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Sovereignty, Genealogy, and the Critique of State Violence

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ABSTRACT

While the immediate aim of Walter Benjamin's famous essay, "Critique of Violence," is to provide a critique of legal violence, commentators typically interpret it as providing a further critique of *state* violence. However, this interpretation often receives no further argument, and it remains unclear whether Benjamin's essay may prove analytically relevant for a critique of state violence today. This paper argues that the "Critique" proves thusly relevant, but only on condition that it is developed in two directions. The first direction is conceptual, and consists in an explanation of the necessary relationship between states and violence. This explanation is found by appealing to a concept not cited in Benjamin's text, but which, I argue, remains its implicit basis: sovereignty. According to this conceptual development, state violence is the necessary result of the state's attempt to maintain its sovereign law at the expense of emancipatory struggles to generate non-sovereign law. The second direction is genealogical, and consists in destabilizing the modern belief that justice is best served through the judicial channels of a sovereign state. Here I employ Michel Foucault's genealogical research to demonstrate the historical contingency of state justice and, by extension, the possibility of a justice beyond the state.

1 | INTRODUCTION

Today, as perhaps always, state violence abounds. Whether against its poor, immigrant, racialized or feminized subjects, or against those unfortunate to reside in nations on which it has declared war, the state exercises force on a daily basis, threatening, coercing, and often taking life. A critique of state violence thus seems like a necessary condition for critical theory to fulfill the emancipatory vocation with which it has long been identified.¹ Yet a successful elaboration of this critique is perhaps more elusive than at first glance. For its target, following Walter Benjamin (2006a), would lie not merely in the

“particular laws or legal practices” that promote violence. Instead, it would consist in the “legal system root and branch” (Benjamin, 2006a, p. 242), which is responsible for the upholding of unaccountable state power as such. In particular, Benjamin’s famous 1921 essay, “Critique of Violence,” sought to deflate the common assumption that with the right ends, the state could in principle pursue just means towards these ends, and that any violence thereby employed could be both minimal and legitimate. Benjamin argued instead that *all* legal means necessarily reverted to the same, illegitimate end of merely restoring power. By locating the structural necessity of the reversion of law to illegitimate or “mythic” violence, Benjamin’s critique thus sought to explain the prevalence of state violence through history. Absent this structural explanation, any critique remained “impotent” (2006a, p. 242). A critique of state violence today thus seems to minimally require that it target not mere instances of violence, viewed as contingent phenomena, but rather the “system root and branch.”

In what, for Benjamin, did this system precisely consist? The primary object of the “Critique” is legal violence, and so the system may appear, *prima facie*, to be exhausted in the legal system. And yet Benjamin’s focus on law slides, at times, into an apparent consideration of “power” in general, and “state power” in particular. Thus, in the concluding paragraph of the essay, Benjamin cites the “abolition of state power” as the result of the “deposition (*Entsetzung*) of law with all the forces on which it depends as they depend on it” (2006a, pp. 251-52).² Elsewhere, Benjamin links the paradigmatic violence of the police and militarism not to law as such, but rather to the state and its own ends. Such suggestive gestures no doubt help to explain why numerous commentators have read the text not only as a critique of law, but also as a critique of state violence or of the state *tout court* (Bohrer, 2015; Butler, 2006, 2012; Derrida, 1992; Erlenbusch, 2010; Loick, 2019). On this reading, law is typically taken to be the law *of the state*, and as such a guarantor of its power or an instrument of its interests. Accordingly, the critical intention of Benjamin’s essay would be less to indict law as such, than to indict the legal violence specifically deployed by state power. The analytical separability of law and state

implicit in this reading would then open the conceptual possibility of a radical democratization of the law and its autonomization from statist logics or institutions that otherwise tie it to undemocratic ends.³ Yet in most scholarship, this step from a critique of legal means-ends logic to that of the state remains unproblematized, and is typically assumed without further argument.⁴ Hence while a cursory reading of Benjamin's essay renders it apparently available as a critique of the state, the specific relationship between state and legal violence remains unclear.

A further difficulty in reading "Critique of Violence" as a critique of the state follows from the entirely underdetermined concept of the state and state power found therein. What the state is, how it serves as the source of law while remaining in principle distinct from it, why it perpetrates legal violence, and why the deposition of law entails the abolition of state power, all remain unclear. Moreover, that the identity of the state cannot be simply assumed—that the state is in some sense a plural and complex configuration of offices, interests, functions, representative bodies, and "governmentalities" which stands in need of further elaboration—has long been a major point in both philosophical and social scientific scholarship alike (Foucault, 2007a, 2008; Mitchell, 1991). Thus while Benjamin provides a compelling presentation of the *form* of law (to be discussed below), he offers no parallel discussion of the form, or nature, of the state. And thus, even if somewhat intuitive, the slide from law to state seems to lack philosophical justification, at least when such a justification is sought exclusively in Benjamin's essay. If the common reading of Benjamin's critique of law as a critique of the state is to be maintained, and if this critique is to provide political guidance today, then it seems to require a further account of *why* the state is structurally compelled to instigate the violence of its law.

This article contends that the common reading is the correct one and that Benjamin's essay carries contemporary relevance for a critique of state violence—but only on condition that it is developed in two directions. The first direction is conceptual, and consists in an explanation of the necessary relationship between states and violence. This explanation is found by appealing to a concept

not cited or elaborated in Benjamin's text,⁵ but which, I argue, remains its implicit basis: *sovereignty*.⁶ It is ultimately the state's claim to sovereignty that explains its oscillating employment of law-preserving and law-positing violence. Taking up Christoph Menke's (2018b) recent interpretation of Benjamin's essay, I argue that it is not the form of law that requires and perpetually reproduces legal violence, but rather, the logic of sovereignty which compels the state to organize violence for the protection of its own monopoly over law-positing authority and the legitimate use of force. I argue further that *threats* to sovereignty, or to the law of the state, are foremost responsible for provoking this violence. Through his essay, Benjamin invokes multiple instances of challenges to the law, whether that of the workers' strike, or of the criminal's illegal acts. I read these instances as examples of "counter-law," which challenge sovereign legality by proposing another law in its place. To reassert its sovereignty, and to reimpose law on counter-law, the state must ultimately deploy its own law-positing violence. It must make (again) the law where the law has been deposed by social or political contestation. By developing Benjamin's critique with the concept of sovereignty, we thus find that it is the pretension to sovereignty in instances of the contestation of sovereignty that explains the necessary violence of the state.⁷

The second direction in which Benjamin's essay must be developed is a genealogical direction. That sovereignty, or law tied to the state, conceptually requires at least minimal coercion is not an observation original to Benjamin (Habermas, 1996; Hobbes, 1985; Kant, 1999). Benjamin's contribution to this critical tradition instead primarily consists in his further argument that such coercion is *in principle* illegitimate. The success of this argument ultimately requires reference to Benjamin's concept of divine violence, which purports to demonstrate the possibility of a justice beyond the violence of the state. Only such an external or "transcendent" (Honneth, 2009, p. 98) perspective allows a view on an alternative to the violent means otherwise taken to be the necessary, if unfortunate, price for justice. Thus divine violence is taken to provide evidence of the separability of justice and the state; it shows that justice is accessible beyond the political monopoly exercised over it. In appealing to a sacred world

or justice “to come” (Benjamin, 2005, p. 664, 2006c, p. 226; Derrida, 1992, p. 27), Benjamin thus achieves leverage to destabilize the modern unity of justice and the state. Yet the esoteric concept of divine violence has long troubled commentators, who have often viewed it either as “theocratic” and entailing an incongruous dependence on the action of God (Honneth, 2009, p. 125), or else as dangerously close to Schmitt’s concept of exception and even analogous to Nazi violence (Derrida, 1992; Weber, 2008). While other commentators have, I think, successfully defended this concept and the related idea of a “deposition of law” (Agamben, 2005; Loick, 2019), its availability for a normative argument against state violence remains questionable.

I argue that a more immediately successful means of destabilizing the unity of justice and state is found in genealogy. In its typical formulation, genealogy is understood to demonstrate the contingent origin of our beliefs, values, and institutions, which in turn removes their sense of necessity and renders them more available to transformation in the present (Koopman, 2013; Saar, 2002.) To develop Benjamin’s critique in a genealogical direction would thus mean to “problematize” (Foucault, 2007b) the historical origin of the state monopoly of justice. Doing so would arrive at the same conclusion as the appeal to divine justice, but by more secure means: by demonstrating that the state has not always maintained a monopoly of justice and legitimate violence, a justice outside or beyond the state becomes conceivable as an alternative in the present. Thus where Benjamin posits a positive alternative to sovereign justice in the form of divine violence, and thereby secures his standpoint of critique, genealogy would proceed immanently and negatively, by showing the historical contingency of the former. Accordingly, I argue that Michel Foucault’s (2019) recently published lecture course, *Penal Theories and Institutions*, genealogically develops Benjamin’s critique by problematizing the origin of sovereign justice in the early modern consolidation of state power. In what I term Foucault’s genealogy of state violence, Foucault traces the history of the “state takeover and control of justice” (2019, p. 171) from previously decentralized and non-statist practices of feudal justice. Foucault thus identifies the

contingent emergence of the state's monopoly of legitimate violence, which is otherwise assumed in Benjamin's critique. Accordingly, Foucault historicizes and denaturalizes the mythic violence of the state, and thereby offers immanent grounds for its critique. By developing Benjamin's critique genealogically, we find that the state's claim to offer the only means of reducing violence is historically false, and cannot legitimately impede advocacy for a "justice to come."

Thusly developed in conceptual and genealogical directions, Benjamin's original analysis of law provides powerful resources for a contemporary critique of state violence by 1) explaining the necessary violence of sovereignty, and 2) revealing the contingent unity of justice and the state. Given the prevalence of state violence today, this critique may contribute to the realization of the emancipatory vocation of critical theory. I begin, in Section 2, by conceptually developing Benjamin's essay as a critique of sovereignty, before turning, in Sections 3 and 4, to its genealogical development.

2 | BENJAMIN'S CRITIQUE OF SOVEREIGNTY

Benjamin's critique of violence is simultaneously a critique of critiques of violence. In fact, his essay is largely structured as a critical response to attempts made by natural and positive legal traditions to distinguish between legitimate and illegitimate uses of violence. Benjamin is foremost concerned with rejecting the "dogma" shared by both traditions that "just ends can be attained by justified means, justified means used for just ends" (2006a, p. 237). Adopting this dogma, natural law views violence as illegitimate when used for unjust ends; positive law views it as illegitimate when the procedures through which it is adopted are unlawful. Benjamin's central strategy is to demonstrate that violence construed as means is *always* illegitimate, no matter what its ends or procedures of adoption. He does so by arguing that violence, as Christoph Menke puts it, "cannot *remain* a mere means, that it does not 'abdicate,' and instead becomes the secret purpose of law itself" (2018b, p. 31). Violent means inevitably transform themselves into "violence crowned by fate," or "mythic" violence (Benjamin, 2006a, pp. 242,

248), which frees itself from its original context of justification in order to merely reassert the authority of law itself. Or, in other language used by Benjamin, instances of law-preserving violence always revert to a law-positing violence that is by nature unaccountable to the subjects over which it is exercised. The “critique of the legal system root and branch” consists, then, in revealing the immanent tendency of *all* legal means to exercise violence for the sole end of reestablishing power. As Benjamin puts it, “power [is] the principle of all mythic law-positing” (2006a, p. 248).

In what does the violence of law consist? In his recent reading of Benjamin’s critique, Menke argues that violence therein does not consist—or does not only consist—in acts of physical coercion. More significantly, violence consists in law’s “mode of operation” (2018b, p. 31), or its specific form of normativity whereby the application of law presupposes its imposition on *non-law*. In reverting, necessarily, to law-positing violence, law must ultimately repeat its own origin, which occurs through the imposition of a legal order on a non-normative sphere lying outside the law. To preserve itself, the law must always reestablish law in conditions of the absence of law. The violence here consists in the necessarily non-normative or unjustifiable imposition of law on subjects who, outside the law, thereby cannot recognize it as legitimate. Violence is thus “the manifestation of the normative vis-à-vis the non-normative” (Menke, 2018a, p. 214) or of law vis-à-vis non-law.⁸ Menke locates this opposition within the *form* of law itself. Non-law is seen as a presupposition of law, or as an internal requirement for all legal normativity whatsoever. As such, non-law entails the perpetual failure of law, insofar as law must constantly reproduce it as the sphere in which it intervenes: “Law can never be conclusively enforced, can never prevail over non-law, because law itself engenders what it aims to prevail over in its enforcement.... Law cannot leave the act of its instauration behind. To be compelled to repeat it endlessly is the fate or the violence of law” (Menke, 2018b, 32).

In respective replies to Menke’s “Law and Violence,” Daniel Loick (2018) and Andreas Fischer-Lescano (2018) have contested the central thesis that violence is a necessary feature of law as such. Both

argue instead that violence is a *contingent empirical feature* of law, and should instead be attributed to the political forms to which law has been externally attached. To establish its contingency, Loick demonstrates the conceptual possibility of a non-coercive law by appealing to Kant's idea of an international law organized not through force but in accord with the regulative ideal of perpetual peace (Kant, 1996). Loick offers further empirical evidence for his counterargument by citing the historical existence of Jewish diasporic law, whose distance from any state apparatus, he contends, has rendered it non-coercive. While the primary intention of Loick's response is just to show the conceptual possibility of a separation between law and violence, an implicit claim is that the source of violence is instead to be found alternately in the state or sovereignty. Thus Loick construes Jewish law as "a law without sovereignty" while he articulates Benjamin's aim as that of "defend[ing] a non-statist form of commandment that can be seen as opposing or distancing itself from the state" (2018, pp. 102, 103). Fischer-Lescano similarly locates violence not in law as such, but in the homogenizing and communitarian polity with which Menke identifies it (2008, pp. 170-1). For the latter philosopher, Menke's misstep lies in applying this Westphalian concept of law to an epoch in which law is no longer exclusively generated from sovereign nation-states. In arguing for the possibility of a fully democratized law instead, Loick and Fischer-Lescano thus contend that violence is not inherent to law, but rather to the political forms of state and sovereignty.

These critical responses to Menke rely less on Benjamin's critique than on philosophical texts and empirical legal practices that fall outside of it. In what follows, I attempt to reach the same conclusion, but by way of a strategy that hews more closely to the letter of "Critique of Violence"; the essay itself, I contend, locates violence not in law as such, but rather in sovereignty. My primary strategy is to challenge Menke's claim that the division between law and non-law, or between the normativity of law and the non-normativity of that on which it is imposed, is sufficient to explain the genesis of violence. As has been seen, for Menke, this division is internal to the form of law, and constitutes its

inevitable violence. As he further writes, “The legal idea of normativity presupposes and hence *creates* the conceptual possibility of extra- and non-legal behavior” (2018a, p. 215). Yet another distinction must be made between this conceptual possibility of non-legal behavior, and the further violence that law imposes on the latter. These are two separate steps that Menke collapses into one: from the possibility of non-legal behavior, coercion doesn’t necessarily follow. For in fact, non-legal behavior often goes unchallenged by the law; law often permits and even implicitly condones action that violates its letter.⁹ Hence what is missing from Menke’s account is an explanation of the *motivation* that law has to enact actual violence. While the conceptual possibility of non-law follows from the legal idea of normativity, what is left unexplained—and indeed, what a wholly immanent analysis of law *cannot* explain—is when and why law intervenes in a non-legal sphere, in order to posit the law.

On the other hand, Benjamin’s essay provides a fairly straightforward account of the cause of this violent intervention: the establishment of a new or *counter-law* in opposition to that of the state. Here, Benjamin’s examples are instructive. The revolutionary general strike, educational violence, and the “great” criminal all represent not a kind of naturalized non-law, but instead their own immanent normativity and lawfulness, which authorize a violence unsanctioned by the state’s law. As Benjamin emphasizes, it is not their illegality *per se* that is found threatening to the state. In other words, it is not non-law as such that provokes its intervention. Instead, it is the “mere existence outside the law” (Benjamin 2006a, p. 239) of a violence which posits its *own* law that elicits retaliation. As Benjamin puts it, “The state ... fears this violence simply for its law-positing character” (2006a, p. 240). It is not the brute fact of violence that arraigns itself against the state, but rather, its counter-normativity. Thus while an immanent analysis of law may deliver a view on the generation of a conceptual *possibility* of non-law, an explanation for the *intervention into* non-law (or counter-law) must look outside law. Menke has successfully demonstrated that violence is an immanent potentiality of all law. But on Benjamin’s account, it is only a “new law” (2006a, p. 240) which finally prompts the latter to actualize.

Accordingly, in place of Menke's explanatory pairing of law and non-law, I propose, as closer to Benjamin's intent, a pairing of law and *counter-law*.¹⁰ Counter-law would not be free of legal normativity, as is implied in the concept of non-law, which Menke also associates with the "natural" or *physis* (2008b, p. 214). Instead, counter law would present a normativity counter to, or opposing, that of the state. Thus, counter-law would provoke legal violence because its autonomous normativity threatens legal authority *tout court*.

What, more precisely, is entailed by "counter-law"? Benjamin's text suggests a spectrum of phenomena that would fall under its description, from overt and revolutionary challenges to the law, to more quotidian forms of life that evade law's normativity by subtler and less confrontational means. My use of the concept borrows from Foucault. In his *Penal Theories and Institutions* (to be canvassed below as a genealogical development of Benjamin's critique), Foucault documents the development of modern French penal institutions and strategies in the context of 17th century peasant revolts. Above all he focuses on the 1639 revolt of the *Nu-pieds*, which reached such a scope and intensity as to directly challenge the law of the state. As this revolt spread through the countryside, it developed its own law—in my terminology, *counter-law*—to *replace* that of the state. In this context, Foucault writes that for the *Nu-pieds*, "rejection of the law is at the same time a law (it is like the other side of the law...); the rejection of justice is like the exercise of justice" (2019, p. 28). Here the revolt exceeds a merely negative or subversive attempt at legal evasion to instead pose a competing legal authority. In this, its most robust sense, counter-law thus represents a positive construction of legal and political power, a "reflection" of power (Foucault, 2015, p. 29) or, as Étienne Balibar has commented, a kind of "double power" (2015). In Benjamin's essay, this end of the spectrum of counter-law is exemplified by the revolutionary or proletarian general strike, which "sets itself the sole task of destroying state power" (2006a, p. 246).

Yet Benjamin's essays also characterizes educational violence and the figure of the criminal as significant threats to law, and thus I contend that phenomena like these—which fall short of the revolutionary threats of peasant uprisings or general strikes—may also be considered instances of counter-law. Here counter-law is not literally the positive law of a competing political authority, but instead, a stand-in for a normativity opposed to state-sanctioned rules and norms. Thus even some “forms of life” may be construed as instances of counter-law, provided they somehow challenge or subvert the law. As “clusters of social practices” that include “attitudes and habitualized modes of conduct with a *normative character* that concern the *collective conduct of life*” (Jaeggi, 2018, p. 41), forms of life are often political and transgressive (Loick, 2017). Even while not aiming to topple state power, they often provoke violent state responses. Such forms of life recognize as legitimate not the norms and values that receive the sanction, and often material support, of the state, but those issuing from entirely different sources. A further example of this sort of normativity is found in Benjamin's appeal to “[c]ourtesy, sympathy, peaceableness, [and] trust” as constitutive of a “sphere of nonviolent means” autonomous from the state and pursuing its own, nonviolent form of conflict resolution (2006a, p. 244). What the concept of counter-law helps to crystallize is thus that legal violence intervenes not on a passive or merely natural sphere *outside* the law, but rather one that stands *in opposition* to it, even when this opposition is the often subtle and subversive opposition of a form of life. Menke writes, as quoted above, that “violence means the manifestation of the normative vis-à-vis the non-normative” (2018a, p. 214). In fact, a closer reading of Benjamin's examples, and their development through the concept of forms of life, shows that violence often instead manifests the normative vis-à-vis the *counter-normative*.

Rearticulating violence as a violence on counter-law also addresses the apprehension that an overemphasis on the vulnerability of subjects of state violence tends to deprive the latter of the agency with which they in fact contest it. Judith Butler has expressed this apprehension by querying whether

the very discourse of “vulnerability,” often deployed in analyses of state violence, “denies women, queers, trans people, and people of color (more generally) their networks, their theory and analysis, their solidarities, and their power to wage an effective opposition” (2020, p. 191). Butler’s worry is primary political; the specific danger inherent in this discourse, she argues, consists in supposing that vulnerability itself is a sufficient starting point of politics, rather than the actual struggles already underway. But to this political worry we may add a specifically analytical one. For if critique, according to the influential formulation of Marx, foremost involves the self-clarification of the struggles and desires of an epoch (1978, p. 15), then a critique of state violence would thus minimally require an analysis of actual struggles against it. It is from the vantage point of these struggles that the logic of state violence—here construed as the imposition of law on counter-law and, as I argue below, the reassertion of a contested sovereignty—can be best elucidated. In focusing on instances of counter-law, Benjamin’s essay crystallizes an essential form of state violence deployed against numerous emancipatory struggles today.

This concept of counter-law, however, challenges Menke’s central premise that the critique of violence may remain immanent to the analysis of law. For unlike non-law, counter-law is not a presupposition of law. Law’s immanent production of the possibility of non-law does not extend to actual instances of counter-law; the latter are instead contingent, empirical phenomena that follow from agential action rather than conceptual necessity. Hence law alone can no longer explain the generation of legal violence. Instead, violence will require a different explanatory principle.

This explanatory principle is found, I contend, in the concept of sovereignty. Benjamin’s implicit use of the concept is signaled perhaps most clearly not in his “Critique,” but rather in a fragment written the year before it, in which he characterizes the state as “the supreme organ of law” and the “supreme legal authority” (2006b, pp. 231, 232). This characterization tracks what the classical theory of sovereignty, beginning with Bodin, considered to be sovereignty’s first and most important prerogative,

from which all others followed. As Bodin put it, “This same power of making and repealing law includes all the other rights and prerogatives of sovereignty, so that strictly speaking we can say that there is only this one prerogative of sovereignty, inasmuch as all the other rights are comprehended in it” (2001, p. 58). In his *Leviathan*, Hobbes confirmed this basic interpretation, by characterizing the sovereign as “the sole Legislator,” from whom the power to make and abrogate law could only be divorced at cost of dissolving sovereignty itself (1985, pp. 312-313). That this classical legal concept of (internal) sovereignty is at the heart of Benjamin’s essay is further attested by its construal of *law-positing* as the core of state power; and also by his claim (quoted above) that state’s fear of violence is caused primarily by “its law-positing character.” Following from the latter claim is the idea that the danger inherent in violence is its capacity to license an authority besides that of the sovereign. Counter-law threatens not law alone, but also sovereignty’s exclusive claim to it. Thus, while I agree with Daniel Loick that sovereignty is “precisely the political construct he [Benjamin] has in mind,” my own analysis departs from his view that it is foremost the “concentration of violence foreign to it” that “threatens the state in its essence” (Loick, 2019, pp. 89, 90). Instead, I contend, it is not violence *per se* that threatens the state, but rather the law-positing power *within* violence, the anti-sovereign force of counter-law.

Reinterpreting Benjamin’s essay as a critique of sovereignty makes sense of his multiple appeals to an unqualified “power,” presented as somehow lying at the root of law. For example, Benjamin writes that “Law-positing is powermaking, assumption of power,” and (as quoted above), “power [is] the principle of all mythic law-positing” (2006a, 248)—but absent the concept of sovereignty, these statements remain vague and underdetermined. It’s not clear in what this power consists, or to whom it is attributed. Thus I suggest that power here refers foremost to the integrity of sovereignty. It is thus the assumption of *sovereignty* that is immanent to law-positing, and sovereignty that provides the principle of mythical law-positing. This interpretation is further confirmed when Benjamin finds in constitutional law and the drawing of borders a quintessential or “primal” expression of power (2006a, pp. 248-249).

Such phenomena provide classic examples of the establishment of the law and geographical bounds of a *sovereign* polity. Recall that the core of Benjamin's critique is the idea that the use of violence as means *always* reverts to an unaccountable law-positing violence pursued as an *end*. With my proposed reading, we can now make sense of this necessity. Law must always revert to law-positing violence, not because its ultimate aim is the preservation of law as such, but because its aim is the preservation—or refounding—of sovereignty.

Benjamin's critique of sovereignty is also, as I have suggested and many commentators at least assumed, a critique of the state. For it is above all the state that levels the claim to sovereignty; it is the state that deploys violence in the name, and interest, of maintaining its own sovereignty. Here Benjamin appropriates Weber's famous concept of the state as "the only human community that (successfully) claims a *monopoly on legitimate physical violence* for itself, within a certain geographical territory" (Weber, 2020, p. 46). In Benjamin's essay, this monopoly is seen as sovereignty's vehicle, its primary mode of self-reproduction. Because the monopoly of violence and sovereignty are not identical concepts,¹¹ Benjamin's (presumably deliberate) use of the former term signals his recognition that the state as such remains a primary purveyor of political violence. Thus while the principle that requires the violent suppression of counter-law remains sovereignty, the executive and legislative means by which it is carried out are found in the state. It is in the concept of the monopoly of violence that Benjamin's critique becomes legible not just as a critique of state violence, but also of the state as such: if, with Weber, the state is seen to existentially depend on its monopoly of violence, then it must persistently deploy violence to maintain this monopoly, and thus its own existence. Benjamin unequivocally expresses this critique in his fragment written a year before his more famous essay. There he describes his own "moral philosophy" as "a theory that denies a moral right not to force as such but to every human institution, community, or individuality that either claims a monopoly over it or in any way claims that right for itself from any point of view" (2006b, p. 232). Accordingly, Benjamin departs from Weber,

who considered the monopoly of violence legitimate on the grounds that it established security within the polity. Instead, Benjamin contended that this monopoly was ultimately the state's instrument for the perpetuation of a violence just as mythical as that which it purports to leave behind.

The contemporary relevance of this critique of violence is perhaps most obvious in Benjamin's brief discussion of the police. In this "institution of the modern state," Benjamin claims, "the separation of law-positing and law-preserving violence is suspended" (2006a, pp. 242, 243). Accordingly, law-preservation—in contemporary terminology, law "enforcement"—slides inevitably into law-positing violence insofar as the police are ultimately tasked with restoring sovereignty with means that include the right to make decrees, i.e. new law. Any account of police violence today doubtless requires further analysis of its deeply racialized and classed character.¹² While Benjamin's critique abstracts from this character, it nonetheless provides tools for a critique of systemic police violence by highlighting the necessarily extra-legal moment of *all* law enforcement. Police violence, for Benjamin, thus provides a privileged example of a legal means which, under the initial pretension of law-preservation, reverses into brute, law-positing force that exceeds any possible justification in the enforcement of "law and order." Commenting on Benjamin's discussion of police, Axel Honneth argues that the latter generalizes from the political instability of his own historical moment, and fails to consider whether "democratic societies could develop civil resources to control the police and military" (Honneth, 2009, p. 114). Yet Benjamin's analysis pre-empts such considerations by underscoring, as I have shown, the necessarily illegitimate violence that accompanies all legal means—even those apparently determined through democratic channels.¹³ This analysis would also likely prove applicable to other instances of contemporary state violence that lead to bodily injury or death under a claim of preserving the law; border violence, which is used by state or state-authorized forces to enforce nation-state boundaries, would perhaps be only the most symbolic of these. Thus the analysis provides a means for the critique not of mere, surface-level "abuses" (Honneth, 2009, p. 114) but rather the "system root and branch"—

by which Benjamin ultimately means, as I have argued, sovereignty. The critique of state violence is thus a critique of the state's aspiration to sovereignty, and of its organization of violence against all challenges to its sovereign law.

3 | JUSTICE

The purported aim of sovereign law, however, is justice. In achieving a monopoly of legitimate violence, sovereignty claims to definitively constrain all instances of illegitimate social violence. Here, law itself assumes the form of justice, as “legal forms of decision-making are introduced to disrupt the endless sequence of violence and counterviolence and counter-counterviolence” (Menke, 2019a, p. 3). At this point in my article, one might worry that Benjamin's critique of law and sovereignty ultimately advocates a regression to pre-judicial methods of conflict-resolution, by which admittedly imperfect state judicial processes are replaced by the caprice of vengeance, or where minimally formal equality before the law yields to the rule of the strongest. With the “deposition of law ... and the abolition of state power,” is the possibility of justice likewise abolished? How is conflict-resolution and the reproduction of social order secured in a post-sovereign order? The immediate difficulties in crafting binding international law in the absence of a world state perhaps indicate the parallel difficulties that would follow on the disappearance of states' internal sovereignty. As noted above, Benjamin is certainly not the first thinker to emphasize the irreducibility of coercion within the law. Accordingly, validation of his critique would require a second argumentative step that would either illustrate a credible form of justice beyond sovereignty or, more modestly, provide a compelling reason to accept his contention that justice *need not* be tied to the state.

In Benjamin's “Critique,” divine violence secures this second step. There, divine violence is understood to achieve justice by definitively clearing away the “rule of myth” (Benjamin, 2006a, p. 252) and its law-positing violence. Benjamin supplements his discussion of this concept with an appeal to

empirical instances of non-violent conflict resolution—for example, interpersonal exchanges conditioned by “courtesy” and “sympathy,” and also diplomatic relations between states, which “resolve conflicts case by case ... peacefully and without contracts” (2006a, p. 247). However, even if convinced by Benjamin’s claim that the latter examples truly eschew violence, their scope remains too limited to serve as the basis of post-sovereign justice, given the complexity of contemporary, globalized conditions. On the other hand, the concept of divine justice remains essentially esoteric and unavailable for further development outside of Benjamin’s own messianic commitments, which are perhaps not generally shared today. Accordingly, the axiomatic assertion that “Justice is the principle of all divine endmaking” (Benjamin, 2006a, 248) does little to orient an understanding towards the concrete form or content of this justice. Thus while the essay advances, from its “historico-philosophical” viewpoint, the claim that state justice and justice *tout court* are in fact distinct, and that a legitimate political goal may be the achievement of a justice independent of sovereignty, it does little to substantiate this claim. That the overall argument depends on its success thus merits inquiry into whether it can be substantiated by other means.

In the following section I argue that these other means may be found in genealogy. Admittedly, genealogy cannot provide a positive alternative to state justice. The task of sketching such an alternative certainly lies beyond the backwards-looking “history of the present” (Foucault, 1995, p. 31) to which genealogy aspires. Yet, in the final instance, Benjamin’s critique requires not this positive alternative, but rather a convincing demonstration of the separability of justice and sovereignty. For in showing the possibility of a justice outside of sovereignty, the latter’s claim to alone represent the possibility of justice is deflated, and opens the way for a transformative politics that seeks to achieve this justice in the present. I argue that in Foucault’s last published Collège de France lecture course (2019), one finds a genealogy of state violence that shows the historical origin—and thus contingency—of the monopolization of justice by the state. Accordingly, these lectures demonstrate that the very

configuration of state justice—the very institutional arrangement by which justice becomes the exclusive preserve of the state, or by which the state monopolizes justice—is itself contingent and of historical origin. In showing the existence of a justice *before* the state, it debunks the claim of state justice itself, namely, that its monopoly is a requirement for any justice at all.

Accordingly, Benjamin’s transcendental analysis of sovereignty requires further empirical buttressing. To establish the conceptual claim that a justice beyond the state is possible, one must marshal historical evidence to the effect that such a justice has in fact previously existed. Viewed thusly as an empirical supplement to Benjamin’s critique, Foucault’s genealogy provides the latter with firm historical foundations not otherwise available to it. Where Benjamin *deduces* the constitutive violence of sovereignty, Foucault *illustrates* its historical contingency. Accordingly, the “Critique” must be developed not only conceptually, as a critique of sovereignty, but further, genealogically, in order to demonstrate that the constitutive violence of law is of historical origin, and that just as justice preceded sovereignty, so may it succeed it.

4 | FOUCAULT’S GENEALOGY OF STATE VIOLENCE

Penal Theories and Institutions problematizes the birth of the state monopoly on justice and the consolidation of national sovereignty by the French absolutist state. Why did Foucault turn, in his 1971-1972 Collège de France lectures, to the Middle Ages and early modernity? He provides a clue in the opening remarks¹⁴ of his first lecture. “No introduction / The reason for these lectures? / One has only to open one’s eyes / those who may find this distasteful will find the same thing in what I will be talking about” (Foucault, 2019, p. 1). These remarks refer to the repressive political context and prevalence of state violence in post-1968 France. At the time, numerous militants were in prison, while the Latin Quarter and the Collège de France itself were still subject to a high degree of surveillance and policing (Harcourt & Ewald, 2019). Earlier in 1971, Foucault had helped to found the Prisons Information Group

(Group d'information sur les prisons), which sought to provide prisoners a channel for the communication of their conditions to the public. In doing so, it also challenged the penal system as such, often characterizing the police, prisons, and courts as “intolerable” (Groupe d'information sur les prisons, 2013). It was to this penal system, against which Foucault campaigned as a public or “specific” intellectual (Foucault, 1980, p. 126), that he now turned on a philosophical basis. By examining the historical moment in which the state became the sole administrator of justice and legal punishment, he sketched what may be called a “genealogy of state violence.” This genealogy historicizes the mechanisms of contemporary state violence critiqued by Benjamin, tracing them back to the singular achievement of sovereignty, which still provides, as I have argued, their functioning principle today.

A central concern of the lectures is thus to mark the historical origin of “a concentration and centralization and (ultimately) a State takeover and control of justice” (Foucault, 2019, p. 171). Foucault contrasts the final results of this takeover—modern, state-monopolized penalty—with the legal and institutional context from which it emerges. The latter is given in the Germanic feudal justice of the Middle Ages. There, conflict-resolution consists in regulated private war between two individuals. Unlike modern justice, it does not seek a truth of a criminal deed, or a reconciliation between conflicting parties, but instead, follows the logic of a private dispute. Feudal justice is accordingly considered to result from a final test, contest of oaths, or judicial duel. Modern justice, on the other hand begins to emerge with the sovereign’s gradual monopolization or “confiscation” (Foucault, 2019, p. 116) of this private justice and consists primarily in its transformation into a public proceeding overseen by the state. In the latter, crime is no longer construed as private injury, but rather, as offense to the sovereign, while it is now the sovereign who holds the right of punishment and judicial violence. It is at this point that a dispute between two parties comes to require a neutral third party to stand above the first two and render judgement in the name of the state. In tracing this development, Foucault thus provides a history of judicial monopolization that parallels the broader transition from the “parcelized sovereignty”

(Anderson, 1986, p. 15) of feudalism to early modern absolutism and its achievement of state sovereignty.

Foucault's genealogy, reconstructed in the barest detail here, thus demonstrates that the unity between state and justice is itself a historical result, and thereby denaturalizes modern institutions of justice. By tracing the historical emergence of the modern, state-controlled penal system, Foucault shows that this system is, in principle, contingent. Rather than the only available means of conflict resolution, it is instead merely that which we moderns have inherited, while a longer history of judicial institutions may be traced at least into antiquity.¹⁵ Moreover, Foucault shows that the very concept of justice is itself historically variable. While modern understandings carry connotations of neutral, third party adjudication, the feudal understanding conceives it instead as a "regulated struggle" (Foucault, 2019, p. 116), or the set of procedures which allows for the just outcome to a wholly personal dispute. In fact, Foucault is at pains to demonstrate that the very notion of neutral adjudication determined by the state is a rather late development in the longer European history of justice. In tracing this longer history, Foucault's genealogy of state violence accordingly locates and problematizes the fairly recent merging of justice and state. He thus develops Benjamin's critique by grounding its conception of sovereign law in a specific—and, by implication, potentially transitory—historical moment.

It may be objected, however, that this genealogical development is by itself insufficient to demonstrate good reason for advocating, with Benjamin, a non-sovereign law. For sovereignty itself recognizes and avows its historical novelty. Its claim is not to be the timeless source of justice, but the modern invention by which the latter first becomes realizable. This claim is expressed most succinctly by Hobbes' argument that only the founding of the Leviathan that can bring about the transition from the state of nature to a political society that assures the bodily integrity—and fruits of labor—of each of its members (1985, p. 227). Thus, the objection would assert that Foucault's genealogical illustration of the

contingent emergence of a state monopoly of justice in fact *reinforces* the claim of sovereignty to represent an unequivocal, progressive break from the social order that precedes it.

This objection, however, misses the mark: it denies pre-modernity its status as at least a minimally rule-governed normative order, and thereby overstates the normative distance between the latter and the modern social order. If “philosophical discourses on legitimation pit law against the violence of the state of nature,” this state of nature is itself a philosophical invention, deployed for the purposes of justifying the political order which purports to end it (Menke, 2018b, p. 7). Menke has defended this claim by demonstrating that the law of retribution that governs conflict-resolution in ancient tragedy is not a bare, non-normative violence, but rather that of a particular normative order. Thus, the advent of law is not “the unprecedented genesis of normativity against nature but a late transformation in the order of justice” (Menke, 2008a, p. 8). Foucault’s genealogy extends this claim to medieval Europe, and justifies it with considerable historical detail. While conflict was rife within it, medieval Europe was not a bare state of nature, and conflicts within it were often resolved according to a meticulous set of judicial procedures and rules. Justice typically assumed the form of private war, but the latter was itself a “form of law” (Foucault, 2019, p. 131). Through careful historical argumentation, Foucault thus undercuts a key premise of the legitimation of sovereignty, according to which social order—and the possibility of justice in particular—depends on it. While sovereignty may still claim to represent moral progress, it cannot claim to be the first order that attempts to minimize and control social violence according to some set of generally valid rules.

Accordingly, Foucault’s genealogy of state violence purports to show 1) the contingent origin of the state monopoly of violence, and 2) the longer history of justice that precedes it. It thereby relativizes the configuration of law and sovereignty analyzed by Benjamin as just one in a historical succession of different practices and conceptions of justice. It should be emphasized, however, that in distinction from Benjamin, Foucault’s aim is not foremost to *condemn* modern justice, or else to suggest that it marked

no normative improvement from pre-modern justice. While he was certainly critical of the idea of historical progress (Allen, 2016), the primary task of his genealogies consisted foremost in “problematization” (Koopman, 2013). Such a task, then, sought not foremost—or not only—to “debunk” some contemporary practice, value, or set of beliefs on the basis of its dubious historical origin. Instead, it also sought to problematize such practices, values, or beliefs, on the basis of an analysis of their conditions of emergence. The ultimate aim was in fact practical: in revealing these conditions of emergence, the means for their successful transformation would become apparent. As Colin Koopman has put it, Foucault sought to “make manifest the constitutive and regulative conditions of the present as a material for thought and action that we would need to work on if we are to transform that present” (2013, p. 18). Accordingly, Foucault’s genealogy of state violence should not be viewed as merely a species of “realist” historiography or political theory which sees in sovereign law only the pretense of power. His aims are also more modest: to successfully show that this law is “dangerous” (Foucault, 1997, p. 256) insofar as it is the product of complex relations of power and violence that are not immediately apparent outside this genealogical perspective.

This danger becomes particularly evident in Foucault’s account of the causes of the transition to modern justice. Ultimately, the consolidation of justice within the state represents a strategy for the containment of a wave of popular struggles against feudal power relations in the fourteenth and fifteenth centuries. The fourteenth century “crisis of feudalism”—which consisted foremost in the dramatic loss of seigneurial power due to declining agricultural productivity and a scarcity of peasant labor—compelled a widespread revolt that could not be contained by the decentralized judicial procedures in place under feudalism. Its containment instead required the centralization of coercive force in a unified judicial apparatus backed by the monopolized violence of the absolutist state (Foucault, 2019, pp. 102-103, 160, 172-176). Foucault’s key historical argument here is thus that the modern judicial system emerges as part of a larger strategy to suppress the revolts—or instances of

counter-law—that threatened social order. The transition from feudal to state justice is the accompaniment to and instrument of a broader political transformation by which political power shifts from a patchwork of feudal suzerainty to modern territorial sovereignty.¹⁶ It is with this historical argument that Foucault seeks to refute what he calls the “ideology of justice,” according to which justice is a neutral sphere detached from political influence (2019, p. 194n). Foucault thereby calls attention to the “danger” inherent in this set of practices which purports neutrality but likely remains caught in broader structures of power—and the aspirational prerogatives of sovereignty—in which it originates.

Foucault’s genealogy does not provide a positive alternative to sovereign law. Yet it does, I think, provide compelling reasons to think that such an alternative is both possible and desirable. Possible, because in demonstrating the contingent unification of state and justice, along with the longer history of practices of justice that precedes it, Foucault shows that a justice *after* the state is at least a conceptually coherent aim. Desirable, because in tracing contemporary justice to its origin as a strategy for the consolidation of sovereignty, he shows that justice remains dangerous to this day, and that it cannot be easily legitimated as an unequivocal moral improvement from the apparent state of nature it purports to replace. By historically unearthing the claim to power that underlies the law, Foucault thus converges with Benjamin’s own construal of the oscillation between law-preserving and law-positing violence, or between law and sovereignty.

Yet the genealogical development of Benjamin’s critique consists not only in its denaturalization of the configuration of justice conceptually analyzed by the latter. By elucidating its conditions of emergence and its “regulative conditions of the present” (Koopman, 2013, p. 18), this development also renders it more available to contemporary transformation. Thus while Benjamin’s critique provides a view on the structural violence of sovereignty, Foucault’s genealogy affords further tools for struggles against it. Foucault supplements Benjamin’s transcendental analysis with an empirical examination and explication of actual mechanisms of power, of the concrete strategies by which sovereign violence is

exercised and may therefore be contested. In interviews, Foucault certainly remained guarded about the immediate normative implications of his genealogical research, yet he was also quick to stress their practical value. Thus he characterized critique itself as “an instrument for those who fight, those who resist and refuse what is” (2000, p. 236). Foucault’s personal engagement in struggles against state violence suggests that he used his own research for precisely these ends, perhaps above all when he advocated “for a new right [*droit*] that is both antidisiplinary and emancipated from the principle of sovereignty” (2003, p. 40). The anti-sovereign politics of Foucault’s and Benjamin’s critique of state violence is well-captured by the following passage from Andreas Fischer-Lescano: “as Benjamin suggests, we must get involved in the struggle over the violence of the law and champion structures that give permanent form to society’s law-making power and render it independent of the statist institutions of violence” (2018, p. 181). Put differently, we must champion structures that give permanent form to emancipatory instances of counter-law, and render law independent from sovereignty.

5 | CONCLUSION

Today, as state violence abounds, a critique of the “system root and branch” is all the more pressing. I have argued that Benjamin’s essay affords just that—provided it is developed conceptually as a critique of sovereignty, and genealogically to illustrate the contingency of the state monopoly of justice. The necessary reversal of law-preserving into law-positing violence is accordingly explained as the state’s attempt to maintain its sovereignty at the expense of emancipatory struggles to generate a counter-law. On the other hand, Foucault’s genealogy provides good reason to contend that the sovereign organization of justice is not the best that we can do, and that it is amenable to transformation in the present. In an era in which challenges to sovereignty intensify and spread, we may expect, if Benjamin and Foucault are correct, a concomitant intensification of state violence. Yet these philosophers also

provide reason for hope by defending the possibility of a justice outside and beyond the state, a non-sovereign law.

NOTES

¹ Most paradigmatically in Horkheimer, 2002.

² Translation modified. Throughout this article I translate “Entsetzung” as “deposition” and “rechtsetzend” as “law-positing,” following the translation found in Loick, 2019.

³ This view is advocated explicitly in Fischer-Lescano, 2018 and Loick, 2018, 2019.

⁴ One notable exception is Loick, 2019, to which I return repeatedly below.

⁵ Edmund Jephcott (Benjamin, 2006a, p. 252) mistranslates “waltende Gewalt” as “sovereign violence,” while a closer translation, following Loick (2019, p. 187) may instead be rendered “sublime violence.”

⁶ Both Loick (2019) and Agamben (1998, 2005) also emphasize the explanatory function of the concept of sovereignty in Benjamin’s essay. I depart from both interpretations in construing the violence of sovereignty not only as a result of its form, but further, as its necessary response to what I term “counter-law,” a concept developed below.

⁷ This article primarily elaborates just one distinctive form of state violence, which appears in the use of coercive force for the maintenance of state sovereignty. Other, often less visible forms of state violence—analysis of which is essential for a comprehensive critique of the state—have been discussed elsewhere (Butler, 2020; Loick, 2019; Oksala 2007).

⁸ The apparent proximity of this claim to Carl Schmitt’s view that the legal order ultimately depends on a non-normative state of exception has brought the charge of “realism” to Menke’s interpretation (Ferrara, 2018, pp. 116, 123). In a response, however, Menke rejects this charge by calling attention to his essential argument that law is in fact *contradictory*: while necessarily reverting to illegitimate violence, the initial impulse of law is in fact to overcome violence (2018a, p. 215).

⁹ For just one of likely many examples, see Judith Butler’s discussion of the complicity of legal systems in violence against women (2020, p. 189).

¹⁰ Menke briefly acknowledges the possibility of counter-legal acts contained within non-law (2018b, p. 21), but in his explanation of violence, this phenomenon seems to remain only secondary to the primary source of violence, law’s immanent production of non-law. Additionally, he considers ancient, retributive justice to consist in cyclical assertions of “counter-justice” (2008a, p. 19), which modern justice succeeds in overcoming. My argument, following Benjamin, is that counter-law and counter-justice instead remain essential to the explanation of modern legal violence.

¹¹ For a discussion of this distinction in relation to Weber’s thought, see Anter, 2014, p. 28.

¹² See, for example, Vitale, 2017, p. 27: “The origins and function of the police are intimately tied to the management of inequalities of race and class. The suppression of workers and the tight surveillance and micromanagement of black and brown lives have always been at the center of policing.” See also Gilmore, 2007 and Wacquant, 2009.

¹³ Benjamin thus provides early resources for an abolitionist critique of police and prisons. For more contemporary examples, see Davis, 2003 and Vitale, 2017.

¹⁴ Because no audio recording of Foucault’s lectures was available to the editors, these lectures are published in the form of Foucault’s original lecture notes (Ewald & Harcourt, 2019).

¹⁵ As Foucault does in (2010) and (2013).

¹⁶ As Foucault (2019, p. 192) puts, it “The penal was organized as such on the basis of a certain distribution of political power.... It is political power presenting itself as sovereignty above feudal suzerainty, and manifesting its sovereignty in the guarantee of order.”

REFERENCES

- Agamben, G. (1998). *Homo Sacer: Sovereign Power and Bare Life* (D. Heller-Roazen, Trans.). Stanford University Press.
- Agamben, G. (2005). *State of Exception* (K. Attell, Trans.). The University of Chicago Press.
- Allen, A. (2016). *The End of Progress: Decolonizing the Normative Foundations of Critical Theory*. Columbia University Press.
- Anderson, P. (1986). *Lineages of the Absolutist State*. Verso.
- Anter, A. (2014). *Max Weber's Theory of the Modern State: Origins, Structure and Significance* (K. Tribe, Trans.). Palgrave Macmillan.
- Balibar, É. (2015, September 28). Presentation. Foucault 13/13: 2/13, Penal Theories and Institutions, Columbia University, New York. <http://blogs.law.columbia.edu/foucault1313/2-13/>.
- Benjamin, W. (2005). In the Sun. In M. W. Jennings, H. Eiland, & G. Smith (Eds.), *Walter Benjamin: Selected Writings Volume 2, Part 2, 1931-1934*. Harvard University Press.
- Benjamin, W. (2006a). Critique of Violence. In M. Bullock & M. W. Jennings (Eds.), & E. Jephcott (Trans.), *Walter Benjamin: Selected Writings Volume 1, 1913-1926*. Harvard University Press.
- Benjamin, W. (2006b). *The Right to Use Force* (M. Bullock & M. W. Jennings, Eds.; R. Livingstone, Trans.). Harvard University Press.
- Benjamin, W. (2006c). World and Time. In M. Bullock & M. W. Jennings (Eds.), & R. Livingstone (Trans.), *Walter Benjamin: Selected Writings Volume 1, 1913-1926*. Harvard University Press.
- Bodin, J. (2001). *On Sovereignty* (J. H. Franklin, Ed. & Trans.). Cambridge University Press.
- Bohrer, A. (2015). Critique and Violence: A Response to Andrew Benjamin's Working with Walter Benjamin. *Philosophy Today*, 59(1), 133–138.
- Butler, J. (2006). Critique, Coercion, and Sacred Life in Benjamin's "Critique of Violence." In H. de Vries & L. E. Sullivan (Eds.), *Political Theologies: Public Religions in a Post-Secular World*. Fordham University Press.
- Butler, J. (2012). Walter Benjamin and the Critique of Violence. In *Parting Ways: Jewishness and the Critique of Zionism*. Columbia University Press.
- Butler, J. (2020). *The Force of Nonviolence: An Ethico-Political Bind*. Verso.
- Davis, A. (2003). *Are Prisons Obsolete?* Seven Stories Press.
- Derrida, J. (1992). Force of Law: The "Mystical Foundation of Authority." In D. Cornell, M. Rosenfeld, & D. G. Carlson (Eds.), & M. Quaintance (Trans.), *Deconstruction and the Possibility of Justice*. Routledge.
- Erlenbusch, V. (2010). Notes on violence: Walter Benjamin's relevance for the study of terrorism. *Journal of Global Ethics*, 6(2).
- Ferrara, A. (2018). Deconstructing the deconstruction of the law: Reflections on Menke's "Law and Violence." In *Law and violence: Christoph Menke in dialogue*. Manchester University Press.
- Fischer-Lescano, A. (2018). Postmodern legal theory as critical theory. In *Law and violence: Christoph Menke in dialogue*. Manchester University Press.
- Foucault, M. (1980). Truth and Power. In C. Gordon (Ed. & Trans.), *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*. Pantheon Books.
- Foucault, M. (1995). *Discipline and Punish: The Birth of the Prison* (A. Sheridan, Trans.). Vintage Books.
- Foucault, M. (1997). On the Genealogy of Ethics: An Overview of Work in Progress. In P. Rabinow (Ed.), *Ethics: Subjectivity and Truth (Essential Works of Foucault 1954-1984, Volume One)*. The New Press.
- Foucault, M. (2000a). Questions of Method. In J. D. Faubion (Ed.), & C. Gordon (Trans.), *Power (Essential Works of Foucault 1954-1984, Volume Three)*. The New Press.
- Foucault, M. (2000b). Truth and Juridical Forms. In J. D. Faubion (Ed.), *Power (Essential Works of Foucault 1954-1984)*. The New Press.
- Foucault, M. (2003). "Society Must Be Defended": *Lectures at the Collège de France, 1975-1976* (M. Bertani & A. Fontana, Eds.; D. Macey, Trans.). Picador.
- Foucault, M. (2007a). *Security, Territory, Population: Lectures at the Collège de France, 1977-1978* (M. Senellart, F. Ewald, & A. Fontana, Eds.; G. Burchell, Trans.). Picador.
- Foucault, M. (2007b). What is Critique? In S. Lotringer (Ed.), & L. Hochroth & C. Porter (Trans.), *The Politics of Truth*. Semiotext(e).

- Foucault, M. (2008). *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979* (M. Senellart, F. Ewald, A. Fontana, & A. I. Davidson, Eds.; G. Burchell, Trans.). Picador.
- Foucault, M. (2013). *Lectures on the Will to Know: Lectures at the Collège de France, 1970-1971 and Oedipal Knowledge* (D. Defert, F. Ewald, & A. Fontana, Eds.; G. Burchell, Trans.). Palgrave Macmillan.
- Foucault, M. (2015). *The Punitive Society: Lectures at the Collège de France, 1972-1973* (B. E. Harcourt, F. Ewald, & A. Fontana, Eds.; G. Burchell, Trans.). Picador.
- Foucault, M. (2019). *Penal Theories and Institutions: Lectures at the Collège de France, 1971-1972* (B. E. Harcourt, F. Ewald, & A. Fontana, Eds.; G. Burchell, Trans.). Palgrave Macmillan.
- Gilmore, R. W. (2007). *Golden Gulag: Prisons, Surplus, Crisis and Opposition in Globalizing California*. University of California press.
- Groupe d'information sur les prisons. (2013). *Intolérable* (P. Artières, Ed.). Gallimard.
- Habermas, J. (1996). *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (W. Rehg, Trans.). The MIT Press.
- Harcourt, B. E., & Ewald, F. (2019). *Course Context* (B. E. Harcourt, F. Ewald, & A. Fontana, Eds.). Palgrave Macmillan.
- Hobbes, T. (1985). *Leviathan*. Penguin Books.
- Honneth, A. (2009). Saving the Sacred with a Philosophy of History: On Benjamin's "Critique of Violence." In J. Ingram (Trans.), *Pathologies of Reason: On the Legacy of Critical Theory*. Columbia University Press.
- Horkheimer, M. (2002). Traditional and Critical Theory. In M. J. O'Connell (Trans.), *Critical Theory: Selected Essays*. Continuum.
- Jaeggi, R. (2018). *Critique of Forms of Life* (C. Cronin, Trans.). The Belknap Press of Harvard University Press.
- Kant, I. (1996). Toward Perpetual Peace. In M. J. Gregor (Ed. & Trans.), *Practical Philosophy*. Cambridge University Press.
- Kant, I. (1999). *Metaphysical Elements of Justice: The complete text of the Metaphysics of Morals, Part 1* (J. Ladd, Trans.; 2nd ed.). Hackett.
- Koopman, C. (2013). *Genealogy as Critique: Foucault and the Problems of Modernity*. Indiana University Press.
- Loick, D. (2017). 21 Theses on the Politics of Forms of Life. *Theory & Event*, 20(3), 788–803.
- Loick, D. (2018). Law without violence. In *Law and violence: Christoph Menke in dialogue*. Manchester University Press.
- Loick, D. (2019). *A Critique of Sovereignty* (A. DeMarco, Trans.). Rowman & Littlefield International.
- Marx, K. (1978). For a Ruthless Criticism of Everything Existing. In R. C. Tucker (Ed.), & R. Rogowski (Trans.), *The Marx-Engels Reader*. W. W. Norton & Company.
- Menke, C. (2018a). A reply to my critics. In G. Jackson (Trans.), *Law and violence: Christoph Menke in dialogue*. Manchester University Press.
- Menke, C. (2018b). Law and violence. In G. Jackson (Trans.), *Law and violence: Christoph Menke in dialogue*. Manchester University Press.
- Mitchell, T. (1991). The Limits of the State: Beyond Statist Approaches and their Critics. *The American Political Science Review*, 85(1), 77–96.
- Oksala, J. (2007). The Management of State Violence: Foucault's Rethinking of Political Power as Governmentality. *Graduate Faculty Philosophy Journal*, 28(2), 53–66.
- Saar, M. (2002). Genealogy and Subjectivity. *European Journal of Philosophy*, 10(2), 231–245.
- Vitale, A. (2017). *The End of Policing*. Verso.
- Wacquant, L. (2009). *Punishing the Poor: The Neoliberal Government of Social Insecurity*. Duke University Press.
- Weber, M. (2020). *Charisma and Disenchantment: The Vocation Lectures* (P. Reitter & C. Wellmon, Eds.; D. Searls, Trans.). New York Review Books.
- Weber, S. (2008). *Taking Exception to Decision: Walter Benjamin and Carl Schmitt*. Harvard University Press.