

ISSN 1751-8229

Volume 3 Number 1

Legal Luck

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Kant grounds what he calls the “transcendental formula of public law” (“All actions relating to the right of other men are unjust if their maxim is not consistent with publicity.”) in the obvious reason that a secret law, a law unknown to its subjects, would legitimize the arbitrary despotism of those who exercise it: “A maxim which I cannot divulge without defeating my own purpose must be kept secret if it is to succeed; and, if I cannot publicly avow it without inevitably exciting universal opposition to my project, the necessary and universal opposition which can be foreseen a priori is due only to the injustice with which the maxim threatens everyone.”

This paradox is nicely rendered in the title of a recent report on China: “Even what’s secret is a secret in China.”¹ Many troublesome intellectuals who report on political oppression, ecological catastrophies, rural poverty, etc., (for example, a Chinese woman who sent her husband, who lives abroad, clippings from a local Chinese newspaper), got years of prison for betraying a state secret, even if they were not aware of doing anything wrong. The catch was that “many of the laws and regulations that

make up the state-secret regime are themselves classified, making it difficult for individuals to know how and when they're in violation." This secrecy of the prohibition itself serves two different purposes which should not be confused. Its commonly admitted role is that of universalizing guilt and fear: if you do not know what is prohibited, you cannot even know when you are violating a prohibition, which makes you potentially guilty all the time. (Incidentally, no wonder that, in *Opus Dei* also, their statute has a half-secret status, existing only in Latin and unavailable even to the majority of its members.)

Of course, things are more precise here: except at the climax of the Stalinist purges when, effectively, everyone could be found guilty, people *do* know when they are doing something that will annoy those in power. The function of prohibiting prohibitions is thus not to give raise to "irrational" fear, but to let the potential dissidents (who think they can get away with their critical activity, since they are not breaking any laws, but only doing what laws guarantee them – freedom of the press, etc.) know that, if they annoy those in power too much, they can be punished at the power's will: "Don't provoke us, we can do with you whatever we want, no laws are protecting you here!" In ex-Yugoslavia, the infamous Article 133 of the penal code could always be invoked to prosecute writers and journalists. It criminalized any text that falsely presented the achievements of the socialist revolution or that *might arouse tension and discontent among the public* for the way it dealt with political, social, or other topics. This last category is obviously not only infinitely plastic, but also conveniently self-relating: doesn't the very fact that you are accused by those in power equal the fact that you "*aroused tension and discontent among the public*"? In those years, I remember asking a Slovene politician how he justified this law. He just smiled and, with a wink, told me: "Well, we have to have some tool to discipline at our will those who annoy us without worrying about legal niceties!"

But there is another function of prohibiting prohibitions which is no less crucial: that of *maintaining the appearances* (and we all know how absolutely crucial appearances were in Stalinism: the Stalinist regime reacted with total panic whenever there was a threat that appearances will be disturbed (say, that some accident which renders clear the failure of the regime will be reported in the public media: there were, in the Soviet media, no black chronicles, no reports on crimes and prostitution, not to mention workers or public protests). Which is why this prohibiting of prohibitions is far from being limited to Communist regimes: it is operative also in today's "permissive" capitalism. A "postmodern" boss insists that he is not a master but just a coordinator of

our joint creative efforts, the first among equals; there should be no formalities among us, we should address him by his nickname, he shares a dirty joke with us... but in all this, he *remains our master*. In such a social link, relations of domination function through their denial: in order to be operative, they have to be ignored. We are not only obliged to obey our masters, we are also obliged to act as if we are free and equal, as if there is no domination – which, of course, makes the situation even more humiliating. Paradoxically, in such a situation, the first act of liberation is to demand from the master that he acts as one: one should reject false collegiality from the master and insist that he treats as with cold distance, as a master. From my military service, I remember how I rejected a commanding officer's friendly offer to drop the formalities in our communication, which made him explode in rage... The same goes for patriarchal domination over women: in modern societies, this domination is no longer admitted as such – which is why, one of the subversive tactics of the feminine resistance is to act as mockingly subordinated...

What one should bear in mind is that, while every social edifice relies on certain exclusions and prohibitions, this exclusionary logic is always redoubled: not only is excluded/repressed the subordinated Other (homosexuals, non-white races...); the excluding and repressing power itself relies on an excluded/repressed "obscene" content of its own (say, the exercise of power that legitimizes itself as legal, tolerant, Christian..., relies on a set of publicly disavowed obscene rituals of violent humiliation of the subordinated). More generally, we are dealing here with what one is tempted to call the ideological practice of disidentification. That is to say, one should turn around the standard notion of ideology as providing the firm identification to its subjects, constraining them to their "social roles": what if, at a different - but no less irrevocable and structurally necessary - level, ideology is effective precisely by way of constructing a space of false disidentification, of false distance towards the actual coordinates of the subjects's social existence? Is this logic of disidentification not discernible from the most elementary case of "I am not only an American (husband, worker, democrat, gay...), but, beneath all these roles and masks, a human being, a complex unique personality" (where the very distance towards the symbolic feature that determines my social place guarantees the efficiency of this determination), up to the more complex case of cyberspace playing with one's multiple identities? The mystification operative in the perverse "just gaming" of cyberspace is thus double: not only are the games we are playing in it more serious than we tend to assume (is it not that, in the guise of a fiction,

of "it's just a game," a subject can articulate and stage - sadistic, "perverse," etc. - features of his symbolic identity that he would never be able to admit in his "real" intersubjective contacts?), but the opposite also holds, i.e. the much celebrated playing with multiple, shifting personas (freely constructed identities) tends to obfuscate (and thus falsely liberate us from) the constraints of social space in which our existence is caught.

It is here that things get ambiguous in Kant. As every Kant scholar knows apropos his prohibition to lie, one has always to be very attentive about exceptions to his universal maxims. In the Second Supplement to his "Perpetual Peace," Kant asks a naïve question: can the contract between states which obliges them to perpetual peace have a secret clause? Although he admits that a secret article in contracts under public law is objectively a contradiction, he allows an exception for subjective reasons. This clause is not what one would have expected, a clause allowing dirty realpolitical compromises in order to maintain peace, like to infamous secret clause of the Soviet-German Treaty from 1939 regulating the partition of Poland and other Eastern European states. It is, rather, something which may appear much more innocent, even ridiculous to make it the topic of a secret clause: "The opinions of philosophers on the conditions of the possibility of public peace shall be consulted by those states armed for war." Why should this clause remain secret? If made public, it would appear humiliating to the legislative authority of a state: how can the supreme authority, to whom "we must naturally attribute the utmost wisdom," seek instruction from its subjects? This may sound ridiculous, but do we not respect it even today? When Habermas was in England during Blair's government, did Blair not invite him just to a discrete diner which was not reported in the media? Kant was thus right: this clause should remain secret, because it does something more horrible than bringing out the dark cynical underside of legal power (in today's cynical era, a state power can proudly admit its dark side, flirting with the fact that it is discreetly doing dirty things it is better for us not to know them) – it brings out the blindness, stupidity and ignorance of power, a blindness which is not personal but institutional: in spite of hundreds of highly-educated experts, the result of the US invasion of Iraq are catastrophic.

There are, however, two problems with Kant's thesis. A radical liberal would point out that philosophers in politics stand for a catastrophic misfortune: starting with Plato, they either miserably fail or succeed... in supporting tyrants. The reason, so the story goes on, is that philosophers try to impose their Notion on reality, violating it - no wonder

that, from Plato to Heidegger, they are resolutely anti-democratic (with the exception of some empiricist and pragmatists), dismissing the crowd of “people” as the victim of sophists, at the mercy of contingent plurality... So when the common wisdom hears of Marxists who defend Marx, claiming that his ideas were not faithfully realized in Stalinism, the reply: thanks God! It would have been even worse to fully realize them! Heidegger at least was willing to draw consequences of his catastrophic experience and conceded that those who think ontologically have to err ontically, that the gap is irreducible, that there is no “philosophical politics” proper. It thus seems that G.K.Chesterton was fully justified in his ironic proposal to install a “special corps of policemen, policemen who are also philosophers”:

“It is their business to watch the beginnings of this conspiracy, not merely in a criminal but in a controversial sense. /.../ The work of the philosophical policeman /.../ is at once bolder and more subtle than that of the ordinary detective. The ordinary detective goes to pot-houses to arrest thieves; we go to artistic tea-parties to detect pessimists. The ordinary detective discovers from a ledger or a diary that a crime has been committed. We discover from a book of sonnets that a crime will be committed. We have to trace the origin of those dreadful thoughts that drive men on at last to intellectual fanaticism and intellectual crime.”²

Would not thinkers as different as Popper, Adorno and Levinas, also subscribe to a slightly changed version of this idea, where actual political crime is called “totalitarianism” and the philosophical crime is condensed in the notion of “totality”? A straight road leads from the philosophical notion of totality to political totalitarianism, and the task of “philosophical police” is to discover from a book of Plato’s dialogues or a treatise on social contract by Rousseau that a political crime will be committed. The ordinary political policeman goes to secret organizations to arrest revolutionaries; the philosophical policeman goes to philosophical symposia to detect proponents of totality. The ordinary anti-terrorist policeman tries to detect those preparing to blow up buildings and bridges; the philosophical policeman tries to detect those about to deconstruct the religious and moral foundation of our societies... The same insight was already formulated by Heinrich Heine in his *History of Religion and Philosophy in Germany* from 1834, although as a positive, admirable fact: “Mark you this, you proud men of action, you are nothing but the unconscious henchmen of intellectuals, who, often in the humblest seclusion, have meticulously plotted your every deed.”³

So, back to Kant, what was unthinkable to him was the modern “totalitarian ideology” as opposed to mere authoritarian lust for power: the will to impose on reality a theoretical vision of a better world. In totalitarian regimes like Stalinism, rulers were effectively listening too much to philosophers’ advices – and was the same not true already for Robespierre who listened to (relied on) Rousseau, so much beloved by Kant? And the story goes on till today: Brecht, Sartre, Heidegger ... thank God that those in power do not listen to philosophers’ advice too much! In the 1960s, when China exploded its first atomic bomb, Karl Jaspers advocated a big atomic arms attack on China to prevent it becoming a threat to world peace ... For all those who dismiss such a “totalitarian” notion of state power as a neutral mechanism steering individuals, one can thus imagine a new version of the Kantian secret clause: “Pretend publicly to consult philosophers, but do not trust their word!” - Which, then, is the dimension of the law that the law cannot admit publicly? The best way to discern it is through a logical paradox deployed by Jean-Pierre Dupuy in his admirable text on Hitchcock’s *Vertigo*:

An object possesses a property x until the time t ; after t , it is not only that the object no longer has the property x ; it is that it is not true that it possessed x at any time. The truth-value of the proposition ‘the object O has the property x at the moment t ’ therefore depends on the moment when this proposition is enunciated.⁴

One should note here the precise formulation: it is not that the truth-value of the proposition “the object O has the property x ” depends on the time to which this proposition refers - *even when this time is specified, the truth-value depends on the time when the proposition itself is enounced*. Or, to quote the title of Dupuy’s text, “when I’ll die, nothing of our love will ever have existed.” Think about marriage and divorce: the most intelligent argument for the right to divorce (proposed, among others, by none other than the young Marx) does not refer to common vulgarities in the style of “like all things, love attachments are also not eternal, they change in the course of time,” etc.; it rather concedes that indissolvability is in the very notion of marriage. The conclusion is that divorce always has a retroactive scope: it does not only mean that marriage is now annulled, but something much more radical – a marriage should be annulled because it *never was a true marriage*.

Recall also the paradox of the process of apologizing: if I hurt someone with a rude remark, the proper thing for me to do is to offer him a sincere apology, and the proper thing for him to do is to say something like “Thanks, I appreciate it, but I wasn’t

offended, I knew you didn't mean it, so you really owe me no apology!" The point is, of course, that, although the final result is that no apology is needed, one has to go through the entire process of offering it: "you owe me no apology" can only be said after I DO offer an apology, so that, although, formally, "nothing happens," the offer of apology is proclaimed unnecessary, there is a gain at the end of the process (perhaps, even, the friendship is saved). (A scene in Ernst Lubitch's wonderful *To Be Or Not to Be*, a short dialogue between the two famous Polish theatre actors, Maria Tura and her self-centred husband Josef, playfully subverts this logic. Josef tells his wife: "I gave orders that, in the posters announcing the new play we are starring in, your name will be at the top, ahead on mine – you deserve it, darling!" She kindly replies: "Thanks, but you really didn't have to do it, it was not necessary!" His answer is, of course: "I knew you would say that, so I already cancelled the order and put my name back on the top...") There is a well-known joke about cooking which relies on the same logic: "How anyone can make a good soup in one hour? You prepare all the ingredients, cut the vegetables, etc., boil water, put the ingredients into it, cook it in not too hot water for half an hour, occasionally stirring the water; when, after three quarters of an hour, you discover that the soup is tasteless and unpalatable, you throw it away, open up a good can of soup and quickly warm it up." This is how we, humans, make soup.

How is this circle of changing the past possible without recourse to travel back in time? The solution was already proposed by Bergson: of course one cannot change the past reality/actuality, but what one can change is the virtual dimension of the past – when something radically New emerges, this New retroactively creates its own possibility, its own causes/conditions. A potentiality can be inserted into (or withdrawn from) past reality. Falling in love changes the past: it is as if I ALWAYS-ALREADY loved you, our love was destined, "answer of the real." My present love causes the past which gave birth to it. The same goes for LEGAL POWER: here also, synchrony precedes diachrony. In the same way that, once I contingently fall in love, this love was my necessary Fate, once a legal order is here, its contingent origins are erased. Once it IS here, it was always-already here, every story of its origins is a myth, like the Swift story of the origin of language in *Gulliver's Travels*: the result is already presupposed.

In *Vertigo*, it is the opposite that occurs: the past is changed so that it LOSES objet a. What Scottie first experiences in *Vertigo* is the LOSS of Madeleine, his fatal love; when he recreates Madeleine in Judy and then discovers that the Madeleine he knew already was Judy pretending to be Madeleine, what he discovers is not simply that

Judy is a fake (he knew that she is not the true Madeleine, since he recreated a copy of Madeleine out of her), but that, *because she is NOT a fake – she IS Madeleine* -, *Madeleine herself was already a fake* – objet a disintegrates, the very loss is lost, we get a “negation of negation.” His discovery CHANGES THE PAST, deprives the lost object of objet a.

Are, then, today’s ethico-legal neoconservatives not a little bit like Scottie in Hitchcock’s *Vertigo*: in wanting to recreate the lost order, to make a new distinguished Madeleine out of today’s promiscuous and vulgar Judy, they will be sooner or later forced to admit not that it is impossible to restore to life Madeleine (the old traditional mores), but that Madeleine WAS already Judy: the corruption they are fighting in modern permissive, secular, egotist, etc. society was there from the beginning. It is like with Zen Buddhism: those who criticize the Westernized New Age image and practice of Zen, its reduction to a “relaxation technique,” as the betrayal of the authentic Japanese Zen, obliterate the fact that the features they deplore in the Westernized Zen were already there in Japanese “true” Zen: after WWII, Japanese Zen Buddhists immediately started to organize Zen courses for business managers, during the WWII their majority supported Japanese militarism, etc.

In true love, after discovering the truth, Scottie would have accepted Judy as “more Madeleine than Madeleine herself” (he DOES that just before the rise of the mother superior...): here Dupuy should be corrected. Dupuy’s formula is that Scottie should left Madeleine to her past – true, but what should he have done upon discovering that Judy IS Madeleine? Past Madeleine was an imaginary lure, pretending to be what she was not (Judy played Madeleine). What Judy is doing now in playing Madeleine is TRUE LOVE. In *Vertigo*, Scottie does NOT love Madeleine – the proof is that he tries to recreate her in Judy, changing Judy’s properties to make her resemble Madeleine. The result like Marx brothers joke: “Everything about you reminds me of you – your lips, hair, arms, legs... everything except you yourself.” A person doesn’t resemble itself, it IS itself. No wonder *Vertigo* can be read as a variation of the Ravelli-joke from Marx brothers: “You look like Emmanuel Ravelli!” “I AM Emmanuel Ravelli!” “Well, no wonder, then, that you look like him!” No wonder Judy looks like Madeleine – she IS Madeleine... This is why the idea to clone a child to parents who lost him (or her) is an abomination: if the parents are satisfied, their love was not true love - love is not love for the properties of the object, but for the abyssal X, the *je ne sais quoi*, in the object.

In his *Wissen und Gewissen*, Viktor Frankl reports on one of his post-WWII patients, a concentration camp survivor who reunited with his wife after the war; however, due to an illness contracted in the camp, she died soon afterwards. The patient fell into total despair, and all Frankl's attempts to drag him out of depression failed, till, one day, he told the patient: "Imagine that God would give me the power to create a woman who would have all the features of your dead wife, so that she would be indistinguishable from her – would you ask me to create her?" The patient was silent for a short time, then he stood up, said "No, thanks, doctor!", shook his hand, left and started to lead a new normal life.⁵ This patient did what Scottie, who precisely tried to recreate the same woman, wasn't able to do: he became aware that, while one can find the same woman as to her positive features, one cannot recreate the unfathomable object a in her.

There is a science-fiction story, set a couple of hundred years ahead of our time when time travel was already possible, about an art critic who gets so fascinated by the works of a New York painter from our era that he travels back in time to meet him. However, he discovers that the painter is a worthless drunk who even steals from him the time machine and escapes to the future; alone in today's world, the art critic paints all the paintings that fascinated him in the future in made him travel into the past. Surprisingly, it was none other than Henry James who already used the same plot: *The Sense of the Past*, an unfinished manuscript found among James' papers and published posthumously in 1917, tells a similar story which uncannily resembles *Vertigo*, and caused penetrating interpretations by Stephen Spender and Borges. (Dupuy notes that James was friend with H.G.Wells – *The Sense of the Past* is his version of Wells' *Time Machine*.⁶) After James' death this novel was converted into a very successful play Berkeley Square, which was made into a movie in 1933 with Leslie Howard as Ralph Pendrel, a young New Yorker who, upon inheriting an 18th century house in London, finds in it a portrait of a remote ancestor, also named Ralph Pendrel. Fascinated by the portrait, he steps across a mysterious threshold and finds himself back in the 18th century. Among the people he meets there is a painter who was the author of the portrait that fascinated him – it is, of course, his own portrait. In his commentary, Borges provided a succinct formulation of the paradox: "*The cause is posterior to the effect, the motif of the voyage is one of the consequences of this voyage.*"⁷ James added a love aspect to the trip into the past: back in the 18th century, Ralph falls in love with Nan, a sister of his (18th century) fiancée Molly. Nan eventually realizes that Ralph is a time-

traveller from the future, and she sacrifices her own happiness and help him return to his own time and to Aurora Coyne, a woman who had previously rejected Ralph but would now accept him. – This story just psychotically (in the real) mystifies the circle of symbolic economy, in which effect precedes the cause, i.e., retroactively creates it.

This, perhaps, is the most succinct definition of what an authentic ACT is: in our ordinary activity, we effectively just follow the (virtual-fantasmatic) coordinates of our identity, while an act proper is the paradox of an actual move which (retroactively) changes the very virtual »transcendental« coordinates of its agent's being – or, in Freudian terms, which does not only change the actuality of our world, but also »moves it underground.« We have thus a kind of reflexive “folding back of the condition onto the given it was the condition for”⁸: while the pure past is the transcendental condition for our acts, our acts do not only create new actual reality, they also retroactively change this very condition. In Predestination, fate is substantialized into a decision that precedes the process, so that the stake of individuals' activities is not to performatively constitute their fate, but to discover (or guess) one's pre-existing fate. What is thereby obfuscated is the dialectical reversal of contingency into necessity, i.e., the way the outcome of a contingent process is the appearance of necessity: things retroactively “will have been” necessary.” This reversal was described by Dupuy:

The catastrophic event is inscribed into the future as a destiny, for sure, but also as a contingent accident: it could not have taken place, even if, in *future anterieur*, it appears as necessary. /.../ if an outstanding event takes place, a catastrophe, for example, it could not not have taken place; nonetheless, insofar as it did not take place, it is not inevitable. It is thus the event's actualization – the fact that it takes place – which retroactively creates its necessity.⁹

Dupuy provides the example of the French presidential elections in May 1995; here is the January forecast of the main polling institute: “If, on next May 8, Ms Balladur will be elected, one can say that the presidential election was decided before it even took place.” If – accidentally - an event takes place, it creates the preceding chain which makes it appear inevitable: THIS, not the common places on how the underlying necessity expresses itself in and through the accidental play of appearances, is *in nuce* the Hegelian dialectics of contingency and necessity. The same goes for The October Revolution (once the Bolsheviks won and stabilized their hold on power, their victory appeared as an outcome and expression of a deeper historical necessity), and even of Bush's much contested first US presidential victory (after the contingent and contested

Florida majority, his victory retroactively appears as an expression of a deeper US political trend). In this sense, although we are determined by destiny, we are *nonetheless free to choose our destiny*. This, according to Dupuy, is also how we should approach the ecological crisis: not to “realistically” appraise the possibilities of the catastrophe, but to accept it as Destiny in the precise Hegelian sense: like the election of Balladur, “if the catastrophe will happen, one can say that its occurrence was decided before it even took place.” Destiny and free action (to block the “if”) thus go hand in hand: freedom is at its most radical the freedom to change one’s Destiny.

In Peru in the early 1990s, in the months prior to the arrest of Abimael Guzman, the country lived in the oppressively-resigned atmosphere of the inevitable victory of Sendero Luminoso: somehow, everyone in the official public space seemed silently to accept that they are all doomed, that Sendero Luminoso will sooner or later take power. (The root of this deep immobilization was the fascination exerted by the uncompromising ruthlessness of the Luminoso activity: they acted as if they are the instruments of destiny, spreading terror, not allowing for innocent bystanders, not caring for any “dialogue” with other parts of society.) When Guzman was arrested, the spell was broken - however, the point is that, IF Sendero were to win, its victory would have been perceived as “inevitable”...

The same loop also holds for the future: if we are to confront properly the threat of a (cosmic or environmental) catastrophe, we have to introduce a new notion of time. Dupuy calls this time the »time of a project,« of a closed circuit between the past and the future: the future is causally produced by our acts in the past, while the way we act is determined by our anticipation of the future and our reaction to this anticipation. This, then, is how Dupuy proposes to confront the catastrophe: we should first perceive it as our fate, as unavoidable, and then, projecting ourselves into it, adopting its standpoint, we should retroactively insert into its past (the past of the future) counterfactual possibilities (»If we were to do that and that, the catastrophe we are in now would not have occurred!«) upon which we then act today.¹⁰ Therein resides Dupuy’s paradoxical formula: we have to accept that, at the level of possibilities, our future is doomed, the catastrophe will take place, it is our destiny – and, then, on the background of this acceptance, we should mobilize ourselves to perform the act which will change destiny itself and thereby insert a new possibility into the past. For Badiou, the time of the fidelity to an event is the future anterior: overtaking oneself towards the future, one acts now as if the future one wants to bring about is already here. The same circular strategy of

future anterieur is also the only truly efficient when we are confronting the prospect of a catastrophe (say, of an ecological disaster): instead of saying “the future is still open, we still have the time to act and prevent the worst,” one should accept the catastrophe as inevitable, and then act to retroactively undo what is already “written in the stars” as our destiny.

And is not a supreme case of the reversal of positive into negative destiny the shift from the classical historical materialism into the attitude of Adorno's and Horkheimer's »dialectic of Enlightenment«? While the traditional Marxism enjoined us to engage ourselves and act in order to bring about the necessity (of Communism), Adorno and Horkheimer projected themselves into the final catastrophic outcome perceived as fixed (the advent of the »administered society« of total manipulation and end of subjectivity) in order to solicit us to act against this outcome in our present. And, ironically, does the same not hold for the very defeat of Communism in 1990? It is easy, from today's perspective, to mock the “pessimists,” from the Right to the Left, from Solzhenitsyn to Castoriadis, who deplored the blindness and compromises of the democratic West, its lack of ethico-political strength and courage in its dealing with the Communist threat, and who predicted that the Cold War is already lost by the West, that the Communist block has already won it, that the collapse of the West is imminent – but it is precisely their attitude which did most for bringing about the collapse of Communism. In Dupuy's terms, their very “pessimist” prediction at the level of possibilities, of the linear historical evolution, mobilized them to counteract it.

Exactly the same holds for the legal status of the rebellion against a (legal) power in Kant: the proposition “what the rebels are doing is a crime which deserves to be punished” is true if pronounced when the rebellion is still going on; however, once the rebellion wins and establishes a new legal order, this statement about the legal status of the same past acts no longer holds. Here is Kant's answer to the question “Is rebellion a legitimate means for a people to employ in throwing off the yoke of an alleged tyrant?”:

The rights of the people are injured; no injustice befalls the tyrant when he is deposed. There can be no doubt on this point. Nevertheless, it is in the highest degree illegitimate for the subjects to seek their rights in this way. If they fail in the struggle and are then subjected to severest punishment, they cannot complain about injustice any more than the tyrant could if they had succeeded. /.../ If the revolt of the people succeeds, what has been said is still quite compatible with the fact that the chief, on retiring to the status of a subject, cannot begin a revolt for his restoration but need not fear being made to account for his earlier administration of the state.

Does Kant not offer here his own version of what Bernard Williams developed as “moral luck” (or, rather, “legal luck”)? The (not ethical, but legal) status of rebellion is decided retroactively: if a rebellion succeeds and establishes a new legal order, then it brings about its own *circulus vitiosus*, i.e., it erases into ontological void its own illegal origins, it enacts the paradox of retroactively grounding itself – Kant states this paradox even more clearly a couple of pages earlier:

If a violent revolution, engendered by a bad constitution, introduces by illegal means a more legal constitution, to lead the people back to the earlier constitution would not be permitted; but, while the revolution lasted, each person who openly or covertly shared in it would have justly incurred the punishment due to those who rebel.

One cannot be clearer: the legal status of the same act changes with time. What is, while the rebellion goes on, a punishable crime, becomes, after a new legal order is established, its own opposite – more precisely, it simply disappears, as a vanishing mediator which retroactively cancels/erases itself in its result. The same holds for the very beginning, for the emergence of the legal order out of the violent “state of nature” – Kant is fully aware that there is no historical moment of “social contract”: the unity and law of a civil society is imposed onto the people by violence whose agent is not motivated by any moral considerations:

since a uniting cause must supervene upon the variety of particular volitions in order to produce a common will from them, establishing this whole is something no one individual in the group can perform; hence in the practical execution of this idea we can count on nothing but force to establish the juridical condition, on the compulsion of which public law will later be established. We can scarcely hope to find in the legislator a moral intention sufficient to induce him to commit to the general will the establishment of a legal constitution after he has formed the nation from a horde of savages.

What Kant is struggling with here is nothing other than the paradoxical nature of the political ACT. Recall, from the history of Marxism, Karl Kautsky’s defense of the multiparty democracy: Kautsky conceived the victory of socialism as the parliamentary victory of the social-democratic party, and even suggested that the appropriate political form of the passage from capitalism to socialism is the parliamentary coalition of progressive bourgeois parties and socialist parties. Lenin saved his utmost acerbic irony

for those who engage in the endless search for some kind of "guarantee" for the revolution. This guarantee assumes two main forms: either the reified notion of social Necessity (one should not risk the revolution too early; one has to wait for the right moment, when the situation is "mature" with regard to the laws of historical development: "it is too early for the Socialist revolution, the working class is not yet mature"), or the normative ("democratic") legitimacy ("the majority of the population is not on our side, so the revolution would not really be democratic") - as Lenin repeatedly put it, it is as if, before a revolutionary agent risks the seizure of power, it should get the permission from some figure of the big Other – say, organize a referendum which will ascertain that the majority supports the revolution. With Lenin, as with Lacan, the point is that a revolution *ne s'autorise que d'elle-meme*: one should assume the revolutionary ACT not covered by the big Other - the fear of taking power "prematurely," the search for the guarantee, is the fear of the abyss of the act nicely rendered in the anecdote about the exchange between Lenin and Trotsky just prior to the October Revolution: Lenin said: "What will happen with us if we fail?" Trotsky replied: "And what will happen if we succeed?" *Se non e vero e ben trovato ...*

Even some Lacanians praise democracy as the "institutionalization of the lack in the Other": the premise of democracy is that no political agent is a priori legitimized to hold power, that the place of power is empty, open up to competition. However, by institutionalizing the lack, democracy neutralizes – normalizes – it, so that the big Other is again here in the guise of the democratic legitimization of our acts – in a democracy, my acts are "covered" as the legitimate acts which carry out the will of the majority. In contrast to this logic, the role of the emancipatory forces is not to passively „reflect“ the opinion of the majority, but to create a new majority – as Trotsky put it, a revolutionary subject should act *“not in statically reflecting a majority, but in dynamically creating it.”* Kautsky's worry that the Russian working class took power „too early“ implies the positivist vision of history as an „objective“ process which in advance determines the possible coordinates of political interventions; within this horizon, it is unimaginable that a radical political intervention would change these very „objective“ coordinates and thus in a way create the conditions for its own success. An act proper is not just a strategic intervention into a situation, bound by its conditions – it retroactively creates its conditions.

We can see where Kant's weakness resides: there is no need to evoke "radical Evil" in the guise of some dark primordial crime – all these obscure fantasies have to be

evoked to obfuscate the act itself. The paradox is clear: Kant himself, who put such an accent on the ethical act as autonomous, non-pathological, irreducible to its conditions, is unable to recognize it where it happens, misreading it as its opposite, as the unthinkable “diabolical Evil.” Kant is here one in the series of many conservative (and not only conservative) political thinkers, from Pascal and Joseph de Maistre, who elaborated the notion of illegitimate origins of power, of a ‘founding crime’ on which state power is based; to obfuscate its origins, one should offer to ordinary people “noble lies,” heroic narratives of origins.

What is often said about Israel is quite true: the misfortune of Israel is that it was established as a Nation-State a century or two too late, in conditions when such founding crimes are no longer acceptable. The ultimate irony here is that it was Jewish intellectual influence that contributed to the rise of this unacceptability! During my last visit to Israel, I was approached by an Israeli intellectual who, aware of my Palestinian sympathies, mockingly asked me: “Aren’t you ashamed to be here, in Israel, in this illegal, criminal state? Aren’t you afraid that your being here will contaminate your Leftist credentials and make you an accomplice in crime?” In all honesty, I have to admit that, every time I travel to Israel, I experience that strange thrill of entering a forbidden territory of illegitimate violence. Does this mean I am (not so) secretly an anti-Semite? But what if what disturbs me is precisely that I find myself in a State which hasn’t yet obliterated the “founding violence” of its “illegitimate” origins, repressed them into a timeless past. In this sense, what the State of Israel confronts us with is merely the obliterated past of every state power.

Why are we more sensitive to this violence today? Precisely because, in a global universe which legitimizes itself with a global morality, sovereign states are no longer exempt from moral judgments, but treated as moral agents to be punished for their crimes, however contested, who exerts the justice and judges the judge remains. This accounts for the emblematic value of the Middle East conflict: it confronts us with the fragility and penetrability of the border that separates ‘illegitimate’ non-state power from ‘legitimate’ state power. Israelis are cunningly counting on the change in mores in the last half-century: the exemption of ethnic conflicts for land from moral considerations is no longer acceptable today. However, in the case of the State of Israel, its ‘illegitimate’ origins are not yet obliterated. Here is what David ben Gurion, Israel’s first Prime Minister, wrote:

Everyone can see the weight of the problems in the relations between Arabs and Jews. But no one sees that there is no solution to these problems. There is no solution! Here is an abyss, and nothing can link its two sides ... We as a people want this land to be ours; the Arabs as a people want this land to be theirs.”¹¹

The problem with this statement today is clear: such an exemption of ethnic conflicts for land from moral considerations is simply no longer acceptable. Years ago, Habermas made a perspicuous critical observation about those who see as the predominant feature of our era a drift towards new forms of “totalitarian” bio-power (rise of torture, ethnic slaughters, police control, mass extermination in concentration camps, etc.): it is not only that there is more torture and killing in reality; in most of the cases, we simply perceive more of it because of the media coverage and, above all, because our normative standards are higher. Can we even imagine a World War II in which the Allies would have been measured by today’s standards? We are now learning that there were serious tensions among the British and the US headquarters concerning the (predominantly British) tactics of ruthlessly bombing German civilian centers which were of no military value (Dresden, Hamburg...); even in the UK itself, many officers, priests and intellectuals were asking the question if, by doing this, the UK is not starting to resemble the Nazis. The whole debate was totally hushed up and never reached the public. On the US side, recall the ignominious dispossession and internment of the entire Japanese ethnic population: while today, there are even Hollywood films condemning this act, nobody, including the Left, protested in 1942. (Or, in the opposite direction, imagine that Colombia, Afghanistan, and other opium producing nations were to apply to the US the same logic as the British empire and other Western powers did in the 1840s against China, as a pretext for the Opium War (the military attack on China for refusing to allow free import of opium, since opium was catastrophic for the health of the thousands of ordinary Chinese): those who reject free trade are barbarians who should be forced to accept civilization... Imagine, then, Colombia and others issuing the same ultimatum addressed at the USA!)

The same goes not only for the historical dimension, but also for different countries today: the very fact that Abu Ghraib tortures turned into a public scandal which put the US administration in a defensive position was in itself a positive sign – in a really “totalitarian” regime, the case would simply be hushed up. (In the same way, let us not forget that the very fact that the US forces did not find weapons of mass destruction is a positive sign: a truly “totalitarian” power would have done what cops usually do - plant

drugs and then “discover” the evidence of crime...) The widespread protests of the US public, especially students, against the US engagement in Vietnam was a key factor in causing the US withdrawal – however, is the very fact of such a protest in the middle of a war not in itself a proof of high US ethical and freedom standards? Imagine a similar movement, say, in England when it joined the World War I: Bertrand Russell was interned for his pacifism, and for years he had to submit the manuscripts of his books to a state censor. (He mentions this fact in the foreword to the later new edition of his popular History of Western Philosophy, ironically admitting that the censor’s remarks were often insightful and helped him to make the manuscript better.) When Leftists today complain about the violations of human rights in Guantanamo, the obvious counter-question is: do we all not know that there must be dozens of much worse places in China, Russia, in African and Arab countries? The standard Rightist-liberal complaint that the critics of the US “apply different standards”, judging the US much harsher than other countries, misses the point, which is that the critics tend to judge each country BY ITS OWN STANDARDS.

The idea of today’s global liberal justice is not only to bring out all past (acts which appear from today’s standards as) collective crimes; it also involves the Politically Correct utopia of “restituting” the past collective violence (towards Blacks, native Americans, Chinese immigrants...) by payment or legal regulations – THIS is the true utopia, the idea that a legal order can pay back for its founding crime, thereby retroactively cleansing itself of its guilt and regain its innocence. What is at the end of this road is the ecological utopia of humanity in its entirety repaying its debt to Nature for all its past exploitation. And, effectively, is the ecological idea of “recycling” not part of the same pattern as that of the restitution for past injustices? The underlying utopian notion is the same: the system which emerged through violence should repay its debt and thus regain ethico-ecological balance.

- ¹ See “Even what’s secret is a secret in China,” *The Japan Times*, June 16 2007, p. 17.
- ² G.K.Chesterton, *The Man Who Was Thursday*, Harmondsworth: Penguin Books 1986, p. 44-45.
- ³ Quoted from Dan Hind, *The Threat to Reason*, London: Verso Books 2007, p. 1.
- ⁴ Jean-Pierre Dupuy, “Quand je mourrai, rien de notre amour n’aura jamais existe,” unpublished manuscript of the intervention at the colloquium *Vertigo et la philosophie*, Ecole Normale Supérieure, Paris, October 14 2005.
- ⁵ Viktor Frankl, *Wissen und Gewissen*, Frankfurt: Suhrkamp 1966.
- ⁶ James was more interested in the contrast of mores between the near past and the present: the mechanics of time travel were foreign to him, which is why he wisely left the novel unfinished.
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- ⁷ Dupuy, op.cit.
- ⁸ Bernard Williams, *Moral Luck*, Cambridge: University of Cambridge Press 1981, p. 109.
- ⁹ Jean-Pierre Dupuy, *Petite metaphysique des tsunamis*, Paris: Seuil 2005, p. 19.
- ¹⁰ See Jean-Pierre Dupuy, op.cit., ibid.
- ¹¹ Quoted from *Time* magazine, July 24 2006.