THE ECLIPSE OF NATURAL RIGHT IN WALTER BENJAMIN'S NATURAL HISTORY OF BAROQUE SOVEREIGNTY

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Introduction

In his most accomplished work, *Origin of the German Trauerspiel*, Walter Benjamin analyzes the genre of Baroque *trauerspiel*, or mourning play, and the historical condition that gave rise to it: 17th-century European absolute monarchy. Art, jurisprudence, and history are here fused in a metaphysical orientation that Benjamin set out to formulate as his program for upcoming philosophy.[1] The *dramatis personae* of the *trauerspiel*, entering the stage in the ostentatious aesthetic of the Baroque, reflect the specificity of what turns out to be an entirely fabricated modern tyranny. It is a secular political drama through and through; even the theological element of the state of exception is neutralized in Baroque sovereignty, a juridical constellation in which the absolute monarch partakes not as God-like but as "the most exalted of creatures."[2] This exposition of Baroque politics not only repudiates Carl Schmitt's political theology of sovereignty but also grounds Benjamin's critique of natural right and legal positivism, elaborated in the earlier "Critique of Violence," and foreshadows his later confrontation with the Fascist state of emergency in "Theses on the Philosophy of History."[3] The "natural history" approach in *Trauerspiel*, which Benjamin elaborates as part of his

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1: Walter Benjamin, "On the Program of the Coming Philosophy," in *Walter Benjamin: Selected Writings, Volume 1: 1913–1926*, ed., Marcus Bullock and Michael W. Jennings, trans., Mark Ritter, 100–110 (Cambridge: Harvard University Press, 1996), 107.

2: Walter Benjamin, *Origin of the German Trauerspiel*, trans., Howard Eiland (Cambridge: Harvard University Press, 2019), 74.

3: See Samuel Weber, "Taking Exception to Decision: Walter Benjamin and Carl Schmitt," *Diacritics* 22, no. 3/4 (1992): 5–18; Marc de Wilde, "Meeting Opposites: The Political Theologies of Walter Benjamin and Carl Schmitt," *Philosophy & Rhetoric* 44, no. 4 (2011): 363–381; Horst Bredekamp, "Walter Benjamin's Esteem for Carl Schmitt," in *The Oxford Handbook of Carl Schmitt*, ed., Jens Meierhenrich and Oliver Simons, 679–704 (Oxford: Oxford University Press, 2013).

historico-philosophical doctrine of ideas in the "Epistemo-Critical Foreword," deserves particular attention to gauge the ornate fabrication of Baroque sovereignty and its persistence in the total Fascist state.

Although central to Benjamin's project in *Trauerspiel*, natural history became associated with the work of Theodor Adorno, who expanded and formalized this approach along the lines of the "materialist dialectic."[4] The most influential interpretations of Benjamin's critique of law, from Jacques Derrida to Giorgio Agamben, do not take into account natural history, either as Benjamin presented it or as Adorno reformulated it.[5] What is thus overlooked is the concept of nature as decaying and transitory, as implied in Benjamin's natural history, drawn from the dramatists of the Baroque *trauerspiel* and the historical reality of absolute monarchy they depicted. As a result, the Baroque concept of nature is not considered in light of the political implications that it brings to bear on the conservative-revolutionary thought that sought to restore monarchical authority. This article will expound the hermeneutics behind the conservative 'constitutionalism' of Baroque sovereignty, which persists in political Romanticism, counter-revolutionary monarchical restoration, and Fascism. While elaborating on the strengths of Benjamin's conservative-revolutionary hermeneutic for understanding the meaning of Fascism, this article also draws out those aspects of natural history that might indicate the inability to fully confront Fascist politics. In particular, the critical focus on the *natural* history of the Baroque in this article is meant to elucidate antinomian implications in Benjamin's rejection of the natural right tradition, which have been accentuated in interpretations of Benjamin that emphasize the normative purchase of law-destroying Divine violence, political anarchism, and utopian legal nihilism.[6] In heeding the warnings that Benjamin's utopian notion of the Divine, in its law-destroying and melancholy articulation, paradoxically approximates the political phenomena it means to counter, this article also attempts to wrestle Benjamin's political thought from antinomianism.[7]

4: Theodor W. Adorno, "The Idea of Natural History," *Telos* 60, no. 60 (1984): 111–124.

5: See Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" in *Deconstruction and the Possibility of Justice*, ed., Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson, trans., Mary Quaintance, 3–67 (New York: Routledge, 1992) and Giorgio Agamben, *State of Exception*, trans., Kevin Attell (Chicago: University of Chicago Press, 2005).

6: See Agamben, *State of Exception*; Illan rua Wall, *Human Rights and Constituent Power: Without Model or Warranty* (London: Routledge, 2013); Duy Lap Nguyen, *Walter Benjamin and the Critique of Political Economy: A New Historical Materialism* (London: Bloomsbury, 2022); Werner Hamacher, "Affirmative, Strike: Benjamin's 'Critique of Violence,'" in *Walter Benjamin's Philosophy: Destruction and Experience*, ed., Andrew Benjamin and Peter Osborne, 110–138 (London: Routledge, 1994); and Christoph Menke, "Law and Violence," *Law & Literature* 22, no. 1 (2010): 1–17.

7: Theodor W. Adorno, "A Portrait of Walter Benjamin," in *Prisms*, trans., Samuel and Shierry Weber, 227–241 (Cambridge: MIT Press, 1981), 237; Derrida, "Force of Law," 58–62; Jürgen Habermas, "Consciousness-Raising or Redemptive Criticism: The Contemporaneity of Walter Benjamin," trans., Philip Brewster and Carl Howard Buchner, *New German Critique* no. 17 (1979): 30–59; Jürgen Habermas, "Between Eroticism and General Economics: Georges

I begin by discussing Benjamin's historico-philosophical approach to law and justice in "Critique of Violence," where the evocation of natural history occurs against the backdrop of Benjamin's rejection of any affirmative concept of natural right. I demonstrate that this negative criticism originated in *Trauerspiel*, where *natural* history as a method contains the discoveries Benjamin made about the 17th-century Baroque allegory of nature in philosophical, theological, and aesthetic terms. The portrayal of nature as fallen, transient, and positivized informs Benjamin's theory of Baroque sovereignty and his understanding of the fate of legal positivism. At the crux of this article, I show that this conservative-revolutionary hermeneutics allows a profound understanding of reactionary political phenomena from the 19th-century Romantic counter-revolution and monarchical restoration to the 20th-century Fascist triumph of legal positivism. In particular, Benjamin's *natural* history reveals the origins of Schmitt's total state in these persisting tendencies with origins in the political theory of 17th-century absolute monarchy. However, regardless of the metaphysical depth of Benjamin's *natural* history of Baroque sovereignty, his dismissal of the natural right tradition leads him to pit fallen positive law against redemptive utopianism in a way that fails to expound any realizable just ends. I argue that the limitation of this approach, which is reflected in antinomian interpretations of Benjamin, can be remedied with an expanded programme of *natural history* that calls forth a materialist-dialectical critique of the historical contradictions of rational natural right without rejecting it.

1. Shrouding Nature in Ostentation: The Natural History of Natural Right and the Baroque Allegory of Nature

Benjamin conceived his *Trauerspiel* study in 1916 and completed it as his habilitation thesis in 1925, a period during which he wrote a dissertation on Romanticism and was influenced by anti-progressivist and utopian political currents, including Georges Sorel's anarcho-syndicalism.[8] His reflections on law and justice in the 1921 "Critique of Violence" occur against the backdrop of this 'metaphysical' period.[9] Although Benjamin does not make explicit references to

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Bataille," in *The Philosophical Discourse of Modernity: Twelve Lectures*, trans., Frederick Lawrence, 211–237 (Cambridge: MIT Press, 1990), 220; Gillian Rose, "Walter Benjamin – Out of the Sources of Modern Judaism," in *Judaism and Modernity: Philosophical Essays*, 175–210 (London: Verso, 2017).

8: For an account of social utopianism in Benjamin, see Michael Löwy, "Religion, Utopia, and Counter-Modernity: The Allegory of the Angel of History in Walter Benjamin," *Social Compass* 36, no. 1 (1989): 95–104. On Ernst Bloch's influence, see Axel Honneth, "Saving the Sacred with a Philosophy of History: On Benjamin's 'Critique of Violence,'" in *Pathologies of Reason: On the Legacy of Critical Theory*, 88–125 (New York: Columbia University Press, 2009).

9: See the chronology of this period by Marcus Bullock and Michael W. Jennings, "Chronology, 1892–1926," in *Walter Benjamin: Selected Writings, Volume 1: 1913–1926*, ed., Marcus Bullock and Michael W. Jennings, 490–515 (Cambridge:

this essay in *Trauerspiel*, the former's legal themes suggests continuity with the latter's discussion of the theory of sovereignty. This continuity is also discernible in terms of methodology, although "Critique of Violence" is set more narrowly within the parameters of legal philosophy and keeps the declared "historico-philosophical view of law" largely implicit.[10] Benjamin evokes natural history in passing, and does not explicitly claim it as his method, which explains the lack of attention to it in secondary literature. What is striking is that, in "Critique of Violence," Benjamin evokes natural history in the context of his critique of natural right, dedicating a few critical passages to it before abruptly abandoning the topic. How does the natural history approach in *Trauerspiel* illuminate his historico-philosophical method? And what does the dismissal of natural right reveal about Benjamin's engagement with the European legal tradition?

The overall aim of "Critique of Violence" is to approach violence, law, and justice from a standpoint that would not fall under the dogmatism of the two main European legal traditions—natural right and legal positivism. Benjamin employs a brilliant schematic shorthand to characterize legal systems as defined by the relationship between ends and means. Natural right and positive law are said to agree that "just ends can be attained by justified means, justified means used for just ends."[11] The difference between natural right and legal positivism, however, lies in the relative priority given to ends and means. Positive law establishes its criterion in justified means, deeming the ends just if they have been attained through appropriate means. These sanctioned means are 'legal' in the sense that they have been posited, or 'put there,' making them discoverable in specific legal conditions codified in positive laws that evolved as a result of historical developments. Natural right, on the other hand, establishes its criterion in the realm of just ends and then judges, or criticizes, legal means according to the extent that they achieve these ends. Although Benjamin seeks to go beyond both traditions, he argues that natural right is least able to offer a critical perspective on violence as a principle behind moral means to achieve just ends. When it comes to the justification of means, Benjamin says, natural right's focus on the absoluteness of ends "can only lead to bottomless casuistry."[12]

Benjamin's primary concern here appears to be the ideological aspects of

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Harvard University Press, 1996). Especially curious is Benjamin's engagement with *Action Française*, the organ of French reactionary monarchism.

10: Walter Benjamin, "Critique of Violence," in *Reflections: Essays, Aphorisms, Autobiographical Writings*, ed., Peter Demetz, trans., Edmund Jephcott, 277–300 (New York: Schocken Books, 2007), 279.

11: Benjamin, "Critique of Violence," 278.

12: Ibid., 279.

natural right—that is, certain presuppositions that this doctrine holds about 'the state of nature.' At first glance, Benjamin's critique can be seen as following Hegel's critique of natural right for abstracting an *a priori* state of nature from some aspect of actual social relations.[13] With reference to Spinoza's *Political-Theological Treatise*, Benjamin observes that the natural right doctrine presupposes the right of individuals to use violence in the *de facto* state of nature before a rational contract between them is established.[14] Spinoza theorized that prior to the establishment of law or right, individuals exist in the whole of nature. Nature's power is said to be coextensive with her right, from which Spinoza then derives that "each individual thing has the sovereign right to do everything that it can do."[15] For Benjamin, the problem arises when right is articulated through natural 'power' before the social contract is established, which elevates this natural right to an *a priori* one.[16] According to this type of critique, the *de facto* state of nature turns out to be not the *quaestio qui facti* but the question of right, *quaestio quid juris*. This *a priori* transformation of a factual aspect of social life into a juridical one makes the presupposed natural use of force into a 'right.' Once the social contract is formed, the right to force is 'smuggled in.' It becomes the implicit principle of a community, a violent power that has to be obeyed "either of their own free will or through fear of the ultimate punishment."[17]

It is in the context of this critique of natural right that the notion of natural history is introduced. To put it in the terms of an unpublished 1918 fragment, by natural history, Benjamin means a view of the "developmental stages of human phenomena."[18] In "Critique of Violence," however, these developmental stages in the natural history of natural right are taken in their dogmatic aspect, according to which violence is a product of nature. For Benjamin, such a dogmatic view is reflected in Darwin's biological theory of "natural selection," and the more pernicious "popular Darwinistic philosophy," or social Darwinism, which holds that violence is the only original means to the ends of nature.[19] To this end, the natural history of natural right reveals "the use of violent means to just ends" as

13: G.W.F. Hegel, *Natural Law: The Scientific Ways of Treating Natural Law, Its Place in Moral Philosophy, and Its Relation to the Positive Sciences of Law*, trans., T.M. Knox (Philadelphia: University of Pennsylvania Press, 1975), 67 [428].
14: Benjamin, "Critique of Violence," 278.
15: Baruch Spinoza, *Theological-Political Treatise*, ed., Jonathan Israel, trans., Michael Silverthorne and Jonathan Israel (Cambridge: Cambridge University Press, 2007), 195 [ch. 10, ¶2].
16: Benjamin's usage of Spinoza's emphasis on right rather than law also indicates that Benjamin is critical of the modern natural right doctrine, and the English rendition of *Naturrecht* as 'natural law' is not accurate.
17: Spinoza, *Theological-Political Treatise*, 200 [ch. 16, ¶8].
18: Walter Benjamin, "Types of History," in *Walter Benjamin: Selected Writings, Volume 1: 1913–1926*, ed., Marcus Bullock and Michael W. Jennings, trans., Rodney Livingstone, 115 (Cambridge: Harvard University Press, 1996), 115.
19: Benjamin, "Critique of Violence," 278.

the natural "'right' to move [the] body in the direction of a desired goal."[20] This presupposition of natural violence is, for Benjamin, an ideological foundation of the Terror of the French Revolution. Unlike Hegel or Marx, however, Benjamin neither criticizes natural right from the perspective of the political economy of bourgeois civil society nor, unlike some Hegelian or Frankfurt School thinkers, does he seek alternative grounds to articulate natural right.[21] This disregard for the affirmative aspects of natural right is a paradoxical move because Benjamin acknowledges that natural right directly addressed the question of justice, not mere historical legality.[22] And insofar as he claims that "[j]ustice is the principle of all divine end making," the notion of Divine violence that Benjamin evokes in the closing part of the essay suggests a relationship to just ends and, by extension, to natural right.[23] For if natural right's just ends are excluded from consideration, how can the question of justice be introduced into the Divine?

This problem was not lost on Derrida in what is considered the most influential interpretation of Benjamin's "Critique of Violence." In his "Force of Law: The Mystical Foundation of Authority," Derrida observes that Benjamin's Divine violence is "not always incompatible with the theological basis of all *jusnaturalisms*."[24] Derrida sees Divine violence not as law-destroying, contrary to Benjamin's assertion, but posits that it shares with natural law a form of "founding" violence, a violence that legitimates."[25] However, Derrida's reconstruction—rather than deconstruction—of Benjamin's theory of the Divine appears to hinge on his misuse of Benjamin's negative natural right critique.[26] Derrida is at liberty to do so because Benjamin's natural history of natural right only registers the history of violence in the exercise of natural right but not, for example, its affirmative 'tricolor' concept of liberty, equality, and fraternity (most brilliantly developed by the late Ernst Bloch).[27] As Gillian Rose demonstrates, Derrida uses Benjamin's text to introduce his own concept of

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20: Ibid., 277.
21: Alexandre Kojève, *Outline of a Phenomenology of Right*, ed., Bryan-Paul Frost, trans., Bryan-Paul Frost and Robert Howse (Lanham: Rowman & Littlefield Inc., 2007); Franz Neumann, "Types of Natural Law," in *The Democratic and the Authoritarian State: Essays in Political and Legal Theory*, ed., Herbert Marcuse, 69–95 (New York: The Free Press of Glencoe, 1957); Ernst Bloch, *Natural Law and Human Dignity*, trans. Dennis J. Schmidt (Cambridge: MIT Press, 1986).
22: See an excellent discussion of Benjamin's restricted use of natural right, including the historical context in Germany that conditioned it, as well as his later self-reflective attempts to come to terms with the natural right tradition in Julia Ng, "Afterword," in Walter Benjamin, *Towards a Critique of Violence: A Critical Edition*, ed., Peter Fenves and Julia Ng, 113–160 (Stanford: Stanford University Press, 2021), 122–124.
23: Benjamin, "Critique of Violence," 295.
24: Derrida, "Force of Law," 32.
25: Ibid., 35.
26: See the critique of Derrida's deconstruction as a 'reconstructive' thinking that reinstates the subjective act of positing in Gillian Rose, "Law and Writing: Derrida," in *Dialectic of Nihilism: Post-Structuralism and Law*, 131–170 (Oxford: Basil Blackwell, 1984).
27: Bloch, *Natural Law and Human Dignity*, 153–180.

natural law based on Heidegger's ontology of originary violence.[28] Ironically, Derrida's attribution of foundational violence to Divine violence itself falls under Benjamin's critique of natural right. "The foundation of all states," Derrida posits, "occurs in a situation that we can […] call revolutionary […] terrifying moments," the "mystique" of *polemos* or *eris*.[29] Just as in Heidegger's ontology of violence, Derrida's foundational violence does not legitimate with reference to "the city and its laws" but instead resembles what Benjamin is repulsed by in the experience of the French Revolution—the experience of the Terror—which shows how the presupposed right to use force resurfaces in the violent destruction of the *ancien régime* and the creation of a new state based on the natural right doctrine.[30]

Benjamin's avoidance of an affirmative tricolor concept of natural right— *liberté, égalité, fraternité*—not only leads to the reconstructive co-optation by Derrida but is also symptomatic of the difficulty with natural history as a method. Although "Critique of Violence" announces a historico-philosophical approach to establish a criterion for evaluating violence "mutually independent" of the traditions of natural right and legal positivism, natural history is used in a negative sense to detect the dogmatic use of force.[31] The "Epistemo-Critical Foreword" and, indeed, the entirety of *Trauerspiel*, dwell on natural history in much greater detail. In the Foreword, Benjamin defines natural history as the "redemption" of historical content in the realm of ideas.[32] For Benjamin, historical content is neither mere facts grasped inductively nor a deductive genesis that would indicate "the coming-to-be of what has originated."[33] Instead, the essence of the historical world is contained "in the becoming and passing away": the origins concern the fore- and after-history of historical content drawn from exemplary and extreme monads—metaphysical forms, artistic devices, concepts of nature, juridical doctrines—that form a "constellation" of eternal ideas characteristic of historical epochs.[34] However, Benjamin's natural history method shares its main features with the object of his investigation, the Baroque *trauerspiel*. As Habermas perceptively observed, the allegorical portrayal of ruins, suffering, and

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28: Gillian Rose, "Of Derrida's Spirit," in *Judaism and Modernity: Philosophical Essays*, 65–87 (London: Verso, 2017), 80–84. Also see Martin Heidegger, *Introduction to Metaphysics*, trans., Gregory Fried and Richard Polt (New Haven: Yale University Press, 2014). For Heidegger's philosophical Fascism and relationship to German counter-revolutionary thought, see Richard Wolin, *Heidegger in Ruins: Between Philosophy and Ideology* (New Haven: Yale University Press, 2023).
29: Derrida, "Force of Law," 35.
30: Rose, "Of Derrida's Spirit," 80, 68–84.
31: Benjamin, "Critique of Violence," 278.
32: Benjamin, *Origin of the German Trauerspiel*, 24.
33: Ibid.
34: Ibid., 24–26. On how Benjamin's focus on the extreme case—the borderline notion—is indebted to Schmitt, see Weber, "Taking Exception to Decision," 6–8.

suppression in the *trauerspiel* genre attends to the negativity at the heart of Benjamin's critique.[35] Unlike symbolic art's promises of "happiness, freedom, reconciliation, and fulfilment," Baroque allegory lacks an affirmative promise.[36]

As the discussion of allegory in *Trauerspiel* shows, Benjamin understood that the idea of classical beauty, revived in the symbolism of bourgeois drama, had been radically dislodged in Romantic aesthetics. Benjamin is critical of this deformation of the concept of the symbol in 19th-century Romanticism. To account for the perversion of Enlightenment symbolism, Benjamin analyzes how Baroque allegory laid the foundation for Romanticism, just as the Baroque absolute monarchy inspired anti-Enlightenment Romantic notions of the organicist state.[37] In this analysis, allegory is not a timeless ideal-type, but an artistic device specific to the *trauerspiel* genre. The excess of signification in allegory does not represent the idealized values of the revolutionary bourgeoisie, but instead leads to "the abyss between image-being and meaning."[38] (It is this abyss that makes Benjamin's critique so attractive to poststructuralist thought.) Allegory draws on the underlying feature of the monarchical courtly decorum in the *trauerspiel*, its Baroque ostentation. The ornate imagery of the Baroque aesthetic, with its excessive ornamentation and grandiose literary forms, leaves nothing hidden in the exuberant display.[39] The dramatic plots and their catastrophic culminations are shrouded in grandeur, obtrusive show, and ornamental flourishes of language and theatrical staging that overwhelm the logical sense and obscure the structure of the drama itself.[40] In other words, allegory's excessive signification forecloses the reality of things, from which issues the mood of mournfulness—or better still, melancholy over the lost meaning.[41] As Rose explains, the meaning of Baroque aestheticization is "not truth as beauty but ornamentation without truth."[42]

The centrality of allegory in *Trauerspiel* directs attention to the problem with the allegory of nature implied in natural history. Nature itself is shrouded in allegorical ostentation. The Baroque allegory of nature, with its motifs of death,

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35: Habermas, "Consciousness-Raising or Redemptive Criticism," 36.
36: Ibid.
37: Benjamin, *Origin of the German Trauerspiel*, 166; Lutz P. Koepnick, "Allegory and Power: Walter Benjamin and the Politics of Representation," *Soundings: An Interdisciplinary Journal* 79, no. 1/2 (1996): 59–78, 62–66.
38: Benjamin, *Origin of the German Trauerspiel*, 173.
39: Ibid., 191–192.
40: Ibid., 204–206.
41: Ibid., 198.
42: Rose, "Walter Benjamin," 189. Also see ibid., 181, 201–205 for her observation on the continuity between Baroque ostentation and Fascist aestheticization of politics.

ruins, and decay, depicts a world of suffering. Unlike classical symbolic art, which arises in societies where, as Rose notes, "nature, sensuousness as such, is regarded as divine," the Baroque allegory is conditioned by a world in which nature is understood in terms of decline and decay—that is, in aspects that are transient, relativistic, and historical through and through.[43] In the Baroque aesthetic, nature does not refer to anything beyond itself, which is reflected in what Benjamin describes as the theological situation of this epoch: "the renunciation of a state of grace in reversion to the bare creaturely condition."[44] For Benjamin, this "creaturely condition" signifies that the nature of creation "is totally different from Rousseau's nature."[45] In Rousseau, natural right indicates the sovereignty of the people "who begin anew among equals."[46] This natural condition can have an antithetical relationship with history, in which Rousseau detects the evils of property.[47] In the Baroque, in contrast, there is no antithesis between nature and history, but rather a "total secularization of the historical" within the creaturely state.[48] This portrayal is infused with a melancholic sense of irrevocable loss and dramatized as a history of nature's fall: "Because it is mute, fallen nature mourns."[49]

As Adorno explains in his programmatic essay, "The Idea of Natural History," the device of allegory used by Baroque poets reveals nature as the site of eternal transience.[50] Adorno describes this aspect of natural history as a way "to comprehend historical being in its most extreme historical determinacy, where it is most historical, as natural being."[51] The central point here is that the myth of nature in the *trauerspiel* is portrayed not as a fixed myth, but as a myth in which nature is characterized as contingent, inherently subject to change and transience.[52] This myth, or allegory, of nature as transient carries over to Benjamin's methodological procedure. As Rose observed, the methodological foreword to *Trauerspiel* "is best read as the text to which the rest of the book provides an introduction," for it presupposes "a world of beings who know

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43: Gillian Rose, *Hegel Contra Sociology* (London: Verso, 2009), 155; G.W.F. Hegel, *Aesthetics: Lectures on Fine Art, Vol. 1*, trans., T.M. Knox (Oxford: Clarendon Press, 1975), 315.
44: Benjamin, *Origin of the German Trauerspiel*, 67.
45: Ibid., 81.
46: Bloch, *Natural Law and Human Dignity*, 61.
47: Jean-Jacques Rousseau, *Discourse on the Origin of Inequality*, trans., Donald A. Cress (Indianapolis: Hackett Publishing Co., 1992), 44–65.
48: Benjamin, *Origin of the German Trauerspiel*, 81.
49: Ibid., 244.
50: Adorno, "The Idea of Natural History," 119.
51: Ibid., 117.
52: Gillian Rose, *The Melancholy Science: An Introduction to the Thought of Theodor W. Adorno* (London, UK: Verso, 2014), 48–51.

themselves to be creatures, not natural beings."[53] The negativity of natural history as a method is thus tied to the negativity of the *trauerspiel* as an object of investigation. This operation can be understood as *natural* history, where the emphasis on *natural* means that history in the meaning of transitoriness appear as natural or fixed. Benjamin's *natural* history of origin constitutes the origin of historicity itself, so much so that *natural* history implies the Baroque concept of nature as inherently historical: decaying, ruined, positivized.[54] Like Habermas after him, Adorno illuminates the importance of Benjamin's discovery in *Trauerspiel* by way of comparing it to a critique of the bourgeois novel.[55] The latter, exemplified by György Lukács' *The Theory of the Novel* is the prime example, deals with nature not as inherently transitory, but as a fixed myth or second nature.[56] This natural *history* offers an ideology critique of the myth of nature as fixed by demonstrating its historical conditioning.

Benjamin's *natural* history does not expound natural *history*, that is, how things that appear natural can be seen as historical. What is crucial about this missing aspect in Benjamin's work for the critical philosophy of law is that the ideology critique of the bourgeois novel has its correlate in the critique of natural right within political philosophy.[57] In the realm of aesthetic critique, natural history functions as a critique of the promises of happiness in the novel-form, or bourgeois drama, and the contradictory historical and political experience of economic exploitation.[58] Similarly, the natural history of natural right would explore the affirmative tricolor idea of natural right—*liberté, égalité, fraternité*—in contradiction with its realization. Regardless of his declared attempt to uncover the ideological foundation of the French Revolution, Benjamin's historico-philosophical perspective does not engage in ideology critique or natural right critique. Benjamin's *natural* history of natural right does not analyze second nature in the manner of Hegel, Lukács, or Bloch. To this end, Habermas observes that Benjamin's redemptive criticism should be understood as conservative in an

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53: Rose, "Walter Benjamin," 191.
54: For a useful discussion of the origin of historicity in Benjamin, see Samuel Weber, "Genealogy of Modernity: History, Myth, and Allegory in Benjamin's *Origin of the German Mourning Play*," *MLN* 106, no. 3 (1991): 465–500, 473. Further, as Paula Schwebel observes, "[t]he notion that all created things must perish and decay encapsulates what Benjamin means by baroque natural history. History and nature are synthesized in the idea of transience." Paula Schwebel, "Sovereign/Creature: Neostoicism in Benjamin's *Origin of the German Trauerspiel* and His Response to Carl Schmitt's *Political Theology*," in *German Stoicisms: From Hegel to Sloterdijk*, ed., Kurt Lampe and Andrew Benjamin, 109–135 (London: Bloomsbury, 2020), 115.
55: See a useful discussion of the difference between natural history and second nature in Ng, "Afterword," 137–139.
56: György Lukács, *The Theory of the Novel: A Historico-Philosophical Essay on the Forms of Great Epic Literature*, trans., Anna Bostock (Cambridge: MIT Press, 1974).
57: Habermas, "Consciousness-Raising or Redemptive Criticism," 36.
58: Herbert Marcuse, "The Affirmative Character of Culture," in *Art and Liberation: Collected Papers of Herbert Marcuse, Vol. 4*, ed., Douglas Kellner, trans., Jeremey J. Shapiro, 82–112 (London: Routledge, 2017).

eminent sense: it seeks to redeem historical phenomena by preserving them in the realm of ideas.[59] Although Benjamin does indeed have a Messianic understanding of redemption, to which I will return at the end of the essay, redemption for Benjamin also means the preservation of historical data in a negative and descriptive way. The historico-philosophical approach to the legal tradition is similarly conservative, which explains the dismissal of any affirmative, or 'idealist,' concept of natural right in "Critique of Violence." This conservative-revolutionary hermeneutic, as I show in the following section, is part and parcel of Benjamin's *natural* history of Baroque sovereignty.

2. The *Natural* History of Baroque Sovereignty: Positive Law and Conservative-Revolutionary Hermeneutics

Benjamin's *natural* history is entangled in the Baroque meaning that nature acquired in the historical epoch of absolute monarchy. This complicates the interpretation of *natural* history for the critical operation in "Critique of Violence": the negative critique of natural right stems from the transience and negativity of the Baroque myth of nature. While lacking an affirmative element in relation to natural right, this portrayal of nature as transitory, decaying, and positivized in the *Trauerspiel* offers a novel hermeneutic perspective from which Benjamin's critique of legal positivism, or mythic law, in "Critique of Violence" can be reconsidered. In what follows, I show how Benjamin's *natural* history opens up the conservative-revolutionary hermeneutic of Baroque sovereignty that accounts for the political phenomena which have hollowed out eschatology and reduced the political world to a this-worldly catastrophe of posited nature and posited law. Specifically, these features of Baroque absolute monarchy, reflected in the *trauerspiel* genre, are constitutive of the fore-history of Fascism: political romanticism, counter-revolution, and monarchical restoration. Baroque positivism then finds its final fate in Schmitt's Fascist state theory, its after-history.

The Baroque conception of nature as transitory and ever-changing—historical and positive—allows for a reassessment of what Benjamin says about positive, or mythical, law in "Critique of Violence." Redirecting his critique from natural right toward the domain of legal positivism, Benjamin attributes positive law to a mythic "order imposed by fate."[60] This fateful order brings together two modes of mythic law operative within any system of sanctioned legal means, with

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59: Habermas, "Consciousness-Raising or Redemptive Criticism," 38.
60: Benjamin, "Critique of Violence," 285.

coercive violence as "the principle of all mythical lawmaking."[61] "All violence as a means," says Benjamin, "is either lawmaking or law-preserving."[62] The first, law-positing, function of positive law is exemplified by the right to use force that the French revolutionaries employed as a means to realize their conception of justice: It constitutes the negative aspects of natural right, the violence of positing, regardless of the revolutionary meanings of natural right such as freedom, equality, and solidarity.[63] The same holds for the institution of parliament, which is said to offer a "woeful spectacle" concealing the violent origin of the institution.[64] Similarly, the critique is strictly negative: it reveals the violent foundations of any posited—that is, positive—law, regardless of any democratic meaning the institutions of parliament might promise.[65] Another paradigmatic example of such law-posting function is military violence, which frames military victory through the means of a peace ceremony.[66] Again, peace here is taken in a negative sense: a peace ceremony masks the violent means of the victorious power. At the same time, the second, law-preserving function of mythic law prohibits any "natural ends" insofar as it considers these ends as threats to the existence of the positive legal system. Only those actions of legal subjects codified within the positive law are considered legal and just.[67] This means that once a social contract has been established as a coercive system of laws, the law-preserving function of positive law tends not to tolerate any forms of violent means outside the legal system's framework.[68]

Both the law-positing and law-preserving functions of mythic law, forming a pernicious cycle of mythical violence, belong to "violence crowned by fate."[69] In "Critique of Violence," mythic law carries a connotation of pagan Greek law, which engenders the fate of punishment and guilt. Benjamin offers this peculiar genealogy with reference to the legend of Niobe, where her arrogance provoked Leto to send Apollo and Artemis to punish her by preserving her life but instilling

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61: Ibid., 295.
62: Ibid., 287.
63: In rendering *Rechtsetzender* as "law-positing" rather than "law-making," I have followed the latest translation of "Critique of Violence" by Julia Ng. Compare "law-positing" to Gillian Rose's Marxian exposition of Hegel's critique of Fichte's legalistic logic of positing—of law that is 'put there'—in *Hegel Contra Sociology*, 194–195, 207–214. For an antinomic interpretation of the violence of positing, see Hamacher, "Afformative, Strike," 110–118.
64: Benjamin, "Critique of Violence," 288.
65: See a critical account in Honneth, *Pathologies of Reason*, 115 and Judith Butler, "Critique, Coercion, and Sacred Life in Walter Benjamin's 'Critique of Violence,'" in *Political Theologies: Public Religions in a Post-Secular World*, ed., Hent de Vries and Lawrence E. Sullivan, 201–219 (New York: Fordham University Press, 2006), 206–207. For the connection between Benjamin's critique of parliaments and the historical parliament of the period of Weimar constitution, see Hamacher, "Afformative, Strike," 113.
66: Benjamin, "Critique of Violence," 283.
67: Ibid., 280–281.
68: Ibid., 288.
69: Ibid., 286.

guilt.[70] Emerging from the "ambiguous sphere of fate," mythic law is understood here as establishing boundaries, "an eternally mute bearer of guilt and as a boundary stone on the frontier between men and gods."[71] Crucially, the meaning of fate changes radically in *Trauerspiel*. Here, the mythical connotations of fate belong not to Greek mythology, but to the Baroque "drama of fate."[72] Benjamin states, "[h]owever it may disguise itself in pagan, mythological guise, fate is meaningful only as a natural-historical category in the spirit of the restoration theology of the Counter-Reformation."[73] The *natural* history of the drama of fate is thus to be discovered in the Baroque myth—that is, the allegory. As Rebecca Comay recently observed, even Benjamin's description of the myth of Niobe, portrayed as a stone seeping tears—a representation of melancholic, dead nature—resembles the spirit of the 17th-century *trauerspiel*.[74] The mythical aspect of Baroque *trauerspiel* differs radically from ancient tragedy's dependence on the myth of a prehistoric epoch and heroic past.[75] In contrast, the Baroque drama of fate expresses historical life *par excellence*. The content of historical life, the political machinations of the absolutist constitution, takes on primary importance as the dramatists who wrote the *trauerspiel* shared more in common with jurists and political analysts than they did with artistic men of genius.[76] The content of their work is taken not from the classical symbolism of the Renaissance but from written historical accounts of the modern European nobility.[77] As a genre, Benjamin says, the *trauerspiel* is political intrigue spilled into the literary form of allegory.[78]

The *natural* history of the Baroque drama of fate elucidates the meaning of mythical law, the legal order of fate in "Critique of Violence." The law-positing and law-preserving functions are not mythical either in the sense of ancient epic tragedy or the bourgeois novel but operate in fallen historical life of the Baroque. This goes against Derrida's interpretation, in which the law-positing function is akin to natural right's end-making. When mythical law is considered from the perspective of Baroque drama of fate, it becomes impossible to assign mythical law-positing the foundational aspect of natural right and relegate law-preserving

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70: Ibid., 294–295.
71: Benjamin, "Critique of Violence," 295.
72: Benjamin, *Origin of the German Trauerspiel*, 127–132.
73: Ibid., 128.
74: See an unpublished draft by Rebecca Comay, "Bad Mothers" (Part One), 22. https://www.academia.edu/123093629/BAD_MOTHERS_Part_One
75: Benjamin, *Origin of the German Trauerspiel*, 46.
76: Ibid., 48.
77: Ibid., 46–48.
78: Ibid., 48.

violence to positive law, as Derrida does.[79] Instead, what Benjamin observation about fateful mythical law and violence in "Critique of Violence" is interwoven with the *natural* history of fate in *Trauerspiel*. Both functions of the mythical law belong to fallen positive law; their dwelling place is the myth of nature as inherently transitory and historical.[80] Axel Honneth's interpretation of law-positing violence as "executive" and law-preserving violence as "administrative" thus better reflects the idea that mythical law belongs to positive law.[81] The executive and administrative functions of the institution of policing further attests to this.[82] While the obvious legal function of the police is law-preserving— upholding legal ends and ensuring that human activities conform to codified positive laws— Benjamin observes that the police also wield the power to issue executive decrees in the course of their intervention and to justify law-positing violence for "security reasons."[83] For Benjamin, the police are the paradigmatic example of a fusion between law-preserving and law-positing functions of the fateful mythic law.

The police force expresses the "oscillation" between the law-preserving and law-positing functions of the state, an oscillation in which the law-preserving function weakens the law-positing function which, in response, forces the latter to resort to purely arbitrary means, revealing "something rotten in the law."[84] One can already see how the emphasis on the arbitrary power of the police that operates under positive law resembles the 20th-century literary portrayal of the dominance of the police in Fascism and anticipates the critique of the Fascist total state.[85] A question might arise: what does policing, as a modern institution, have to do with the Baroque? In fact, Benjamin points out in "Critique of Violence" that the origin of this paradigmatic mythical institution is to be found in absolute monarchy.[86] Specifically, this origin lies in the Baroque concept of sovereignty, to which I now turn.

In the *trauerspiel*, the mythic law is incarnated in the historical drama of the

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79: Derrida, "Force of Law," 35–36.
80: Rose has argued that the preserving and making functions of fateful violence are not the correlate of the mythic and divine, but part of the law of constitution and representative institutions. See Rose, "Of Derrida's Spirit," 84.
81: Honneth, *Pathologies of Reason*, 100.
82: In an argument to the contrary, Massimiliano Tomba argues that the appeal to the 'people' and democracy in natural law cannot be disentangled from the institution of the police. See Massimiliano Tomba, "Another Kind of Gewalt: Beyond Law Re-reading Walter Benjamin," *Historical Materialism* 17, no. 1 (2009): 126–144, 132–133. For an interpretation of Benjamin that does not extend the critique of state and police violence to law and right *tout court*, see Daniel Loick, *A Critique of Sovereignty* (Lanham: Rowman & Littlefield Inc., 2018), 113–123.
83: Benjamin, "Critique of Violence," 287.
84: Ibid., 286.
85: Jean Genet, *Funeral Rites*, trans., Bernard Frechtman (New York: Grove Press, 1969).
86: Benjamin, "Critique of Violence," 287.

Baroque sovereign—the tyrant.[87] "The sovereign represents history. He holds historical happenings in his hand like a scepter."[88] As with the genre of the *trauerspiel* in general, the figuration of the sovereign does not merely rely on theatrical devices but is based on 'constitutional' and state law of absolute monarchy.[89] On the level of literary genre, the *trauerspiel* unfolds in the context of bloody struggles, catastrophes, and the torture of creaturely life.[90] Crucially, the political machinations of Baroque tyrants and their sovereign violence are depicted as bloody. Blood, as Benjamin observed in "Critique of Violence," symbolizes "mere life" and the operation of the law of mythical fate that instills guilt in this mere life.[91] In the *trauerspiel*, the figure of the martyr is the correlate of mere life and the underside of the tyrant.[92] Regarding this dual aspect of Baroque sovereignty, Benjamin writes that "[t]yrant and martyr in the Baroque age are the two Janus-faces of the crowned head," with "an element of martyr tragedy […] hidden in every drama of a tyrant."[93] The sovereign tyrant is a worldly creature devoid of revolutionary convictions; the martyr, on the other hand, is also a creature but lacks princely sublimity. The portrayal of the martyr does not dramatize moral transgression but instead emphasizes the creaturely state of suffering.[94] The Baroque martyr ostensibly performs "the devotion of the citizenry" while retreating into a radical ascesis of the aestheticized inner world that is equally removed from the creative power presupposed in natural right.[95] The guilt of the martyr results from the sovereign tyrant's catastrophic stabilization in the realm of historical transience—that is, bloody positive law. The martyr's guilt is 'natural,' but this nature is itself historical and positive.

Benjamin's critique of Schmitt's theory of sovereignty unfolds alongside his exposition of these *dramatis personae* of the Baroque drama. According to Schmitt's *Political Theology*, which Benjamin cites, "sovereign is he who decides on the exception."[96] The exception is described as a "borderline concept" that sustains the general theory of the state in conditions where a general legal norm cannot subsume a total exception in a situation of conflict or extreme emergency.[97]

87: Benjamin, *Origin of the German Trauerspiel*, 46.
88: Ibid., 48.
89: Ibid., 49.
90: Ibid., 35, 65, 75.
91: Benjamin, "Critique of Violence," 297.
92: As Schwebel observes, "the torments of the Stoic martyr are decidedly of the flesh," which also suggest that the martyr is "mere life." Schwebel, "Sovereign/Creature," 117.
93: Benjamin, *Origin of the German Trauerspiel*, 54, 59.
94: Ibid., 77.
95: Ibid., 58–59, 77.
96: Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans., George Schwab (Chicago: University of Chicago Press, 2005), 5.
97: Schmitt, *Political Theology*, 5.

Regardless of the content of the general norm, Schmitt insists, any legal order is based on a sovereign decision, a correlate of the theological notion of a miracle.[98] Benjamin's critique of Schmitt amounts to a *natural* history of the concept of sovereignty. He points out that in the Middle Ages, the doctrinal position of the Church held that the usurper of political power could be deposed by the Catholic Curia.[99] In the century of religious wars, especially during the Thirty Years' War between Protestants and Catholics, the Catholic Church adhered to this doctrine to resist the emergent sovereign princely powers.[100] Protestantism, in response, sought to transfer power from the Pope's Curia to the prince, resulting in the first modern conception of the sovereign decision. For Benjamin, the properly early-modern decisionist doctrine of sovereignty ends here. Benjamin shows that decisionist sovereignty was later sublimated in the absolute monarchy, the Catholic counter-response to the Protestant Reformation. Baroque sovereignty is not predicated on an exceptional decision but reacts to this early modern Protestant doctrine. Schmitt's self-proclaimed decisionist theory is, in fact, a Baroque theory of sovereignty. The sovereign as an entity that decides on the exception and elevates the absolute ruler above the church and the people, Benjamin argues, was shaped by the *realpolitik* of the Catholic Counter-Reformation, the theological correlate of the Baroque.

"If the [early] modern concept of sovereignty amounts to a supreme executive power of the ruler," says Benjamin, "the Baroque concept develops on the basis of a discussion of the state of exception, and its most important function is to avert this state."[101] The key point is that while the early-modern princely sovereignty did emerge as a result of war, just as Hobbes' sovereign was conceived against the backdrop of the civil war in England, it still contained the impulse of classical natural right.[102] The Catholic reaction, with which Schmitt is associated, seeks to achieve a "more spiritual and more profound" doctrine than this.[103] This response is not merely a Medieval Catholic doctrinal ecclesiastical opposition to the worldly prince but aims for a complete stabilization that weaves together both ecclesiastical and political authority in the element of transient and positivised

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98: Ibid., 5–15.
99: Benjamin, *Origin of the German Trauerspiel*, 49.
100: In *Trauerspiel*, Benjamin exemplifies this strike with the wars against the Curia on the part of Protestants and the assassination of usurpers such as Henry IV of France by Catholics. Ibid.
101: Ibid., 49.
102: Thomas Hobbes, *Leviathan*, ed., Edwin Curley (Indianapolis: Hackett Publishing Co., 1994), 88. Although Hobbes already showed a preference for positive law by arguing that no law can be unjust, his theory still relies on classical natural law tradition. Bloch, *Natural Law and Human Dignity*, 47.
103: Benjamin, *Origin of the German Trauerspiel*, 49. On the comparison between Hobbes's political concept of sovereignty and Schmitt's Romantic one in the context of comparison with Benjamin, see Bredekamp, "Walter Benjamin's Esteem for Schmitt," 691–693.

nature itself. From a theological perspective, the Baroque political destitution refers to the divorce of historical actions from the process of salvation in the Counter-Reformation.[104] The elimination of transcendence explains the references to Byzantine sources in the *trauerspiel* insofar as the theological-political doctrine of Byzantium subsumed the theological under temporal politics.[105] In its this-worldly character, Baroque Byzantinism's attempt at stabilization leads to catastrophe. At the core of the *natural* history of Baroque sovereignty is the foreclosure of the transcendental eschatological dimension, leading to a cataract. The emptied beyond precludes "every formation"—that is, any creation of a new political order legitimized by natural right.[106] Instead of transcendence, the drastic form of Baroque absolute monarchy is set to "swallow up the earth one day with catastrophic violence."[107]

This exposition has already indicated that, for Benjamin, Schmitt's theory of sovereignty originates from the absolute monarchy's Baroque sovereignty, not from any early-modern rationalist natural law doctrine of sovereign people. This not only demonstrates that the origins of Fascism are reflected in the 17th-century Baroque *trauerspiel* but also helps us understand how the Baroque manifested in the conservative-revolutionary proto-Fascist tendencies.[108] This after-history of Baroque sovereignty, and fore-history of Fascism, was prefigured in Benjamin's discussion of the influence of Baroque allegory on Romanticism.[109] Unlike the natural right of the revolutionary bourgeoisie, Romanticism sought to recover the organicist theory of the state and monarchical authority, thus reaching back to Baroque sovereignty. Positive law, as Bloch notes, was the preferred means of absolute monarchy.[110] In reacting to the ideals of the French Revolution, Romanticism inherited this instrumentalization of positive law from the absolute monarchy and developed its own version of historicist positivism in jurisprudence. The *a priori* principle of rational natural right, which correlated with the literary dramas of the revolutionary bourgeoisie, was replaced by the Romantics with historical investigations into Roman law, Germanic laws, and various mythical national laws.[111] Historians of law, such as Friedrich Carl von

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104: Benjamin, *Origin of the German Trauerspiel*, 65–68.
105: G.W.F. Hegel, *The Philosophy of History,* trans., J. Sibree (New York: Dover Publications, 1956), 336–340.
106: Benjamin, *Origin of the German Trauerspiel*, 50.
107: Ibid., 51.
108: See Rose's brilliant exposition of the "Baroque ethic and the Spirit of Fascism" in "Walter Benjamin," 184–197. See also Lutz Koepnick, *Walter Benjamin and the Aesthetics of Power* (Lincoln: University of Nebraska Press, 1999), 35–52.
109: On the aspects of fore- and after-history in Benjamin's doctrine of ideas see Benjamin, *Origin of the German Trauerspiel*, 25–26.
110: Bloch, *Natural Law and Human Dignity*, 82.
111: Ibid., 86.

Savigny, traced historical facts back to their magical, mystified, and organic origins.[112] This had been reflected in the counterrevolutionary theory of Louis de Bonald, a precursor to Schmitt, where traditionalism relied on the discovery of history in opposition to the 'ahistorical' French Revolution.[113] However, because the Romantic investigations lost any orientation toward rational right, all law became mythic in the sense that Benjamin understood it—historical and positive.

Benjamin's analysis grasps Romantic historicism as was part of the counter-revolutionary, irrationalist, and traditionalist tendency inaugurated in the Baroque period. The mystical notion of *âme nationale*, or 'national soul,' in Joseph de Maistre's 'constitutional' thought represents this tradition and serves as a key reference point for Schmitt in *Political Theology*.[114] Unlike the revolutionary bourgeoisie's vision of the state and society oriented around rational principles of the economy and human needs, Marcuse explains, de Maistre justifies the existing positive system of domination with reference to the irrational "divine and natural" order.[115] This 'constitutional' theory paradoxically denies the people, *qua* citizens, any constitutional power in the manner of Rousseau; rather, people are supposed to discover their place within irrational nature. It is this nature that Benjamin characterized in the Baroque idea of nature as fallen, mute, and mournful features that reappear in de Maistre's thought. The nature that man discovers is fallen from God, and there is no access to the divine apart from the person of the creaturely sovereign. This nature is mute insofar as it retains the Romantic mystical connotation: it cannot be discovered through its transformation by human *praxis* and human language. Finally, the melancholic nature of the Baroque is echoed in de Maistre's "sad nature."[116] The anthropological teaching of the Baroque royal courtier—dramatized in the *trauerspiel* genre as the intriguer, the organizer of courtly plots—informs the sovereign's manipulation of human emotion.[117] These teachings are animalistic and creaturely, reflections of 'sad nature' that feign a realist 'political science.' Later, this portrayal is presented by Schmitt—the intriguer. Bereft of meaning grounded in reason, nature becomes known through an anthropology of wickedness and destruction.

The counter-revolutionary personalistic authority can be seen as a 19th-

112: Ibid., 87–89.
113: Schmitt, *Political Theology*, 53–66; Herbert Marcuse, "A Study on Authority," in *Studies in Critical Philosophy*, trans., Joris de Bres, 49–155 (Boston: Beacon Press, 1972), 119.
114: Schmitt, *Political Theology*, 53–66.
115: Marcuse, "A Study on Authority," 112.
116: See Marcuse's discussion of de Maistre in ibid., 114.
117: Benjamin, *Origin of the German Trauerspiel*, 85–86.

century iteration of the Baroque sovereign. Benjamin's analysis of Baroque theatre in *Trauerspiel*, as Lutz Koepnick notes, "come[s] to terms with political strategies of legitimation that hinge upon the charisma and stage management of monarchical authority."[118] The naturalistic justification of authority is thus united with the personalistic, charismatic one. Instead of a bourgeois legal framework distinguishing between office and person, the Counter-Reformation revival of personalistic authority reinstates charismatic power.[119] The infallible Baroque sovereign reemerges in the juridical theory of de Maistre to justify absolute government in response to the political liberalism of the 19th-century. This charismatic authority emanated from what Benjamin described as the metaphoric sun in the *trauerspiel* and its allegorical meaning of world domination.[120] Like these sovereign princely suns, each of which is 'light-shy' of others and has to keep distance from other sovereigns, charisma, as Marcuse observes, "radiated out from the person of the ruler to the whole political and social order which culminates in him."[121] Because the counter-revolution reacted against the Enlightenment's natural right and its constitutive principles of freedom, equality, and solidarity, it also had to address the problem of mass politics. Thus, its anti-rationalism was wielded as an instrument in class politics.[122] The 'naturalistic' national soul became the means through which the masses are mobilized through "faith and patriotism" around the irrational domination of the charismatic sovereign, which is impervious to the criticism permitted by early bourgeois theories of the state.[123] This, for example, crystallized in the political phenomenon of Bonapartism analyzed by Marx.[124]

If French counter-revolutionary thought found real expression in the restoration, German counter-revolutionary thought lacked such direct manifestation. However, the tendencies of de Maistre and de Bonald were echoed in German thought through Friedrich Julius Stahl's theoretical state-absolutism, another inspiration for Schmitt's *Political Theology*. Stahl's subordination of the Church to the supreme sovereignty of the state exemplifies the Byzantinism of Baroque politics, which united ecclesiastical and temporal authority under the secularized sovereign.[125] This counter-revolutionary approach resorts to the

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118: Koepnick, *Walter Benjamin and the Aesthetics of Power*, 36.
119: Marcuse, "A Study on Authority," 113.
120: Benjamin, *Origin of the German Trauerspiel*, 52.
121: Marcuse, "A Study on Authority," 113.
122: Ibid., 115.
123: de Maistre in ibid., 116.
124: Karl Marx, "The Eighteenth Brumaire of Louis Bonaparte," in *The Marx-Engels Reader, 2nd Ed.*, ed., Robert C. Tucker, 594–617 (New York: W.W. Norton & Co., 1978).
125: Marcuse, "A Study on Authority," 123.

primacy of positive law proclaimed by Stahl: "Through such constancy of the law, the original simplicity of the people's consciousness is preserved, so that what is existing law is taken as just, and what is just as existing. Its effect is that law in itself is not known in any form other than the form of the law of the fatherland. […] Hence the existing law is regarded as, by and large, what is necessary, and cannot be otherwise."[126] Through Stahl's theory, positive law is elevated as the only valid law, and rational natural law is entirely eclipsed, a tendency central to Fascism, exemplified by the Fascist jurist Julius Binder's assertion that "for the individual the claim to justice can only mean that he finds himself in accord with positive law."[127] According to this Fascist position, there can be no justice in the authoritarian state. The spirit of absolute monarchy, as it becomes clear now, is incarnated in Schmitt's total state.[128]

3. Materialist Dialectical *Natural History*: A Critique of Fascism and Natural Right

The legal skepticism of "Critique of Violence" finds its completion in the *natural* history approach of *Trauerspiel*. If, in the earlier essay, the *natural* history of natural right unveiled the violence of means behind revolutionary just ends, the *natural* history of Baroque sovereignty in the later work paints a petrifying allegory of nature reduced to the transitory means of positive law. Unlike the Prussian constitutional monarchy described in Hegel's *Philosophy of Right*, the contingency at the heart of the Baroque does not even claim an impartial view of social classes.[129] Instead, Baroque absolute monarchy elevates absolute contingency and caprice to the ultimate political principle. The counter-revolutionary tradition, stemming from the metaphysics of Baroque sovereignty, thus reduces rational natural right to "the life of creaturely things, and nothing of the voice of revelation reaches it."[130] Benjamin's *natural* history not only offers a hermeneutic perspective on the counter-revolutionary political tendencies that sought to restore the essence of absolute monarchy in the 19th-century, but it also provides powerful insight into the persistence of this lineage in the 20th-century Fascism. However, because *natural* history as a method presupposes the allegory of fallen nature, this hermeneutic of total political power in modernity comes at a cost: it mars

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126: Friedrich Julius Stahl in ibid., 124.
127: Ibid., 124; Julius Binder in Bloch, *Natural Law and Human Dignity*, 43.
128: Richard Wolin, "Carl Schmitt, Political Existentialism, and the Total State," *Theory and Society* 26, no. 3 (1990): 389–416.
129: G.W.F. Hegel, *Outlines of the Philosophy of Right*, ed., Stephen Houlgate, trans., T.M. Knox (Oxford: Oxford University Press, 2008), 273–275 (§281).
130: Benjamin, *Origin of the German Trauerspiel*, 157.

Benjamin's final confrontation with Fascism in "Theses on the Philosophy of History," where positive law will be pitted against utopian Divine redemption. As I will show in this concluding section, the promise of Benjamin's historical materialism necessitates natural *history*; only the double-procedure of *natural history* can sustain a materialist dialectical critique of law.

In reacting against rational natural right and the French Revolution, counter-revolutionary thought found inspiration in the Baroque's irrational historicity. To be sure, this reaction was prepared by the legal formalism into which late bourgeois constitutionalism had degenerated. By foregoing natural right's promise of substantial equality and the abolition of private property, bourgeois constitutionalism's formal juridical equality embraced unbridled competition, culminating in total war. The formal constitutional state, as Bloch observed, "can turn into fascism at any point" by destroying the concepts of natural right inherited from 1789.[131] This degeneration of bourgeois law shares its positivist cynicism with counter-revolutionary thought. Schmitt's 'decisionist' theory of sovereignty is part of this eclipse of natural right. This is why Benjamin traces the origin of Schmitt's theory in Baroque naturalism and the creaturely realm of positive law that it sustains. If Schmitt argued that the notion of exception was reflected in the 17th-century doctrine of natural right, Benjamin's *natural* history demonstrates that there is no rational natural right in 17th-century Baroque absolutism.[132] As such, the exceptional decision lacks content and is merely formal. This formalism results in the Baroque sovereign's inherent indecisiveness at the moment of sovereign decision-making. This condition of indecisiveness does not lead to the constitution of a juridical order but to catastrophe.[133] As Koepnick notes, "Baroque secularization thus simultaneously generates and undermines the possibility of decisionistic enactments of sovereign power."[134] With this *natural* history of Baroque sovereignty, Benjamin effectively shows that Schmitt's decisionism belongs to the irrationality of the Baroque.

What Benjamin is arguably repudiating here is Schmitt's imposter notion of 'natural law.' Schmitt's theory of sovereignty in *Political Theology* was developed based on his earliest theory of dictatorship and the distinction between its commissarial and sovereign forms.[135] In *Dictatorship*, these two modes of

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131: Bloch, *Natural Law and Human Dignity*, 137, 149.
132: Benjamin, *Origin of the German Trauerspiel*, 50.
133: Ibid., 55–57.
134: Koepnick, *Walter Benjamin and the Aesthetics of Power*, 46. Similarly, Samuel Weber shows how Benjamin puts the notion of sovereignty into question, Samuel Weber, "Taking Exception to Decision," 9–15.
135: Carl Schmitt, *Dictatorship*, trans., Michael Hoelzl and Graham Ward (Cambridge: Polity Press, 2014), 5.

dictatorship relate respectively to the scientific natural law and the 'natural law of justice.' Schmitt rejects the first and embraces the second, the 'natural law of justice,' which does not expound content but enacts a pure decision.[136] This exceptional decision, which Schmitt then locates in the theory of Jean Bodin, releases the sovereign from any responsibility to the people (who are the source of sovereignty in the natural right tradition).[137] As such, the decisionistic 'natural law' abolishes any principles or content of rational natural right. What remains is the lack of principle characteristic of the Baroque courtier—the intriguer—whose treacherous machinations unfold within the malign realm of fate.[138] This so-called 'natural law of justice' was arguably reflected in the infamous Article 48 of the German Constitution, which granted the president emergency powers. By Schmitt's own admission, this dictatorial presidential power corresponds to the monarchical sovereignty of the French Restoration in 1815.[139] The emergency power of the Fascist state thus reflects romantic, organicist, and historicist theories of the state prevalent in counter-revolutionary thought and monarchical restoration—all originating in the Baroque allegory of nature. Schmitt's 'natural law' of sovereignty is, as Bloch argues, an anti-natural imposture: it mimics the arbitrariness of late bourgeois formal constitutional theory and reclaims it for Fascism.[140]

This anti-natural law is unable to found anything and merely reproduces the fallen, mythical positive law. This is, in fact, congruent with what Schmitt himself says in *Political Theology* about the sovereign suspension of the legal order. The sovereign decision is said to account for the exceptional instance within the public context of the state.[141] Once the normative legal order is suspended, as Schmitt emphasizes, what ensues is not anarchy but the state order—*the order of the positive state*.[142] The state, as Samuel Weber observes, "has the first and the last word in Schmitt's theory of sovereignty."[143] In the final analysis, as recently corroborated by Julia Ng, Benjamin's intervention in the legal debates involving Schmitt is meant to out Schmitt as a legal positivist.[144] The entirety of Schmitt's sophisticated calibrations are exposed as the defense of the positive state,

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136: Schmitt, *Dictatorship*, 16.
137: Schmitt, *Political Theology*, 9.
138: Benjamin, *Origin of the German Trauerspiel*, 161.
139: Schmitt, *Political Theology*, 11.
140: Bloch, *Natural Law and Human Dignity*, 150.
141: Schmitt, *Political Theology*, 6.
142: Ibid., 5–13.
143: Weber, "Taking Exception to Decision," 10.
144: Ng, "Afterword," 135.

Nietzsche's "coldest of all cold monsters."[145] This explains Schmitt's reliance on Bodin's conceptualization of sovereignty, as Bodin, according to Bloch, was "the first to disdain natural law from a perspective of positive law."[146] The Fascist police state becomes the manifestation of the violence crowned by fate, the law-positing and law-preserving fictions of legal positivism, where the law-positing function is an impostor of natural law. The pernicious unity of executive and legislative power in the Baroque monarch degenerates into the greatest violence of the Fascist police state: its executive and administrative powers constitute a permanent state of emergency.[147]

In his late "Theses on the Philosophy of History," Benjamin confronts the Fascist state of emergency. According to this 1940 essay, the state of emergency had become not the exception but the rule. Here, as in *Trauerspiel*, the notion of exception is revealed to be not a miracle but a sham: the state of emergency is not exceptional but the rule of the positivist total police state. What underlies this rule is historicism, which he associates with the 19th-century conservative historian Fustel de Coulanges.[148] Benjamin's implicit critique of the historical school of law reemerges here as he emphasizes that the "sadness" of historicism stems from its empathy with the victors of history.[149] For, to approach law from the perspective of historical *fait accompli* is merely to justify the force of coercive mythical law. Benjamin further emphasizes how Fascism, the enemy that "has not ceased to be victorious," is reinforced by the progressivist ideologies of Social Democratic reformism.[150] What unites this 'progressivism' and Fascism are technocratic features grounded in the positivistic conception of nature.[151] The *natural* history of the Baroque accounts for the formalism of late bourgeois constitutional law, here represented by the reformism of Social Democracy, and the Fascist state of emergency that abuses this formalism. However, the confrontation that Benjamin offers in response to Fascism returns us to the problems of Divine violence. Just as Divine violence was opposed to positive mythical law in "Critique of Violence," in the "Theses on the Philosophy of History," Benjamin pits the homogeneous time of the Fascist "state of emergency" against a "real state of emergency" inaugurated by the "time of the now" (*Jetztzeit*),

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145: Friedrich Nietzsche, *Thus Spoke Zarathustra: A Book for All and None*, trans., Walter Kaufmann (New York: Penguin Books, 1978), 48.
146: Bloch, *Natural Law and Human Dignity*, 272.
147: Benjamin, "Critique of Violence," 287.
148: Walter Benjamin, "Theses on the Philosophy of History," in *Critical Theory and Society: A Reader*, ed., Stephen Eric Bronner and Douglas Kellner, trans., Harry Zohn, 255–263 (New York: Routledge, 1989), 257.
149: Benjamin, "Theses on the Philosophy of History," 257.
150: Ibid.
151: Ibid., 259.

intended to allow the revolutionary multitude to shatter the clocks of homogeneous, fateful time.[152]

The real state of emergency has often been celebrated for its antinomian character. According to Agamben's influential legal-nihilist interpretation, Benjamin's "affirmation of a wholly anomic human action" and the concomitant desire to conceptualize a violence beyond and outside the law culminate in the notion of the real state of exception that deposes Schmitt's Fascist state of exception.[153] Agamben is correct to observe that the undecidability of the Baroque sovereign analyzed in the *Trauerspiel* is re-actualized by Benjamin in the conditions of the Nazi Reich, which constitutionally enshrined the undecidability between exception and rule, leading to catastrophic violence.[154] However, Agamben's conceptualization of the real state of exception is based on his anarchic interpretation of Divine violence and the realm of "bare life." Divine violence is interpreted as a force of redemption of "bare life," taken to signify "mere life" from "Critique of Violence," which Agamben claims Schmitt captures within "the dialectic between constituent power and constituted power"—an overarching tendency in "Western metaphysics" to exclude the anodyne realm of "bare life."[155] However, this interpretation fails to account for the fact that there is no rational notion of "constituent power" or natural right in Schmitt, but instead the impostor— anti-natural law. It also entirely misses the significance of the Baroque martyr, the Janus-face of the Baroque sovereign, for interpreting mere life and Benjamin's broader conservative-revolutionary hermeneutic. Bare life is similarly lauded in Duy Lap Nguyen's recent and otherwise monumental interpretation of Benjamin's *œuvre*, where the Baroque transience is embraced as desirable "profane" politics in the creaturely realm.[156] However, when one sees mere life as a correlate of the Baroque martyr, it becomes clear that this creaturely figure only serves to stabilize the tyrant in the overall creaturely drama of Baroque sovereignty.

The proximity of the Baroque tyrant and martyr suggests that the notion of Divine "sovereign violence" is entangled in the creaturely realm of Baroque sovereignty.[157] Notwithstanding the liberties Derrida took in interpreting

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152: Ibid., 260–262.
153: Agamben, *State of Exception*, 53.
154: Ibid., 58–59.
155: Ibid., 54; Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans., Daniel Heller-Roazen (Stanford: Stanford University Press, 1998).
156: Nguyen, *Walter Benjamin and the Critique of Political Economy*, 92, 102–104.
157: Benjamin, "Critique of Violence," 300.

Benjamin, he justifiably warns that the law-destroying logic behind Divine violence resembles the Holocaust and thus approximates Nazi violence.[158] Indeed, it seems difficult to disentangle the concept of pure means, which is the basis of the Divine, from its catastrophic consequences that become apparent once the pure means are understood through the positivist logic of Baroque sovereignty.[159] Benjamin's intention is, of course, emphatically anti-Fascist, even if the *means* he employs are questionable. I submit that this paradoxical proximity between the Divine and the Baroque should be attributed to his *natural* history method. The paradox of Benjamin's approach, as Rose observed, is "that Benjamin analyzes, or breaks down, but he also fixes what he discerns."[160] Thus, the Baroque allegory nature in *Trauerspiel* becomes naturalized as the domination of the fixed mythical fate, the utopian Divine escape from which is so much fixated on the catastrophe that the Divine itself becomes pure means.[161] This fixation on the Baroque catastrophe is perfectly exemplified in the petrified stance of Klee's painting *Angelus Novus*, evoked in "Theses on the Philosophy of History." The angel of history cannot avert his gaze from the pile of debris that "we call progress"—a catastrophe with metaphysical origins in the homogeneous and mechanistic concept of Baroque nature.[162]

This fixation renders the Divine impotent against the Baroque. The Divine that is supposed to redeem history, vanquish the Antichrist, and bring about the original state of perfection, appears as a utopian 'dialectical image.' Because of its utopianism, history can only be interrupted in selective breakouts, which, Habermas notes, leads to Benjamin's pessimism.[163] This dialectical image, as Rose further shows, is not properly dialectical—or "dialectics at a standstill"—because there is no mediation through the recollection of universal history; instead, everything is staked on the lightning flash of eschatological repetition.[164] The absence of any visible and realizable expiatory divine law was already clear in "Critique of Violence," where natural right was given a *natural* history only in negative terms from the perspective of positive violent means. The attempt to salvage fallen history in the final chapter of *Trauerspiel*, in the scene of resurrection, is thus undertaken on the Baroque stage itself. And in "Theses on

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158: Derrida, "Force of Law," 32–35, 58–62.
159: Emanuele Castrucci, "Law as Myth—On the Young Walter Benjamin," in *Law and Philosophical Theory: Critical Intersections*, ed., Thanos Zartaloudis, 183–197 (London: Rowman & Littlefield Inc., 2018), 186.
160: Rose, "Walter Benjamin," 190.
161: Habermas, "Consciousness-Raising or Redemptive Criticism," 39.
162: Walter Benjamin, "Theses on the Philosophy of History," 258.
163: Habermas, "Consciousness-Raising or Redemptive Criticism," 40.
164: Rose, "Walter Benjamin", 178, 207, 209. See Löwy's argument to the contrary, although he does seem to have a similar concern as Rose, in "Religion, Utopia, and Counter-Modernity," 102.

the Philosophy of History," the real state of exception in the "time of the now" (*Jetztzeit*), which is supposed to be redemptive, cannot enact redemption because Benjamin rejects all human law, representation, political judgment, and legitimation. Without a visible Divine law, there is no way to distinguish Divine violence from the Fascist state of emergency; Fascism is allowed to usurp the Divine to abolish the world's boundaries and emerge as an aestheticization of war.[165] The nihilistic Divine cannot work and, as Rose argues, either leaves everything intact or inaugurates catastrophic violence.[166] In the final analysis, this fixation on fallen law prevents Benjamin from "unraveling the antinomies of realization," which would imply a critique of natural right, before formulating his programme of Divine redemption.[167]

Subsequent Frankfurt School thinkers were more successful in offering a natural *history* critique. Adorno's "The Idea of Natural History" identifies the one-sidedness of Benjamin's *natural* history and complements it with a perspective that is arguably more dialectical in relation to natural right. *Natural history*, according to Adorno, must be investigated from a double perspective.[168] On the one hand, Benjamin's *natural* history of the Baroque *trauerspiel* shows the portrayal of nature as transitory and historical, allowing a critical perspective on historical transitoriness *as* natural. On the other, this approach is supplemented by Adorno with Lukács' early critique of second nature: a natural *history* perspective that critiques things appearing *as* natural but in fact historical.[169] The difference in literary genres here becomes crucial. If Benjamin's *natural* history is articulated from the perspective of the Baroque mourning play, which reflects the historical situation of absolute monarchy, Lukács' natural *history* critique pertains to the novel-form, a reflection of the ideas of the modern bourgeoisie. The naturalized bourgeois concept of natural right is then criticized by Lukács as "legal-rational domination" and tied to the naturalization/reification of commodity exchange.[170] Undertaken by Marcuse in "The Affirmative Character of Culture," this ideology critique seeks to discern how bourgeois classical ideas of freedom, happiness, and solidarity are at odds with the contradictory experience of their realization

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165: Rose, "Walter Benjamin," 189.

166: Ibid., 207.

167: Ibid.

168: Adorno, "The Idea of Natural History," 118–124.

169: Ibid., 118.

170: Although in this work, Lukács emphasizes the rise of class consciousness out of these contradictions and not an alternative notion of natural right, his overall critique detects the antinomies of realization. See György Lukács, *History and Class Consciousness: Studies in Marxist Dialectics*, trans., Rodney Livingstone (Cambridge: MIT Press, 1972), 83–222; Gillian Rose, "From Speculative to Dialectical Thinking—Hegel and Adorno," in *Judaism and Modernity: Philosophical Essays*, 53–63 (London: Verso, 1993), 57.

through capitalism's competitive and coercive forces.[171] Natural *history* of natural right thus allows an affirmative critique of late bourgeois formalism in light of the revolutionary tricolor justice of natural right, best developed by late Bloch: freedom as the *praxis* of the oppressed classes, substantial equality that would imply the abolition of private property, and the solidarity in revolutionary camaraderie.[172]

The main weakness of Benjamin's *natural* history is its lack of the affirmative and dialectical dimension of natural *history*. As we have seen, once Benjamin's conservative *natural* history is transposed onto his critique of law, it becomes clear that he does not historicize natural right in a way that aligns with a critique of natural right but instead engages with positive law, which he understands as naturalized "fate" and seeks to overcome by introducing the expiatory notion of the Divine. Adorno's double-rearticulation of *natural history*, though schematic, offers such dialectical thinking in the chiasmus between historical beings as nature-like and nature as historical, thereby providing a "materialist dialectical" basis for interpreting concrete historical events.[173] This methodological effort by Adorno, as Susan Buck-Morss demonstrated in detail, allows for an interpretation of Benjamin's work along the intertwined dimensions: the positive and negative aspects of historicized nature as well as the positive and negative aspects of naturalized history.[174] The application of such a two-fold critical operation would, I contend, address some problematic aspects of Benjamin's critique of law. Applying Adorno's *natural history* to the philosophical critique of law in "Critique of Violence" means understanding the relationship between natural right and legal positivism or, in *natural history* terms, between nature as a historically fixed myth and the historical myth of nature as transitory. This would recover the notion of just ends out of the antinomies of their realization without reducing all law to violence and arbitrariness.

The double-articulation of *natural history* offers a unique perspective on legal legitimation and the antinomic "relief of law" in recent Benjamin scholarship. Christoph Menke's interpretation of Benjamin, which emphasizes the relief or deposing of law (*Entsetzung des Rechts*), broadly follows Agamben's interpretation

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171: Ideology critique, analogous to the critique of natural right in political philosophy, aligns with Hegel's perspective in his *Natural Law* essay, highlighting how theories of natural right reflect bourgeois property relations. See Hegel, *Natural Law*, 114.
172: Bloch, *Natural Law and Human Dignity*, 153–208.
173: Adorno, "The Idea of Natural History," 119, 124.
174: Susan Buck-Morss, *Origin of Negative Dialectics* (New York: Simon and Schuster, 1979), 52–57; Susan Buck-Morss, *The Dialectics of Seeing: Walter Benjamin and the Arcades Project* (Cambridge: MIT Press, 1989), 58–204.

of Benjamin's Divine violence as "destituent power" and treats all law as inherently violent.[175] This skeptical interpretation implies that any attempt to render law just or legitimate is doomed to merely re-posit the violence of state sovereignty. However, such an interpretation relies on the uncritical assumption that any concept of sovereignty is of the Schmittian sort. If Benjamin's critique of sovereignty is understood as a critique of Baroque sovereignty, it becomes clear that his critique of violence is historically specific—even if skepticism and historical relativism are not.[176] It is precisely the Baroque view of nature as transitory that makes the violence of legal positing, and the Fascist state of exception, triumphant by eclipsing natural right's *sovereign* promise of tricolor justice. A *natural* history perspective would allow for further investigation into positivist state violence without condemning all legal claims to justice.[177] To this end, the defense of just law has been undertaken by commentators who contest the antinomic "relief of law" interpretation, instead accepting the struggle over law by seeking law that is non-violent (Loick), democratically legitimate (Fischer-Lescano), constituted by constituent power (Lokdam), or understood as "counter-law" (Lichtenstein).[178] These contributions can be further enriched by a natural *history* perspective on natural right, problematizing unquestioned liberal assumptions in both critical and legitimation discourses. This natural *history* perspective would offer a historical materialist critique of formal legitimation in liberal political theory by revealing how formal equality contradicts capitalist social institutions that reinforce substantive unfreedom.

The strength of the *natural history* approach to law becomes particularly salient in the context of Benjamin's discussion of revolutionary labor politics. Although often overlooked, the central focus of "Critique of Violence" is the

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175: Menke, "Law and Violence," 1–17. Also see Agamben's discussion in "What Is a Destituent Power?" *Environment and Planning D: Society and Space* 32, no. 1 (2014): 70–71.

176: See Thrasymachus' thesis on justice as the advantage of the stronger in *The Republic of Plato*, trans., Alan Bloom (New York: Basic Books, 2016), 21 [343c].

177: See Eli B. Lichtenstein's Foucauldian genealogical account of the sovereign state, which makes an important contribution by analyzing sovereignty in its determinate origin in the absolutist state and its contingent emergence out of Medieval and feudal decentralized power relations. This recognition includes aspects of Baroque sovereignty, such as the radical contingency of the Baroque drama of fate. Eli B. Lichtenstein, "Sovereignty, Genealogy, and the Critique of State Violence," *Constellations* 28, no. 1 (2021): 1–15, 9–12.

178: In focusing on Kafka's parable "Before the Law" from *The Trial*, Agamben and Menke interpret the stance of the man from the country as embodying the study of the law. However, this stance can also be viewed as a rejection of the struggle over law. See Menke, "Law and Violence," 14 and Giorgio Agamben, *Profanations*, trans., Jeff Fort (New York: Zone Books, 2007), 76. For the parable, see Franz Kafka, *The Trial*, trans., Mike Mitchell (Oxford: Oxford University Press, 2009), 153–155. See also Daniel Loick, "Law without Violence," in *Law and Violence: Christoph Menke in Dialogue*, 96–111 (Manchester, UK: Manchester University Press, 2018); Andreas Fischer-Lescano, "Postmodern Legal Theory as Critical Theory," trans., Gerrit Jackson, in *Law and Violence: Christoph Menke in Dialogue*, 167–192 (Manchester: Manchester University Press, 2018); Lichtenstein, "Sovereignty, Genealogy, and the Critique of State Violence"; Hjalte Lokdam, "A Living Constituent Power and Law as a Guideline in Walter Benjamin's 'Critique of Violence,'" *Constellations* 26, no. 2 (2019): 208–224.

"objective contradiction of the legal system" encapsulated in the workers' legally guaranteed right to strike: while the mythic state seeks to prevent any pursuit of ends outside the operation of positive law, it concedes the right to strike to avert revolutionary violence that could destroy the legal system altogether.[179] Benjamin's solution was to embrace the law-destroying proletarian general strike, the exemplar of Divine violence, over the political general strike that advances a Social Democratic political programme as a form of legal legitimation. The *natural* history perspective allows for reconsideration of Benjamin's rejection of the programmatic ends-making force of the political general strike as too easily conflating Social Democracy with the Baroque sovereignty of Fascism. Recognizing that Social Democracy has a relation to just end—albeit a formalist one—and that Fascism does not, makes possible to introduce the Divine as a possible source of just ends within Social Democratic politics. For, as Fischer-Lescano observed, it is precisely the combination of the political and proletarian general strikes that allows transcendence beyond legal legitimation without rejecting the possibility of just law.[180] Finally, the natural *history* perspective on Social Democratic politics would question its inherent formalism. An affirmative critique of natural right would take seriously Anatole France's famous phrase, to which Benjamin refers, exemplifying the historical contradiction between the state and civil society: "Poor and rich are equally forbidden to spend the night under the bridges."[181] The contradiction of formal equality and substantial inequality within the critique of natural right, approached along the lines of historical materialism, could lead to the real possibility of substantial equality and the transformation of objective conditions within capitalist institutions to achieve the substantial equality of socialism. This is not to forsake Benjamin's radicalism for the programme of Social Democracy but rather to introduce just ends into the Divine force that emerges at moments of danger—the ever-recurring danger of the Fascist state of emergency in our century.

179: Benjamin, "Critique of Violence," 281–282. See Agamben's explicit intention to overcome the 'left' tradition's treatment of the human in terms of labor in "What Is a Destituent Power?" 69.
180: Fischer-Lescano, "Postmodern Legal Theory as Critical Theory," 184–185.
181: Anatole France in Benjamin, "Critique of Violence," 296.