

A Weak Anti–foundationalism: Law at the Vanishing Point

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1. Introduction

The idea of law without foundations may strike us at first as an oxymoron. Law, after all, *is* a foundation, a basis for society, for politics even for justice. Yet there is a long and radical tradition of thinking of just this. Thinkers and writers ranging from Nietzsche to Walter Benjamin and from Daniel Paul Schreber to Jacques Derrida and Giorgio Agamben have attempted to conceptualize what an ‘anti-foundational’ law might look like (not always in those precise terms of course), how it functions, what are its moving (and unmoving) parts. In thinking about this tradition, there is one thing that strikes me as a near constant, namely a reluctance, at the end of the day to completely eliminate the foundation that the law seeks to escape from. That is, for each thinker to some degree or other (sometimes it is barely at all) there is a remnant or trace of the foundation in question. In this way, the question to ask is not so much ‘can there be law without foundation?’ but ‘why do anti-foundationalist legal thinkers hold onto a bit—even if just a vanishingly small bit—of foundation?’ What does this say about the law that they conceive of and the goal of having a law that is fully without foundation?

In this essay I will visit this question, looking at the way that the foundations for law are shrunk almost but not quite to the vanishing point. I will look at three of the authors I mentioned above, Nietzsche, Benjamin and Agamben, and their own considerations of law, plus a short discussion of Antonio Negri (who is not discussing law *per se* but who engages in a similar hesitation at the brink of a fully anti-foundationalist philosophy). In each case, my argument will be that the hesitation that we see with these authors involves not so much a fear of the results of a full departure from foundationalism (in most cases these authors welcome precisely that), but rather a recognition that foundations are constantly reasserting themselves.

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The position of the anti foundationalist thinker is something like a situation when one tries to dig a hole in a very muddy and boggy place and the hole keeps refilling with mud as fast as one can dig it out. In this case the ‘mud’ is the foundation and the ‘hole’ is the attempt to think of law without one. What I am looking for then is not a full anti-foundationalism but rather what I have chosen to call a ‘weak’ anti-foundationalism (not weak in the sense of powerless but more along the lines of Benjamin’s idea of a ‘*weak* messianic power’), an anti-foundationalism that holds back from a full victory over that which it struggles with (which would actually be a defeat, as I will argue further), one that goes to the brink but not quite over that brink in terms of its opposition and its resistance (Benjamin 2003, 390).

In the face of this tendency, the thinkers I will be looking at engage in an oppositional rather than a fully liberational strategy for law, leaning hard against a foundationalism that there is never any risk of fully abandoning. The dangers of chaos, dissolution and the like that are frequently trotted out when more liberal or traditional thinkers contemplate an anti-foundationalist approach to law are, in this view, not real dangers but chimeras that seek to limit the degree to which foundationalism can be resisted in the first place. The thinkers I am looking at then ultimately seek, not so much to destroy the foundations for law (and politics and other things as well) so much as they seek to maximally oppose and resist them. There can—and actually must—be law in such a stance but it needn’t only be law that develops out of foundationalism itself. Instead, an attention to this question shows that there are a plethora of other kinds of law, some directly oppositional (a mirror image as it were) and others hardly related to conventional forms of law at all. These other laws also exist and become visible and available to us the more we push back on the assumption that law can be one way only.

2. One span from [the] goal: Nietzsche and the unfulfilment of law

To begin this discussion, let me start with Nietzsche who, more than any thinker, is most responsible for a kind of committed anti-foundationalism, including in terms of the question of law. One key place where he does this comes in a section of *Thus Spoke Zarathustra* entitled ‘On Old and New Tablets’ (*Von alten und neuen Tafeln* in the original German). That section starts with the line ‘Here I sit and wait, surrounded by broken tablets, and new tablets half covered with writing’ (Nietzsche 1995, 196). The old and broken tablets are clearly meant to represent Moses’s tablets that contained the Ten Commandments and which Moses himself subsequently dashed to pieces. In this instance too, those tablets have been thrown down and broken to make room for new law which is only ‘half’ written. For much of the section that follows, Zarathustra remains in a highly critical mode about the value and function of law as such, particularly in terms of its ‘black letter’ inscribed and dogmatic aspects. For example, speaking of the old tablets, he says:

‘Thou shalt not rob! Thou shalt not kill!’ Such words were once called holy; one bent the knee and head and took off one’s shoes before them. But I ask you,

where have there ever been better robbers and killers in this world than such holy words?

Is not there in all life itself robbing and killing? And that such words were called holy—was not truth itself killed thereby? Or was it the preaching of death that was called holy, which contradicted and contravened all life? O my brothers, break, break the old tables! (Nietzsche 1995, 203.)

Our duty as subjects of law, it seems, is to destroy the law, to smash the legal codes and strictures that otherwise bind us as legal subjects. Yet note that in the text already cited, the law hasn't quite been destroyed. First of all, the law, as Nietzsche tells us, is not vanished but only broken and in ruins. It is still legible as law, even if its brokenness suggests a different reading and experience of law as such. Also, it seems as if not all the old tablets have been destroyed. When Zarathustra says 'O my brothers, break, break the old tablets,' he is allowing that there still are tablets to be broken (or maybe we can keep breaking the ones that are already partly destroyed, Nietzsche isn't entirely clear on this point). Furthermore, and this is perhaps the most critical point of all, we see that even as old tablets are broken, new tablets are being written. Is it possible that as soon as those tablets are complete they too will be treated as 'old tablets' and destroyed accordingly? Is the law for Nietzsche just a kind of conveyor belt that is constantly shuffling new law for old but never—even in the process of destroying the tablets as soon as they are done—actually breaking away from law itself?

Indeed, Nietzsche seems to suggest precisely that possibility when, a bit further on in the section, he writes:

Break, O my brothers, break this *new* tablet too. The world-weary hung it up, and the preachers of death, and also the jailers; for behold, it is also an exhortation to bondage. Because they learned badly, and the best things not at all, and everything too early, and everything too hastily; because they *ate* badly, therefore they got upset stomachs; for their spirit is an upset stomach which counsels death. For verily, my brothers, the spirit *is* a stomach. Life is a well of joy; but for those out of whom an upset stomach speaks, which is the father of melancholy, all wells are poisoned. (Nietzsche 1995, 206.)

Here we can see that the new tablets, like the old, quickly become ossified relics worthy of destruction. The law is (as the passage just cited suggests) never performed slowly and carefully enough; it is never free or deliberate enough. A truly correct law can therefore never be produced or discerned. Nietzsche suggests something like this when he writes: 'precisely this is godlike that there are gods, but no God' (Nietzsche 1995, 203). In other words, there are many attempts at a godlike perfection but there is no perfection per se. So in this sense the law is always failing to be 'Law' and, accordingly, it must always be continuously destroyed. Thus Nietzsche writes further, 'O my brothers, there are tablets created by weariness and tablets created by rotten, rotting sloth' (Nietzsche 1995, 207).

This kind of endless failure raises a question; if making law does nothing but repeat the same mistakes, the same hastiness, sloth and weariness of the old tablets, if these new tablets are made only to be (or deserve to be) destroyed, what is the purpose of law? Why is Zarathustra sitting amidst these old and new tablets if law seems to be something futile and entirely negative?

Nietzsche supplies the beginnings of an answer when he argues that it is not the content of law, but the process of making law that is important, what is worth maintaining (and anyway, it seems that the function of making laws is unavoidable for Nietzsche). Depicting one of these hewers of law into tablets, Zarathustra says:

Behold this man languishing here! He is but one span from his goal, but out of weariness he has defiantly lain down in the dust—this courageous man! Out of weariness he yawns at the way and the earth and the goal and himself: not one step farther will he go—this courageous man! Now the sun glows on him and the dogs lick his sweat; but he lies there in his defiance and would sooner die of thirst—die of thirst one span away from his goal! Verily you will have to drag him by the hair into his heaven—this hero! Better yet, let him lie where he lay down, and let sleep, the comforter, come to him with cooling, rushing rain. Let him lie till he awakens by himself, till he renounces by himself all weariness and whatever weariness taught through him. (Nietzsche 1995, 207–8.)

Here we see that there *is* a great promise in making law tablets, namely the failure to complete them. In a particularly Nietzschean twist, “weariness” here results, not from failure to complete a task but from its opposite; the lawmaker—when that is all he is—is weary from the endless production of completed tasks. His weariness reflects that nothingness that such completion produces, as opposed to an energy that comes from finally failing to finish the task. Rather than the endless recycling of law that Nietzsche depicts initially, we see here that there is a kind of rest, if not escape, from this endless, wearying cycle in the form of stopping just short of the goal (missing it by one single span).¹

The ‘courage’ that Nietzsche admires in this figure is the courage to not complete the tablet, to ‘die of thirst one span away from his goal!’ This figure resists, therefore a kind of metaphysics of completion, a teleology that demands its own fulfillment. Let’s therefore call him the Law unfulfiller (an admittedly awkward term for a strange and uncomfortable role).

This seems to be a complete refutation of the transcendent and metaphysical qualities of law. Indeed, Nietzsche tells us that this figure would have to be ‘drag[ged] by the hair into his heaven’; he resists even that kind of completion and prefers to lie where he is, content in his non completion and his non fulfillment.

Nietzsche sees the Law unfulfiller as being courageous and heroic; he is the one who refuses, who stops the endless cycle of making and breaking tablets of the law. But note that this person is stopping amidst an ongoing process of making law. He

¹ This is an idea that he reinforces a bit later when he says ‘And he whom you cannot teach to fly, teach to fall faster!’ (Nietzsche 1995, 209).

has not shattered the law, only this iteration of it. This is not therefore a full break, a complete release but only a relative one; it is a form of resistance from within the body of law itself. The last sentence of the passage just cited suggests that perhaps the Law unfulfiller will in fact return to carving tablets: ‘Let him lie till he awakens by himself, till he renounces by himself all weariness and whatever weariness taught through him.’ This state of affairs might not last forever; he might go back to making more law but he will do so with a new wisdom; the wisdom to know that it is not the specifics of law that matters (those are made to be discarded) but rather the process of making law itself. This process is what forms a structure that he can abandon (if only temporarily), the very thing that allows him to take his break from lawmaking.

The fact that Nietzsche notes several times that the Law unfulfiller has stopped one span away from finishing may be particularly worth noting in this case because it suggests that the engagement with the end, with termination, is a critical part of what makes giving up or not finishing so valuable, so overcoming of weariness and despair. To come right to the brink of finishing and then not doing it, is the sweet spot for Zarathustra. It is a site of maximal resistance, of being in the full bore of the promise of law (promises for justice, for truth and the like) and at that point simply saying no.

Without this penultimate position or this relationship to law, the Law unfulfiller, it seems, would be and have nothing at all. Thus, for Zarathustra, giving up on law altogether is never in question, never a possibility. Throughout this section we see not so much a choice between making or breaking the law (in a way the Law unfulfiller does neither) but rather a set of possible responses that are simultaneous and which include a strong involvement and engagement in the various paths that the law might take. Indeed, not only does Zarathustra say ‘Break, break the old tablets’ but towards the end of ‘On Old and New Tablets,’ he asks the Law unfulfiller if he will join him not only in terms of making new law, but in some sense both inscribing and being that law:

And if your hardness does not wish to flash and cut and cut through, how can you one day create with me?

For creators are hard. And it must seem blessedness to you to impress your hand on millennia as on wax.

Blessedness to write on the will of millennia as on bronze—harder than bronze, nobler than bronze. Only the noblest is altogether hard.

This new tablet, O my brothers, I place over you: *become hard!* (Nietzsche 1995, 214.)

Here, Zarathustra is asking for the Law unfulfiller to effect a kind of merger where he actually becomes a kind of writing implement, hard enough to ‘impress [his] hand on millennia as on wax.’ It seems making law is in fact a necessary destiny for this figure (and just prior to this passage, Zarathustra says ‘And if you do not want to be destinies and inexorable ones, how can you triumph with me?’) (Nietzsche 1995, 214).

Even so, as is so often the case with Nietzsche, the sense of ultimate triumph and destiny is itself tempered and subverted by the cycles and rhythms of the text. Insofar as we already know that law—even law that has lasted millennia—is ‘old’ and vulnerable to breaking, there is no guarantee that even this ‘hard’ law will not follow the pattern set by what Zarathustra has said up till now.

Furthermore, in effectively suggesting that the ideal temporal position for the subject of law may not be here, at the end of the section (and in a fully teleological mode full of hope for the future and the fulfillment of law and destiny) but back in the middle where the Law unfulfiller was enjoined to lay down just before finishing the tablet, it seems that the ‘destinies’ that Nietzsche is fond of invoking are not always what they appear to be.

We see some evidence for this earlier in the text in the section called ‘On Redemption.’ There, Zarathustra is crossing a bridge and comes upon a group of people with various maladies and deformities. They ask Zarathustra to heal them and he refuses. Not only does he refuse to heal them but he identifies with them when he says: ‘A seer, a willer, a creator, a future himself and a bridge to the future—and alas, also, as it were, a cripple at this bridge: all this is Zarathustra’ (Nietzsche 1995, 139).

Here too we see a mixing of destinies and futures with the mundane, with the here and the now. Zarathustra is a ‘bridge to the future’ even as he is also ‘a cripple at this bridge.’ And similarly, the lawmaker is urged to become ‘*hard*’ an imprinter of law into millennia, even as he is asked to lay down one span before finishing his tablet. The juxtaposition of these two positions tells us a great deal about Nietzsche’s position on law and its foundations. We see that we need to ceaselessly unmake, break, deconstruct and otherwise resist the siren calls of the law. We must stop just before the end, just shy of completion (and hence just shy of total destruction). The contrast between law as destiny and law as unfinished task is required to make the moment of unfulfillment, of failure both possible and powerful. Without a sense of a future, there is no point, it seems in stopping. That stopping is powerful because it occurs in the face of what it resists; the stopping needs the destiny, the subject needs the law, in order to perform their resistance, in order to have a purpose at all.

We see the way that the lawmaker is implicated within the law all the more when Nietzsche considers the relationship between this figure and the ‘good and the just’, those avatars of a law that still promises fulfillment and destiny (Nietzsche 1995, 212). Zarathustra asks:

‘Whom do they hate most?’ The *creator* they hate most: he breaks tablets and old values. He is a breaker, they call him lawbreaker. For the good are *unable* to create; they are always the beginning of the end: they crucify him who writes new values on new tablets; they sacrifice the future to *themselves*—they crucify all man’s future.

The good have always been the beginning of the end. (Nietzsche 1995, 212.)

We see here that the lawmaker has a role to play in the ongoing ebb and flow of law as such; he breaks the old tablets, he makes new ones, because without his help, the

law wouldn't exist at all (and, after all, he needs the law too). Here again, Nietzsche performs a curious reversal. The unfulfiller of the law is the “*creator*.” His failure to complete the law is what makes his action original, unanticipated, something new. The good and the just ‘are *unable* to create’; they rely on the unfulfiller to make and break the laws that otherwise bind and orient them (i.e. what they are good and just about), to make the law something other than what it is intended to be. This does not mean that the Law unfulfiller is a stooge for the good and the just—clearly he is not since he won't finish the job that they wish him to do—only that he is part of the way that the law continues both for his own sake (so he can stop) and for theirs (so they can imagine themselves as having a future, so they can think that they are getting law ‘right’). This entangled relationship of response, breaking and making is the backdrop for the resistance of the Law unfulfiller. Just as Zarathustra sits in the ruins of the law (ruins but not the utter extinction), so too does this figure occupy a realm where the law is in flux, always challenged and always reasserting itself.

3. (Dis)engaging with the fetish: Benjamin and mythic violence

The basic pattern that we see in Nietzsche of a kind of perpetual revolution against legal foundations (a revolution that approaches but never fully breaks with law as such) can be seen in any number of thinkers who follow in Nietzsche's anti-foundational footsteps. For the sake of brevity, I'd like to focus on just two thinkers in this tradition, Walter Benjamin and Giorgio Agamben. Let me begin with Benjamin and his own relationship to the foundations of law which tracks very closely with Nietzsche's own position.

One way to think about Benjamin is that he dismisses law altogether. Certainly the structure and content of the ‘Critique of Violence’, Benjamin's most important legal writing, suggests as much. After going through a very complex and admittedly dense argument about various approaches to law (‘law making’ vs. ‘law preserving’, natural vs. positive etc.), Benjamin introduces about two thirds of the way through the essay, the critical distinction between mythic and divine violence. Mythic violence is Benjamin's term for what we ordinarily call law (although it could be applied to many other things as well).² Mythic violence is the violence of projection, of phantasm and yearnings for power and authority that manifest itself in the form of states, legal systems and the like. This is ‘mythic’ because it asserts a basis in a mystical authority that it has no actual access to.³ Whether it claims that authority based on God or nature or on some secularized versions of these things, mythic violence has no actual basis and hence resorts to physical violence in order to—as Benjamin puts it—‘jut manifestly and fearsomely into existence’ (Benjamin 1996, 242).

² Benjamin writes that mythic violence ‘shows itself fundamentally identical with all legal violence’ (Benjamin 1996, 249).

³ Derrida's famous reading of ‘Critique of Violence’ is one key text that explicates Benjamin's legal theory. See Derrida, 1993.

Benjamin contrasts mythic violence with divine violence which is God's power and which has nothing to do with human activity.⁴ Divine violence, for Benjamin, strikes into the world mainly to remove instances of mythic violence which constitute attempts to speak, as it were, for God. Benjamin's chief example of divine violence in the 'Critique of Violence' is the story of Korah, an idolator that God removed, along with all of his followers by swallowing them into the ground. Here, God answers such claims with a purifying violence that erases any trace of the hubristic attempt for humans to speak with God's voice.

If we put this in a legal framework, we could say that for Benjamin, human law is all myth and God's law is unknowable as such. If this is the case, then can it be said that Benjamin really does effectively do away with law altogether?

The short answer, like the longer answer, is no. For one thing, we see that no matter what, for Benjamin, there *is* law in the form of divine law. Although we are almost entirely ignorant of it, this divine law does exist and its existence has a serious consequence for us. Benjamin tells us that even a seemingly clear commandment from God such as 'Thou shalt not kill'

exists not as a criterion of judgment, but as a guideline for the actions of persons or communities who have to wrestle with it in solitude and, in exceptional cases, to take on themselves the responsibility of ignoring it. (Benjamin 1996, 250.)

In this way, divine law is reflected in our own behavior only in the most feeble and weak form (but here I mean weak once again in the sense of a '*weak* messianic power' that Benjamin evokes in his essay 'On the Concept of History'). As far as we are concerned, divine law exists only as an idea with no definite content, one that ultimately throws us back onto our own devices even as it remains a commandment nonetheless. Here, Benjamin has stripped the meaning of law to its roots. The commandment is only a cipher but as such it points to a need to interpret it (just as language always demands our response) to 'wrestle' with it and indeed, sometimes to ignore—or perhaps more accurately to abandon—it.⁵

Here we already see how Benjamin effectively replicates the way that Nietzsche strips law down to its barest pith, once again almost, but not quite, to the vanishing point. Law here too becomes almost nothing, but not quite, nothing. But there is another, more prosaic way that Benjamin takes law nearly to the vanishing point. Rather than conclude that 'what pleases is permitted', in the absence of clear and unimpeachable law, Benjamin offers us a way to think about law, not just as a murky commandment but also as a kind of way of life (Benjamin 1996, 241). Here, the 'wrestling' that we must engage with takes on a kind of positive form insofar as the one commandment that we *can* follow fairly strictly is the Second Commandment against idolatry, in other words the law that requires us to destroy and oppose mythic

⁴ Although there are a few instances in the text where Benjamin muddies this distinction.

⁵ The original German term '*abzusehen*' translated here as ignore means something more like 'to turn your back to it' or abandon which remains much more engaged, I think, than the term ignore itself conveys (Benjamin 1980, 201). I am grateful to Marc de Wilde for pointing this out to me.

violence in all of its forms.⁶

Something like this can be seen in Benjamin's claim (partially quoted earlier) that:

Far from inaugurating a purer sphere, the mythic manifestation of immediate violence shows itself fundamentally identical with all legal violence, and turns suspicion concerning the latter into certainty of the perniciousness of its historical function, the destruction of which thus becomes obligatory. (Benjamin 1996, 249.)

Although Benjamin does not explicitly link this practice of destruction and opposition with the Second Commandment, there is plenty of textual evidence to suggest just such a connection. Perhaps most critically, he says of Kafka—who is perhaps his most important muse (or perhaps tied with Baudelaire)—that: 'No other writer has obeyed the commandment 'Thou shalt not make unto thee a graven image' so faithfully' (Benjamin 1999, 808).

To obey this commandment means to live and think in a way that is not merely a reiteration of mythic violence. In this way human beings can imitate or perhaps more accurately remain in the aftermath of acts of divine violence and make the opening that that law created a basis for their own practice. Opposing myth is not purely a negative function in this way (just as divine violence is not purely negative, even though its expression takes the form of removal of human myth). Here too then, there is just the barest hint of law but it is enough (as Jews sing on Passover, *Dayenu!*)

For Benjamin, as for Nietzsche, this barest hint, this law just shy of the vanishing point, is critical. Recall that for Nietzsche in his story in 'On Old and New Tablets,' being right at the brink of fulfilling the law ('one span' away) but stopping there allows the presence of law to present the 'unfulfiller' with the best of both worlds; on the one hand he gets all the power and promise of law, the way he is motivated, challenged and put on the hook, ethically speaking. But at the same time, by drawing back just at this moment, he avoids all the darker sides of law, the way it controls and projects, the way it insists and dominates (and often, and along with that domination, injures and kills for its own sake).

I think something very similar happens with Benjamin as well; by engaging with law as a cipher, as a demand to avoid the projection that mythic violence always brings, Benjamin also has a kind of best of both worlds situation; the legal subject acts because the law exists, but that law has no binding effect on her; she is in a sense brought to her own agency by the simultaneous appearance and failure of law (her resistance to law is in effect what law *is* for her). In this way she resists from deep within the apparatus of law, perhaps causing maximal damage to the structures that she rebels against.

⁶ I make this argument at much greater length in Martel 2014.

4. 'A sort of remnant': Agamben and inoperable law

A final thinker who is very close both to Nietzsche and Benjamin is Giorgio Agamben. For all of his similarity, there is a way in which I think Agamben is more ambiguous than Nietzsche and Benjamin about the nature and value of law. For all of his own weak anti-foundationalism, I see Agamben as entertaining the possibility of leaving the law behind altogether (a move that he ascribes to Benjamin himself) in a way that I think Nietzsche and Benjamin both avoid.

The book where Agamben most clearly engages with the question of law and anti-foundationalism is *State of Exception* and more specifically a chapter in that book called 'Gigantomachy Concerning a Void'. In that chapter, Agamben describes Benjamin's unique approach to law (as mediated via Kafka), writing:

It is from this perspective that we must read Benjamin's statement in the letter to Scholem on August 11, 1934, that 'the Scripture without its key is not Scripture but life'...as well as the one found in his essay on Kafka, according to which '[t]he law which is studied but no longer practiced is the gate to justice' ...The Scripture (the Torah) without its key is the cipher of the law in the state of exception, which is in force but is not applied or is applied without being in force (and which Scholem, not at all suspecting that he shares this thesis with Schmitt, believes is still law). According to Benjamin, this law—or rather this force-of-law [crossed out in the text]—is no longer law but life, 'lived as it is lived' in Kafka's novel [*The Castle*] 'in the village at the foot of the hill on which the castle is built'...Kafka's most proper gesture consists not (as Scholem believes) in having maintained a law that no longer has any meaning but having shown that it ceases to be law and blurs at all points with life. (Agamben 2003, 63.)

Here we see both a way for law to almost but not quite vanish ('the law which is studied but no longer practiced is the gate to justice') as well as a sense that the law might completely vanish after all. The law here, after all is 'no longer law but life "lived as it is lived"'. Law in this way disappears into its own practice, an idea that Agamben expands on a great deal in a later book, *The Highest Poverty* when he further describes the idea of 'form of life' (Agamben, 2013). Gershom Scholem, Agamben says, is mistaken to believe that such a practice is 'still law'.

The question here becomes then, which is it: Law at the vanishing point or law as vanished? Earlier in that chapter, Agamben raises a similar issue when he compares Benjamin and Schmitt on the extent to which the law entails, and works off from a zone of exclusion:

Just as essential for the juridical order is that this zone—wherein lies a human action without relation to the norm—coincides with an extreme and spectral figure of the law, in which law splits into a pure being-in-force [*vigenza*] without application (the form of law) and a pure application without being in force: the force-of-law [With the final word law crossed out in the text] (Agamben 2003, 60).

Here too we want to ask just how spectral is the figure of law here? If it can be divided into application and force (or to use the terms I have been using earlier, cipher and violence) does it remain lawful or lawlike in any way? Is this too close to vanishing to remain a viable and useful category? And what are the consequences for pushing the idea of the law to such an extreme?

In discussing the example of Kafka and the way that Benjamin reads him, Agamben further states that:

In the Kafka essay, the enigmatic image of a law that is studied but no longer practiced corresponds, as a sort of remnant, to the unmasking of mythico-juridical violence effected by pure violence. There is, therefore, still a possible figure of law after its nexus with violence and power has been deposed, but it is a law that no longer has force or application, like the one in which the 'new attorney' leafing through 'our old books', buries himself in study, or like the one that Foucault may have had in mind when he spoke of a 'new law' that has been freed from all discipline and all relation to sovereignty. (Agamben 2003, 63.)

The key phrase here, I think, is the idea of the law as 'a sort of remnant', that is, once again, something that is barely there but still has an effect (perhaps neither an application nor a force but some other kind of influence). This is a 'possible figure of law' that has been stripped of both its authority and its content. Agamben writes:

The decisive point here is that the law—no longer practiced but studied—is not justice, but only the gate that leads to it. What opens a passage towards justice is not the erasure of law but its deactivation and inactivity [*inoperosità*—that is, another use of law. This is precisely what the force-of-law [crossed out] which keeps the law working [*in opera*] beyond its formal suspension) seeks to prevent. Kafka's characters—and this is why they interest us—have to do with this spectral figure of the law in the state of exception; they seek, each one following his or her own strategy, to 'study' and deactivate it, to 'play' with it. (Agamben 2003, 64.)

Here, Agamben seems to want to reduce the law even further than Nietzsche and Benjamin and my wager here is that he may be reducing it *too much*, depending on how you read his concept of inoperativity. If inoperativity means that the law does literally nothing, then I think Agamben may have reduced it beyond the event horizon where it remains effectively an agent in this world. That would possibly explain the way his text hesitates—as I have tried to show—between announcing the end of law altogether (where it vanishes into life) and the idea of a kind of 'new law' (requiring also a 'new attorney' that has been supplied by Kafka's narratives) where the law appears to survive its own demise and absorption by life.

Agamben continues this ambiguity when he concludes the chapter by writing:

One day humanity will play with law just as children play with disused objects, not in order to restore them to their canonical use but to free them from it for

good. What is found after the law is not a more proper and original use value that precedes the law, but a new use that is born only after it. And use, which has been contaminated by law, must also be freed from its own value. This liberation is the task of study, or of play. And this studious play is the passage that allows us to arrive at that justice that one of Benjamin's posthumous fragments defines as a state of the world in which the world appears as a good that absolutely cannot be appropriated or made juridical. (Agamben 2003, 64.)

Here again, we see the same ambivalence between a law from which we are 'free[d] for good' and a 'new use' of law. Note too that at the very end of the passage, Agamben cites Benjamin as being the source of his conviction that the law might be entirely useless and unrelated to the world, perhaps gone once and for good. Yet the Benjamin fragment that he cites this from, 'Notes to a Study on the Category of Justice', [in German '*Notizen zu einer Arbeit über die Kategorie der Gerechtigkeit*'] is not itself as sanguine about leaving behind justice as Agamben implies. In that fragment, Benjamin writes:

Justice is the striving to turn the world into the highest good.

These thoughts lead to the supposition that justice is not a virtue like other virtues (humility, neighborly love, loyalty, courage), but rather constitutes a new ethical category, one that should probably no longer be called a category of virtue but a category of virtue in relationship to other categories. Justice appears not to be based upon the good will of the subject but forms the state of the world...While virtue can be demanded, justice, in the end, can only be the state of the world or the state of God. (Cited in Jacobson 2003, 166).⁷

We see here, a reiteration of the division of labor between humans and God that we find elsewhere in Benjamin. Justice is, properly speaking, God's business and not ours but we are not unaffected (far from it!) by this practice. Although Benjamin writes further in that fragment that 'the responsibility of the world that we share is shielded from the instance of justice' seemingly saying that justice is not a matter for human beings to concern themselves with, we see that, in effect, we (fortunately) cannot escape justice altogether (Jacobson 2003, 167). We remain 'on the hook', as it were, responsible for and accountable to a form of justice—and, by extension, law—that we otherwise know nothing about.

This same idea is reinforced in another Benjamin fragment that makes a similar point, namely 'The Meaning of Time in the Moral Universe'. There he writes:

[the significance of the Last Judgment is] revealed not in the world of law, where retribution rules, but only in the moral universe, where forgiveness comes out to meet it. In order to struggle against retribution, forgiveness finds its powerful ally in time. For time, in which Ate [a Greek figure which stands for relentless dogma] pursues the evildoer, is not the lonely calm of fear but the tempestuous

⁷ See also Lesch 2014

storm of forgiveness which precedes the onrush of the Last Judgment and against which she cannot advance. ...As the purifying hurricane speeds ahead of the thunder and lightning, God's fury roars through history in the storm of forgiveness, in order to sweep away everything that would be consumed forever in the lightning bolts of divine wrath. (Benjamin 1996, 287–288.)

Here again, we see a situation where we are held under God's law (as represented by the Last Judgment) even as that law is forever being put off (blown, in this case, by a 'storm of forgiveness'). In this way, both the human world and the divine world that envelops it exist in a permanent relationship. The fact that we are held accountable does not limit our freedom; both states are true at the same time (i.e. we are perfectly free and on our own even as we are beholden to a law which is only suspended, or put off, albeit possibly forever). Similarly, we see that the significance of the Last Judgment is not 'revealed...in the world of law' but rather in the moral universe.

It is this duality that I think Agamben is missing in his own readings of Benjamin. Where Agamben is ambiguous (is there law or isn't there law? Does it almost vanish or actually vanish?) I see Benjamin as being theological: there is a place with no law: the human world where law is false and mythical and there is also a place with law: the divine law that is always true. Rather than being ambiguous, this duality for Benjamin is simultaneous.

Just as critically, although these two realms never overlap, there is a point of interaction between them. At the intersection of these two realms, the human and the divine, we find the vanishing point. What might look therefore as a binary is in fact a kind of transactional space where something appears to disappear but then reemerges only to disappear again, moving between the human and the divine.

This further means that inoperability may not be the right term to use to describe the function of a law that has been reduced to its pith, to a cipher. Not only does such a cipher continue to have a very strong effect (as my earlier analysis of both Nietzsche and Benjamin suggests), being in that sense very 'operative', but furthermore the law as we understand and practice it cannot not be considered (if you'll forgive the double negative here) in parallel to the divine which is itself very, very operative indeed. In fact, I am tempted to say the opposite of what Agamben claims; that as you reduce law to its pith, it becomes not less but more effective. Under such conditions, the dross of law falls away (its authority, its violence, even its content) and what you get instead is a sheer vision of law's power as such, the demand to interpret, the desire to effect, the wish for justice and the connection to effectiveness. As I've said before, as you approach the vanishing point, that is when you get the best sense of the power of the law. The trick is to let go 'one span' before the end to be in that sweet spot between the law's seduction and its domination (in this way, I think of Nietzsche's 'cripple at this bridge' as similarly situated almost at the far end of the bridge; so close to the shining and ultimate end but not quite there).

5. On the verge: Negri and the self-destruction of the transcendental

This weak anti-foundationalism can be seen beyond the realm of law itself. To give just one example, I will now briefly turn to the work of Antonio Negri and in particular his book *The Savage Anomaly* to show that this kind of brinksmanship exists in other fields of theory as well. Negri's well known book on Spinoza is a masterpiece of anti-foundationalism. Even while he acknowledges Spinoza's liberalism and bourgeois sympathies, as well as the way his text can easily be read as being thoroughly rooted in western rational thought, for Negri there is something deeply subversive about Spinoza, a subversion that comes, as it were, from the heart of liberalism and which serves as a 'savage anomaly' to challenge the very structures of power and capitalism that Spinoza otherwise seems to be in service to.

One of the key points that Negri makes about Spinoza is that in expressing an apparently transcendental concept like God, Spinoza shows how the attributes that collectively make up this transcendent being serve, in their infinite variety, to overtake and render material the metaphysical concept that they purportedly serve. Thus, for example, Negri writes:

The unification of the attribute, of the two attributes ('Thought is an attribute of God, or God is a thinking thing' [P1] and 'Extension is an attribute of God, or God is an extended thing' [P2]), creates a dimension of the world that is not hierarchical but, rather, flat, equal: versatile and equivalent. The absolute essence, predicated univocally, refers as much to the divine essence (the existence of God) as it does to all things that descend from its essence. We are at a fundamental point, at a point in which the idea of power—as univocal order, as the dissolution of every idea of mediation and abstraction (which, instead, is the idea of Power)—leaps to center stage with enormous force. (Negri 1991, 62.)

In this way we see how in Negri's reading, Spinoza in a way transcends (descends might be a better term for it) his own transcendence. His metaphysics disobeys its own principles and heads downward in a materialist direction.

It is here that we can see Negri's own version of what we have seen with Nietzsche, Benjamin and Agamben, a kind of brinksmanship once again with the very constructs that he is engaged with (and resisting). Thus, Negri goes on to say:

What remains to be said at this point? The attributes (as functions of the mediation of the spontaneity of being, between substance and mode) have themselves been reabsorbed on a horizontal field of surfaces. They no longer represent agents of organization but are subordinated (and very nearly eliminated) in a linear horizon, in a space where only singularities emerge. (Negri 1991, 63.)

In my reading, the key phrase here is the idea that the 'agents of organization' (that is the dominating, vertical and hierarchical forces of power as they are ordinarily practiced) are 'very nearly eliminated'. Why very nearly? Why not absolutely

eliminated since this seems to be the direction that Negri clearly prefers?

I would argue that here Negri is evincing some of the same Nietzschean tendencies that we have seen in the other thinkers discussed in this essay. There is a hesitation in his language (which later on becomes a discussion of limits in general) to fully explode and do away with the transcendental. Why? Because, to put it rather simply, if God disappears, so do God's attributes and, in that sense, so does the material world itself. God needs to *nearly* disappear, almost completely vanish, but a tiny bit must remain just to animate the rebellion against God which is what Negri appreciates about Spinoza's subversive materialism. This view of attributes corresponds to the way that Benjamin sees the objects of the world in constant and endless revolt against the idolatry and commodity fetishism that we humans impart to them.⁸ In either case what is animating is what is resisted; the foundation that is being denied, rendered (in Negri's case) horizontal and material.

A bit further on in the same chapter (entitled 'First Foundations') Negri goes on to write:

Every attempt to resist the violence of the paradox (and the subsequent overthrow of its terms) is unable to account for not the coherence, but the force and happiness of Spinoza's first formulation of the system, of the first stage of the *Ethics*... The attributes and the ontological parallelism are on the verge of elimination. But the process does not stop here. For the moment, though, it settles here, on the first and fundamental limit of pantheism: if God is all, all is God. The difference is important: on one side an idealistic horizon, on the other side a materialistic potentiality. (Negri 1991, 64.)

Here, we find ourselves in territory that is not dissimilar from what was just discussed in the previous section on Agamben. We see God and the world looking at each other, as it were across a great cosmic divide. In this case, for Negri, this simultaneity is decisively settled in favor of the human and the material but notice that even here, he uses a language of limits and hesitations. He writes that 'the attributes and ontological parallelism are on the verge of elimination'. But being 'on the verge' is different than being eliminated. It seems that Negri shares Agamben's belief (or perhaps hope) that the transcendental will in fact be utterly eliminated in the end but in the suspension between being and not being (or, more accurately between vanishing and not vanishing) we see a tremendous apparatus of power, a 'tension,' to quote Negri, that moves and shapes the world and the context of politics (Negri 1991, 63).

6. Conclusion: Weak anti-foundationalism

In light of the previous expositions, I argue that anti foundationalism is perhaps at its best and most potent when it holds itself back just a bit, that is when it is weak. In the end, the target of anti foundationalism is metaphysics itself and all of the thinkers

⁸ I discuss this at much greater length in Martel, 2011.

that follow Nietzsche continue his war on metaphysics—that is one of his greatest contributions to critical thought. But this war can never be complete; I see Nietzsche as being somewhat akin to Trotsky and his view of ‘permanent revolution.’ The metaphysical is always reasserting itself; it does so through the demands of language, of the cipher, of meaning and of law. When I speak of a ‘weak’ anti-foundationalism, I mean so precisely in the spirit of Walter Benjamin’s ‘*weak* messianic power.’ This power is weak not in the sense of being inept or useless but rather in terms of being human and not divine. In the fuller quotation of Benjamin that this comes from, he writes: ‘Like every generation that preceded us, we have been endowed with a *weak* Messianic power’ (Benjamin 2003, 390). This is an explicitly human power in the face of the divine. It has just a tinge of that other power (hence *weak*) but our own response, when we use it properly is all that we need. This is a power to resist idolatry in all of its forms, a power to combat mythic violence, false projections of sovereignty and legal authority. Such a power can be very strong indeed but the term *weak* reminds us of a necessary humility that comes with recognizing the position of the human vis a vis the divine. I would argue that weak anti-foundationalism occurs right at the cusp between the human and the divine but it is definitely on the human side of that cusp.

The brinksmanship that Nietzsche describes characterizes each of the thinkers that I have dealt with. All of them, I would argue, are always tempted towards a teleological goal, towards completion and fulfillment. Even Nietzsche himself displays this temptation through his character of Zarathustra when the latter calls himself ‘A seer, a willer, a creator, a future himself and a bridge to the future—and alas, also, as it were, a cripple at this bridge: all this is Zarathustra’ (Nietzsche 1995, 139). Here, Zarathustra is ‘a cripple at this bridge’ but he is also ‘a seer, a willer... a future himself and a bridge to the future.’ He is fully engaged in the longing for fulfillment that metaphysics always promises (but never delivers). Nietzsche’s depiction of the Law unfulfiller is similarly in this position; he is one span from completion. These positions are, I argue, manifestations of a ‘*weak* messianic power’; their strength comes from going to the very brink of the phantasm and pulling back just at that moment. From that position, however weak it seems, they have the ability to bring down the whole apparatus of law and sovereignty. They can do so as long as they don’t forget that the dream of utter victory is the same thing as an utter loss; if they cross that final threshold, their enslavement to the siren calls of metaphysics, of mythic violence and projection overwhelms them and they are returned to the status of legal and political subject (in all senses of that word) that motivated their resistance, their brinksmanship in the first place.

As a final thought, I would like to briefly comment about what kinds of law, what kinds of states of subjectivity, emerge when weak anti-foundationalism is engaged with. If we think of this project as purely negative, then it seems quite dreary, just digging that hole over and over again and watching it fill back up with more foundation(s). But if we think about the project as a way of life, we can see it in a much more positive sense. Here, I would like to appreciate Agamben’s idea of form

of life minus the insistence the law itself vanishes into such a practice. If we think of this form of resistance and brinksmanship as being a way of life, an ongoing practice, then it becomes less dreary, less futile.

This idea can be illustrated by returning to what Agamben talks about in an earlier citation, the community that lives around the castle in Kafka's work by that name. In my reading of that book, the community that lives in the circumference of the castle is wholly submerged in weak anti-foundationalism sometimes consciously and other times not so much.⁹ On the one hand, the villagers live and breathe their love for the denizens of the castle (who are never seen, or at least never seen with any certainty); their lives and their desires are all formed in response to the castle itself. But the castle is nothing for them; it is a mere cipher which they never really encounter and so, even as they are so enamored of the castle, they are actively also living their own lives. In this way, there is a whole set of ongoing practices and laws that can be recuperated simply by recognizing the periphery around the absent center of law. If you remove, however temporarily and partially (and I hope I've been clear that it can never be anything but temporary and partial) the myths of law, the actual practices of law in all of their complex variety stand out in contrast. If we can never be free from law this does not mean that we are doomed to obey one kind of law only. A realization of the plethora of laws and authorities that we are constantly producing and responding to—a plethora that lays, as with Negri, on a horizontal level—is itself a key factor in battling a law that we otherwise only see as something that is done to us according to rules that we only dimly understand and dare not look at too closely (least we espy something we aren't yet ready to see).

⁹ I also talk about this further in Martel 2011.

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