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All Natural Right Is Changeable: Aristotelian Natural Right, Prudence, and the Specter of Exceptionalism

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> Let us then return to the surface. Let us abandon every pretense to know.[1]

I. "A Curiously Neglected Passage"

In his recent book on Strauss, Steven B. Smith has called attention to "a curiously neglected passage from the very center of *Natural Right and History*," a passage in which Strauss "acknowledges the way political decisions grow out of concrete situations and cannot be deduced from a priori rules."[2] The passage reads:

> Let us call an extreme situation a situation in which the very existence or independence of a society is at stake. In extreme situations there may be conflicts between what the self-preservation of society requires and the requirements of commutative and distributive justice. In such situations, *and only in such situations*, it can justly be said that the public safety is the highest law. A decent society will not go to war except for a just cause. But what it will do during a war will depend to a certain extent on what the enemy—possibly an absolutely unscrupulous and savage enemy—forces it to do. There are no limits which can be defined in advance, there are no assignable limits to what might become just reprisals.[3]

Smith is right; it is odd that this part of *Natural Right and History* is as little discussed as it is. There is, first, the passage's central position in the most influential book of an author who found significance in central positioning. There is also its place in Strauss's explication of classic natural right, which

[1]Leo Strauss, *The City and Man* (Chicago: University of Chicago Press, 1964), 55 (hereafter CM).

[2]Steven B. Smith, *Reading Leo Strauss: Politics, Philosophy, Judaism* (Chicago: University of Chicago Press, 2006), 198.

[3]Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), 160 (hereafter NRH); Smith's emphasis.

is crucial to his work as a whole. Finally, there is the way it seems to confirm a certain caricature of Strauss as a Machiavellian, or even a Schmittian. Let's look at each of these factors more closely.

As Smith tells us, the passage is "from the very center" of Strauss's text. It appears in the 173rd paragraph of a text composed of 340 paragraphs.[4] Hence, one might say that nothing appears in "the very center of *Natural Right and History*" except the break between paragraphs 170 and 171. This break cleaves the two claims—natural right is part of political right, and natural right is changeable—that Strauss presents as comprising Aristotle's natural right teaching. Strauss does not call much attention to the diversity of classic natural right teachings. His presentation of modern natural right is composed of long sections on Hobbes, Locke, Rousseau, and Burke, but he presents classic natural right as something of a unity.[5] The similarities among the teachings of Socrates, Plato, Cicero, Aristotle, and Aquinas seem to outweigh the differences. Upon closer inspection, however, a certain diversity comes into view. The teachings of Socrates and Plato are identified with one another as the Socratic-Platonic teaching. Strauss argues that Cicero shared this Socratic-Platonic understanding of natural right, and that the supposed novelty of the Stoic natural right teaching is merely exoteric.[6] Thus, three of the classical philosophers treated by Strauss are consolidated into one position on natural right. Aquinas, for his part, is treated very briefly in one paragraph, and seemingly dismissed; because of his belief in divine revelation, Strauss doubts whether "the natural law as Thomas Aquinas understands it is a natural law strictly speaking, i.e., a law knowable to the unassisted human mind."[7] Hence, classic natural right divides into the Socratic-Platonic teaching on the one hand, and the Aristotelian teaching on the other.

The primary difference between the two, and the criterion according to which Cicero is classed with Socrates and Plato, concerns the incompatibility between political life and natural right. The Socratic-Platonic teaching affirms this incompatibility; the Aristotelian teaching seems to deny it. More precisely, Aristotle seems to deny that the incompatibility makes any difference "for all practical purposes."[8] There is a theoretical intransigence in the Socratic-Platonic teaching, which is at least less pronounced in Aristotle. Strauss's Plato teaches the incommensurable superiority of the theoretical over the practical life. Aristotle's first claim is that this incommensurable superiority makes no practical difference. But Aristotle's second claim seems to scramble the lines of demarcation. The claim that all natural right

[4]Paragraph breaks, but not pages, are within a modern author's control, and Strauss certainly counted his paragraphs, here and elsewhere (see *The City and Man*).

[5]I owe this observation to Michael Zuckert.

[6]Strauss, NRH, 153–56.

[7]Strauss, NRH, 163.

[8]Strauss, NRH, 157.

is changeable has the consequence—admittedly far from obvious—that only philosophers are practically wise.[9] This might reconcile Plato and Aristotle, but only by pitting Aristotle against himself. If Aristotle affirms that the divergence between philosophy and political practice is irrelevant for practice, how can he also affirm that only a full awareness of the hierarchy of ends, hence only philosophy, can prepare one for right practice? It seems significant that the articulation of these two Aristotelian claims should be at "the very center of *Natural Right and History*."

This brings us to the second curiosity in the neglect of the passage that Smith notes. If Aristotelian natural right is central to Strauss's project in *Natural Right and History*, then the ever-growing scholarship on Strauss seems to have produced a distorted picture of that project by focusing almost exclusively on the Socratic-Platonic teaching. The neglect of this passage is but one instance of the neglect of Strauss's understanding of Aristotelian natural right in its specificity.[10] But if this is so, attending to Strauss's six paragraphs on Aristotelian natural right reveals the surprising fact that Strauss nowhere cites Aristotle.[11] Indeed, the only citation of any sort in these paragraphs is a reference to Strauss's essay "The Law of Reason in the *Kuzari*."[12] This oddity raises the question of the provenance of Aristotelian natural right. Just how Aristotelian is it?

This brings us to the third curiosity in the neglect of this passage. For his critics, the questionable basis of Strauss's Aristotelian natural right in Aristotle might lend credence to the suspicion that it has another, less respectable source. Indeed, the passage Smith notes is not entirely neglected. Shadia Drury called attention to precisely this paragraph in her polemic against what she termed Strauss's unconstrained "consequentialism."[13] According to Drury, Strauss's comments on the mutability of natural right demonstrate

[9]See Section III, below, for a reconstruction of the argument.

[10]Insofar as the commentary on Strauss pays any special attention to Strauss's reading of Aristotle, the conclusion reached tends to be the one voiced by Stanley Rosen: "Strauss evidently leans upon Aristotle's authority in one set of texts and silently rejects him as un-Socratic in others" ("Leo Strauss and the Possibility of Philosophy," *Review of Metaphysics* 53, no. 3 [2000]: 559).

[11]David Lachterman notes this fact, but says of it only that the Aristotelian natural right teaching is "an intermezzo" between the Socratic-Platonic teaching and the natural law teaching of Thomas Aquinas ("Strauss Read from France," *Review of Politics* 53, no. 1 [1991]: 234). Strauss cites Aristotle five times in his discussion of Socratic-Platonic natural right, and twenty-seven times in his discussion of classic natural right preceding the distinction among its types.

[12]Leo Strauss, "The Law of Reason in the *Kuzari*," in *Persecution and the Art of Writing* (Chicago: University of Chicago Press, 1952), 95–141 (hereafter PAW); cited by Strauss, NRH, 158n32.

[13]Shadia B. Drury, "Leo Strauss's Classic Natural Right Teaching," *Political Theory* 15, no. 3 (1987): 299–315, esp. 307–9.

that, for Strauss, it is "possible to consider any conduct just if it is deemed necessary under the circumstances."[14] Tellingly, in her citation of the passage, Drury omits the phrase that Smith emphasizes: "and only in such situations."[15] It seems that the friends of Strauss must highlight what the enemies of Strauss must omit. According to his friends, Strauss insisted especially on keeping the exception or the extreme case firmly segregated from the rule or the normal case, and is, despite his exceptionalism, a proponent of the rule of law.[16] According to his enemies, on the contrary, the admission that the extreme case is relevant for natural right is automatically disqualifying.[17] Such a disagreement is possible only on the ground of a basic concord: friend and foe agree that Strauss argues that "the statesman must be allowed to respond to evil by using means that would ordinarily be considered unjust."[18] The mutability of natural right seems to those who discuss it to entail a sort of situation ethics. The question is only whether Strauss effectively circumscribes the situations in which extraordinary action is right and the agents who may rightfully decide such exceptions to the ordinary rules of justice.

Hence, three issues are raised by the passage to which Smith draws our attention. First, there is the question of the unity and specificity of the Aristotelian teaching. What is Strauss's "Aristotelian natural right"? Second, there is the question of the provenance of this teaching. Is Aristotelian natural right Aristotelian? Third, there is the question of exceptionalism. Is Aristotelian natural right compatible with the rule of law?

II. The Argument Forecast

This essay seeks to advance inquiry into two of these three issues. Primarily, it aims to clarify Strauss's understanding of the Aristotelian claim that all natural right is changeable. Strauss takes this to mean that there is, in every situation, one best course of action, but that the right thing to do can be neither discovered by nor properly understood as the application of any

[14]Drury, "Leo Strauss's Classic Natural Right Teaching," 307.

[15]Ibid.

[16]See, e.g., Catherine H. Zuckert and Michael Zuckert, *The Truth about Leo Strauss: Political Philosophy and American Democracy* (Chicago: University of Chicago Press, 2006), 184–93.

[17]Drury finds Strauss's "Aristotelian" position to be worse than Machiavellian. "Strauss is not saying that in extreme situations the preservation of the state requires that we suspend the rules of natural justice and in so doing act unjustly. This is the view of Machiavelli. Strauss's claim that the 'exceptions are as just as the rules' … allows us to do injustice with a clear conscience" ("Leo Strauss's Classic Natural Right Teaching," 308).

[18]Smith, *Reading Leo Strauss*, 199.

general rule or universal principle.[19] I have already mentioned that this claim has consequences that seemingly contradict the other Aristotelian claim that natural right is part of political right. A closer examination will show that it also sits uneasily with the Socratic-Platonic claim that natural right is incompatible with political right. In short, if moral laws or commandments neither explain nor produce the rightness of right action, then the status and import of philosophical treatments of the best regime are obscure. How can political philosophers pronounce laws when they know they are ignorant of what justice is? And how can it be that they act rightly in so doing?

These tensions among the claims comprising the classic natural right teachings are, I will argue, clarified, if not resolved, in the *Kuzari* essay. This, I believe, is why Strauss refers his readers there rather than to Aristotle. What matters is Strauss's understanding of the claim that natural right is changeable, and the consequences of this claim for the compatibility or incompatibility of natural right and political right, philosophy and law. I can therefore leave aside such questions as whether and why Strauss generally prefers Plato to Aristotle, how the claims in *Natural Right and History* cohere with Strauss's other readings of Aristotle's political philosophy, and how best to interpret Aristotle's remarks about what is just by nature.[20] My discussion should be helpful for those interested in these questions, but I will not address them myself.

Secondly, my reconstruction of Strauss's position will distance it from the assumptions shared by Drury's attack and Smith's appreciation. If Strauss took the position that Smith attributes to him, Drury's criticism would be on target. To be sure, Smith takes his direction from Strauss himself, but Strauss was not concerned in 1953 to rebut criticisms that would not emerge for thirty years, and his own formulation of the difference between the Aristotelian position and "Machiavellian" exceptionalism are not directed toward this issue. For Strauss, what matters is whether one is oriented by the normal case or by the exception. This is a special case of his concern with

[19]Strauss's position, in this regard, bears comparison with contemporary moral particularism. See Jonathan Dancy, *Ethics Without Principles* (Oxford: Oxford University Press, 2004); and Brad Hooker and Margaret Olivia Little, eds., *Moral Particularism* (Oxford: Oxford University Press, 2000).

[20]The single best treatment of this last issue may be found in Richard Bodéüs's essay "The Natural Foundations of Right and Aristotelian Philosophy," trans. Kent Enns, in *Action and Contemplation: Studies in the Moral and Political Thought of Aristotle*, ed. Robert C. Bartlett and Susan D. Collins (Albany: State University of New York Press, 1999), 69–103. Bodéüs had earlier presented a preliminary form of his interpretation as a critical counterpoint to Strauss's understanding of Aristotle ("Deux propositions aristotéliciennes sur le droit naturel chez les continentaux d'Amérique," *Revue de Métaphysique et de Morale* 3 [1989]: 369–89), but the more recent essay explicitly revises the conclusions of the earlier one, and whatever disagreement remains between Strauss and Bodéüs is for sharper eyes than mine to spy out.

whether one is oriented by the high or by the low. Now, as Strauss himself says, "No legal expression of this difference can be found."[21] But the contest between Smith and Drury is over a matter of legal expression, for it concerns whether, as a rule, latitude ought to be given to statesmen to depart from the ordinary rules of justice in exceptional circumstances. No number of references to how the statesman is oriented will settle the matter of whether or not Strauss advocates empowering the executive to act outside the purview of the legal system. Only a reconstruction of Strauss's understanding of the mutability of natural right can decide the controversy.[22]

Undertaking such a reconstruction, I will first examine the paragraphs on Aristotelian natural right in *Natural Right and History*. This will clarify and flesh out Strauss's argument. It will also raise the question of the relationships among natural right, philosophy as a way of life, and law.[23] These relationships are clarified by the essay on the *Kuzari*, an examination of which will show that the true import of the mutability of natural right lies far from the sphere of executive decision, or exceptionalism for an elite. Instead of being an argument for giving statesmen the latitude to decide exceptional matters without legal oversight, the mutability of natural right has the consequence that philosophers, as prudent individuals, are extremely difficult to recognize.

III. Aristotelian Natural Right

Strauss opens his treatment of Aristotelian natural right by acknowledging the thin and obscure textual basis for attributing any natural right teaching at all to Aristotle. Nonetheless, he maintains that Aristotle makes two distinctive claims about natural right: that it is part of political right, and that it is changeable.[24] The first of these claims Strauss deals with in one paragraph;

[21]Strauss, NRH, 162.

[22]Regardless of whether Strauss's argument for the mutability of natural right is Aristotelian, I will treat it as Strauss's own view. I do so because it makes my own argument more challenging. Faced with Drury's charge, a defender of Strauss might deny that Strauss endorses the Aristotelian position on natural right. This has a certain plausibility, since Strauss generally seems to prefer Plato to Aristotle. My strategy is different. My argument is not that Strauss is an Aristotelian, but that *even if* Strauss is an Aristotelian, this is no basis for accusing him of exceptionalism. This brings me closer to Smith, who also treats what Strauss says in this section as articulating his own views. But Smith, like Drury, thinks exceptionalism follows from the Aristotelian doctrine; he disagrees with Drury only insofar as he does not think there is anything problematic about Strauss's exceptionalism. I think he's wrong to see exceptionalism here, and also wrong to think exceptionalism unproblematic.

[23]See Steven B. Smith, "Philosophy as a Way of Life: The Case of Leo Strauss," *Review of Politics* 71, no. 1 (2009): 37–53.

[24]The implicit reference points are in *Nicomachean Ethics* 1134b18 and 1134b29–30, respectively.

the second occupies five pages and engages Aquinas, Averroës, Marsilius, Machiavelli, and Plato. Likewise, it will be the second claim that centrally concerns us here. Strauss interprets the first claim primarily by way of contrast with Plato. As noted, this seems to be where Strauss locates the contrast between Aristotelian and Platonic understandings of natural right. Plato, according to Strauss, "defines natural right by direct reference to the fact that the only life which is simply just is the life of the philosopher."[25] As a consequence, there is an essential conflict between natural right and political life.[26] Whatever right obtains in the city is, at best, a "dilution of natural right by merely conventional right."[27] Aristotle, however, teaches that "there is no essential need for the dilution of natural right."[28] Justice as it is known in the cities, political justice, is, at least in part, natural right. We will have to wait to see whether or in what form Strauss accepts this claim.

The bulk of Strauss's discussion is devoted to the second Aristotelian claim, that all natural right is changeable. Strauss puts forward first the interpretations of Aquinas and Averroës, both of which he finds unsatisfactory. He then provides his own interpretation, the details of which he sets out over the course of four paragraphs. The first contains a formulation of the position that runs into an objection. The second reformulates the position in order to meet the objection, and contains the passage Smith points out. The third contrasts the position with that of Machiavelli. The fourth reconciles the position with Plato's, and reformulates it once again. Let us look first at the three formulations of the position, and at the objection considered by Strauss.

According to the first formulation, Aristotle locates natural right not in any "general propositions" but in the set of "concrete decisions" that best address "every human conflict," decisions "based on the full consideration of all the circumstances."[29] That is, what is right by nature is nothing other than the set of decisions in which perfect justice is—or would be—exhibited. Since, obviously, not every conflict-addressing decision actually instantiates justice, natural right is counterfactual much of the time. The question, "What is justice?" can therefore be fleshed out as the infinite series of questions, "What is the best decision that could be made in x (y, z, …) situation?" Because virtue is a condition of the soul rather than of actions, this infinite series of questions can be reformulated as, "What would a perfectly just person do in x (y, z, …) situation?" This leaves open the question whether or not there is, indeed, a just decision in *every* circumstance, or whether, on the contrary, there are some conflicts that are so far from what any just

[25]Strauss, NRH, 156.
[26]"Natural right would act as dynamite for civil society" (Strauss, NRH, 153).
[27]Strauss, NRH, 152–53.
[28]Strauss, NRH, 156.
[29]Strauss, NRH, 159.

person would get into that they do not admit of any answer to the third question, even though they admit of an answer to the second.

This approach might seem anti-Socratic, since it substitutes an infinite series of examples for an answer to the question, "What is justice?" Such an objection confuses Socrates's aim with his starting point and procedure. The Socratic-Platonic teaching begins from the knowledge that we do not know the most important things, including what justice is, and derives from this the conclusions that wisdom is the highest end and that philosophy is, therefore, the most needful activity. The Aristotelian teaching draws the further conclusion that, if we do not know what justice is, then there is no true theory of justice on hand, and hence no universal rule that would cover all instances of just action. But the Aristotelian natural right teaching also depends on the claim that one can nonetheless recognize and perform just deeds, even in the absence of a true theory of justice. As Strauss claims, "It is much easier to see in most cases, that this particular act of killing was just than to state clearly the specific differences between just killings as such and unjust killings as such."[30] Skepticism about the ability to act rightly does not follow from Socratic skepticism about our ability to formulate a true account of what justice is.

Strauss considers perhaps the most obvious objection to this position. Each just decision must be just for some reason or reasons. Whatever counts as a reason for acting thus will also count as a reason for acting analogously in analogous circumstances. Hence, every just decision implies or presupposes general principles of justice, valid reasons for making this decision in this situation, and a similar decision in any similar situation.[31] This reference to valid reasons for action need not entail that the reasons we have for acting thus could be properly or easily formulated as criteria for distinguishing between all just acts and all unjust acts, for neither is one's ability to do the right thing in one situation any guarantee of that ability in another situation. Rather, we can approach both right action and the giving of reasons in the spirit of fallibilism. Our attempts to generalize our reasons for acting are nothing but our attempts to articulate why what we did was the right thing. Since the difficulty of formulating complete criteria for right action goes hand in hand with the difficulty of acting rightly in all circumstances, the appeal to the diversity of circumstances and the difficulty of judging them rightly is far from sufficient to motivate dispensing with rules or principles altogether. If such a dismissal is implied by Strauss, then we would need reasons of a different sort than those given to make such a radical position at all plausible or attractive.

[30]Strauss, NRH, 159; see also CM, 26–27.

[31]Strauss, NRH, 159. This line of argument has also been advanced against contemporary moral particularism, for example by Pekka Väyrynen, "Moral Generalism: Enjoy in Moderation," *Ethics* 116 (2006): 707–41.

There is, moreover, a second objection, which Strauss invites but does not consider. He dismisses Aquinas's interpretation because it fails to take seriously Aristotle's claim that all right is mutable; Aquinas maintained that, while the derivative rules of natural right admit exceptions, the axiomatic principles of natural right are "universally valid and immutable."[32] But Strauss's interpretation seems to destroy utterly the mutability of right, if in the opposite way. If natural right belongs only to the set of right decisions, rather than to general rules, then natural right is singular, and hence not at all changeable. Since decisions do not carry over from one situation to another in the way that rules do, there is nothing in natural right that might change. Thus, when Strauss claims that natural right, understood as the set of just decisions, "is obviously mutable,"[33] he seems to have misunderstood his own claim.

However, the objection on the basis of implicit reasons for right action leads Strauss to reformulate the Aristotelian position in a way that addresses both challenges. Strauss grants that every right action implies or presupposes some reason or principle which might be formulated as a rule. He argues, however, that there are multiple "principles or sets of principles" of justice, that these principles conflict with one another in a nontrivial set of situations, and that we know no higher-order principle that will decide for us when one principle or another has priority.[34] Hence, natural right is changeable in the sense that which principle articulates the demands of justice in a given situation varies with the circumstances in an unpredictable way.

To be more precise, Strauss acknowledges two principles, which we might call, for the moment, the principle of *necessity* and the principle of *nobility*. The principle of necessity comprises "the requirements of public safety, or what is necessary in extreme situations to preserve the mere existence or independence of society."[35] The principle of nobility includes the normal rules of commutative and distributive justice and any other moral maxims by which one pursues the common good. Strauss also treats these as aiming at the perfection of humanity,[36] so one could also say that right action always pursues either the continued existence of humanity or its perfection, as these appear in the particular situation at hand. Under the pressure of necessity, the pursuit of perfection may give way, and the decision to bow to necessity

[32]Strauss, NRH, 157.

[33]Strauss, NRH, 159.

[34]Strauss, NRH, 161. The highest-order principles are incommensurable, since they cannot be traded off against one another in a rationally explicable or consistent manner. Of course one might refer to a name in which these principles are comprehended—justice, right, the common good—but this will be a name only, not a principle, in the sense that it will not provide any guidance or rule for action. See Strauss, NRH, 160–61.

[35]Strauss, NRH, 161.

[36]Strauss, CM, 26–27, and NRH, 127, 145.

can be the right decision. Hence, Strauss can acknowledge (1) that every decision implies a principle of right action, (2) that, nonetheless, awareness of those principles does not suffice to guide action, and (3) that natural right is changeable insofar as the highest-order principle we know to be implied by one right action will not be implied by another action that is nevertheless also right.

By way of reconciling this reformulated position with Plato's, Strauss makes another shift, more subtle but at least as important. He replaces the two principles with a "hierarchy of ends."[37] He does not, in this context, spell out how many ends there might be or what they are. Nonetheless, I think it is fairly easy to fill in at least a few of these ends. Doing so, moreover, makes it clear that nobility and necessity present themselves not simply but in varying degrees. The independence of the community is more noble than its mere survival, and the decency of its laws is more noble than its independence, but, as Strauss says, "one has to consider not only which of the various competing objectives is higher in rank [i.e., more noble], but which is most urgent [i.e., more necessary] in the circumstances."[38] He continues:

> What is most urgent is legitimately preferred to what is less urgent, and the most urgent is in many cases lower in rank than the less urgent. But one cannot make a universal rule that urgency is a higher consideration than rank. For it is our duty to make the highest activity, as much as we can, the most urgent and the most needful thing.[39]

There is no doubt that, for Strauss, the highest activity is philosophy, and the highest end wisdom or "the science of all the beings."[40] But this does not mean that everyone has a duty to pursue ontology all the time, or that the only naturally right decision is the decision to philosophize.

Although the life of the philosopher is "the only life that is simply just,"[41] the philosophic character of a whole life cannot be distributed to every decision that makes up that life. Socrates, the "classic representative" of the "method" or "attitude" of the philosopher,[42] went to war and to court, ate, drank, and fathered children, and made many other decisions that contributed to a just life even though they were not decisions to pursue the highest end. Moreover, these decisions were themselves right decisions, and hence did not detract from or dilute the justice of Socrates's life. The final act of Socrates's life, drinking the hemlock rather than fleeing from Athens, embodied a decision to philosophize no more, upholding instead the established laws of the city, necessary as these were to the common good. Nonetheless,

[37]Strauss, NRH, 162.
[38]Ibid.
[39]Strauss, NRH, 162–63.
[40]Strauss, NRH, 122.
[41]Strauss, NRH, 156
[42]Strauss, PAW, 105n29.

this most extreme of all actions was the right one, and its justice has been "made visible …, in retrospect, to all" by the historians who have told of it, beginning with Plato.[43] It is *sometimes* right to recognize and respond to necessity by choosing to ignore the higher demands of decency, nobility, or wisdom in favor of the lower demands of common existence. There is no rule by which we can demarcate this "sometimes," however, even though there is a general presumption against it obtaining, the presumption contained in calling some ends higher and others lower. The death of Socrates is the ultimate reminder that this "sometimes" is possible.

Finally, what seems like the higher or more noble end in one circumstance might appear to be the lower end or the dictate of necessity in another. In comparison to true friendship, for example, the common rules of justice appear lowly. One does not normally demand exact compensation from one's friend, neither for harm inflicted nor for goods used. Nonetheless, one cannot rule out the possibility that a situation will arise in which the right thing to do, vis-à-vis one's friend, will be to demand a precise accounting and recompense, perhaps to protect the friend's dignity or to give to him or her a clean conscience. Here "the precise rules of justice," Strauss's example of the normal and the noble,[44] play the role of the exceptional or extreme demands that Strauss saw exemplified in the demands of public safety. Adhering to the rules of justice, in this case, turns one aside from the higher nature and end of friendship in order to secure its bare survival. Strauss's final reformulation of the Aristotelian claim reveals, therefore, that there is not one conflict of principles, but a host of conflicts of a similar form.[45] In order to do the right thing in a particular circumstance, one must be able to identify the conflicts between higher and lower ends present in it, and to decide each of these conflicts rightly. This is why only a philosopher, who is fully aware of the multiplicity of ends, seems capable of acting rightly; only someone who, in each situation, sees the possibility of pursuing wisdom will be in a position to decide the conflicts between higher and lower ends rightly.

To tie these considerations together, Strauss's understanding of the mutability of natural right implies that every right decision is both principled and unprincipled. It is principled because it implies the pursuit of the common good, *either* in the form of human perfection *or* in the form of the survival of some community.[46] It is unprincipled because *which* form of the common

[43]Strauss, NRH, 161.

[44]Strauss, NRH, 160–61.

[45]Hence Strauss's comment in NRH, 161n33.

[46]Strauss equates the just and the common good (see esp. NRH, 101–2, 160; CM, 16) and attributes conflicts between different conceptions of justice to different understandings of the common good (see, for instance, his footnote on the elevation of capitalist accumulation to moral respectability at NRH, 61n22). I take this as a sign of Strauss's opposition to "Kantianism" (NRH, 60n22), or the doctrine that right action

good it pursues is based on a judgment about the present circumstances that, while it can be better or worse, cannot be based in any rule, or knowledge of principles. This decision—normal case or extreme case?—implies a capacity for judging that proceeds without lawful guidance. This form of judgment is *prudence* or *practical reason*. Natural right, then, consists of the proper decisions of prudence and, so far as we humans can tell, nothing else. And only philosophers seem capable of this prudence.

IV. The Political Problem of Moral Law

If this is how Strauss understands the mutability of natural right,[47] then it presents a political problem. Because natural right consists solely of the right decisions of prudence—the decisions that secure the common good in whatever form it is available in the circumstances—"we must conceive of it as essentially independent of law."[48] Law has the form of universal injunctions. Strauss's understanding of the mutability of natural right entails that there is at least one situation, actual or conceivable, in which any such law will enjoin the wrong action. But if this is so, then we must make the judgment, whenever following any law, that the situation at hand is not one of those fatal situations in which this law misleads. No law can guide us in making this judgment, but we must make this judgment correctly in every case if we are to always act rightly. Acting lawfully may generally coincide with acting rightly, but lawfulness never makes an act right. Law necessarily treats the normal case as if it were the only case, or pronounces as if it embodied knowledge of justice. Law is, therefore, external to prudence, which, proceeding always from the particular case at hand, refuses to bind its judgment to any rule without exception, or pretense of knowledge.[49] Law, it seems, is extraneous to natural right.

Despite this fact, pronouncing and enforcing law can be right actions. Hence, in the *Kuzari* essay—to which I will turn momentarily—Strauss claims that "it is with a view to their provenience from practical reason

is an end in itself, not for the sake of any good. That perfecting one's humanity, or pursuing virtue, would promote the common good follows from Strauss's claims that "humanity itself is sociality" (NRH, 129) and that "there must be things [i.e., thought] which are by nature common" (CM, 16).

[47]Strauss's point of reference is the equity (*epieikeia*) attributed to the *phronimos* by Aristotle (*Nicomachean Ethics* 1137a32–1138a3).

[48]Strauss, NRH, 146. Strauss at times suggests that any code of law would be external to natural right because, as codified, it would not be natural (for example, see PAW, 127n103a). I am pressing a separate issue, that any code of law would be external to natural right because, as law, it could not be known to be right.

[49]Strauss, NRH, 160.

that the (good) laws of political communities—the (just) positive laws—as well as any other sound rules of conduct can be called rational."[50] As support for this contention he cites Aristotle's claim that "the law has necessitating power, being speech from a certain prudence and intelligence."[51] The decision to pronounce law can be a right decision of prudence, even though that law, once pronounced, is incapable, qua law, of guiding anyone to act rightly. Why should setting forth universal injunctions be, in some circumstances, right, if the universal injunction, as such, misleads about right action? Where does the rightness of pronouncing law lie, if not in pronouncing rightly what is to be done?

The answer would seem to lie in the twin objectives of social control and moral education.[52] In the first instance, law is governmental, in that it enjoins actions for those who are incapable of acting rightly. In the next instance, law is educational, in that it delineates what is normally or usually right, and thereby presents a rough outline of natural right. This outline may be incorrect in many particular circumstances, and is certainly inadequate as a substitute for prudence, but the outline is nonetheless a helpful set of training wheels for those who are potentially capable of acting rightly.

This dual answer has the immediate plausibility of common sense; these are quite traditional roles to attribute to the law. Nonetheless, the Socratic-Platonic natural right teaching sits very uneasily with the attribution of governmental and educational purpose—as these are usually conceived—to rightful pronouncements of law. As we have already seen, only a philosophic life is in full accordance with natural right, since only a philosophic life is lived in full awareness of the full hierarchy of ends. The natural right justification for pronouncing law must therefore be a justification for a philosopher to legislate, that is, for one who knows that they do not know what justice is to nonetheless pronounce universal rules of justice. Why is it ever right for the philosopher to pretend to know what is right?

The second aspect of Aristotelian natural right thus seems to run counter both to the first aspect of Aristotelian natural right and to Socratic-Platonic natural right. How can the difference between philosophical prudence and political right be irrelevant for practical purposes? How can the decisions of prudence be part of political right if political right consists of laws? How can philosophers live according to natural right and yet legislate? The mutability of natural right identifies natural right with prudence, and divorces it from law, but this divorce seems so absolute as to render the other

[50]Strauss, PAW, 121–22.

[51]*Nicomachean Ethics* 1180a21–22; Strauss cites the same text again later in the *Kuzari* essay, in support of the claim that "all laws which deserve that name are the work of reason" (PAW, 133n121, reading "21f" for "12f").

[52]Strauss, PAW, 119–26; CM, 22.

aspects of classic natural right unintelligible. There must be more to the relationship between law and prudence than this opposition. In order to consider these issues, I want to follow the sole reference in Strauss's discussion of Aristotelian natural right, and turn to his essay on the *Kuzari*.

V. Why the *Kuzari* Essay Matters

Strauss appears to refer to the *Kuzari* essay in order to substantiate his understanding of the Averroist reading of Aristotelian natural right. Since he promptly distances his own reading from that of the Averroists, my suggestion that his reference actually helps to flesh out his own understanding of the mutability of natural right might seem odd. However, Strauss's description of the Averroist position in *Natural Right and History* is not sustained by his *Kuzari* essay. Instead, that essay contains a much more extensive consideration of the philosopher's difficult relationship with moral laws, precisely the issue raised by Strauss's understanding of the mutability of natural right. Since it is the only text cited in his entire discussion of Aristotelian natural right, I think it is worth following this clue with an open mind.

This essay has not attracted very much attention, and the only prominent treatment of it would seem to give succor to the exceptionalist reading of Strauss that I wish to trouble. Michael S. Kochin has argued that the theme of the essay is "the natural differences among human beings as expressed in their variegated understandings of the status of moral obligations."[53] Kochin's reading would seem to agree with the interpretation of natural right offered here, insofar as this natural difference is understood by Kochin to be "the difference between the many who require a categorical moral teaching and the few who are capable of ordering their own lives in the face of the true hypothetical status of all moral commands."[54] But it would also seem to support the exceptionalist reading of Strauss, insofar as those who require a categorical moral teaching will reveal their inadequacy in those extreme circumstances that call for exceptional action. If the prudent few act properly in the face of the true hypothetical nature of all moral commands, this suggests to many that these few are, or ought to be, above the law.

The division between the few and the many is certainly a theme of the *Kuzari* essay. Nonetheless, I think Kochin's formulation glosses over two difficulties raised by Strauss's essay. First, the division between prudence- and rule-directed life is consonant with but independent of the division between the few and the many. There must be some other reason, independent of the distinction itself, for locating the division between the need for

[53]Michael S. Kochin, "Morality, Nature, and Esotericism in Leo Strauss's *Persecution and the Art of Writing*," *Review of Politics* 64, no. 2 (2002): 265.

[54]Kochin, "Morality, Nature, and Esotericism," 280.

a categorical moral teaching and the ability to order one's life by prudence alone as a division *between* rather than *within* people, and Kochin's interpretation does not register Strauss's claim that the rational laws, rather than regulating the lives of the many who need them, constitute "an essentially apolitical rule of conduct destined for the guidance of the philosopher alone."[55] Second, Kochin's reading ignores the difficulty of identifying the few in the first place. What would be the experiential basis for identifying some few who live according to natural right and apart from the many who need moral laws?[56]

Strauss's essay is more ambiguous than Kochin's reading suggests. Its central theme is the question whether or not prudence recommends moral law and revealed religion. Must every society have moral laws, and must these include a theological component, or is a thoroughly secular and thoroughly prudential political community possible?[57] Strauss's commentary brings out what he takes to be Halevi's answer to this question—prudence justifies revelation because prudence justifies moral laws and revelation is necessary for moral laws—but Strauss's own answer is less clear.[58] Unearthing the question itself requires Strauss to discuss in some detail the relationship between philosophy and law. Throughout the essay, he deploys a host of terms that ambiguously indicate natural right: "Natural Law," "*ius naturale*," "*iura naturalia*," "rational laws," "rational *nomoi*," "*lex naturalis*," "dictates of right reason," "the Law of Reason," "natural morality," etc. Of these, only two are capitalized for emphasis and treated as technical terms, "Natural Law" and "the Law of Reason."[59] I think Strauss's treatment of these terms indicates how the three claims of classic natural right from *Natural Right and History* might be reconciled. What Strauss offers in the *Kuzari* essay is a natural-right—that is, prudential—justification of law,

[55]Strauss, PAW, 116.

[56]Note that the governmental and educational functions attributed by common sense to moral laws do not require any identification of the few and the many as classes of people. All transgressors are treated the same, whether they were right to transgress or not, as are all children.

[57]These two questions are separable, at least for the purposes of analysis. I will be concerned with the question of the necessity of moral laws, leaving aside the question whether morality must be based in revealed religion.

[58]This is the theological-political problem that Strauss claimed guided his inquiries throughout his adult life. There has been much scholarship lately devoted to this aspect of Strauss's writings. See, especially, Leora Batnitzky, *Leo Strauss and Emmanuel Levinas: Philosophy and the Politics of Revelation* (Cambridge: Cambridge University Press, 2006); Heinrich Meier, *Leo Strauss and the Theological-Political Problem*, trans. Marcus Brainard (Cambridge: Cambridge University Press, 2006); and Daniel Tanguay, *Leo Strauss: An Intellectual Biography*, trans. Christopher Nadon (New Haven: Yale University Press, 2007).

[59]Strauss, PAW, 136.

which shows that there need be no contradiction between the Socratic-Platonic and Aristotelian natural right teachings, or between the first and second claims of Aristotelian natural right.[60]

The "Law of Reason," I will argue, names natural right as it appears in the life of the philosopher, and amounts to a prudential argument for the philosopher respecting the conventional moral laws of the community. "Natural Law," on the other hand, names natural right as it appears in any functioning community. Natural Law harmonizes the mutability of natural right with the claim that natural right is part of political right by offering a prudential argument for communities adopting some canon of moral laws. By examining the interplay between these two aspects of natural right, I hope, finally, to show that the philosopher's rightful decision to pronounce laws has no political implications at all, much less elitist or exceptionalist implications.

VI. The Law of Reason as Philosophical Prudence

Immediately upon differentiating the Law of Reason from Natural Law, Strauss seems to define the former: "the Law of Reason in the full sense of the term" is "the 'rational' (practically wise) presentation of the 'rational' (theoretical-demonstrative) teaching which … is a refutation of the teaching of the revealed religions."[61] However, he also claims to "assume" that "the Law of Reason is primarily the sum of rules of conduct which the philosopher has to observe in order to become capable, and to be capable, of contemplation."[62] These two definitions hardly seem identical. Moreover, the *full* sense seems to be narrower than the *primary* sense, insofar as the exoteric presentation of doctrine would seem to be but one of the rules of prudence observed by the philosopher. For the moment, I will proceed according to this intuition that the primary sense of the Law of Reason encompasses the whole set of

[60]That it is the texts of Jewish and Islamic Aristotelians that reveals this is certainly significant. As Strauss writes in his introduction to *Persecution and the Art of Writing*, "The status of philosophy in the Islamic-Jewish world resembled … its status in classical Greece" (PAW, 21). To turn the matter around the other way, one could say that Athens contained both Athens and Jerusalem. It is the advent and spread of Christianity that overturned the world of classical philosophy, not revelation as such, which is coeval with humanity. Beyond or underneath the world made by Christianity, this suggests, is a world in which Aristotle is also a Platonist, Plato an Aristotelian, and every *falāsifa* both. I will not pretend to have demonstrated any such thesis, which would go far beyond my purview and knowledge, but it is an implication of my argument here that the text of *Natural Right and History* gives us no good grounds for positing an incompatibility between the Platonic and the Aristotelian natural right teachings.

[61]Strauss, PAW, 136n129.

[62]Strauss, PAW, 136.

working rules for the philosophic life, including exotericism. We will see shortly the extent to which this intuition must be modified.

This Law of Reason is "the *regimen solitarii*,"[63] the code of conduct of those who are born of society but live apart from it insofar as "the life of contemplation … is essentially asocial and hence anachoretic."[64] Being asocial, the philosophic life is possible even in a society that takes an extremely unfavorable view of philosophy. The philosopher adheres to natural right rather than to the morality promulgated by society, since philosophy respects no authority, moral or otherwise.[65] But, for precisely this reason, the Law of Reason advises the philosopher to accommodate his or her outward conduct to the law of society *so far as necessary*. The Law of Reason might be summarized as "Live long enough to philosophize." The philosopher, by acting lawfully as necessary, can seem morally virtuous "as [a] mere means towards his end" of questioning, among other things, the very definition of virtue offered up by the city and its laws.[66]

This is not a "Machiavellian" pretense of virtue that hides evil deeds.[67] Rather, the philosopher cannot be completely serious about the moral virtue advocated by his or her society, since the love of wisdom undermines the sources of moral seriousness. For the philosopher, the conventional ends of virtuous action cannot be more than the demands of necessity, which it is nevertheless right to respect.[68] Hence, the philosopher's behavior is not *moral*, directed to lawful actions done for their own sake, but is precisely *prudential*, directed to figuring out "how he can secure the conditions of his philosophizing here and now."[69] But this philosophical prudence does not run counter to the laws as such, but produces a certain conformity to the conventional morality of the philosopher's society. The philosopher pursues wisdom, but does so *by* keeping to the laws and norms necessary for the continued existence and health of the political community on which he or she depends for corporeal existence.[70] Those laws are themselves among the "rules of conduct which the philosopher has to observe in order to become capable, and to be capable, of contemplation."[71]

[63]Strauss, PAW, 137.

[64]Strauss, PAW, 126; compare also CM, 115.

[65]Strauss, NRH, 84, 92.

[66]Strauss, CM, 27.

[67]Unless, of course, one thinks skepticism about the law is itself the definition of evil.

[68]Leo Strauss, *Jewish Philosophy and the Crisis of Modernity: Essays and Lectures in Modern Jewish Thought*, ed. Kenneth Hart Green (Albany: State University of New York Press, 1997), 464–65.

[69]Strauss, CM, 26–27.

[70]Obviously, this conclusion presupposes that moral laws are essential to every community. We will see below just how far this is true.

[71]Strauss, PAW, 136.

This reconstruction has the virtue of dissolving the apparent oddity of the full sense of the Law of Reason being narrower than the primary sense. The two senses are identical. The prudent presentation of the rational teaching of philosophy is not the exoteric book that hides heterodox doctrines about the heavens, but the accommodating life that preserves rational and radically skeptical questioning. Every philosophical life has a "literary character."[72] It consists in readily apparent accommodation to the moral laws coupled with a not so readily apparent skepticism about the rightness of any moral law. Hence, the Law of Reason, despite its name, is not at odds with the mutability of natural right. It is nothing but the form that awareness of this mutability takes in the life of the philosopher. But this awareness counsels the philosopher to keep to the moral law of his or her community in most circumstances. The Law of Reason is, therefore, a prudential justification of the moral law from the point of view of the philosopher.

VII. The Natural Law as Basic Prudence

Although the philosopher's life is defined by its pursuit of the highest end, the philosopher's prudential "social morality" might be adopted by anyone who pursues any unorthodox end, or by anyone who falls short of being fully moral, which is to say, by anyone at all.[73] In this way, the basic outline of the Law of Reason is merely the set of prudential survival skills by which any individual might pursue his or her own ends without destroying the communal basis of his or her existence. This comprises what Strauss here calls Natural Law: "the framework of every code" of morality, or the "rules of social conduct" that articulate "the minimum moral requirements of living together."[74] One should not be misled by Strauss's use of "moral" in this context; he says explicitly that "these rules are not obligatory; … they are rules of 'prudence' rather than rules of morality proper."[75] In contemporary parlance, they are strategies by which prudentially rational agents secure the conditions of cooperation. The object of this cooperation might be very mean indeed; as Strauss reiterates, this basic aspect of natural right does not go beyond "the morality essential to the preservation of a gang of robbers."[76] Nonetheless, these prudential strategies are on display in every functional and lasting political community. They are the centripetal forces

[72]Hence, Laurence Lampert is on to something when he argues that Strauss's rediscovery of exotericism is identical with the rediscovery of the possibility of philosophy ("Strauss's Recovery of Esotericism," in *The Cambridge Companion to Leo Strauss,* ed. Steven B. Smith [Cambridge: Cambridge University Press, 2009], 63–92).

[73]Strauss, PAW, 138.

[74]Strauss, PAW, 139.

[75]Ibid.

[76]Strauss, PAW, 140; see also PAW, 126–35 and NRH, 105–6.

that create social cohesion in spite of the centrifugal forces of individually conceived and pursued ends of action. As such, Natural Law is "neutral as between democracy, aristocracy, and monarchy."[77]

This reconciles the Aristotelian contention that natural right is part of political right with the mutability of natural right. In *Natural Right and History*, Strauss claims that Aristotle "suggests" that natural right takes its "most fully developed form … among fellow-citizens."[78] It would be strange to call the Natural Law of the *Kuzari* essay the most fully developed form of natural right. But Strauss glosses his suggestion in a deflationary way, claiming that "only among fellow-citizens do the relations which are the subject matter of right or justice reach their greatest density and, indeed, their full growth."[79] This reformulation makes it easier to integrate the two accounts, since the full growth of the relationships subject to right is necessary but not sufficient for the full development of natural right. Basic natural right (Natural Law) is part of political right since prudence constitutes the framework of every *Binnenmoral*, and this prudential framework is more developed or fleshed out the more successful (powerful, lasting, perfect) is the polity in which it is exhibited, wherein people are, as a rule, doing a better job of achieving the common good.

Hence, neither the Law of Reason nor Natural Law is actually a law, in the sense of a categorical injunction. Each is merely a summation of certain strategies of prudence. Each advises; neither commands. However, the question at the heart of Strauss's essay is whether the propagation of moral laws—a set of categorical rules—is among the things advised by Natural Law. His presentation of the Law of Reason presupposes that such moral laws are indeed among the recommendations of Natural Law. This conclusion is consonant with affirmations in Strauss's other works.[80] A code of moral legislation that pronounces categorically authoritative opinions about the first things is thus an inescapable part of social life.

Or, to be more precise, *some law or other* is, *as a general rule*, inescapable. Since this is part of the Natural Law, it is a rule open to exceptions, and since the Natural Law does not contain specific legislation, it is compatible with any number of actual laws, each of which will decide a great deal about which Natural Law is silent and indifferent. The word that Strauss generally uses for the moral laws that realize this advice of Natural Law is "regime." Thus, we can rephrase this advice of Natural Law by saying that (most) every society should have some regime. Strauss refers to the regime as the "way of life" of a community,[81] comprising its "specific notion of

[77]Strauss, CM, 48.
[78]Strauss, NRH, 157.
[79]Ibid.
[80]E.g., Strauss, CM, 19–20; NRH, 91.
[81]Strauss, NRH, 136.

justice," its "public or political morality," what it "regards as publicly defensible," or "what the preponderant part of society (not necessarily the majority) regards as just."[82] Hence, when Strauss claims that Natural Law is neutral as between regimes, he is affirming what we already know on the basis of the arguments above; there are prudential reasons for having some publicly espoused moral code or other in any society, but prudence does not endorse any particular moral code since every moral code, as such, makes categorical pronouncements which will be, in some situations, at odds with the counsel of prudence. There are prudential reasons for preferring one regime here and another there, but there could never be a prudential reason for permanently yoking one's judgment to, or moralizing, any regime.[83]

VIII. Conclusion: The Philosopher's Laws

The realization that a community's predominant moral laws constitute its regime allows us to reach a number of conclusions about the questions with which this essay is concerned. First, there is the question of the political implications of the mutability of natural right. My equation of the regime with a set of moral laws might seem to run afoul of Strauss's claim that the regime "is not a legal phenomenon."[84] I think, on the contrary, it serves to drive a wedge between Strauss's understanding of law and, especially, the liberal understanding of law. When Strauss talks about the law he is not generally talking about the sum of enacted legislation, or the legal system that adjudicates those enactments. Rather, he means something closer to what Montesquieu called the spirit of the laws, the dominant sense of what is important and right, and who is exemplary, within a community. This law is only ever accidentally written down and published as legislation, for it is "the legitimating principle," and can no more be a particular enactment

[82]Strauss, CM, 48; Strauss's "regime" is supposed to translate Aristotle's *politeia*. Geoffrey Waite has suggested parallels between Strauss's regime and Gramsci's hegemony ("On Esotericism: Strauss and/or Cassirer at Davos," *Political Theory* 26, no. 5 [1998]: 639n31).

[83]And yet every regime, just by virtue of its form, asks people to yoke their judgment to it. This line of Strauss's thinking emerges in his opposition to modern "natural public law," or "doctrinairism," the effort to delineate "a universally valid solution to the political problem," in the form of institutional arrangements that would be legitimate in, and applicable to, every possible situation (Strauss, NRH, 190–94). This is perhaps the major fault line between Strauss and other twentieth-century advocates of liberalism. Strauss's endorsement of a liberal and democratic regime is always local and prudential, never moral.

[84]Strauss, NRH, 136.

than there can be a law that says, "Obey the law." Such a law would beg the question.[85]

Hence, Strauss's rule of law—the regime-boundedness of a political community—is not the liberal's rule of law, and the exceptions to the law carved out by prudent action in extreme circumstances are not Schmittian states of exception. Both liberal advocates of the rule of law and Schmittian exceptionalists presuppose a division between state and society that is alien to Strauss's understanding of the regime. For Strauss, the rule of law is the normal rule of moral laws, essentially unwritten, that govern life in a community by articulating what is high or low, who is good or bad, what to do or to refrain from doing. For liberals, it is the existence, within the state, of an independent legal system for the adjudication of criminal and civil law, and to which everyone is equally subject. Having a regime is not incompatible with having an independent legal system, but neither are the two phenomena ever identical.[86] When Strauss advocates for the rule of law, he affirms that prudence recommends that communities have some regime. This position has no obvious implications, positive or negative, for the liberal advocacy of the rule of law.[87]

Nor does it have anything in common with the Schmittian argument for sovereign exceptionalism.[88] If we examine anew the curiously neglected passage with which we began, it appears to contain not a defense of "the autonomy of statecraft," but rather an attack on the pretense of moral

[85]Strauss, CM, 48; and see Paolo Virno, *Multitude between Innovation and Negation*, trans. Isabella Bertoletti, James Cascaito, and Andrea Casson (Los Angeles: Semiotext(e), 2008), 25.

[86]An appreciation of this point seems to me to be missing from William Galston's "Leo Strauss's Qualified Embrace of Liberal Democracy," in *The Cambridge Companion to Strauss*, 193–214. The liberal legal system can never have for its content a comprehensive set of moral laws, but, for precisely the same reason, it need not replace a society's intact moral laws. This leaves aside the issue of the extent to which any legal system relies, tacitly or explicitly, on intact moral laws as its background condition.

[87]It does imply a disagreement with a certain liberal understanding of the rule of law as entailing strict state neutrality regarding various conceptions of the good (as, for instance, in Hayek and Rawls); the legal system might be more or less neutral between competing conceptions of the good, but the regime is precisely society's dominant conception of the good, and the state must partake of this regime.

[88]Strauss elsewhere argues against Voegelin's defense of the legitimacy of extraconstitutional rule, pointing out that even though his own understanding of natural right entails the possibility of situations in which the common good is served by extraconstitutional rule, this possibility ought not be enshrined in a defense of Caesarism (Leo Strauss, *On Tyranny*, rev. ed., ed. Victor Gourevitch and Michael S. Roth [Chicago: University of Chicago Press, 2000], 178–80). This argument has the same form as Strauss's defense of the regime, but different premises, insofar as the regime differs from the constitution (Strauss, NRH, 136).

theory. Contrary to Smith's contention, nothing in Strauss's understanding of the mutability of natural right supports the claim that "the statesman must be allowed to respond to evil by using means that would ordinarily be considered unjust."[89] First of all, the mutability of natural right pertains to prudent people, not to holders of high office. One must possess an exaggerated admiration of modern electoral politics to think that it always, or even regularly, elevates the practically wise to the heights of executive power. A prudent person does what is right in any given situation, and neither asks for nor needs any allowances in order to do so. No such allowances could be forthcoming, either. Who would offer them, and how? The way of life of the community makes authoritative a certain conception of justice. The moral laws inscribed in this dominant sense of justice are necessarily categorical injunctions, and it is for the best of the community that justice appears to be a rule without exceptions. To ask that allowances be made is to ask that the moral law appear as something other than law. To suggest that prudent people need allowances is to suggest that their prudence is not really prudent. The mutability of natural right poses no threat to the liberal's rule of law, and does not contain a doctrine of exceptionalism.

Secondly, Straus's conception of the regime makes it possible to understand the sense in which it can be right for those who know they are ignorant of justice to legislate. Since the relevant sorts of laws are the moral laws comprising the various regimes, the laws of the philosophers must be contained especially in the best regimes presented in Plato's *Republic* and *Laws*, Aristotle's *Politics*, and the other major texts of classical political philosophy. Strauss even claims that "the classic natural right doctrine in its original form, if fully developed, is identical with the best regime."[90] This would seem to imply that an elaborate set of laws is part if not the whole of natural right. How can we understand this claim to be compatible with the mutability of natural right?

Quite simply, the best regime is the most highly developed form of the classical philosophic *practice*, and is hence given to a double reading. The city in speech is exoterically a plan for a regime, while being, esoterically, a practice of self-purification and self-mastery, a way of caring for the city in the soul. Qua utopian plan, the best regime is the object of "wish or prayer" since, while possible, its establishment would depend on "chance" rather than on conditions human beings control.[91] Hence, this regime "is not obligatory for the very philosophers, let alone for other human beings."[92] Nothing in any work of political philosophy is laid down as a moral law to be obeyed here and now. Neither are we under any obligation to bring about the city

[89]Smith, *Reading Leo Strauss*, 199.
[90]Strauss, NRH, 144.
[91]Strauss, NRH, 139.
[92]Strauss, PAW, 117.

in which the philosophers' laws would have force; *ought* implies *can*. Political philosophy, even in its exoteric presentation, is never a set of moral laws, or a "theory of justice."

On the other hand, insofar as the discussion of the best regime is a *practice* of philosophy instead of its product, "the philosopher's law is not necessarily a political law."[93] The rational laws of the best regimes are, for the careful reader, identical with the *regimen solitarii*, the psychic regime of the philosopher.[94] As a practice of inquiry, the best regime "regulates 'the soul,' 'the intention,' the basic attitude of the philosopher, rather than any action."[95] This basic attitude, or orientation towards knowledge of the whole as the highest or most noble end, does not, as we have seen, dictate any particular actions, or generate any universal rules for action. Hence, the rightness of pronouncing laws, in the form of a best regime, does not contradict the mutability of natural right, even in the case of the philosopher who knows she is ignorant of what justice is.

Finally, one must recall that the division between exoteric and esoteric, which contains the basic possibility of the philosophic life and of natural right, is a division *within* what is outwardly apparent, not a division between the outwardly apparent and the inwardly invisible. As Laurence Lampert reminds us, Strauss's understanding of exotericism entails that "everything essential is hidden in plain sight. What is needed is the proper perspective for viewing the surface of the text in its planned complexity."[96] This carries over from text to life; the philosopher's inner regime or soul is contained in the philosopher's outer regime, the words and deeds of his or her body. To speak or otherwise to act is always to legislate, since every action implies or presupposes some reason or principle which, taken in isolation, might be formulated as a rule, universal in its claim. Only the complex play of words and deeds, and of the principles implicit in them, can indicate a philosophical life. For this reason, it is both misleading and subtly correct for Smith to claim that Strauss's "philosophical politics displayed a combination of inner resistance and outer conformity."[97] The "inner resistance" of a philosophical life is "displayed" in its "outer conformity." Philosophers are prudent, not invisible. The identification of philosophers, therefore, can only ever be the tentative outcome of reading whatever record exists of their words and deeds. If we wish to learn from philosophers, let us return once more to the surface of history, the record of words and deeds. Let us abandon every pretense to know who—or how many—they might be.[98]

[93]Strauss, PAW, 116–17.
[94]See Strauss, PAW, 116, 121n77, and 137 (including n133).
[95]Strauss, PAW, 137.
[96]Lampert, "Strauss's Recovery of Esotericism," 64.
[97]Smith, "Philosophy as a Way of Life," 47–48.
[98]Consider, for example, Strauss, PAW, 123–26.