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# Kant's Open Secret

Geoffrey Bennington

One might be forgiven for imagining, especially perhaps in the age of Wikileaks, that political secrets are bad and the truth should simply be uncovered. But as we can find out by reading Kant, that exemplary *Aufklärer*, uncovering secrets always might unveil the fact that the truth this revealed is part of a greater system of secrecy, and merely a supplementary fold in the structure of veiling itself. Enlightenment always might in fact be the dupe of apparent transparency, and transparency might still be a kind of veil. '*Sapere aude!*' (Kant, 1784: 54) might then still today be the motto of a certain innocence.<sup>1</sup>

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Having established to his satisfaction that there can be no *objective* conflict between politics and ethics, on the grounds that once we have recognized the absolute authority of the concept of moral duty 'it is patently absurd to say that we *cannot* act as the moral laws require' (Kant, 1795: 116), Kant turns to a transcendental analysis of public (and therefore political) right. What makes public right public is the transcendental character of *public-ity* [*Publizität*]. No matter the material *content* of the law: for it to be public, it must have the *form* of public-ity or publicness, and the same goes for the right of peoples, i.e. international law, which is law only insofar as it can be founded on the possibility of making public the maxims of any proposed political action without the fact of publication *ipso facto* making that action inoperative. It is 'easy', then (as moral knowledge always is in Kant), to know whether an action is in conformity with public or international law: it suffices to run its maxim through the test of publicity understood in this way.

We can begin here to get a sense of what for Kant is nonetheless supposed to distinguish ethics from politics: in ethics, one can assess the morality of a proposed action by running its

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<sup>1</sup> This paper is adapted and revised from Chapter 4 of Bennington (2000).

maxim through the test prescribed by the categorical imperative, to see if this maxim can without contradiction be taken as a universal law. This does not require publicity in any normal sense. But in public law, the categorical imperative prescribes a test slightly displaced from that of morality itself, and one which gives the ‘transcendental formula’ of public right: ‘All actions affecting the rights of other human beings are wrong [*unrecht*] if their maxim is not compatible with their being made public.’ (Kant, 1795: 126). First, the domain of this principle is restricted to the political sphere (or at least the sphere in which my freedom externally confronts that of others); then, what is the proof in this test is not formal non-contradiction (as in the ethical categorical imperative), but compatibility with making this same maxim public. This compatibility [*Verträglichkeit*] is measured in more complicated fashion than the simple test of non-contradiction that grounds ethics, because here one must take into account a possible *resistance or opposition* of others to what I propose to undertake:

For a maxim which I may not *declare openly* without thereby frustrating my own intention, or which must at all costs be *kept secret* [*verheimlicht werden muss*] if it is to succeed, or which I cannot *publicly acknowledge* without thereby inevitably arousing the resistance of everybody to my plans, can only have stirred up this necessary and general (hence *a priori* foreseeable) opposition against me because it is itself unjust and thus constitutes a threat to everyone. (Kant, 1795: 126)

This principle, says Kant, is purely negative, in that it identifies what is *unjust* rather than what is *just*. As such, this principle is ‘like any axiom, valid without demonstration and... *easy to apply*’ (Kant, 1795: 126; emphasis added). As if by chance, the two examples Kant gives to illustrate this principle are, for internal right, insurrection, and for external right, various forms of international relations: the *temporal frontier* of revolution, where one regime is in discontinuous transition into another in the same place, and the *spatial frontier* of the state, where one regime is in discontinuous transition into another at the same time. First example: there can be no right to insurrection, even in an obvious case in which the people’s rights are being violated by the sovereign, because the maxim of such an action could not be publicly declared. First by reason of contradiction: the contract that binds the people to the head of state

could not contain a right allowing the people to use violence against that leader, for in that case the head of state would not in fact be the head of state – which is a contradiction. But this contradiction is brought out by noting that if one were to declare publicly the maxim of the action of rising up against the head of state, the point of the insurrection would by that very fact be compromised: ‘the maxim would therefore have to be kept secret’ (Kant, 1795: 127), whereas the corresponding maxim of the head of state (to punish by death any attempt at rebellion) would not at all have to be kept secret: the head of state knows that he (at least in principle) ‘possesses *irresistible* supreme power’ and so ‘does not have to worry that his own aims might be frustrated if his maxim became generally known’ (Kant, 1795: 127).

Kant seems less sure of this position, however, in *The Conflict of the Faculties*:

Why has no ruler ever dared say publicly that he does not recognize any *rights* of the people against himself? Or that the people owe their happiness only to the *beneficence* of a government which confers it upon them, and that any pretensions on the part of the subject that he has rights against the government are absurd or even punishable, since they imply that resistance to authority is permissible? The reason is that any such public declaration would rouse up all the subjects against the ruler, even though they had been like little docile sheep, well fed, powerfully protected and led by a kind and understanding master, and had no lack of welfare to complain of. (Kant, 1798: 183)

Which complicates somewhat the relation between secret and publication. This extra move in the play of the veil which keeps what is no secret secret all the while letting something of it be seen (and which we might suspect just is politics), is registered a little further in this same text, with regard to the British constitution. Kant has just briefly repeated the transcendental argument in favor of publicity that we have seen. But states in fact do not stop at banning public-ity, which is, however, required for the rational progress Kant is arguing for. There is something worse than such an interdiction, or at least something other, and here is where the veil will hide itself, veil itself, and in so doing perhaps show itself for what it ‘is’.

What is worse—or at least other—than the interdiction of political public-ity? A disguise, and this time a legal disguise, of the nature of the Constitution itself. This disguise, as Kant will say immediately, is not very effective *as* a disguise, but we might be tempted to say that it works

all the better for that fact. And that's the veil, in its mysterious transparency. Let's read this very curious passage:

Another thing which is concealed [*Eine andere...Verheimlichung*] (transparently enough [*leicht durchzuschauende*]) by legal measures from a certain people is the true nature of its constitution. It would be an affront to the majesty of the people of Great Britain to say that they lived under an *absolute monarchy*. Instead, it is said that their constitution is one which *limits* the will of the monarch through the two houses of parliament, acting as representatives of the people. Yet everyone knows very well that the influence of the monarch upon these representatives is so great and so infallible that the aforesaid representatives is so great and so powerful that the aforesaid houses make no decisions except those which His Majesty wishes and recommends through his minister. Now and again, the latter will certainly recommend decisions wherein he knows and indeed *ensures* that he will meet with contradiction (as with the abolition of the slave trade), simply in order to furnish ostensible proof of parliamentary freedom. But this sort of approach has the insidious effect of discouraging people from looking for the true and rightfully established constitution, for they imagine they have discovered it in an instance which is already before them. This a mendacious form of publicity [*eine lügenhafte Publizität*] deceives the people with the illusion that the monarchy is *limited* by a law which emanates from them, while their representatives, won over by bribery, secretly subject them to an *absolute monarch*. (Kant, 1798: 186-7)

This disguise is worse than the interdiction of publicity, because it is *legal*, and it remains in place in spite of, and by means of, publicity itself. Publicity, whose – transcendental – principle appeared to be clear and infallible, and to keep the secret out of politics, can nonetheless allow this secondary disguise with respect to the true nature of the constitution to come about. What's the secret? The fact that by means of a pseudo-transcendental publicity, or by means of a transcendental pseudo-publicity, the public believes that it is in the presence of the thing itself, 'the true and rightfully established constitution' whereas in fact this is not at all the case. Kant claims that this disguise of the true nature of the British constitution is *easy* to see through: there is a veil in the sense of a misleading cover, and it must be torn or penetrated for the truth to be discovered. One senses Kant's impatience and even irritation faced with the British imposture: the British are proud of having already realized a constitution in conformity with the transcendental principles of right; well, we'd better disabuse them immediately, and that will not be difficult. Kant does not even deign to do so in the main text, and relegates the task to a footnote:

A cause whose nature is not directly perceptible can be discovered through the effect which invariably accompanies it. What is an *absolute* monarch? He is one at whose command war at once begins when he says it shall do so. And conversely, what is a *limited* monarch? He is one who must first ask the people whether or not there is to be a war, and if the people say that there shall be no war, then there will be none. For war is a condition in which *all* the powers of the state must be at the head of state's disposal.

Now the monarch of Great Britain has waged numerous wars without asking the people's consent. The king is therefore an absolute monarch, although he not be so according to the constitution. But he can always bypass the latter, since he can always be assured, by controlling the various powers of the state, that the people's representatives will agree with him; for he has the authority to award all offices and dignities. This corrupt system, however, must naturally be given no publicity if it is to succeed. It therefore remains under a very transparent veil of secrecy [*Es bleibt daher unter dem sehr durchsichtigen Schleier des Geheimnisses*] (Kant, 1798: 186-7, note).

What is the conceptual status of this rather seductive 'very transparent veil'? Such a veil is not content simply to let something show through: it does not hide that it isn't hiding anything, or it lets see that it is letting everything be seen. But, by letting it be seen in this way *that* it is letting everything be seen, with a wink of connivance, as it were, does it not hide even more effectively what it is supposed to be letting one see? The veil always also unveils, or promises an unveiling, but that promise, and the prospect of finally seeing what is behind it, are also part of the veiling. What the veil is really veiling is that the promise of unveiling and revelation is part of the seductive game of politics. For what 'is not known to the public' is not any kind of *content*: the king does not bother to ask the people's opinion, not so that he can simply *hide* what he intends to do, to make a secret of it, but because he can count on public approval, and thereby the connivance of the public in the *structure* of secrecy itself. What is hidden in this apparent transparency is its 'corrupt system', namely the structure of the veil itself, given no publicity because it is hiding in plain sight as publicity itself. All supposed political 'transparency' is at risk of producing the same effect of 'corruption' through the action of what is, *apparently*, public-ity itself, the appearance of public-ity *as* appearance itself. The disguise is easy to pierce because there is not even really a disguise, the veil is transparent and even very transparent, there is no secret – and just that is its whole mystery. This system cannot be known to the public as such, because it defines public-ity or public-ness itself as a transcendental structure. The so-called 'public space' as such is always veiled to itself, never entirely available to itself as itself.

The truth in politics is not available *in politics*. There is no secret except the absence of any secret – and that is the secret that the philosopher must try to get out.

Second example. International right is necessarily a public right that ‘implies by definition that there is a general will which publicly assigns to each state that which is its due’ (Kant, 1785: 127, translation slightly modified). So if, for example, the question arises of knowing whether a state can break a promise made to another state (under the pretext of its internal responsibilities); or if it is permissible for less powerful states to attack a neighbouring state that has become powerful and threatening; or if a small state can be subjected to a larger state whose territorial continuity it interrupts, then one can immediately discover that these actions would be unjust because the fact of publishing their maxims could not fail to make the proposed actions unrealizable by virtue of forewarning the other state.

Here we find at work all the ambiguity of the political moralist and the moral politician, the two *characters* Kant puts on stage to play out the relation between ethics and politics. The first of these conceives of politics along the lines of a natural or mechanical causality, where the point is to get people to do things with specific ends in view, to act on the body of the people as though it were a natural object subject to laws of cause and effect. The ends the political moralist has in view may be perfectly laudable (perpetual peace, for one example that is more than an example, because it is the end of politics as such), but the very fact of thinking of politics as the *means to* those ends separates politics from morality, or turns morality into no more than a possible rhetorical or more generally technical means of obtaining otherwise desirable outcomes. The moral politician, on the other hand, believes that moral action will necessarily bring about moral ends, but only if the action is not undertaken *with a view to* bringing about those ends, but rather because of its intrinsic morality as tested by the categorical imperative or here more specifically its ‘political’ analogue, the imperative of publicity or non-secrecy. As Kant attempts to define these two characters more precisely however, curious things begin to happen to his argument. The moral politician, just because he is moral and thereby puts morality above politics, always runs the risk, by a sort of internal catastrophe in Kant’s thought which looks

forward in spite of itself to Hegel's analysis of the Enlightenment and Terror in the *Phenomenology of Spirit*, of becoming even less moral than the political moralist. For the 'political wisdom' attributed to the moral politician, as opposed to the sinuous and indirect 'political prudence' of the political moralist, 'goes straight to its goal', says Kant [*führt gerade zum Zweck*] (Kant, 1795: 122), that goal being perpetual peace, but just because of that directness always might try to go *too* directly, and thus too violently, and thereby precipitate a revolution, which is absolutely immoral. Political wisdom [*Weisheit*] unchecked by political prudence [*Klugheit*] (however immoral political prudence in particular, and indeed prudence in general may be in itself from Kant's point of view<sup>2</sup>) *precipitates* the risk of absolute immorality against which it looked to be absolutely secure, and so the political wisdom has to *inoculate itself* with political prudence and wait for 'favorable opportunities' (Kant, 1795: 122): which draws its supposed wisdom into the prudential domain of the political moralist (for the *kairos*, the favourable moment, is (see Aristotle) an ingredient of prudence (*phronesis*) rather than wisdom (*sophia*)).<sup>3</sup> The 'moral politician' can avoid absolute immorality (in the form of the revolution he cannot recommend or support) only by compromising morality with the snakelike manoeuvres of the political moralist. It follows that there is no real distinction between moral politician and political moralist, but at best an economy of political moralism in which the moral politician is always already caught up.

This will mean that Kant's supposed 'solution' to what he here calls the *antinomy* of politics and morals merely exacerbates the antinomy in question, perhaps beyond the form of antinomy itself. For, according to the principle of publicity of maxims, in each case listed above the injustice of the action in question is proved by the fact that making the maxim public would

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<sup>2</sup> 'There can be no conflict between politics, as an applied branch of right, and morality, as a theoretical branch of right (i.e. between theory and practice); for such a conflict could occur only if morality were taken to mean a general doctrine of prudence, i.e. a theory of the maxims by which one might select the most useful means of furthering one's own advantage—and this would be tantamount to denying that morality exists.' (Kant, 1795: 116; modifying the translation of *Klugheit* from 'expediency' to 'prudence'.)

<sup>3</sup> See Aristotle, *Nicomachean Ethics*, 1141b-1142a.



render it in *ineffective*. We know it's unjust because it wouldn't work if made public. The transcendental injustice of political prudence (which is just politics itself, however) is seen in the fact that it would miss its aim if it did not keep its maxims *secret*.

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How does the secret work here? Everything that Kant wants to say implies that (public) right does not like the secret, that the secret is on the side of (moralizing) politics, that it suffices to dissipate the secret to be on the right track when it comes to politics and morality and their relationship. It is not that every maxim made public is by that fact made moral (for, as Kant recognizes as though in passing, 'the person who has decisive supremacy has no need to conceal his maxims' (Kant, 1795: 129), so that revealing the secret can also be a power play), but that, according to this *negative* test, no maxim that does *not* pass the test of publicity can be considered moral. There are no secrets for the moral politician, everything must be declared, unveiled, brought to light. But this righteous doctrine of non-secrecy encounters two distinct problems: on the one hand, it makes sense only in the very situation whose advent it is supposed to help along, namely perpetual peace. For there to be a politics compatible with morality, and which by that fact could lead to perpetual peace, we would already have to have perpetual peace (and thus there would be no need for politics at all, because *the end of politics is the end of politics*). Politics can finally be moral when it no longer needs to be politics; we can have perpetual peace when we've got perpetual peace; transparency will reign in transparency.

But on the other hand, there is something worse for Kant. Moral politics does not tolerate the secret. But, according to Kant himself, moral politics itself is *based on* a secret. This secret is even the secret *of* the secret, the secret itself, the very secret that allows for the possibility of a moral politics in the first place. This secret is so secret that one must not even try to find out what it is. In saying so, Kant immediately violates the secret that he has just put in place as the very foundation of moral politics. And by blowing the secret of the state (of any state) in this way, Kant, according to his own doctrine, is guilty of the highest treason and risks exile and death. This is the political price of philosophy, or perhaps its political secret. To avoid

this consequence, the secret of the secret must be re-established, its violation must be kept secret; but as this (philosophical) violation of the (political) secret is absolutely indispensable if politics is to have a chance finally of being moral, this secret violation of the political secret must be made public, but somehow made public *secretly*.

Which is why we have not yet breathed a word about the second supplement to the 'Perpetual Peace' essay, between the first supplement (which concerns the natural 'guarantee' of perpetual peace), and the appendix on the relations between morality and politics that has been exercising us. This second supplement is indeed entitled, '*Secret Article of a Perpetual Peace [Geheimer Artikel zum ewigen Frieden]*,' and was added to the second edition of Kant's text in 1796. This little supplement takes to a certain limit the logic we have been following thus far. We have seen that the secret, the need for secrecy, is sufficient proof of the immorality of a political maxim, and this is what Kant duly recognizes at the beginning of the article. The secret is *objectively* contradictory in public right, but can perhaps be justified *subjectively*. What does this mean? That the identity of the *author* of the secret, or of the one who *dictates* it [*die ihn diktiert*], can remain secret:

But in subjective terms, i.e. in relation to the sort of person who dictates it an article may well contain a secret element, for the person concerned may consider it prejudicial to his own dignity to name himself publicly as its originator [*Urheber*] (Kant, 1795: 114).

So if there is a secret article, what is secret or should remain secret is not so much the article itself or its content, but the name of its author. The secret article makes a secret of its signature. But in fact there is only *one* secret article of this kind (where the 'subjective' secret is justified), and that secret article is as follows, openly declared by Kant, written out in quotation marks, emphasized, without forgetting the signature (for 'Perpetual Peace' was not published anonymously, but had Kant's name on the title page):

*'The maxims of the philosophers on the conditions under which public peace is possible shall be consulted by states which are armed for war'* (Kant, 1795: 115)

How is this a secret? In that such an article could never be *admitted to* by its authors, namely the heads of state, who must hide their invitation to the philosophers to discuss such questions

behind a general authorization allowing the philosophers to debate everything ‘freely and publicly.’ The states, then, wanting to consult the philosophers, who are mere subjects [*Untertanen*], cannot do so openly, because that would compromise the dignity of the supreme legislative authority of the state (‘to which’, Kant adds with a hint of irony made hollow by the gravity of the problem here, ‘we must naturally attribute the highest degree of wisdom [*die grösste Weisheit*]’ (Kant, 1795: 115)) to have to ask advice from someone who cannot, by definition, have the same degree of wisdom. The secret is here guaranteed *by public-ity itself*: the state pretends to be generously allowing a freedom, an openness, public-ity where in fact it is secretly hoping to learn something in secret. The article is, then, secret, and in fact doubly secret: both within the state, where the head of state will not admit *to his subjects* that he is seeking counsel from some of them (the philosophers), and without, in relations between states, where the heads of state will not want to admit *to each other* that they are all looking for counsel from mere philosophers. This article can be so secret that there is no need for it even to appear in the perpetual peace treaty being signed by the states entering into the federation of states (the ‘surrogate,’ as Kant calls it, for a single international state that might seem to be the truly rational solution to the problem of peace), because everyone’s agreement on this point ‘already lies in the obligations imposed by universal human reason in its capacity as a moral legislator’ (Kant, 1795: 115).

So there is no need to make public the article of public-ity itself: in fact it *must* remain forever secret in its self-evident rationality, for fear of compromising the dignity of the supreme authority of the state, and it *can* remain forever secret, because in any case it is a universal rational obligation, which will to that extent already be known, and about which the states can have mutual confidence in each other, because this secret can be a secret for no-one in that it emanates from universal reason. What remains secret, then, is not the *fact* of public-ity (everybody, all subjects, can hear and read, freely discussing among themselves, the

philosophers to whom the states concede that freedom), but its *end* (to give counsel to the states armed for war).

What is Kant doing in formulating and signing this secret article? Obviously betraying the secret by publishing it. Not only is he already using the freedom he is also demanding in so doing, but is making the publication even more public by revealing its secret (and therefore not straightforwardly moral) purpose. He makes public the secret purpose of public-ity itself. Kant reveals the true but hidden address of his whole text (the head of state), and thereby too his political ambition (to dictate to that head of state), or at least the inextricable entanglement of his moral thought and its being compromised by the kind of subjective ‘prudence’ he so forcibly denounces elsewhere. But is *this* revelation (namely that revealing the secret, as when in the *Rechtslehre* he reveals the secret violent origin of the state that the subjects are supposed never to know, obviously making the philosopher guilty in the eyes of public right (Kant, 1797: 95)) not still harboring a further secret?

What exactly is going on in this publication of the secret? Kant says in his secret article (that he is thus *dictating* to its author, namely the head of state, whose dignity is compromised here not in fact so much by being the author of the article in question, but by the very fact of having to have it dictated to him by one of his subjects, the fact of *not even* being its author, of having the stupidity of the sovereign revealed) that the philosophers must be *consulted* by the head of state. But this consultation looks odd, because if the head of state allows the philosophers to express themselves publicly so he can secretly be informed as to what reason itself dictates to mankind in general, this is not exactly in order to act accordingly, but just in order *to hear*. The philosopher must simply be ‘given a hearing [*daß man ihn höre*]’ (Kant, 1795 : 115). The head of state does not exactly *listen* to the philosopher, for fear of indignity, but one might hope he *hears* the philosopher. The head of state needs to do this just because the philosopher has no political power at all: in politics, it is not the philosopher’s but the jurist’s judgment that makes the law: however, as in the case of the political moralist (who ‘does not

deserve a hearing [*verdienen sie kein Gehör*]’ (Kant, 1795: 123)), that judgment, which is content merely to apply the law to the case, is by definition hand in glove with the powers that be. In applying the law, the jurist by definition has right on his side, with all the overwhelming force without which it would not be right: but according to an inevitable effect of corruption and usurpation, that the *force* of law (without which the law would not be the law) will always win out over law itself, meaning that, in Kant’s words, the jurist, having taken as symbols the scales and the sword, does not hesitate to throw the sword into the balance when the scales are not coming down on his side (Kant, 1795: 115). However, in order to decide, not the cases under the law, but the *case of the law itself*, this force must be absent. The right of right must then be spoken secretly by the philosopher from beyond the boundaries of force and indeed of right – which is why the philosopher cannot be king, and rather tends to join the legislator in his exile, *ex lex*, outlawed, structurally sentenced to death,<sup>4</sup> from which secret position he hopes to *make himself heard*, knowing that he cannot exactly be *listened to*.

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This secret place of exile for the philosopher, which is nonetheless a public place, and even the place from which what is public can be defined – for philosophy is intrinsically public, rationally speaking it should have no secrets – this secret but radically *open* and thereby *exposed* place is what we are calling the frontier: it is always on the edge of the ‘mechanical’ system of right (which is always perfectly and necessarily right, because the law is the law), the zone of transition between systems of right (figured by the revolution in time and the border of the state in space). This secret place, which is neither simply spatial nor simply temporal, and which tendentially fills the whole space and time of politics, like a fractal curve, this place from which the philosopher (the critical philosopher at least) makes himself heard without being listened to, can nonetheless *just about* be recognized and named by right, if only the better to locate it and keep it safely out in the margins or the marches.

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<sup>4</sup> On this situation of the legislator, see Bennington (1985) and Bennington (1991).

In the Introduction to the *Rechtslehre*, having separated out the domain of right from the domain of virtue (the former considering the limitation of my freedom by that of others as a question not of virtue but solely of constraint, and thus able to be formulated ‘by analogy with the possibility of free movement of bodies within the law of the *equality of action and reaction*’ (Kant, 1797: 26)), Kant nonetheless recognizes a frontier zone which, although it does not come under ethics, is also separated from the domain of right while still appealing to it for decision. This zone is presented through discussion of two *cases* that appear to be diametrically opposed, and which limit the domain of right rather as contradiction and tautology limit the domain of logic in Wittgenstein’s *Tractatus* (5.101). As is often the case in Kant whenever trouble is brewing, these cases are presented with reference to Epicurus:

But without making incursions into the province of ethics, one finds two cases that lay claim to a decision about rights although no one can be found to decide them, and that belong as it were within the *intermundia* of Epicurus. – We must first separate these two cases from the doctrine of right proper, to which we are about to proceed, so that their wavering principles will not affect the firm basic principles of the doctrine of right (Kant, 1797: 26)

The *intermundus* or *metakosmion* (posited by Epicurus in the letter to Pythocles, quoted by Diogenes Laertius in Book 10 (I: 89) of *The Lives and Opinions of Eminent Philosophers*), is, from the point of view of right at any rate, the place of ambiguity or equivocation (*ius aequivocum*), placed, marginally, in an appendix to the Introduction. The two cases in question are not just any cases, but run the risk, if one is not careful, of taking over the whole domain of right. One case is *equity*, and the other the *right of necessity*.

Equity pulls right towards ethics, the right of necessity towards mere natural mechanism (we might want to say that the whole domain of public right – of politics – just is the *intermundus*, the frontier, between these two domains):

An authorization to use coercion is connected with any right in the *narrow* sense (*ius strictum*). But people also think of a right in a *wider* sense (*ius latium*), in which there is no law by which an authorization to use coercion can be determined. – There are two such true or alleged rights, *equity* and the *right of necessity*. The first admits a right without coercion, the second, coercion without a right. It can easily be seen that this

ambiguity really arises from the fact that there are cases in which a right is in question but for which no judge can be appointed to render a decision. (Kant, 1797: 26-7)

The argument from equity arises when the strict application of right produces injustice, as judged according to a criterion that cannot be presented to any tribunal, and which cannot therefore give rise to a legal judgment. According to equity, in Kant's example, one ought *not* to respect the equal distribution of profits in a case where one partner has done more work and thereby suffered greater losses than the others: his disproportionate loss should be compensated, but according to the law, one must respect the contract that demands equality. According to equity, someone who receives a payment due to him in a currency that has meantime been devalued is due a supplementary payment that no tribunal, however, is in a position to accord. Equity is a 'mute divinity who cannot be heard [*eine stumme Gottheit*]' (Kant, 1797: 27) but who incites one to push cases before a tribunal when they can, according to Kant, in fact be heard only by the *court of conscience*. Kant does not contest the *truth* of what he calls equity's motto ('the strictest right is the greatest wrong (*summum ius, summa injuria*)') but simply the ability of right to remedy that wrong, which it inevitably produces in its very righteousness.

Second case: the supposed right of necessity (*ius necessitatis*). Kant deals with it even more rapidly, under the sign of contradiction, because here there would supposedly be a right where there is no injustice. I invoke the right of necessity not when the other has attacked me and I have killed him to save my own life, but when, without it being his fault, I would die if I did not kill him. After the shipwreck, I push the only other survivor off the single piece of floating wreckage in order to use it myself. Here I am acting under a certain constraint, but right cannot be involved, says Kant, because there could be no penal law to punish this case (it would make no sense to threaten me with death for taking by force the last floating plank, 'since a threat of an ill that is still *uncertain* (death by a judicial verdict) cannot outweigh the fear of an ill that is *certain* (drowning)' (Kant, 1797: 28). This does not mean that the action is *just* (for I have caused someone to die without legal justification), nor even *legal*: it is not that I am not guilty (I

am) but simply not punishable. Invoking necessity changes nothing, because ‘there could be no necessity that would make what is wrong conform with law’ (Kant, 1797: 28).

In both cases, then, there is equivocation. In the case of equity, *subjective* right (as exercised by reason) justifies me whereas *objective* right (as practised by a tribunal) can only find that I am in the wrong; in the case of necessity, subjective right says I am wrong where the objective right of the tribunal finds me in the right or at least does not punish me even though I am not innocent. In both cases, the proper exercise of right leaves a residue of injustice which belongs to the *intermundus* or the frontier in the sense that it *concerns* right (neither of these cases is purely a moral matter and in both cases the question is that of a possible legal judgment by a tribunal).

In order to put forward a *doctrine* of right, Kant has to get rid of the problem of equity, even though it can clearly show up at any moment in the exercise of right, and even though it must in fact show up *in every case*, each time right is rendered in pure legality, to the extent that *the more right is right the less just it is*. Perfectly right right, analogically mathematical or mechanical, always runs the risk, by its very rightness, of being *merely* right, pure constraint without justice, force of law become simple force, and thus absolutely unjust. And even though the case of necessity seems as though it would show up less often (on the basis of Kant’s example, or the tradition he is following here), it is no less important, in that the very possibility of such an unjudge-able case (even if there were only one) puts the whole doctrine of right into question.

So it is no accident that this problem of a supposed right of necessity returns in Kant at a crucial point of his political philosophy, namely the revolution. It is hard not to see the similarity between the shipwreck survivor (guilty but unpunishable) and what happens in revolution, where the revolutionaries are never within their rights, but where, once the revolution has succeeded (if it succeeds), they are unpunishable too. And just as, in the case of the shipwreck, the other could have appealed to the same right if he had succeeded in pushing



me into the deep, in the case of the revolution, if the people invokes the right of necessity to justify its rebellion, the head of state could just as plausibly invoke it to justify its repression. Right cannot punish this action that suspends right ('Necessity knows no law' because necessity just is the illegal law of nature) and is suspended on it (in the case of revolution, this shows how right originates in a violence that escapes its judgment).

So if equity appears in *every case* as the inevitable bending of the right that is always too right (in the sense of straight, *rectus*), its inevitable obliqueness, the case of necessity (always an exceptional case) is always *at the basis* of right. For as Kant insists, *all law* must have the character of necessity, be it on the side of the laws of nature dictated by the legislative understanding, or on the side of the moral law, where the typic that borrows from nature the form of conformity to law (*Gesetzmässigkeit*) also borrows this character of necessity. The whole enigma (mystery or secret) of Kant's thinking about law is concentrated in this problem, this 'equivocation' of a necessity that grounds law and thus right, but that here immediately undermines the foundations of that same right to the point that, once again, it must remain *secret*. The secret of the law is that necessity knows no law, whereas all law must know necessity.

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This is again the secret hidden at the origin of the state, which the subjects must not even inquire into, the very question of which cannot even be raised without right being immediately overrun and provoked into a punitive paroxysm. This is the same secret that Kant is betraying, *ex lex*, when he secretly tries to denounce secrecy in 'Perpetual Peace' and when he banishes our two equivocal cases to the Epicurean *intermundus* in the Introduction to the *Rechtslehre*, only to see these two ghosts return to haunt the entire text, emerging from the abyss of regicide or coming down from the heights of revolutionary violence. Exactly here, on the frontier of right, torn between pure justice and natural necessity, is the place of the philosopher, undecidably moral and moralistic, in the right and yet always radically equivocal, with his wisdom that is also

always mere prudence, his claim to *parrhesia* that is still always perhaps a rhetorical ploy, his wholly public secrets and totally transparent veil.

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I have argued elsewhere (Bennington 2000 and 2003) that this equivocal position, on or at the frontier, is always the place of *nature*, seen no longer as a domain of specifiable mechanical laws, but as something that loves to hide, as Heraclitus said, to veil itself in its secrets. This nature (rather than ethics) would perhaps be the basis for a different thinking of politics. That thinking would recognize that the veil cannot simply be lifted or pierced. To believe in transparency, one must really be (an) innocent.

What is Enlightenment? A child's idea of what it is to be grown up.

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