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Legal Holes

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Legal Holes

Noa Ben-Asher*

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Introduction

In the years that followed the events of September 11, 2001, a debate crystallized between those who think that "legal grey and black holes"—which I call simply "legal holes"—are necessary and integral to U.S. law and those who think that they are dangerous and should be abolished. Legal black holes "arise when statutes or legal rules 'either explicitly exempt[] the executive from the requirements of the rule of law or explicitly exclude[] judicial review of executive action.'"[1] Grey holes, in contrast, "arise when 'there are some legal constraints on executive action . . . but the[y] are so insubstantial that they pretty well permit government to do as it pleases.'"[2] Currently both sides of the legal holes debate agree that in legal holes executive action is not bound by the rule of law. The debate turns on what should be done about this.

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[1] Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096 (2009) (taking these terms from DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 3 (2006); and Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1,1 (2004)).

[2] *Id.* (quoting Dyzenhaus, *supra* note 1, at 42).

While this debate has been heightened by contemporary questions about the rule of law and the role of the executive in moments of emergency, this essay argues that the debate regarding the desirability of legal holes is not new. It reflects a deep historical conflict between two competing attitudes toward law. The first tends to view the legal order as a *scientific*-like system, and the second as a *theistic*-like system. The first seeks a wholeness and completeness of law through the abolition of legal holes, and the second views completeness as impossible and legal holes as necessary and even salutary. The essay focuses on two pairs of legal scholars as representatives of these competing ways of thinking about the law and legal holes. In the 1920s and 1930s Carl Schmitt and Hans Kelsen pursued the theistic and scientific approaches respectively; currently Adrian Vermeule and David Dyzenhaus have taken up these approaches in a debate on legal holes in the context of securing western nation-states from Islamic terrorism.

I call these two scholarly legal attitudes theistic and scientific *not* because they explicitly view law as science or theology (although they sometimes do). My claim is structural. Modern science typically treats nature as a set of constant, predictable, and binding rules without exceptions. Under some theistic views, by contrast, nature is a direct consequence of divine will, a will that can alter or suspend the laws of nature (most famously through miracles).

By analogy, in the legal holes debate, the scientific-structured approach criticizes the existence of legal holes because it contends that law should have the capacity to respond to all situations from within the rule of law. Under this scientific-structured approach, just as rules of nature should explain and govern our physical world, so should legal rules be able to explain and govern the world of human behavior. In contrast, the theistic-structured approach embraces legal holes as spaces of detour, or inapplicability for law, which are justified and sometimes crucial for the preservation of the nation. Under this theistic-structured approach, just as God can suspend the order of nature, the executive branch should be able to "suspend" the legal order. So this approach is theistic not in the sense that it argues that one should believe in the executive just as one may believe in God. It is theistic in that *in its suggested structure* it locates the executive in the position that God held in traditional theistic systems. The two approaches differ in the scope of their application in the following way. The scientific-structured approach views law as sovereign *at all times*. The theistic-structured approach views law *in emergencies* as subject to a superior will—the will of the executive branch.

By explaining the legal holes debate via the lens of science and theology, the essay offers two main insights. First, the essay argues that although the legal holes debate is often understood as simply being about executive measures in emergencies, the debate should also be seen as implicating a broader jurisprudential dispute about the very nature of the legal system. Second, the essay shows that the two approaches bear several surprising similarities—their skepticism of judges, their skepticism of legislators, and, most notably, their use of law-preserving violence.[3]

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[3] *See infra* Part III.

I. Law As Theology

The theistic-structured approach maintains that legal holes are "integral to the administrative state," and "no legal order governing a massive and massively diverse administrative state can hope to dispense with them."[4] Two legal scholars can be viewed as characteristic representatives of this approach: Carl Schmitt in the 1920's and 30's and Adrian Vermeule today. They share three key insights. First, they are skeptical toward the premise that legal systems are scientific in the sense that they can and should resemble the laws of nature. Second, they view legal holes as necessary for the survival of legal systems. Third, they view the executive branch as the primary decision-maker in emergencies.

A. Law's Analogy to Theology

There are various possible ways to approach the analogy of law to theology.[5] This essay pursues one particular claim: that the human sovereign, in analogy to God, *can alter or suspend the existing legal order* (hereinafter "the structural analogy"). This analogy to God has appeared in legal scholarship from the Middle Ages to the twentieth century.[6] Although the structural analogy has not been explicitly articulated in the current Schmittian renaissance, I argue that it is critical for our understanding of the current legal holes debate.

In laying out this structural analogy, Schmitt writes the following:

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[4] Vermeule, *supra* note 1, at 1149.

[5] Some have focused on the inherently theistic nature of liberal rights such as equality and dignity. For example, according to Jeremy Waldron, John Locke's commitment to the principle of equality is premised on "theological content [that] shapes and informs the account through and through." JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE'S POLITICAL THOUGHT 237 (2002) (arguing that "Lockean equality is not fit to be taught as a secular doctrine; it is a conception of equality that makes no sense except in the light of a particular account of the relation between man and God. . . .[I]t may be impossible to articulate certain important egalitarian commitments without what one takes to be their religious grounds"). Likewise, Michael Perry has argued that the liberal democratic commitment to the dignity of every human being is adequately justified only through the prism of religious belief. Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground?*, 54 EMORY L.J. 97 (2005). Others have pursued an analogy between faith in the "rule of law" and faith in God. John Gardner has suggested that the *Grundnorm* can be understood as a juristic God. John Gardner, *Law as a Leap of Faith*, *available on* SSRN http://ssrn.com/abstract=1397138, at 13-14 ("Just as one may have reasons for faith in God, so one may have reasons for allying oneself with the *Grundnorm* . . . And just as the moral reasons mentioned here to do what God commands have no application to the faithless, so the moral reasons mentioned here to follow legal rules have no application to those who do not ally themselves with the *Grundnorm*, or who, to put it another way, do not have faith in law.").

[6] *See, e.g.*, PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 48-49 (2008) (tracing the analogy of the human lawmaker to the divine sovereign back to at least the Middle-Ages); JEAN BODIN, ON SOVEREIGNTY 50 (Julian H. Franklin ed., Cambridge Univ. Press, 10th prtg. 2007) (1576).

> [a]ll significant concepts of modern theory of the state are secularized theological concepts not only because of their historical development—in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent law giver—but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts.[7]

Schmitt traced this structural analogy to Jean Bodin, a sixteenth-century French jurist and political philosopher. The distinctive mark of sovereignty, according to Bodin, is the "power of making and repealing law," which "includes all the other rights and prerogatives of sovereignty."[8] The term sovereign, writes Bodin, "cannot apply to someone who has made a subject his companion."[9] This is because "just as God, the great sovereign, cannot make a God equal to Himself because He is infinite . . . so we can say that the prince, whom we have taken as the image of God, cannot make a subject equal to himself without annihilation of his power."[10] Bodin accordingly defines law as the "just command of the person or persons who have full power over everyone else . . . and excepting only the person or persons who made the law."[11]

In fact, this analogy of the human lawmaker to the divine sovereign dates back at least to the Middle Ages. Philip Hamburger describes the reasoning behind the God-sovereign analogy in the Middle Ages:

> If the highest of rulers occasionally exercised his will outside the channel of his laws, then perhaps earthly rulers might also at times have to take extra-legal measures. The possibility of miracles and of divine forgiveness could seem to suggest that God himself sometimes departed from his natural law, and far from being merely an academic question, this was, like equity and pardons, a problem that potentially reached deep into the nature of the universe. It was only to be expected that human language could not adequately capture the complexity of the world and that human rulers might therefore sometimes have to act in a manner that could not be reduced to the regular generalizations of law, *but if God himself sometimes exercised his will absolutely, beyond his law, then perhaps the universe itself was not essentially regular or subject to law.*[12]

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[7] CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 36 (George Schwab trans., Univ. Chicago Press 2005) (1922); *see also* FRIEDRICH NIETZSCHE, HUMAN, ALL TOO HUMAN 173 (R.J. Hollingdale trans. Cambridge Univ. Press, 10th prtg. 2006) (1878) ("[T]he belief in a divine order in the realm of politics, in a sacred mystery in the existence of the state, is of religious origin. . . . [I]f religion disappears the state will unavoidably lose its ancient Isis veil and cease to excite reverence.").

[8] Bodin, *supra* note 6, at 58 ("[S]o that strictly speaking we can say that there is only this one prerogative of sovereignty, inasmuch as all the other rights are comprehended in it—such as declaring war or making peace.").

[9] *Id.* at 50.

[10] *Id.*

[11] *Id.* at 51 (emphasis added).

[12] Hamburger, *supra* note 6, at 48-49 (emphasis added) ("Although English monarchs asserted prerogatives above the law of the land, they remained cautious enough to avoid

What drives the analogy in the above passage between the "earthly rulers" and God is that even "the highest of rulers" had to exercise his will outside the laws. And if God had to act outside his laws at times, so would "earthly rulers." Thus extra-legal measures might sometimes be necessary.

In seventeenth-century England as well, the analogy of the extraordinary legal powers of the King and God was explicit in legal texts.[13] Sir John Davies, for example, writes in 1625 that "by the positive law the King himself was pleased to limit and stint his absolute power, and to tye himself to the ordinary rule of the law, in common and ordinary cases." However, the king retained and reserved in many cases "that absolute and unlimited power which was given to him by the Law of Nations." And in this, "he doth imitate the Divine Majesty, which in the Government of the world doth suffer things for the most part to passe according to the order and course of Nature, yet many times doth shew his extraordinary power in working of miracles above Nature."[14]

Notably, since early modernity, there have been differences between the English and the Continental approaches to this question. English lawyers treated the king's absolute power with hesitation. Although they acknowledged in the sixteenth century that such power existed in the monarch, they treated it as exceptional and confined it through a set of particular prerogatives acknowledged by law.[15] In contrast, civilians tended to consider absolute authority a general transcendent power.[16] The best-known account of the latter is Bodin's above account of sovereignty as defined by absolute power.

Schmitt used Bodin's structural analogy to contest jurisprudential theories that compared law to the natural sciences.[17] Schmitt suggested instead that the better understanding of law is through the lens of theology:

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generalizing that this was what they were doing—it being safer to leave ambiguous whether such prerogatives were exercised through the law of the land or above it.").

[13] *See*, *e.g.*, FRANCIS OAKLEY, OMNIPOTENCE, COVENANT, AND ORDER: AN EXCURSION IN THE HISTORY OF IDEAS FROM ABELARD TO LEIBNITZ 109 (1984).

[14] *Id.* at 109 (quoting JOHN DAVIES, THE QUESTION CONCERNING IMPOSITIONS, TONAGE, POUNDING 30-32 (London 1656)). Oakley also mentions Aegidius Romanus, a theologician and publicist who elaborated the parallel between the powers of God and that of the Pope at great length. *Id.* at 111.

[15] Hamburger, *supra* note 6, at 67.

[16] *Id.*

[17] Schmitt, *supra* note 7, at 41 ("[A]t the foundation of [Kelsen's] identification of state and legal order rests a metaphysics that identifies the lawfulness of nature and normative lawfulness. This pattern of thinking is characteristic of the natural sciences. It is based on the rejection of all 'arbitrariness,' and attempts to banish from the realm of the human mind every exception. In the history of the parallel of theology and jurisprudence, such a conviction finds its place most appropriately probably in J.S. Mill. In the interest of objectivity and because of his fear of arbitrariness, he too emphasized the validity without exception of every kind of law. . . .").

> The distinction between the substance and the practice of law, which is of fundamental significance in the history of the concept of sovereignty, cannot be grasped with concepts rooted in the natural sciences and yet is an essential element of legal argumentation. When Kelsen gives the reason for opting for democracy, he openly reveals the mathematical and natural-scientific character of this thinking: Democracy is the expression of a political relativism and a scientific orientation that are *liberated from miracles and dogmas* and based on human understanding and critical doubt.[18]

Schmitt thought that the legal exception was analogous to divine miracles, arguing that "the exception in jurisprudence is analogous to the miracle in theology. Only by being aware of this analogy can we appreciate the manner in which the philosophical ideas of the state developed in the last centuries."[19] Just as the miracle was essential to the solidity of some strands of theological thought, Schmitt claimed that the legal exception was critical to the survival of the state. Schmitt blamed the rationalization in western thought for banishing both the divine miracle (in the realm of theology) and the legal exception (in the realm of law and sovereignty). In the realm of law, the legal rationality of the 18th and 19th centuries, according to Schmitt, "rejected not only the transgression of the laws of nature through an exception brought about by direct intervention, as is found in the idea of a miracle, but also," and for Schmitt much more importantly, "the sovereign's direct intervention in a valid legal order."[20] He thus concluded that "the rationalism of the Enlightenment rejected the exception in every form."[21]

Schmitt sought to bring the exception back into the theory of the state and into the legal order. In his famous opening words of *Political Theology*—"Sovereign is he who decides the exception"[22]—and later in *The Concept of the Political*, Schmitt positioned the legal exception as definitive of sovereignty and as the core of politics. Thus he argued that whoever was in the position to decide, under the Weimar constitution, that constitutional protections were to be suspended due to an emergency, was in fact the sovereign of the Weimar republic. And, according to Schmitt, that sovereign was neither the parliament nor the courts. It was the president. The moment in which the sovereign practices that authority to declare an exception is, according to Schmitt, the core of politics.

B. The Legal System as a Bagel: The Necessity of Legal Holes

Adrian Vermeule, who provocatively argues, "American administrative law is itself Schmittian", has recently replicated Schmitt's positioning of the exception at the core of politics.[23] The "key point," Vermeule writes, "that makes our administrative law

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[18] *Id.* (emphasis added).

[19] *Id.* at 36.

[20] *Id.* at 36-37.

[21] *Id.* at 37.

[22] *Id.* at 5.

[23] Vermeule, *supra* note 1, at 1103. Interestingly, Freund and Frankfurter were already debating the meaning of U.S. administrative law in the early twentieth century. Freund

Schmittian [is that] *the exception cannot, realistically, be banished* from administrative law; exceptions are necessarily built into its fabric."[24] He explains:

> At the heart of the system of administrative rules are law-free zones and open-ended standards. When the intensity of review under these standards becomes sufficiently low, grey holes arise. I want to call a legal scheme like the one I have imagined a 'Schmittian law,' and to say that a lawmaker who would create it is usefully described as a 'Schmittian lawmaker.' And then my claim is that American administrative law quite closely resembles this law, and that the legislators, presidents, judges, and other actors who created the structure of American administrative law acted (jointly) as Schmittian lawmakers.[25]

Black holes, according to Vermeule, are created through Administrative Procedure Act (APA) exclusions. Such holes arise with questions regarding definitions of "agency"[26] and "agency action,"[27] exceptions for "military or foreign affairs functions,"[28] and issues that are "committed to agency discretion by law."[29] Vermeule's main point is that exclusion from review under the APA "is always an important step toward the creation of a legal black hole, especially for statutory claims."[30]

With regard to grey holes, Vermeule argues, "quite ordinary administrative law doctrines, such as 'arbitrary and capricious' review of agency policy choices and factual findings, function as grey holes during times of war and real or perceived emergency."[31] These doctrines are potential *grey* holes because "even when the parameter is adjusted down to near zero—even when the intensity of review is very weak—the facade of lawlikeness is preserved."[32] To demonstrate this point, Vermeule focuses on federal appellate cases decided after 9/11 that involved issues directly or indirectly related to national security. He concludes, "after 9/11, administrative law has incorporated substantial grey holes that are integral to its structure" by relaxing

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attempted to import *Rechstaat* to the United States, while Frankfurter argued for broad administrative discretion. Freund's approach is close to what I have called the scientifically-structured approach, and Frankfurter's approach is close to the theistically-structured approach. *See* Daniel R. Ernst, *Ernst Freund, Felix Frankfurter, and the American Rechtsstaat: A Transatlantic Shipwreck*, 1894-1932, 23 STUD. AM. POL. DEV. 171-88 (2009).

[24] Vermeule, *supra* note 1, at 1104 (emphasis added).

[25] *Id.*

[26] *Id.* at 1107-10.

[27] *Id.* at 1109-12.

[28] *Id.* at 1112-13.

[29] *Id.* at 1113-15.

[30] *Id.* at 1117. Vermeule goes on to explain that "[b]ecause the APA is the only general review mechanism in the administrative state, exclusion from its coverage remits the party challenging administrative programs or conduct to finding some special review mechanism. . . ."

[31] *Id.* at 1118.

[32] *Id.*

"the intensity of judicial review of executive action to the point where review is more apparent than real."[33]

Vermeule's legal holes theory is both descriptive and normative. He argues that legal holes are necessary and inevitable, and that there must be spaces within the legal order where executive power is exercised in a lawless manner.[34] He criticizes those who seek to eliminate legal holes by filling them in with law. As he explains,

> Legal black holes and legal grey holes are not confined to Guantanamo Bay, or to Kafkaesque literary nightmares about sham adjudication. They are integral to the administrative state, and can be observed on location in the federal courts of appeals after 9/11 . . . Theorists of the thick rule of law are entirely correct that legal black holes and grey holes are best understood through the lens of Carl Schmitt's view of emergencies, law, and the state. They are only wrong in thinking that anything can be done about this state of affairs.[35]

Legal holes, according to the passage above, are not primarily about K who wakes up one day to find out that he is under a mysterious criminal investigation for which he must draft his own indictment.[36] Nor are legal holes primarily about a detainee held without trial at Guantanamo Bay. Legal holes are not oddities at the fringe of the legal system. They are "inevitable; no legal order governing a massive and massively diverse administrative state can hope to dispense with them." They are not the exception—they are the rule that holds the system together. Or to use Schmitt's expression, legal holes are the core of politics.

Notably, this approach to the significance of the exception is distinguishable in scope and nature from Hart's "problems of the penumbra" exemplified in his famous "no vehicle in the park" hypothetical. According to Hart, for every legal rule "there must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out."[37] Do bicycles count as prohibited vehicles under the "no vehicle" rule? What about toy vehicles? In penumbral situations, Hart explains, "the classifier must make a decision which is not dictated to him."[38] And "if a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbral area cannot be a matter of logical deduction."[39] In the penumbral situation, judges must necessarily

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[33] *Id.* at 1118-19.

[34] *See also* John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210 (2004) (claiming that dualism, the constitutional suspension of law through law, which creates an exceptional regime alongside the regime of ordinary law, is a universal feature of the "nonabsolutist western legal tradition").

[35] Vermeule, *supra* note 1, at 1149.

[36] FRANZ KAFKA, THE TRIAL (Willa & Edwin Muir trans., Schocken 1992) (1925).

[37] H.L.A. Hart, *Positivism, Law and Morals*, *in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 49, 63 (1983).

[38] *Id.*

[39] *Id.* at 64.

legislate,[40] and therefore "we can say laws are incurably incomplete and we must decide the penumbral cases rationally by reference to social aims."[41]

Despite some shared observations, Hart's problem of the penumbra differs substantially from Vermeule's approach to "legal holes." Both Hart and Vermeule share the insight that legal uncertainty is sometimes inevitable. They do not, however, share the same view on why and to whom this uncertainty matters. While Hart explains that uncertainty results from the fact that language can never be conclusive, he insists that moments of legal uncertainty are exceptional and rare. Hart is therefore not alarmed by statutory uncertainty as long as the core of settled law is larger than its realms of uncertainty (which are solved by judicial discretion). "Of course, it is good to be occupied with the penumbra," Hart observes.[42] "Its problems are rightly the daily diet of the law schools. But to be occupied with the penumbra is one thing, to be preoccupied with it another."[43] In contrast, as we have seen, Vermeule characterizes "legal holes" as the essential core of the administrative state. The legal system depends on legal holes because legal norms simply cannot respond to emergency situations. In emergencies, legal holes arise, and the executive branch should be authorized to respond without judicial or parliamentary intervention.

This Vermeulean account of the legal system can be vividly captured by the metaphor of a bagel. Legal holes are like the hole in a bagel. Though made of the same material (air), the hole inside a bagel is substantially different from the air outside it. The hole inside the bagel *is shaped by the bagel*. It comes into existence through the bagel. Its "holeness" is directly attributed to the bagel. Likewise, legal holes are directly attributed to the legal system. They are inside it. They are statutorily enacted by Congress in acts such as the APA and practiced by courts. They are therefore, as Vermeule tells us, "*legal* black holes and *legal* grey holes." They are legal, but at the same time they are not law. They are made of the substantive stuff that one may associate with lawlessness or chaos (because no legal rules guide them), but they are *inside* the legal system rather than outside of it.

C. Executive Supremacy

In the bagel's hole resides executive decision-making. The basic claim of the theistically structured approach is that the president and the executive branch should be the primary decision-makers in national security emergencies. The principle here is that when law "runs out" in legal holes, someone needs to decide what to do. And the most competent institution to make those decisions, according to the theistically structured approach, is the executive branch.

Vermeule and Eric Posner offer three main justifications for the primacy of the executive branch in legal holes. First, "the real cause of deference to government in times of emergency is institutional: both Congress and the judiciary defer to the

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[40] *Id.* at 65.

[41] *Id.* at 71.

[42] *Id.* at 72.

[43] *Id.*

executive during emergencies because of the executive's institutional advantages in speed, secrecy, and decisiveness."[44] Legislators and judges understand that in times of emergency "it is worthwhile transferring more discretion to the executive even if it results in an increased risk of executive abuse."[45]

Second, the legislative and judicial branches owe an "epistemic deference" to the executive branch. "Epistemically humble judges," according to Vermeule and Posner, "should not require statutory authorization for emergency action by the President."[46] Vermeule explains elsewhere:

> [e]pistemic deference is deference to expert judgment about whether a certain state of facts exists, while authority-based deference is deference to an agent empowered by some higher source of law to choose a policy or establish a rule, even or especially if there is no fact of the matter or right answer about which policy or rule is best under the circumstances . . . . [47]

Epistemic deference has to do with knowledge of certain facts to which the deferring judge allegedly has lesser or no access. Vermeule characterizes Holmes's approach to emergencies as "epistemic deference," and argues that the Holmesian version of "epistemic deference" correlates with the Holmesian view of the emergency as *a pure question of fact*. This means that emergencies are not social or legal events. They are objective/factual realities to which judges should epistemically defer.[48]

The notion of epistemic deference interestingly echoes the theistic structure of this approach. When performing miracles, God disregards the rules of nature by creating an unpredictable factual situation. In the miracle, God is both a law-breaker (in that he breaks the ordinary rules of nature) and a maker of an alternate reality. Vermeule views the executive declaration of an emergency as an epistemic act to which the other branches defer because the executive epistemically knows that "a certain state of facts exists." The factual knowledge regarding the existence of an emergency is avail-

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[44] ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 16 (2007); *see also* RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 35 (2006) ("Judges may lack confidence—and may be right to lack confidence—that they know enough about the consequences of particular measures taken for the protection of national security to be able to strike a proper balance. Judges think they know a lot about trading off liberty against safety in ordinary criminal cases. But they would admit they're not experts on national security in general or the terrorist threat in particular.").

[45] Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 893 (2007).

[46] Eric A. Posner & Adrian Vermeule, *Originalism in Emergencies: A Reply to Lawson,* 87 B.U. L. REV. 313, 316 (2007).

[47] Adrian Vermeule, *Holmes on Emergencies*, 61 Stan. L. Rev. 163, 169 (2008).

[48] *Id.* at 164. ("The main elements of Holmes's account are these . . . The existence and duration of an emergency are questions of fact . . . Judges will give epistemic deference to other officials—they will treat those officials' claims about the existence of an emergency as important information—but ultimately will decide for themselves whether an emergency exists.").

able only to the executive branch. Therefore the declaration of an emergency, like the divine miracle, is not a legal act but an epistemic one.

Third, Vermeule tells us that in the course of U.S. history courts have always deferred to the executive branch in emergencies. For example, during the Civil War, President Lincoln suspended habeas corpus, allowing the Secretary of War to detain 13,000 Northern civilians, most of them political opponents of the war. The arrests were either made without charges or were for vaguely defined offenses created by executive decrees. During World War II, approximately 120,000 Japanese were interned in camps on the basis of military orders.[49] Therefore: "[i]t is natural, inevitable, and desirable for power to flow to this branch of government . . . . Both Congress and the judiciary realize that they do not have the expertise or the resources to correct the executive during an emergency. Only when the emergency wanes do these institutions reassert themselves . . . . "[50]

In Vermeule's theory the sovereign is the president. The idea that society looks to its one sovereign in emergencies resonates with the theistic structure of this approach. In theistic traditions, that sovereign was God. Here again it should be reemphasized that this approach is theistic not because it argues that one should believe in the executive just as one may believe in God. Instead, the approach is theistic because *in its suggested structure* it locates the executive in the position that God holds in traditional theistic systems. Vermeule and Posner's claim here seems to be that psychologically, in times of crisis, it is natural to look up to and rally behind the leader. In theistic traditions, by analogy, the people in crisis have turned to God. According to the Old Testament, when the Israelites were fighting a war with the *Amalek*, Moses sat at a hill top with the "rod of God" in his hands. As long as his hands were lifted in the air, Israel prevailed, but when Moses let down his hands, *Amalek* prevailed.[51] In U.S. history, under the theistic view, it is the president and the executive branch to which the people psychologically look in times of crisis.

In sum, the theistic-structured approach views the legal system as analogous to certain theistic systems in which God can suspend the ordinary rules of nature through miracles. This approach views legal holes as inevitable and necessary in modern nation-states. It envisions the legal system as a bagel, and it locates sovereignty in emergencies in one particular branch of government: the executive branch.

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[49] *See also* Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755, 781-82 (observing that "the Court tends to uphold arguably unconstitutional detentions during national security emergencies, deferring to the Executive's affirmations of the necessity of detentions").

[50] Posner & Vermeule, *supra* note 44, at 4.

[51] Exodus 17: 8-12 ("Amalek came and fought with Israel at Rephidim. Moses said to Joshua, 'Pick some men for us, and go out and do battle with Amalek. Tomorrow I will station myself on the top of the hill, with the rod of God in my hand'. . . . Then, whenever Moses held up his hand, Israel prevailed; but whenever he let down his hand, Amalek prevailed.").

II. Law As Science

Under the scientifically-structured approach, legal holes are not necessary. They are dangerous. The key premise is that "there is a substantive conception of the rule of law that is appropriate at all times."[52] Among others, two legal scholars who stand for this approach are Hans Kelsen (in the early twentieth century) and David Dyzenhaus. They disagree with the theistically structured approach on all three counts. First, they argue that legal systems are and should be scientific in the sense that they can and should resemble the laws of nature. Second, they view legal holes as dangerous to legal systems and as a real threat to the rule of law. Third, they view the "rule of law" (rather than the executive branch) as the supreme sovereign in emergencies.

A. Law's Analogy to Nature

Some have analogized the science of law to the natural sciences. Hans Kelsen, for example, argued that both law and science follow similar *structures*:

> The fundamental form of the law of nature is the law of causality. The difference between the rule of law and the law of nature seems to be that the former refers to human beings and their behavior, whilst the latter refers to things and their reactions. Human behavior, however, may also be the subject-matter of natural laws, insofar as human behavior too, belongs to nature.[53]

Here Kelsen equates the "subject-matter" of the rule of law and the laws of nature. He writes that the behavior of humans and the behavior of things can be covered by a comparable set of principles mainly because human behavior too "belongs to nature."

Kelsen notes a difference between human laws and laws of nature, however, in that the two systems connect their elements in a different manner:

> The rule of law and the law of nature differ not so much by the elements they connect as by the manner of their connection. The law of nature establishes that if A is, B is (or will be). The rule of law says: If A is, B ought to be . . . . [T]he principle according to which natural science describes its object is causality; the principle according to which the science of law describes its object is normativity.[54]

In laws of nature, "if A is, B is." This means, for example, that if an apple disconnects from a tree ("if A is"), it will fall downwards at a predictable speed ("B is"). Under the "rule of law," in contrast, "[i]f A is, B ought to be." For example, if A breaches a duty of care towards B who then suffers an injury attributable to that breach, and A cannot demonstrate legal defenses ("if A is"), then A will have to com-

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[52] David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV 2005, 2037 (2006).

[53] HANS KELSEN, GENERAL THEORY OF LAW AND STATE 50 (1945).

[54] *Id.*

pensate B for the losses suffered ("B ought to be"). Namely, natural science operates on a principle of causality, whereas the "science of law" prescribes normativity.[55]

For the purposes of this essay, the most important implication of Kelsen's analogy is that law, just like nature, *has no exceptions*. In nature, A will *always* cause B, with no exceptions. The apple will always fall. The causal connection of the elements (the apple and the ground) is constantly present. Likewise in law, if A is, B *always* ought to be. If A has breached her duty of care towards B, B has been injured, and A can demonstrate no defense, then A will *always* have to compensate B. The normative connection between the elements is always present. Kelsen notes that "usually, the difference between law of nature and norm is characterized by the statement that the law of nature can have no exceptions, whereas a norm can."[56] This distinction, however, is "not correct." Rather, according to Kelsen "there can be no exceptions to a norm. The norm is, by its very nature, inviolable."[57]

B. The Legal System as a Roll: The Danger of Legal Holes

The Kelsenian idea that "there can be no exceptions to the norm" is currently voiced in the scholarship of David Dyzenhaus, who has asserted that "if we are to answer Schmitt's challenge, we have to be able to show that, contrary to his claims, *the exception can be banished from legal order.*"[58] Dyzenhaus explains that

> one succumbs to [Schmitt's] challenge when one accepts that a substantive conception of the rule of law has no place in a state of emergency, whether this is because one thinks that it is appropriate only for ordinary times or because one thinks that a thin conception is appropriate across the board.[59]

An answer to Schmitt must demonstrate that

> one can respond through law to emergencies without creating an exceptional legal regime—alongside the ordinary one—that will permit government to claim that it is acting according to law when it in effect has a free hand and will, the longer the exceptional regime lasts, create the problem of seepage of government outside of the rule of law into the ordinary legal order.[60]

Legal holes are legally created exceptions. Although Dyzenhaus views both grey and black holes as a great danger to the rule of law, he views grey holes—"space[s] in which the detainee has some procedural rights but not rights sufficient for him effectively to contest the executive's case for his detention"—as much more harmful.[61]

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[55] This understanding of science does not accurately describe some more recent modes of science, such as modern physics, which do not assume such regularity.

[56] KELSEN, *supra* note 53, at 46.

[57] *Id.*

[58] Dyzenhaus, *supra* note 52, at 2029 (emphasis added).

[59] *Id.* at 2037.

[60] *Id.* at 2029.

[61] *Id.* at 2026.

Dyzenhaus explains that the grey hole "is worse because the procedural rights available to the detainee cloak the lack of substance . . . . A little bit of legality can be more lethal to the rule of law than none."[62] The main problem with grey holes, according to Dyzenhaus, is that they offer the façade of legality to executive acts. In legal holes courts serve as rubber stamps for executive action. Thus "to try to maintain that law does play a role risks legitimizing whatever steps the executive takes. Even the barest forms of rule by law seem to evoke the idea that the rule is legitimate because it is in accordance with the law, that is, the rule of law."[63]

Dyzenhaus turns to Kelsen's "Identity Thesis" to support his own critique of the existence of legal holes. Dyzenhaus argues that "one needs to maintain Hans Kelsen's Identity Thesis: the thesis that the state is totally constituted by law."[64] This means that "when a political entity acts outside of the law, its acts can no longer be attributed to the state and so have no authority."[65] Consequently, legal holes cannot be part of the legal system because "a political entity acts as a state when and only when its acts comply with the rule of law."[66] And where John Locke proposed that "this power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, *is* that which is called prerogative,"[67] Dyzenhaus insists that "there is no prerogative attaching to any institution of state to act outside of the law."[68]

In this view, law is not (and should never be) a bagel. It has no holes. It is a roll. The rule of law is like the dough that persists throughout the roll with no exceptions. There is no space in the roll that lacks substantive dough. And if it does, it is no longer a roll. Just as any hole is by definition outside of the roll, legal holes, to use Kelsen's identity thesis, are not attributable to the state or its laws.

C. Law's Supremacy

In contrast to the theistic-structured approach that locates sovereignty in the president and the executive branch, the scientific approach identifies the supreme

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[62] *Id.*

[63] *Id.* at 2029.

[64] DYZENHAUS, *supra* note 1, at 199.

[65] *Id.*

[66] Dyzenhaus, *supra* note 52, at 2010.

[67] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 84 (1690) (emphasis in original) ("[F]or since in some governments the lawmaking power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to execution; and because also it is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public, or to make such laws as will do no harm, if they are executed with an inflexible rigour, on all occasions and upon all persons that may come in their way; therefore there is a latitude left to the executive power, to do many things of choice which the laws do not prescribe.").

[68] Dyzenhaus, *supra* note 52, at 2010.

sovereign as the *law itself.* Under the scientific-structured approach, all three branches are bound only by the rule of law:

> The issue is not how government and officials should react to an emergency situation for which there is no legislative provision. Rather it is whether, given an opportunity to contemplate how the law should be used to react to emergencies, it is possible to react in a way that maintains the rule of law project, an enterprise in which the legislature, the government and the judges cooperate in ensuring that official responses to the emergency comply with the rule of law.[69]

Interestingly, while one might expect that this approach would argue for robust judicial review in times of emergency, Dyzenhaus in fact conveys no faith in the ability of judges to make meaningful determinations in times of emergencies.[70] He suggests that "it would be better for judges to confess that in an emergency situation, they cannot uphold the rule of law."[71] Dyzenhaus argues that judges *must* be prepared to make such admissions.[72] Otherwise, judges become active participants in the dangerous creation of legal holes and in maintaining the façade of the rule of law.

In taking the position that law itself, and not any particular branch, is sovereign, the scientific-structured approach rejects the idea of Legislative Supremacy as well as Executive Supremacy. Put simply, in emergencies, Congress (like the executive branch) is very likely to lose touch with basic principles of the rule of law. Proponents of this approach have accordingly articulated a helpful distinction between "rule by law" and "rule of law." The former typically refers to a situation in which the legislature serves as a rubber stamp for executive action, and the latter — to a more robust version of legality that maintains the core principles the legal system. Congress might authorize a variety of state actions that contradict basic principles of the legal system. For example, Congress might authorize ongoing detentions of people determined by the executive to pose terrorist threats. Recognizing such legislative acts as legitimate would reflect a "rule by law" approach. But "rule by law" can contradict the "rule of law." Such situations typically arise when the executive or the legislature or both have ceased to cooperate in the rule of law project.[73] Therefore, Dyzenhaus maintains that "a concession that a statute is a valid one is not necessarily a concession that it has legal authority."[74] Under this view, "a law might be valid on the one hand and yet, on the other hand, have only a doubtful claim to legal authority because it overrides explicitly fundamental principles of the rule of law."[75]

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[69] *Id.* at 2037.

[70] Dyzenhaus points to historical decisions such as *Halliday, Liversidge and Korematsu*, where courts validated extreme governmental detention measures in times of war, as indicative that "the record of the judiciary is a problem." DYZENHAUS, *supra* note 1, at 63.

[71] *Id.* at 33.

[72] *Id.*

[73] Dyzenhaus, *supra* note 52, at 2037.

[74] *Id.* at 2035.

[75] *Id.*

In sum, the scientific-structured approach views the legal system as analogous to laws of nature in that its rules apply at all times with *no exception*. Hence this approach views legal holes as dangerous to liberal-democratic states. It envisions the ideal legal system as a roll rather than a bagel. Moreover, this approach resists ideas of any particular branch of government as sovereign in emergencies. The only sovereign under the scientific-structured approach is law itself.

III. Common Threads

Interestingly, the theistically structured approach and the scientifically structured approach, though opposed in principle and in contemporary political leanings, share at least three tenets. First, for different reasons they are skeptical about legislative supremacy in emergencies. Second, they agree that in both historical and present-day emergencies judges in fact defer to the president and the executive. Finally, they are both forms of what Walter Benjamin has called "law-preserving" violence.

A. Legislative Supremacy Skepticism

As we have seen, both approaches challenge the view that Congressional authorization is the ultimate test for legitimacy in times of war or emergency. Cass Sunstein has argued that "Democracy-promoting decisions are those that lead to explicit judgments by democratically accountable actors, above all Congress."[76] Therefore, according to Sunstein, the first of "three main ingredients of a minimalist approach" in emergencies is clear Congressional authorization.[77]

For different reasons, both the theistic-structured and the scientific-structured approach disagree with this definition of sovereignty and legality. The theistic approach, as discussed above, argues that in times of emergency the ultimate decision-maker is the executive branch and not Congress. The other two branches do and should defer to the executive branch mainly because only the executive branch can properly respond to emergencies. The scientific-structured approach mistrusts Congress for an altogether different reason. Congressional acts in emergencies, according to this theory, are likely to respond to pressure from the executive branch and produce statutes that do not conform to the rule of law. So under the theistic-structured approach, Congress is problematic because it is not institutionally

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[76] Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, at 48-9 (2004).

[77] *Id.* at 54 ("Courts should require clear congressional authorization before the executive intrudes on interests that have a strong claim to constitutional protection. As a general rule, the executive should not be permitted to act on its own. The underlying ideas here are twofold: a requirement of congressional authorization provides a check on unjustified intrusions on liberty, and such authorization is likely to be forthcoming when there is a good argument for it. A requirement of clear authorization therefore promotes liberty without compromising legitimate security interests.").

equipped to respond to emergencies, and for the scientific-structured approach, Congress's inadequacy stems from its tendency to defer to the executive branch.

Thus, by contrasting the theistic-structured approach with the scientific-structured approach, we can see that both approaches have moved (at least in times of real or perceived emergency) away from the prevalent Rousseauian understanding of the sovereignty of the *legislative branch* as the true representative of the "will of the people."[78] Both approaches concede that although in "normal" times legislative sovereignty prevails, (real or perceived) emergencies raise a need for another sovereign body. For the theistic approach it is the executive branch, and for the scientific approach it is the rule of law.

B. Judicial Review Skepticism

Interestingly, both approaches also meet in their critique of judicial competence in emergencies. For very different reasons both approaches agree that judges are not competent to handle emergencies, and cannot be relied on to do so. As we've seen, the theistic-structured approach argues that for a number of reasons judges do not have the *tools* to protect the nation in times of emergency. The scientific-structured approach, in contrast, doubts the judiciary's *courage* to seriously challenge the executive branch in emergencies and preserve the rule of law. Both approaches rightly point to major twentieth-century moments of crisis, where constitutional courts silently stood aside for the executive branch. It is thus not surprising that both approaches also agree that legal grey and black holes exist in all modern legal systems and that they are activated in times of emergency. In other words, they both agree that, descriptively, Schmitt was right and that judges cannot do much about this.

C. Law-Preserving Violence

A third shared characteristic of the two approaches involves their relation to legal violence. In *Critique of Violence*, Walter Benjamin describes a cycle of legal violence on which modern-legal democracies are based.[79] Benjamin identifies two types of legal violence that create modern legal orders. He calls these two types of violence "law-making" violence and "law-preserving" violence.[80]

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[78] Jean Jacques Rousseau, *On the Social Contract, in* THE BASIC POLITICAL WRITINGS 141, 162-165 (1762).

[79] Walter Benjamin, *Critique of Violence*, *in* REFLECTIONS 277 (1955).

[80] *Id.* at 283-84. It is interesting to consider Benjamin's distinction between "law-making" and "law-preserving" violence alongside Robert Cover's distinction between "world creating" and "world maintaining"—two different ideal typical patterns of forming legal systems. ROBERT COVER, *Nomos and Narrative*, *in* NARRATIVE, VIOLENCE AND THE LAW 95, 105-6 (1995) (1983) ("the first such pattern, which according to Karo is world-creating . . . [, suggests] a sense of direction or growth that is constituted as the individual and his community work out this implications of their law. . . . [T]he second ideal typical pattern, which finds its fullest expression in the civil community, is 'world maintaining' . . . . [I]n this model, norms are universal and *enforced* by institutions. They need not be taught at all, as long as they are

The main difference between the two types of legal violence is that law-preserving violence involves legal violence aimed at preserving the state or its legal order, and law-making violence involves attempts to challenge the state or its legal order and to replace it with an alternative legal order.[81] In moments of law-making violence, a legal system is shattered for a new legal regime to take over (such as in the American, French, and Russian Revolutions). As Robert Cover reminds us, "we too often forget that the leaders of the rebellion had certainly committed treason from the English constitutional perspective."[82] Law-making violence involves not only the actual physical violence that usually accompanies such revolutions, but also the shattering of the previous legal order. The newly created legal order attempts to preserve itself by protecting against law-making violence through its various law-preserving violence mechanisms — the army, the police, and the courts.

I argue here that, interestingly, both the theistic-structured and the scientific-structured approaches fall under Benjamin's conception of law-preserving violence, but assert different forms of law-preserving violence. In particular, the theistic-structured approach legitimizes *state violence as a means to preserve the nation*, and the scientific-structured approach *uses interpretive violence as a means to preserve a certain understanding of the legal system.* One approach (the theistic-structured approach) violently preserves the state, and the other (the scientific-structured approach) violently preserves its version of the law.

Under the theistic-structured approach, legal holes are necessary because they authorize state violence implemented by the executive branch. This violence can take forms such as indefinite detentions, torture, and other extreme security measures. This is law-preserving violence because its goal is the preservation of the nation in emergencies.

But the scientific-structured approach must also be understood as law-preserving violence. And it is especially important that we see this because the violence of this approach is much less apparent. Here we have violence through interpretation. The scientific-structured approach is "law preserving" in that it is concerned with preserving *a certain way of thinking about the law*. How can an approach that genuinely aims to limit state violence be violent itself? My claim is that the position that law is (or can be) a scientific system with no holes that can cover *all* human behavior assumes a

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effective. Discourse is premised on objectivity—upon that which is external to the discourse itself.") (emphasis in original). I intend to pursue these distinctions elsewhere.

[81] Jacques Derrida explains Benjamin's notion of "law-making violence": "what the state fears, the state being law in its greatest force, is not so much crime or robbery, even on the grand scale of the Mafia or heavy drug traffic . . . . The state is afraid of *founding* violence—that is, violence able to justify, to legitimate, or transform the relations of law, and so to present itself as having a right to right and to law . . . all revolutionary situations, all revolutionary discourses, on the left or on the right . . . justify the recourse to violence, by alleging the founding, in progress or to come, of a new law, of a new state." JACQUES DERRIDA, *Force of Law*, *in* ACTS OF RELIGION 230, 268-9 (2002) (1990).

[82] COVER, *Violence and the Word*, *in* NARRATIVE, VIOLENCE AND THE LAW, *supra* note 80, at 203, 209.

strict, universalist, and objective definition of law. Robert Cover's work on interpretation *as* violence may help illuminate this point. Cover writes,

> In the world of the modern nation-state—at least in the United States—the social organization of legal precept has approximated the imperial ideal type…we exercise rigid social control over our precepts in one fashion or another on a national level. There is a systematic hierarchy—only partially enforced in practice, but fully operative in theory—that conforms all precept articulation and enforcement to a pattern of nested consistency.[83]

Cover's main insight here is that in order to avoid multiplicity of legal meaning, *i.e.*, of different interpretations of norms, there is a strong tendency in U.S. law to perceive law in what he calls an "imperial mode." In this mode, "norms are universal and enforced by institutions,"[84] and "discourse is based on objectivity."[85] Claims of the scientific-structured sort, such as that the rule of law can and should respond to all situations, reflect law's "imperial mode." So the scientific-structured approach is violent not because it prescribes actual physical violence but because of the manner in which it claims authority. Furthermore, the scientific-structured approach denies that law sometimes "runs out" and that decision-makers sometime have to decide based on intuition.[86]

In sum, whereas the theistic approach seeks to *preserve the state* by creating the legal space for state violence, the scientific approach seeks to *preserve the law* by imposing its version of legality. Both approaches resist "law-making" violence—that is, violence that challenges the existing legal order. Both approaches are protective. Both perceive dangers and stand for different fundamental values: the theistic approach stands for the safety of the nation, and the scientific approach for the rule of law. If we add these values together—the preservation of the nation *and* its laws—we have the essence of law-preserving violence.

Conclusion

Emergencies are flash points for debates about the nature of law. Over the past decade two opposing approaches have promoted two possible understandings of how law can and should respond to emergencies. According to the theistically-structured

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[83] COVER, *supra* note 80, at 110.

[84] *Id.* at 106.

[85] *Id.*

[86] *Cf.* Duncan Kennedy, *Afterward a Semiotics of Critique*, 22 CARDOZO L. REV. 1147, 1158 (2001) ("Antinomianism is the idea that 'you can never rely on the law.' It means that as moral and political actors we make choices that cannot be justified according to the available principles that are supposed to govern that particular kind of choice, because it is 'in the nature' of the principles that they either contradict each other or 'run out' just when we need (and want) them most to tell us what to do. We have then to resort to inspiration or intuition.").

approach, the executive branch is and should be the primary decision-maker in emergencies. Legal holes serve as the legal mechanisms that authorize such executive action, and I have suggested that the legal system under the theistically structured approach can be imagined as a bagel: the executive branch operates in the bagel's hole under no legal constraints. The scientifically structured approach, on the other hand, has urged that the rule of law governs in emergencies, that all three branches are bound by the rule of law at all times, and that legal holes should be banished from the legal system. I have suggested that the legal system under the scientifically structured approach is analogous to a roll with no holes. Despite their differences, both approaches agree that these exceptions or holes exist and that states of emergency force us to address them.

In evoking the specter of the false emergency, however, Walter Benjamin's final response to Carl Schmitt's theory of the exception becomes a challenge to both approaches. As Benjamin warns,

> The tradition of the oppressed teaches us that the "state of emergency" in which we live is not the exception but the rule. We must attain to a conception of history that is in keeping with this insight. Then we shall clearly realize that it is our task to bring about a real state of emergency, and this will improve our position in the struggle against Fascism . . . . [87]

That "states of emergency" are in fact not exceptional at all—if examined from the point of view of the oppressed—has been the grim reality of many "emergency" regimes of the 20th and 21st centuries.[88] Benjamin warned that "states of emergency"—black holes, exceptions—are all catastrophic situations where state violence strips individuals of their humanity and exposes them to physical and other harms. In other words, Benjamin warned us about Schmitt's and Vermeule's legal holes and about legal systems that suddenly turn into bagels.

The solution, however, is not to assert that law must govern all situations. General, absolutist claims about the rule of law only shift the debate from one form of law-preserving violence to another. Thus we should begin to formulate responses that do not involve folding every exception back into the law.[89]

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[87] WALTER BENJAMIN, ILLUMINATIONS: ESSAYS AND REFLECTIONS 257 (Hannah Arendt ed., Harry Zohn trans., 1968).

[88] *See also* GIORGIO AGAMBEN, STATE OF EXCEPTION 2 (2005) ("Faced with the unstoppable progression of what has been called a 'global civil war,' the state of exception tends increasingly to appear as the dominant paradigm of government in contemporary politics.").

[89] In my next article, *Legalism and Decisionism in Crisis* (work-in-progress), I offer such a response in the context of current emergency powers debates.