

Death and Other Penalties

PHILOSOPHY IN A TIME OF MASS INCARCERATION

Edited by

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guilt; and people with mental problems would not face the death penalty in the first place, as they presently do, even though various state prosecuting attorneys would say otherwise. The prosecutor points to charts and expert witnesses for proof, just as the defendant's attorney points to his/her own charts and expert witnesses, which dictate the exact opposite interpretation. Who to believe?

The death penalty should be abolished not only because it is inhumane but also because the legal process used to achieve the guilty verdict can never overcome the individual jurors' prejudices regarding race, religion, and class, any of which would undermine the constitutional mandate of a fair and impartial trial by a jury of one's peers. Naturally, this critique could apply to all jury trials, but due to the finalized nature of the death penalty, the stakes are much higher. The first corrective step must be the elimination of the death penalty. Sentences of life should also be eliminated. Any sentence that does not take into consideration the possibility of redemption and forgiveness—a person's ability to change—should not be allowed. I am calling for a radical transformation of the legal process used to convict, imprison, and execute people in the United States. True justice demands that we examine the root causes of violence and the current legal practices that create unjust and unreliable convictions and sentences.

U.S. Racism and Derrida's Theologico-Political Sovereignty

Geoffrey Adelsberg

The connection between theology and the death penalty is central to Derrida's study of capital punishment. As Michael Naas, a participant in the Derrida Seminar Translation Project, states: "In the two years he devotes to the death penalty . . . Derrida seems to want to show how the concepts, rhetoric, symbolism, images, and imaginary of the death penalty are all determined and *marked* by a Christian or Judeo-Christian theologico-political heritage."¹ This chapter aims first to provide a working definition of this relation among religion, politics, and the death penalty. Second, I will offer an interpretation of Derrida's methodology, asking: Why does Derrida focus his analysis on the rarefied realms of sovereignty and religion qua Western European sovereignty rather than focusing on the particular histories of the death penalty in the countries where it is/was practiced? I contend that Derrida's methodological avoidance of the history of the death penalty is premised upon the thought that abolitionist movements are at their strongest when they conceive of the death penalty as central to the state rather than an instrument of its criminal law.

I will contend that Derrida's focus on the death penalty's connection to religion and politics requires supplement by a historical analysis, and

I argue that this is possible without falling into a conditional abolitionism. I will interpret Angela Y. Davis's account of the connection between slavery, the death penalty, and prisons as that critical supplement to Derrida's theologico-political analysis of the death penalty. I contend that the death penalty during slavery and the prisons that thrived in the wake of U.S. post-Emancipation Reconstruction reveals a continuing differential exposure of Black and Brown people to sovereign decision. I conclude with preliminary speculation that this differential exposure of Black and Brown people to sovereign decision is a structural feature of European sovereignty. Reading Derrida together with Davis provides ground for thinking about the particular histories and people that are exposed to the death penalty alongside the death penalty's theologico-political grounding.

In the first session of the *Death Penalty Seminars*, Derrida identifies a pattern in the executions of Socrates, Christ, Al-Hallaj, and Joan of Arc, which he deems classical cases of Judeo-Islamic-Christian tradition: the religious authority prosecutes heresy by giving the state the right to enforce the will of a punishing god.² Derrida conceives of the death penalty as the foundational alliance between religious authority and sovereign authority. Insofar as the state becomes the enforcer of sacred law, it is also the judge of whether the religious claim ought to be upheld. The state becomes the judge of whether the heretic defendant ought to live or die. Insofar as it decides the life or death of the subject, the state takes on the power of the divine judge. In this judgment, the sovereign decides who is sacred and deserving of protection and what is profane and deserving of death or the indifference of exile.

In *For What Tomorrow*, Derrida claims that in order for a sovereign to be a sovereign, she/he must have the power over life and death. Derrida writes, "State sovereignty thus defines itself by the power of life and death over subjects. And therefore by this right of exception, by the right to raise itself . . . above the law."³ The self-definition of the sovereign is at stake in the sovereign power over life and death. Without the power over life and death, the sovereign would be unable to define her/himself as sovereign. For Derrida, as for Schmitt, the sovereign's self-definition in power over life and death is at once self-definition by a decision on the exception that raises the sovereign beyond the law. There are a great deal of ways to think of exception, but for the purposes of this chapter, I suggest that the sovereign right to power of exception is the right to decide on the sacred and profane without reference to previously existing law. In other words, the sovereign's self-definition is the power over life and death unrestricted by law. No matter how many international organizations a nation joins, no

matter how much one sovereign state submits to the strictures of the laws of these institutions, the sovereign only retains her/his sovereignty if she/he holds the right of exception, the right to put these laws aside and decide over life and death.

In Derrida's conception of a sovereign state, the sovereign both makes the law and is exempt from the law. The laws of the sovereign state establish the distinctions between sacred and profane, but the sovereign always has the power to redefine the sacred and profane for the sake of upholding the state's law and stability. I would resist reading sovereign decision too literally. It need not refer to a sovereign in a throne or a head of state receiving a call from the death chamber; it does refer to a power that the state must reserve for itself in order to remain a state.

The death penalty, for Derrida, is the exemplary moment of the establishment of theological-political sovereignty because it instantiates the sovereign power over life and death. I have followed Derrida previously in his contention that the death penalty arises from the foundational alliance between religious authority and sovereign authority. In each of the "classical" cases of the death penalty, the religious authority prosecutes heresy by giving the state the right to take the place of god. The sovereign decides whether the god's law has been broken, thereby taking the place of god in the decision of life and death. If the decision over life and death is at the foundation of the sovereign's power, we can make sense of Derrida's claim that he "does not rely on an *already available* theologico-political concept that it would suffice to apply to the death penalty as one of its 'cases' or examples."⁴ For Derrida, it is not enough to think of the death penalty as an effect of sovereignty. It is not enough to think of the death penalty as a moment when the sovereign exercises her/his power over life and death. It is not enough to think of the death penalty as one mode of punishment among others. For Derrida, the sovereign practice of the death penalty is the moment that constitutes sovereignty. It is only in the decision to put the heretic to death that the sovereign raises himself to the godly decision over life and death. It is only in the capacity to exercise the death penalty that the sovereign becomes the sovereign. Derrida affirms the death penalty as the primary moment of sovereignty: "I would be tempted to say that one cannot begin to think the theologico-political, except from this phenomenon of criminal law that is called the death penalty."⁵ The death penalty instantiates sovereignty's power over life and death.

Now that we have a working definition of the relation between religion, politics, and the death penalty—death penalty as sovereign power over life and death—I will offer an interpretation of Derrida's methodology.

As Derrida writes, and as I quoted earlier, "One cannot begin to think the theologico-political, except from this phenomenon of criminal law that is called the death penalty." I take phenomenon to refer to both the existence of the death penalty in legal code of a particular country as well as the concrete instances of people being put to death by the law of that country. When we, as philosophers, take the death penalty to be a phenomenon, we find ourselves in a particular sovereign's legal code; we find ourselves in a particular history of the exercise of that legal code. When the phenomenon of the death penalty is the object of our study, we can speak of its history and the people that come under its decision. Derrida does not take the phenomenon itself as the object of his study. The phenomenon of the death penalty, for Derrida, points the way to theologico-political sovereignty. Derrida is concerned with the formal structure of sovereignty; his sovereign governs no specific state. Rather than borders, Derrida's concept of sovereignty is tied to an intellectual Judeo-Christo-humanist tradition. Indeed, he does not devote his intellectual attention to particular histories of the death penalty in the United States, even when the U.S. death penalty is at stake in his analysis.

The question for Derrida is: Why move immediately from the phenomenon of the death penalty to sovereignty and its intellectual religious background? Why this restlessness? Why not a fuller analysis of the particular history of the U.S. death penalty? My contention is that Derrida moves swiftly from the phenomenon of the death penalty to questions of sovereignty because he does not believe that we can gain an adequate abolitionist discourse from the phenomenon or the history of the death penalty alone.

If we follow Derrida and say that the death penalty is the condition without which the state could not be, the abolitionist demand for the state to end its practice of the death penalty would be the equivalent of asking the state to abolish itself. Although this is a strong claim, seeming to verge on hyperbole, we can make this claim intelligible by following Derrida's strict definition of the death penalty. If the death penalty attests to the state's capacity to decide over life and death, then when we ask the state to give up this right, we are asking for a great deal. We are asking for the state to give up its right to decide, unconditionally, when and whom to kill. Without this right, the state would lose its justification for defensive and offensive war in addition to law. Following Derrida's definition of the state, we would be asking the sovereign state to give up the terms of its founding: the violence with which it enforces its law and protects its perpetuity.

If we were to study the phenomenon of the death penalty as an instrument of the state rather than its founding condition, then we might see the

spectacle of the death penalty as one way among many that the state enforces its law. On those grounds, we would be led to request that the state enforce the law without killing. As in European Union countries, we might find this demand successfully implemented by the U.S. state. But this abolition will be unsatisfactory for Derrida because the stakes of his abolition are deeper. For Derrida, the demand of abolition must be an unconditional abstinence from the sovereign's decision over life and death. For Derrida's theologico-political state, that is unintelligible. It calls for the end of the theologico-political state as such.⁶

For Derrida, historical and present-day death penalty abolitionists will be limited as long as they fail to recognize that the stakes of abolitionism are more radical than ending the death penalty as a form of punishment. It is here that I distinguish between calls for abstinence from the death penalty as punishment, which I will call phenomenal abolitionism, and Derrida's call for the opposition to all sovereign decision over life and death, which I will call sovereign abolitionism. Phenomenal abolitionism aims to civilize and improve the rule of law by ridding it of its recourse to the death penalty. It therefore assumes an already-standing rule of law. Phenomenal abolitionism asks the sovereign to refrain from using the death penalty as an instrument of punishment. Sovereign abolitionism considers the death penalty as the condition upon which the rule of law can exist in the first place. Against phenomenal abolitionism and its desire to civilize the rule of law, sovereign abolitionism stakes its opposition against all instances of the sovereign power over life and death. The sovereign abolitionist therefore stakes her/his abolition against the sovereign itself.

Derrida motivates the move from phenomenal to sovereign abolition by showing the limits and conditionality of Cesare Beccaria's phenomenal abolitionism. For Beccaria, the death penalty is one of many weapons in the sovereign's arsenal of punishment. He argues that the death penalty ought to be largely removed on grounds of limited effectiveness: deterrence from wrongdoing requires prolonged suffering, the death penalty is too quick a punishment, and therefore it fails to deter.⁷ Beccaria claims that his abolitionism is valid only for a well-ordered society under the rule of sovereign law.⁸ Beccaria thus distinguishes between the death penalty in a stable, well-ordered state and the death penalty when the stability of the state itself is threatened. For Beccaria, we must allow the death penalty in the latter case. On grounds of securing the safety and stability of the state, the sovereign can justify the death penalty.

For Beccaria, as well as for everyday phenomenal abolitionists, there is a distinction between the punishments within a society ruled by law and

punishments meted out to secure and defend that society. For Beccaria, as well as for many abolitionists who are focused on the abolition of the death penalty as an instrument of lawful punishment, the only death penalty their abolitionism opposes is within a stable society under the rule of law. Derrida argues that this is insufficient. In his criticism of Beccaria, Derrida writes: "In other words—here we touch on one of the more obscure stakes of the problem, insofar as one has not clearly defined the concept of war, the strict difference between civil war, national war, partisan war, 'terrorism' whether domestic or not, etc. (so many concepts that have always been and are still more problematic, obscure, dogmatic, manipulable than ever)—the abolition of the death penalty within the secure borders of a prosperous and peaceful nation will remain something seriously limited, convenient, provisional, conditional—which is to say, not principled."⁹

Beccaria assumes a clear distinction between the death penalty that takes place under the rule of sovereign law and the death penalty that secures and defends that state's stable existence. Derrida calls into question this distinction between that which is internal to rule of law and that which is external to it by pointing to the lack of definite criteria and limits for the acts of violence that are supposedly justified for the sake of preserving the state. Insofar as death penalty abolitionists leave war and terrorism outside their purview, they allow the sovereign exercise of the death penalty to return under a different name. As we have too often seen in the last decade of U.S. foreign policy, the supposed threat of terrorism to the stability of U.S. sovereignty as such can justify unlimited death penalties in the Middle East.

As long as our focus on the death penalty is limited to the instances of lawful execution, our abolitionism remains conditional. We only deny the sovereign the right to decide over life and death in one domain without confronting the need to deny the sovereign the right to decide over life and death in all domains. Our abolitionism will be conditional upon the stable functioning of the rule of law. If this is the limit of our abolitionism, the sovereign can too easily reinstate the death penalty by justification on grounds of protection of the state itself. The conditionality of this abolitionism is unsatisfactory insofar as we also want an abolition that denies the sovereign right to exercise arbitrary violence whenever that sovereign can spin a yarn justifying violence on grounds of the preservation of the state. Sovereign abolition aims to remove this power itself from the sovereign; it challenges every instance of the sovereign's decision over life and death.

With Derrida, we can endorse sovereign abolitionism above phenomenal abolitionism on two grounds: (1) The death penalty is a foundation upon which sovereignty is built because it establishes the sovereign's power of life and death. Phenomenal abolitionism is inadequate to this insight because its view of the sovereign's relation to the death penalty is too narrow: it takes the death penalty as an instrument of sovereign power rather than the moment when the sovereign capacity to decide over life and death is established. The phenomenal abolitionist is limited to questioning the death penalty as *practice* rather than death penalty as sovereign *capacity* to decide over life and death. As such, phenomenal abolition can only speak to one instantiation of the sovereign violence rather than the condition upon which the sovereign violence can happen in the first place. (2) A principled abolitionism can only attack the sovereign capacity to decide over life and death if it stakes its opposition against all instances of the sovereign decision over life and death. When we oppose the death penalty as an instrument of punishment only, our abolition becomes conditional upon the stability of the state and the rule of sovereign law. The sovereign may lose her/his capacity to decide on the life and death of citizens in the realm of criminal law, but she/he will retain it as recourse when the stability of society and law itself is supposedly at stake. This leads to a partial, merely conditional abolition that leaves the sovereign power of decision over life and death violently intact. It allows the decision over life and death to be justified in terms of the security and stability of the state.

Derrida's opposition to a phenomenal analysis of the death penalty is due to the impossibility of building an adequate abolitionism on phenomenal grounds. He wants to move away from grounding abolition on phenomenal analysis, but this still leaves room for interpreting the phenomenon of the death penalty in light of theologico-political analysis. In the rest of this chapter, I will read the most pressing insights of phenomenal analysis in light of Derrida's unconditional sovereign abolitionism. Derrida gestures toward phenomenal insights regarding representations of the U.S. death penalty in the media, the death penalty as colonial war in Algeria, and the continuing legacies of racism in the United States. Even here, his phenomenal analysis is not rich enough. The history of racism in Europe and the United States is gestured to without changing the central terms of analysis. If Derrida were to wade more deeply into this phenomenal analysis, I believe that the sufficiency of Derrida's conception of theologico-political sovereignty would be challenged: that he would see that European sovereign violence is not violence as such but violence that

threatens Black and Brown people to a much greater extent than people of white European descent.

In contrast to Derrida's claim that the phenomenon of the death penalty persists in the United States due to its status as the most Christian country in the world, Angela Y. Davis claims that "the most compelling explanation for the routine continuation of the death penalty in the United States . . . is the racism that links the death penalty to slavery."¹⁰ Derrida's claim follows from his theologico-political analysis: where there is the death penalty in a European nation, there is a religious inheritance of the theologico-political. Insofar as the death penalty remains practiced in the United States, the United States will bear the mark of its Christian inheritance more outwardly than its European counterparts. Davis's claim that the death penalty remains in the United States due to its racist history follows from her phenomenal analysis: the death penalty is analyzed in terms of *who* was killed by the state. Davis also asks *why* they were subject to this punishment and under what historical, political, and legal conditions they were executed. Bringing the two analyses together, we can ask: What can the history of those who have been subject to the death penalty reveal about the structure of the sovereign decision over life and death? Responding to this question enriches our conception of sovereignty and its subjects without formulating abolition on limited, phenomenal grounds.

Davis is attentive to the intersections of slavery and the death penalty that continue to inform capital punishment and its attendant prisons. She offers an account of the death penalty in the United States beginning with its near abolition with the emergence of prisons at the end of the eighteenth century. Davis explains, "What is interesting is that slavery as an institution . . . managed to become a receptacle for all those forms of punishment that were considered barbaric by the developing democracy. So rather than abolish the death penalty outright, it was offered refuge within slave law."¹¹

The "humanization" of punishment, as in the late eighteenth century's talk of inalienable rights of citizens, referred only to white male citizens.¹² Hardly erased from the law, barbaric punishments were simply displaced from white males to slaves. Insofar as slaves were exposed to barbaric treatment while "humane" punishment was reserved for white males, the stage of American theologico-political sovereignty was set: the white man's dignity would be sacred under the law while the African-descendent slave would be subject to punishment unmitigated by the Enlightenment.

Slave law establishes the exposure of Black and Brown people before U.S. law: White citizens were released from the threat of death for most

crimes while "Black slaves . . . were subject to the death penalty in some states for as many as seventy different offenses."¹³ Davis's explication of slave law shows that punishment in the United States is founded upon an unequal exposure to sovereign decision. The possibility of sovereign decision threatens the slave to a much greater extent than the white male citizen. After the abolition of slavery, the death penalty "was incorporated into the legal system with its overt racism gradually concealed."¹⁴ Although free and equal before the law, the death penalty remained a much greater threat to African-descended people before the law than white people. Today, the claim is that we can rid the death penalty of racism by assuring proportionality, by assuring that equal crimes receive equal punishment. This is an impulse to equalize the protection of all people under the law.

I have so far used the language of differential exposure to punishment to capture the phenomenon of European and European-descended countries punishing Black and Brown people to a much greater extent than white people. My usage is meant to invoke a phenomenon of quantitative overrepresentation of African-descended people in penal systems in those countries. But, I wish to make the notion of differential exposure to punishment speak to injustice beyond the fact that people of color are vastly overrepresented in penal systems and subject to harsher punishment than white people when they commit similar crimes. Davis offers the resources to show how the history of Black and Brown institutions of enslavement and colonization shape the qualitative features of contemporary penal structures in the United States.

One way to explicate Davis's claim that slave law was incorporated into post-Emancipation U.S. penal codes is to say that those who are punished by post-Emancipation penal codes inherit the legacy of subpersonhood from those punished under slave code. The criminal under slave code is one whose discipline depends on the infliction (or at least the threat) of great violence and whose self-defense is prohibited. That criminal is one whose educative and cultural life outside of uncompensated productive labor is considered a threat to the extant social and political order. The analogy between the framing of subpersonhood during slavery and the civil death of U.S. prisoners today is inexact. Nonetheless, the overcrowded warehouse prisons, the denial of educational/therapeutic opportunities to incarcerated people due to governmental divestment, and the preventable continued violence faced by incarcerated people speaks to inheritances of subpersonhood in the contemporary U.S. penal code. Davis's analysis shows that the continuing differential exposure of Black and Brown people to punishment is not only about quantitative overrepresentation but also

about the notion of who the criminal is and what they deserve. Such racialized notions of personhood have concrete implications for life within contemporary prisons. Equalizing the racial distribution of who is subject to the suffering and disenfranchisement of contemporary penal systems does not erase ways that that very suffering and disenfranchisement is constituted by racist conceptions of personhood and subpersonhood.

Davis's insistence on the connection between the death penalty and the civil death of prisons reveals another point at which Derrida's abolitionism must stretch. Derrida insists on the opposition to all forms of sovereign decision over life and death, but it is also necessary to be explicit in the expansion of what it means to be subject to sovereign decision. To be killed by the state is the literal incarnation of the sovereign decision, but being sent to the civil death of imprisonment where every minute is regulated and managed, one's civil rights are stripped, and one is subject to arbitrary punishment and pain must also fall under the sovereign decision over life and death. In condemning its subjects to prison, the sovereign is subjecting life to violence unmediated by sovereign protection. Solitary confinement, medical neglect, exploitation of prisoners' labor, and sexual coercion in women's and men's prisons demonstrate the extent of the exposure to violence in the civil death that is imprisonment.

Davis's research also shows that the death penalty in slave law and contemporary practices of imprisonment are coextensive insofar as they expose Black and Brown people to punishment of a much greater extent than their white counterparts. Engagement with differential exposure to punishment means engaging with thoroughly racialized notions of criminality and disposability that support European sovereignty. I believe the racist U.S. history and present illustrates this clearly, but we can widen our scope and examine imprisonment within the larger community of theologico-political states. European nations show a similar inequality of exposure to sovereign decision over civil life and death. Although European nation-states are not as strict in their accounting of the ethnicity of their prison population, theorist Lucia Re claims that "the average percentage of foreigners detained in European prisons exceeds 30% of the prison population, as compared with a presence of foreigners on the European territory that is around 7% of the population."¹⁵ The inequality of exposure of immigrants to punishment in France, England, and Italy speaks to a larger problematic debated and developed among decolonial and postcolonial intellectuals that Derrida should have engaged with: how does the analysis of legal violence transform when we consider colonialism, enslavement, and racism to be essential rather than accidental features of political sovereignty?

This is a question that goes beyond the scope of this chapter, but toward a conclusion, I will offer preliminary speculation. Recalling the Derridean and Schmittean thesis, the sovereign's power is predicated on her/his capacity to decide on the life and death of its subjects. We should extend this thesis: the sovereign not only must establish her/his power by killing but must *reestablish* power by killing on a continual basis.¹⁶ For sovereignty to remain sovereign, the potency of the sovereign decision over life and death must be practiced.

We can think of the punishment in its current racialized form as sustaining a political "economy of sacrifice." This is in contrast with potentially revolutionary practices of mourning. If those killed by the state are of a privileged sociopolitical status, their death can be mourned in such a way that the legitimacy of the sovereign is put into question.¹⁷ As martyr, the executed is a cause against the sovereign. Those killed in Tahrir Square in 2011, for instance, had the effect of delegitimizing the sovereign decision. In these cases, the sovereign's decision to punish was stripped bare. Hosni Mubarak had no recourse to justification outside the furtherance of his tyrannical rule.¹⁸ To both kill and retain legitimacy, the sovereign decision to kill must be justified and accepted by a substantial majority (or a strategically placed minority) as justified killing, killing that maintains or otherwise protects the body politic.

For Derrida, the economy of sacrifice creates viciously successful mourning.¹⁹ He says, "In successful mourning, I incorporate the one who has died, I assimilate him to myself, I reconcile myself with his death, and consequently, I deny death and the alterity of the dead other and of death as other."²⁰ White supremacist sovereignties and populations view the deaths of Black and Brown people sent to death row or "accidentally murdered" in a foreign airstrike as justifiable insofar as they are an unfortunate consequence of an otherwise justifiable military action. Incorporation is the (tacit) acceptance that this death is necessary for the security of the community or the state. Death is accepted as "for a purpose" rather than the end of a life, which overwhelms the political community's capacity to incorporate it.

The differential exposure of Black and Brown people to punishment in U.S. history is also a differential exposure to the logic of sacrifice and incorporation. In order for sovereignty at once to maintain its decision over life and death and to hold the consent of certain constituents, the sovereign repurposes the white imaginary of Black and Brown criminality to frame certain people as always already a threat and thus deserving of sacrifice for the sake of protecting the polity. Such language of protection in Eu-

ropean (and European-descended) sovereignties has always been code for protecting those racial and sexual groups deemed innocent and therefore protected from sovereign violence.

Reading the phenomenal history of the American death penalty together with Derrida's notion of the death penalty as a constitutive moment of political theology deepens our conception of what is at stake in the structure of sovereignty as well as what is at stake in its abolition. The differential exposure of Black and Brown people to sovereign violence reveals that the effects of sovereignty are going to be distinct across populations. We must then begin speaking of sovereignty's effects in a way that captures its inequality of decision and moves toward an analysis adequate to the ways that this differential exposure is endemic to sovereignty as such.

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Making Death a Penalty: Or, Making “Good” Death a “Good” Penalty

Kelly Oliver

Currently, the United States is the only country in the so-called developed Western world that continues to execute prisoners.¹ Since 2008, in order to avoid construing the death penalty as “cruel and unusual” punishment, which would violate the Eighth Amendment, the Supreme Court has upheld the use of a tripartite lethal injection protocol as more “humane” than other methods of execution: the first drug renders the condemned unconscious, the second paralyzes his muscles, and the third kills him by stopping his heart. In *Baze v. Rees* (2008), the Supreme Court upheld Kentucky's lethal injection protocol and ruled that there is no cruelty in execution as long as the prisoner is unconscious at the time of death, particularly since use of the drug that stops the heart is excruciatingly painful.²

One of the drugs in the court-approved, three-drug “cocktail,” however, is no longer being made and states have had to halt executions because they don't have legally sanctioned means to carry them out. European pharmaceutical companies will no longer sell drugs if they are to be used in executions.³ The shortage of sodium thiopental, an anesthetic that renders prisoners unconscious, and other drugs used more recently in lethal injections, has done more to stop the death penalty in the United

workforce, De Giorgi argues, marks the end of biopolitical control and exploitation of labor power. Rather, punishment under the conditions of neoliberalism is focused on the control of the “poor, the unemployed, the immigrants: these are the new dangerous class, the ‘wretched of the metropolis’” (x).

48. Lichtenstein, *Twice the Work of Free Labor*, 188.

49. For instance, in “The Permanence of Primitive Accumulation: Commodity Fetishism and Social Constitution,” *The Commoner* 2 (2001), Werner Bonefeld argues, “The commodity form poses the totality of bourgeois social relations and as such a totality posits the basis of the productive practice of all individuals as alienated individuals” (5).

50. Karl Marx, “Wage Labour and Capital,” in *Karl Marx and Frederick Engels Collected Works*, vol. 9, ed. Philip S. Forner et al., 50 vols. (New York: International Publishers, 1996), 198.

51. Marx, *Capital*, 300.

52. Karl Marx, *Das Kapital: Band I*, vol. 23, in *Karl Marx und Friedrich Engels Werke*, 42 vols. (Berlin: Dietz Verlag, 1962), 85.

53. In “Marx on the Penal Question,” Dario Melossi argues, “After the factory had been recognized as an ideal workhouse, then prisons became ideal factories; punishment finally acquired the double characteristic of tangible representation of the dominant social ideology” (30).

54. de Giorgi, *Re-Thinking the Political Economy of Punishment*, 44.

55. See: Loïc Wacquant, “Crafting the Neoliberal State: Workfare, Prisonfare, and Social Insecurity,” *Sociological Forum* 25 (2010): 197–220; Wacquant, *Punishing the Poor*.

56. Michael Hallett, “Race, Crime, and Forprofit Imprisonment: Social Disorganization as Market Opportunity,” 371.

57. *Ibid.*

58. See: Loïc Wacquant, “Class, Race and Hyperincarceration in Revanchist America,” *Daedalus* (Summer 2010): 75–90; Eduardo Mendieta, “Plantations, Ghettos, Prisons: US Racial Geographies,” *Philosophy & Geography* 7 (2004): 43–59; Eduardo Mendieta, “Penalized Spaces: The Ghetto as Prison and the Prison as Ghetto,” *City* 10 (2007): 384–390.

59. Wacquant, *Punishing the Poor*, 295.

MAROON PHILOSOPHY: AN INTERVIEW WITH
RUSSELL “MAROON” SHOATZ
RUSSELL “MAROON”
Shoatz and Lisa Guenther

1. Eugene Genovese, “Black Maroons in War and Peace,” in *From Rebellion to Revolution: Afro-American Slave Revolts in the Making of the Modern World* (Baton Rouge: Louisiana State University Press, 1979).

2. Frantz Fanon, *The Wretched of the Earth*, trans. Richard Philcox (New York: Grove Press, 1963), 128.

3. Russell “Maroon” Shoatz, *Maroon the Implacable: The Collected Writings of Russell Maroon Shoatz* (Oakland, CA: PM Press, 2013).

U.S. RACISM AND DERRIDA’S THEOLOGICO-POLITICAL SOVEREIGNTY
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1. Michael Naas, “Philosophy and the Death Penalty” (presented at the Derrida Seminar Translation Project, Caen, France, Summer 2011), <http://derridaseminars.org/pdfs/2011/2011%20Presentation%20Naas.pdf>.

2. Jacques Derrida, *The Death Penalty. Volume I*, trans. Peggy Kamuf (Chicago: University of Chicago Press, 2013), 22.

3. Jacques Derrida and Elisabeth Roudinesco, *For What Tomorrow: A Dialogue*, trans. Fort (Stanford, CA: Stanford University Press, 2004).

4. *Ibid.*, 145.

5. *Ibid.*

6. If this analysis is right, that it is anathema for the state to give up its decision over violence reveals that the theologico-political conception has valence. It is right that any entity that we can recognizably call a state is only a state insofar as it can exercise this capacity to decide on the life and death of its citizens (thereby have at least the capacity to kill). This demonstrates that the foundational claim of theologico-political sovereignty refers to political structures as we know them. This does not prove the whole of the claims of political theology, but it does point to the valence of its fundamental premise.

7. Cesare marchese di Beccaria, *Beccaria: “On Crimes and Punishments” and Other Writings*, ed. Richard Bellamy, trans. Richard Davies (Cambridge: Cambridge University Press, 1995), 68.

8. Derrida, *For What Tomorrow*, n25.

9. *Ibid.*, 149.

10. Angela Y. Davis, *Abolition Democracy* (New York: Seven Stories, 2005), 35.

11. *Ibid.*, 37.

12. White women, unrecognized in the public sphere, were subject to the tremendous cruelties of the private punishments of their husbands and hence, like slaves, were largely ineligible for these more “humane” prisons.

13. Davis, *Abolition Democracy*, 37.

14. *Ibid.*, 97.

15. Lucia Re, “Structural Discrimination and Color-Blindness in United States and European Prison Systems,” *Jura Gentium: Rivista di filosofia del diritto internazionale e della politica globale* 3 (2007): <http://www.juragentium.org/forum/race/en/re.htm>.

16. See Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" *Cardozo Law Review* 11 (1990): 920–1046.
17. My discussion here tracks, in broad outline, Judith Butler, *Frames of War: What Makes Life Grievable* (New York: Verso, 2009).
18. In contrast to the abolitionist response to Troy Davis's execution, the killing of protesters in Tahrir Square brought political action against the sovereign itself. The Troy Davis abolitionists impugned the institution of the death penalty as punishment without challenging the sovereignty of the state itself. Herein, we find a rather concrete example of the distinction between the sovereign abolition of anti-Mubarak protesters in Egypt and the phenomenal abolitionism in Georgia.
19. In Derrida's language, the mourning of the protestors in Tahrir Square exemplifies a political iteration of overdetermined, impossible mourning. He writes, "Mourning must be impossible" (159). Their deaths caused a rupture in the lives of those who mourned.
20. Derrida, *For What Tomorrow*, 159.

MAKING DEATH A PENALTY:
OR, MAKING "GOOD" DEATH A "GOOD" PENALTY

Kelly Oliver

1. "The United States ranked fifth for the highest number of executions. The U.S. takes a spot behind China, Iran, Iraq, and Saudi Arabia for the most executions in the world last year, sitting ahead of Yemen and the Sudan" (Alexis Manning, *National Geographic News*, published April 12, 2013, accessed at <http://news.nationalgeographic.com/news/2013/13/130412-death-penalty-capital-punishment-culture-amnesty-international/> on January 31, 2014).
2. *Baze v. Rees* (Roberts opinion), 533 U.S. 35 (2008).
3. Ross Levitt and Deborah Feyerick, "Death Penalty States Scramble for Lethal Injection Drugs," *CNN*, November 16, 2013, <http://www.cnn.com/2013/11/15/justice/states-lethal-injection-drugs/index.html>.
4. "Death Row Inmate Executed Using Pentobarbital in Lethal Injection," accessed March 11, 2014, <http://www.cnn.com/2010/CRIME/12/16/oklahoma.execution/>.
5. "State by State Database," *Death Penalty Information Center*, accessed January 28, 2014, http://www.deathpenaltyinfo.org/state_by_state.
6. Brian Haas, "Death Penalty Stuck in Limbo in Tennessee," *The Tennessean*, April 25, 2011, <http://www.timesfreepress.com/news/2011/apr/25/death-penalty-stuck-limbo-tennessee/?news>.
7. *Ibid.*
8. *West v. Schofield*, 380 SW 3d 105 (Court of Appeals 2012), 112.

9. *Baze v. Rees* (Ginsburg, J., dissenting), U.S. (U.S. Supreme Court 2008). For a discussion of consciousness checks in relation to phenomenology of consciousness, see Lisa Guenther, "Toward a Critical Phenomenology of Lethal Injection." *New APPS: Art, Politics, Philosophy, Science*, January 27, 2014. <http://www.newappsblog.com/2014/01/toward-a-critical-phenomenology-of-lethal-injection.html>. Guenther invokes Husserl's theory of consciousness to argue against the possibility of second person or external consciousness checks.
10. Erica Goode, "After a Prolonged Execution in Ohio, Questions Over 'Cruel and Unusual,'" *The New York Times*, January 17, 2014, <http://www.nytimes.com/2014/01/18/us/prolonged-execution-prompts-debate-over-death-penalty-methods.html>.
11. *Ibid.*
12. For a discussion of the death penalty and phenomenology of consciousness, see Lisa Guenther, "Toward a Critical Phenomenology of Lethal Injection."
13. For a more substantial version of this argument, see Kelly Oliver, *Technologies of Life and Death: From Cloning to Capital Punishment* (New York: Fordham University Press, 2013).
14. *Furman v. Georgia*, 408 U.S. 238 (Supreme Court 1972).
15. *Baze v. Rees*, 533 U.S. 35, 38 (2008).
16. *Ibid.*
17. *Baze v. Rees*, 533 U.S. 35, 119 (2008) (Ginsburg, J., dissenting).
18. *Ibid.*, n4.
19. Alison Motluk, "Execution by Injection Far from Painless," *New Scientist*, April 14, 2005, <http://www.newscientist.com/article/dn7269-execution-by-injectionfar-from-painless.html>.
20. Brian Haas, "Tennessee's Death Penalty Is Back on Track," *The Tennessean*, October 23, 2013, <http://www.wbir.com/story/news/local/2013/10/23/tennessees-death-penalty-is-back-on-track/3168925/>.
21. *Ibid.*
22. *Ibid.*
23. Austin Sarat, ed., "Killing Me Softly: Capital Punishment and the Technologies for Taking Life," in *Pain, Death, and the Law* (Ann Arbor: University of Michigan Press, 2001), 44.
24. For a discussion of the issue of pain in relation to the death penalty, see Sarat, "Killing Me Softly."
25. Jacques Derrida, *The Beast and the Sovereign. Volume II* (Chicago: University of Chicago Press, 2011).
26. Jacques Derrida, *The Death Penalty. Volume I*, trans. Peggy Kamuf (Chicago: University of Chicago Press, 2013), 42.