Derrida and Nietzsche: on the "Bidding Up" of Sovereignty

-Since we are now discussing session six, standing in the middle of Derrida's seminar on the death penalty, I thought it might be helpful to start with a couple of reminders about some of the motifs that we explored in the previous sessions, before approaching the question of "interest" in Derrida's brief reading of Nietzsche in this session, which acts as a crucial hinge that guides much of what follows, including the interest a state or an individual may have in either the maintenance or the abolition of the death penalty. What I want to do today very quickly, is to relate what Derrida says about the "interests" hidden behind the positions of those both for and against the death penalty, to the "bidding up" on sovereignty that we have discussed in a couple of other contexts, including the previous session on the death penalty, and to some extent the seminar on the *Beast and the Sovereign*.

-In the earlier sessions, Derrida asks two interrelated philosophical questions- "what is an exception" and "what is cruelty?" both of which are linked by the exceptionally cruel instance of the death penalty (since it is a sentence for which there is no redress, pardon, clemency etc., the death penalty is exceptional *within* the law itself, it is not a punishment like others). The death penalty constitutes a kind of counter-point to the exceptionality of forgiveness—a "concept" which is partly the focus of the seminar that precedes this one—where Derrida argues that any forgiveness worthy of the name must be *unconditional*, it must forgive the unforgivable, and so must itself be exceptional in its structure. The structure of the exception (linked to Schmitt's definition of the sovereign as he who decides *on* the exception— and thus he who emerges co-originarily with the exception— at the

same time, or in the same space, as it were), finds itself curiously on both sides of the law: both an exception *to* the law, and an exception *within* the law.

- Moving now towards some of the issues raised in session six: Derrida again raises the question of the origin or foundation of law in his reading of Hugo, who grounds his abolitionism in natural law *and* divine revelation. Derrida's question to Hugo is thus: how is it possible to ground an abolitionism in natural law and, at the same time, in the same space, have recourse to a revelation predicated on a death sentence: the sentencing to death of God as Jesus. Who sentences Jesus to death, and in the name of what law? What grounds both of these laws—natural law and the law of revelation? Do they share an origin, a similar relationship perhaps to the exception and exceptionality?

-Derrida's way in to these questions is through the question of *interest*, along with the ruse of disinterest, which is to be found on both sides of the death penalty debate: the Kantian affirmation of a pure juridical rationality, a principle beyond "pathological" interests—and the pure principle of the inviolability of life advocated by the abolitionist. In both cases, what occurs is a gesture that claims to be operating *in principle*, according to a law outside of calculation, outside of equivalence.

- Penal law, of course, must by definition be impersonal, without any interest at its heart, in order to be just. The principle of *jus talionis* is the beginning of a juridical order whose origin is grounded on a disinterest that is inherent to it, a *pure* law of pure equivalence, which must be beyond the particular interests of the two or more parties it attempts to

render justice to. The paradigmatic case of disinterest, the one that hints at the moral law that makes demands on us outside of our own "pathological" interests, is the Kantian beautiful, which is possible only as a reflective judgment (i.e. one which does not offer an identifiable concept in advance, which does not proffer the law to which the particular is applied). So we are without the anteriority of the law to itself, and this "without," is what makes it "disinterested" in Kant.

-Enter Nietzsche, who smells something at work here in this notion of an originarily disinterested law. The genealogist of law suspects something, stands incredulous before this disinterest and asks: whence comes the law of equivalence, the balancing of injury, fault and pain? At what point, and for what reasons, did the law introduce a common measure between what appear to be two incommensurable things: a wrong or guilt, and the suffering inflicted for punishment of this wrong or guilt?

-What emerges from Nietzsche's archeo-genealogy is an economy of suffering, and ultimately, an economy of the death penalty. If there is a general equivalence between injury and punishment, then, as Derrida suggests, Nietzsche's response: "consiste alors à chercher l'origine de cette incroyable équivalence… auquel il n'est pas possible de croire, pas possible d'accorder le moindre crédit" (21). This leads finally to the claim that the origin of penal law is fundamentally commercial law: with rules about debt, exchange, surplus value and, of course, *interest*, the regulation of a certain kind of "bidding up," as we'll see, including the bidding up on cruelty.

- What Nietzsche locates at this origin, according to Derrida, and finds hard to believe (Derrida calls it an "incroyable équivalence" (21)) is precisely "belief itself," ("croyance même" (21): "Ce qui signifierait en somme que ce qui *fait croire* les crédules que nous sommes, ce qui nous fait croire à une équivalence entre crime et châtiment, au fond, c'est la croyance même, c'est le phénomène fiduciere du crédit ou de la foi (*Glauben*)." (21) The origin of belief in equivalence is "belief itself." What does this mean?

-The structure of it, at least, closely resembles the "performative without performative" that we discussed last year (a "performative" that is not strictly speaking a performative, since to be "felicitous" in traditional Austinian speech-act theory, a performative must make reference to a legal or juridical order that authorizes it, when in fact the "performative without performative" first sets the juridical framework in place to begin with. It is not illegal, since this already presumes that law is in place, but a-legal, a force of law without law). Something like the same structure appears operative here: at the ground of the law of equivalence, which opens up the notion of economy and the notions of faith, belief, credit etc., is "croyance même," a belief that erects, makes possible *jus talionis*, but remains irreducible to what it erects, or sets in place: "Mais cette croyance ne consiste pas seulement à croire à ce que nous croyons être ou être vrai, mais à croire en posant, *performativement*, en inventant un équivalence qui n'existe pas, qui n'a jamais existé et n'existera jamais entre crime et châtiment, une équivalence commode mais fictive en somme qui nous permet à la fois de croire et d'échanger des signes et des choses, des signes et des affects…" (22, emphasis mine). This belief, at the bottom of the law, is also at

bottom what no one believes, what no-one can believe, since it is the very origin of belief, credit and so on: “Au fond, personne ne <le> croit ni n’y a jamais cru sérieusement” (22).

-And here is where the Nietzschean “wedge,” if I can use this term, the opening of a genealogy that would chart a very different historicity, of rather *pre*-history, of law, sniffs out something that the juridical cannot account for from within itself: the disinterest at the heart of penal law *can only ever be a simulacrum*, a fiction, a believing that does not in fact believe, or that is not in fact, or *as such*, belief. At bottom we do not believe in the simulacrum of belief, which is nevertheless the condition of the law of equivalence, exchange and so on. So— it is not a matter of simply saying, there where the law claims to be neutral, where it claims to be disinterested, one finds *in fact*, an interest… of a particular social class, for example. 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. This belief without belief is the condition not just of law, but of the social contract, which founds itself on a strangely divided moment: a belief that does not believe in itself, a simulacrum of belief that is nonetheless the condition of credit, religion, the social contract, the law of equivalence etc.

- What drives the genealogist is the ruse of cruelty that emerges out of this, and I will return to this notion of a “belief without belief” shortly. First, however: this “au fond” at the bottom of penal law that grounds its claims of radical “disinterest” becomes, in Derrida’s reading of Nietzsche, radically “interested” *not* because it must be understood in terms of a Nietzschean “field of forces,” where various interests appropriate the law to their own ends, but because the non-belief at the heart of belief, precisely, begins a process of

"bidding up," the creation of interest that follows from a mad and hyperbolic form of accreditation. Once belief without belief has set up the economy or the system of exchange, what takes place is this system's gradual spiritualization into a theatre of cruelty. In place of, in exchange for, a thing (someone, a good, etc.) what is given instead is a compensatory enjoyment, a psychic pleasure that extracts the interest of causing another to suffer, based on the law of equivalence. The point here, though, is that this spiritualization of the law of equivalence is only possible because of the "belief without belief" that grounds it, that makes it possible to substitute the one for the other: "À la place de quelque équivalent, quelque chose ou quel'qu'un, on accorde en retour, en paiement, la jouissance de faire violence (*Genuss in der Vergewaltigung)*… je dirais aussi le plaisir pris, le jouir qui tient à exercer le pouvoir (*Gewalt*), et même ici à exercer sa souveraineté sur le débiteur— ou la débitrice" (26). Thus, the "spiritualizing ruse" of this simulacrum of equivalence operates by not *fully*, in fact, believing in equivalence. It thus lives in and on the "belief without belief" that is the ground of penal law, which also grounds its sovereignty, its right to cruelty, in the simulacrum that is, at the same time, a part of belief itself.

- What is important to note in this mad economy of cruelty found at the heart of a supposedly disinterested law, is that, from the point of view of the law of equivalence, there *is no exception*, or no relation to exceptionality. This is precisely what *jus talionis* has to disavow: the law begins by assuming a crime or a fault, from which follows the right to punish the perpetrator. As Nietzsche puts it in the *Genealogy of Morals*: its motivating idea is that "everything can be paid off, everything MUST be paid off."

-The law, however, is ialso grounded on the *incommensurability* that pertains to belief without belief (as Derrida put it: "Je disais que cette division interne, cette dissociation proprement analytique, ce clivage, cette schize du croire hanté par l'incroyance est quasiment hypnotique, autant dire spectrale, quasiment hallucinatoire ou inconsciente" (24)). This opening to an incommensurability of belief with itself produces another "bidding up" of the sovereign "right" to cruelty. Both the law of equivalence, and a radical amortization, the extraction of interest, occupy the same time and space, grounded on the same belief without belief that allows a passage and exchange between two incommensurables.

-If this "belief without belief" institutes an incommensurable at the heart of the law, it takes Christianity's "stroke of genius" to capitalize on it, and to push the entire movement of "spiritualization" and of "bidding up" to its furthest point. Christianity's stroke of genius is to introduce the incommensurable back "inside" the law of equivalence, as a debt that cannot ever be balanced or paid off. God, by sacrificing his son, *forgives the unforgivable*, exceptionally, *against the law*, even. But this forgivenness achieves a hyperbolic passage to the limit of spiritualization, reversing the process so that it becomes the creditor himself who offers *himself* for the debt. A kind of bidding up on bidding up takes place here: "…Nietzsche souligne non seulement la spiritualisation, l'intériorisation dont je parlais à l'instant, mais la surenchère, l'augmentation hyperbolique, la disproportion infinie, une jouissance du "plus haut degré" qui accompagne cette loi de la cruauté: à une dette finie, en quelque sorte, la compensation en cruauté psychique non seulement correspond main excède la correspondance en y répondant par un plaisir de la cruauté qui, lui, devient infini,

en tout cas extrême, du "plus haut degré" (35). This "surenchère" ends in a radical "disproportion infinie, une jouisssance du plus haut degré" a *jouissance* that reaches its limit, and thus becomes qualitatively different than the "bidding up" of cruelty set in place by the law of equivalence. We move here from a finite debt that becomes spiritualized, to an infinite debt that doubles down on the law of equivalence. It brings this law to its limit by having God introduce the "plus haut degré" of a bidding up that begins by *relying* on the law of equivalence, even as it *extends* it beyond itself, perhaps even demolishing it, finally.

- I would like to now end with the question I wanted to arrive at while touching upon the logic of exception and its relation to sovereignty that we saw developed in the previous sessions. We've seen Derrida continuously speak of a "bidding up" on sovereignty in several contexts, focusing on something that exceeds classical sovereignty, mastery, the appropriation of exceptionality and so on; a machine of sovereignty at work—a bidding up that *must* take place since it is part of the very structure of the ipseity of sovereignty itself. What seems to be at stake in Derrida's reading of Nietzsche is the way that he locates, within the economy of cruelty, at least two *simultaneous* gestures that take up a relation to the exception, but which produce at least two very different "forms" of bidding up: on the one hand, there is the law of equivalence predicated on the "secret" of a belief without belief, which makes exchange possible, including the bidding up of interest and amortization. On the other, there is a bidding up on the exception, in what appears to be a fundamentally *unconditional* act that ends by shattering the *jus talionis*, pushing it to its limit where something else emerges, for better or worse. At stake, then, is not just the notion that exceptionality is located both inside and outside the law. What is at stake is also

a “surenchère” or “bidding-up” specific to the nature of Derrida’s gesture, his form of reading, a kind of radical risk that would contemplate pushing what appears to be the most sovereign, the most cruel, and the most capitalizing “bidding up” as far as possible, in order, perhaps, to make it say something else, the enigma of a “bidding up” on “bidding up,” as it were. Perhaps, then, the death penalty must be thought at once (à la fois), not only as a case of exceptional “bidding up” on cruelty, a kind of appropriation of the exception by the law within the law, but as a figure of another bidding up, one that treats the death penalty as *also* an opening towards a threshold or limit internal to the system of general equivalence that is penal law, its own kind of “enigma.” I’ll end with this “perhaps.”