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LACAN AT THE LIMITS OF LEGAL THEORY:
LAW, DESIRE, AND SOVEREIGN VIOLENCE

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CIVIL DISOBEDIENCE AND THE LAW OF GOD

The best place to seek the concept of law is not in the theory of law itself but in the praxis of civil disobedience. More than a political strategy, civil disobedience manifests — or rather "demonstrates" — the disjunction between the existence of the law and its essence, that is, between the existence of an unjust law and the essence from which this law should derive its authority. This disjunction has been articulated primarily in terms of the dualism of natural law theory, which holds that any given terrestrial law ("the law of the land") ultimately derives its authority from the law of God or the moral law. The clearest theoretical presentation of the connection between civil disobedience and the law of God occurs in Martin Luther King, Jr.'s theologico-political epistle, "Letter from Birmingham City Jail":

> One may well ask, "How can you advocate breaking some laws and obeying others?" The answer is found in the fact that there are two types of laws: there are *just* and there are *unjust* laws. I would agree with Saint Augustine that "An unjust law is no law at all."
>
> Now what is the difference between the two? How does one determine when a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law...Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality.[1]

In this context, the law of God has a strictly political importance; it is the name for the principle of justice (universal equality and liberty) whereby terrestrial laws can be legitimately contested. For King, in accord with the tradition of Kantian-Christian morality, this principle is inseparable from the sanctity of human personality; every law must recognize the inviolability of human personality in order to be recognized as a law of the land. Rather than standing for a value unto itself, however, the primary value of what King calls the "moral law" inheres in its function as a test of the lawfulness of positive law. The moral law can thus be reduced to the "virtue" or "sense" of justice — reduced, in other words, to the categorical imperative that unjust laws must always be actively contested. The famous opening lines of John Rawls' *A Theory of Justice*

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(written contemporaneously with the civil rights struggles of the 1960s) articulate just such an imperative: "Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override."[2] If virtue is the political actualization of morality, then civil disobedience would be the political act that manifests the sense of justice.

The absolute value of the person, however, need not be the only test of the lawfulness of the law, just as the meaning of civil disobedience need not depend upon reference to such a value. This form of political action has an import that goes beyond its theoretical justification. Civil disobedience remains a decisive and relevant practice because it manifests the possibility of legitimate contestation — the contestation of unjust state action — that does not depend upon deference to a sacred principle (be it the Good, the Person, or the Law, along with their historical corollary, the economy of private ownership). Indeed, it is my initial working hypothesis that the question of law cannot even be posed as such until it is emancipated from its traditional complicity with the economy of personhood and private ownership. On this point, my discussion follows certain basic theses of the legal thought of both Hans Kelsen and Jacques Derrida.[3] The works of these seemingly incompatible thinkers are linked through their fidelity to the Kantian tradition — or rather, through their attempt to inherit the Kantian tradition in a way that takes it beyond its entrenchment in the values of personhood and property.[4]

The attempt to think such an emancipation of law from the property system involves two major difficulties. First, *contestation*: if the law can no longer be conceived on the basis of its adherence to a transcendent principle, what is the basis for its legitimate contestation — that is, a possible contestation of legalized injustice that does not abrogate fidelity to the rule of law as such? In the name of what does one contest injustice if not the inviolability of the person and his property? Second, *violence*: the price of affranchising the question of the law from its complicity with a legal system designed to protect private property is a more complex engagement with the relation between law and violence. Kelsen's theory is exemplary on this point: he holds that the only possible concept of law, a concept that would transcend the relation between juridical institutions and specific politico-economic systems (capitalist or communist), would be a concept that defines law according to the horizon of its enforcement, that holds the force of law to be intrinsic to law as such. As such, for Kelsen, law is what he calls a "coercive norm."[5] Derrida makes an analogous argument: he elaborates both the genealogy, from Montaigne and Pascal to Kant, and the political horizon of such a concept of law as the "force of law."[6]

In contemporary political thought, the answer to the first set of difficulties takes the form of an attempt to discover if the *universal* has a place beyond the theological determination of politics,

and thus to think the universal in terms of the contestation of personality, the division of the subject, the death of God, expropriation, or arche-violence. The second set of difficulties is linked to the first through the question of civil disobedience. The wager implied in the traditional praxis of civil disobedience is that the violence of law — and even the most revolting implementation of this violence in the form of "law enforcement" — presupposes such a universal. The wager is that *this* law, no matter how unjust, can only ever be enforced as *the* law — that the active enforcement of *a* law (the law of a specific land) necessarily implies the claim that it is *the* law and thus universal. In the case of an unjust or discriminatory statute, the enforcement of the law will always entail a presupposition that contradicts the letter of the law. At the moment of enforcement, the state can no longer avoid the universality presupposed by the fact of its own institutions, and thus unavoidably exposes itself to claims that contest their justice.

The legitimacy of civil disobedience does not ultimately depend upon the principle that the act claims to uphold, but rather inheres in the specific theater of its public gesture. On the one hand, as Rawls writes in his chapter on the topic, the act of civil disobedience "addresses the sense of justice of the majority of the community"[7]; it openly insists on the disjunction between the existing laws and the law of law. On the other hand, the same act has a scope that exceeds the open airing of a principle of justice. Its function is not to transform the community into a theater of the beautiful soul, to represent an exclusive adherence to a law that transcends the law of every land. The paradoxical "civility" of civil disobedience inheres in the fidelity of this public action not to a higher law, but to the very same unjust law of the land that it openly disobeys. The gesture that represents such fidelity is in fact the most dramatic moment in any act of civil disobedience: the moment at which the actors submit to the legal consequences of their action, allowing themselves to be arrested. As Rawls writes, "[c]ivil disobedience...expresses disobedience to law within the limits of fidelity to law, although it is at the outer edge thereof. The law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act, by the willingness to accept the legal consequences of one's conduct."[8] Beyond demonstrating the contradiction between the law of God and the law of the land, the theater of civil disobedience would thus body forth this other contradiction between the universal implied by law enforcement and the discrimination written into the law or otherwise manifest in state action. This activist "willingness to accept the legal consequences of one's conduct" displays an adherence to the sheer *fact* of the law beyond the set of its specific dictates.

For Rawls, this fidelity to law remains subordinate to the task of addressing the community, to the expression of conscience. To some extent, he advocates a kind of "responsible" activism, designed both to advance its claims and to reassure the state that disobedience is neither an act of war, juvenile resentment, or pathological compulsion, but is rather "conscientious and sincere." To accept the legal consequences of one's conduct (arrest, bodily injury) would thus function as

a pledge of allegiance to the rule of law as such, that the act for which one is being punished has been undertaken in the name of a sense of justice (or even "a theory of justice"): "This fidelity to law helps to establish to the majority that the act is indeed politically conscientious and sincere, and that it is intended to address the public's sense of justice. To be completely open and non-violent is to give bond of one's sincerity, for it is not easy to convince another that one's acts are conscientious, or even to be sure of this before oneself."[9] It is important to be clear on this point: fidelity to law — to the rule of law or the mere fact of law — does not necessarily imply allegiance to constituted authorities, but rather to the possibility of contestation from which such authorities derive their own claims to legitimacy. The rule of law does not name the sovereignty of the prevailing order, but rather the point at which sovereign power *loses control of itself* — both in the sense that, in defense of unjust laws, state violence becomes constitutively illegitimate and excessive, and in the sense that it is at precisely the point of such excess that state action unavoidably exposes itself to contestatory interventions.

In the courtroom, the oath invokes the law of God as the guarantor of the truth. In the theater of civil disobedience, Rawls claims that one would "invoke" one's own present acquiescence to punishment (for example, going limp upon seizure by the police) as an attempt to guarantee ("to give one's bond") that one acts in accordance with the law of God itself. This is precisely the rhetorical situation of King's letter written from prison. In other words, civil disobedience presents a situation in which God is not the ultimate guarantee, a situation in which one must establish one's credibility and sincerity according to an immanent criterion in order to make others believe that one truthfully acts in the name of God or a rational sense of justice. This criterion is what Rawls calls simply "fidelity to law," but would more appropriately (and problematically) be called fidelity to the consequences of law, fidelity to the "force of law," or even fidelity to the violence of law. The disobedient protester does not simply contest state violence in the name of a higher principle of nonviolence, but rather openly (and contemptuously?) "swears" on the violence to which he submits at the very moment he is acting out of respect for a higher law.[10] The force of law thus opens a space in which it becomes possible to claim adherence to a universal principle, in which it becomes possible to expose one's adherence to the universal *as* universal, rather than as an unverifiable private predilection. Indeed, the universal only becomes thinkable within the horizon opened with such exposition.

THE FULFILLMENT OF THE LAW

Civil disobedience thus manifests an unavoidable and fundamental engagement with the law, without this law being reducible either to the statutes of a determinate legal order or to a law that transcends all legal orders. The law at stake emerges rather at the point where the "sincerity" of the act turns into a theatrical ironization of violence. It is not a coincidence, therefore, that the law in this sense should occur as a poetic *topos*.

One of Schönberg's choral song cycles (*Sechs Stücke für Männerchor*, op. 35), from 1930, includes the following lyrics:

> That there is a law
> which all things obey
> the way you follow your Lord:
> a law which is master of all things the way
> your Lord is your master:
> this is what you should recognize as a miracle!
> That someone decides to rebel
> is an obvious banality.[11]

These lines not only reduce the act of rebellion against the law to the status of banality, but also implicitly expose the limits of any theoretical attempt to elaborate a concept of law as such. The tonality of exhortation in general arises from a rupture — in this case, that rupture with the regime of sufficient reason called the "miracle." Accordingly, this exhortation asks its addressee to accept this rupture as the condition for thinking the law. It asks one to begin with the illegitimate fact of a law without concept.

Any discourse that attempts to theorize the law will be beset by the suspicion that its ultimate purpose is to uphold the preservation of an illegitimate and coercive legal system. When speaking of the law, one opens oneself to the accusation that this term represents merely the aspiration of a specific system of law to legitimate status, that one keeps an entire penal code in reserve for those who need convincing in order to accept that *this* law is *the* law. To speak of *the* law is always illegitimate simply because there is no such thing: there are only *laws* in the plural whose aspiration to the status of law will always be infinitely contestable. This plurality of laws, however, does not in itself invalidate the claim of each law or system of law to be lawful, does not make it impossible for each law to present itself as *the* law. On the contrary, this plurality is irreducible because *the* law is nothing other than the mere fact — the miracle of which Schönberg's song urges us to recognize — "that there is *a* law." Law as such thus becomes inseparable from the withdrawal of the concept or principle of law, from the fact that there is a law beyond any access to what law is. What Schönberg calls the "miracle" of the law's existence would thus name its essential excess, the event of its presentation beyond its own concept. The decision to rebel thus becomes a banality, amounting to nothing other than the claim that a given law is illegitimate because it has no right to call itself law, while such illegitimate nomination is in fact inseparable from the structure of law as such.

The same problems arise when one attempts to take up the philosophical question, "What is the law?" On the one hand, the question seems to refer to the essence of law or the concept of law. On the other hand, this version of the question will always be displaced by another. To ask "What is the law?" can always amount to asking "What is the law that applies to this case?"

“What does the law *say* in this situation?” Further, the problem of what the law says is not limited to knowing which law applies in any particular case, but extends to the problem of understanding what the specific applicable law means. Indeed, it is possible to become so absorbed with knowing what the law says that the question of its essence is indefinitely deferred, if not forgotten. The miracle of the law, therefore, would not so much occur as an epiphany before which one stands paralyzed with wonder; rather, it would lie in this engaged relation to the saying — the “juris-diction” — that will have always carried the law beyond the question of its essence.

What both the Jewish and the Christian traditions call *the fulfillment of the law* names the way in which this engaged relation to the saying of the law has always already been folded into the law itself. According to one rabbinical tradition, for example, Moses does not only deliver the Torah to the Israelites at Mount Sinai, but at the same time he is also supposed to have “revealed” to them every eventual commentary on the Torah and all the commentaries upon those commentaries.[12] The commentary on the saying of the law, in other words, comes “before the law” itself. Saint Paul predicates the Christian event upon the same tradition when he postulates that love for the neighbor is the fulfillment of the law: “The commandments, ‘You shall not commit adultery; You shall not murder; You shall not steal; You shall not covet’; and any other commandment, are summed up in this word, ‘Love your neighbor as yourself.’ Love does no wrong to a neighbor; therefore, love is the fulfilling of the law” (Rom. 13:8-10). Paul departs from the rabbinic tradition only to the extent that he emancipates the relation to the law from the historical revelation of the law itself (from the tradition of Sinai). Instead, he finds the relation to the law in the praxis of love for the neighbor: love *does* no wrong to the neighbor. The law is “revealed” in the love for the neighbor, and this love reveals itself as the “miracle” of an engagement with the law (its “summation”) that is both “older” and “newer” than the gift of the law itself.

DIVINE VIOLENCE

If the attempt to present *a* law as *the* law can never be upheld without reference to a coercive or punitive power, the point of the decision to rebel would be to contest this power (especially in cases where its deployment is manifestly unjust). The problem with such rebellion, however, is that it presumes the possibility of purifying law of its association with sovereign power. It can only contest the injustice of the power that is supposed to uphold the law in the name of the law “itself,” or rather, in the name of the pure principle of a law whose legitimacy would not be contaminated by an appeal to violence. In other words, acts of rebellion remain effective only so long as they engage determinate systems of law, acts for which the responsible parties can be prosecuted. But such acts would lose their basis if a punitive violence, perhaps even of the most

extortative variety, were inseparable from the pure concept of law as such — if this concept were nothing other than a "fact" to whose acceptance there is no alternative but the pain of death.

In "The Temptation of Temptation," his Talmudic lesson on the relation between law and reason, Emmanuel Levinas elaborates a tradition according to which the horizon of coercion and punishment emerges inseparably from the original gift of the law itself. Levinas' text is devoted to a passage from the Tractate *Shabbat* (88*a* and 88*b*) that comments on the simple lines of Exodus 19:17: "Moses brought the people out of the camp to meet God. They took their stand at the foot of the mountain." But the Talmudic passage immediately reinscribes these lines within a kind of rabbinical fiction that opens the horizon of a divine violence. Yahweh threatens to destroy his own people, using the mountain itself as an implement, if they decide not to accept the law that he presents to them. Rabbi Abdimi bar Hama bar Hasa comments that the lines from Exodus "teach us that the Holy One, Blessed be He, inclined the mountain over them like a titled tub and that He said: If you accept the Torah, all is well; if not here will be your grave." The miracle "that there is a law" thus happens as a violent extortion that divides the life of the people to whom the law is delivered. The revelation of the law only becomes a historical event to the extent that the very life of the people suddenly depends entirely upon its acceptance. The threat of divine violence places the Israelites in the position of making the impossible choice between the law and their own extinction.

For Levinas, however, this decision is not simply a forced choice because it occurs before it becomes possible to distinguish between freedom and coercion (unless the "force" in the forced choice names precisely the status of force or violence beyond their determination according to the distinction between freedom and coercion). One significant section of his reading revolves around the apparently nonsensical promise, which the Israelites were supposed to have offered Yahweh once he presented them with the law: "we will do and we will hear." The nonsense of the promise inheres in its inversion of a normative temporal order that the divine commandment generally functions to preserve. To the extent that the commandment prescribes certain deeds that should follow its word, it also prescribes in general that the deed as such should follow the word, that the deed is only possible based on a clear preliminary understanding of the word, and further, based on the presupposition that the word is inherently understandable. Conceived in this way, the form of the commandment inscribes the primacy of reason with respect to the law, the primacy of metalanguage with respect to language. How, then, could one *do* the law without first having *heard* its requirements, or without having scrutinized the ground for its claim to adherence? If this inversion takes place, it would pertain to the horizon of divine violence. Levinas elaborates the praxis that pertains to this inversion in terms of the fulfillment of the law: "To receive the gift of the Torah — a Law — is to fulfil it before consciously accepting it...Not only does acceptance precede examination but practice precedes adherence. It is as if the alternatives liberty-coercion

were not the final ones, as if it were possible to go beyond the notions of coercion and adherence due to coercion by formulating a 'practice' prior to voluntary adherence."[13] The gift of the law is already the fulfillment of the law; the miracle of the law lies in its being accepted without being understood; the fact of the law lies in an act that goes beyond freedom and beyond the will.

Saint Paul's elaboration of "the fulfillment of the law" can be read as both an extension and a transformation of the same tradition. The love for the neighbor fulfills the law in that it constitutes a fundamental praxis from which the authority of the commandment itself would derive. What distinguishes the Christian love for the neighbor from the tradition from which it emerges, however, is that this love moves beyond the threat of every possible violence upon the life of the one to whom the law is addressed. Paul thus opens the trajectory, which culminates in Kant, that makes love for the neighbor into the movement whereby law is gradually detached from the possible enforcement that remains associated with the event of its revelation, a movement that ultimately leads beyond the form of the commandment itself. *Rather than commanding what cannot be done, the prescription to love the neighbor commands what can only be done without being commanded.* "Love *does* no wrong to a neighbor; therefore, love is the fulfilling of the law." The impossibility of the command paradoxically bears witness to a fundamental stratum of possibility, what Kant calls the "practicability" or even the "feasibility" (*Tunlichkeit*) of the moral law.[14] Even where the command has been articulated, the praxis of love itself should always have come before the law that makes it imperative: "For, as a commandment [to "*Love God before all, and your neighbor as yourself*"] it requires respect for a law that *commands love* and does not leave it to one's discretionary choice to make this one's principle. But love for God as inclination (pathological love) is impossible, for he is not an object of the senses. The same thing toward human beings is indeed possible but cannot be commanded, for it is not within the power of any human being to love someone merely on command. It is, therefore, only *practical love* that is understood in that kernel of all laws."[15] Love thus becomes synonymous with an ethical courage: one must always love without fear for one's life. Love is not love that admits the extortion of the violence that subtends every commandment. At the limit, such true unforced love (even the love of God himself) necessarily entails the death of God since its horizon exceeds the reach of his power. If the death of God shows that death itself has an omnipotence beyond the power of divine violence, then love belongs to the horizon of death.

LACAN AND THE DEATH PENALTY

Lacan locates the facticity of *the* law (the fact that there is *a* law) in analytic experience: "The hard thing we encounter in the analytic experience is that there is one, there is a law."[16] If the rudiments of a legal theory could be found in Lacan's writings, they would thus be largely consistent with the tradition that accepts the "hard thing" (or the "miracle") that "there is a law"

without concept and without theory, and that makes this thing itself the basis for the contestation of injustice. Moreover, like Levinas, Lacan finds that this "hard thing" is inseparable from a sovereign violence, and he shows that this violence emerges where the law itself can no longer account for its own existence.

Despite readings that emphasize its analysis of the moral law, Lacan's "Kant with Sade" is as much an engagement with questions of positive legality. According to a tradition that conceives law as divided between these two — moral and positive — poles, Lacan never examines questions of the former without measuring their impact upon the paradigm of the latter. Although the reading of the *Critique of Practical Reason* and its determination of the "doctrine of virtue" belong to the explicit program of Lacan's essay, it also implicitly opens the way for an elaboration of the relation between psychoanalysis and the problems of legal institutions that pertain to the "doctrine of right." Indeed, the proper names invoked by the title itself might well bear witness to such a concern with both major divisions of the *Metaphysics of Morals*: whereas Lacan makes Kant into the name for the determination of the subject by the moral law, he makes Sade into the name for the institution of the moral law as the foundation of right and the possibility of justice. The perverse virtue of the Sadian maxim is not only to introduce the division of the subject (*enoncé*, *enonciation*) there where this division is repressed in Kant by the voice of conscience, but also to introduce the claim upon a *right* there where Kant limited himself to positing a *fact*, that is, the moral law as the "fact" of reason that constitutes the inviolable dignity of the person. In other words, Sade shows that even this universal fact takes place within the horizon of sovereign violence; he demonstrates that, politically speaking, a systematic and potentially infinite *violation* (jouissance) can occupy the place of what Kant calls dignity. The challenge of Sade is his claim that the universal is inseparable from violation and thus that jouissance is inseparable from the possibility of justice. Lacan responds to this challenge by revising both Kant and Sade. On the one hand, he locates the fact of law in desire rather than reason; on the other, like Sade (but also Levinas) he situates this fact within a sovereign violence. For Sade, sovereignty lies in the freedom of transgression, but the sovereignty that matters for Lacan is manifest in the cruelty of the death penalty. Whereas the sovereignty of transgression inheres in the violation of the law, Lacan shows that the death penalty is a paradoxical corollary of Christian charity, and thus that its sovereignty inheres in the fulfillment of the law. Lacan reinscribes this fulfillment as the "autonomy" of desire.[17]

In a discussion of censorship from his seminar of 1954-1955, Lacan examines a law that is formally analogous to the ultimatum that Yahweh delivers to the Israelites. Lacan addresses what he calls a "primordial law": "any man who says that the King of England is an idiot will have his head cut off."[18] The law is primordial because it excludes the position from which its acceptance could be the result of a deliberative act. The death penalty is thus the point at which

the possibility of such an act is excluded. The law is accepted to the precise extent that its non-acceptance entails the death of its addressee.

> I want to show you that any similar law, any primordial law, which includes the specification of the death penalty as such, by the same token includes, through its partial character, the fundamental possibility of being not understood. Man is always in the position of never completely understanding the law, because no man can master the law of discourse in its entirety.
>
> I hope I'm giving you a feeling of this final, unexplained, inexplicable mainspring upon which the existence of the law hangs. The hard thing we encounter in the analytic experience is that there is one, there is a law. And that indeed is what can never be completely brought to completion in the discourse of the law — it is this final term that explains that there is one. [*Et c'est bien ce qui ne peut jamais être complètement achevé dans le discours de la loi — c'est ce dernier terme qui explique qu'il y en a une.*][19]

How does Lacan's version of the death penalty differ from the divine violence that Levinas locates in the rabbinical tradition? The answer to this question can be found in the closing pages of "Kant with Sade": the sovereign violence of the death penalty emerges on the far side of the commandment to love the neighbor. It is, as Lacan writes, "one of the corollaries of Charity."[20] In other words, the death penalty is the sovereign violence that survives the death of God, that goes beyond the divine violence which binds the people to the law. The death penalty is also a violence that binds one to the law, but, whereas divine violence comes from the same God who gives the law itself, the death penalty would come from a different god — or it would name, rather, the sovereign power of death itself freed from reference to any determinate authority. Whereas Yahweh threatens his people with the death that he has the power to administer, the recourse to the death penalty amounts to the deployment of death itself as a power. Although the death penalty remains inseparable from the incomprehensible fact that there is a law, it has a scope that far exceeds the limits of this fact. For Lacan, the problem of the death penalty only emerges with the fulfillment of the law in the love for the neighbor. In fact, following Freud, he describes this roving death as the repressed truth of the love for the neighbor — such that it becomes possible for him to understand the fulfillment of the law starting from the death penalty rather than from love. Rather than the revelation of the law in its praxis, the fulfillment of the law thus exposes the dimension of a sovereign violence that is irreducible to the law. The fulfillment of the law exposes that the fact of the law does not belong to the horizon of the law, and thus what Lacan calls *ethics* corresponds to the fulfillment of the law in this sense.

These considerations might help to measure the complexity of Lacan's assessment of Sade's position in the last pages of "Kant with Sade." Lacan's basic point is that, despite Sade's systematic apology for transgression and destruction, the logic of his demonstration remains bound to what Saint Paul called the "curse of the law." Lacan limits himself entirely to the closed set of "opportunities" opened by the explicit prohibitions (rather than the mere fact) of the law. The

logic of the argument thus gestures toward that fulfillment in which tradition upholds the event of a miraculous rupture with this malediction:

> Sade thus stopped, at the point where desire is knotted together with the law. If something in him held to the law, in order there to find the opportunity Saint Paul speaks of, to be sinful beyond measure, who would throw the first stone? But he went no further.
>
> It is not only that for him as for the rest of us the flesh is weak, it is that the spirit is too prompt not to be lured. The apology for crime only pushes him to the indirect avowal [*aveu détourné*] of the Law. The supreme Being is restored in Maleficence.[21]

This avowal of the law does not amount to a confession of sin. Lacan is not saying that Sade's apology for crime ultimately becomes an elaboration of guilt and thus a personal appeal for forgiveness. The apology for crime as such can only be an avowal of the fundamental sin of subjection to the law and an appeal for expiation from this sin — an appeal, in other words, for expiation from the malediction of the law itself. In this sense, the avowal of the law restores the supreme Being to the extent that it functions as a demand perhaps addressed to the power of what Walter Benjamin calls "divine violence," which constitutes a form of retribution that "purifies the guilty, not of guilt, however, but of law." "For with mere life," Benjamin writes, "the rule of law over the living ceases. Mythical violence is bloody power over mere life for its own sake, divine violence pure power over all life for the sake of the living."[22]

For Lacan, however, the confession that appeals to the power of such expiation implies a disavowal of what Schönberg called the *miracle* of the law, what Kant called the *fact* of the moral law, or what Lacan himself (in the last lines of "The Subversion of the Subject and the Dialectic of Desire," which immediately follows "Kant with Sade" in the *Écrits*) called "the Law of desire." *Desire is the facticity of the law from which expiation is not possible.* (And the dictum from the *Ethics* seminar, "do not give up on your desire," would have a similar status to Schönberg's exhortation). The death penalty is the point at which the possibility of such expiation definitively withdraws. The fulfillment of the law toward which Lacan's analysis of Sade gestures would be nothing other than the mere presentation of the law beyond expiation.

Much like Saint Paul, Lacan situates the "Christian commandment" ("love your neighbor as yourself") beyond the logic of transgression to which the curse of the law restricts the subject. And he makes clear that Sade, in staging his apology within the parameters of the law's dictates, keeps a distance from the implications of this commandment unto Christian charity. For Lacan, however, this commandment does not imply a pacified love between men, but rather the absolute hostility that Freud associated with it in *Civilization and Its Discontents.* Sade's extensive apology for crime functions to recoil from this dimension of *méchanceté*: "We believe that Sade is not close enough to his own wickedness to recognize his neighbor in it. A trait which he shares

with many, and notably with Freud. For such is indeed the sole motive of the recoil of beings, sometimes forewarned, before the Christian commandment."[23] As evidence of this recoil, Lacan cites Sade's rejection of the death penalty. "For Sade, we see the test of this, crucial in our eyes, in his refusal of the death penalty, which history, if not logic, would suffice to show is one of the corollaries of Charity."[24] Much as Levinas finds that the fulfillment of the law is overdetermined by a relation between the people and the threat of divine violence, Lacan finds that the history and logic of the death penalty is internal to the fulfillment of the law in the love for the neighbor. To oppose the death penalty, as Sade does, amounts to rejecting the facticity of the law, and thus to repressing the autonomy of desire. In other words, desire as such becomes legible only within the horizon of a sovereign violence. Carl Schmitt famously identifies such violence with the contingent possibility of a decision on the exception embodied by the person of the sovereign — the decision to suspend the validity of the entire law in states of emergency. For Lacan, this horizon becomes the "sinuous" line that constitutes the topology of the fantasy.

1. Martin Luther King, Jr., *A Testament of Hope: The Essential Speeches and Writings of Martin Luther King, Jr.*, ed. James M. Washington (San Francisco: Harper & Row, 1986), 293.

2. John Rawls, *A Theory of Justice*, rev. ed. (Cambridge: Harvard University Press, Belknap Press, 1970), 3.

3. See Hans Kelsen, *Introduction to the Problems of Legal Theory,* trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 1992); and Jacques Derrida, "Force of Law: 'The Mystical Foundation of Authority,'" trans. Gil Anidjar, in *Acts of Religion*, ed. Gil Anidjar (New York: Routledge, 2002). For a discussion of Kelsen and Derrida, see Margaret Davies, "Derrida and Law: Legitimate Fictions," in *Jacques Derrida and the Humanities: A Critical Reader*, ed. Tom Cohen (Cambridge: Cambridge University Press, 2001). Throughout this paper, I am further indebted to Juliet Flower MacCannell's reading of Rousseau with Lacan — especially her understanding of the social contract as the "negative law" of universal dispossession. What seems ultimately at stake in such a reading is the determination of whether democracy is essential to the concept of the political, or whether, as Carl Schmitt decided, the concept of the political only emerges with the suspension of the regime of democratic legality. See Juliet Flower MacCannell, *The Hysteric's Guide to the Future Female Subject* (Minneapolis: University of Minnesota Press, 1999). See also Willy Apollon's "Introduction" to *Lacan, Politics, Aesthetics,* ed. Willy Apollon and Richard Feldstein (Albany: State University of New York Press, 1996).

4. The list of attempts to emancipate legal theory from such an entrenchment would also have to include the psychoanalytic teaching of Jacques Lacan, which I will address later in the paper, and Antonio Negri's communist theory of the state. See Antonio Negri, *Insurgencies: Constituent Power and the Modern State,* trans. Maurizia Boscagli (Minneapolis: University of Minnesota Press, 1999); and Michael Hardt and Antonio Negri, *Labor of Dionysus: A Critique of the State-Form* (Minneapolis: University of Minnesota Press, 1994).

5. Kelsen, 26.

6. Derrida's elaboration of the question is incompatible with Kelsen's theory, however, in that, for Derrida, the force of law can never be theorized simply as a "norm," comprehended in terms of a generic attribute. The epistemological aspirations of the theory of law will always encounter insuperable obstacles in the force of law. For Derrida, as for Walter Benjamin, whose text provides the occasion for his intervention, the theory of law must always begin — and perhaps end — with a critique of violence. I will return to this point later, but in connection with a discussion of the presentation of law in psychoanalysis.

7. Rawls, 320.

8. Ibid., 322.

9. Ibid.

10. This aspect of civil disobedience is perhaps not far from the Stoic "contempt" that, at one point in his analysis of Kant and Sade, Lacan levels against the Sadian experience of jouissance. "What [pain] is worth for Sadian experience will be better seen by approaching it through what, in the artifice of the Stoics, would dismantle this experience: contempt...Imagine a revival of Epictetus in Sadian experience: 'See, you broke it,' he says, pointing to his leg. Lowering *jouissance* to the destitution of such an effect where its pursuit stumbles, isn't this to turn it into disgust?" Lacan, "Kant with Sade," trans. James B. Swenson, Jr., *October* 51 (winter 1989): 60. (This translation will be slightly modified throughout.)

11. Arnold Schönberg, *Das Chörwerk*, Sony 2K44571. For an important discussion of the law in Schönberg's opera *Moses und Aron,* see Massimo Caccari, *Icônes de la loi,* French

trans. Marilène Raiola (Paris: Christian Bourgois, 1990). (English translation forthcoming from Stanford University Press.)

12. See Gershom Scholem's essay, "Revelation and Tradition as Religious Categories in Judaism" in *The Messianic Idea in Judaism, And Other Essays on Jewish Spirituality* (New York: Schocken Books, 1971).

13. Emmanuel Levinas, *Nine Talmudic Readings,* trans. and intro. Annette Aronowicz (Bloomington: Indiana University Press, 1990), 40.

14. Immanuel Kant, *Critique of Practical Reason*, ed. and trans. Mary Gregor (Cambridge: Cambridge University Press, 1997), 66. "Fontenelle says: *'I bow before an eminent man, but my spirit does not bow.'* I can add: before a humble common man [*einem niedrigen bürgerlich-gemeinen Mann*] in whom I perceive uprightness of character in a higher degree than I am aware of in myself *my spirit bows*, whether I want it or whether I do not and hold my head ever so high, that he may not overlook my superior position. Why is this? His example holds before me a law that strikes down my self-conceit when I compare it with my conduct, and I see observance of that law and hence its *practicability* proved before me in fact."

15. Ibid., 71.

16. Lacan, *The Seminar of Jacques Lacan, Book II: The Ego in Freud's Theory and in the Technique of Psychoanalysis, 1954-55*, ed. Jacques-Alain Miller, trans. Sylvana Tomaselli (New York: Norton, 1991), 129. (This translation will be slightly modified throughout.)

17. See Lacan, *Écrits* (Paris: Seuil, 1966), 814.

18. Lacan, *The Ego in Freud's Theory*, 128.

19. Ibid., 128, 129.

20. Lacan, "Kant with Sade," 74.

21. Ibid.

22. Benjamin, *Reflections: Essays, Aphorisms, Autobiographical Writings*, ed. and intro. Peter Demetz, trans. Edmund Jephcott (New York: Schocken Books, 1978), 297.

23. Lacan, "Kant with Sade," 74.

24. Ibid.