

Justification Between Positivism and Decision

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PROLOGUE

What in me is dark
Illumine, what is low raise and support;
That to the hight of this great Argument
I may assert Eternal Providence,
And justify the ways of God to men.¹

Thus ends the first stanza of Milton's epic, *Paradise Lost*. In the aftermath of revolutionary struggle, after the beheading of a monarch, the restoration of the monarchy and his own incarceration, and finally, his blindness, Milton sets out to justify the ways of God to men. Here, on the brink of modernity, Milton will attempt to achieve an improbable task: to justify that which is beyond justification. Indeed, to justify, precisely where the call to justification may itself be blasphemous: for were it possible to justify the ways of God, at least in terms understandable to humankind, there would be no need of faith. Luther put the point starkly:

This is the acme of faith, to believe that God, who saves so few and condemns so many, is merciful; that he is just who, at his own pleasure, has made us necessarily doomed to damnation, so that he seems to delight in the torture of the wretched and is more deserving

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¹ John Milton, *Paradise Lost* (I:22-26), in *Complete Poems and Major Prose* 173, 212 (Merritt Y. Hughes ed., 1957).

of hate than of love. If by any effort of reason I could conceive how God, who shows so much anger and harshness, could be merciful and just, there would be no need of faith.²

The tension that motivates the epic (and Luther's doctrine of faith) points to the limits of reason. One must believe that God is just, even though human reason cannot justify his ways: God's justice is beyond justification.³ And yet, although finding a convincing justification may be impossible,⁴ the work of justification is compelling, calling upon us to attempt what cannot be achieved.

This very tension, the possibility that the *just* may be beyond *justification*, motivates Shai Lavi's *The Use of Force Beyond the Liberal Imagination*.⁵ The possibility is presented first as a paradox, and will eventually hold the key to an understanding of the political use of force, as Lavi states early in the essay:

Within the liberal tradition and perhaps more generally, we assume that an act is just if and only if it can be justified and, conversely, that it is unjust if and only if it cannot be justified. Thus punishment is justified and just, whereas violence is unjustified and unjust. The possibility of a justified yet unjust act or, conversely, of an act that is unjustified but just seems paradoxical. But it is precisely such paradoxes that can illuminate the use of political force.⁶

Mine will be a secondary reflection on the initial grappling with the paradox Lavi presents. I will be asking whether Lavi's analysis does indeed illuminate the use of political force, and whether his analysis of the paradox of justification might not benefit from the addition of terms from traditional jurisprudence. I will proceed as follows: in Part I of this comment, I note the rhetorical mode Lavi relies upon to develop his argument, and then briefly restate his claims regarding the relationship between politics, violence, and the structures of justification. Part II compares Lavi's extrapolation from the structure of justification to the theoretical framework that inspires his line of questioning, a framework developed by

2 Martin Luther, *The Bondage of the Will* 101 (J.I. Packer & O.R. Johnston trans., Revell 1957) (1525).

3 The Book of Job, the biblical classic on this theme, resonates in Milton's poetry.

4 And morally dangerous: after all, human reason, being fallible, might lead us to abandon faith and even to disobedience. This, we may recall, is the story of the fall of Eve as recounted by Milton in *Paradise Lost*.

5 Shai Lavi, *The Use of Force Beyond the Liberal Imagination: Terror and Empire in Palestine, 1947*, 7 *Theoretical Inquiries L.* 199 (2006).

6 *Id.* at 204.

Walter Benjamin in his *Critique of Violence*.⁷ The goal of Part II is to highlight Lavi's extensions of Benjamin's initial framework, and question the ends he achieved by departing from Benjamin's formulation of a critique of violence. Part III adds an additional theoretical framework, pitting Carl Schmitt's theory of sovereignty against Hans Kelsen's legal positivism. The comparison with positivism underscores both the strengths and the limitations of Lavi's project.

I. STORYTELLING, THE ETHICAL PARTITION OF VIOLENCE, AND THE LIBERAL IMAGINATION

Lavi's stated purpose is to deepen our understanding of the role of violence in politics, and more specifically, to inquire whether it is "possible to conceive of a use of force that deviates from the liberal conception."⁸ Thus, the theoretical target of Lavi's inquiry is the liberal account of the exclusion of violence from politics. But before dealing with the contents of the theoretical claims, the storytelling form that Lavi chooses for his inquiry is worthy of attention.⁹ In recounting a relatively well-known narrative of the brief period before Israeli independence, or (depending on your perspective) the brief period before the fall of the British Empire, Lavi unfolds a concrete set of historical circumstances against which he will overlay a philosophical foreground. Lavi does not set out to fool anyone. Clearly, the stakes have nothing to do with judging the character of the resistance to British occupation by the *Irgun*, and (despite the centrality of the category of terror) precious little to do with the practical, normative debate over the appropriate evaluations of or responses to present day terrorism. Instead, the stakes are more abstract, yet more fateful: they entail a philosophical questioning of the nature of violence and of the connection between violence and legality. At the same time, the historical narrative is far from incidental and certainly not accidental. The history, and the rhetoric of its retelling, are not simply an

7 Walter Benjamin, *Critique of Violence*, in *Reflections* 277 (Edmund Jephcott trans., Peter Demetz ed., 1978).

8 Lavi, *supra* note 5, at 202.

9 Benjamin divides storytelling into two types: stories of far-away places told by travelers, and local tales told by people rooted in their homes. Walter Benjamin, *The Storyteller: Reflections on the Works of Nikolai Leskov*, in *Illuminations* 83, 84-85 (Harry Zohn trans., Hannah Arendt ed., 1968). Lavi's book on death is of the first type; the present discussion of independence era violence is of the second. See Shai J. Lavi, *The Modern Art of Dying: The History of Euthanasia in the United States* (2005).

example used to concretize an analytical inquiry. Rather, the telling of an historical tale serves to emphasize that the analytical categories that will eventually come into play do not have independent existence, but are instead thoroughly discursive categories. Perhaps the primary mode of operation of the categories is as interpretive devices: they instruct our understanding and evaluation of historical events. In other words, in order to see the categories at work we must have access to their historical application. Therefore, the rhetorical strategies at work in Lavi's piece will be a recurrent theme in my own investigation.

Lavi's opening salvo is analytical. He begins by presenting what he will call the liberal conception of force, one dominated by a binary, ethical distinction. Force on the liberal horizon is either carried out by the state according to legal means and limitations (including the requirement of proportionality) and thus legitimate; or it is appropriated by private parties, violent, and illegitimate. Politics is associated with the legitimate use of force, whereas bare violence is either simply crime, or worse, a threat to politics. But the liberal paradigm falls short precisely because it is based on an analytical framework that is too simple: the ethical opposition between legitimate force and illegitimate violence does not "cover[] the entire array of the use of force," thus requiring an attempt to view force "beyond the liberal conception."¹⁰

In order to combat the oversimplification of the field, Lavi, following Benjamin, introduces an additional variable, which is the relationship of the use of violence to the ends-means calculus. The liberal paradigm assumes that all force is to be evaluated as a means to an end, and thus that force is either legitimate (when the proper relationship of means to ends holds), or illegitimate (when the proper relationship does not hold).¹¹ Introducing the possibility of viewing force not only as a means to an end but also as "pure means" allows Lavi to break apart the ethical distinction into two bifurcated

¹⁰ Lavi, *supra* note 5, at 200.

¹¹ Lavi writes:

Benjamin's important insight is that within the liberal tradition, force is understood as a means to an end. Force is deemed legal when the end justifies the means, that is, when the means are proportional to a just end that they serve; force is illegitimate, or violent, when the end is unjust or the means are disproportionate to the given just end.

Lavi, *supra* note 5, at 204. This telegraphic reference to Benjamin's categorization is apt to leave the reader unfamiliar with Benjamin's essay puzzled. I elaborate Benjamin's framework in more detail, *infra* Part II. At this stage, it is enough to rely on the abstract restatement presented in the text above.

parts, forming a two-by-two grid: force may be just or unjust and, at the same time, force may be justifiable or unjustifiable. Each box in the grid is then filled by a label that Lavi attributes to the particular kind of force that combines the relevant attributes: *legality* is just and justifiable; *violence* is unjust and unjustifiable (this much is predictable, and subject to reservations that will become clear later, unobjectionable); *terror* is unjust but justifiable and, most intriguingly, *empire* is just but unjustifiable. Lavi does not specify the criteria for these categorizations. We can, at this stage, only speculate about whether "just" means just from within the internal perspective of a particular legal order, or whether "just" appeals to a transcendental concept, a regulative ideal, or to a philosophically grounded concept tied to a legal system, even if non-positively. Even the question of the perspective from which the act is perceived as just (the actor's, or an external observer's) is not treated at this point. Similarly, we cannot be sure if "justifiable" means rationalizable, explainable, understandable, compatible with good or moral reasons, or if some more exacting standard of justification is in place. For now, however, I want to bracket the ambiguity generated by these appellations. I will come back to this ambiguity later.

Before going on, however, two minor critical points should be addressed, one terminological and the other more substantive. The terminological point concerns the choice of the term that fills the unjust/justifiable rubric in the model, *terror*. Terror is particularly inapt as a label, because in normal parlance it is difficult to generate justification for terror, and the idea that Lavi advances regarding terror's limited means does little to clarify. However, because he is actually referring to *Irgun* actions responding to British imperial force, Lavi is not referring to *terror* in what most readers recognize as its current form, which is the killing of arbitrary victims.¹² Instead, Lavi is actually referring to something closer to *revenge*, regarding which it is easier to make the case for "unjust yet justifiable." This is particularly so when one takes into account the idea that typical cases of revenge involve an action that is potentially justified on its own terms but carried out by the wrong actor, or an action disproportionate to the initial harm inflicted, and yet understandable because initiated in response to an actual harm.

The second critical point is that Lavi's characterization of *terror* as a "pure means" does not accord well with his own description of the *Irgun*'s acts,

12 My assumption here is that "terror" in normal parlance refers to attacks on random civilians not necessarily connected to the conflict in which the terrorist has a stake. The World Trade Center attack and Lockerbee are obvious examples. Attacks on soldiers of an occupying army would not be considered terror under this definition.

since the *Irgun* perceived its *aventuras* as geared toward the end of driving the British out of Palestine. Terror, then, is not a pure means, but rather a somewhat indirect means. It does not imagine itself as winning a straightforward military battle, but rather as having a symbolic political impact. The goal, however, is clear, as evinced in the quotation from Begin: "[O]ur observation persuaded us, that if we could succeed in destroying the government's prestige in *Eretz Yisrael*, the removal of its rule would follow automatically."¹³ The fact that the means are indirect does not turn them into pure means, and in fact, does not distinguish terror as a means from punishment as a means. Thus, the primary logic of terror (in Lavi's example) is instrumental.¹⁴

Returning to Lavi's central argument, the categories established in the grid of justice and justifiability are imagined as generally applicable. Under normal circumstances, our interpretive procedures are adequate to the task of classifying events within the categories and, in turn, the categories themselves supply the basis for what Lavi fleetingly refers to as the legitimation of force.¹⁵ But Lavi's main argument is that the categories are

13 Quoted in Lavi, *supra* note 5, at 209.

14 Lavi does point to an aspect of terror that might be considered pure means, however, and that is the idea, also expressed by Begin, that military action is a constitutive process whereby Jews would transform themselves from a "herd of slaves" into a group of self-respecting fighters. This sort of existential militarism, encapsulated in the slogan "We fight, therefore we are" (Lavi, *supra* note 5, at 209), makes the act of fighting its own end. It is doubtful whether Lavi would want to limit his framework to cases where this existential brand of militarism existed. This existential militarism would also need to distinguish itself from *terror*, because it could only be applied to *military* conditions — in other words, it would have to limit itself to military targets and to the conception of "battle" that such targets entail. The first and the second objections to Lavi's characterization of *terror*, then, actually combine.

15 Lavi's overt reference is oblique:

To understand the limits of the liberal conception of force, one must first distinguish what is sound in the liberal view from what is questionable. The core truth that will remain undisputed in what follows is the clear distinction that liberalism draws between political power and violence. If a political regime does not wish to ground its domination solely on the use of violence, it must found its political power on some claim to justice. Only political order, but not political power, can be grounded in the use of bare force, as indeed is the case in totalitarian regimes. Furthermore, and as a consequence of the above, there is also truth to the liberal claim that legality, as a form of political power, and violence are mutually exclusive.

Lavi, *supra* note 5, at 202 (citations omitted). The context of the discussion and the terminology of justice, however, make the question of legitimacy unavoidable. I will return to this issue in *infra* Part III.

not stable. In times of political contestation,¹⁶ the lines between the categories blur, and we are led into a zone (or multiple zones) of indistinction. And here is where Lavi's masterful storytelling becomes so important: in the particular instance of political contestation at hand, *terror*¹⁷ plays a double role. On the one hand, terror is just plain terror, akin possibly to revenge, a member of its category, an instantiation of unjust but justifiable force. But on the other hand, terror has a ghostly double. In its second role, terror works discursively, as a parody, a type of mimicry with the power to shift genres, to break down barriers, to dissimulate. Terror enjoys not only the wherewithal to disguise itself, but also the power to transform the actions that would normally occupy other categories. In this second role, applicable primarily in times of political contestation, terror dresses itself up as punishment (the "trial" and hanging of the sergeants), and portrays punishment (the execution of the *Irgun* members by the British that preceded the hanging of the sergeants) as arbitrary, unjust, and unjustifiable violence. The power to transform through parody is not simply political criticism but, rather, "part of the structure of vengeful terror."¹⁸

Political contestation suspends categorization over an abyss. Although Lavi does consider the idea that differences between uses of force are indeed categorical, his essay constantly points to the specific instances where the categories collapse, where the affinity between them blurs their boundaries, where disguises subvert the ability to distinguish one use of force from another. The blurring of boundaries is not accidental, but precisely a structural feature of the use of force, and particularly of the parodic

16 And perhaps at other times as well. See *infra* text accompanying notes 40-41.

17 From here on in, I will use Lavi's labels without reference to my reservations about them.

18 Lavi, *supra* note 5, at 226. Here is the full quotation (citations omitted):

These charges should be understood first and foremost as a conscious parody of the criminal trials that the British conducted against *Irgun* members, and parody here, as elsewhere, works through mimicry. The legalistic language that the British military courts used against the *Irgun* in these trials was imitated and directed against the British occupying forces. The charges of illegality, criminality, and terrorism were reversed. But the parodic repetition of the trial should not be understood merely as political criticism, but, rather, as part of the structure of vengeful terror. The structure of revenge, not unlike parody, is one of mimetic repetition: "An eye for an eye," a trial for a trial, a scaffold for a scaffold. Here, however, the structure of terror should be understood also through its political goals: not only to expose, through parody, the British system as arbitrary and unjust, but also to transform, through terror, the perception of the system of punishment into arbitrary violence.

inhabitation of legality by vengeful terror. Thus, we learn that the essence of political contestation is precisely a battle over the characterization of violence. Legality and terror, violence and empire, are neither pure categories nor pure events; instead, they are the results of an interpretive process in which force is a constant feature. Force is always doubled: it is both the object of interpretation, and one of the tools by which multiple actors attempt to influence interpretation itself.¹⁹

According to Lavi, however, the conflict over categorization initiated by vengeful terror is not necessarily ongoing. Terror initiates a cycle of transformation, attempting to shift the categorizations of force. Yet, while it may generate a cycle of violence, terror eventually "comes up against the limits of its own transformative powers" when faced with empire. Imperial force, which stands beyond the need for justification, brings the cycle of terror to an end.²⁰ In so doing, it closes the circle of interpretation and redeems categorization from the abyss. But this act of redemption relies on violence beyond legality, a use of force that would, in itself, challenge the rule of law, but whose application reinstates it.²¹

II. WALTER BENJAMIN'S *CRITIQUE OF VIOLENCE*

Early in his essay, Lavi frames his inquiry as a response to the challenge posed by Benjamin to question "other kinds of force than all those envisaged by legal theory."²² Benjamin's *Critique* and Lavi's essay bear several strong resemblances. Benjamin opens his essay by noting: "The task of a critique of violence can be summarized as that of expounding its relation to law and justice,"²³ which seems precisely the goal of Lavi's piece as well. Each is

19 Lavi's central example of this process lies in his description of the *Irgun's* uses of force: these were constantly geared toward changing accepted interpretations. Where the common view was that the British acted through legality, *Irgun* force was meant to convince the interpreter that the occupation forces were simply and arbitrarily violent.

20 Lavi, *supra* note 5, at 228.

21 Recall that Lavi's example of imperial force is a sort of police riot: soldiers and policemen, some in uniform but most in civilian dress, attack citizens, shatter shop windows, and apparently also shoot and kill passersby while police officers on duty do nothing to intervene. Lavi, *supra* note 5, at 227. This violence is not legally authorized, and indeed, is even denied. And yet, it serves in Lavi's narrative to end the cycle of terror and reestablish order.

22 Benjamin, *supra* note 7, at 293, quoted in Lavi, *supra* note 5, at 203.

23 Benjamin, *supra* note 7, at 277.

concerned with the relationship between what is just and what is justifiable in violence or force; each proceeds by breaking up the ethical binarity of violence as either legitimate or illegitimate; each develops a four-part categorization of the types of violence and, crucially, each suggests one type of violence that may be just and yet beyond justification. In what follows, I will suggest that Benjamin's types of violence — *lawmaking*, *law-preserving*, *mythical* and *divine* — bear a strong analogy to Lavi's categories. Yet, I hope to show that Benjamin's analysis of types of violence leads us to a different appreciation of the relationships between types of violence and modes of classification. The differences between the analyses should both clarify Lavi's argument and help point to its most intriguing and problematic aspect.

Before turning to an explication of Benjamin's types, one preliminary note is in order: Benjamin begins his essay with a musing over the theoretical possibility of defining just ends and justifiable means. He distinguishes between natural law theory and positivism in their views of ends and means. In Benjamin's account, both theories are limited by their inability to evaluate means and ends independently of one another. Natural law theory looks only to the ends, and learns from them how to evaluate the means, whereas positivism has no theory of evaluation of the ends, thus condoning any ends reached by sanctioned means. He remains critical of the two major schools of jurisprudence regarding the provision of *independent* criteria for justice and justifiability but concludes that, for the purpose of the critique, the jurisprudential perspective of positive law must be the point of departure. The reason for preferring a positivistic theory of law as the backdrop to the inquiry is that positivism distinguishes between types of violence as products of history. Benjamin writes: "[T]he positive theory of law is acceptable as a hypothetical basis at the outset of this study, because it undertakes a fundamental distinction between kinds of violence independently of cases of their application. This distinction is between historically acknowledged, so-called sanctioned violence, and unsanctioned violence."²⁴ Making positivism his background theory allows Benjamin to explain law's claim to a monopoly on violence and to avoid, at the early stages of his essay, a direct confrontation over the nature of just ends, or of the meaning of the term justice.²⁵

At this point we can move onto a brief picture of Benjamin's types of violence. *Lawmaking* violence is the violence that institutes law. The paradigmatic cases are revolutionary, regime-making violence of the type that establishes a new law, a new state. Romulus murders Remus to establish

²⁴ *Id.* at 279.

²⁵ One of the key passages in Benjamin's explanation of the preference for working with a positivistic theory follows:

Rome; the English revolutionaries behead Charles I; the Iranian masses drive out the Shah (the examples, of course, could be multiplied). In some sense, it is the violence of war, certainly the violence of insurrection. When undertaken, it is unjust and unjustifiable from the perspective of the existing order, and indeed, its hope is that it will eventually be justifiable from a new perspective, guaranteed only by its success in vanquishing the existing order. The popular myth regarding Benjamin Franklin's statement,²⁶ just prior to signing the Declaration of Independence, is a good illustration of the point. The American revolutionaries were well aware that their actions were treason from the perspective of the British Crown, and their vindication and justification could only be established by their victory in the Revolutionary War.

Law-preserving violence, by contrast, is the force necessary to maintain an existing order. Suppressing insurrection would be a clear instantiation. Punishment of criminals is its primary, obvious manifestation, but all legal coercion, from the eviction of squatters to the enforcement of contracts, offers examples of law-preserving violence. Thus far, the analogies to Lavi's categories in terms of content ought to be fairly clear,²⁷ though a subtle difference has already emerged. On the one hand, for Lavi, unjust and unjustifiable violence appears to include simple, non-political violence, or

The meaning of the distinction between legitimate and illegitimate violence is not immediately obvious. The misunderstanding in natural law by which a distinction is drawn between violence used for just and unjust ends must emphatically be rejected. Rather, it has already been indicated that positive law demands of all violence a proof of its historical origin, which under certain conditions is declared legal, sanctioned. Since the acknowledgment of legal violence is most tangibly evident in a deliberate submission to its ends, a hypothetical distinction between kinds of violence must be based on the presence or absence of a general historical acknowledgment of its ends. Ends that lack such acknowledgment may be called natural ends, the other legal ends. The differing function of violence, depending on whether it serves natural or legal ends, can be most clearly traced against a background of specific legal conditions.

Id. at 279-80. A full explanation of Benjamin's account of the state's claim to a monopoly on violence would require an essay of its own. I will only note here that the central idea is that the state does not prohibit only those uses of violence that collide with its own legal ends; rather, it also prohibits uses of violence by individuals even when that violence is directed towards ends deemed legitimate by the state (in other words, even ends that the state itself may pursue through state-imposed violence). *See id.* at 280-86.

²⁶ The statement popularly attributed to Franklin is: "We must, indeed, all hang together, or most assuredly we shall all hang separately."

²⁷ *Law-making* violence for Benjamin is akin to *violence* for Lavi; *law-preserving* violence is akin to *legality*.

what the liberal order will understand as crime. For Benjamin, on the other hand, the only violence to be considered is political, at least on some level. *Law-making* violence (unjust and unjustifiable from the perspective of a given legal order) may be crime, but only if it is unsuccessful in its law-making aspirations.

At this point, however, comparing Benjamin and Lavi's frameworks becomes more complicated. The difficulty results from the fact that, for Benjamin, these types do not represent stable categories. Instead, the initial appearance of difference is threatened when we look deeper at the nature of violence. Benjamin outlines this threat to differentiation by looking at an extreme case and at an ordinary case. The extreme case is the supposed punishment (law-preserving) of the death penalty. Of this, he writes (with Hegelian overtones):

If violence, violence crowned by fate, is the origin of law, then it may be readily supposed that where the highest violence, that over life and death, occurs in the legal system, the origins of law jut manifestly and fearsomely into existence ... [the death penalty's] purpose is not to punish the infringement of law but to establish new law. For in the exercise of violence over life and death more than in any other legal act, law reaffirms itself.²⁸

In other words, inflicting the death penalty is never a simple act of preserving existing law. Whenever the law can be brought to extremity, to the elimination of the actual legal subject, we are in fact witnessing the making of new law.

But the routine case is even more troubling according to Benjamin, and materializes in the combination of lawmaking and law-preserving power, in the institution of the police:

In a far more unnatural combination than in the death penalty, in a kind of spectral mixture, these two forms of violence are present in another institution of the modern state, the police. True, this is violence for legal ends, but with the simultaneous authority to decide these ends itself within wide limits. The ignominy of such an authority ... lies in the fact that in this authority the separation of lawmaking and law-preserving violence is suspended. If the first is required to prove its worth in victory, the second is subject to the restriction that it may not set itself new ends. Police violence is emancipated from both conditions.²⁹

²⁸ Benjamin, *supra* note 7, at 286.

²⁹ *Id.*

Police power is formless, it is a "ghostly presence" in the life of civilized states, precisely because the police intervene in "countless cases where no clear legal situation exists."³⁰ The examples show, for Benjamin, that his types cannot actually be distinguished, making them unsound bases for the type of critique he had hoped for from the beginning. And so, contrasting these two types of violence that are both means to an end, he moves on to consider another type of violence.

Mythical violence initially seems like it might offer a contrast to lawmaking and law-preserving violence because, at first sight, it appears not to be a means to an end but rather unmediated violence, simply a manifestation of the existence of the gods. It is not punishment, but clearly rings of revenge and retribution.³¹ Two elements here underscore the parallel with Lavi's category of terror. First, mythical violence appears to be unrelated to the achievement of external ends and thus to exhaust itself in its very manifestation. This is precisely the way Lavi describes the intentions of the *Irgun*: "For the *Irgun*, the turn to arms was an end in itself, crucial for the national revival of the Jewish People and thus outside the means-end framework."³² Second, mythical violence includes an element of revenge, which is central to the style of terror employed by the *Irgun* in Lavi's examples.³³

Benjamin quickly retreats from the conjecture of difference, however, saying instead that mythical violence is power making and, as such, it shows its deep connection with lawmaking. The claim here is that *mythical* violence is indeed a manifestation, but that such manifestation serves to exhibit and reinforce the power of the gods.³⁴ Eventually, Benjamin concludes

³⁰ *Id.* at 287.

³¹ Benjamin's example, alluded to briefly, is the myth of Niobe. Niobe, queen of Thebes, boasted that she was more fortunate and more worthy of praise than the goddess whom the residents of Thebes worshipped because she had seven sons and seven daughters while the goddess had only two children. Her children and her husband were immediately struck down by the gods, leaving her alone, "more guilty than before through the death of the children." *Id.* at 294-95.

³² Lavi, *supra* note 5, at 208-09. I critiqued this characterization in my account of Lavi's argument, *supra* text accompanying note 14.

³³ One could critique Lavi's selectivity in describing *Irgun* terror: the kidnapping and killing of the sergeants (and other related kidnappings) are well-contained in the framework of revenge. The bombing of the King David hotel, on the other hand, would not be comprehended within that framework. This is yet another reason to approach Lavi's label of *terror* with suspicion, but it does not affect the central claims of his article, or of this response.

³⁴ Benjamin writes:

[T]he function of violence in lawmaking is twofold, in the sense that lawmaking

that myth actually clarifies the immediacy of lawmaking violence. "Far from inaugurating a purer sphere, the mythical manifestation of violence shows itself fundamentally identical with all legal violence."³⁵ Thus, the suspicion regarding legal violence turns into certainty of its historical perniciousness.

At this point, Benjamin is still in search of a critical, categorical difference between types of violence, and it is at this point that he turns to *divine* violence, explaining it as the antithesis of mythical violence:

If mythical violence is lawmaking, divine violence is law-destroying; if the former sets boundaries, the latter boundlessly destroys them; if mythical violence brings at once guilt and retribution, divine power only expiates; if the former threatens, the latter strikes; if the former is bloody, the latter is lethal without spilling blood.³⁶

Benjamin's example of divine violence is "God's judgment on the company of Korah,"³⁷ when the earth swallowed up Korah's followers, thus ending their rebellion against Moses.³⁸ But divine violence may never be recognized by humans — they cannot know if its manifestations are indeed those of divine violence: "[O]nly mythical violence, not divine, will be recognizable as such with certainty, unless it be in incomparable effects, because the expiatory power of violence is not visible to men."³⁹

By way of summing up this section, it seems useful to point out some of the differences between Benjamin's and Lavi's frameworks. First, Lavi sets up categories that are supposed to be generally applicable, and claims that political contestation brings us into a zone of indistinction. For Benjamin, on the other hand, it is thinking itself, his own action of critique, that reveals the indistinction always already present in the attempted typology. Types that may seem at first glance to be categorically different constantly

pursues as its end, with violence as the means, *what* is to be established as law, but at the moment of instatement does not dismiss violence; rather, at this very moment of lawmaking, it specifically establishes as law not an end unalloyed by violence, but one necessarily and intimately bound to it, under the title of power. Lawmaking is power making, and to that extent, an immediate manifestation of violence.

Benjamin, *supra* note 7, at 294-95.

³⁵ *Id.* at 296.

³⁶ *Id.* at 297.

³⁷ *Id.*

³⁸ The story of Korah is related in *Numbers* 16. There are good reasons to doubt whether the story accords with Benjamin's description of divine violence, but such doubts are beyond the scope of my argument here.

³⁹ Benjamin, *supra* note 7, at 300.

infect one another, except for *divine violence*, which alone is pure, and which alone is different.⁴⁰ And maybe, just maybe, divine violence is just the breaking down of supposed distinctions, those distinctions that masquerade as justifications of force, quieting the conscience that some forms of legal force are not "pernicious." Divine violence cuts, breaks down boundaries, tears down limits without erecting new ones. And this is precisely what Benjamin's critique has done not only thematically, but formally, with the one exception being the boundary around critique or divine violence itself. What is at stake here is the critical recognition that state force is violence, even where we are not in the presence of a political contestation on the order of the crumbling of the British Empire. One reading of Lavi's treatment seems to cut off this kind of critique of violence, in that the violence called empire is assumed to be just (though not justifiable). It is unclear whether that is the best reading of Lavi's essay. I will return to this point in the next section, but for now it will suffice to say that such a limitation is, to my mind, untenable.

The second difference is the problematic relationship between Lavi's category of empire and Benjamin's divine violence. Benjamin is messianic and mysterious when describing divine violence. I have briefly alluded to a reading possibly equating divine violence with the idea of critique, but Benjamin clearly wants to imagine that physical events in the world could constitute divine violence. Such physical events, however, seem wholly distinct from acts of empire or imperial violence. Thus, merging the categories of empire and divine violence would appear mistaken, since such a merger would draw a legitimating connection between the *redemptive* category of divine violence on the one hand, and imperial violence that seems at first sight to be anything but just, on the other. And yet, it is difficult to get around Lavi's insistence that empire be understood as encompassing a category of violent action that is *a priori* considered *just*, even when beyond justification.⁴¹ In other words, precisely when Lavi's

40 In this sense, perhaps Benjamin never really breaks away from the ethical binary distinction that his essay seems to reject. After initially rejecting the distinction as too narrow, Benjamin in a sense reverts to a framework in which there are, again, only two types of violence: pernicious and divine. This reversion to ethics may mark a limit that Benjamin recognizes in treating violence: perhaps one can never completely reject the ethical evaluation of violence.

41 The difficulty is serious enough when the only example of *empire* (actions that are just but unjustifiable) is the rampage by British forces in response to the hanging of the sergeants. It becomes even more problematic in a related work of Lavi's, where the category of just but unjustifiable force is termed *vengeance*, and seems to include the extrajudicial killings of purported terrorists. There is more than a hint in the article that it is the state that has access, indeed, monopolistic access, to

description seems to slip into normative confusion, Benjamin's account of divine violence, despite its air of mystery and even mystification, retains a peculiar clarity: by making redemptive violence a transcendent category, unknowable directly to humankind and unharnessable by the state, Benjamin ensures that violence can never be excused by reference to that category. Benjamin holds out a moment of hope in redemption, a certain potential for reconstruction around overtly theological renewal. Yet, in Benjamin's schema, one can never clear one's conscience by claiming to have acted in the name of divine violence; one can never deflect the call for justification by appealing to an inexplicable form of justice, imperial or even godly.

III. POSITIVISM, DECISIONISM, AND THE POLITICS OF LAW

In the concluding paragraph of the preceding section, I intimated that Lavi's categorization, and particularly his characterization of *empire* as just though beyond justification, entails a serious normative difficulty. But perhaps there is a better way to understand Lavi's characterization of the justice of empire, one that will clarify the advantages of his analysis and, at the same time, imply a different (though possibly deeper) clash with normative legal analysis.

As a prelude to an alternative understanding, it is worthwhile returning to Benjamin's remarks on the criteria of justness or the justice of ends. On the one hand, early in the essay Benjamin states that "the question of a criterion of justness is excluded for the time being from this study."⁴² On the other hand, when finally approaching the point where a criterion must be addressed, Benjamin states clearly that only God can decide on the justness of ends, and that "justice is the principle of divine end making."⁴³ Thus, for Benjamin, it is clear that there is indeed a criterion of justice, and that it exists beyond the "bottomless casuistry" of natural law,⁴⁴ and beyond anything treated by

vengeance, and that extrajudicial killings are the closing of a circle of retributive violence. See Shai J. Lavi, *Imagining the Death Penalty in Israel: Punishment, Violence, Vengeance, and Revenge*, in *The Cultural Lives of Capital Punishment: Comparative Perspectives* 219, 221, 227-29 (Austin Sarat & Christian Boulanger eds., 2005). The characterization seems inapt: if anything, extrajudicial killings of purported terrorists seem to be a primal site of mythical violence, a manifestation of pure power, an attempt both to make and preserve law. This, to use Benjamin's phrase, is pernicious violence — indeed, one of the most degraded forms of violence used by modern states.

⁴² Benjamin, *supra* note 7, at 278-79.

⁴³ *Id.* at 294-95.

⁴⁴ *Id.* at 279.

positivistic theories of law: it is available only by recourse to theology, or to Benjamin's somewhat secularized version of theology that he calls the philosophy of history. Justice, then, is a transcendental category, an ideal and a value worth pursuing, though possibly unattainable in human intercourse and unjustifiable by human reason.

Now, with this vision of justice clearly stated, we can at least surmise that Lavi has employed a different meaning of *just*, and this would be the key to an alternative understanding of his categorization. According to this alternative reading, we would strip the word *just* of any moral content whatever, transcendental or otherwise. For clarity's sake, we could replace *just* with *valid*, where the question of validity is a question of the relationship between law and politics. Paraphrasing Lavi on this alternative reading, we would say that the force of legality is valid and rationally justifiable; the force of terror is invalid but justifiable;⁴⁵ the force of violence is invalid and not justifiable; and (again, most intriguingly) the force of empire is valid, though not justifiable rationally, and possibly more important, in need of no justification.

At this point, Lavi's categorization takes on new critical force, as it separates itself from Benjamin's sweeping critique of all state violence but, more crucially and far more sharply, from "the liberal imagination" in all that concerns the relationship between law, politics, and the state. Lavi abandons Benjamin primarily in two features of his argument. First, Lavi attempts to uphold a distinction between types of violence that for Benjamin eventually collapse into one another.⁴⁶ Second, Lavi apparently rejects the transcendental, messianic avenue that Benjamin sketches as a possible path of exit from the oscillation between lawmaking and law-preserving violence.

More important for our purposes here is Lavi's (mostly implicit) critique of the liberal imagination, a critique grounded less in Benjamin's essay than in the work of Carl Schmitt.⁴⁷ Schmitt's critique of liberalism is too complex

45 Putting aside my critique that the logic of terror is instrumental, *supra* text accompanying note 14, and following Lavi's claim that terror operates outside the means-ends framework, terror is justifiable on its own terms, as pure manifestation. See also *supra* text accompanying notes 32-33. Terror, then, is justified, but not *rationality*, insofar as rationality implies a nexus between means and ends.

46 Benjamin has shown that at the heart of all state force, including legally sanctioned force, lies a repressed initiating violence for which liberalism can never truly account. The state, with its supposed monopoly on force, is always implicated in "a dialectical rising and falling in the lawmaking and law-preserving formations of violence. The law governing their oscillation rests on the circumstance that all law-preserving violence, in its duration, indirectly weakens the lawmaking violence represented by it, through the suppression of hostile counter-violence." Benjamin, *supra* note 7, at 300.

47 Lavi does not mention Schmitt in his article, nor does he refer directly to Schmitt's

to be summarized here,⁴⁸ but two related features stand out as relevant in understanding Lavi's argument. The first is the meaning of sovereignty; the second, the status of the *decision*. Sovereignty, for Schmitt, may be defined as the capacity to decide on the *exception*, or most practically, to decide on the suspension of the constitution in times of emergency. The sovereign, under normal circumstances, is bound by the legal norms that are the essence of the modern state, according to the image propounded by liberal legalism. In times of emergency, however, the sovereign himself may decide to suspend the norms, including basic constitutional guarantees, in order to uphold order and protect the state from its enemies, internal or external.⁴⁹ Moreover, the sovereign *decision* is beyond justification and evinces "a reduction of the state to the moment of the decision, to a pure decision not based on

vocabulary in discussing the relationship between law, politics and the state. To the extent that *empire* is equated with *divine violence* and divine violence in turn is termed *sovereign violence*, however, it is not difficult to see that what Lavi analyzes under the heading of *empire* is actually akin to Schmitt's foundational concept of sovereignty. For the connection between divine violence and sovereign violence, see Benjamin, *supra* note 7, at 300. For Schmitt's discussion of sovereignty, see generally Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans., 1985) (1922).

48 For a full-length treatment, see John P. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (1997).

49 Schmitt, *supra* note 47, at 5-7. A few passages are worth quoting at length:

Sovereign is he who decides on the exception

The assertion that the exception is truly appropriate for the juristic definition of sovereignty has a systematic, legal-logical foundation. The decision on the exception is a decision in the true sense of the word.

... The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law.

It is precisely the exception that makes relevant the subject of sovereignty, that is, the whole question of sovereignty. The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited... If such action is not subject to controls, if it is not hampered in some way by checks and balances, as is the case in a liberal constitution, then it is clear who the sovereign is. He decides whether there is an extreme emergency as well as what must be done to eliminate it. Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety. All tendencies of modern constitutional development point toward eliminating the sovereign in this sense.

reason and discussion and not justifying itself, that is, to an absolute decision created out of nothingness."⁵⁰

The parallels with Lavi's vision of empire seem quite clear. The question is, how does this vision of sovereign decision function as a critique of the liberal imagination? Liberal legalism, of the sort Schmitt criticizes directly, identifies the state with the order of legal norms or, in short, rests on the rule of law. Schmitt asserts that modern constitutionalism, of the type propounded by legal scholars such as Hans Kelsen, hampers sovereignty by imposing checks and balances on the capacity to decide on the exception, as well as by imposing limitations on the content of the exceptional decision.⁵¹ But the idea that constitutionalism impinges on sovereignty is a practical criticism at best; in and of itself, it only suggests that the state may be threatened if the sovereign's hands are tied by procedural constraints. Standing alone, this critique does not challenge the legalists' claim that the state itself is reducible to the normative or legal order.

Schmitt, however, goes considerably further. His claim is not simply that constitutional arrangements that limit the powers of the executive to issue commands in time of emergency are dangerous. Instead, Schmitt argues that legalists of Kelsen's stripe misunderstand the conceptual apparatus of the state. For Kelsen, the validity of state action can always and only be tested in relation to legal norms, and the validity of any particular norm is always (and only) traceable to a more general norm, all the way up through the basic norm.⁵² A norm can only be authorized by another norm, and such

50 *Id.* at 66. Note that Schmitt's decisionism is not limited to the question of the sovereign decision regarding the exception, though that is its paramount concern. An additional element relates to the status of decision for adjudication. Schmitt's claim is that legal norms are not self-executing, and that a judge or administrative official also instantiates decision as an act of will that is not circumscribed or at least not completely determined by the legal norm. This is a claim with close analogues in legal realism (American and European) and in the critical legal studies literature. See generally Duncan Kennedy, *A Critique of Adjudication: fin de siècle* (1997). It also has a deep affinity with Benjamin's examples of the merging of lawmaking and law preserving force, for example in the actions of the police. See *supra* text accompanying notes 27-30. While I believe that this *internal* aspect of Schmitt's critique raises the most interesting problems for the liberal imagination, Lavi ignores or even rejects it, and I will therefore leave the discussion of it for another time.

51 For example, by enumerating the specific constitutional guarantees that the executive is permitted to abrogate in the state of emergency. See Schmitt, *supra* note 47, at 11.

52 The basic norm is the one norm of Kelsen's system that is not authorized by another norm, and it is the only norm in the system that is not a *positive* norm, i.e., it is not posited by a state actor authorized to create a norm. Instead, it is a presupposition reconstructed by the legal scientist in order to serve as the hypothetical foundation

authorization is a formal matter: the determination of validity has nothing to do with a value judgment regarding the content of the norm.⁵³

Schmitt argues that this formal test of validity is inadequate as a conceptual matter. For Schmitt, and with him Lavi, validity is to be tested as a matter of the sociology of concepts, which transcends the juridical conceptualization.⁵⁴ Accordingly, the validity of a particular sovereign act is not to be evaluated — as Kelsen would have it — in reference to the chain of norms authorizing (or proscribing) the act. Instead, validity would be tested against the sociology of the concept of sovereignty itself. Schmitt envisions that this test of validity would vindicate the kind of *decision* based on nothing but a determination by the sole and indivisible sovereign of its necessity, which could never be specifically authorized by a legal norm. In other words, Schmitt's theory would validate acts that on their face violate existing legal norms.

Before going on to critique this position, which is what the rest of this comment will attempt to do, it seems important to restate what the position does and does not claim to establish. I will begin with the latter task. The position advanced by Schmitt and espoused by Lavi does not claim that, from an overarching moral perspective, we should prefer to consider as valid and therefore good certain acts that do not conform with legal

of the chain of positive norms. See Hans Kelsen, Introduction to the Problems of Legal Theory 56-61 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992) (1934) [hereinafter Kelsen, Introduction to Legal Theory]; Hans Kelsen, General Theory of Law and State 115-18 (Anders Wedberg trans., 1949) (1945).

53 This is the basic thrust of Kelsen's *Pure Theory of Law*, which revolves around the idea that legal science is restricted to the cognition of norms in terms of their validity, rather than their success in advancing an ideal of justice. See Kelsen, Introduction to Legal Theory, *supra* note 52, at 13-19, 56-57. See also Hans Kelsen, *Pure Theory of Law* 66-69 (Max Knight trans., 2d. ed. 1967) (1960) [hereinafter Kelsen, *Pure Theory of Law*].

54 Of the method of analysis, Schmitt writes:

Altogether different is the sociology of concepts, which is advanced here and alone has the possibility of achieving a scientific result for a concept such as sovereignty. This sociology of concepts transcends juridical conceptualization oriented to immediate practical interests. It aims to discover the basic, radically systematic structure and to compare this conceptual structure with the conceptually represented social structure of a certain epoch...

The presupposition of this kind of sociology of juristic concepts is thus a radical conceptualization, a consistent thinking that is pushed into metaphysics and theology. The metaphysical image that a definite epoch forges of the world has the same structure as what the world immediately understands to be appropriate as a form of its political organization. The determination of such an identity is the sociology of the concept of sovereignty.

Schmitt, *supra* note 47, at 45-46.

norms. That would simply amount to saying that the acts were justifiable, and the very point of the position is to claim that this type of act is beyond the need for justification. In this limited sense, Lavi's example of an act of empire is felicitous, because it is easy to grasp that a determination of its validity does not amount to condoning the act from the perspective of morality, or from any straightforward normative perspective.⁵⁵ What, then, does Schmitt's position claim to establish? The answer is that, from the perspective of the sociology of concepts,⁵⁶ such an act may be scientifically perceived as valid. In other words, a proper appreciation of *reality* reveals what ought to have been self-evident to consciousness, which is that the act in question is valid although no scientific account of its justification is possible.⁵⁷

But does the sociology of concepts as theorized by Schmitt and adopted by Lavi have anything to recommend it, when compared with traditional legal positivism, or with Kelsen's *pure theory of law*? When faced with the abrogation of constitutional guarantees by the executive, Kelsen's theory puts forward its rather simple, and completely formal test of validity. Either the actions of the executive are authorized by a more general positive norm (say, a constitutional provision allowing for emergency powers), in which case they are valid, or they are proscribed, and therefore invalid.⁵⁸ The test of

55 This last concession is applicable so long as we are not confused by Lavi's terminology, which uses the word *just* where I have substituted the word *valid*. It is difficult to divorce the word *just* from its normative connotations, but I believe a reasonable reading of Lavi's piece requires just such a disjunction. Any other reading turns his piece into a simplistic apology for the use of power, which I cannot credit as his intention.

56 This perspective could be termed phenomenology, or metaphysics, but the questions of labeling the method beyond Schmitt's own specialized terminology are beyond the scope of this paper. For Schmitt's own connection of his method with phenomenology, see Schmitt, *supra* note 47, at 46-47.

57 In this wider sense, Lavi's example of empire is particularly unconvincing. The fact that what I have called a "police riot" goes unacknowledged by the British authorities, the fact that it is carried out by low-ranking officials in the imperial authority, accompanied by the fact that there is no hint of official *decision* at the highest levels, are all indications that this particular act simply does not qualify as that type of decision in which sovereignty is actually implicated. The idea that a seriously threatening emergency exists here is simply not intuitively plausible, and the denial by the British of any act at all further distances this act from what Schmitt imagines as the sovereign decision. However, as I take the stakes of Lavi's article to be conceptual rather than historical and concrete, the ineffectiveness of the example is not of particular importance to the central claim of the piece, a claim important enough in its own right to warrant response.

58 The fact that the test is simple and formal does not mean that its application is

validity has nothing to do with whether the specific acts are good from a moral perspective, just as it has nothing to do with the question of whether abiding by the legal norms will generate bad results, such as the murder of innocents or the dismantling of a democratic state. The requirements of legal validity may be over or under inclusive when compared with the political (and possibly military) necessities of maintaining order or upholding sovereignty or saving democracy. In this sense, Kelsen's pure theory refuses to collapse law and politics. And because of this strict separation, Kelsen's theory is unlikely to be a solid predictive tool regarding the behavior of judges or other officials. But that is completely beside the point.

Kelsen's theory tells us little about reality. But it tells us a great deal about the analytical arrangement of legal norms. During extreme emergencies, states may, in practice, ignore the analytical scheme that authorizes the norms, but this does not point to a limitation of the theory. The great advantage of Kelsen's analytical scheme is that it clarifies what *legal* cognition is about. When the executive acts in contradiction to existing legal norms, it is paramount that the legal analyst (or as Kelsen would have it, the legal scientist) be able to point to the legal situation: invalidity of the executive act from the legal perspective, or a violation of the rule of law. Crucially, this is very limited critical tool.⁵⁹ It says only that the rule of law has been violated; but the pure theory can never say whether that is a good or a bad thing. Perhaps an illegal act will save innocent lives, advance a peace process, save a democracy from destruction by fascists or other internal enemies; perhaps perfectly legal acts will ruin the poor in order to fatten the rich, imprison nonviolent political dissidents, undermine or even destroy

mechanical or obvious in any sense. There will always be difficult cases for the legal analyst, as for the judge. Those difficulties and the proper theories of interpretation to help settle them are crucial for the examination of any particular case. *See infra* text accompanying notes 62-63.

59 Recall that this theory tells us about legal validity, but nothing about institutional competence. Thus, there may be types of cases for which there is no legal recourse (for instance, to courts) when an executive acts without the support of a valid norm. Nothing in Kelsen's pure theory requires that *courts* be granted the institutional power to declare acts of the executive (or of the legislature, for that matter) invalid. Kelsen, of course, had views on the question, but they are distinct from the pure theory of law discussed here. *See* Hans Kelsen, *International Peace — By Court, or Government*, 46 *Am. J. Soc.* 571 (1941); Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 42 *J. Pol.* 183 (1942). For Kelsen's account of what the pure theory requires regarding the availability of some organ competent to pass on the validity of norms, see Kelsen, *Pure Theory of Law*, *supra* note 53, at 271-76.

freedom of speech or other basic freedoms. Even if every legal analyst in a system (or on the globe, for that matter) were to adopt the pure theory of law as her jurisprudence, not a single positive normative result (within the legal system) would necessarily follow, because the pure theory of law does nothing to guarantee that the norms adopted in any system will be good norms.

The benefit engendered by Kelsen's theory lies on a different plane: it has little or nothing to do with state decision making — nothing to do with lawmaking, but it may be important regarding the capacity for criticism of such decision making. Most obviously, Kelsen's positivism supplies a tool (albeit a limited one) of critique when the executive abrogates legal guarantees or violates the rule of law. In addition to questioning the wisdom of the executive decision, an observer would be able to demand independent justification for the violation of existing norms.⁶⁰ But the more important effect is more general: Kelsen's brand of positivism is a constant reminder that the type of legitimacy bestowed upon a norm by a judgment of legal validity is extremely limited, and that beyond the pure theory of law, we are called upon to engage in the substantive justification of any legal order.⁶¹ A determination of validity — far from being the end of a discussion of justification or a replacement for such discussion — is only one, not necessarily crucial, step alongside the more open and difficult inquiry into justification.

There are two reasons, internal and external, for why the determination of validity is so limited. Internally, validity is limited because it supplies only a frame within which a number of decisions, or specific norms, could

⁶⁰ Such a justification would never be legal in nature, but rather moral, political, ethical etc. It would not be limited to a justification of the decision on its own terms, but rather would require the additional step of justification of the violation of norms. This seems to be an advantage from a liberal perspective, in that known existing norms set up a framework within which the subject arranges her life-plans. Despite the claims of liberals that the rule of law actually guarantees freedom, however, we should probably be skeptical regarding the actual influence of such critique on the liberal subject's chances for realizing her plans. What does seem clear is that in societies where rule of law rhetoric is a significant element of political culture, state organs generally feel pressure to keep their actions within the general frame of legally authorized activity, or at least to hide their departures from that frame. This also seems to be the case in Lavi's example of the British Empire, as is attested by the denial of official action during the reported incidents.

⁶¹ Kelsen's work beyond the pure theory is a clear example of the attempt to delve into possible substantive justifications of the content of a legal order. For one definitive work, see Hans Kelsen, *Foundations of Democracy*, 66 *Ethics* 1 (1955).

be authorized. In explaining why a judge or administrative official will have to use will, and not only intellect or reason, in reaching a decision, Kelsen writes:

The question which of the possibilities within the frame of the law to be applied is the "right" one is not a question of cognition directed toward positive law — we are not faced here by a problem of legal theory but of legal politics. The task to get from the statute the only correct judicial decision or the only correct administrative act is basically the same as the task to create the only correct statutes within the framework of the constitution. Just as one cannot obtain by interpretation the only correct statutes from the constitution, so one cannot obtain by interpretation the only correct judicial decisions from the statute.⁶²

Legal norms, therefore, circumscribe the range of decision, but only minimally. The actual decision is not founded on a cognition of positive law; rather, it is based on "other norms that may flow here into the process of law-creation — such as norms of morals, of justice, constituting social values which are usually designated by catch words such as 'the good of the people,' 'interest of the state,' 'progress,' and the like. From the point of view of positive law nothing can be said about their validity."⁶³ Thus, internally, there will always be (at least in any concrete case that allows for interpretation) a need for justification beyond the validity of the specific norm.

But even if we were to ignore the internal necessity of justification, we would still be faced with its external necessity. The external necessity arises because any legal norm (or, for that matter, any legal system) is worthy of respect and obedience not just by virtue of its formal structure. The only way to decide that a legal system deserves respect or obedience

⁶² Kelsen, *Pure Theory of Law*, *supra* note 53, at 353. *See also id.* at 348-56. Kelsen's elaboration of the pure theory makes clear that jurisprudential analysis determines only a frame within which there is a great deal of room for individual will, including at the level of the judge. He therefore calls the traditional view of mechanical jurisprudence a fallacy, and emphasizes that, within the confines of the pure theory, adjudicative questions have more than one right answer. In this sense, Kelsen is partially in accord with Schmitt's *internal* decisionism (*supra* note 50), in that he acknowledges that the content of actual decisions is not limited solely by the legal norm. But where Schmitt goes from indeterminacy of the legal norm to decision beyond justification, Kelsen says only that such decisions will rely on other normative commitments (political, moral, ethical, public policy) that cannot be tested by a science of law.

⁶³ Kelsen, *Pure Theory of Law*, *supra* note 53, at 353.

is by evaluating the content of its norms, and this is not a question of legal cognition, but rather, as Kelsen would say, of politics. Wicked regimes are the clearest instance of the importance of such evaluations: when faced with a wicked regime, our moral and political normative commitments should bring us to the realization that its legal norms are not worthy of respect and obedience, even when they are valid from the point of view of legal science. But the general point crucial to this discussion is simply that legal validity, on Kelsen's view, does nothing to end the inquiry into the political valence or the ultimate justification of a norm or normative system: rather than positing that validity places the decision beyond justification, positivism reminds us that the inquiry into justification is necessary, and beyond legal validity.

Before turning to the conclusion, I must point out an irony within this analysis. Schmitt's critique of liberalism and, more generally, of neo-Kantian thought in the analysis of law and the state, is based largely on a conviction that modernity brings with it a penchant for technology that eventually eradicates politics. In other words, ever more significant portions of our life-world, previously dominated by politics, are overtaken by technical thinking and impersonal calculation. In a characteristic passage, Schmitt laments:

Today nothing is more modern than the onslaught against the political. American financiers, industrial technicians, Marxist socialists, and anarchic-syndicalist revolutionaries unite in demanding that the biased rule of politics over unbiased economic management be done away with. There must no longer be political problems, only organizational-technical and economic-sociological tasks. The kind of economic-technical thinking that prevails today is no longer capable of perceiving a political idea... The core of the political idea, the exacting moral decision, is evaded ...⁶⁴

Schmitt's critique of positivism in legal theory rested on the idea that it was formal and lifeless, that it turned legal inquiry into a mechanistic brand of calculation. But as a close reading of Kelsen shows, the formal aspects of his jurisprudence do not eliminate politics, even from the calculus of legal decision making. The question of the norm's validity

⁶⁴ Schmitt, *supra* note 47, at 65. *See also* Carl Schmitt, *The Concept of the Political* 69-79 (George Schwab trans., 1996) (1932). For a detailed discussion of the tension between Schmitt's conception of politics and his conception of technology, see McCormick, *supra* note 48.

presents legal *science* with a narrow inquiry, an inquiry that is indeed quite technical. But Kelsen's positivism is *anti-technocratic*, because it narrowly circumscribes the technical task: it constantly tells us that the normative work (and all the work of legal decision makers, as opposed to scientists)⁶⁵ is precisely in justification, that we are always in need of it, and that its arguments lie beyond the technical competence of the analyst.

Ironically, then, Schmitt's collapsing of the politics of sovereignty with the analytics of the legal (within the sociology of concepts) actually turns the analysis of legal-political decision making into a very specialized science. Whether we view that science as a part of technology or not, it should be clear that the concept of the sovereign decision — a concept echoed by Lavi in his characterization of empire as *a priori* just — creates a blunt instrument that shuts off the possibilities of rational discussion over justification. Schmitt apparently celebrated that, because he was convinced that the discussion of justification was a fake.⁶⁶ But Schmitt's view of public discourse in Weimar need not be decisive for us, especially if we are really talking about legal analysis or philosophy today. The question

65 The distinction between the work of judges (and other decision makers) and the legal scientist is important throughout Kelsen's theoretical work. It comes through most clearly in his contrast between *authentic* interpretation (which is lawmaking, the work of the judge) and the type of interpretation undertaken by the science of law, which "can do no more than exhibit all possible meanings of a legal norm." Kelsen, *Pure Theory of Law*, *supra* note 53, at 355.

66 This was a view shared by many of Schmitt's European contemporaries. For Schmitt's most cutting tirade against the belief in public discourse, whether in the media or in parliament, see Carl Schmitt, *The Crisis of Parliamentary Democracy* 48-50 (Ellen Kennedy trans., 1988) (1923), in particular its closing paragraph, the conclusion of which I reproduce here:

There are certainly not many people today who want to renounce the old liberal freedoms, particularly freedom of speech and the press. But on the European continent there are not many more who believe that these freedoms still exist where they could actually endanger the real holders of power. And the smallest number still believe that just laws and the right politics can be achieved through newspaper articles, speeches at demonstrations, and parliamentary debates. But that is the very belief in parliament. If in the actual circumstances of parliamentary business, openness and discussion have become an empty and trivial formality, then parliament, as it developed in the nineteenth century, has also lost its previous foundation and its meaning.

Id. at 50. On European inter-war disillusionment with parliamentary democracy, see Julian Benda, *The Treason of the Intellectuals* (Richard Aldington trans., 1969).

is whether such disciplines should ever give themselves over to a claim, however inspired, of being beyond justification.

EPILOGUE

The Use of Force Beyond the Liberal Imagination raises a specter for liberal thought: sovereign violence will occur and, ultimately, it will not be justifiable in rational terms; such force is beyond justification. Anyone harboring healthy suspicions regarding the limits of rational thought will recognize a core of truth in the limits of justification notion, limits that are most intense from the perspective of the actor required to decide. Most of us have agonized over decisions, created lists of pros and cons, and in hindsight, admitted that our decision was based on intuition. To some degree, every real decision is an act of faith.

The implications of the limits of rational justification, however, are no simple matter. Lavi's attitude seems to tell the reader (despite the absence of any prescriptive pathos): this is reality, live with it — do not waste your time and vital energies deliberating about the undecidable. I have my doubts. First, the issue of perspective: while a decision may be an act of faith for its maker, such faith should not necessarily be a shield from rational evaluation on the part of the onlooker. The decision maker cannot deliberate endlessly; she may not even have time to consider all the known relevant arguments. But the onlooker after the fact, whether sociologist, legal analyst, or cultural critic, is in an entirely different position. Freed from the necessity to decide at any given point in time, she may evaluate the decision with the best arguments possible, and similarly demand of decision makers a good faith grappling with such arguments. Second, the social reality of sovereignty: Schmitt seemed to recognize that liberalism or some variation of it might eradicate sovereignty as he understood it. He seems to have viewed this eventuality as tragic. Today, I would argue, sovereignty is even more diffused and fragmented, indeed disseminated, than it was in 1922, when Schmitt wrote *Political Theology*. I find it hard to muster any nostalgia, especially in the face of recollections of sovereignty's repetitive swan songs in the twentieth century. Finally, what do we do in the beyond of justification? Milton's answer, quoted at the opening, was to attempt the impossible, to try to justify that which faith required be left beyond justification. This might serve as the definition of heroism. But the theology of politics has lost ground since Milton and Hobbes lived and wrote. Today, a rational questioning of what remains of sovereign decision, even when we suspect that no final justification exists, lies on a less elevated plane, a plebeian version of impossibility that might simply be termed, responsibility.