

The (Non)Violence of Private Ordering

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Abstract

This paper explores and explicates the constitution and ontology of private ordering – organized or unorganized means of securing order which do not (explicitly) rely upon the law and other formal means of dispute resolution sanctioned by law. Private ordering, I argue, is best understood through its dialecticism of (non)violence: that is, private ordering is concurrently violence and non-violence. This is explicated through three texts: first, reading Frantz Fanon's classic *The Wretched of the Earth* against the exhortations and warnings of Hannah Arendt's *Reflections on Violence*; secondly, Walter Benjamin's classic essay *Critique of Violence*. After situating the (non)violence of private ordering, I argue that symbolic violence – an important component of its constitution – is insufficient for the practice of private ordering: if its normative aspirations are to be realized, a place for physical violence must also be made available to private ordering. The law, it is further claimed, must be open to this, lest the law be reduced to tyranny.

Key words

Private ordering; violence; dialecticism; Walter Benjamin; Frantz Fanon; Hannah Arendt

Resumen

Este artículo explora la constitución y ontología del derecho privado - formas organizadas o no organizadas de garantizar el orden que no se basan (explícitamente) en el derecho y otras maneras formales, sancionadas por la legalidad, de resolver litigios. Sostenemos que el derecho privado es simultáneamente violento y no violento. Ello se explica mediante tres textos: el clásico de Frantz Fanon *Los condenados de la tierra*, contra las exhortaciones y advertencias de Hannah Arendt en *Sobre la violencia*; y el ensayo de Walter Benjamin *Crítica de la violencia*. Después, argumentamos que la violencia simbólica -un importante componente de su origen- es insuficiente para la práctica del derecho privado: si han de llevarse a cabo sus aspiraciones normativas, asimismo

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debe facilitarse al derecho privado un espacio para la violencia física. El derecho debe estar abierto a esto, no sea que la ley quede reducida a tiranía.

Palabras clave

Derecho privado; violencia; dialéctica; Walter Benjamin; Frantz Fanon; Hannah Arendt

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1. Introduction

This paper explores and explicates the constitution and ontology of private ordering, by which I mean organized or unorganized means of securing order which do not (explicitly) rely upon the law and other formal means of dispute resolution sanctioned by law. These means can either co-exist with(in) law and the legal institution, in which case order is produced extra-legally or, they can exist and operate outside and in contravention of law, in which case order is produced illegally (in the latter, what is produced would, at least in the eyes of the law, be disorder, not order).

The exploration and explication of private ordering is an important endeavour for at least two reasons. First, it is clear that private ordering is a ubiquitous practice in ordering everyday life. Marc Galanter (1981, 16-17), for example, writes that “private ordering is a prominent part of the legal universe” and explains one reason for this: “courts resolve only a small fraction of all disputes that are brought to their attention [and] [t]hese are only a small fraction of the disputes that might conceivably be brought to court (...) and an even smaller fraction of the whole universe of disputes” (Galanter 1981, 3). An important and significant contribution of law-and-society (and, now, legal) scholarship is the revelation that order is often not the product of law and other formalized rules and codes of conduct (e.g. Macaulay 1963, Mnookin and Kornhauser 1979, Galanter 1981, Engel 1984, Ellickson 1991, Bernstein 1992, 2001, Richman 2004, 2006, 2012, Ranasinghe 2014, 2017). Second, and related, private ordering has much to reveal about the law and its practices. Exploring private ordering sheds important insights into the ways the law is thought about (in terms of its values, expectations and taken for granted assumptions). Equally, light is shone on the practices of law (what the law does, as opposed to what the law claims it does – the chasm between the law on the books and the law in action). Thus, the explication and theorization of private ordering is a worthy endeavour which sheds important and significant light on the production of order in society.

I argue that private ordering is best understood through its dialecticism of (non)violence. By dialecticism, I follow the path laid by Henri Lefebvre (1991/1974), who refers to it as “the theory of contradictions” (Lefebvre 1991/1974, 333; see also Soja 1989, 2006, Harvey 2006, and Jessop 2006 for related, though different, ways to theorize dialectically).¹ Rather than eschewing contradictions, this theory seeks to embrace them in the spirit of furthering knowledge production (see Ranasinghe 2015). My purpose, thus, is to shed light upon the dialectical process through which the constitution and ontology of private ordering comes to be and take shape; this becoming and being, I claim, is concurrently violence and non-violence.

To illuminate this process and the implications that arise as such, I draw on three important texts in political theory. First, I read Frantz Fanon’s classic, *The Wretched of the Earth* (1961), against the exhortations and warnings of Hannah Arendt’s *Reflections on Violence* (1969). In so doing, I claim that the marginalized voice needs a space of – and, for – violence. Yet, I suggest that fear of violence – epitomized in Arendt’s pleas – need not consume detractors because these fears essentially (are meant to) reproduce the status quo. While counterintuitive, I argue that violence is – or, at least can be – an antidote to fear, even, bigotry.

¹ Edward Soja’s “trialectics”, which follows from and builds upon Lefebvre’s work, is particularly fruitful for its open-ended nature of dialecticism (Soja 1996, 53-82), as is Walter Benjamin’s “dialectical image” which occupies a prominent part in this paper. Michael Jennings describes the “dialectical image” as the “textual space in which a speculative, intuitive, and analytical intelligence can move, reading images and the relays between them in such a way that the present meaning of ‘what has been comes together’ in a flash” (Jennings 2006, 12-13, emphasis omitted; see also Pensky 2004).

After developing the import of symbolic violence to this programme of social reformation, I turn to the classic text of Walter Benjamin on law and violence, namely, *Critique of Violence* (Benjamin 2007/1921). This invocation is meaningful for two reasons. First, as surprising as it may seem, Benjamin's text can be read as a theory of and about private ordering. Thus, invoking Benjamin as such gives a different picture of his contribution to law and legal theory (cf. Kellogg 2013). Secondly, and related, this text illustrates the ways that private ordering can be thought about and mobilized for those who have a particular normative bent, as I do here.

After situating Benjamin's text in these contexts, I develop the (non)violence of private ordering, and return, once more, to the import of symbolic violence to its ontology and constitution. In so doing, I carve a place for violence in the constitution of private ordering. I claim, rather polemically, that private ordering cannot – and, must not – simply be about symbolic violence: this will quash its normative dreams and reproduce the status quo of law. Rather, I suggest that a place for physical violence – *should it be necessary* – must also be made available to private ordering. Equally polemic, I claim that the law – that which closely monitors private ordering and holds trepidations about the use of violence outside its purview – must be tolerant of this need. Where this is not so, I claim that the law simply becomes a tool of oppression. I begin with a discussion of private ordering as exemplified in law-and-society scholarship to situate the arguments to follow.

2. The Boundaries of Private Ordering: On the Shadow of Law and Beyond

Despite the rich and voluminous literature on private ordering, the concept is somewhat amorphous and this has detracted from the significant insights the literature has made in highlighting its import in ordering myriad aspects of everyday life. In this vein, more recently, Barak Richman (2004, 2006) has sought to bring some clarity to this topic by seeking to provide a more robust conceptualization of it. Drawing upon a slew of empirical work on private ordering including some of his earlier theorizations, Richman (2012) delineates two forms of private ordering: those that occur within the shadow of the law (e.g., Mnookin and Kornhauser 1979, Galanter 1981), that is, within the confines of the law, and those that occur without law, that is, outside its purview, what Richman (2012, 746) refers to as a “mechanism [that] involves a much more categorical rejection of state law and state institutions”. This is an important and useful distinction that essentially parallels what I distinguished at the outset as efforts that are extra-legal (within the shadow of the law) and illegal (without or outside law).

Thus, private ordering can be conceptualized via the analogy of the shadow and what lies within and beyond it. The importance, significance and utility of the shadow have been pithily described by Marc Galanter (1981, pp. 8-9, note 11): “The shape of shadows bears a lawful relationship to the original, but the proportions are changed and features can be effaced or transformed. And, the object that casts the shadow is not the energizing source of the image” (Galanter 1981). In what follows I make sense of what resemblance, if any, private ordering has to its prototype, that is, the law and the legal system, and how this resemblance or, lack thereof, comes to be and takes (its) shape.

It is worth commencing with the reflections of Marc Galanter (1974), whose attempts to redress some of the ills of the architecture of the legal system, which, he claims, tends to provide advantages to the “haves” at the expense of the “have-nots,” leads him to discuss what he calls “appended” legal systems, of which private systems constitute one form (Galanter 1974, 128). Galanter claims that two conditions help explain the emergence of private systems: first, the parties are alike and share similar values; second, and perhaps somewhat surprisingly, the private system embodies values that are similar to the official system (Galanter

1974, 130-132). At the risk of reductionism, *sameness*, rather than difference, Galanter believes, forms the basis for private ordering.

Numerous empirical studies, however, have shown that these two conditions do not adequately explain private ordering. The example of a couple who does not invoke the law during separation (Mnookin and Kornhauser 1979) might point to evidence of Galanter's claims – the law accepts the deal brokered by the couple, thereby illustrating concordance between the two forms of ordering (and, the parties themselves) – but other studies illustrate how private ordering appears to depart from the legal system. Stewart Macaulay's (1963) discussion of businessmen who negotiate outside the guarantees of contracts is an example, as is Robert Ellickson's (1991) discussion of the ordering of ranchers in Shasta County. It is important to underline that in these cases, especially the latter, it is not so much the law that is viewed as the problem, but the logistics associated with its implementation – for example, private dispute resolution in Shasta County is directly a product of high transactional costs associated with invoking the legal system. Thus, it is not necessarily that private ordering stands in stark opposition to the law and what it espouses, but rather that the conveniences of private ordering – or, the inconveniences of law – dictate which system is invoked.

This neat distinction – based largely in economic terms – does not hold in other cases, as David Engel's (1984) classic study suggests. Engel illustrates how a particular community heavily frowns upon funneling personal injury claims into the legal system in an effort to preserve local values, while, somewhat paradoxically, has little problems redressing contract disputes via the legal system. Thus, it appears that the legal system is invoked in a precise manner: while the law of torts is not considered problematic to resolve injuries, the law of contracts is considered problematic to resolve breaches of contracts, what essentially amounts to breaches of trust. Much more than the type of law, however, is necessary to understand what is unfolding because it is the particular type of problem, personal injuries versus contracts, which appears to decide which system will be resorted to. This and other studies, then, appear to suggest that it is something more than law that determines the birth of private ordering, this something, I will refer to as values.

Nevertheless, there are other examples which illustrate that it is the law – specifically, its constitution, not necessarily its administration, application or logistics – that is at the heart of private ordering. This is the conclusion Tehila Sagy (2011) reaches in her review of some important studies on private ordering. A good example are two Jewish communities, one in New York City (NYC), the other in the Israeli Kibbutzim, where the desire to safeguard traditional Jewish values leads to the renouncement, if only implicitly, of the formal legal system. This is specifically and forcefully brought to light in the former example, where Sagy describes how the Jewish community in NYC places pressure, both formally and informally, on recent Jewish settlers in the neighbourhood to resolve their disputes through the Jewish Court of Arbitration rather than through the legal system (Sagy 2011, 932-938). While Sagy claims that this system and the others she describes “are not private” (Sagy 2011, 944) because they do not provide choice and are, therefore, “products of domination (...)” (Sagy 2011, 944), it is worth underlining that it is the law itself that is viewed as the problem – the law is not compatible with Jewish values and may eviscerate them – and this gives rise to private ordering.

The same premise also seems to explain the ordering of the diamond and cotton industries as narrated by Lisa Bernstein (1992, 2001). Bernstein (1992, 115) notes that “[t]he diamond industry has systematically rejected state-created law”, though concludes that this is “for reasons wholly unrelated to *shortcomings* in the legal system” (1992, 157; emphasis added). Despite this, however, there appears to be little doubt that it is the law itself – its shortcomings, in other words – that spurred and spawned the need for a private system. Thus, Bernstein refers to “the flexibility and informality of the [private] system [which is] essential to the rapid resolution of

disputes (...)” (Bernstein 1992, 150), the “provi[sion] [of] a comprehensive set of well-tailored default rules (...)” (Bernstein 2001, 1741), as well as the “*clarity of the rules* (...)” (Bernstein 2001, 1742; emphases added), all of which incentivize these industries to resolve disputes privately. To a large extent, Bernstein’s case studies hint at the rigidities constitutive of law that form the bases for private ordering (see also McMillan and Woodruff 2000, Milhaupt and West 2000). As Richman (2004, 2342; emphases added) puts it: “*private law can be tailored very specifically to the idiosyncratic needs and transactional challenges of a particular industry* (...)”

The hitherto mentioned studies illustrate that values drive and shape the birth and life of private ordering: where particular values are threatened or need to be reinforced or safeguarded, a fecund ground and space for private systems emerge. This is true whether these values are of a religious nature (e.g., the Jewish communities discussed by Sagy), driven by business and economic principles (e.g., the communities discussed by Ellickson, Macaulay, or Bernstein) or some other local and parochial norms (e.g., the community discussed by Engel). This would suggest, then, in contrast to Galanter, that *differences*, rather than sameness – the desire to underline or protect differences – are at the heart of private ordering and these differences are of two (related) types: first, that the parties in a community or group united by similar values are, as a matter of *being*, in stark opposition to a different set of values or norms; second, that these differences lead to, as a matter of *doing*, different forms of dispute resolution.

All these examples of private ordering exist and operate in the shadow of the law, that is, they are extra-legal, rather than necessarily illegal.² The law, in other words, sanctions or blesses this type of ordering – and, in this sense, the law creates private ordering. To put it another way, without law, private ordering will not exist; it will not exist because it will be unnecessary, even redundant. Thus, while an eclectic array of values (as noted above) are responsible for private ordering, the line dividing private ordering and the legal system is one of both opposition (in relation to differences) and apposition (in relation to pedigree).

I suggest, however, that opposition to the formal system rather than apposition is an important key to the birth of private ordering. In examining the ordering of an emergency shelter, I have explicated the conditions upon which private ordering emerges and sustains itself (Ranasinghe 2014, 2017). While the law – in this case, rules – is viewed reverentially by both management and employees of the shelter (rules provide consistency and consistency provides – is, in fact – order), the binary logic which constitutes law (that is, between legal and illegal) makes the application of law difficult. The problem with the application of the law, however, is not simply an issue concerning the binary logic of the rules. The other issue is that the shelter is governed by an ethic of care, that is, the provision of myriad services ranging from the essentials of life (e.g., food and shelter) to miscellaneous services (e.g., treatment for drug and alcohol addictions). This ethic of care, however, is polysemic rather than uniform. In other words, different employees conceptualize and administer it in starkly different ways. Thus, and unsurprisingly, these employees apply the rules as they see fit to cohere with their visions of an ethic of care.

Here, as well, values are at the heart of the problem. In this case, this value is the myriad ethics of care carved along the lines of who is and is not deserving of care and what this care should and should not entail. In fact, and assuming hypothetically that the law does not function on a binary code, the problems explicated above will still exist. The only difference, however, would be that when

² My usage of the distinction between the *within the shadow of the law* and *without the law* departs from Richman’s (2012) with respect to the means by which he comes to it. Richman reads the behaviour of the ranchers in Shasta County as described by Ellickson (1991) as indicative that they exist and operate outside the law and, therefore, establish order without it, whereas I see it as evidence of order procured within law’s shadow. This point, however, is largely unimportant to the thoughts developed here.

the employees administer care as they see fit, they will not be breaking the rules but rather applying them – the difference, in other words, between a legal and illegal exercise. In such a scenario, the law would facilitate the application an ethic of care that is polysemic. I draw on this hypothetical scenario to underline that much more than values are at stake: it is, in fact, the constitution of the law, its binary coding, that creates a problem and the very need for private ordering. That is, if the law permitted eclecticism, private ordering would not exist and would be unnecessary and redundant.³

Private ordering, then, is an explicit and conscious distancing and departure from the rigidities of formal law – an attempt to escape the boundaries of law, boundaries which emanate from its constitution which spell out, in black-and-white terms, what is and is not permissible. Thus, both materially and symbolically, private ordering is a renouncement of law and the official system; it is a renouncement of the value of binary coding, a renouncement of structure and stability, of order and planning. The rigid – the structured, planned and consistent – is what private ordering renounces, and whether this translates itself materially or not is irrelevant: symbolically, private ordering is a victory in and of itself (see Ranasinghe 2014).⁴

Thus, if the law can be thought of as a set of boundaries – the law creates space within which individuals (are free to) act – then private ordering is an effacement of these boundaries (or, at least, an attempt to so do). In some instances, private ordering exists and functions within law's shadow; in others, it exists and functions outside both the law and its shadow. In both instances it is the renouncing of law that makes it private ordering, though in each instance, the degree of renouncing (an implicit versus explicit renunciation) differentiates the two (cf. Richman 2012). However, and this is the import of what is developed further, both instances of private ordering can be conceptualized as violence, that is, violence against the law, first in the symbolic sense, and second, though not always a precondition, materially, through physical forms. Thus, private ordering is not law and has no desire to be law: it is law-like (in terms of a normative system of ordering, and only in this way is it in apposition to law), but one which unabashedly celebrates the polysemic and disorderly over the structured, planned and consistent.⁵ It is, then, operatively in opposition to law and everything it stands for. Private ordering, in other words, is that which cannot be – and, wishes not to be – bounded.

3. On Violence

What precisely, then, does it mean that private ordering is not law and that it exists and operates outside the boundaries of law? I suggest that private ordering can be conceptualized as violence. That is, private ordering does violence to law by renouncing law and distancing itself from law. Private ordering, in other words, violates law by inverting the very ethos of law: the law, the tool enacted and deployed to curb, repress and eliminate violence, is itself said to be problematic –

³ John McMillan and Christopher Woodruff (2000, 2421) suggest that “when the law is dysfunctional, private order might arise in its place”. This dysfunctionality has sometimes been referred to as the *dark side* of private ordering, denoting what is illegal (see Milhaupt and West 2000). Here, however, it is worth utilizing the image of dysfunction (or dysfunctionality) to characterize the inherent nature of the public legal system: the constitutive nature of the law, that is, its binary coding, makes it dysfunctional. Thus, “the binary decision that a court must make – that of liability or no liability” (McMillan and Woodruff 2000, 2425), is what limits the legal system and the law. This is also the rigidity that Bernstein (1992, 2001), as noted above, hints at when speaking of the shortcomings of the law.

⁴ In this sense, while private ordering can be illegal given the renunciation of law, it does not have to be of the significant sort as in the example of organized crime, which leads Curtis Milhaupt and Mark West (2000) to characterize it as the *dark side*, essentially, *a priori*, describing private ordering pejoratively. This is unfortunate and I attend to this in greater detail in the penultimate section.

⁵ Richman (2004, 2342, 2012, 756-757), for example, speaks of how private ordering caters to the idiosyncrasies of agents in the ways the law simply cannot; similarly, Bernstein (1992, 150) speaks of the flexibility and informality of private ordering, again, in the ways that law cannot.

in fact, said to be *the* problem. This inversion – turning law's values on its head – is the first and primary act of violence.

In claiming that private ordering is violence, I am making a tactical move both conceptually (that is, theoretically) and practically (that is, normatively and politically). The logic which underpins this claim is based on two related premises. First, in the broadest sense, violence is egregious, indeed, grievous. It poses immediate and substantial harm whether it is to the body, property or psyche. It violates the whole. In this sense, in invoking the word violence, I mean to capture the grievous – even, heinous – nature of the act of violence, one not condoned in society. In other words, to say that something is violence is to say that it is dangerous and in need of suppression and elimination. While this speaks to violence in the material sense – that is, in the physical sense – my invocation is intended to speak to more than this. I am also interested in what the word means as a concept: that is, as something that, in and of itself, violates. Thus, in invoking the word violence, I mean to suggest something that materially and, more importantly symbolically, ruptures, tears, eviscerates and separates.

Here, two types of violence take centre stage and are in need of explication. The first is physical violence – to which I return to below. The other is symbolic violence. By symbolic violence I mean violence that is not necessarily focused instrumentally, that is, towards particular material outcomes. Rather, by symbolic violence I refer to violence that is intrinsically – that is, in its very being – constituted by value. This distinction is described well by Neil Roberts (2004, 146) who differentiates the different types of violence in Fanon's work: "Instrumental violence refers to a concept in which the implementation of (...) violence occurs as a means to an end", that is, "to achieve a particular result", while "[i]ntrinsic violence (...) refers to a metaphysical concept, in which the act of (...) violence itself contains inherent value". Private ordering, as noted, is a concerted and conscious effort to renounce law. Given this, in this very renunciation, the primary act of violence, in the symbolic sense, is found, an act which has inherent value despite any further result that might or might not follow.⁶

This leads to the second, related, premise. Constitutionally, violence is a legal term, a legal product. In other words, it only exists because of, and through, law. Without law, violence not only ceases to exist and have life, but also becomes meaningless. This also means that if violence is problematic, it is only so because of – and, only in the eyes of – the law. All this is premised on a simple point: it is the law's authority to name that gives it, by right, the freedom to demarcate what is and is not violence. Additionally, as developed in the next section, it is this authority that allows the law to claim a monopoly on violence – this claiming, coupled with its right to name, would mean that law claims a monopoly on *legitimate* violence; everything else it does not claim, simply because it has no desire to so do, would be illegitimate, which is also why, in circular logic, it does not wish to claim it. A good example is natural law theory (e.g., Hobbes 1985/1651, Locke 1982/1689, Rousseau 1968/1762), where this is visible in the shift from the state of nature

⁶ This is precisely why I distance my usage of symbolic violence from what is perhaps the most famous usage of it, that is, as explicated by Pierre Bourdieu. For Bourdieu, symbolic violence is an effective tool that is wielded in power relations that structure and organize everyday life (see Wacquant 1987, Dezalay and Madsen 2012, for good overviews). However, as Bourdieu has it, this violence is symbolic precisely because it is largely hidden: "Symbolic violence (...) is the *violence which is exercised upon a social agent with his or her complicity*" (Bourdieu and Wacquant 1992, 167; emphases in original), but which, at the same time, "*lies beyond – or beneath – the controls of consciousness and will (...)*" (Bourdieu and Wacquant 1992, 172; emphases in original). While it is very much the case that individuals might not often (easily) recognize the oppression that is part and parcel of their lives through the constitutive power of law, this does not mean that they are necessarily complicit in this oppression. Private ordering aptly illuminates this because it is a concerted and conscious effort to free oneself from the oppression, in this case, law, that binds society, of which the agent is far from complicitous.

(and, state of war) to civil society. Thus, for example, that man must “lay down this right to all things (...)” as Hobbes (1986/1651, 190) puts it or “the executive power of the law of nature”, as Locke (1982/1689, 8, par. 13; emphasis omitted) puts it, means that what is countenanced in the state of nature cannot be so in civil society. This is a direct result of the power to name, so that, for example, where “Force and Fraud are in [the state of] Warre the two Cardinall vertues” (Hobbes 1986/1651, 188), they are not in society, where through the power granted to the state to define force and fraud as illegitimate, they cease to be virtuous and instead become grounds for prohibition or, at least, regulation.

Examined as such, the import of the tactical invocation of violence becomes clearer. That is, while violence is grievous, it is this very grievousness that is in need of inversion. In other words, what the law prohibits via its naming and claiming, private ordering brings to the fore. What is considered vile and evil in the eyes of the law, private ordering makes virtuous. This can be appreciated and illuminated if the gaze is inverted. So doing illustrates not simply how private ordering inverts what is orthodox and normalized, but why this inversion is necessary in the first place.

While an extreme example, *The Wretched of the Earth* (Fanon 1961) is nevertheless suggestive, if not illustrative, of the violence of (and, in) private ordering. In vividly painting a picture of the violence of colonialism, Fanon broadens the contours within which violence is conceptualized. In this picturing, physical violence reigns supreme, best evinced in the memorable and equally haunting statement that while the “native’s back is to the wall, the knife is at his throat (or, more precisely, the electrode at his genitals)” (Fanon 1961, 46). Here, the nature and degree of violence is certainly magnified, though far from embellished: the very essence of procreation is violated by the colonizer – in some ways, a prudent course of action by him or her who sees the native as vile, despicable, even sub-human (or non-human). Physical violence, thus, is brought vividly into the spotlight, culminating in blood and the mutilation of the genitals (or, at a minimum, in the production of dysfunctional genitals). There is more, however, in this painting, because physical violence cannot be extricated from a different sort of violence that goes hand-in-hand with it. Fanon, thus, continues to vividly portray the constitution of the native as it unfolds at the hands of the colonizer: “He is insensible to ethics; he represents not only the absence of values, but also *the negation of values*. He is (...) *the enemy of values*, and the absolute evil. He is the corrosive element, destroying all that comes near him; he is the deforming element” (Fanon 1961, 34; emphases added).

As the foregoing attests, the native is painted as everything the colonizer is not – and, cannot be. This is so as a matter of being, not simply doing. The import of values needs underlining here, because as Fanon tells the story of the colonizer, it is not simply that the native is constitutionally inferior to the colonizer. Rather, it is also that the disposition of the native renders him or her unable to appreciate and account for the values of the colonizer. What the native values, in other words, is everything that will, supposedly, destroy the colonizer and everything s/he stands for. Thus, there is little recourse but for the colonizer to “calm (...) down the natives” (Fanon 1961, 53), a task attended to not simply through the knife and electrodes laid at the very humanity (read, manhood) of the native, but also through a plethora of other psychological aids, including religion and education. When looked upon as a whole, psychic violence and physical violence go hand-in-hand in subjugating and oppressing the native. As Fanon puts it, “the emotional sensitivity of the native is kept on the surface of his skin like an open sore which flinches from the caustic agent” (Fanon 1961, 45). In other words, the effects of psychic violence – certainly on equal par to physical violence, perhaps more oppressive and punitive – are worn on the skin of the native, akin to an open sore (see also Fanon 1991/1952).

The native responds to this violence with violence, perhaps even greater violence – though it takes time for this violence to materialize. This is the only means by which the native can salvage his or her dignity. This is the only way the native can become human. On this, Fanon is unequivocal. This is not merely descriptive, in terms of what dignity and humanity entail. It is also normative: that is, an explicit call to violence – though, as I take up below, the nature of violence prescribed is multifaceted. Perhaps it is the normative dimensions of Fanon's call that leads Arendt (1969, 8) to claim that the writings of Fanon and Jean-Paul Sartre (who penned the preface to *The Wretched of the Earth*) amount to "irresponsible grandiose statements", especially because they "glorif[y] violence for violence's sake" (Arendt 1969, 25).

It is worth examining how and why Arendt comes to this position. Despite the above statements, Arendt is left with little recourse but to admit the important place of violence. According to her, "under certain circumstances [,] violence (...) is the only possibility to set the scales of *justice* right again" (Arendt 1969, 24; emphasis added). In further explaining this, she notes that "there are situations in which the very swiftness of a violent act maybe the only appropriate remedy" (Arendt 1969, 24). These are intriguing statements. On one hand, it not only acknowledges an important place for violence, but for its speedy utilization as well. This appears to suggest that it is not so much the use of violence that Arendt is wary of. Rather, it is the manner in which it is deployed that concerns her. This becomes clearer when considering that she believes that "all violence harbors within itself an element of arbitrariness" (Arendt 1969, 2). This would mean that the end product of violence – not necessarily violence itself – is (what is) volatile. As she puts it: "The practice of violence, like all action, changes the world, but the most probable change is a more violent world" (Arendt 1969, 33). In other words, while violence might be necessary in certain – exceptional – circumstances, what results is far more grievous than the position or moment before the deployment of violence. This is why she reduces calls for violence as "ignorance" (Arendt 1969, 8), despite her belief that in some cases justice necessitates violence.

The difference between Fanon and Arendt is not necessarily ideological; it is mostly conceptual, pertaining to the way each views violence. Simply put, Arendt conceptualizes violence as strictly instrumental (Arendt 1969, 8). Given that the effects of violence can only be predicted for short-term gains, not long-term ones (Arendt 1969, 32-33), violence has the potential to do more harm than not – that is, even in the exceptional circumstances in which it may be used, the resulting effects will be worse than not. For Fanon, however, such fears are allayed – in fact, are irrelevant and in-existent – because violence is not reduced strictly to the instrumental. Violence, rather, is also – and, perhaps more importantly – symbolic. It is the symbolic that speaks to the place of violence, and why this place is essential for freedom, dignity and, most importantly, the recognition of humanness. This is why violence has an important and imperative, though specific, role to play in the decolonization process. In other words, for Fanon, decolonization has a specific look and feel to it. Examining this look and feel sheds further insights into the place of violence in private ordering.

Fanon is forthright about the effects of decolonization. In this sense, his candour maybe read as an acknowledgement of the negatives of violence. "Decolonisation", he writes, "is obviously a programme of *complete disorder*" (Fanon 1961, 29; emphases added). This is far from surprising given that decolonization is "a complete calling in[to] question of the colonial situation" (Fanon 1961, 30) because it "sets out to change the order of the world" (Fanon 1961, 29). As well, Fanon is forthright that "decolonization *is always a violent phenomenon*" (Fanon 1961, 29; emphases added).

Unlike Arendt, however, Fanon is not merely satisfied with locating the violence of decolonization and its constitutive problems. Rather, this exercise is a prelude for

what is to come: the celebration of this very violence. Fanon, thus, extends and broadens the case for the violence of decolonization when he claims that decolonization “constitutes (...) the minimum demands of the colonized” (Fanon 1961, 29). This is because – and, importantly as alluded to before – the violence of colonialism is not reduced strictly to the instrumental (see also, Roberts 2004). Recall that Fanon places heavy emphasis on the psychic violence which goes hand-in-hand with physical violence. This is why, for Fanon, “liberation must, and can only, be achieved by force” (Fanon 1961, 57). As he puts it: “Violence is (...) comparable to a royal pardon. The colonized man finds his freedom *in* and *through* violence” (Fanon 1961, 67; emphases added).

This is a crucial passage in Fanonian thought. It is true that Fanon is speaking of the place of violence *vis-à-vis* liberty. In other words, what is at stake is victory in the instrumental sense. This is why he speaks of the path to freedom *through* violence. In the instrumental sense, however, and crucially, this need not be the only path: freedom maybe – and, has been – achieved non-violently. There is another path for Fanon, however, that is equally – or, more – important in the quest for freedom. This concerns the symbolic. In this sense, violence is the *only* path. That is, if freedom is achieved without – or, outside – symbolic violence, it would not amount to freedom in the truest sense. Instrumental freedom maybe achieved without violence. However, psychic freedom cannot: it requires symbolic violence. Thus, Fanon claims that “[t]he practice of violence binds them [the natives] together as a whole” (Fanon 1961, 73). Simply put: “violence is a cleansing force. It frees the native of his inferiority complex and from his despair and inaction; it makes him fearless and restores his self-respect” (Fanon 1961, 73). In other words, it is violence that cleanses the native of his supposed inferiority; it is violence that ruptures the hitherto oppressive psyche that chained the native.

It is important to underline the two profoundly different sorts of violence described by Fanon. Equally important is to note that it is not strictly nor necessarily physical violence that is at the heart of the decolonization mission – as noted before, such violence has a place in liberation though it is not a precondition for liberation. This is important to note despite the paranoia that threads the exhortations, even, warnings, of Arendt (1969). This is a mistake that could easily be made. On the surface – as noted above – Fanon appears to write in this manner, perhaps even glorifying violence as Arendt accuses him. For example, he claims that colonialism “is violence in its natural state, and it will only yield when confronted with greater violence” (Fanon 1961, 48). He also notes that “[t]he violence of the colonial regime and the counter-violence of the native balance each other and respond to each other in an extraordinary reciprocal homogeneity” (Fanon 1961, 69). Such statements appear to suggest the important place of physical violence in Fanonian discourse.

This important place aside – and, physical violence has an important role to play – it is the symbolic nature of violence that is at the heart of Fanon’s discourse (see also Roberts 2004). Fanon conceptualizes the very awakening of the native – the moment s/he realizes that s/he is not inferior to the colonizer; the moment s/he realizes that s/he has been the subject of violence, both of the physical and psychic sort – as the pinnacle of violence. It is here, Fanon claims, that the seeds of violence – perhaps physical, but certainly symbolic – have been sowed, a moment where there is no turning back (Fanon 1961, 36-37). It is the defining moment that sets the processes of decolonization in motion. This is precisely why he claims that “all decolonisation is successful” (Fanon 1961, 30). It is symbolic violence, then, not necessarily physical violence, that Fanon calls for and glorifies – and, glorify it he does. In fact, it is clear that Fanon is quite wary of physical violence as the following cautionary statement attests to: “[A]ll parties are aware of the power of such violence and that the question is not always to reply to it by a great violence, but rather to see how to relax the tension” (Fanon 1961, 57).

I will return to the import of both physical and symbolic violence *vis-à-vis* private ordering. For present purposes, my intention is to underline the import of symbolic violence as a moment of rupturing. This is certainly evident in the process of decolonization. Similarly, I suggest, private ordering can be thought of as a moment and process of rupturing. It ruptures the norm and the taken-for-granted. What it ruptures, thus, is the law because it unequivocally renounces law – in similar ways to decolonization. This rupturing, I claim, is violence or, at least, can be thought of as violence, though as I explicate further, this is dependent upon the power of narrative. In what follows, I shed further light on the awakening and rupturing in private ordering – as a moment that is static and processual in the same breath – through Benjamin’s text on violence and law.

4. The Violence of Law and the Violence upon Law

Benjamin’s (2007/1921) text, I suggest, maybe read as an explication of private ordering. This might seem surprising at first, especially given that no more than a few sentences are devoted to it, and that too, largely in passing. Nevertheless, I contend that his theorization of governing and order, which he explores through the coming of the Messiah, provides a fecund ground to conceptualize what private ordering looks and feels like. I rely on Benjamin’s text to theorize the dialecticism of private ordering: private ordering is concurrently violence and non-violence.

As Benjamin sees it, the law (and, the legal system),⁷ is quite peculiar, both as a tool of governance and an institution more broadly. This is so for two related reasons. The first is that the law explicitly sanctions violence. That is, the law must be able not simply to regulate violence, but also deploy it where necessary. For the law to be law and function effectively, this is non-negotiable (cf. Hobbes 1985/1651, Locke 1982/1689). In other words, if the law did not sanction violence, it would not be – and, cannot be – law [as Hobbes’s (1985/1651, 223) famous dictum has it: “Covenants, without the sword, are but words, and of no strength to secure man at all”]. This is because, and to introduce the second point, the law is violence, and is so constitutionally and otherwise (conceptually, for example). That is, the law, born of violence, is violence, and this is further magnified because of its need for violence, both as a matter of being (ontologically) and doing (practically and logistically). Again, if this is not the case, the law would not be – and, cannot be – law (see Cover 1983, 1986, Derrida 1990, Constable 2001; cf. Fitzpatrick 2001).

Benjamin takes the argument further and claims that the law holds – and, must hold – a monopoly on violence. In other words, the law demarcates between legitimate and illegitimate violence and monopolizes the former. The “legal system”, Benjamin writes, “tries to erect, in all areas where individual ends could be usefully pursued by violence, legal ends that can only be realized by legal power” (Benjamin 2007/1921, 280). There are two reasons for this. The first is logistical or practical. That is, it becomes difficult – in fact, impossible – for the law to do what it claims to do, if various parties are also vested with the right to violence (and, this becomes even more difficult if these parties have essentially the same capacity to inflict violence as the law does – the quintessential Hobbesian premise). Simply put, violence bestowed in the hands of one party – and, only one party – is the most efficient and effective means to regulate violence. The law, in other words, needs to have a monopoly on violence. As Benjamin notes, “a system of legal ends [the preservation and regulation of violence] cannot be maintained if natural ends are anywhere still pursued violently” (Benjamin 2007/1921, 280) – to

⁷ In the logistical sense, there are many sub-legal systems as there are myriad laws – what is commonly referred to as *legal pluralism* (see Galanter 1981, Merry 1988). Thus, for example, one finds criminal, administrative and other municipal codes, for example, working together to order society that emerge from particular (colonial) histories. Despite this pluralism, all these are *law* in the sense that they are formalized within one system, the state. It is in this sense that I speak of, via Benjamin, the legal system, acknowledging, of course, its fragmentation within.

invoke natural law theory once more, this refers to renouncing the “right to all things (...)”, as Hobbes (1986/1651, 190) puts it, or “the executive power of the law of nature”, as Locke (1982/1689, 8, para. 13; emphasis omitted) puts it.

In this framing, law’s monopoly on violence speaks to its efficiency and effectiveness. These characteristics are important for the end(s) they serve – or, preserve – namely, the betterment of society. In other words, law’s monopoly on violence serves the wellbeing of society, whether in relation to justice (see Constable 2001, 2011) or freedom (see Locke 1982/1689) to name just two. For example, because law funnels all violence into its purview, thereby protecting citizens from arbitrary violence, it allows citizens to plan their lives as they see fit with little to no trepidations that unplanned events will stifle them. This ability to plan, in other words, safeguards and maximizes freedom (see Locke 1982/1689, Mill 2006/1859). I will refer to this as *law’s altruism*.

There is another, darker, side of law’s monopoly on violence that Benjamin is keen to underline – in fact, this is the foundational moment upon which he relies to explicate the import of the Messianic. In this picturing, the law is not altruistic – far from it. The law has little interest with its citizenry or the wellbeing of society. Rather, law’s monopoly on violence has to do with the law itself – its own wellbeing. As Benjamin sees it, the “law’s interest in a monopoly of violence vis-à-vis individuals is not explained by the intention of preserving legal ends but, rather, by that of preserving the law itself (...)” (Benjamin 2007/1921, 281). This is why “violence, when not in the hands of the law, threatens it not by the ends that it may pursue but *by its mere existence outside the law*” (Benjamin 2007/1921, 281; emphases added). In other words, and put simply, any trace of violence outside the parameters of law, in any form, threatens and jeopardizes the existence and essence of law. Thus, the law will cease to be law if it does not, and cannot, monopolize violence. This is the dark side of law – I will refer to this as the *narcissism of law* (see also Valverde 1996).

This is evinced in the example of the strike. For Benjamin, the right to strike “is, apart from the state (...) the only legal subject entitled to exercise violence” (Benjamin 2007/1921, 281). Facially, the strike does not amount to violence because it is undertaken through – and, because of – a right bestowed by law. That is, a strike does not violate law. Despite this, Benjamin states that a strike is, in fact, violence. This is because a strike goes against the interest of the state and, by extension, the law and the legal system. As he claims, “the right to strike constitutes in the view of labor, which is opposed to that of the state, the right to use force in attaining certain ends” (Benjamin 2007/1921, 282). This clash – what he calls “[t]he antithesis between (...) two conceptions” – is, as a matter of being, violence, despite being, by right, not necessarily so: “For, however paradoxical this may appear at first sight, even conduct involving the exercise of a right can nevertheless, under certain circumstances, be described as violent” (Benjamin 2007/1921, 282). This is especially so if this right is exercised “in order to overthrow the legal system that has conferred it” (Benjamin 2007/1921, 282). Given that it is the state – and, only the state – which has, by right, the capacity to label something as violence, a strike, which runs counter to the interests of the state, is, as a matter of existence, violence. It simply cannot escape this fate. For Benjamin, what this example illustrates is that in certain carefully crafted instances – the strike being one – the state tolerates or permits violence, the reasons for which I take up below.⁸

⁸ This example, and many others discussed by Benjamin, must be situated within the time his thoughts were penned. This is not the place to discuss this issue, though these have been taken up in other contexts (see Arendt 1970, Jennings 2006, Kellogg, 2013). Despite being dated, what the example of the strike offers about the relationship between law and violence and, more importantly, the relation between private ordering and (non)violence, is invaluable to the thoughts developed here. A good example of its current relevance is the recent threat of a strike by the Canadian Union of Postal Workers

If all law and its resolutions – such as a strike – are violence, this leads to an intriguing question posed by Benjamin (2007/1921, 289): “Is any nonviolent resolution of conflict possible?” Benjamin answers this in the affirmative, stating: “Without a doubt” (Benjamin 2007/1921, 289), and locates this possibility in what is here termed private ordering:

The relationships of private persons are full of examples (...). Nonviolent agreement is possible wherever a civilized outlook allows the use of *unalloyed means* of agreement. Legal and illegal means of every kind that are all the same violent may be confronted with nonviolent ones as unalloyed means. Courtesy, sympathy, peaceableness, trust, and whatever else might be mentioned, are their subjective preconditions (Benjamin 2007/1921, 289; emphases added).

The word unalloyed – specifically the phrase “unalloyed means”, used twice – is significant to what Benjamin wishes to develop. It is meant to convey purity (that is, what is pure). As Benjamin sees it – and, as developed further below – the law is far from pure, especially when its focus is to safeguard its own essence and being, its own power, that is. Thus, with(in) the law, the means by which order is procured and maintained is alloyed because of its connection to violence; specifically, it is the ways that despite being born of violence, the law seeks to circumscribe, even circumvent, violence that makes it quite pernicious. As will become apparent, in this very attempt, law is alloyed and Benjamin, therefore, seeks a pure(r) means by which order can be sustained.

It is important to note, however, that Benjamin also acknowledges the import of the law in this possibility. That is, it is the law – not any other entity or institution – that facilitates non-violent resolutions via its powers. As Benjamin has it, the “objective manifestation (...)” of non-violent resolution “is determined by the law (...)” (Benjamin 2007/1921, 289). This means that, either directly or indirectly, the law is part and parcel of non-violent resolutions. Private ordering, in other words, is constituted, in some ways at least, via the violence of law. The “unalloyed means [non-violence]”, Benjamin notes, “are never those of direct [solutions], but always those of indirect solutions” (Benjamin 2007/1921, 289). Even in private ordering, then, the law is implicated and heavily involved. As such, an unalloyed or pure means of conflict resolution simply does not – and, cannot – exist. To put this another way, Benjamin’s foray into private ordering suggests that private ordering *appears* to exist in the shadow of the law (Mnookin and Kornhauser 1979) – it can never escape law’s shadow, which is to say, law’s violence.

What is revealed, then, is the all-encompassing – in fact, overbearing and overwhelming – nature that is the law. This is evinced in the example of the strike, to which I return once more. Recall that for Benjamin the example of the strike illuminated the way the state tolerates or permits violence. According to the state, this gesture is meant to highlight its magnanimity. That is, the state, which takes into its ambit all violence, does, in rare instances, permit violence to ensure and demonstrate that it is not tyrannical. While such instances can only be rarities, lest the good order and wellbeing of the nation be thrown into chaos, they, nevertheless, are meant to illustrate the openness of the state, and this is so both materially and symbolically. In other words, the state puts the wellbeing of the citizens ahead of its own wellbeing. For Benjamin, however, all this merely amounts to an illusion (a fairy tale, as I take up below). The state – and, law, by extension – is tyrannical and the exceptions it makes are for its own benefit. While “the concession of the right to strike (...)” is granted to citizens even though it “contradicts the interests of the state,” the state “grants this right because it forestalls violent actions the state is afraid to oppose” (Benjamin 2007/192, 290). In other words, the right to violence is permitted only where it ensures that further

during the summer of 2016. Despite operating within its mandate to strike, the threat of the strike posed massive concerns to the state, in particular, to (small) business interests, the effects of which would have placed enormous pressures on an already tenuous economy.

violence against the state does not accrue. It is, thus, the existence of the state – its wellbeing – that is at the heart of the exception to the rule of violence. This allowance, of course, Benjamin notes, is carefully monitored and scrutinized.

While facially private ordering appears to amount to unalloyed or pure means, on a deeper level this is more apparent than real. This is because private ordering is a product of the law, which means that it is, itself, violence. This strips private ordering of its purity. Benjamin is most cognizant of this, and this is precisely why he invokes the Messianic – an allegorical (re)presentation meant to illustrate the implications of law and the legal system. Delving into this provides an important path towards reclaiming the non-violence that is also constitutive of private ordering.

According to Benjamin, “every conceivable solution to human problems, not to speak of deliverance from the confines of all the world-historical conditions of existence (...) *remains impossible if violence is totally excluded in principle (...)*” (Benjamin 2007/1921, 293; emphases added). This means that violence cannot be excluded *a priori*. This, then, gives rise to yet another important question: if violence itself is not necessarily the problem (or, problematic), then, what is? – a fair question, it should be noted, given that in this framing violence is cast as a (potential) solution. The answer, as alluded to before, is the law. It is the law that is violence, a particular sort of violence that Benjamin finds unacceptable. Thus, Benjamin claims that “the question necessarily arises as to *other kinds of violence* than all those envisaged by legal theory” (Benjamin 2007/1921, 293; emphases added). One important example of the “other kinds of violence” explored and advocated by Benjamin is private ordering. Despite the violence that is private ordering, Benjamin sanctions this form of governance because it is backed by different mandates with different threats. Its ethos, in other words, is not law, largely because of its desire not to be law or law-like (see also Ranasinghe 2014).

The distinction carved by Benjamin between mythical and divine violence illuminates the non-violence that is also part of private ordering. Mythical violence, Benjamin notes, “is a mere manifestation of the gods” (Benjamin 2007/1921, 294), that is, “a manifestation of their [very] existence” (Benjamin 2007/1921, 294). The invocation of deity – in particular, from Greek mythology – is meant to immediately capture the mythical component of such a way of thinking, being and acting. Mythical violence is identical to what he calls “law-making violence”. That is, violence that is used to found a legal system – the original moment, if one prefers (Benjamin 2007/1921, 284-285). This moment, then, is used and relied upon to sustain the life of the system:

[T]he function of violence in lawmaking is twofold, in the sense that lawmaking pursues as its end, with violence as its 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 (Benjamin 2007/1921, 295; emphasis in original).

In other words, “*Lawmaking is power making (...)* [and] an immediate manifestation of violence” (Benjamin 2007/1921, 295; emphases added). This has profound implications for the life – that is, durability and resonance – of law’s myth(s) (see also Fitzpatrick 1992). For Benjamin, the law is only (or, at least, mainly) concerned with one thing: power – in particular, in finding and keeping power (that is, lawmaking and law preserving). This would mean, then, that the law is not – and, cannot be – interested in concerns over justice, fairness, equality and the good life, for example, issues that deeply concerned Benjamin, as will become apparent shortly. That is, the law creates, maintains and sustains its hegemony simply because it is law. The law, equated to deity and, hence, treated reverentially, is durable because of the myth(s) it propagates, namely, that it is concerned with justice, equality and fairness, for example. As Benjamin

(2007/1921, 295) puts it: "Justice is the principle of all divine end making, power the principle of all mythical law making". Or, as he puts it elsewhere: "[F]rom the point of view of violence, which alone can guarantee law, there is no equality, but at the most equally great violence" (Benjamin 2007/1921, 296). Mythical violence, thus, is the manifestation of the power of fate over reason and rationality. Cast as such, Benjamin's disdain for law is clear and palpable. It is premised on violence and is, therefore, violence. Even worse, however, its existence is based upon a myth: it propagates myths about what it does and in so doing locks and seals its institutional and hegemonic power.

In a different, though related, manner, this can be appreciated in the concept of the fairy tale, which can be likened to law. In describing the *place* of the fairy tale in society, Benjamin writes:

'And they lived happily ever after,' says the fairy tale. The fairy tale, which to this day is the first tutor of children because it was once the first tutor of mankind, secretly lives on in the story. The first true storyteller is, and will continue to be, the teller of fairy tales. Whenever good counsel was at a premium, the fairy tale had it, and where the need was greatest, its aid was nearest. The need was the need created by the myth. (Benjamin 1970/1936, 102)

The law, thus, can be equated to a fairy tale, at least in terms of the narratives weaved and spun by it: the law regales its constituents with grand tales of justice, fairness and equity, all in the quest for the good life. However, as Benjamin sees it, like a fairy tale, the law is not only incapable of delivering what it promises, but perhaps more perniciously, has no interest in so doing. It is the myth of law – narrated and believed like a fairy tale – that sustains its hegemonic power. Equally important to this analysis is that the fairy tale is narrated to children *by* – and, this is the important point – adults (often their parents), a clear sign that illuminates the institutional power of the law, where via tradition, the passage of stories from one generation to another ensures their survival, so that the law is capable of maintaining its hegemony despite the clear signs of its inability and disinterest on delivering its promises. Perhaps this is how and why Benjamin comes to read Franz Kafka's *The Trial* as a reflection of the true essence of law: "What may be discerned, subtly and informally, in the activities of these messengers is law in an oppressive and gloomy way for this whole groups of beings" (Benjamin 1970/1934, 117).

This is precisely why despite its violence – a different kind of violence, as explicated below – private ordering is viewed by Benjamin as refreshing: private ordering destroys the myth of (and, about) law. In so doing, it seeks to also destroy the power that is locked into law, its hegemony, in other words. This achieved, matters of justice, equity and fairness, for example, are given due course and brought to the fore.

Before discussing how private ordering achieves this, it is worth briefly noting the import of social justice in Benjamin's work. The import of justice (and, as well, other like matters such as equity and fairness, for example, in a nutshell what would be conducive to the good life) deeply concerned Benjamin as it did many writers during this time. Michael Jennings, for example, writes that "Benjamin champions Baudelaire precisely because his work claims a particular historical responsibility: in allowing to be marked by the ruptures and aporias of modern life, it reveals the brokenness and falseness of modern experience" (Jennings 2006, 14). Similarly, Hannah Arendt notes that "the Jewish question was of great importance for this generation of Jewish writers and explains much of the personal despair so prominent in nearly everything they wrote" (Arendt 1970, 37). The notion of despair – a sense of a profound loss of hope – is a key theme found in many of Benjamin's works, be it explicitly or implicitly. To draw once more on Arendt, she notes of Benjamin – and, others – that his writings grew out "of the despair of the present and the desire to destroy it" (Arendt 1970, 39). Thus,

Benjamin's work – especially his scathing criticisms of the law – must be situated within a particular epoch where a deep and profound sense of hopelessness enveloped, constituted and swallowed life as a whole (the "Jewish Question" perhaps being the paradigmatic example). However, this sense of hopelessness, while in many ways all-consuming, was, in other ways, seen as important to combat and rectify – in a different context, precisely the point homed-in by Fanon and others like him. Perhaps this is why Benjamin notes that "our image of happiness is indissolubly bound up with the image of redemption" (Benjamin 1970/1950, 256), hinting at the persistent need and desire to break free from the shackles that bind the marginalized and otherwise disenfranchised. As will become apparent below, part of unshackling the chains of oppression necessitated the "death" of law or, at least, reconceptualizing it anew.

For Benjamin, this is (or, can be) accomplished in – and, through – divine violence. Divine violence is the antidote to the problem of myth – "its antithesis in all respects," as he puts it (Benjamin 2007/1921, 297). "[T]he destruction of (...)" myth, Benjamin writes, "becomes obligatory" (Benjamin 2007/1921, 296-297). It is obligatory because this is the sole basis upon which freedom can be met and sustained. Divine violence is law-destroying violence. It destroys boundaries – here, the boundaries of law (in relation to the legal system and everything outside it) and the boundaries carved by law, especially in relation to the monopoly on violence and the way it subjugates citizens to this violence (in relation to what is legal and illegal). Divine violence expiates guilt – here the guilt cast by law (Benjamin 2007/1921, 297). In so doing, divine violence "purifies the guilty (...)". This purification, however, is "not from guilt (...) but of law" (Benjamin 2007/1921, 297). It is the guilt of law – and the guilt it casts upon the world – that is expiated. Divine violence rescues citizens from its pernicious hold thereby making them free. Divine violence, then, is freedom.

The Messianic – or, the coming of the Messiah – is the representation and manifestation of divine violence in action. The Messiah will free his people from the bondage of slavery and unlawful rule (as in Judaism) or, from the bondage of law and set in place a path for salvation based on grace (as in Christianity). For present purposes, I will limit my comments to Christianity, but in both cases it is the older form and path that is destroyed to make way for the new. Thus, in the same way that Christ destroys law (the law of the Old Testament) and frees the Jew and Gentile alike from Jewish law and custom (where grace replaces sacrificial offerings),⁹ divine violence frees citizens from the bonds of positive law, a law that has been founded upon and sustained by myth. This is the metaphor invoked by Benjamin. The old – the hegemony of myth – is destroyed; in so doing, light is shone upon the darker side of law and what it stands for, namely, power. What is created and opened anew is a space for freedom and important matters to society: justice, fairness and equality, for example. Private ordering, I suggest, is the new which effaces the old.

The image and figure of the hunchback – which Benjamin borrows freely and frequently from the works of Kafka – helps further illuminate the place of the Messianic in Benjamin's overall argument. Benjamin claims that the various figures (essentially characters) in Kafka's works "are connected by a long series of figures with the prototype of distortion, the hunchback" (Benjamin 1970/1934, 117). The hunchback, in other words, epitomizes distortion. The hunchback is a physical deformity and anomaly, essentially an excessive curvature of the spine that is visibly noticeable via a protrusion or hump. Given the abnormality of the hunchback

⁹ Technically, it is the fulfillment of the law that takes place in and through Christ. Thus, according to the Gospel of Matthew (5:17): "Do not think that I have come to abolish the Law or the Prophets; I have not come to abolish them but to fulfill them" (this translation is from the New International Version, 2011, as are the others found below). This fulfillment, however, also necessitates the concurrent destruction (or, abolishment) of the old – here, the law of the Old Testament – and it is in this sense that I speak of *destruction*.

– both in its occurrence, that is, frequency and, therefore, through other means as well, for example, aesthetically – the hunchback serves as a useful image for Benjamin to speak of the ills facing society, in this particular instance, law. For Benjamin, the law is very much like the hunchback: where the hunchback is the prototype of a physical distortion (a deformity), the law is the prototypical distortion in (and, of) society. Distortion refers to a representation that does not cohere with what is real or, at least one that does not accurately represent. As Benjamin sees it, the law is a distortion, in particular, a distortion of its very being: it presents itself as premised upon the good of society when, in fact, Benjamin claims, it is merely interested in its own being, that is, sustaining its own powers. Thus, the law has sustained its hegemonic power through particular myths that are narrated *ad nauseam* which have had the effect of distorting reality.

This is precisely why, as noted above, the Messiah represents the end of distortion. As Benjamin puts it elsewhere: “The same symbol occurs in the folksong *The Little Hunchback*. This little man is at home in distorted life; he will disappear with the coming of the Messiah (...)” (Benjamin 1970/1934, 134). The invocation of the Messianic is quite propitious. In Christianity, it is not simply that Christ destroys the old and replaces it with the new, but so doing represents *the* atonement (that is, pardoning or forgiving) of the iniquity (that is, sin) that has encumbered and saddled humans (and, humanity). This is evinced, for example, in Isaiah where several verses portend the coming of Christ and that He alone will be the way to salvation:

Surely he took up our pain and bore our suffering, yet we considered him punished by God, stricken by him, and afflicted. But he was pierced for our transgressions, he was crushed for our iniquities; the punishment that brought us peace was on him, and by his wounds we are healed. We all, like sheep, have gone astray, each of us has turned to our own way; and the Lord has laid on him the iniquity of us all.

After he has suffered, he will see the light of life and be satisfied; by his knowledge my righteous servant will justify many, and he will bear their iniquities (Isaiah, 53: 4-6; 11).

The invocation of the Messiah by Benjamin is propitious because in Christianity iniquity is represented by a figurative sense of being bent over, in a similar manner to the hunchback. However, whereas a deformity led to the physical condition of the hunchback, in Christianity, it is sin which puts such an immense burden on the person – essentially to be saddled with it – that the weight of it leads to the figurative hunchback. This is why the debt of sin needs a payment so that the iniquities can be atoned (essentially, the straightening of the hunchback).

Benjamin is not necessarily positing (and, positioning) the Messiah as factual and it is most plausible that he would countenance the mythical nature of the Messiah. That said, what the Messiah represents – salvation – is what Benjamin wants to highlight in his effort to underscore that society, similarly, needs a Messiah to save it from the perils of law. In the same manner, Benjamin may not have necessarily been calling for the actual destruction of the old, in this case the law and legal institution – though, such a reading is also in keeping with the tenor of the text (cf. Abbott 2008, Kellogg 2013). In fact, in what might be construed as a rather polemical reading, I suggest that for Benjamin, the law is merely a reflection of a larger problem at hand: the problem of irrationality, evinced in the propagation of myth. That is, while divine violence frees citizens from the shackles of law, what citizens are really freed from is irrationality, that is, the long held belief in the mythical, of which law plays an important part. Framed in this way, I claim that divine violence and the Messianic represent the (re)emergence of reason and rationality, represented here in the birth of private ordering. In other words, freedom can only exist in and through private ordering.

Invoking Benjamin provides an interesting portal through which to view and conceptualize private ordering. Private ordering is, first, a realization – a dawning –

that the extant system of law is oppressive: it is unjust, unfair and unequal. It safeguards and maintains its own hegemony. In this sense, and symbolically, private ordering is already a victory: the very realization or dawning that gives birth to it has already made problematic the oppression at hand – in the same ways that Fanon spoke of decolonization as a triumph, regardless of material success. In other words, private ordering has already called into question the myth that is law, and in so doing has already begun the process of rectifying the despair, as Benjamin sees it, that constitutes life. This alone makes private ordering virtuous and this is its triumph. Second, and related, private ordering is a destruction of the old. Like divine violence, private ordering calls into question the very rationality that grounds and sustains the law. The faith placed in law is called into question and the seeds for a new path to order are sowed. Yet, in the strict sense – and, again, despite material success or lack thereof – private ordering is itself the seed that represents the new that has *already* arrived and been cemented. In other words, whether instrumentally successful or not, private ordering is, symbolically, a triumph because it ruptures and shatters the myth of law, that is, the hunchback responsible for life's despair.

Constitutively, then, private ordering exists and functions outside the boundaries of law and has no desire to be law or anything like it (see Ranasinghe 2014). In so being and doing, private ordering calls into question certain legitimacies the law pronounces, for example, in regards to what constitutes violence. The effects of calling into question law's boundaries can have real, material, effects: for example, in shifting boundaries, what was once not permitted becomes permissible. This is one way private ordering contributes to rewriting the contours of law. However, and more importantly for present purposes, the symbolic effects associated with challenging law's boundaries must not be minimized. The very calling into question of law, that is, challenging law and its authority – its myths – is itself an attempt at re-marking the boundaries of law and the effects that accrue from law marking its boundaries in particular ways.

5. Private Ordering and the Dialecticism of (Non)Violence

If, then, private ordering is not law, law-like and has no desire to so be, this also means that private ordering operates outside the boundaries of the law. This is why equating private ordering with divine violence is meaningful because it illuminates the law-destroying zeal of private ordering – recall, again, the destruction of the hunchback (the physical deformity that oppresses the body, even mind) and the destruction of law's myths (the binds that oppress society) via the straightening of the hunchback. In this sense, as repeatedly noted, private ordering *is* violence. Ontologically, private ordering must be violence: if it is not, it loses any sense of meaning and will cease to exist. This, of course, raises the question: what does it mean that private ordering is violence? Equally important, and to further muddy the conceptual picturing of private ordering, the essence of private ordering is also simultaneously non-violence. This raises yet another question: what does it mean that private ordering is also non-violence? What is important, then, is the dialecticism of (non)violence – as concurrently violence and non-violence – which provides a portal through which to make sense of private ordering. In what follows, I explicate how private ordering is both violence and non-violence in the same breath and the implications of this for law and the legal system.

There are two related ways private ordering is violence. The first concerns the way order is conceptualized. If order is premised upon law and the legal system – not in the sense that the law provides order but, rather, in the notion that law is said to be order and everything outside it is not – then, private ordering, which renounces law, also renounces order. Private ordering, in other words, claims that order is (to be) found outside law. This means that violence is done to the very core of this order – here, the law – certainly symbolically and perhaps materially as well. Cast as such, private ordering is violence – violence to, and against, the law.

The relation between law and violence demonstrates the second way private ordering is violence. Recall that law is violence. Yet, in law being violence, law channels into its purview all violence. Thus, unless sanctioned and blessed by law, anything and everything outside it is violence. If this is so, what is outside of law can only be violence. Given that private ordering exists and operates outside law – and, has to so be to have ontological essence – it is violence.

Interestingly, the relation between law and violence serves as the backdrop for the non-violence of private ordering. The law, as noted repeatedly, is violence, and unequivocally so: it is formed upon violence, funnels all violence into its ambit, permits violence to be used outside its purview as only it sees fit and, finally, administers violence as deemed necessary to uphold not only order in general but its own wellbeing. However, because all violence is brought into the purview of law, what is on the outside cannot be violence. If private ordering is an explicit renunciation of law, it is also, then, a concomitant renunciation of violence, and explicitly so. It simply has to be. In other words, it is not simply the law that private ordering renounces. It also renounces violence – the violence of law and law's violence. Private ordering claims that it is not law, does not wish to be law, and does not desire to function like law. This means that violence is not – and, cannot be – its *modus operandi*. It is true that in renouncing law, private ordering may rely upon physical violence – as, for example, in programmes of decolonization. However, this violence is violence only in relation to law – that is, only in the eyes of law is it violence. Yet, because private ordering renounces law and has no desire to be law or law-like, the violence it administers on or against law, is not violence – it is, in fact, antithesis of, and antithetical to, violence. It is that very label of violence that is cast against private ordering that it wishes to destroy in renouncing law.

Crucially, however, the violence of private ordering is not the violence of law – this, even if physical violence is utilized (as I take up below). This is because private ordering does not seek power – that is, its own wellbeing – as does the law. Rather, private ordering invokes a different sort of violence (including a different sort of narrative). This different type of violence is crucial to the story and legitimacy of private ordering because it needs to – and, must – separate itself from law. If it does not, again, it would lose its ontological essence. Thus, private ordering does not lose ground or legitimacy because it is violence. In fact, private ordering has no qualms about being violence – it needs and thrives on this. However, this labeling cannot come from law and this is what it fights against. Instead, it is private ordering which labels itself violence. It destroys, it overthrows, it disorders and so forth. What it does, however, it does – and, wishes to so do – on its own terms. This is what gives it legitimacy. This is its ontological essence. In other words, the legitimacy of private ordering – which, it should be recalled, may sanction physical violence (as in decolonization) – lies in the fact that it is symbolic violence in the first place. This is what provides it with the legitimacy to invoke physical violence should it so choose. That is, it is through the symbolic violence that is first leveled at law that the next step, physical violence, should it be deemed necessary, is made right and just. The steps between the descriptive and the normative, however, are large and significant as they are steep and dangerous.

This, however, should not lead to a grim outlook regarding private ordering, where it has, for example, been characterized pejoratively as “dark” (see Milhaupt and West 2000). Even though Curtis Milhaupt and Mark West (2000, 43) admit that a “substantial literature has exposed the bright side of private ordering”, they claim that particular forms of private ordering – such as organized crime – represent its “dark side”. Such a view, however, operates on the premise that everything that is against or outside law – here, what is illegal – is necessarily problematic. Thus, and by extension, the law and what is within its boundaries, is what is acceptable (and, bright). This, however, is precisely the point that Benjamin seeks to underline in criticizing law's supremacy both in practice and thought. As documented here, the

very basis upon which particular forms of private ordering are characterized as “dark” – the power to name – is itself the problem. In other words, given that private ordering is a renunciation of law, that very renunciation is a beacon of hope for the change – in whatever form – that lies ahead. In that sense, private ordering is anything but “dark.”

6. Conclusion

In this paper, I have sought to conceptualize private ordering anew by explicating its dialecticism of (non)violence. This, however, is far from a purely descriptive – or, theoretical – exercise. An important normative aspiration also threads what is penned here. These final remarks elucidate this important aspect of (and, for) the life of private ordering.

Without doubt, private ordering is symbolically violence. This, for the most part, is likely without controversy. What likely will court controversy is the normative programme I espouse. I underline that it is insufficient for private ordering to solely be symbolically violence. Private ordering would still be private ordering, but it would lack material effects. For related reasons, it is also insufficient for the law to merely permit violence of the symbolic sort – that is, for law to tolerate a space for (and, of) private ordering, but foreclose to it a right to violence (violence, here, as a matter of doing, not simply being). Hence, I underscore that private ordering also needs physical violence to be at its disposal. This would mean that the law must be cognizant that violence maybe brought upon its very being by, and because of, private ordering, and equally important, be tolerant and open to this possibility. Where the law *a priori* forecloses such a possibility, it will be, as Benjamin accuses it, tyrannical, and will simply perpetuate the myths he accuses it of perpetuating.

Thus, what I have hitherto largely implied and suggested I now state unequivocally. Violence of the physical sort should never be excluded *a priori* as an available option (or tool) if meaningful change is to be even remotely considered and effected. To remove it from the equation is merely to reproduce the status quo – this does little to nothing to effect meaningful, substantive, change. It would appear that Benjamin had this in mind when he noted that “[t]he concept of progress must be grounded in the idea of catastrophe. That things are ‘status quo’ is the catastrophe” (Benjamin 2006/1938-1939, 161; emphasis in original). Where such is the case, private ordering will only be violence symbolically and this means that the efforts it strives for may remain unrealized.

I am cognizant that what is claimed is polemical, even dangerous – this is perhaps why Arendt, who acknowledged that in some cases violence is the only condition for change, was unable to find a place for it in her prescriptions. I do not claim that violence is the only way to effect change. Nor do I mean that violence is always necessary. I also do not mean that violence is always the best way to go about this task (in this sense, I am quite sympathetic to Arendt’s fears, despite the paranoia that encapsulates them). These admissions aside, I claim that in some cases violence will be necessary to effect meaningful change. If this is granted – as Fanon, Arendt and many others do – then, to *a priori* foreclose violence does great disservice to those marginalized and simply reproduces what already is, the status quo as Benjamin notes.

I have held up private ordering as a beacon of hope to the ills of formalized law akin to the Messiah who atones for the iniquities of society. This is so because of its dialecticism of (non)violence. The hope of (and in) private ordering is in its symbolic violence which challenges law, by rupturing the taken-for-granted nature of law, and with it, its hegemony. What is suggested here, however, and rather agonistically, is that the law must be open to the imposition of violence on – and, against – its own being. It must, in other words, be willing to sacrifice its very being for the broader interest of the people. This is not to claim that the law must condone what is illegal – it needs to mark, via boundaries, what it deems good and

bad. Rather, it is to claim that the law must be willing to admit that its pronouncements may be problematic – even, wrong – and that in some instances, it is only through violence that these may be rectified [though stated in a different context, I am drawn to Michel Foucault's (1983) powerful yet sobering reminder that "justice must always question itself (...)"]. Anything else means that the law is merely interested in power – its own power. A law (and legal institution) that is about freedom, justice, equality and other virtues, I suggest, should not – and, cannot – foreclose violence *a priori*. To so do is to put forth a recipe towards serfdom. This is why private ordering needs – and must have – physical violence at its disposal.

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