

Legal Punishment and Its Limits: The Future of Abolitionism

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Abstract Derrida notes that while many discourses—like law, politics, morality and theology—make use of the term cruelty, psychoanalysis *alone* takes psychical suffering as its own object of study. He is therefore incredulous that psychoanalysis has had so little to say about such important legal and political questions as the death penalty and other forms of state-sanctioned cruelty. His diagnosis is that insofar as psychoanalysis remains attached to a logic or a fantasy of sovereignty—one in which subjectivity is understood as individual or indivisible—its revolutionary force remains blunted. Thus, Derrida calls for ‘a psychoanalysis to come’, a psychoanalysis for whom ‘cruelty’ is delinked from moral or theological approaches, a psychoanalysis which is delinked from its reliance on sovereignty—the sovereign subject, the sovereign nation or sovereign knowledge. Significantly, the ‘to come’ here is not the positing of some horizon of possibility for psychoanalysis, as if this were just an *Idea* (in a Platonic or regulative, Kantian, sense) that we must move towards. Rather the ‘to come’ expresses the dislocation that structures the very possibility of psychoanalysis from within. I conclude by asking how this psychoanalysis to come might shed light on what Angela Davis called the ‘great feat of the imagination’ required to ‘envision life beyond the prison’.

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Introduction

In the first volume of his death penalty seminars Derrida demonstrated that to date, abolitionist and anti-abolitionist discourses rely on remarkably similar arguments. Specifically, arguments for *and* against the death penalty ground themselves in principled positions about cruelty: *against* the cruelty of capital punishment on the one hand, or against the cruelty of the *offenders* who must therefore be punished, on the other. Both abolitionists and anti-abolitionists use the term cruelty then, as a pivotal term in the vocabulary of some alibi for God; a grammar that claims an unconditional right over life and death and an unconditional right above any positive law. To this, Derrida says, ‘as long as there is “God,” belief in God, thus belief period, there will be some future for both the supporter of the death penalty and his abolitionist opponent’ (Derrida 2014, p. 259).

Because the question of legal punishment is on the public radar—not just the death penalty and botched executions, but also mass and hyper-racialized incarceration, double-bunking and the increasing use of solitary confinement—there are more critics and activists who are thinking not just about the abolition of the death penalty and prison reform, but also *prison abolition*. Of all of the positions on prison abolition, perhaps the most well known, and the most thoughtful, is that offered by Angela Davis in her 2003 classic *Are Prisons Obsolete?* (Davis 2003, pp. 9, 19). She opens her book with the insight that while debates about the death penalty are fiercely fought over, with positions both for and against, easily identifiable in public discourse and in public policy, no such place (yet) exists for a sustained and public debate about the abolition of the prison. As she says, ‘the prison is considered such an inevitable and permanent feature of our social lives...that it requires a great feat of the imagination to envision life beyond it’ (Davis 2003, pp. 9, 19).

To contribute to that feat of imagination, I track Derrida’s analysis of the stand-off between the death penalty supporter and his abolitionist opponent, especially with regard to their deployment of the term cruelty. I do this because I think his analysis has a great deal to tell us about the logic of arguments for abolitionism generally, including prison abolition. Debates about prison abolition, like those for and against the death penalty, pit the public interest and the need to punish against the cruelty of the form of punishment.

As I will show, the question of *punishment* itself turns on a calculation of credit and debt, interest and investment; indeed, all of the cognates of commerce. To illustrate this point Derrida turns to Nietzsche who finds the origins of punishment, which is to say the belief that there is an equivalence between ‘injury and pain’, in Roman commercial law, in the ‘contractual relationship between *creditor* and *debtor*’ (Nietzsche 2000, p. 40). As Nietzsche shows, the belief at the bottom of *talionic* law—the principle that for any crime there is an appropriate punishment—is the belief in *commerce*. As Derrida puts it, it is a belief in ‘debt, the market, the exchange between things and monetary signs, with their general equivalent’ (Derrida 2014, p. 152). Belief in punishment is linked to the logic of commerce.

Surprisingly, Derrida argues that psychoanalysis is a resource for working through the stand-off between the supporter of the death penalty and his abolitionist opponent. Because psychoanalysis poses a dramatic challenge to the myth of the sovereign subject and indeed the sovereign figure (God, the father) it also poses a radical challenge to the idea of a radical evil. What Derrida calls (in a term to be unpacked) *psychoanalysis-to-come* analyzes something it calls cruelty in a non-moral, which is to say, a non-theological way.¹ To be clear, this is not a call for some *future* psychoanalysis, but rather points to the critical impasse between psychoanalysis' continued reliance on belief in a phantasm of sovereignty, and one that works with psychoanalysis' analysis of the amorality of the drives, one which psychoanalysis *resists*. The 'to come' here is not the positing of some horizon of possibility for psychoanalysis, as if this were just an *Idea* (in a Platonic or regulative, Kantian, sense) that we must move towards. Rather the 'to come' expresses the dislocation in the phantasy of sovereignty that structures the very possibility of psychoanalysis from within.

A non-moral approach to the term cruelty returns us to one of Freud's most notoriously difficult moments: his description of a drive whose aim is destruction, death or mastery/sovereignty; a death drive. As it turns out, both the death drive and the life drive are steadfastly amoral. To make the significance of a *non-moral and non-theological* approach to cruelty clear, it is helpful to remember that it has an analogue in psychoanalysis' approach to sexuality. Freud's discovery that sexual desire has neither natural object nor aim led him to conclude that so-called 'perversions' are not morally wrong, but rather deviations from the norm (Freud 2001a). Alongside the Freud whose position on perversion had so much to add to the sexual revolution of the feminist, lesbian, gay and queer movements, then, is a potential resource for contemporary debates about legal punishment including arguments for prison abolition.

Because Kant offers (arguably) the most elaborated and thorough articulation of a purely moral approach to punishment, this paper begins with Derrida's analysis of Kant's rigorous *philosophical* defence of the death penalty. As Derrida goes to show, the very disinterestedness of the moral law that gives it the god-like quality of impartiality, turns out to reveal a certain disavowed cruelty at its heart; a cruelty that remains to be analyzed. The paper then turns to Derrida's analysis of Victor Hugo's passionate *abolitionist* position because rather than attempt to maintain impartiality, Hugo takes on the position of divine law-maker, making *himself* a representative of the divine right of literature, a new representative for Christ. In contrast to the dispassionate, disinterested moral law, the passionate interest that Hugo (and other nineteenth century abolitionists) reveals turns out to be an interest in saving their own necks.

At the same time that Derrida finds in psychoanalysis a resource for revealing the linkages between belief in God (the sovereign), punishment and commerce, Derrida's reading of discourses of abolitionism is *also* a radical challenge to

¹ For a recent important contribution to thinking deconstruction in radically atheist ways, see Hagglund (2008). To see a useful response to some of the difficulties with Hagglund's contribution with respect to psychoanalysis, see Laclau (2008), pp. 180–189.

psychoanalysis itself. On his reading, as long as psychoanalysis remains attached to a phantasm of sovereignty—a phantasm, in other words in which there is, as Robert Trumbull put it recently, a ‘hypervaluation’ of human life, a ‘commitment to the absolute, transcendental value of man’s humanity’, psychoanalysis will remain, like law and religion, unable to intervene in current debates of crucial political importance such as debates about legal forms of punishment (Trumbull 2015, p. 330). I conclude with a sketch of what psychoanalysis-to-come entails, in order to then return to the ‘great feat of the imagination’ required to ‘envision life beyond the prison’. My position is that Derrida’s seminars are not just an important scholarly event; they also intervene in a public conversation about the abolition of prisons.

Death Penalties, Philosophy and Law

In the first volume of the seminars, Derrida begins from the insight that the death penalty ‘presents itself, in any case as a concept of law’ (Derrida 2014, p. 40). But in his first written piece on the death penalty he also points out that the death penalty is one legal punishment among others, *and* the condition of possibility for the law itself (Derrida and Roudinesco 2004, p. 142). That is, he argues that the death penalty is *internal* to law, it is one of law’s techniques, and it is also an origin, *exterior* to law. In this sense, the death penalty defines the limits, or to use Derrida’s terminology, the *margins* of law. To be sure, as Derrida points out, the penalty of death is at the juncture of many things. It is the point where the machine or *technics* meets the biological or natural, it marks the limit between the exception and the rule and, of course, it is also the point where we can see the limits—or the limitlessness—of the state’s sovereign power.

To begin making sense of some of these limits, it is helpful to notice it is no accident that one of the founding texts of the Western political philosophical tradition—Plato’s *Apology*—is organized around a trial that results in an execution. The first seminar begins not just with Socrates, but also Jesus, Mansur al Hallaj and Joan of Arc, because as Michael Naas points out, each of them is executed in part because they claimed a divine speech (Naas 2012, p. 42; Derrida 2014, p. 24). The adjoining of the philosophical, the theological and the political then, is regularly made through a literary form. The western philosophical tradition charts a narrative involving human willingness to risk ‘mere’ life for what is worth *more than* life: dignity, freedom, conscience and so on. This glorious capacity to sacrifice ‘mere aliveness’ for a politically qualified life is one of the reasons why Derrida says that never to his knowledge has any philosopher, *as a philosopher*, *opposed* the death penalty. (Derrida and Roudinesco 2004, p. 144). Either they have stayed entirely quiet on the question, or like John Locke, Jean-Jacques Rousseau, Hegel and especially Kant, they have enthusiastically embraced it. On the basis of these analyses, Derrida says that the death penalty, which is to say *the inclusion of the sacrifice of human life in law itself*, is not only the origin of law, it is the cement or the weld that keeps upright the speculative scaffolding upholding the legal, theological and philosophical discourse on the death penalty.

For those of us thinking alongside Derrida about the law's use of violence, this claim is of great interest. While 'Force of Law' used a reading of Walter Benjamin's *Critique of Violence* to show the contamination of law and violence, the violence of the state form, and the ultimate undeconstructibility of justice, Derrida also spent the last 20 years of his life writing about sovereignty and its theological foundations that give those states that claim it, the right over life and death (see Derrida 2002b, 2005; also Derrida 2009). But in the death penalty work Derrida points out repeatedly that the limitation on legal uses of violence and extra-legal or illegitimate uses is expressed by the term 'cruel and unusual', a phrase originally found in the English Bill of Rights (1689) but echoed in Article Five of the Universal Declaration of Human Rights, the 8th Amendment to the United States Constitution, Section 12 of the Charter of Rights and Freedoms in the Canadian Constitution, and in many other constitutions. This work on cruelty is relatively new, although, as Michael Naas recently pointed out, Derrida's masterwork *Glas*, published forty years ago, was centrally concerned with blood (Derrida 1976; Kellogg 2010, chapter 5). Famously arranged in two columns, *Glas* pits one column of long citations from Jean Genet's *Our Lady of the Flowers* with its preoccupation with blood, sex, and the maternal, against another column made up of long citations from Hegel concerning bloodlines, kinship and so on.² Ten years before AIDS, Derrida's work focused on the family, conjugality, sex, and on blood, whose Latin root is *cruor*, the origin for the term 'cruel'. It is in the spirit of Naas' intervention and comment that I want to think with Derrida about the meaning of this strange term cruelty, whose meaning is under contest at least in part because it marks the limit of legal punishment (Naas 2014).

The question of cruelty's relationship to moral and philosophical arguments about the death penalty is made most plain in Kant's moral philosophy, specifically his position on punishment. In the first section of the *Metaphysics of Morals*, the 'Doctrine of Right', Kant claims that death is the only morally appropriate punishment for murder, the moral necessity of which is grounded a priori in the *jus talionis* that demands that an offence must be visited back in both kind and degree upon the wrong-doer (Kant 1996, pp. 333–334). Indeed, Kant declares that capital punishment is a 'categorical imperative', and he uses the term to refer to a specific obligation deriving from *the* categorical imperative.³

This principle of universalizability, itself a principle of reason, is also a principle of *exchangeability*. In other words, for any harm or crime, there is a punishment that can *substitute* or be exchanged for that crime on the grounds of pure reason alone. Kant talks about this in terms of equivalences, equilibrium and *equality*. Kant says:

² Derrida points out that the first word of *Our Lady of the Flowers* is the proper name Weidman, the last public execution to occur in France. His guillotining was famously recorded on film, and Derrida remembers his face from the newspapers as a child in Algeria (Derrida 2014, p. 29).

³ So when Kant says that 'the principle of punishment is a categorical imperative' he is telling us that this principle makes an unconditional moral demand, and that it can be derived from some version of *the* categorical imperative which is itself derived from reason alone: 'Act only according to that maxim whereby you can, at the same time, will that it should become a universal law.' Kant (1956).

But what kind and what amount of punishment is it that public justice makes its principle and measure? None other than the principle of equality (in the position of the needle on the scale of justice), to include no more to one side than to the other. Accordingly, whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself.... But only the law of retribution (*lex talionis*) it being understood, of course, that this is applied by a court (not by your private judgment)—can specify definitely the quality and the quantity of punishment. (Kant 1996, p. 332)

The *lex talionis* restores the ‘moral equilibrium’ that existed before the crime, and thus a ‘balance’ is re-established.

But there is an important qualification on the imposition of punishment, which comes from concern for the personhood of the punishee. When a person is executed, the punishment ‘must still be freed from any mistreatment that could make the *humanity* in the person suffering it abominable’ (Kant 1996, p. 333). On these grounds Kant declares that there are two crimes that form an exception to the categorical imperative of the death penalty: homicide committed during a military duel, and maternal infanticide of illegitimate children.

In his analysis of the second exception, Derrida redeploys his oblique reading of Hegel through the question of the family in *Glas*, because Kant’s preoccupation with sex, bloodlines, maternity and so on is implicated in this exceptional case. Specifically, maternal infanticide of illegitimate children is not punishable by death according to Kant, because children born outside of marriage are born *outside of the law*. An illegal child does not inherit the right to life. It *has* life, but not *human* life, not *legal* life, not the *right* to life.

On Kant’s logic, the categorical imperative of penal law is the *talionic* law, a ‘life for a life’, then the unwed mother (like the officer who kills in a duel) is killing a life that is not *human* (and therefore her own human life would be a price too high for the killing). She is acting to preserve *her honour*. While both have committed homicide, neither have committed murder (*homicidium dolossum*) because as Derrida says, neither of these does Kant understand as ‘a crime of malice, thus an evil (*un mal*), an evil-doing, a cruelty in the sense of wanting-to-make suffer’ (Derrida 2014, p. 124). Punishing either the military officer or the infanticidal mother with capital punishment would make the humanity of the punishee abominable by paying *non-cruelty*, *cruelly*.

Here, Derrida claims that Kant finds himself in a ‘double bind’; what Kant himself declares is a ‘knot’. Either the *lex talionis* demands a life for a life, in which case the lives taken by the dueler and infanticidal mother must be repaid with death, *or* it follows that the need to protect the honour rather than cruelty or evil that motivates those murders, in which case the categorical imperative is set aside. Kant’s double bind is that it would be *too cruel* to inflict the penalty of death in the cases wherein barbarous and incomplete forms of life persist. Kant explains that ‘[s]ince the man of honour is undeniably less deserving of punishment than the other, both would be punished quite proportionately if all alike were sentenced to death; the man of honour would be punished mildly in terms of his sensibilities’ (Kant 1996, p. 333). If public law determines that no cruelty (i.e. no malice, evil or

mens rea) was involved in murder, but only the desire to protect or defend honour, then the death penalty would be ‘too cruel’ a punishment. What the cases that are exempt from the categorical imperative go to show, in other words, is that notwithstanding its purported disinterestedness, the moral law *inflicts a cruel punishment*; it is a punishment that wants to see another suffer.

If the Kantian moral law, based as it is in a pure principle of reason, which claims disinterested innocence, turns out to be guilty of demanding a payment that involves some ‘cruelty’, Derrida goes on to declare that abolitionism is *doubly* guilty (Derrida 2014, p. 129). Contrasting the stance of nineteenth century abolitionists with the ‘innocent’ and disinterested Kantian reason, Derrida finds these positions guilty of ‘guilt itself’ (Derrida 2014, p. 129). If Kant’s advocacy of the death penalty is based on the absolute disinterestedness of the law, the abolitionists of the nineteenth century ‘betray an interest’ Derrida says, of the Nietzschean variety. They are interested in saving their own necks while ‘pretending to save the lives of others’ (Derrida 2014, p. 133).

To make this clear, in the fourth session of the Death Penalty seminar, Derrida undertakes an analysis of Victor Hugo’s *abolitionist* stance for here he finds this ‘interest’. Hugo’s argument, like Kant’s and Hegel’s, also pulls on the thread of filiation, but this time not one that relates to maternity, consanguinity or bloodlines, but with the passage of father to son. Rather than finding the source of sovereign knowledge in pure reason alone, Hugo takes the responsibility of this knowledge on his own back. To show this, Derrida begins with Hugo’s infamous announcement made from the podium of the newly formed constituent assembly on 15 September 1848. Victor Hugo declared: ‘I vote for the pure, simple, and definitive abolition of the death penalty’ (Derrida 2014, p. 98).

Hugo declares *himself* responsible, as a writer, as the author of his own words, condemning the law of blood for blood (*lex talionis*) in the name of Christ himself by ‘asserting divine law above human law’. As Derrida goes on to say, for Hugo and the abolitionists, ‘[t]he death penalty is too human; abolition is divine’ (Derrida 2014, p. 106). As Derrida points out, Hugo assumes for himself the role of both the father and the son. In his speech, he points to an image of Christ as though to move the jurors and convince them that while the human law of the Romans condemned to death the incarnation of the divine law, the French Republic could and should do differently. As Derrida says, ‘with the father-son generation, [Hugo] assured and inaugurated the law of their genre’ (Derrida 2014, p. 108). Derrida quotes Hugo at length:

The real guilty party I insist is I, I who, for the last twenty-five years, have fought in every way against irreparable punishments! I who, for the last twenty-five years, have defended at every opportunity the inviolability of human life! ... Yes, I declare it; against this vestige of savage punishment, this old and unintelligent *talionic* law, this law of blood for blood, I have fought my whole life—all my life, gentlemen of the jury!—and so, as long as breath remains in my body, I will fight it with all my strength as a writer, with all my acts and all my votes as a legislator, I declare it (*Mr. Hugo extends his arm and points to the figure of Christ...*) before the victim of the death penalty who is

there and watches us and hears us! I swear before that gallows, where two thousand years ago, as an eternal lesson to the generations, human law nailed divine law! (Derrida 2014, p. 107)

Here Derrida hears that Hugo calls for a right, ‘no less sacred than the legislators...a divine ... or sovereign right’ (Derrida 2014, pp. 105–106). He also hears that Hugo’s abolitionism is profoundly ‘Christian, Christlike, evangelical’ and so Hugo assigns for himself the role of the ‘heir to and the elementary offspring of a Christian family, a holy family’. Ventriloquizing Hugo, Derrida says ‘I am the father, reincarnated as the son, it is I who must be judged’ (Derrida 2014, p. 106). The abolitionist passion displays a passionate *interest*; they must *not* be disinterested, ‘and if the abolitionist is so interested, then necessarily it is in *his* interest’ (Derrida 2014, p. 132).

Derrida says,

what would remain to be analyzed and psychoanalyzed here is ... an infinite circle of resentment in which the two postures or the two postulations [advocation for the death penalty and abolitionism] can be interpreted as reactive movements of resentment. The defenders of the death penalty and the abolitionists would be waging a war of resentment against each other. (Derrida 2014, p. 133)

Against either the abolitionist position that takes the divine law on its own back, or Kant’s formulation that the ethical subject need not only ‘discover’ the moral law, but actually *is* the point of its articulation through a subjective experience of ‘respect’, a certain psychoanalysis proposes another formulation with regard to cruelty and its interest: one that is neither moral, philosophical, literary nor religious.

Psychoanalysis Searches the State of Its Soul

In June 2000 Derrida gave a keynote at the annual gathering of the International Psychoanalytic Association, auspiciously entitled ‘Estates General of Psychoanalysis’, a title that deliberately references the Estates General; that is, those events that were convened by Louis XI during times when he required the cooperation of different parts of French society. The most notorious of the Estates General were those of 1789, which led to the forming of a constitution that not only eradicated the monarch and called for a constituent assembly, it also famously enshrined the ‘rights of man and citizen’. This was the opening volley of the French Revolution, a revolution that led first to the King’s execution, to the ‘terror’ and ultimately to the execution of Robespierre himself in June 1794. It is thus not surprising that questions of revolution, of constituent assemblies, of international law and human rights, of regicide and other mechanisms of the death penalty were among the themes of Jacques Derrida’s keynote address.

In equal measures a provocation, a call to arms and a scathing condemnation of psychoanalysis, Derrida’s address points out that psychoanalysis *alone* takes cruelty

and psychical suffering ‘as its own affair’, making it distinct from all other discourses, whether those are ‘theological, metaphysical, genetic, physicalist, cognitivist and so on’ (Derrida 2002a, p. 240). He expressed incredulity then, that despite this unique view on cruelty, psychoanalysis has been so radically disengaged from discussions of war, state violence and state-inflicted cruelty and suffering. Making note of Freud’s 1932 correspondence with Einstein, initiated by the Permanent Committee for Literature and the Arts of the League of Nations on the question of war, he points out that whereas Einstein declared himself ‘immune from nationalist bias’ and called for an international body to adjudicate between states who would necessarily give up some part of their sovereignty, Freud came out fairly squarely in the just war tradition. Nonetheless, Derrida suggests that this correspondence began an articulation: ‘a relationship between psychoanalysis on the one hand, ethics, law, economy and politics on the other’ that has not been continued ‘on the basis of what is called psychoanalysis’ (Derrida 2002a, p. 270). While cruelty is indeed, what is most *proper* to psychoanalysis, Derrida says that it ‘has not yet undertaken and thus still less succeeded in thinking, penetrating, and changing the axioms of the ethical, the juridical, and the political’, which includes such dramatic changes in the world scene as the UN Declaration of Human Rights and ‘the vestiges of forms of punishment called “cruel”... such as the death penalty’ (Derrida 2002a, pp. 244–245). These are things about which psychoanalysis ‘has had next to nothing original to say’ (Derrida 2002a, p. 245).

Noting that States General are always ‘convoked at critical moments when a political crisis calls for deliberation’, he clearly signals that the *psychoanalytic* crisis in the United States is the way in which the ‘talking cure’ has been increasingly replaced by psychiatry, pharmacology, and neurology, and that the *political* crisis is that effected by the ‘killing state’. In Derrida’s objection to the current state of psychoanalysis, one in which he charges that psychoanalysis has resisted its own calling, it is possible to hear echoes of Marx’s claim that in 1843, Germany was historically out-of-joint; that *its* revolution, in the form of the Reformation, unlike the political revolution of 1789 in France, had taken place ‘only in the brains of monks’ and that this had left Germany ‘philosophical contemporaries of the present, without being its *historical* contemporaries’ (Marx 1996, p. 32). This is why Derrida begins his address by ‘saluting’ the Estates General of Psychoanalysis because he hears in their deliberate reference to 1789 a call for something that might resemble a kind of ‘revolution’. Asking what would be the correlate within the International Psychoanalytic community to the creation of a parliament or constituent assembly, or what would be the ‘revolution’ in psychoanalysis that, like the great revolutions of the eighteenth century that recognized the ‘rights of man and citizen’ would make it equal to the dawn of the twenty-first century, Derrida is calling on psychoanalysis to overcome its resistance. He suggests that this might admit what he calls ‘the humanity of psychoanalytic man’ or even more pointedly ‘the human right to psychoanalysis’ (Derrida 2002a, p. 269).

Derrida notices a simple and startling fact: psychoanalysis is *predicated* on the ‘rights of man and citizen’ insofar as freely given speech, ‘free association’, is its standard technique. Psychoanalysis thus posits that the subject’s freedom and freedom of speech are joined at their most basic level. But, as Derrida says, while

psychoanalysis might have something to say about the relationship of torture, human rights violations, indefinite incarceration, solitary confinement and so on, to what he calls world-wide-ization—which is to say, changes to the structure of the international state system, to the continuing usefulness of thinking territory in terms of ‘frontiers’ or borders, and thus to the very nature of war, to economic, political, geological, climatological crisis and dispossession, the ‘technical or techno-scientific revolution’ and so on (Derrida 2002a, p. 246)—these are things which psychoanalysis, poised as it is to think cruelty and suffering in a way that no other discourse might, has instead *resisted*. Psychoanalysis then, is one of the revolutionary forces that emerged out of the 1789 Revolution, but it has stayed stuck at the scene of its own traumatic origins. He cautions that if this *remains* the scene of psychoanalysis, it will be ‘deported, overwhelmed, left on the side of the road... or inversely, it will remain rooted in the conditions of its birth: a certain equivocal aftermath of a French Revolution, whose event ... psychoanalysis has still not thought through’ (Derrida 2002a, p. 245).

This diagnosis provides a *political reading of psychoanalysis*, which is to say that it calls for a revolution in analytic practice as well as the radical democratization of psychoanalysis’ forms of self-governance, particularly its forms of representation. At the same time, perhaps in a register that is more difficult to undertake or understand, it seems also to call for a *psychoanalytic approach to politics*, an endeavour quite different from the first, and one that operates at a completely different level of scale and intervenes in very different kinds of scenes. What would a psychoanalytic approach to politics entail?

The answer is not the usual one of ascribing ‘motivations’ or psychological attitudes to political and legal institutions. Rather, a psychoanalytic approach to politics begins with an understanding of *sovereignty as a phantasm*, which is to say, as a fantasy that is more than a daydream or whimsical thought but more as what Althusser called ‘an imaginary relationship that structures our real conditions of existence’ (Althusser 1991). That is not just to say that states who claim sovereignty are mistaken about the extent of their political power (although the flows of capital belie the absoluteness that sovereign states claim for themselves), but rather to say that psychoanalysis demonstrates the impossibility of self-sovereignty. As I will show, following Freud, what Derrida means by a belief in sovereignty (which is an alibi for God) is belief in a *phantasm*: a god-like sovereign human figure or father (or a sovereign state imagined as the analogue of this figure). What the supporter of the death penalty and his/her abolitionist opponent share in their use of cruelty, on this view, is a term that is meant to show the terrible *power* of this phantasm, a power that must be limited by law, especially penal law. The sovereign human subject, in other words the subject in full mastery of him or herself, is understood to be capable of cruelty because he/she has power over life.⁴ Limitations on punishments like the various legal documents that place the limitation of ‘cruel and unusual’, cruel and inhuman or cruel and degrading, are all aimed at nullifying the

⁴ One way to think about the difference between psychoanalysis and psychoanalysis-to-come is by way of wondering whether an analytic cure would entail a renewed capacity to assume the symbolic identity (as individual egos), or whether it would entail a break with the culture of legitimation of sovereign authority?

terrifying power of the sovereign subject's analogue, the sovereign state, which shows itself capable of also behaving in 'cruel' ways.

In *The Future of an Illusion*, Freud lamented our preoccupation with the 'enormously exalted father' embodied by God. He argued that the idea of placating a supposedly higher being for future recompense seemed utterly infantile (Freud 2001c). However, he also noted that many persisted in this illusion for the duration of their lives. After looking specifically at religion, Freud broadened his inquiry into the relationship between civilization and misery in *Civilization and Its Discontents* where, among other things, Freud objected to the biblical commandment 'Love thy neighbor' (Freud 2001b). Freud's objection to neighbour love was premised on the insight that the primal instinct of human beings is to act aggressively towards one another. As he put it, in 'primitive' societies, the head of the family gave free reign to the instinctual manifestations of his aggression at the expense of all others; in civilized society, we have restrained our inclination to aggression through the rule of law and the imposition of authority (both internal and external), to ensure the maximum security and happiness for all. While we originally entered society precisely to escape the forces of mutual aggression and self-destruction, the necessity to thwart our aggressive instincts has paradoxically caused great unhappiness, an increasingly burdensome sense of guilt, and in the most extreme cases, various forms of psychological neurosis. Individuals have consequently begun to rebel against civilization with an aggression that exceeds the level of aggression originally suppressed, threatening the disintegration of society. Freud thus identifies an overwhelming sense of guilt as one of the central problems threatening modern civilization, and attributes it to the operation of the super-ego, an internal psychical agency that monitors the intentions and actions of the ego, keeping the aggressive instincts of the latter in check. Freud traces the formation of the super-ego back to the primordial act of rebellion against authority: the killing of the primal father by his sons, who were left with such a sense of remorse that they internalized the authority formerly represented by their father. The super-ego often puts severe demands on us that we cannot realistically meet, causing great unhappiness. Freud also posits the existence of a collective super-ego, embodied by forceful leaders or men of great achievement, that operates on a larger scale within a given culture or society.

In this sense, it is no accident that psychoanalysis has been understood to pose such a dramatic challenge to modern Western philosophy. For the modern subject of politics is understood to be responsible insofar as she has rescued herself from her 'self-incurred tutelage', as Kant put it, and has reached 'the age of majority'. Because the subject of modern politics is finally able to direct herself and the world, she is also able to answer for herself in a sovereign manner before the law. Freud's massive insight—and/or speculative thought, the narcissistic wound he imparts to that dream—is the idea that human subjects are, in fact, always labouring imperfectly for autonomy against the inexhaustible and ultimately invincible conditions of heteronomy.

While the revolutionaries of 1789 may have handed the King his head, neither psychoanalysis nor modern democracies have become free from the basic presupposition of sovereign power, which is what John Caputo calls 'a bit of

undigested theology lodged in the throat of even the most secular societies' (Caputo 2006, p. 12). As Caputo points out, that seems to mean that any effort to carry the revolution one step further (for instance, a call for a revolution in psychoanalysis equal to the situation of the twenty-first century) would necessarily involve extricating psychoanalysis, with its unique view on cruelty, from the logic of sovereignty, with its bit of 'undigested' theology.

Extricating psychoanalysis from its continued investment in a phantasm of sovereignty is why Derrida says that

what should take place in a certain way, at every analytic session is a sort of micro-revolution, preceded by some music from the States General chamber group... The analysand would then be initiating a revolution, perhaps the first revolution that matters; he would be opening virtually *his* States General and giving the right to speech within him to all the states, all the voices, all the agencies of the psychic body as multiple social body. (Derrida 2002a, p. 253)

The micro-revolution in every analytic session, on this view, would be repeated encounters with the rupture in the necessary investment in self-sovereignty as indivisible, as god-like or autonomous. If the unconscious is the locus of psychic activity whereby a human being becomes a 'subject', and if subjectivity is accomplished by metabolizing our existential dependence on symbolic 'sovereigns', then the transference relation of the analytic scene involves a constant negotiation with the enigmatic impossibility of that task. It would reveal that the internal or repressed god that comes to us in the form of conscience turns out to be a psychic internal agency that watches over us like 'a garrison in a conquered city' (Freud 2001b).

The psychoanalysis-to-come, of course, has already arrived, insofar as the Estates General is no innocent formulation. In searching the state of its soul, psychoanalysis has invited the *arrivant*, like Nietzsche's mad philosopher of the future, a role that Derrida seems to assign to himself. In that role, he asks whether psychoanalysis 'might not open up the only way that could allow us, if not to know, if not to think even, at least what to interrogate' the meaning of this strange term 'cruelty' (Derrida 2002a, p. 239). He thus immediately initiates (as he does in the seminars) a conversation between Nietzsche for whom cruelty is both *without limit and without opposable term*, and Freud, for whom cruelty might be without limit but *not* without opposable term. If there is something beyond cruelty or the drive for sovereign mastery, how might psychoanalysis articulate it or even know it?

Freud's decisive breakthrough was that unconscious mental activities have something mechanical about them. From the *Project* onwards, Freud emphasized the persistence of something mindless or automatic in symptom formation. The persistence of this mindlessness—a persistence that typically causes the patient pain (or rather pleasure-in-pain)—is what Lacan meant by *jouissance*. A first definition of fantasy then would be the specific ways that a subject organizes this *jouissance*. The life that is of concern to psychoanalysis then is always *biopolitical* life; life that is bordered by institutions that claim sovereignty on the one hand, and the uncanny vitality—too much pressure—that is at the same time unbearable, on the other. And so the 'death drive' is aimed not at life as such, but rather at this uncanny excessive

'life' that comes to us by way of being thrown amidst enigmas. What the 'death drive' signifies is a kind of internal alien-ness (the 'other' within that is neither I nor not-I) that emerges from our encounter with the enigma of the other.

Derrida says that whereas Freud's question was whether there *is* 'some death drive', Derrida's *own* question was whether there might be 'for psychoanalytic thought to come... a *beyond* of the death drive, or the drive for sovereign mastery, thus a beyond of cruelty, a beyond that would have nothing to do with either drives or principles' (Derrida 2002a, p. 241). Averring that this is very hard to think, he says that psychoanalysis-to-come, would allow a way to think 'a *contrary to the cruelty drive*'. If, as Derrida sets out to show, for psychoanalysis, cruelty and the drive for power and mastery are tied together by way of an attachment to the logic of sovereignty, then psychoanalysis is in a position to think cruelty otherwise by extracting itself from the 'bit of sovereignty' lodged in its throat. Derrida's wager is that a psychoanalysis-to-come is organized around psychoanalytic reason which *does not believe in the sovereign good* and that therefore, might be able to think *otherwise* the relationship between death, the drive for mastery and autonomy on the one hand, and life as a kind of persistence or survival on the other. This psychoanalysis no longer relies on the alibi of a God; sovereignty as freedom and an unconditional judgement over good and evil.

To begin to get a sense of the radicality of Derrida's challenge (extracting cruelty from any discourse of theology, belief, god and so on), it is helpful to point out Jacques Lacan's claim that 'the true formula of atheism is not that God is dead' but rather that '*God is unconscious*' (Lacan 1998, p. 59). To explain this, Slavoj Žižek says, 'the modern atheist thinks he knows that God is dead; what he doesn't know is that, *unconsciously, he continues to believe in God*' (Žižek 2006, p. 166). As Žižek goes on to explain, what characterizes modernity is no longer the standard figure of the believer who secretly harbours intimate doubts about his belief and engages in transgressive fantasies; today, we have, on the contrary, so-called secular and modern subjects whose belief in God or in a sovereign good is, in fact, *unconscious*. This unconscious belief in a sovereign good or in God is another term for what Freud termed the superego: the internalized voice of contemporary values, rules or prohibitions that, in the internal psychic economy, is not a friendly voice at all. Indeed, the voice of conscience, the voice of duty and the voice of the internalized rules of our societies, are the most sadistic and cruel voices most of us will encounter in our lifetimes.

This structure of an unconscious and repressed belief that nonetheless structures our relationship to reality is linked, rather explicitly to Marx's analysis of the fetishism of commodities. The difference between the belief in God—which is repressed—and the belief in the magical properties of commodities—which is a fetishistic belief—is that the one represses an unconscious wish, while the other disavows a clear external reality. So when Marx points out that while most of us are completely aware that there is no intrinsic value hidden in money, we continue to behave *as if* this were not true, he is clearly making use of the logical structure of fetishism, wherein we know very well but 'nonetheless' continue to behave as though we did not know it. To (once again) paraphrase Louis Althusser, commodity exchange (like sovereignty) works because we *repress* the illusion that structures

our real relationship to reality. But the modern atheist, the modern member of secular societies, believes he does not believe in God but *continues to do so at the level of the unconscious*. The fetishistic disavowal of the real in the case of commodity fetishism and a belief that operates at the level of the unconscious is a difference which psychoanalysis alone is in a position to analyze.

On this basis, Derrida points out, 'what makes us believe, credulous as we are, what makes us believe in an equivalence between crime and punishment is *belief itself*' (Derrida 2014, p. 152, emphasis mine). Patiently and meticulously, Derrida points out that the belief at the bottom of *jus talionis*, the belief that there is a punishment that is commensurate with the crime (an eye for an eye, a life for a life), which is the belief at the bottom of the law, is also *what no one believes*. He says:

To believe is *this strange divided state*, or this strange divided movement in which I am not myself, in which I do not know what I know, in which I do not do what I do, in which I doubt the very thing I believe, or in which I believe. Believing in sum, is not believing; to believe is not to believe. And the whole origin of religion, like that of society, culture, the contract in general, has to do with this non-belief at the heart of believing. *Skepsis*, skepticism, incredulity, *epoche*, all of these suspensions of belief or of *doxa*, ... of the 'saying yes to' are not accidents that happen to believing; they are believing itself. Believing is its own contrary, and thus it has no contrary. Not to believe in it is not the contrary of believing, of trusting, of crediting or having faith. This is the essence of the fiduciary, and of interest. And the market, exchange, the social contract, the whole system of equivalences that ground money, language, law and penal law; all of this presupposes trafficking in the act of faith. (Derrida 2014, p. 154)

What he means here is that in the same way that we do not believe that there is an intrinsic value in money, a simulacrum in a belief of this sort is nevertheless the condition of the law of equivalence, exchange and so on. In other words, this is not just a matter of pointing out that where the law claims to be neutral or disinterested, one finds in fact an interest of a particular class. The point is that there is no *in fact* to this anteriority of belief—it is not itself an object of belief; it is a believing *without believing*. Belief, then, has the same structure as fetishism and the current psychoanalytic take on cruelty, because neither have a contrary. As Kir Kuiken put it: '[t]his believing without belief is the condition not just of law, but of the social contract' (Kuiken 2011, p. 5).

Here Derrida returns us to his long-standing position about the difference between belief and faith (Derrida 1994). Belief, he says, is a dogmatic calculation of a programme: indeed it is a kind of sovereign knowledge; the believer *knows* that the messiah is coming. Psychoanalysis itself emerges not only as an inheritance of the modern revolutions associated with the establishment of the freedoms and rights of 'man' (singular) and citizen (generalized), but also as a science that has at its founding myth the fraternal murder of the father, and thus is itself *a result of* that symbolic death. The death of the father (or of God, the end of 'man' as the measure of all things, or the end of metaphysics, if you will) produces psychoanalysis as a *symptom* of symbolic stress. To put this in different terms, the question animating all

psychoanalytic encounters is the question ‘what do you/I/we mean?’ a question that can never be answered in a fashion that is guaranteed. At the most general level this means that there is no normative life script; there is no way to calculate what desires are ‘right’ and which are ‘wrong’ but rather only a potential attention to human suffering.

On the basis of these analyses, Derrida concludes that punishment and cruelty, like the death penalty itself, are not matters of law, they are ‘not a juridical apparatus’ but rather ‘a movement of life’. Indeed, he says that, ‘hostility to life ... is inherent to life itself, to the *itself* of life’; the unbearable excitations or too-much pressure that emerge from our necessary thrownness among enigmatic others (Derrida 2014, pp. 149, 142). This is no glorious willingness to die for a life that is better than life itself. Life *itself* has not only a strange kind of automaticity, but that automaticity or machine-like quality to life entails a kind of autoimmunity; for instance, cells sacrifice themselves to the organism, and so on a certain view, life itself attacks itself to save itself. Derrida’s turn towards the term ‘autoimmunity’ captures this danger insofar as it demonstrates—more than a term like ‘deconstruction’ (which might require a ‘deconstructor’)—the automaticity of psychoanalysis’ self-destructiveness. Explaining why he turned to this biological metaphor, Derrida says that it allowed him not only to take into consideration the distinction between life and death, but also to take ‘into account within politics what psychoanalysis once called the unconscious’ (Derrida 2005, pp. 109–110).

Cruelty thought as originary cruelty is the mechanism, the technology, the automaticity by which all living things are doomed to die. This insight makes the meaning of this term cruelty spin. If cruelty is not evil, as most of us believe, including many versions of psychoanalysis, if it is not a wanting to see-suffer and is, instead, simply the mechanism in life that directs it towards death then, indeed, it has become a word we no longer know or understand. It is a term that is no longer about the intent, the moral reasons for suffering or pain or death. It is a term that can no longer mean cruelty at all.

Derrida affirms that for a psychoanalysis-to-come, ‘it is necessary’ that there be a reference to some unconditional, some life without sovereignty and thus without cruelty. Averring that this is a ‘very hard thing to think’, he says that this affirmation *advances itself*, in a kind of automaticity, without alibi, ‘as the originary affirmation from which, and thus beyond which the death drive and the power, cruelty and sovereignty drives determine themselves as “beyond” the principles’. It is, as John Caputo puts it:

‘a yes, yes, come’ to the future and also to the past, since the authentic past is also ahead of us. It leads to, it is led by, a ‘yes’ to the transforming surprise, to the promise of what is to come in whatever we have inherited—in politics, art, science, law, reason and so on. The bottom line is ‘yes, come’. (Caputo 2014)

This yes, or originary affirmation of life itself he tells us ‘is not a principle’. Like cruelty and death, ‘it is attached to life’ but it cannot be ‘made into the horizon of a task, not even for psychoanalysis’ (Derrida 2002a, pp. 112). The originary affirmation, before or beyond belief in the commensurability of the incommensurable is *also* life.

But it is life in the form of a *promise*, before programme, a faith before belief, advancing itself automatically.

In every life, in other words, there is a kind of *faith* in vitality; a kind of persistence, which supersedes belief, in the sense that it is more originary than religion or science: the two discourses that he has so patiently shown elsewhere, have their common source in life itself (Derrida 2002c). If every birth is a promise, an opening of an expectation, it quickly turns and becomes a programme towards death. The common source of both religion and science—the *salut*—the common source of both faith and knowledge, is life *as* this promise, in the sense that there could not be anything like religion or science or technology without it. The movement of the living towards its programme or its death, cannot be separated from the movement of that promise.

But as soon as life comes, it turns against itself and becomes a machine, something automatic. A promise is an opening of an expectation, but you do not know what is coming. On the contrary, a programme is a belief in something that you know. This is the operation of death in life. As Freud shows us, the operation of death in life is repetition, yes, but also habit, ageing and rigidity. The end of life is programmed from the beginning.

As if giving up on science, reason and philosophy, which can produce an account of cruelty and its vicissitudes but cannot or has never produced a science or an account of *non-cruelty*, Derrida turns to psychoanalysis to discover what it might be, were it to do what philosophy has never been able to do: produce a knowledge, a science, that no longer ‘believes in the sovereign good nor sovereign evil’. This knowledge, he says, would effect ‘a leap into the ethical (thus also into the juridical and political)’. This would be a psychoanalysis-*to-come* because ‘psychoanalytic knowledge as such has neither the means nor the right’ to do as it presently stands (Derrida 2002a, p. 273). The stranger or the *arrivant*, does not ‘speak “badly” of man’ but rather ‘speaks badly of evil; he no longer believes in the sovereign, neither in sovereign good, or sovereign evil’ (Derrida 2002a, pp. 266, 279).

The Future of Prison Abolition

The great feat of imagination required for prison abolitionists then, like that required to assure no future for the continued alliance between the supporter of the death penalty and his abolitionist opponent, requires the constant ‘vigilance’ or working through of a belief in a supreme power, a God-the-father, a sovereign who punishes those who are guilty and repays those who have been wronged with the pleasure or *jouissance* of seeing-them-suffer. In slightly different terms, it means understanding that we will organize our *jouissance* around a fantasy of sovereignty as long as sovereign power is the symbolic meaning organizing our biopolitical world. What is aliveness in human life is not lawlessness, but rather exposure to the meta-judicial dimension of the law.

In more prosaic terms, this vigilance against any moral justification for punishment turns out to be one that reveals the political rather than moral quality of prisons. In a recently published essay, Lisa Guenther cites an interview with

Michel Foucault about his work with the Prison Information Group (GIP) in the early 1970s. In the interview about the GIP Foucault said:

The ultimate goal of [GIP] interventions was... to question the social and moral distinction between the innocent and the guilty... Confronted by the penal system the humanist would say 'The guilty are guilty and the innocent are innocent. Nevertheless the convict is a man like any other and society must respect what is human in him: consequently, flush toilets!' Our action, on the contrary isn't concerned with the soul or the man behind the convict, but it seeks to obliterate the deep division that lies between innocence and guilt. (Cited in Guenther 2016, p. 235)

This refutation of the humanism is a refutation of moralism; a call to 'obliterate the deep division between innocence and guilt'. Michel Foucault develops this perspective in his recently translated seminars on *The Punitive Society*, saying not public interest, but rather 'the notion of civil war... must be put at the heart of ... analyses of penality' (Foucault 2015). His analysis does not make use of psychoanalysis, but it does point the direction for the future of prison abolitionism, which is an analysis of prisons as political choices that are directed towards the containment of populations on the one hand, and the disciplining of subjects into the wage-form on the other. More precisely, he says that civil war 'is the general matrix that enables us to understand the establishment and functioning of a particular strategy of penality: that of confinement' (Foucault 2015, p. 13).

This signals, of course, the 'great transformation' that he will go on to analyze more famously in *Discipline and Punish*, in which by the early nineteenth century, from Western Europe to America, sequestration or confinement comes to be not just one punishment among others (including exclusion, fines and physical marking), but the universal form of punishment in the western world. As he says, the prison was 'radical innovation at the beginning of the nineteenth century' (Foucault 2015, pp. 225–226). Emerging from 'all the old forms of punishment ... the stocks, quartering, hanging, burning at the stake, and so on ... [came] this monotonous function of confinement' (Foucault 2015, p. 226).

What interests me in Foucault's seminars is precisely the decision to place civil war at the centre of an analysis of what Foucault calls the 'prison-form'. This analytic strategy disables the moralism lying at the heart of most analyses of prison wherein it appears that society is injured by crime, and so it is also in the name of society that punishment is demanded (Foucault 2015, p. 14). Instead, placing civil war at the centre of an analysis of the prison-form means understanding confinement as one of the practices and institutions of the war of power against the powerless: the poor, the racialized, the unemployable.

But if this is admittedly his most Marxist work, Foucault's analysis is informed by more than just political economy. Confinement is a mode of punishment that is congruent with a war of the poor against the wealthy in a few, very particular senses. First, 'its basic aim is the subjection of individual time to the system of production' (Foucault 2015, p. 231). The homogenization of time under industrial capitalism is mirrored in the detailed overseeing of time in the prison. As he says:

A system of power like sequestration goes far beyond the guarantee of the mode of production: it is constitutive of it. We could say that the problem of feudal society was to assure the extraction of rent through the exercise of a sovereignty that was, above all, territorial; the problem of industrial society is to see to it that the individual's time, which is purchased with wages, can be integrated into the production apparatus in the forms of labour-power. (Foucault 2015, p. 232)

In this sense, Foucault puts a new twist on Clausewitz's infamous account of war as politics by other means, and argues that the so-called universal form of law, especially penal law, is *war by other means*; a 'war of rich against poor, of owners against those who have nothing, of bosses against proletariat' (Foucault 2015, p. 22).

The future of abolitionism—of death penalty and prison abolitionism—turns on the radicality involved in these political analyses of punishment. Replacing questions of cruelty, of innocence and guilt, indeed, any moral (theological) attachment to sovereignty or any moral (theological) understanding of cruelty, is a crucial step in the great feat of imagination required to envision life beyond the prison.

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