

# ***Law, Authority and Critique in the Wake of Terra Nullius: A History of 'Profane Illumination' or an Economy of Violence?***

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For histrionic or fanatical stress on the mysterious side of the mysterious takes us no further; we penetrate the mystery only to the degree that we recognize it in the everyday world, by virtue of a dialectical optic that perceives the everyday as impenetrable, the impenetrable as everyday (*R*: 189-190).<sup>1</sup>

## ***Prologue***

Terra nullius is the principle of a violence that inheres in every origin. And, in its wake, there is no law, no text, no culture, free of that violence. The origin is no accident. Terra nullius is not an historical error. Our conceptual legacy is the unsettled and unsettling history of this violence. It demands critical... thinking...Or else. .we are condemned to repeat this origin again and again.

## ***Introduction***

What this paper hopes to explore is what is both essential and obscure in the constellation provided by the above quotation, the constellation made up of the concepts of violence, fate and justice.<sup>2</sup> This paper is driven by concern over a central paradox that appears within this constellation so construed: if *terra nullius* is not an historical error, if it stands as the origin of a certain history, can its repetition ever be avoided? If no law, text or culture is free of that violence how can we explain the overthrowing (if only symbolically at this stage) of *terra nullius*, except as a reiteration of violence, a violence that is itself without a ground?

The basic puzzle that this paper hopes to highlight is the question of how an approach that locates a violence in every origin, the view that there is a performative violence at the origin of every history, one that is inevitably reiterated throughout the subsequent history - an economy of violence - can even conceive of the possibility of meaningful critique. In particular, what is obscured by such a conceptualisation is the possibility of an intra-historical learning process, the gradual and fallible disentangling of violence and non-violence; in other words the possibility of progressive emancipation and the prospect of happiness.

To enable this possibility we need more than a diagnostic based on a simple negation of the violence of the origin; and indeed, those approaches which demonstrate the most intense diagnostic sensitivity also exhibit complex insight into ethical-normative principles that can be used to justify critique. However, if critique is to be meaningful, it has to be more than an abstract negation - and one of the effects of an economy of violence is the incapacity to conceive of a

progressive though fallible normative learning process that renders concrete these ethical-normative principles. This has the double effect of a reductive understanding of violence which is thereby able to operate autonomously and anonymously throughout law, text and culture, coupled to an ethical impulse which cannot be brought into effect within history through the intended actions of concrete social beings. That is, an economy of violence, as implied in the above quotation, in fact reinstates a bad metaphysics:

...if history has to become the Other of history in order to escape the system of delusion...then the critique of the historical present moment turns into a critique of historical being - the latest form of a theological critique of the earthly vale of tears (Wellmer 1991: 63).

The argument here will be that approaches that ascribe to an economy of violence must, in order to maintain their intense diagnostic sensitivity, either secretly employ a concept of a learning process which itself they cannot account for, or else lack both the normative content and heuristic facility needed to support their claims. Accordingly, any such approach that seeks to avoid resignation or cynicism, that is which seeks to maintain the emancipatory ideal, needs to reconsider whether their ontological commitment does not render their critical ambitions untenable.

This paper aims to address this claim through an examination of the work of Walter Benjamin. Benjamin's struggle with Romantic, metaphysical, anarchist, Marxist and Messianic elements in his understanding of violence, language and history provides a unique opportunity for such an investigation, and ultimately gives us reasons to prefer a notion of 'profane illumination' to an economy of violence in our understanding of justice, history and law.

***The Economy of Violence***

Violence, irrationality, negativity, and absence as characterisations of the ground of human activity, history and language arise initially as an attempt to overcome certain difficulties of more conventional metaphysics. Indeed such accounts have a long tradition: Plotinus, Schopenhauer, Nietzsche, Heidegger and Derrida all engage with such a figure of thought albeit in different ways. Other theorists have regarded the violence of human nature as a state to be left behind or contained in a condition of freedom, with Hobbes being the most famous proponent. Still others invoke various distinctions and injunctions in order to overcome the competition they see between the violence (of either the mechanical determinism or, by contrast, the randomness) of nature and freedom, as we find in Kant; yet, apparently unavoidably, violence has unsettled all such attempts, as testified in Rousseau's dictum that we can be forced to be free.

In the twentieth century, three influential theoretical perspectives have irreversibly undermined faith in the possibility of purifying human activity and history of violence, by demonstrating the ineradicable violence inherent in every such metaphysical ambition itself. In the *Dialectic of Enlightenment*, Adorno and Horkheimer reveal the violence involved in every act of conceptualisation; Foucault demonstrates the constitutive presence of power in every discourse; Derrida too points to the violence that takes place in practices of signification. At the same time, all three perspectives share a commitment to critique and the emancipatory ideal, whether in the form of 'enlightening the Enlightenment about itself', the rescuing of subjugated and local knowledges or the practice of deconstruction.

Despite the diversity, complexity and insight of all three perspectives, a common problem inheres in their approach. All three partake, not necessarily willingly, in the ontological project of an economy of violence; that is, they ground an economy of violence anterior to history, beyond the sphere of influence of subjects capable of thought and action, in a mythic relationship of violence whose authority is reinstated even in the attempt to try and break free. However, although they provide a convincing argument that the metaphysical puritanism which seeks to purge humanity of violence is itself a violence, to conceive the issue in this way, such that violence is unavoidable, is to remain within the confines of such a metaphysics. To in turn ontologise violence is to be in secret affinity with this metaphysical desire: the idea of a performative violence that is at the basis of all distinctions itself reinvoles the metaphysical myth of a founding of meaning and history from out of an undifferentiated, effusive or indeterminate state which is somehow able to be projected behind or beneath all such existing meanings or distinctions. However convincing specific examples of this phenomenon are, the totalising impulse within this transcendental argument leads, as we will see, into a vicious circle of undialectical affirmations and negations which tends to bring about the conditions within history that it presupposes as the basis of history (Cf Wellmer 1991: 87).

The consequence of an economy of violence is a singular inability to explain how it is possible to bring about a transformation of the conditions of humanity that would not reinstate the same violence under a different guise; that is, how to break through myth and into history where emancipation is possible. Note that such a problem raises a radical question for these theorists themselves; how is their own position of critique possible? What is it that enables the privileging of their own perspective as that of critique? All three provide an answer to this question, analyses of which go far beyond the scope of this paper; however, it will be argued that they can only do so if they implicitly

abandon the ontological conception of an economy of violence. In its place we should recognise that we find ourselves within a world, history, language (and often more than one) in which the conditions of humanity (such as the body, power, meaning and desire - violence also) are disclosed, and which can be disclosed anew, but which can neither be made nor unmade in their entirety as a totality (Wellmer 1991: 70). Now, with this 'disenchantment' of violence, the recognition that violence is a part of this world and so distinguished from its own Other (that is, non-violence),

it would no longer be possible to assert...that the will to truth is in itself a will to power; that dialogue *as such* is symbolic violence; that speech which is oriented towards truth *is* terror; that moral consciousness *as such* is a reflex of internalized violence; or that the autonomous human being *as such* is *either* a fiction *or* a mechanism of auto-suppression (Wellmer 1991: 70).

Or that law as such is an economy of violence.

Rather, it means that we can attempt to identify an historically situated normative learning process, progressive though fallible, that through determinate negations of specific experiences of violence and injustice can allow an insight into the necessary conditions of possible emancipation and happiness (without Utopian projections to either a past or future origin); and it is such an idea that enables the practice of critique.

## ***Benjamin on Violence, Language and History***

### ***(1) Violence***

In Benjamin's work, the struggle between fate and history, myth and experience, violence and hope is ineliminable, and his text, *Critique of Violence*, contains these tensions in a prototypical fashion. This early work is simultaneously a text that: reveals the violence that first makes and then preserves the law; calls for its demystification; then totalises its history as the mythic perpetuation of violence; raises the hope of a 'pure' revolutionary violence, but promptly locates such a hope beyond history and human understanding in the realm of the divine. As such it exemplifies both the insights and limitations of an economy of violence approach.

This text operates through a consideration of *Gewalt*, which can mean both force and illegitimate force, or violence (or, both legitimated force and violence). For Benjamin, traditional legal theory has approached the question of how to apply this distinction with respect to the force of law from two, equally untenable, directions. Natural law is concerned with ends; 'just' ends will be able to legitimate any means to such ends. Positive law, however, guarantees the justness of the ends by attending to an evaluation of the means (*R*: 278). Yet for Benjamin, neither approach can provide a position from which we can evaluate the meaning of any distinction between sanctioned and unsanctioned violence without having already presupposed a symmetry between just means and just ends: natural law allows just ends to annul the violence of the means (an argument already shown to be spurious in Hegel's critique of the post-revolutionary terror in France), an argument which avoids the issue of

evaluating the violence employed to establish the criterion of 'just ends' originally; positive law similarly obscures the fact that the evaluative criteria used to determine the justness of the means were themselves decided upon prior to the establishment of such criteria. Both approaches thereby occlude the consideration of a sphere of violence; they are unable to examine the role of violence in establishing these crucial distinctions. Benjamin therefore argues that only a historico-philosophical view of law, one that examines both how these distinctions come into being and how they operate, can explain how a il/legitimate criterion can be applied to violence at all (*R*: 279).

Benjamin rejects outright the natural law position that the justness of ends decides the question of violence. His concern shifts to violence as a means, and the question of whether there is a symmetry between justified means and just ends (a question made possible by the experience of conscription in World War One) (*R*: 278). As a means, violence can pursue either natural or legal ends (*R*: 280). In examining the law's regulation of the pursuit of ends, Benjamin reveals the interest held by law in the monopoly on violence. That is, he concludes from the fact that the law limits the pursuit of natural ends, not the standard liberal doctrine of the state attempting to bring about the harmonising of conflicting goals, but instead that there is an intention on the part of the law to preserve itself, to perpetuate its domination over the dissemination of violence (*R*: 281).

This desire is revealed by examining certain contradictions in the legal situation (not the law as such), such as the notions of the (general) strike and military violence. What analysis of these situations demonstrates, is that law fears the existence of extra-legal violence, violence directed to natural ends (equally in the 'extortion' for better conditions or in the predatory quest for greater possessions), as this has itself a lawmaking character (*R*: 283). That is, such violence threatens the existent form of law and order of legal ends, the

prevailing order of dissemination of violence, with the possibility of a new economy; a new order which will legitimate this founding violence retrospectively (Derrida 1992: 35).

Law's reaction to the threat of this first function of violence, lawmaking violence, is the attempt to bring its operation within the sphere of legal relations. It does this by constructing legal ends with which the violent pursuit of natural ends will inevitably collide, such as when a right to strike is granted (to limit the force of organised labour) or rules of war created (to sanction victory and secure recognition of the new possessions). This second function of violence, which Benjamin terms law-preserving, refers to the forms of violence employed towards legal ends; and as these ends are defined according to the existing order, the violence of the means to these legal ends functions (threateningly) as the preservation of current forms of law, and so indeed of law itself.

The cooperation, or interdependence of these two forms of violence appear in such institutions as the police, and in capital punishment:

For if violence, violence crowned by fate, is the origin of law, then it may be readily supposed that where the highest violence, that over life and death, occurs in the legal system, the origins of law jut manifestly and fearsomely into existence... Its purpose is not to punish the infringement of the law but to establish new law. For in the exercise of violence over life and death more than in any other legal act, law reaffirms itself (*R*: 286).

Law is thus permeated throughout by violence; even the contract, which attests to the unforced agreement of two parties, points to the potential violence of its enforceability (*R*: 288).

The function of violence in lawmaking is twofold, in the sense that lawmaking pursues as its end, with violence as the means, *what* is to be established as law, but at the moment of instatement does not dismiss violence; rather, at this very moment of lawmaking, it specifically establishes as law not an end unalloyed by violence, but one necessarily and intimately bound to it, under the title of power (*R*: 295).

Law arises from an originary, law-making violence which establishes the criteria for the legality of ends: the operation of law preserving violence (rather than the nature of the ends themselves) completes the fatal entanglement of law and violence, for it means that we cannot distinguish between the force of law of an authorised power and the violence that first established this authority (Derrida 1992: 6). This unavoidable entanglement, this fated repetition of the original violence, is intrinsic to law, and is why Benjamin describes law as a mythical violence.

Accordingly, the result of Benjamin's historical investigation of the basis of law is the formulation of an ontological concept of an economy of violence, the uncovering of an originary violence which negates history itself and undermines any normative concept of law's legitimacy: lawmaking violence 'proves its worth in victory' and establishes ends that law preserving violence serves (*R*: 286). Thus, ironically, Benjamin must give up any decision on the possibility of the justification of means, a decision about the status of violence, an account of 'justice', to the operations of fate (*R*: 294).

This formulation raises the question of critique; if this is to be a critique of violence, a moment in its overcoming, rather than just a demonstration of its unavoidability, can Benjamin explain how the cycle of mythic violence may be broken? What force grounds his own critique?

In response to this problem, Benjamin introduces the concept of divine violence, a power which destroys laws, and in so doing can only expiate (*R*:

297). For Benjamin, this category of divine violence enables the thought of the possibility of revolutionary violence, the overthrow of mythical forms of law. This power, however, which Benjamin cryptically locates also in 'educative power' (*R*: 297), to shatter the hold of mythic violence lacks what would seem to be an important characteristic for the possibility of critique - it is not known in advance (*R*: 298). Indeed Benjamin suggests that the decision over when and how such violence has been or ought to be used in particular cases is neither possible nor urgent (*R*: 300).

Here, as in his discussion of capital punishment, we see the problematic effect of an economy of violence; its undifferentiated and effusive character, violence *per se* as origin, prior to distinctions, means that every instance of violence (or, although unsayable, 'injustice') is essentially bound, not to any particular law (either as crime or punishment), but to law as a whole. So Benjamin, here the anarchist despite himself, condemns as impotent those who criticise particular laws or legal practices and not the whole law 'root and branch' (*R*: 285).

Two responses (but not only two) present themselves. The first is to affirm the affinity of Benjamin's critical position, his beyond of violence, with pure violence itself, to implicate not only law but critique in the economy of violence. Derrida suggests this formulation, arguing Benjamin in part recognises the law of iterability, that insures that

the founding violence is constantly represented in a conservative violence that always repeats the tradition of its origin and that ultimately keeps nothing but a foundation destined from the start to be repeated, conserved, reinstated (Derrida 1992: 55).

This approach is certainly consistent; yet this simply defers the question of how meaningful critique is at all possible. The undifferentiated notion of violence bound up in an ontological account of law as an economy of violence renders the determinate negation of specific injustice impossible. Such an approach can

apparently trace the violence of an experience of injustice to the inevitable reiteration and displacement of an origin in the operation of the economy, but the consequence is that neither the medium of law nor of critique (nor, ultimately, their relationship) can be understood in a way that makes possible the avoidance of a reiteration of violence either in this very act of diagnosis or in their remedial employment.

Such an account lacks both the normative criteria by which to judge any particular law, practice, or experience and also any heuristic value in guiding transformations of such law or practice. Under these circumstances the tensions that will always exist between law, justice and critique can certainly only be perceived as aporia - and an uninstrusive aporia at that, suspended between the undecidability of violence and the singularity of a wrong without possibility of mediation<sup>3</sup>. Such an approach puts emancipation beyond the realm of cooperative human endeavour and into the realm of a divine violence; and it also obscures the actual existence of just such a possibility of mediation, in the form of ethico-normative potential and learning processes which implicitly inform the critical views of those employing an economy of violence.

It takes untruthfulness to push reification back into Being and into a history of Being, to mourn and consecrate as 'fate' what might perhaps be changed by self-reflection and by the action that it kindles (Adorno 1990: 91).

The second approach is to press Benjamin further, to seek out the position or possibility of a normatively significant, mediating sphere of non-violence. Indeed, one can suspect that Derrida fails to appreciate the significance of Benjamin's comments on the dialectic of lawmaking and law preserving in this respect. This may occur because of Benjamin's highly idiosyncratic concept of history (and of dialectic), which we will discuss below; however, it is also certainly the case that it was not until much later (though the seeds were always present, as we will see below in respect to the *Critique of Violence* itself) that

Benjamin himself, under the influence of historical materialism, came to attempt to explain his understanding of critique in terms of 'profane illumination', as an explanation of how we can from within history unravel the hold of violence over humanity (which is not to say he was ever optimistic about it ever occurring!).

[A]n ecstatic component lies in every revolutionary act. This component is identical with the anarchic. But to place the accent exclusively on it would be to subordinate the methodical and disciplinary preparation for revolution entirely to a praxis oscillating between fitness exercises and celebration in advance (*R*: 189-190).

This second approach points to the need for a conceptualisation of both a concept of a learning process and of a normative potential that enables the possibility of a non-violent and profane concept of 'authority', one that could perhaps explain an extra-legal but non-violent justification of law (or at least provide us with a criterion for use by a critique of violence). However, for this second approach to gain plausibility we need to briefly pursue Benjamin into his account of language and history.<sup>4</sup>

## **(2) Language**

Already in the *Critique of Violence*, Benjamin invokes the idea of a sphere of non-violence; 'that sphere of human agreement that is...wholly inaccessible to violence: the proper sphere of "understanding", language' (*R*: 289). To grasp what it is that Benjamin means by the 'proper sphere of understanding' we need to briefly remind ourselves of Benjamin's concept of language. In this view we again see the struggle between the Messianic, Romantic and materialist elements of Benjamin's thought.

Benjamin sees in the proliferation of languages the sign of the Fall; Adamic language, the giving of names, involved a perfect relationship between the word and the object. This has been lost, however the echo of this relationship remains in every language (and indeed Benjamin understands language as fundamentally mimetic, a non-arbitrary relationship between word and thing) (*R*: 314-320, 333-336). The (economy of) violence of the origin of every language condemns it to a futile longing for reconciliation; its partiality is caused by, and is a reminder of, the origin that this very fragmentation renders irretrievable.

However, in the dimension of language Benjamin soon moves beyond this ontological dualism; myth becomes secularised (Adorno 1995: 233). The reconciliation of all partial languages now becomes the historical task of the translator. For Benjamin, translation comprises not the accurate rendering of the original into the new language - rather, a good translation expands the new language in the direction of the original (*I*: 77).

To understand how it does so, and what this idea signifies, we need to take hold of another important Benjaminian notion; that language seeks not to communicate (transmit information) but rather to express (*R*: 316-317). For Benjamin, the decline of language has been its reduction to the mere transmission of information (the 'semantic element') at the expense of what it expresses (often understood as the mimetic element). This transformation in the nature of language is tied up with the liquidation of collective experience [*Erfahrung*]. Now as collective experience is the condition of meaningfulness of language, this change in the nature of experience entails the emptying out of language, its reduction to mere information, with the simultaneous internalisation and privatization of experience [*Erlebnis*] that renders the latter incommunicable (*I*: 88-89). This change serves the perpetuation of myth, the

transmission and repetition of information, the liquidation of meaning, where the gates of a language slam shut, enclosing experience within silence (*I*: 82).

Translation, however, cannot communicate - it can only express, and as such expands the potential of a language in the dimension of *Erfahrung*. Benjamin's concern, the energy of his critique, is directed to the preservation of experience [*Erfahrung*], the condition of understanding; thus also the sphere of non-violent relations.

The critical theorist, like the translator, operates within the dimension of history in a revolutionary-critical manner, gradually unpicking the strands of myth and violence in the semantic potentials that exist within every language in order to develop the realm of collective experiences [*Erfahrungen*]; this latter is, ultimately, the key figure of thought in Benjamin's idea of emancipation.

### **(3) History**

The nourishing fruit of the historically understood contains time as a precious but tasteless seed (*I*: 254).

Now Benjamin is famous for his rejection of progress; the figure of the angel of history powerfully evokes the image of progress as the accumulation of catastrophe. Benjamin understands progress as the movement through empty time, through myth (*I*: 252). So, the continuum of what we call history, through which the movement of lawmaking and law preserving violence has taken place is, for Benjamin, merely mythic time, which is why violence is inevitable. This idea of progress is, however, immediately contrasted with history, which is the subject not of empty time but filled by the presence of the 'now' [*Jetztzeit*] (*I*: 252-253). History can only arise through critical (or divine) interventions into

this cycle of myth in order to extract semantic potentials that could then be put at the use of humanity. Benjamin's hope is that such breakthroughs in mythic time will combine into a tradition, consolidated *Erfabrungen* (Habermas 1972: 138). In this way a progressive disentanglement of violence and non-violence is to become possible as an historically situated and intersubjectively achieved learning process which liberates or rescues elements of the past to break open the limitations of the present (Wiggershaus 1994: 204). The bettering of the conditions of humanity is an historical task.

It is this idea that Benjamin means by the presence of 'divine' violence in the course of law's development. Important also for the interpretation of *Critique of Violence* is that this idea of an explosion of the continuum of empty time is what Benjamin understands as the dialectic 'at a standstill' (*I*: 254; see Wiggershaus 1994: 204).

### ***Terra Nullius and Determinate Negation***

Returning to the essay on violence, we can now better appreciate Benjamin's account of the *dialectic* of lawmaking and law preserving violence, and demonstrate both why and how this moves him away from an economy of violence. However, rather than examine Benjamin's example of the general strike, in explaining this idea it may be more fitting to employ the example of 'terra nullius'.

*Terra nullius* is a doctrine that exemplifies Benjamin's lawmaking violence. It grounds not only certain legal relations between indigenous people and their non-indigenous cohabitants, but founds a whole legal system (this is why the *Mabo & Wik* decisions, the 'wake' of terra nullius, are concerned with that most central of Australian legal categories, or 'ends': property).

The (much) later integration of Aboriginal and Torres Strait Islanders into this legal system would exemplify law preserving violence at work. In the same way that Benjamin supposes the law granting a limited right to strike is an attempt to annul a threat of violence (by the disenfranchised), here the law gives certain rights (at a minimum, recognition or legal standing) to those whose exclusion is the basis of the legal system itself (Cf *R*: 290). This law, however, must still fear the lawmaking violence that the recognition of indigenous legal concepts would entail - a rival lawmaking violence, one that directly contradicts the lawmaking violence of terra nullius itself.

Eventually these contradictory forces collide. The operation of law preserving violence ultimately weakens the lawmaking violence represented in it (*R*: 300). So the moment arises - a claim for Native Title, that which cannot exist if the law which derives its force from the doctrine of terra nullius is to be preserved, but which is compelled by the existence of both other legal doctrines (for example, the *Racial Discrimination Act*), which represent law preserving violence, and the threat of lawmaking violence of the Indigenous people themselves - a moment in which the whole complex of violence is concentrated: an economic crisis. It is precisely such moments that Benjamin understood as dialectical.

Perhaps, then, we should instead try and understand the decision in *Mabo* as a decision to 'blast a specific era out of the homogenous course of history' (*I*: 254). At this moment of decision, a dialectic at a standstill, law has an opportunity to transcend its own principle of violence. As such it can avoid the simple repetition of violence (becoming a new lawmaking violence), destined in turn to decay, but rather be critically appropriated as part of that tradition which develops every time the cycle of mythic law is broken through, as part of the founding of a new *historical* epoch (*R*: 300).

Benjamin seeks to avoid the consequences of an economy of violence, and can do so only by pointing out a dimension of human activity and history that

emerges as a sphere of non-violence (though in no sense 'pure'). This sphere is that of the struggle to appropriate a tradition of meaningful shared experience over and against the dimension of mythic time. The critique of violence must draw on this tradition in order to both make and justify its incursions into mythic time (*I*: 254).

Yet precisely what Benjamin still lacks is any positive consideration of what constitutes the possible structural elements of tradition.<sup>5</sup> As such his critical theory lacks a certain determinateness, any sense of mediation, of what normative principle provides the dialectical force behind the *Mabo* decision (Arato & Gebhardt 1993: 206). Whilst recognising the existence of a critical counterforce (the 'law governing the oscillation' of lawmaking and law preserving violence, a divine-historical law, not a mythic law) that enables dialectics, it cannot give voice to its normative content (the same problem afflicts Adorno - in this the notions of dialectics at a standstill and negative dialectics draw together).

During Benjamin's lifetime, this shortfall could to some extent be compensated for by the overwhelming ease of identifying the forces of oppression: Fascism and capitalism, their mutual destruction of collective experience through the instrumentalisation of nature, language and culture. This was complemented by a naive Marxist normative orientation that looked to the organised proletariat as the 'other' repository of lawmaking, if not revolutionary, violence (Cf *R*: 281). Awareness of more subtle forms of violence, and a less naive understanding of the normative structures of forms of social organisation (as supplied by Foucault, Derrida and others), however, requires a more rigorous investigation of the sphere of the non-violent in order to effectively provide grounds for critique.

According to an economy of violence, the decision in such a case as *Mabo* will represent a violence without a ground: either lawmaking, the introduction of a

new order based on an authority which can only be legitimated retrospectively; or a law preserving violence, a reaffirmation of prevailing law. In this way the violence of terra nullius is perpetrated (as vengeful fate) or perpetuated. This must be so because this perspective also allows no account of a normative dimension whose critical force cannot be assimilated to a rival performative violence but which is necessary for the very practice of critique.

*Mabo* is a case where the decision must be made over how and when an expiating 'violence' is to be employed; the violence of terra nullius alone cannot account for this, it gives us no guidance on what to do, indeed it gives us no ground to distinguish itself as a violence of any particular concern. That this is unsettling demonstrates a sensitivity that cannot itself be explained, but which in fact signifies the deferral and displacement of the normativity at work in these decisions (for as we know the decision that one is 'unsettled' is a normative one). In order to explain our sense that the overthrow of terra nullius is right (if not 'just' in an emphatic sense, due to its partiality) we need to be able to uncover the grounds for the strong claim to normative authority, the immanent ideal at work, in this decision; the wrong of terra nullius was not established retrospectively by the new legal order which justifies its striking down, rather it is the concrete experience of struggle and suffering of indigenous people over the last two hundred years that indicts the principle of terra nullius at its origin. This struggle is meaningful only with the adoption of an ethico-normative perspective (Cornell 1987: 156-157). Only an understanding of the normative potential of a struggle for recognition, the normative ideal of reciprocal relations and a sensitivity to suffering, gives us the ability to support the claim that the decision is right.<sup>6</sup>

***Conclusion***

The problem of an economy of violence is that a real violence occurs in the obliteration of the ineliminable singularity of the concrete experience of injustice through grounding it in an indeterminate notion of an economy of an ordinary violence and its displacements. Not only does such a perspective deny the specificity of the injustice, its historical and social configuration (including an account of its origin in history, not merely as an effect or an event in the economy of violence, but as an act for which someone is responsible), but it disables critique, by first denying normative significance to that experience, and second by lacking sufficient determinant content to enable a transformation of current conditions through participation in an ongoing learning process.

What is occluded by the economy of violence is the relationship of law to something other than its dimension of violence; for example, its relationship to conditions of democratic legitimacy which are closely related to the normative principle of equal recognition (this occlusion is what makes an economy of violence itself appear plausible). Only this relationship, properly understood, can explain the dialectical force of legal doctrines such as: the right to free association (and democratic participation); anti-discrimination in the recognition of legal claims; the demand for equal treatment of even non-citizens. The operation of such ideas can give us confidence (though never certainty) that our decisions are right or wrong. Further, an economy of violence obscures the fact that the struggle for recognition of groups and individuals is what in fact draws the attention of critique to determinate instances of violence in law (Honneth 1995a: 309; Honneth 1995b: 205-219). It distracts our attention both from the specific constellation of social-historical forces that are responsible for the perpetuation of the violence of the origin

and the potential of an ongoing learning process that provides both the authority and guidance to correct such wrongs; it obscures how law as a medium transforms and produces violence and non-violence, which is a vital area of inquiry.

So while we may even follow Benjamin in describing the intervention into mythic fate for the rescuing of semantic potentials in order to emancipate humanity as a 'violence', we can not conclude that this jeopardises the concept of a normative dimension of non-violence. This is because within a critically appropriated tradition, including that of law, the violence of the origin is not fated to repetition but rather its effects are capable of being transformed (and a critical counterforce justified) via the normative learning process which they become a part of. In this context the intervention takes on the other significance of *Gewalt* - legitimate force, legitimated by the power of a sphere of normative non-violent relations. We ought not confuse the force of law with either violence or the legitimating power of a democratic polity; only such a reduction makes an economy of violence appear plausible. This is not to imply that in practice these forces can be easily distinguished, and certainly they never appear 'pure'; nor is it to imply that in practice any one of these forces has ontological or temporal priority. What it does mean is that in any particular case (of law or practice) the constellation of these forces can be subject to evaluation and transformation. Thus even what originates in violence can be rescued and employed as non-violence;

The blindfold over Justitia's eyes does not only mean that there should be no assault upon justice, but that justice does not originate in freedom (Adorno & Horkheimer 1992: 17).

We can only hope that the 'violent' overthrow of terra nullius can be so employed; but if we refuse to accept the obligation to investigate the normative content of struggles for recognition and their relation to the 'profane foundation of authority' of law in favour of an indeterminate concept of a mystical violence as the ground of law, this opportunity will be lost.

### **Notes**

- 1 Abbreviations in citations refer to texts as follows: *R* = Reflections (Benjamin 1986); *I* = Illuminations (Benjamin 1992).
- 2 I would like to thank the participants of the Law & Discourse Forum, Glebe, Sydney, for stimulating discussion on this and related issues.
- 3 Derrida argues convincingly that the two perspectives which for him constitute the moral dimension, that of 'equal treatment and respect' and the 'obligation to the infinite singularity of the Other' exist in a productive tension that cannot be reconciled, especially in law (despite law's increased sensitivity to the specificity of its application). However, in his application of this insight to law three issues are underdeveloped: (1) law has a special function in its relationship to morality (understood broadly) - to stabilise generalised behavioural expectations in a postconventional culture which relies on the weak force of moral insight for motivation. This means law must be biased in the direction of 'equal treatment' (which is not to imply insensitivity to particular contexts of application); (2) the idea that the shift between the two perspectives, necessary for any concrete decision, lacks 'ultimate' legitimation conceals the operation of fallible learning processes, in both directions or dimensions of the ethical relationship as well as in their interdependence or mediation. Note also that the lack of a determining principle here, which as Derrida notes is actually a structural condition for the possibility of a just, not simply a 'legal', decision does not imply that a decision cannot be justified; (3) the authority of law is not simply tied to justice in the

comprehensive sense: it must satisfy the functional requirements noted in (1) as well as satisfy the test of democratic legitimation, which as Derrida himself points out, is more than a question of procedural 'legality'. Without this recognition, the understanding of the relationship between law and justice will conceptually dissolve the ethical medium of the social which in fact sustains both - and so the 'aporia' of justice migrates into law with an unnecessary loss of heuristic value.

- 4 Note that a more detailed argument would also examine Benjamin's account of the ambiguous consequences of the destruction of the 'aura' of art, such as the emancipatory potential of art (especially the democratic function of art reception), and its relation to the idea of profane illumination.
- 5 Habermas doubts whether Benjamin's theory of experience is compatible with dialectical or historical materialism despite Benjamin's intention announced in "Theses on the Philosophy of History", precisely because Benjamin could give no account of how a series of interventions could constitute a learning process (Habermas 1972: 149-150).
- 6 Note that the key concepts of recognition and reciprocity need to be understood from a postmetaphysical, post-'identity thinking', perspective. I attempt such an account (and argue the need for such an account to make Derrida's two perspective notion of justice available for Critical Theory) in 'Recognition, A/Symmetry and Decentred Autonomy', forthcoming (see also Honneth 1995a: 316-319).

**References**

- Adorno, T. (1995). *Prisms*, Cambridge, MA: MIT Press.
- (1990). *Negative Dialectics*. London: Routledge.
- Adorno, T. & M. Horkheimer (1992). *The Dialectic of Enlightenment*. London: Verso.
- Arato, A. & E. Gebhardt. (1993). *The Essential Frankfurt School Reader*. New York: Continuum.
- Benjamin, W. (1992). *Illuminations*. London: Fontana Press.
- (1986). *Reflections*. New York: Schocken Books.
- Cornell, D. (1987). 'The Problem of Normative Authority in Legal Interpretation'. In R. Kevelson (ed), *Law and Semiotics Volume 1*. New York & London: Plenum Press.
- Derrida, J. (1992). 'The Force of Law: The Mystical Foundation of Authority'. In D. Gray Carlson *et al* (eds), *Deconstruction and the Possibility of Justice*. New York: Routledge.
- Habermas, J. (1972). 'Walter Benjamin: Consciousness Raising or Rescuing Critique'. In J. Habermas (1983), *Philosophical-Political Profiles*, Cambridge MA: MIT Press.
- Honneth, A. (1995a). 'The other of justice: Habermas and the ethical challenge of postmodernism'. In S. K. White (ed), *The Cambridge Companion to Habermas*, Cambridge: Cambridge University Press.
- (1995b). *The Fragmented World of the Social*. NY: State University Press.
- Wellmer, A. (1991). *The Persistence of Modernity*. Cambridge: Polity Press.
- Wiggershaus, R. (1994). *The Frankfurt School*. Cambridge MA: MIT Press.