as “norms of right of a purely technical kind”, that are essentially of no interest to either the philosophy of religion, or indeed to philosophy at all, once the general principles of morality are sifted out from them. (Of course, the vulgar may be unguideable by general principles alone, especially in a “primitive” era of history, but again that is not of genuine and serious concern to philosophy) It was the “primitive” attitude of some medieval philosophers that may have led them to believe that revelation was a necessary basis for law, the attitude which confuses the technical norms of right, the individual and particularistic stipulations of the “positive” law with the general principles of morality. Only the latter are admittedly demonstrable to unassisted reason, and it was the mistake of thinking that the former stipulations need to be binding independent of their derivations from such general principles, which led some medieval philosophers to hold that revelation was strictly speaking *necessary* for the law.

It is at this point in the argument that the constructive philosophical work of *Philosophie und Gesetz* begins in earnest (it has already been prepared to some extent by the “corrections” that Strauss has inserted in the interstices of his critique of Guttman, but until Guttman’s interpretations collapse under the weight of Strauss’s internal critique, leading to the replacement of Guttman’s philosophical question with the genuine or appropriate question, these “corrections” are question-begging or not persuasive on their own terms) .

According to Strauss, precisely the notion that the Law is given as binding in its individual stipulations--that it prescribes not only general rules of morality (necessary for any society to operate as a society), but an entire regimen of life—provides us with a window into the problem or question of Law as it appeared in the original horizon of both the Bible and pre-modern philosophy, both ancient and medieval. It is in this sense that the notion is “primitive”—i.e. in exactly the sense desired if one is to adequately recover the intellectual power of pre-modern Jewish rationalism.

In the pages that follow, Strauss outlines in a very terse manner the problem or question of Law so understood. The Law has two aims: the specific perfection of man (the perfection of the soul), on the one hand, and the maintenance of social order, on the other. The problem of Law is to achieve both aims in a single regime. Strauss’s goes on to articulate this problem as it appears to the philosophers who have it before their eyes.

For the philosophers almost by definition the specific perfection of man includes philosophy itself. From this perspective, the problem of Law cannot be properly solved by any regime that is not directed towards or that does not facilitate the perfection of the soul that is philosophy. But who other than a philosopher could understand the nature of what is required in the way of legal stipulations to facilitate the perfection of man that is philosophy? Thus, philosophy—faced with the problem of Law in its original articulation—is compelled to adopt in principle the solution of the philosopher-ruler, the solution of Plato’s *Republic*. However, such a solution faces a number of difficulties. The

first is that the philosopher is not only a rational being, but a political being too, and even, if the philosopher were to rule self-interestedly, i.e. for the sake of philosophy alone, she would still be concerned with the second aim of the law, the aim of social order. The philosopher like anyone cannot function in the absence of social order, which at a minimum guarantees physical security.

So the philosopher would have to legislate with a view not only to perfection but to order, i.e. with a view to keeping the peace among persons not only who are intellectually defective but in many cases morally defective, just as Prospero must rule Caliban. Yet the philosopher, while she can “*know* in general the principles of a law and in particular the principles of the rational Law, cannot *divine* the concrete particular stipulations of the ideal Law, through the actual ordaining of which the Law in the first place becomes effective, or much more simply, becomes—*Law*. “(Adler, p. 71, Meier, p. 59)

This conception of ideal Law stands in-between the natural law conception and the positivistic conception of the essence of Law. The ideal Law must not only reflect the principles of Law but must also in its particular, positivistic form be such as to command *effectively*, or achieve the acceptance of those to whom it is directed. In other words, the ideal Law must be an ideal positive law.

It is now fairly evident why the philosopher is not well suited to the creation or founding of the ideal Law. The creation of specific ordinances that are such that they will achieve acceptance or obedience by an *actual, particular community or people* would seem to require a rather different skill set than that needed to grasp the general principles of law as such, or the principles of ideal

law as such. Here Strauss asserts an intrinsic limit to the philosophical knowledge of Law—there is a kind of knowledge of Law that is necessary to the idea of Law (which very idea implies that Law is only fully law when it is actual)⁹ and yet which pertains to some other class of human being than the philosopher.

In the pre-modern horizon, this other kind of human being is the prophet or seer. Yet it should be noted that the different character of the philosophical knowledge of law and the insight or “divination” of the particulars necessary to actualize law is not an insight limited to the pre-modern perspective, but is susceptible to a modern and secular interpretation as well. As Cass Sunstein observes: “It is possible that experienced judges, like experienced lawyers, develop a faculty best described as wisdom, perception, or judgment, one that allows them to reach decisions very well and very quickly. *This is a faculty quite different from creativity, intelligence, or analytic capacity. It seems to be associated with the ready and sympathetic apprehension of a wide range of diverse particulars, with an appreciation of the appropriate weight to be given to each.* Certainly, we can imagine a class of people who have a wonderful capacity to tell whether one case is relevantly like another or to decide what underlies their

⁹ A point of agreement in fact between Strauss and Kojève. See his *Outline of a Phenomenology of Right*, ch. 2. The difference between them is indicated by the fact that Kojève speaks of an actual *Droit* or the reality of *Droit*. For Kojève the ideal Law implies actualization, but actualization does not imply that the particular ordinances through which actualization is affected contain any normative content that is strictly speaking contingent from the perspective of *Droit*. If the detailed positive law cannot be derived simply from *Droit*, it is only because differences such as climatic or geographical conditions from one society to another demand some adaptation in the specific ordinances. See Howse and Frost, “Introductory Essay”, in Frost, ed., Frost and Howse, trs., Alexandre Kojève, au., *Outline of a Phenomenology of Right* (Lanham, Md.: Rowman and Littlefield, 2000), p. 19 For Strauss however because the ideal Law implies actualization, it implies that the specific ordinances be such as to command acceptance or obedience from an actual community of human beings with pre-existing beliefs of certain kinds, and thus there can be specific ordinances whose entire normative content is non-derivative from the general principles of Law, or natural Right, for example a prohibition on idol-worship, or of certain kinds of animal sacrifice.

ultimate judgments or their convictions about relevant similarity and difference.”¹⁰

If the necessary knowledge required for the ideal Law is divided between the philosopher and the “prophet”, in the original Platonic understanding, than the idea of the philosopher-ruler discloses an aporia, in as much as the ideal Law, qua Law, implies actualization. Thus, the treatment of the problem of Law, or the ideal Law, in Plato is divided between two very different philosophical exercises, that of the *Republic* and that of the *Laws*. As the *Republic* illustrates, the philosopher can articulate the general principles of a law and the principles of the rational law in particular, in such a manner that it is not unreasonable to *hope* that those principles could educate or affect someone with the capacity of a prophet, who would then found a regime adequate to philosophy as part of, and arguably the highest part of, the perfection of man. This solution, while premised on a hope that philosophy cannot guarantee will work out but which as such is not unreasonable, also carries with it a danger—the danger of legitimating or inspiring a “false prophet” as it were, a tyrant. This is a danger to society and its actual order, and it is also a danger to the philosopher, or his status within society.

¹⁰ Cass R. Sunstein, *Legal Reasoning and Political Conflict* (New York and Oxford: Oxford University Press, 1996). Sunstein goes on to quote the following description of Franklin Roosevelt, which conveys extremely well what in the pre-modern understanding is the political meaning of prophecy: “Frances Perkins later described the President’s idea . . . as a “flash of almost clairvoyant knowledge and understanding. He would have one of those flashes now and then, se observed, much like those that musicians get “when they see or hear the structure an entire symphony or opera.” He couldn’t always hold on to it or verbalize it, but when it came, he suddenly understood how all kinds of disparate things fit together. . . . Roosevelt made up for the defects of an undisciplined mind with a profound ability to integrate a vast multitude of details into a larger pattern that gave shape and direction to the stream of events.”(p. 139). See also J.B. White’s articulation of the relationship of law to rhetoric, and the introductory sections of Freud’s *Traumdeutung*. But cf. Weber’s Christian-inspired articulation of the necessary capacity as charisma, which obscures, if it does not deny, the character of this capacity as a form of *human* knowledge or insight, albeit different from that of the philosopher.

¹¹ (As Strauss indicates elsewhere, the very existence of philosophy in a given society indicates the society is less oppressive than one run by a “false prophet or tyrant might be).

The alternative approach is the one Plato sketches out in the *Laws*. One can begin from the other end, as it were, taking the adequately sound laws prescribed for an actual political community, and transforming them into “truly divine laws”, i.e. perfecting these laws in light of the philosophical knowledge of the principles of law. This alternative is less apparently dependent on mere hope, since the beginning point for the actualization of the ideal Law is in this case already *given*: this act of perfection or transformation presents itself as interpretation—it is through interpretation of the given law, through which legal philosophy can adequately bridge the gap between its own knowledge of the general principles of law on the one hand, and the specific kind of knowledge of particulars necessary for the actualization of law, on the other. But nevertheless, there is still this *dependency* on chance—*sufficiently* divine laws must have already in the past been given to the actual political community by a prophet. The philosopher doesn’t have the capacity to transform a fundamentally defective or simply illegitimate given Law into a truly divine Law.¹²

Thus, platonic legal philosophy offers no solution to the situation of a philosopher in a world of basically defective and unhealthy, or decayed legal regimes, except a posture of hopes and wishes (the project of the *Republic*, a fantasy for all intensive purposes in a world of basically defective and unhealthy

¹¹ See my essay on his *Persecution and the Art of Writing*.

¹² Strauss will develop this much later and in extenso in his debate with Kojève on tyranny and wisdom.

regimes that are very unlikely to bring forth a “true prophet” prior to their utter collapse), or more likely of resignation, acceptance of one’s impotence to bring into being what one *knows* to be rationally necessary.¹³

Strauss now claims that the *medieval* Jewish philosophers were protected from the *aporia* of Platonic legal philosophy by their acceptance of the revelation as given, i.e. their acceptance of the revealed Law as divine or perfect, to which nevertheless as philosophers they are called to understand and interpret on the basis of their specifically philosophical knowledge of the principles of Law, i.e. knowledge from unassisted human reason. But how could a philosopher accept the revealed Law as divine or perfect, if that Law were not directed to philosophy itself as part of the perfection of man? And yet on the Platonic understanding, only a philosopher could adequately determine a law adequate to the perfection of man, inasmuch as philosophy itself is part, if not the highest part, of this perfection. Thus, one appears to be faced with an *aporia*, here too. Unless at least one prophet, the original law-giving prophet had both the knowledge of a philosopher and that of a prophet.

How and in what sense that might indeed be possible is developed by Strauss in the final chapter of *Philosophie und Gesetz*, in his elaboration of Maimonides’ prophetology and in particular, the particular status and case of Moses within that prophetology. But to appreciate or understand Maimonides’ prophetology, his philosophy of law proper, one must first understand the actual

¹³ And indeed this may have been the essential “defect” in pre-modern political philosophy that gave rise to the modern enterprise. What Strauss calls the *conservatism* of the classics in *Thoughts on Machiavelli* amounts apparently to *resignation* to impotence or powerlessness in the face of a fundamentally decayed or decadent legal regime.

status and role of philosophy under the given, revealed Law. This is the task of ch. II.

Chapter II: The Legal Foundation of Philosophy

Strauss has already articulated the original idea of Law as it appeared before the eyes of the pre-modern philosophers as that of a total regimen of life, the right way of life. But if the given revealed Law is adequate in that respect, then why is philosophy necessary or desirable? (The advantage or up-side of the aporia of philosophy and law in Platonism was that in almost all circumstances it seemed to give philosophy a *raison d'etre*—the ideal Law having never been actualized, having never really become Law, the bindingness of actual law on the philosopher as a rational human being (as opposed to its bindingness on him as a political being—see the *Crito*) is less than complete, or in other words, he is authorized to *seek* and indeed called to seek, within the limits of philosophical knowledge, the ideal Law, and particularly the rational law specific to the perfection of man, part of which is philosophy itself.)

Strauss presents three answers to the question or puzzle of the status and role of philosophy under the revealed law, those respectively of Averroes, Maimonides, and Gersonides.

For Averroes, philosophy is commanded by the Law. The basis for such a command is that the happiness of man is the end of the law, and the law dictates that man's happiness consists in the *knowledge* of God. Such knowledge is only available to human beings as human beings through speculation, through

philosophical knowledge of the beings created by God. However, such a command would only be coherent if it were pre-ordained that the results of speculation cannot come into conflict with the teachings of the Law itself. The answer to this difficulty is interpretation. Wherever there arises an apparent tension or contradiction between the literal meaning or teaching of the Law and the results of speculation, the philosopher must interpret the Law non-literally. However, such non-literal interpretation must remain secret—this follows from the full original meaning of the problem of Law, i.e. from the fact that the positive Law to be fully law, must be capable of commanding assent or acceptance by all persons, not just philosophers, who are able to understand by reason the principles of the Law.

Yet the command to philosophize so understood also involves one important restriction on the freedom to philosophize. Since the premise of the command is the knowledge of God through his creation, the results of philosophical speculation cannot result in the denial of the existence of God, or His creation of the world. “In the end, philosophy does no more than to deepen and demonstrate the knowledge accessible to *all* Muslims through the law.”(Adler, p. 88; Meier, p. 74).

How important or decisive a qualification this is on the freedom of philosophy depends on whether there is or is not any intrinsic, i.e. internally or *philosophically* imposed limit on the philosopher’s knowledge of matters such as the existence of God or the creation of the world. Strauss suggests that there are some passages in Averroes that point to the position that there are truths

prescribed by the Law, which philosophical reason cannot validate or invalidate, since such truths are in principle not directly accessible to philosophical reason. If this were the case, than the philosopher's *acceptance* of truths prescribed by the Law in such matters would not really amount to a greater restriction on philosophizing than that posed by the intrinsic limits of philosophical knowledge. However, in Averroes this question remains open or ambiguous.

The main difference between Averroes and Maimonides is that Maimonides is much clearer on the limits of philosophical knowledge in relation to divine matters. The philosopher does not have direct knowledge of the upper world, and the history of philosophy discloses the utter failure to solve through philosophical demonstration the question, for instance, of whether the world was created or is eternal. For Maimonides, but probably not for Averroes, the creation of the world is a foundational dogma. Thus, in order to be free to philosophize under the law the philosopher must accept the creation of the world as a supernatural truth, a truth not evident or demonstrable on the basis of philosophic reason. But this bondage to the Law does not fundamentally cripple or constrain philosophy, because—completely unconstrained by Law, i.e. constrained only by its intrinsic limits—philosophy would nevertheless not be able to come to an opposite conclusion that had the *certainty* of philosophic knowledge.¹⁴

¹⁴It should be emphasized that the personal moral constraints of the stipulations of the law do not impede the freedom of the philosopher, given that this freedom is at its core intellectual freedom, not license or freedom to pursue sensual pleasure. In fact one sense in which the given Law is “divine” is precisely in its direction away from sensual or material life, which of course has a different meaning and importance for the “community order” function of life than for the “perfection” function of the Law. With respect to this latter function, in the understanding of pre-modern philosophy according to Strauss, the life of contemplation itself requires liberation from slavery or dependence on sensual pleasure. And see Joseph

If this is true, then why were the medieval philosophers, including Maimonides, so concerned with Aristotle or bringing Aristotelean theology under the Law as it were? The answer is that while philosophy cannot yield rigorous knowledge of the upper world, the philosopher's purely human interpretation of the lower world tends to produce a kind of "natural theology"—a set of hypotheses or speculations about the upper world, or the first things, that seem particularly plausible, or to which the philosopher is as it were naturally disposed, by his insight into the lower, human world on the basis of unassisted reason.

But the truth of the philosopher's account of the lower world as such does not depend upon the truth of these speculations. Legal philosophy *is* first philosophy, not metaphysics or "natural theology". However, once we understand the difficulty that these speculations pose for the justification of philosophy under the revealed Law, especially if the student of philosophy sees them in the first instance as more than speculations, we can see very clearly why the medieval philosophers were so pre-occupied with Aristotelian "natural theology". They were so pre-occupied because the legal justification of philosophy is prior even to the philosophical justification or account of Law. Prior in two respects, actually. Prior, because the manner in which the philosopher who is under the Law may investigate the Law and account for it by

Weiler, "Federalism without Constitutionalism: Europe's *Sonderweg*", Nicolaidis and Howse, eds., *The Federal Vision*, forthcoming, Oxford University Press, 2001: "There is, however, an interesting paradox in this submission [to the Law] which orthodox Judaism as well as several strands of Islam share. . . . By enslaving oneself to an authority outside of this world, one declares an independence of, and refusal to submit—in the ultimate sense—to, any authority of this world. By abstaining from eating everything that one fancies, one liberates oneself from that powerful part of our physical existence. By arranging life so as not to work on the Sabbath, one subjugates the even more powerful call of career and the workplace. And by refraining from sexual abandon, even if loving, even if within wedlock, one asserts a measure in independence even over that exquisite part of our lives too."

reason alone, depends on the way in which she is under the Law as philosopher. And prior also, in the sense that for the philosopher of the Middle Ages the problem of Law as such first comes to light, becomes visible, through the need to justify herself as philosopher before the bar of the Law.

These elaborations of the place of “natural theology” in Maimonides will appear in the final chapter of *Philosophie und Gesetz*. Before he arrives there, however, Strauss describes a third position on the relationship of philosophy to the revealed Law, which is that of Gersonides. Unlike Maimonides, Gersonides holds that there are no intrinsic pre-set limits to philosophical knowledge—with time philosophy could solve the riddle of creation. According to Gersonides, the possibility of human knowledge is co-extensive with the longing for it—the idea of a longing that cannot in principle be fulfilled is alien to Gersonides. Gersonides also propounds public communication of philosophical truth. However, Gersonides ultimately ends up with a limit on philosophical freedom that Strauss merely asserts here is greater than that which Maimonides had to accept. While for Maimonides the philosopher was free to encounter the Torah based on guidance from reason, Gersonides asserts that the philosopher must be guided by the Torah, which is mysterious and non-lucid, in her encounter with the world. Philosophy as a way of life is incapable of *self-direction*, but must be guided or directed by the mysterious and obscure, even if it is ultimately able to solve philosophically the riddles of existence that *Maimonides* claims it is unable to solve—and *in order* to solve those riddles.¹⁵

Chapter III: The Philosophic Foundation of the Law

In this chapter Strauss takes up Maimonides' prophetology. Prophetology seeks to render lucid what for Gersonides must, for the philosopher must remain obscure and impenetrable, if in some way also binding and directive, namely the revelation of the Law itself. Maimonides is able to argue that this can be rendered lucid by philosophy, and remain true to his view that only the human world can be rendered lucid by philosophy, because of God's fortuitous decision to carry out the revelation through the intermediary of a *human* being, the prophet. Thus, while philosophy may not be able to determine who is chosen as a prophet by God---that indeed would limit God's free will---philosophy can ascertain those human qualities that would be make someone eligible to be a prophet.

The idea of revelation as given in the Bible presupposes the superiority of knowledge to hearsay. Otherwise the prophets who have direct knowledge of the most important truths would not be superior to, would not be able to command those who rely on the authority of their account of those truths. In this sense, the Bible and philosophy have a common ground. If there are some human beings who can achieve indirect knowledge of these things, knowledge through reflection on the human world, then this is still superior to being guided by hearsay or authority alone, even if inferior to direct divine guidance, that to which the prophets, or at least the perfect prophet, has access. Hence, the way of the Bible cannot be said to be the way of simple obedience for all men. If it were then the only superiority of the prophets would be that of their imaginative capacity, their ability to devise particular stipulations that receive acceptance or

¹⁵ Strauss remarks on the modern sensibility of Gersonides—See also Goethe, *Faust, Erster Teil*, 355-385.

obedience by the community as a whole—then, the prophet would be no better than a clever tyrant or tyrannical political founder.

It follows then from the original idea of Law that in order for the prophet to be able to proclaim the ideal law, which is directed at least in part to the perfection of man, which includes philosophy, the prophet must be a philosopher. Thus, the prophet must have access to philosophical truths. But because the law must be expressed in a way that achieves acceptance or obedience by the actual community to which it is directed, in order to be law, the prophet must also have a fully developed imagination, which allows the communication of the law figuratively. But the prophet has direct, therefore certain knowledge of the upper world, which knowledge the mere philosopher does not have, but which the philosophical quest certainly implies a great longing for. Thus in terms of the philosophical ideal itself the prophet stands above the philosopher. Yet not all prophets are superior to the philosopher—since for most, if not almost all prophets, or perhaps all except Moses, the direct access to the upper world causes bewilderment or unclarity. Thus the imaginative perfection of the prophet is at the cost of intellectual perfection, generally speaking. Yet, in accepting the divine or ideal Law as given, one avoids a reversion to the aporia of Platonic legal philosophy. Or put differently, the implication of the acceptance by the *philosopher* of the divine Law as given is that Moses was superior to *both* the ordinary prophet and the ordinary philosopher. In accepting the superiority of one exceptional prophet to herself, the medieval philosopher blunts the question of

whether the *ordinary* philosopher is superior, or inferior (or equal) to the *ordinary* prophet.

For Aristotle, the status of the life of contemplation as the highest life for human beings allows for a relatively simple answer to this question. For Plato, however, the answer is more complex—it is one of mutual dependence. Because, for Plato, the Law, but *not* the ideal Law, *is* given, *is* first for philosophy, and because there can be no simplification or reduction of the two aims of Law (order and perfection) one to the other, without distorting the original, primary, or natural meaning of Law. The dangers to which philosophy is exposed in such a situation, lead to philosophical politics, a bolder and more daring strategy in relation to the given Law than is revealed or suggested by the conclusion of *Philosophie und Gesetz*, which is that the medieval philosophers are free to *understand* the given, ideal Law on the basis of the Platonic framework—just as the Athenian Stranger, in Plato’s *Laws*, is free to “interpret” the given Law, which is not ideal, in light of the principles of Law, the ideal framework (of Plato’s *Republic*, as it were). Because philosophical politics is not the theme of *Philosophie und Gesetz*, or even adequately dealt with there, except through reference to the negative commandment not to reveal to the vulgar the non-literal meaning of the Law, *Philosophie und Gesetz* is not even Strauss’s last word on medieval legal philosophy. *Philosophie und Gesetz* does not fully expose or articulate the natural or original situation of philosophy—in that situation, philosophy is less protected through (reasonable and limited) submission to given law than would appear to be the case according to Maimonides. Without a full

articulation of this issue, it is impossible to answer the question of whether medieval Jewish rationalism can provide the Jewish tradition with the resources for an effective counter-attack against the Enlightenment, i.e. whether it allows the tradition to meet and lock horns with the Enlightenment on the common ground of philosophical *rationalism*. For Strauss's preliminary articulation of philosophical *politics* as an essential element in response to the natural, original (legal) situation of philosophy, we must turn to *Persecution and the Art of Writing*—if one likes canine imagery, the missing PAW of the PuG, as it were.