

# Deconstructing the Death Penalty

DERRIDA'S SEMINARS  
AND THE NEW ABOLITIONISM

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strike appears to come closest in Benjamin's text to an "example" of divine violence because it subtracts itself from the normal means/ends structure that governs the juridical sphere (going as it does beyond the mere legal negotiation of demands, seeking to instead overturn the existing juridical-political order), it must not be forgotten that the "right to strike" is nonetheless grounded in the juridical order itself. Benjamin, in fact, treats the strike as the sole remaining legal form of violence not monopolized by the state. Nor should it, as Slavoj Žižek suggests, be reduced to the "heroic assumption of the solitude of decision," or to a case of what occurs when "those outside the structured social field strike 'blindly,' demanding and enacting immediate justice/vengeance." Divine violence must be understood instead (as Žižek suggests, but does not fully develop) in terms of an Event in which both the notions of "decision" and "sovereignty" have undergone a mutation. See Slavoj Žižek, "Divine Violence," in *Violence* (New York: Picador, 2008), 202.

25. Walter Benjamin, "On Language as Such and the Language of Man," in *Selected Writings*, vol. 1, ed. Marcus Bullock and Michael W. Jennings (Cambridge, Mass.: Harvard University Press, 1999), 67–68.

26. *Ibid.*, 68.

27. *Ibid.*, 72.

28. *Ibid.*, 74.

29. Jacques Derrida, "Force of Law," in *Acts of Religion*, ed. Gil Anidjar (New York: Routledge, 2002), 262.

30. *Ibid.*, 270.

31. J. L. Austin, *How to Do Things with Words*, ed. J. O. Urmison and Marina Sbisa (Cambridge, Mass.: Harvard University Press, 1962).

32. This notion of "suspension" in the eruption of divine violence must be distinguished from the suspension of the law, where the law remains in force without being applied, which Giorgio Agamben analyzes as the history of the State of Exception. What is "suspended" in the case of divine violence is precisely violence's lawmaking capacity. See Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005).

33. Benjamin insists that divine violence is both "lethal without spilling blood" and expiatory without bloodshed, "for blood is the symbol of mere life." See Benjamin, "Critique of Violence," 249–50.

34. *Ibid.*, 250.

35. Derrida, "Force of Law," 291.

36. *Ibid.*

37. Benjamin, "Critique of Violence," 252.

38. Derrida, "Force of Law," 293.

## CHAPTER 7

### Calculus

*Kas Saghafi*

#### *The Game*

"What is *at stake* or *in play* [en jeu] with the death penalty?"<sup>1</sup>

What is a game (*jeu*) and what does a game have to do with the death penalty? Derrida refers to a game, the game of the goose (*le jeu de l'oie*), in the Eighth Session of the second year of the Death Penalty Seminars. A board game of uncertain origins that has appeared in myriad variations of rules and illustrative designs, the game of the goose has been played in Europe for several centuries.<sup>2</sup> The game is played on a spiral shaped board consisting of sixty-three spaces, with four differently colored pieces, often in the shape of a goose. Pieces are placed on the starting space at the outside of the spiral and each player's piece is moved from one square to the next square according to the throws of one or two six-sided dice. But what kind of game is the game of the goose and what does it represent? Does this game have rules and are these "rules of calculation [*règles de calcul*]?"<sup>3</sup>

If Derrida plays around with the game of the goose in his seminar, he tells us, it is because this game is a game in which "all the figures of the same question 'What is man?,' 'What is proper to man [*le propre de l'homme*]?"

would appear successively on a track, thus in a narratable history."<sup>4</sup> In Session Eight of the second year Derrida further emphasizes that the question of the death penalty is "none other than the question of the human" and inevitably leads to the questions "What is man?" and "What is proper to man?"<sup>5</sup> In playing the game, he explains, "one would jump from square to square. . . . One would spend a longer or shorter time on one of the squares (what is proper to man is language, *logos*, reason, or else law, or else politics, or else freedom, or else responsibility, or else sovereignty, or else laughter, or else tears, or else the experience of death, or else time as such, or else right, or else modesty, or else clothing and home, or else technology, etc.)."<sup>6</sup> Among the squares would be the death penalty, Derrida further appends, "a figure for 'what is proper to man' and it would have, like all the other figures, a relation of solidarity, of essential concatenation, with all the other traits, all the other figures of what is proper to man, but also a relation of metonymy or synecdoche with the other traits or figures or predicates of what is said to be 'proper to man.'"<sup>7</sup> Indeed, "what is proper to man, the essence of humanity" would be defined by "the rational and calculated possibility, the possibility as power to *decide* sovereignly, to make the decision to *make die* the other who is deemed responsible and guilty, and to claim to answer for this decision in a responsible way, to claim to give an account and justify it with reason."<sup>8</sup>

But since the square of the death penalty would be just one square on "a circular path," then "the history of that thing or those things that are proper to man would be finite, so to speak; it would have exhausted its possibilities."<sup>9</sup> As Derrida explains: There would be "a finite series of squares, of given responses in the finite course of a given history, thus in a history whose circle was closed, without future."<sup>10</sup> In this game with rules, "history is closed, if not at its end."<sup>11</sup> This is why Derrida says he played around with the figure of the game of the goose. What is interesting about the game is "not only the seeming multiplicity of squares or places, . . . not only the idea of the rules of a game," not only the fact that "the game itself would be one of the things that was proper to man," but that "this game presupposes a *course* [parcours] resembling a history, a course resembling the course [*au cours*] or the coursing [*à la course*], the curriculum [*cursum*] of a history that gives rise to knowledge and narration. And it's this history, this course, this narrative that would be closed."<sup>12</sup> The squares may be numerous, Derrida remarks, but finite in number. This is "a combinatory series whose possibilities are finite."<sup>13</sup> "There is a history, but it is finite."<sup>14</sup> At the end of the session Derrida wonders whether there is "a way out of the game."<sup>15</sup> Would getting out of the game involve calculation or play?

However, like the death penalty, the game of the goose is a game without future since all of its paths lead back to the same spot. Derrida states that even if the square to the death penalty were to be removed from the game, the possibility of the death penalty (as possibility and not as act) would remain.<sup>16</sup>

### Calculation

The death penalty calculates.

But calculation always calculates with some incalculable. Derrida writes: "If that which is subject to calculation were calculable, if calculation were not always dealing with the incalculable, there would never be any problem. There would not be any problem of criminal law or of the death penalty if calculation calculated what is calculable, calculated with what is calculable."<sup>17</sup> It is Derrida's belief, as articulated in Session Six of *The Death Penalty Seminar* volume 2 that calculation is always "provoked, put in motion, by what is itself not simply calculable but remains properly incalculable."<sup>18</sup> Thus it is always the incalculable that is subjected to calculation.<sup>19</sup> Moreover, a problem or crisis of calculation and hence the responsibility of a decision only arises where "we no longer know, we do not yet know what 'calculation' means."<sup>20</sup> The death penalty is a calculation; it involves a calculation. We could venture with Derrida to say that the death penalty is a calculus (*calcul*), a calculus of punishment or retribution.<sup>21</sup>

Apart from its most common designation as a branch of mathematics invented in the seventeenth century by Leibniz and Newton involving or leading to calculations known as the infinitesimal calculus, a calculus can also refer to a method of calculation or the means of arriving at an end. Its Latin etymology, meaning pebble or small stone, refers to a stone used in reckoning on the abacus or counting board as well as to a concretion, usually of mineral salts around organic material found especially in hollow organs or ducts within the body. In conventional usage the phrase "a calculus of. . .," as in, for example, a calculus of power, a calculus of risk, or a calculus of suffering, indicates a particular method of calculation or reasoning, the calculation or appraisal of the degree or amount of what is being calculated. For example, Jeremy Bentham's calculus of pleasure, the famous hedonic calculus, holds that the moral rightness or wrongness of an action is a function of the amount of pleasure or pain that it produces.<sup>22</sup> What Derrida calls "the economy of the death penalty" is a calculus, a calculus involving the calculation of punishment and retribution. The death penalty is the calculation of a penalty assessed for

a wrong, the punishment deemed equivalent to a crime committed, retribution in exchange for a crime. This punishment has its roots in talionic law, a law that prescribes a certain calculation and follows a certain reasoning.

In the opening pages of Session Six, Derrida declares that the question of the death penalty is “the question of reason, of reason in general.”<sup>23</sup> The death penalty is a matter of reason itself, reason as calculation, reason as a “calculating force [*puissance*].”<sup>24</sup> It is nothing other than the “blind calculating drive of a calculation that presents itself as reason itself.”<sup>25</sup> The death penalty is a question of reason, of reason as “*ratio*, if not *logos*” of “giving reason,” of “rendering reason,” of “giving an account [*logon didonai, reddere rationem*].”<sup>26</sup> Criminal law is thus a *ratio*, an accounting.

More specifically, the question of the death penalty is “the question of reason as principle of reason.”<sup>27</sup> As is well known, Heidegger in his lecture course of 1955–1956, during the course of an analysis of Leibniz’s principle of sufficient reason recalls reason to its Latin lexicon of *ratio*, which signifies an account, a calculation, the account to be given or that has been given. It is Heidegger who introduces calculation into a rendering of Leibniz’s principle of sufficient reason: “Every thing counts as existing when and only when it has been securely established as a calculable object [*ein berechenbarer Gegenstand*] for our cognition.”<sup>28</sup> In order to translate *ratio*, the German language brings together the language of (reckoning) calculation (*Rechnen*) and the language of law or justification (*Recht, richtig*, etc.). This, Derrida writes, suggests that there is an “essential affinity between law and calculation, between law and accounting, being-guilty or being-responsible according to law, before the law, as being-countable.”<sup>29</sup> What is involved is “some accountability of the countable,” “some reckoning (*to account, to render account, to account for, to be accountable* [in English in the text]).”<sup>30</sup>

Heidegger associates *ratio* with reason, *Vernunft*, and emphasizes that the principle of reason is the supreme fundamental principle of Reason. It is this interpretation of reason, he shows, that eventually leads to “the technocentered rationality of modern times,” modern technology and, ultimately, to the atomic bomb. As he explains in *Der Satz vom Grund*, “Being is experienced as ground/reason [*Grund*].” The latter is interpreted as *ratio*, as an account, thus making human beings, the *animal rationale*, creatures that require accounts and give accounts.<sup>31</sup> For Heidegger, humans are “the reckoning creature.”<sup>32</sup> This is how, Heidegger suggests, Greek thinking is translated and thus converted into representation.

Calculating reason as judicial reason “insofar as it is dominated by the law of exchange and the law of the talion” is perhaps, Derrida speculates, a

“mercantile reason.”<sup>33</sup> It is as if commercial law were not simply “one law among others but the quasi transcendental essence of law.”<sup>34</sup> All law would then be commercial law, in essence commercial, mercantile.<sup>35</sup> Heidegger associates the essentially calculating function of this reason as principle of reason with the justificatory function of law (*Recht, rechtfertigen, richtig*) with the rectitude, the precision or the correction of the law, as if there were “a congeniality, a common filiation and foundation” of law and calculation.<sup>36</sup> Law, then, would be calculability.<sup>37</sup>

Once there is calculation in matters of criminal law, the talionic law, which is bound up with the calculation of an exchange, an equivalence, or a substitution, is never far behind. Derrida calls the talionic law, *jus talionis*, the law of exchange of an eye for an eye, a tooth for a tooth, the “calculating principle” of the death penalty.<sup>38</sup> Without presuming to know what calculation means or what exchange or calculable substitution mean—even though in an aside he provides a hint by saying “all calculation has to do with the spacing of time, in the end, the economy of time”—Derrida proceeds to discuss the relation of calculation to the talionic law.<sup>39</sup> The Latin word *talion*, which comes from *talis*, “such,” and which refers to a quality as in “such a wrong,” “such a punishment,” “such a crime,” comes to designate in talionic law a passage from quality to quantity. In the seminar, Derrida refers to an article by Father Adrien Schenker of the Biblical Institute of Fribourg who, in an analysis of a passage from Exodus and of the biblical uses of the word *kōper*, establishes that the word designates “ransom” or “compensation,” “the price to be paid in exchange, a calculable substitution, a transaction in return in order to buy back or redeem, remunerate, indemnify.”<sup>40</sup> What is carefully calculated, Derrida notes, is “a price scale.”<sup>41</sup> Derrida adds that it would be necessary to articulate Schenker’s study with the Greek word for *kōper*, which is *lutron, lutra*, signifying a means of deliverance, the price of a ransom, a compensation, a recompense.<sup>42</sup>

So, the death penalty calculates. But what does the death penalty seek to calculate? Capital punishment is the calculation of a penalty, a penalty that seeks to pay for a damage or to repair a wrong. The punishment is in the form of a recompense, a payment that is supposedly equivalent to the wrong incurred. The death penalty calculates. It is the project of a calculation, a calculation that is indissociable from a decision. What Derrida hears in the phrase “condemned to death” is precisely a calculating decision—a decision and a will to master the date and time of death.<sup>43</sup> The death penalty calculates. The death penalty supposes the possibility of calculating and mastering the instant of death—the very limit between life

and death. The death penalty is the “automatic calculation of a mechanism, of some calculating machine,” a program, a calculating project whose goal is mastery over time, over the future.<sup>44</sup>

It is not by chance that Leibniz, the inventor of the formula of the principle of reason, *nihil sine ratione* (nothing is without reason), was also the inventor of life insurance (*Lebensversicherung*).<sup>45</sup> For what is life insurance but that which guards against accidents and provides protection against occurrences that may happen in the future? This fact or happy coincidence is mentioned by Heidegger, who wants to define scientific calculation as “a system of insurances, an insurance-generating machine.”<sup>46</sup> One can interpret law and the death penalty, Derrida comments, as “one of the modalities” of “life insurances and of information put in the service of life insurance.”<sup>47</sup> Indeed, “the entire history and especially the modern history . . . of the death penalty, of the criminal law that includes the death penalty” could be interpreted as “a history of insurances, social insurances, or even social security.”<sup>48</sup> In fact, Heidegger associates the primary character of “human existence [*Dasein*]” with “the work of safeguarding life [*Die Arbeit an der Sicherstellung des Lebens*],” which must be constantly secured.<sup>49</sup> An investment in the death penalty, then, is an insurance policy safeguarding the body politic, protecting it against unexpected losses. With an interest in calculating its salvation, the body politic will continue to accept a certain measure of sacrifice in order to ensure its survival.

Ever since Beccaria or Rousseau, what has mattered has been whether the best social contract, “the best social life insurance,” should or should not inscribe the death penalty. In deciding on the best social contract, it is a matter of knowing if it prescribes or proscribes the death penalty. As Derrida observes, almost all arguments for or against the death penalty “are constituted against this horizon of insurance,” in other words, against this “calculation of probabilities.”<sup>50</sup> According to Derrida, what is interesting about this interpretation of the principle of reason—everything that is (being) has a reason—is that it consists of interpreting beings as objects. What lends itself to calculation is the object, “the figure of the object,” and what is calculated is “objectivated, objectified.”<sup>51</sup> Thus the modern era has determined being as objectivity, as *Gegenständigkeit*—the condition of possibility of the object.

Noting that in order to more fully explore the stakes and ramifications of this view it would be necessary to turn to a close reading of *Der Satz vom Grund*, in the seminar Derrida limits himself to a couple of observations or clarifications. What Derrida finds most curious is the following: How can Heidegger, as someone who thinks the principle of reason as calculation

and as principle of law, avoid speaking of the calculation of punishments and the calculation regarding life and death?<sup>52</sup> Derrida expresses surprise that Heidegger never speaks of punishment and pardon, unless this may have been because he dismissed capital punishment as a juridical problem secondary to and derived from an originary being-toward-death. Perhaps this was because in Heidegger’s view, the very regional and very dependent question of the death penalty could be posed only after thinking being-toward-death, the thinking of which was his main concern.

In his examination of the principle of reason in *Der Satz vom Grund* Heidegger determines that it is “no longer a matter of thinking being from beings,” but rather as being [*Sein*], that is, as ground [*Grund*].<sup>53</sup> The book, which is entirely a meditation on *Grund*, foundation, principle, and axiom, poses the question “What founds or grounds reason?” In other words, where does reason derive its foundation? Traditionally ground has been understood as that to which explanation refers back, that from which explanation proceeds or the foundation for a true assertion. The ground constitutes, produces, engenders, accounts for; it is the common root, the condition of possibility.<sup>54</sup> Heidegger’s argument in *Der Satz vom Grund* runs as follows: The history of the West is a history of thinking reason, not that of Latin rationality, of the objective sciences, but a history of that which thinks being as ground. Heidegger determines being as ground (*Sein* as *Grund*) and not as *ratio* or cause (*Ursache*) or rational grounding (*Vernunftgrund*), on the basis of a thinking of *logos*, of *legein*, as assembling that lets beings before us be.<sup>55</sup> Ground, in this view, is a noncausal, nonobjective grounding, and something more like “a ground without ground, a *Grund* that is also an *Ab-Grund*.”<sup>56</sup> Being (and not being) is reason. Thus, for Heidegger, Being and *Grund* are the Same, which also means Being=*Ab-Grund*, abyss, both reason and without reason.<sup>57</sup> Insofar as it grounds, being has no grounding, the grounding is necessarily ungrounded.<sup>58</sup>

Thus, Heidegger submits, any positing or founding (*Setzen*) of a ground is a leap (*Satz*). This is what relates not only “the *Setzen*, positing, positioning, and proposition (*Satz*)” but also “the leap (*Satz*).”<sup>59</sup> Heidegger wonders whether, with the leap, we do not also fall into “the fathomless abyss [*ins Bodenlose*].”<sup>60</sup> He responds both in the affirmative and the negative. *Yes* because it is impossible to lead being back into a basis (*Boden*) in the sense of beings, and *no* because “for the first time, being is finally thought as being,” as that which gives the measure (the *Mass-Gebende*) and not as a being.<sup>61</sup> Thinking has a duty, Heidegger writes, to “measure itself against, or take its measure from this gift of the measure, this given measure [*muss*

sich dieser Mass-Gabe anmessen].”<sup>62</sup> However, “it is not possible for us to take this measure for ourselves” through any calculation, accounting, computation, or measurement.<sup>63</sup> We “cannot calculate the gift of this measure.”<sup>64</sup> We cannot measure—and “that’s where there is a leap (*Sprung*).”<sup>65</sup>

This gift of the measure “becomes for us incommensurable, immeasurable, immense, measureless [*démesuré*], incalculable, outside the range of any rational calculation.”<sup>66</sup> In other words, “the o-rigin of calculating reason is a-rational [*a-rationelle*] and incalculable.”<sup>67</sup> This means that being is not supported by a foundation upon which it rests but “reposes without repose since it rests on nothing that is . . . it is supported by no foundation, since it is a ground without ground (both *Grund* and *Abgrund*, *Abgrund* because *Grund*), indissociably.”<sup>68</sup> The ground is thus without ground. The conclusion that we could draw from this is that reason as calculation rests on, is based on, an abyss, *Ab-grund*. And “calculating rationalization” is an attempt “to dissimulate the abyss of the incalculable in the depth [*fond*] of the calculable, a historical attempt to reason away what remains unfathomable and incalculable in the origin of this measuring and measured reason.”<sup>69</sup>

Death is this “as yet unthought gift” of the measure of the unmeasurable, of the unfathomable.<sup>70</sup> Playing with the sense of *Gabe* as the gift and the measure, Heidegger writes that death is the measure because it gives the measure and as giving the measure it is itself not measurable. What does “to give the measure” mean?” Derrida asks. This leads him in the direction of another passage, in which elaborating on “the relation between “ratio, *Grund*, *Vernunft*, Heidegger recalls the origin of *ratio*, namely *reor*. *Reor* means to reckon, to calculate.”<sup>71</sup> Heidegger goes on to comment that *ratio* is connected with the verb *reor*, to consider something as that with regard to which I consider something as something. “This broad sense of the verb reckoning (*Rechnen*) also determines the sense of the word *calculation*,” of mathematical calculus, which Heidegger refers to in the last lecture of *Der Satz vom Grund* and writes in Latin (*Kalkül*).<sup>72</sup>

#### *Excursus: A Nonmathematical “Calculus”*

In Lecture 13 of *Der Satz vom Grund*, making a reference to Hölderlin’s “Remarks” on his translations of Sophocles, Heidegger notes that there is another sense of calculus, the use of calculus “in a deeper sense.”<sup>73</sup> He briefly alludes to what he calls “a non-mathematical sense” of the word *calculus*, speaking of “balance,” a balance belonging to scales, but he does not pursue this reference to the calculus any further.<sup>74</sup> Heidegger is, of

course, referring to Hölderlin’s “law [*Gesetz*]” of poetry, which the poet calls the “calculus [*Kalkül*].” *Kalkül* can ordinarily be rendered as a calculation, an assessment, or an estimation. In the “Remarks” (on Oedipus and Antigone), Hölderlin makes references to a “calculable law [*kalkulables Gesetz*]” or “lawful calculation [*gesetzliche Kalkül*].” In the opening paragraphs of “Remarks on ‘Oedipus’” (Anmerkungen zum Ödipus), Hölderlin calls for a “lawful calculus,” writing that, compared with those of the Greeks, other artworks lack reliability.<sup>75</sup> The former have been judged according to the impressions that they make rather than according to their lawful calculus. For Hölderlin, the *Kalkül* describes his poetic logic (*poëtischer Logik*), which operates by way of “balance [*Gleichgewicht*].” *Kalkül*, then, refers to the balance and equipoise of the work of art, the law or calculus of the work appearing in the work’s equilibrium.

According to Jean-Luc Nancy, it is the poet whose task is calculation. The poet’s task is “above all a calculation [*un calcul*],” for the poet must measure and calculate time in view of precision and exactness.<sup>76</sup> In contrast to the philosopher who has to elaborate a system and whose object is synthesis, “the poet has to touch upon an absolute point of exactitude, which is more the stake of a calculation than that of a construction, production, or begetting.”<sup>77</sup> “Exactitude,” in Nancy’s words, “is the proper of calculation.”<sup>78</sup> But calculation, he points out, is “not a deduction; it is a sighting [*visée*]. In sighting the unity of the whole [*pour viser l’unité du tout*], there is no measure outside of the sighting itself.”<sup>79</sup> “The *kairos* of the poet” is “the whole itself.”<sup>80</sup> “Measure [*la mesure*],” Nancy adds, “is the word, the word and the motif, upon which Hölderlin’s thought and poetry very exactly intersect—sharing themselves (*sich mit-teilen*) in every sense of the term.”<sup>81</sup>

#### *The Noncalculable or Incalculable of Punitive Justice, or Beyond Calculation*

In the second year of the Death Penalty Seminars Derrida has recourse to Theodor Reik, whose text *The Compulsion to Confess*, is employed as representative of psychoanalytic arguments regarding the death penalty. (Derrida will later go on to remark that, for him, what is “at issue is a history of reason and the mutation that something like psychoanalysis might inscribe in it—which is not an irrationality but perhaps another reason.”)<sup>82</sup> In Session Seven Derrida summarizes Reik’s assessment of the death penalty, which the latter treats as a “pulsional law.”<sup>83</sup> For Reik, “the whole supposedly rational, rationalizing, . . . the whole of pure judicial rationality that tries to justify talionic law” is “a belated rationalization” and “an intellectual

alibi."<sup>84</sup> Derrida explains that for Freud and Reik, which he treats together as a couple, the unconscious is governed by talionic law. And this law, as a law of the market and exchange, is inflexible and unforgiving.

In the same session of the seminar Derrida turns to Kant's *The Metaphysics of Morals* as he does in several other sessions in the second year. In the "Appendix" to "The Doctrine of Right" Kant describes "punitive justice [*Strafgerechtigkeit*]" as "outside of any calculation of interest of means toward the end, thus of any calculation of interest."<sup>85</sup> Derrida points out that, for Kant, calculation is disinterested: "If it just calculates in order to apply the law of talion, this calculation is in no way a calculation of interest. . . . It is absolutely disinterested; it obeys no pathological motivation (in the Kantian sense), no psychological, passionate or pulsional motivation."<sup>86</sup> What differentiates "Kant's pure reason from every other reason of penal law," Derrida remarks, "thus resisting both Heidegger and Freud-Reik," is precisely this disinterestedness.<sup>87</sup> It resists Heidegger when he interprets the principle of reason as calculation. When Kant speaks of "an Idea of punitive justice or a pure talionic law that gives the idea of calculation but is not itself originally calculable" he may be thinking of what exceeds calculation: "Pure penal reason, here, the Idea of a civil constitution among human beings, implicating as it does the concept of some punitive justice, is not a calculating reason that would seek to reassure, or would be in the service of an insurance project."<sup>88</sup> Derrida clarifies that for Kant "punitive justice goes beyond all calculation as relation between means and end."<sup>89</sup> "Even capital punishment does not answer to calculation and hence serves no purpose, and must serve no purpose; it does not insure or reassure in the least; it is not reassuring, and in this it is worthy of man and the dignity of man; it even honors man."<sup>90</sup> What we are dealing with, Derrida notes, is "a pure reason that follows the principle of reason . . . but which turns it into something other than a principle of calculation in the service of a motivated interest that would be in the interest of insuring life and being."<sup>91</sup> "And this," Derrida adds forcefully, "risks disorganizing the whole epochal or historical schema that Heidegger lays out in *Der Satz vom Grund*."<sup>92</sup> By the same token, "if punitive justice as pure Idea is not and must not be in the service of a calculation of insurances, it is also not in the service of a drive, of a pulsional, psychological and unconscious talionic law."<sup>93</sup> In Derrida's estimation "the *jus talionis* of justice that Kant is talking about is distinct from the *jus talionis* that Freud and Reik are talking about, in the way that *pure form* is distinguished from any *content*."<sup>94</sup>

In his defense of the rigor of Kant's thinking, Derrida notes that "in order to do justice here, never lose sight of the two distinctions that Kant

takes to be decisive, namely 1. the distinction between form and content as well as 2. the distinction between non-calculation of interest by punitive justice (the non-calculable or incalculable of punitive justice, including the death penalty) and the pure calculation of the talionic law."<sup>95</sup> Even though Kantian discourse is not immune from psychoanalytic questioning, in Geoffrey Bennington's estimation, Kant still provides the "most rigorous philosophical argument *in favour* of the death penalty (i.e. Kant's argument in the *Metaphysics of Morals*)." <sup>96</sup> In his "Ex Lex" Bennington strongly argues that "any attempt to produce a properly philosophical argument" for the abolition of the death penalty "will have to confront that defense and that rigor."<sup>97</sup>

### *The Beyond-Measure*

In the Sixth Session of the second year of the Death Penalty Seminars Derrida comments on a passage from the already mentioned thirteenth and last session of Heidegger's course entitled "Der Satz vom Grund" with the death penalty as his "frame of reference [*mise en perspective*]."<sup>98</sup> Yet Derrida's concern, rather than the death penalty, is with death, specifically with "what is *at stake and in play* [*se joue*], what is involved, what is given in death, what is posed in death, between calculation and the incalculable, between the Game [*Le Jeu*] according to the rule of the game as rule of calculation [*sous la règle de jeu comme règle de calcul*], and another thinking of the Game without measure [*Jeu sans mesure*], without calculation and without rule of calculation."<sup>99</sup> For Derrida, the question of the death penalty, including its "calculating principle of *jus talionis*," has its place between the calculable and the incalculable.<sup>100</sup>

Derrida begins the next session by asking "What happens when a measure is given?" Measure belongs to the order of the calculable.<sup>101</sup> Likewise, reason or the principle of reason can be given, but what gives reason or the principle of reason might not belong to rational calculation. As gift, "the gift of measure (*Mass-Gabe*)" might therefore be without measure.<sup>102</sup> In his comments during an earlier session from the previous year (Session Ten) Derrida remarks that he is tempted to put a lot of emphasis on the expression "beyond measure [*démesure*]" since the death penalty is "a matter of an excessiveness [*démesure*], a penalty without proportion, without commensurability, without any possible relation that is proportional with the crime. With the death penalty, we touch on an alleged calculation that dares or alleges to incorporate the beyond-measure and the infinite and the incalculable into its calculation."<sup>103</sup> "If there is a scandal," Derrida continues in his

comments, “the unheard-of, unique scandal of the death penalty” is its “excessiveness, the fact that it cannot be measured, ‘commensured,’ so to speak, with any crime. The death penalty dares to claim to measure the beyond-measure in some way.”<sup>104</sup>

The death penalty calculates. But we have shown that calculation is an affair of the in-calculable, the without measure, the incommensurable. Calculation always calculates with some in-calculable. The in-calculable, though, is not at all something that is noncalculable, since the in-calculable does not lie entirely outside of calculation. What we normally refer to as incalculable is something that is factually not possible to measure or to count. The in-calculable, however, is not completely heterogeneous to the calculable. Even if I cannot actually calculate it, the in-calculable may still remain calculable. What the death penalty seeks is to incorporate the beyond-measure, the incalculable, into its calculation. However, what it claims to be able to determine, what it claims to measure—the incommensurable, the in-calculable—is an excessiveness beyond measure. The death penalty wants to take the measure of what cannot be measured, but death is “the gift of a measure” of the unmeasurable.<sup>105</sup> No crime can ever be equated with, or made equivalent to, the ultimate penalty meted out—the penalty of death.

## NOTES

Portions of this essay were first presented at the American Comparative Literature Association, New York, March 20–23, 2014.

1. Jacques Derrida, *Séminaire: La peine de mort*, vol. 2, ed. Geoffrey Bennington and Marc Crépon (Paris: Editions Galilée, 2015), Sixth Session, 187; *The Death Penalty*, vol. 2, trans. Elizabeth Rottenberg (Chicago: University of Chicago Press, 2017), 136.

2. Scattered throughout the board game are a number of spaces on which a goose is depicted; landing on a goose allows the player to move again by the same distance. Additional shortcuts, such as spaces marked with a bridge, move the player to some other specified position. The first person to reach space sixty-three wins.

3. Derrida, *La Peine de mort*, 2:187; *Death Penalty*, 2:136.

4. *Ibid.*, 282/113.

5. *Ibid.*, 281/110.

6. *Ibid.*, 282–83/113.

7. *Ibid.*, 283/113.

8. *Ibid.*, 283/111–12.

9. *Ibid.*, 283–84/212.

10. *Ibid.*

11. *Ibid.*

12. *Ibid.*

13. *Ibid.*

14. *Ibid.*

15. *Ibid.*, 285/213.

16. *Ibid.*

17. *Ibid.*, 196/144.

18. *Ibid.*

19. Derrida notes the necessity of the relation between the calculable and the incalculable in *Rogues*: “Each time both at once, *both* calculation and the incalculable *are necessary*.” Jacques Derrida, *Voyous: Deux essais sur la raison* (Paris: Galilée, 2003), 208; *Rogues: Two Essays on Reason*, trans. Pascale-Anne Brault and Michael Naas (Stanford, Calif.: Stanford University Press, 2005), 150.

20. Derrida, *La Peine de mort*, 2:197; *Death Penalty*, 2:144.

21. The translator of Derrida’s seminar, Elizabeth Rottenberg, whom I thank here for supplying the English pagination as well as for reminding me that she mentions “the game of the goose” in her essay “The ‘Question’ of the Death Penalty” (*Oxford Literary Review* 35, no. 2 [2013]: 189–204), informs me that the word *calculus* no longer appears in her translation of *The Death Penalty*. Even though the word is not used in her translation, as it was when we discussed it together with the members of the Derrida Seminars Translation Project several years ago, I believe the English term very adequately represents everything that concerns calculation in the seminar.

22. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (London: Athlone, 1970). The hedonic calculus is a calculus of pleasure meant to calculate the degree or amount of pleasure that a specific action is likely to cause or is to be gained and the pain to be avoided.

23. Derrida, *La Peine de mort*, 2:197; *Death Penalty*, 2:144.

24. *Ibid.*

25. *Ibid.*, 191/139.

26. *Ibid.*, 197/144.

27. *Ibid.*, 198/145.

28. Martin Heidegger, *Der Satz vom Grund* (Pfullingen, Germany: Neske, 1957), 198; trans. by Reginald Lilly as *The Principle of Ground* (Bloomington: Indiana University Press, 1991), 145, trans. mod. This was a lecture course given at Freiburg in 1955–1956.

29. Derrida, *La Peine de mort*, 2:199; *Death Penalty*, 2:145.

30. *Ibid.*, 199/146.

31. *Ibid.*, 200/147, citing Heidegger, *Der Satz vom Grund*, 129/210. Heidegger’s previous account of ground can be found in “On the Essence of



Ground," *Vom Wesen des Grundes in Wegmarken* (Frankfurt: Klostermann, 1967); trans. by William McNeill as *Pathmarks* (Cambridge: Cambridge University Press, 1998). There he argues that the "principle of reason" as a "supreme principle" sheds no immediate light on ground as such. Also see the lecture course *Metaphysische Anfangsgründe der Logik im Ausgang von Leibniz* (Frankfurt: Klostermann, 1978); trans. by Michael Heim as *The Metaphysical Foundations of Logic* (Bloomington: Indiana University Press, 1984).

32. Derrida, *La Peine de mort*, 2:200; *Death Penalty*, 2:147.
33. *Ibid.*, 201/147.
34. *Ibid.*
35. *Ibid.*
36. *Ibid.*, 202/148.
37. *Ibid.*
38. *Ibid.*, 206/152.
39. *Ibid.*, 205/151.
40. *Ibid.*, 193/141. Adrien Schenker, "Köper et expiation," *Biblica* 63 (1982). Reprinted in Adrien Schenker, *Text und Sinn im Alten Testament: Textgeschichtliche und bibeltheologische Studien* (Freiburg, Switzerland: Universitätsverlag and Gottingen, Germany: Vandenhoeck und Ruprecht, 1991), 120–34.
41. Derrida, *La Peine de mort*, 2:193; *Death Penalty*, 2:141.
42. *Ibid.*, 194/142.
43. *Ibid.*, 188/137.
44. *Ibid.*, 189/138.
45. *Ibid.*, 203/149.
46. *Ibid.*, 203–4/150.
47. *Ibid.*, 204/150.
48. *Ibid.*, 204–5/150.
49. *Ibid.*, 205/150.
50. *Ibid.*, 205/151.
51. *Ibid.*
52. *Ibid.*, 202/148.
53. *Ibid.*, 207/152.
54. In *The Metaphysical Foundations of Logic*, providing a context for Leibniz's principle of reason in terms of the notion of ground, Heidegger turns to the Aristotelian notion of *archē* and cites four main concepts of ground: cause, essence, argument (in the sense of a "truth"), and intention (Heidegger, *Metaphysical Foundations of Logic*, 138/111).
55. *Ibid.*, 207/153.
56. *Ibid.*, 208/153.
57. *Ibid.*
58. See my "The World after the End of the World," *Oxford Literary Review* 31, no. 2 (December 2017), forthcoming.

59. Heidegger, *Der Satz vom Grund*, 209/154. *Satz* is the proposition that is put forth, the being that is ventured, posited, wagered, but also the leap from the abyss and into the abyss. It also refers to a musical phrase or passage or movement.

60. *Ibid.*

61. *Ibid.*, 208/154.

62. *Ibid.*, 209/154.

63. *Ibid.*

64. *Ibid.* In his late poems Hölderlin refers to "measure" (*das Maas*), for example, in the penultimate stanza of "Der Rhein," where he contrasts the ability of the poet with the faculty of the philosopher, the "wise one." The poem famously declares: "Only each one has its measure [*Nur hat ein jeder sein Maas*]." Friedrich Hölderlin, *Sämtliche Werke*, Große Stuttgarter Ausgabe, ed. Friedrich Beißner et al., 8 vols. (Stuttgart, Germany: Kolhammer, 1943–1985), SA 2, 1:148. Philosophy and poetry each have their own measure. Language has its own measure, meter, which constitutes the technical, "calculable" character of poetry. According to Heidegger's interpretation, "doing poetry" or "poetizing" is measuring ("*Dichten ist Messen*"). Martin Heidegger, "... Dichterisch Wohnet Der Mensch . . .," in *Vorträge und Aufsätze*, ed. Friedrich-Wilhelm von Hermann (Frankfurt: Klostermann, 2000), GA 7, 190; translated by Albert Hofstadter as "... Poetically Man Dwells. . .," in *Poetry, Language, Thought* (New York: Harper & Row, 1971), 221, mod. Heidegger refers to "measure-taking" as the essential act of the poet. However, in his "Measure for Measure: Hölderlin and the Place of Philosophy," Peter Fenves argues that Heidegger's reading of Hölderlin elides the problem of poetic technique "in favor of a generality about measuring as such." Peter Fenves, "Measure for Measure: Hölderlin and the Place of Philosophy," in *The Solid Letter: Readings of Friedrich Hölderlin*, ed. Aris Fioretos (Stanford, Calif.: Stanford University Press, 1999), 37. For Fenves, this neglect of the technical character of poetry, its metrical dimension, accords with Heidegger's exposition of poetry as measuring. "Having a measure," Fenves points out, "is not the same as taking one" (40).

65. Heidegger, *Der Satz vom Grund*, 209/154. On measure see Heidegger, *Vorträge und Aufsätze*, where he asks, "What is measure [*Was heist Messen*]?" 200; *Poetry, Language, Thought*, 221, mod.

66. *Ibid.*, 209/154.

67. *Ibid.*

68. *Ibid.*

69. *Ibid.*, 210/155.

70. *Ibid.*, 211/155.

71. *Ibid.*, 212/156.

72. *Ibid.*

73. Ibid.
74. Heidegger, *Der Satz vom Grund*, 172–73; *Principle of Ground*, 103.
75. Hölderlin, *Sämtliche Werke*, SA 5, 1:195; Friedrich Hölderlin, *Essays and Letters on Theory*, trans. and ed. Thomas Pfau (Albany: SUNY Press, 1988), 101; “Remarks on ‘Oedipus,’” 101–8, “Remarks on ‘Antigone,’” 109–16.
76. Jean-Luc Nancy, “Calcul du Poète,” in *Des Lieux Divins suivi de Calcul du Poete*, (Mauvezin, France: Trans-Europ-Repress, 1997), 53; translated by Simon Sparks as “The Calculation of the Poet,” in *The Solid Letter: Readings of Friedrich Hölderlin*, ed. Aris Fioretos (Stanford, Calif.: Stanford University Press, 1999), 44.
77. Ibid., 55/45.
78. Ibid., 59/48.
79. Ibid., 61–62/50. This sentence can alternatively be translated as: “In order to aim at [viser] the unity of the whole, there is no measure outside of the sighting itself.”
80. Ibid., 62/50.
81. Ibid., 70/57.
82. Derrida, *La Peine de mort*, 2:216; *Death Penalty*, 2:159–60.
83. Ibid., 229/170.
84. Ibid.
85. Immanuel Kant, *Die Metaphysik der Sitten*, in *Gesammelte Schriften*, vol. 6 (Berlin: G. Reimer, 1907), 362–66; translated by Mary J. Gregor as *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1996), 497–98, qtd. in Derrida, *La Peine de mort*, 2:247; *Death Penalty*, 2:183.
86. Derrida, *La Peine de mort*, 2:248; *Death Penalty*, 2:183–84.
87. Ibid. 248/184.
88. Ibid.
89. Ibid.
90. Ibid.
91. Ibid., 249/185.
92. Ibid.
93. Ibid., 248/185.
94. Ibid., 249/185.
95. Ibid., 250/185.
96. Geoffrey Bennington, “Ex Lex,” *Oxford Literary Review* 35, no. 2 (2013): 143–63, 144. Following the presentation of an early version of this essay at the American Comparative Literature Association, Geoffrey Bennington posed a question to me regarding the role of Kant and his views on calculation in the Death Penalty Seminars. I hope that my brief remarks here go in some way to make up for my inadequate response at the time.
97. Ibid., 147.

98. Derrida, *La Peine de mort*, 2:216; *Death Penalty*, 2:159–60.
99. Ibid., 206/152.
100. Ibid.
101. Ibid., 219/161.
102. Ibid.
103. Ibid.
104. Ibid.
105. Derrida, *La Peine de mort*, 2:211; *Death Penalty*, 2:32.