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Bare life: asylum seekers, Australian politics and Agamben's critique of violence

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I argue here that we may gain insight into the political challenges posed by asylum seekers using terms supplied by Giorgio Agamben's analysis of the 'rotten ambiguity' of modern rule of law. Appealing to the language of human rights to address the status and suffering of would-be refugees is inadequate to the extent that it fails to interrogate (1) the terms on which 'belonging' and 'displacement' are politicised in the nation state and (2) the nihilistic form of modern law. I explore these limitations by locating Agamben's thought in relation to that of Schmitt, Benjamin and Arendt, and contrasting his account of the 'state of exception' in which we live with a perspective that would invite us to see human rights as redressing excesses of sovereign power. My discussion leads me to partially endorse Agamben's view that humanitarian concern for refugee entrenches deeply problematic aspects of the sovereign power of the nation state. I also argue, however, that we might think beyond his criticism of the nation state, to consider how democracy would need to be reconceived in order to allow the political claims of refugees to begin to be heard in their full force.

The camp as state of exception

The detention camps of Australia hold people who may or may not be 'genuine' refugees. While their applications for refugee status are processed, men, women and children are detained in conditions that range from the uncomfortable to the unsafe and intolerable. That 'they', as the responsible Minister often puts it, are referred to by number not name, is just one dehumanising aspect of their situation. Minimal legal representation is sometimes available but rarely facilitated. Allegations of brutality and racism on the part of security officers are common but go largely unheeded by the government. Despite criticism by respected and authoritative international agencies following inspections of these camps, the Australian Government refuses to accept that there are reasonable alternatives to its detention policy. Indeed, it positively attempts to reap political benefits from its harsh policy towards people who are essentially assumed to be guilty until they can prove themselves innocent. And even at this point of proof, refugees are for the most part offered not citizenship, but the provisional accommodation of temporary protection visas.

How might we understand the political space articulated in Australia by the presence and the practice of these detention camps, neither prisons nor places of protection, neither entirely within nor entirely outside the rule of law? The Italian philosopher Giorgio Agamben invites us to take a very serious view of such phenomena, which are also proliferating in Europe. He describes the space of the camp — by which he evokes at once the concentration camp, the refugee camp and the detention camp — as 'the materialization of the state of exception and ... subsequent creation of a space in which bare life and juridical rule enter into a threshold of indistinction' (Agamben 1998, 174). Although the terms
Agamben uses are often difficult to grasp, I shall argue here that they can offer us fruitful ways of thinking about the significance of the so-called refugee crisis and of the provisions made by governments such as that of Australia in relation to asylum seekers. Here I explore Agamben’s claim that it is important to look at what remain the special difficulties of those who, for whatever reason, seek to leave the nation state to which they are deemed to properly ‘belong’, in terms that question the forms of sovereignty under which we all live.

This opens a set of questions that frame my discussion. What should ground our sense of concern over the existence of the camp and thus guide the character of our response? Do humanitarian, juridical or political concerns necessarily cohere? And how should we translate an immediate sense of outrage or revulsion at what is taking place in the camp into an argumentative claim about why what happens there matters for ‘us’, where the ‘us’ might itself be a controversial category to bring into the equation?

Human rights without exception

The language most likely to be used in articulating the sense of wrong here is that of human rights. Human rights lie at the core of the liberal-democratic aspiration to secure equal treatment for all under the rule of law and they appear to combine humanitarian, juridical and political concerns almost seamlessly. Savitri Taylor thoughtfully reminds us of the words of Thomas Paine: ‘He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself’ (Taylor 2002a, 396).

Focusing in particular on the way in which the stranger as refugee has come to be presented politically as a security threat through the conflation of this figure with that of the stranger as terrorist, she argues that:

The best way for the members of a liberal society, living with the post-September 11 blurring of the boundary between normalcy and emergency, to safeguard the rights to which they have become accustomed is by insisting that the principle of proportionality be applied in all areas of national security activity. In the present context, this means insisting on a case-by-case demonstration that the cost of procedural restrictions on the individual asylum-seeker is not disproportionate to the seriousness and likelihood of the danger to Australia of permitting that particular individual in those particular circumstances access to the usual procedural safeguards. If Australians wonder how arbitrary denial of procedural safeguards to a non-citizen, the obvious ‘other’, can be a threat to them, consider this: the ‘Australian community’ is not a natural and immutable group. Our history demonstrates that the outer limits of our sense of community contract in the face of war and other political crises [Taylor 2002a, IV].

Taylor acknowledges here that, as Agamben puts it, a ‘state of exception’ is at imminent risk of prevailing in our security conscious world and that refugees are bearing much of the brunt of this new world order which goes by the name of the ‘war on terror’. However, unlike Agamben, Taylor makes a powerful case for responding to the ways in which ‘liberalism in practice falls short of its aspirations’ with a renewed insistence on Enlightenment values (Taylor 2002b, para 6). Her defence of the principle of human rights is politically hard headed, invoking not sheer generosity towards others but rather the recognition that the very existence of human rights requires solidarity in their defence; that human rights know no boundaries or differences and thus as in Hegel’s image of ethical community, what damages one damages all. In this case, however, it is less ethical community than the rule of law which demands a consistent application if it is to be maintained at all. We are each at risk by the establishment of any precedent that fails to respect the right of any individual, for the rule reaches beyond that instance to re-establish itself as the uniformity of human wrong.

What happens in the detention camp would, by this argument, matter to ‘us’ because we are jointly responsible for maintaining precedents of just conduct, lest injustice become the rule. As human rights stand or fall together, our true security as subjects of such rights requires us to determine, on a case by case basis, what each individual is owed by law in terms of protection. Here competing claims as to the nature of that security (the security of the individual under the rule of law versus the security of that order as a whole when under threat from without) and claims regarding whose protection is most importantly at stake at any time (‘anyone at all’ or ‘us’), must be further weighed according to an open ended question as to the identity of the Australian community which seeks to protect itself. As that community ‘expands’ and ‘contracts’ its understanding of who is to be included as a subject whose claim upon it is to be taken seriously, the boundaries between ‘us’ and ‘them’ which have always marked not only the sense of community but also the most blatant violence to the principle of equal consideration, themselves shift and re-form.
Taylor, then, notes certain political phenomena of the contemporary world that, as we will see, are also insisted upon by Agamben; but what she remarks here is the need for a constant vigilance to keep the ‘line dividing good and evil’ less to the evil side, more to the good, without considering this struggle to be one that might be wholly won, but not, perhaps, wholly lost. Although there are competing claims to be judged in considering questions of security, belonging, entitlement and so forth, these can and must be fairly judged without supposing that the difficulties of so doing reveal anything inherently problematic in the rule of law or principle of national sovereignty. Indeed, there is a strong sense here that we either judge according to well established precedent and the criteria provided by human rights or we give way to unlimited violence and arbitrariness. According to Taylor, to accept that we live in ‘the state of exception’, or that normalcy has so far blurred with exceptionality that they can no longer be readily discerned, is to give in far too readily to what the governments united in a ‘war on terror’ would like us to think; and she is sharply critical of Carl Schmitt (Taylor 2002b, para 10, 2002a, IV, Schmitt 1932, 1985) from whom, in part, Agamben draws the political language he uses to analyse the camp as ‘the materialization of the state of exception’. For Taylor, it seems, it is essential that we continue to view and respond to the current harsh treatment of refugees and those detained under suspicion as exceptional circumstances, upon which the ‘normal’ rule of a humanely interpreted order of rights might be brought to bear.

In contrast with Taylor’s claims, what I shall present here is a partial defence of Agamben’s use of such terms as ‘state of exception’ in bringing to light aspects of the situation of refugees and the relation that the existence of the space of the camp bears to the wider political body of the nation. In particular, I shall seek to clarify how his claims about the refugee as a key political figure of our times call into question the adequacy of a language of human rights to address the situation of the ‘unlawful immigrant’, one whose problematic relation to the rule of law is thought by Agamben to exemplify a crisis we cannot ward off by recourse to Enlightenment values. In what follows, then, I shall first elaborate something of the structure of Agamben’s thesis and then examine what it allows us to bring to prominence in the current Australian Government’s policy towards asylum seekers.

Inclusive exclusion: entwining good and evil

It may be helpful to begin by citing a range of historical examples given by Agamben to indicate the breadth of the concept of the ‘camp’ as a means of articulating the character of a particularly contemporary political space:

The stadium at Bari into which Italian police in 1991 provisionally herded all illegal Albanian immigrants before sending them back to their country, the winter cycle racing track in which the Vichy authorities gathered the Jews before consigning them to the Germans, the Konzentrationslager für Ausländer in Cottbus-Sielow in which the Weimar Government gathered Jewish refugees from the East, or the zones d’attente in French international airports in which foreigners asking for refugee status are detained will then all equally be camps. In all these cases, an apparently innocuous space (for example, the Hôtel Arcades in Roissy) actually delimits a space in which the normal order is de facto suspended and in which whether or not atrocities are committed depends not on law but on the civility and ethical sense of the police who temporarily act as sovereign (for example, in the four days during which foreigners can be held in the zone d’attente before the intervention of the judicial authority) [Agamben 1998, 174].

A number of theses are compressed into this set of examples which links apparently ‘innocuous’ spaces to the clearest paradigms of evil in our time. All are characterised as situations that are in some sense extralegal and yet, as such, reveal what Agamben seeks to characterise as a crucial aspect of law — its capacity to apply ‘even in withdrawing’ (1998, 28). What Agamben refers to as ‘bare life’ is life exposed to a particular potential for violence occurring in what is most often considered as a ‘state of exception’ in which the sovereign power of decision is exercised beyond normal juridical processes. Following Schmitt, however, the ‘exceptional’ moment of extrajuridicality is deemed the foundation of all ‘rule of law’. A similar double move situates ‘bare life’, first as that which is excepted from the rights of citizenship but then second as that which is included in citizenship, according to a logic Agamben dubs that of ‘inclusive exclusion’. An appreciation of this double structure of argumentation is essential to interpreting Agamben’s thought.

Thus we may notice, first, that ‘bare life’ lacks the protected political status conferred by citizenship. In this context, Agamben reminds us that the action undertaken against the Jews under the German Third Reich was from start to finish conceived of entirely as a police operation and that Jews were never
'processed' until they had been fully stripped of their status as citizens (Agamben 1998, 166ff). Internment was classified as a preventative police measure that allowed individuals to be taken into custody independently of any criminal behaviour, solely to avoid danger to the security of the state. Yet in the above cited passage, Agamben is clearly also resisting the urge to view the Nazi practice as an aberration of the modern nation state: an exception that ought, if anything, to prove the validity of the rule of liberal democracies guided by respect for human rights. He seeks to argue, second, that a potential reduction to bare life is implicit in modern citizenship; indeed that the human who becomes citizen is already 'bare life', given that the principle of birth, or a beginning of 'bare life', grounds entitlement to participation in the nation state. In a reading of the French Declaration of the Rights of Man and Citizen of 1789, Agamben remarks that it is crucially unclear whether 'the two terms homme and citoyen name two autonomous beings or instead form a unitary system in which the first is always already included in the second' (1998, 127). Agamben claims that where a problematic gap appears between the principle of birth and that of the national identity of the citizen, as happened in the 'lasting crisis following the devastation of Europe's geopolitical order after the First World War, Nazism and fascism appear; that is, two properly biopolitical movements' (1998, 129). Agamben's thought is focused upon such moments of crisis, when good and evil begin to appear as continuous with one another.

Similarly, then, the camp is the 'nomos of the modern' because in and through it, at this time of crisis, 'the exception becomes the rule' (1998, 175). The camp is exemplary of the biopolitical logic delineated above, and like 'bare life', it must be described in double terms as at once rule and exception. The camp is thus the 'new hidden regulator of the inscription of life in the order' and 'sign of the system's inability to function without being transformed into a lethal machine' (1998, 175). The camp is both regulator and terminator. Such irreducible complicity of law with violence is, in many ways, the starting point of Agamben's reflections, as I shall outline in the next section. It leads him toward the thought that law takes 'life' as its object, so that the 'bare life' that inhabits the camp and, as such, exists apparently isolated from the wider citizenry, is not an isolatable property or condition, but rather a 'threshold in which law passes over into fact and fact into law, and in which the two planes become indistinguishable' (1998, 171). Where 'bare life and juridical rule enter into a threshold of indistinction', 'politics becomes biopolitics and homo sacer is virtually confused with the citizen' (1998, 171); the modern space of politics is thus one in which, given 'zones of indistinction', a constant effort bears on the making of distinctions that will secure rights that can be imagined to apply in some regular and universally valid fashion. This is an effort Agamben reads as flawed because it fails to recognise the existence of a deeper issue, which pertains to the very inability of the modern nation state to isolate 'bare life', to exclude life exposed to arbitrary violence without recourse, as if it were antithetical to the life of the citizen. This inability matters because, Agamben will argue, sovereignty bears an essential relation to such 'exceptional' violence which can never fully be transmuted into the regular system, beyond decision and exception, in which the rule of law finds its imaginary form.

In answer then to the question as to why the existence of the camp should matter to 'us', Agamben evokes an ontological issue rather than a principled concern to preserve the universal applicability of those rights designed to protect each of us. His question is: what does the existence of the camp, the very fact of its possibility in all its many forms, show about us as a biopolitical form of life? The difference here from something like Taylor's approach is highlighted in his comment on Auschwitz, which he clearly intends to bear a more general import for the camp conceived as 'the most absolute biopolitical space ever to have been realized':

The correct question to pose concerning the horrors committed in the camps is, therefore, not the hypocritical one of how such crimes of atrocity could be committed against human beings. It would be more honest and more useful to investigate the juridical procedures and deployments of power by which human beings could be so completely deprived of their rights and prerogatives that no act committed against them could appear any longer as a crime [1998, 171].

Agamben's point — which takes him beyond a familiar response to the moral wrong of the camp, conceived as a wrong against an ideal rule of equal and respectful treatment of human beings — is that the very existence of the camp reveals a sphere of possibility in the modern state whose apparently 'exceptional' status we should call into question. The camp is conceived precisely as a 'hybrid of fact and law in which the two have become indistinguishable' (1998, 170), forming a constitutive limit to Enlightenment political thought. To question here is to reflect on the very notions of humanity, citizenship and the rule of law within the modern nation state which are supposed to define the camp.
as exceptional. Thus, for Agamben, to turn only to human rights in addressing the situation of refugees, without also attempting to think beyond them, is to fail to recognise that:

the fates of human rights and the nation-state are bound together such that the decline and crisis of one necessarily implies the end of the other. The refugee must be considered for what he is: nothing less than a limit concept that radically calls in question the fundamental categories of the nation-state, from the birth-nation to the man-citizen link... [1998, 134].

I shall now turn to Agamben's elaboration of this set of claims. It is clearly highly provocative to link the crimes committed in the concentration camps of the Nazi regime with contemporary responses to those who claim they are refugees. Nevertheless, Agamben's critical political ontology raises important questions about Australia's policy of mandatory detention of 'unlawful immigrants'. In particular, it reveals certain difficulties involved in relying on a language of human rights to object to this policy: but it will do so only to the degree that we accept some of Agamben's presuppositions about the 'nihilism' of modernity: a nihilism he finds at work in many of the political landscapes we currently inhabit.

**Human rights and modern nihilism**

Agamben's thought that the camp is the 'materialization of the state of exception' points to the exercise of violence which lies at the heart of the enforceability of the rule of law, raising issues that, in turn, must be linked to the question of law's authority. Agamben suggests that the 'state of emergency has become the rule' because 'all power, whether democratic or totalitarian, traditional or revolutionary, has entered into a legitimation crisis in which the state of exception, which was the hidden foundation of the system, has fully come to light' (Agamben 1999, 170, contrast Schmitt 1985, 15, Benjamin 1968, 257). Agamben here follows a trajectory of thought implicit in Benjamin's *transformation* of Schmitt's thesis that sovereign power is an exercise of juridical power at once inside and outside the law into a thesis about the contemporary crisis of legitimation or 'nihilism'. To set the liberal principle of consistent application at the heart of the rule of law against the potentially dictatorial power exercised in decision on the state of exception is not an option for Agamben because this response can only address the legitimation crisis of the modern world in a circular fashion. Such circularity is most clearly portrayed in Habermas' demonstration of the internal relation of the rule of law and democracy, in which the 'substance' of a deliberatively conceived popular sovereignty is presented as lending body to the formal rule of law, while the rule of law provides the conditions under which individual protection can support universal security (Habermas 1998). This type of response to the modern problem of legitimation, which might also be conceived in terms of the proportional consideration of the interests of a 'people' and those of 'individuals', is most problematic for Agamben at the very point at which it appears to secure equal and inclusive consideration of all human beings as ends in themselves.

In his *Critique of Violence*, Benjamin (1997) argues that a 'rotten ambiguity' lies within the modern rule of law, since while it justifies its use of violence as means to legitimated ends, such ends can never be fully separated from means. This ensures a perpetual slippage between law as a means to preserve the end of human dignity and law as means whose justification lies in the self-preservation of the very sovereignty of law — its capacity to determine justice and to exercise its 'force' accordingly. Although the principle of respect for humanity as end in itself can provide a 'minimal programme' for the critique of a legal order, in the end it is unable to address the specific problem posed by the self-affirmation of that legal order as sovereignty. This problem is exhibited particularly in 'police actions' that enforce the law in a way that can as well be understood as lying outside as within the legal order (Benjamin 1997, 287). Where issues of national security are held to be at stake, the principle that the legal order serves the preservation of each individual as 'end in themselves' can be turned to legitimate any kind of means (Benjamin 1989, 283). The worry is that the very logic of end-means thinking at work in seeking to ensure that law operates as a reasonable means to valid ends is ultimately politically impotent where structures of legitimacy themselves are in the process of collapse.

Agamben's reflections on the camp as 'nomos of the modern' locate the crisis of the nation state, involving the problem of dealing with massive numbers of refugees, in a constellation of contemporary sites of 'rotten ambiguity'. These sites are linked, on the one hand, to the relation between the modern democratic nation state and *ethnicity* taken as a principle of a people's unity and, on the other hand, to the emphasis on the principle of human *dignity* which lends shape to those universal human rights that aim to transcend and regulate ethnic particularity. Two points, then, are key: (1) his reflections on the existence of camps highlight the importance of a crisis affecting the *imaginary* basis of the modern nation-state in the principle of ethnic identity; (2) his characterisation of *homo sacer* develops

Benjamin’s reflections in the ‘Critique of Violence’ concerning the modern principle of the ‘sacrality of life’ — human life’s sacredness or inherent dignity — and follows in raising questions about how far such a notion can take us in offering a critique of violence.

Agamben aims to demonstrate that ‘sacredness’ can be understood with reference to the ‘homo sacer’ of Roman Law. The subject of law is then cast not as the inviolable moral individual possessed of Kantian dignity but one whose life is ‘sacred’ in the sense of being exposed to violence without recourse. ‘Sacred’ life suffers, like the ‘human’ of human rights, from a fundamental equivocality, introducing into law a ‘zone of indistinguishability’ (Agamben 1998, 8). Paradoxically, it is not simply the privileged status of ‘life’s sanctity’ we must consider as being that which orients the respect afforded to human life but also, at once, the radically exposed status of the sacred man, one who stands outside the provisions of law. ‘Sacred life’ is simply that in relation to which a legal order defines itself, affirming its pure sovereignty such as. Crucially, what is excluded in founding that order (the outlaw, terrorist or refugee, or the ‘sacred man’ in the Roman sense) does not bear a merely external relation to what is ‘inside’, but is, rather, constitutive of sovereignty. The (non)status of homo sacer or one to whom the law applies in withdrawing — by suspension of the juridical order’s validity — does not stand, therefore, in a simple relation of exteriority to the political community, but is an ‘inclusive exclusion’.

The important consequence for our purposes here is that homo sacer occupies a luminal zone that may either give form to the political community or threaten it with the incursion of a zone of indistinction in which all stand under the sovereign ‘ban’ — a zone in which all stand guilty even if not accused. It is the latter incursion that characterises contemporary times in which all human life is deemed ‘sacred’ and where this metaphysics translates into the discourse of human rights. We now all stand under what alleges to be a universal and comprehensive law. Yet for Agamben, Kafka’s novel, The Trial, with its hero’s exposure to the absolute force of law without any specific determination of crime or culpability, displays the underside of this situation. The echoes of the Kafkaesque in the contemporary experience of ‘unlawful immigrants’ are inextricably bound up with a world of juridico-political destitution, as law’s legitimacy retreats into the pure formality of the abstract universal.

The refugee as limit concept

Agamben holds that the refugee is ‘nothing less than a limit concept that radically calls into question the fundamental categories of the nation state’ (Agamben 1998, 134). The refugee takes on a fundamental political importance within a context in which a key legitimating form in modernity — the nation state — is imagined to be collapsing.

On this point it is important to note the affinities and differences between Agamben’s thought and that of Hannah Arendt, in analysing the manifest difficulty of applying human rights to those who lack the protection afforded by citizenship and membership in a particular state. Regarding the treatment of stateless persons in the period between the two wars, Arendt comments in The Origins of Totalitarianism that the notion of human rights here lacked force in a manner she links to the minimal characterisation of a person that is conveyed by being ‘merely human’. This human quality, posited as ‘all’ that a person is, readily transmutes into a certain invisibility, a certain being of no account.

The conception of human rights based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships — except that they were still human [Arendt 1951, 290-295].

In her own work, Arendt addresses this issue by arguing that underwriting human rights there must always be the guarantee of political capacity — the ‘right to have rights’. At first reading, Agamben here seems to echo Arendt in claiming that humanitarian responses to refugees might submerge other responses, and turn attention away from political issues, since the status of the subject of ‘merely’ human rights transcends them. Thus he writes:

The separation between humanitarianism and politics that we are experiencing today is the extreme phase of the separation of the rights of man from the rights of the citizen. In the final analysis, however, humanitarian organizations ... can only grasp human life in the figure of bare or sacred life, and, therefore, despite themselves, maintain a secret solidarity with the very powers they ought to fight [Agamben 1998, 133].
Agamben, however, is sceptical about the Arendtian idea that political capacity can only reside in the participation of a citizen in a republic of peers. He responds to what Arendt identifies as the problem of the equivocal status of the ‘fully human’, but thus ‘merely human and no more’ that marks the discourse of human rights, not by attempting to envisage a political form beyond the nation state in which the ‘right to have rights’ might be grounded, but, on the contrary, by articulating a radical critique of the modern language of rights. The second line of thought he pursues, therefore, is one that suggests that not only the lack of viable political rights for refugees but even the rights of citizens themselves must be understood as ultimately constructed upon a crucial conception of the human as ‘bare’ or ‘sacred’ life, the ‘inclusive exclusion’ of which is the ‘secret’ premise of sovereign power. Agamben agrees with Arendt that there is a significant exclusion of ‘bare life’ from the political body of the citizenry and here, accordingly, ‘merely human’ rights reside. Yet he goes beyond this thought to claim that even within the separation of the rights of man from the rights of the citizen, a problem will arise for any attempt to link the ‘right to have rights’ to an imagined participation in a notional republic. Here, again, everything most original and controversial in Agamben’s thought occurs in the second gesture of analysis. The political impotence of appeals to human rights relate to what Agamben calls the biopolitical character of sovereignty, the entwining of sovereignty with a power over life and death that becomes in modernity the power to ‘make survive’ that he detects in all humanitarian concerns.

‘Sanctity of life’ and ‘dignity’ are not metaphysical properties of the human, nor ends in terms of which certain means might be justified, but serve a complex biopolitical function, in which ends and means pass into one another. This is the point at which Agamben focuses his critique of rights:

It is time to stop regarding declarations of rights as proclamations of eternal, meta-juridical values binding the legislator (in fact, without much success) to respect eternal ethical principles, and to begin to consider them according to their real historical function in the modern nation-state. Declarations of right represent the original figure of natural life in the juridico-political order of the nation-state. The same bare life that in the ancient regime was politically neutral and belonged to God as creaturely life and in the classical world was (at least apparently) clearly distinguished as zoé from political life (bios) now fully enters into the structure of the state and even becomes the earthly foundation of the state’s legitimacy and sovereignty [1998, 127].

Polemical as these claims no doubt are and open as they are to contestation from a variety of perspectives which do not conceive of rights as ‘eternal, meta-juridical values binding the legislator’, the useful point they allow Agamben to open out concerns the relation between declarations of rights and the nation state. In a zone of indistinction, the difference between those who are ‘men and citizens’ as opposed to those who are merely ‘human’ is repeatedly and insistently redelineated as the task of modern biopolitics par excellence. It is here, in this zone of rotten ambiguity that Agamben would invite us to consider the contemporary plight of the world’s asylum seekers. The refugee is a limit concept because of a crisis posed for sovereignty by the proliferation of displacements of an ethnic particularity that can no longer be contained within the abstract formalism of human rights.

**What does Agamben help us to see?**

A key aspect of the Enlightenment imaginary is its assumption of a uniform justice that might in principle extend indefinitely to all the peoples of the world. Benjamin’s thought about the law’s ‘rotten ambiguity’ in relation to violence (extended by Agamben as reflection on ‘homo sacer’) brings an important critical edge to bear on that assumption. However, given the contentious character of many of Agamben’s views, which are often as insensitive as Enlightenment discourse itself to the complex genealogies and contradictions informing the history and efficacy of rights claims, it is clearly worthwhile attempting to think against and beyond the analysis Agamben offers.

The key point I wish to take from Agamben’s analysis, for now, is the thought that there are certain injustices and forms of violence in the contemporary world that are not being and perhaps cannot be resolved within currently prevailing juridico-political frames. The case of refugees, as Arendt shows, is difficult to approach from within the interpretation of rights that effectively upholds and enforces them primarily as the rights of citizens, so that those eligible for the universal inclusiveness of merely ‘human’ rights already constitute an exception to the norm. Moreover, I find it plausible to argue that we should view the kind of crisis in legitimation that has appeared around the whole question of the treatment of ‘unlawful immigrants’ (richly exploited by governments worldwide to affirm and assert their national sovereignty) as a crisis that we have to respond to in ways that require us to think and act beyond the familiar Enlightenment project of resecuring the rule of law. The countless stateless people today, displaced in a world that insists on certain narrowly defined ideas of what constitutes
'belonging' and what being 'placed' or 'displaced' entails, remind us that this 'beyond' of order is already inhabited by suffering. To this problem, inclusion in the quasi-citizenship of the world evoked by human rights may ultimately prove a thoroughly inadequate response — even if we may simultaneously affirm that for the present there is none better.

What does Agamben's analysis invite us to consider most important in the response of the Australian Government to asylum seekers today? First, perhaps, the Kafkaesque logic that so often enters into their situation. Unlawful immigrants fall ‘outside’ the law in a number of ways. If, for instance, they are to be eligible for the protection of international law, they must first prove themselves to be genuinely entitled to be classed as refugees. Arriving on Australia's shores before first acquiring permission to do so positions them as ‘unlawful’ in their actions. Absence of proof as to one's entitlement to enjoy protection under the law does indeed allow for 'interim' status and corresponding rights. Confinement in detention camps, however, coupled with the prevailing political rhetoric casting doubt upon the integrity of claimants for asylum and the undertaking of actions that seek to prevent potential refugees from becoming a specific claim upon Australia, all confirm that 'outlaw' status remains the primary marker of detention camp inhabitants; and thus in Agamben’s terms, we would view them most adequately as standing before the law in its totality and not under any of its specific provisions.

The Kafkaesque elements of this situation — consider the favourite government image of the ‘queue jumper’, when it is quite clear that often enough there is simply no queue to join — would be linked by Agamben to a wider difficulty in the application of a jurisdiction that has become a structure ‘in force without significance’. His analysis requires us to consider as salient to all issues raised by asylum seekers, the nihilism of contemporary politics in Australia. For Agamben, the nation state and the ‘limit figure of the refuge’ are bound together in the unravelling of fictions that have lost their persuasive power and, for this very reason, must be violently reasserted by those who exercise sovereignty. The lack of any real differences between the major political parties, presenting middle ground, somewhat paranoid consensus, in lieu of any deeper answers to problems of justification of current action or of the vision of future communities, signals that the real situation of political crisis is being masked as the crisis presented by a threatened ‘influx’ of illegals (see Badiou 2003, for discussion of the interplay of parallel political phenomena in France).

The violent defence of a principle of sovereignty attached to the right to regulate the borders of the nation has become the dominant aspect of response to the so called ‘crisis’ posed for Australia by asylum seekers. If this implies a wider crisis of the nation state form, then it is important, as Taylor remarks, to consider carefully whether we who would criticise what the government makes of this should ourselves highlight the exceptional character of this moment. As with the ‘war on terror’, this threat to security is uniformly figured as a crisis posed to order as such rather than as a part of the normal order of events. What not so long ago might have been viewed as the everyday regulation of borders, vulnerable by their very nature to a certain predictable level of breaching, now takes on the character of the protection of frontiers, whose policing demands an exceptional and decisive response on the part of the government.

But does affirming the exceptional character of this moment simply play into the hands of a government keen to assert its right to decide in the state of exception beyond the rule of law? Agamben’s point here is subtly different from any such endorsement of the principle of sovereignty, and this precisely insofar as his political analysis follows Benjamin and not Schmitt. Agamben tries to show that we live in times in which ‘the exception has already become the rule’. His thought is that the positive dynamic relationship between the rule of law and democracy begins to founder with the breakdown of disavowed relations of ethnic belonging and inclusion that constitute its economy. A critique of Australian politics inspired by his thought might therefore highlight the logic of an exceptionality, which, in confirming the rule, functions normatively. If ‘unlawful immigrants’ present us with a crisis, then what we are asked to imagine as normative is a world in which everyone stays in their ‘proper’ place; and the regulation by exclusion of those who do not belong is also constitutive of the regulation of those who do. It is the terms of this underlying political ontology that Agamben’s thought exposes as important and problematic.

**Beyond Agamben: reconfiguring democracy?**

Is it possible, however, that the ideology of ‘belonging’ that figures the presence of the people in a nation state might be rethought or undone in relation to democracy: a democracy now severed from the principle of sovereignty enshrined in the nation state? For not only the nation state but also any
familiar conception of democracy would seem to entail difficulties in welcoming those who do not already, by some clearly identifiable standard, ‘belong’ to the *demos* (a point made much of by Schmitt in his reflections upon the friend/enemy opposition). It is noteworthy that in a manner that echoes in a significant way the current politicisation of the ‘response to terrorism’, unlawful immigrants are represented as a threat to the maintenance of ‘our’ democracy, which is here identified with the terms of ‘our’ political order and specifies ‘sovereignty’ as the sovereignty of the people. This is, first, because they (‘others’) are imagined as belonging to and bearing with them ‘undemocratic’ ways of life and cultures; but second, because their very presence within the boundaries of the nation and their being ‘out of place’ there calls into question who the people are.

But who rightfully belongs to the *demos* that is the basis for democracy and who is properly excluded from it? Can we imagine democracy as a political form in which a future community, no longer based upon the exclusivity of a ‘people’, might become possible? Can democracy possibly renew the terms of legitimacy to accommodate those whose place is to be displaced?

In this task of legitimation, the outsider, asylum seeker or refugee must play a highly ambiguous and thus potentially disruptive and emancipatory role. Bonnie Honig, in her book exploring this theme, comments that various versions of a myth of ‘immigrant America’ in circulation ‘all seek to renationalize the state and to position it at the centre of any future democratic politics’. The foreigner may thereby be positioned in one of two ways: xenophically as ‘giver’ to the nation, recharging the nation with cultural energy and, even more importantly, as one who endorses the myth of a social contract by *choosing* democracy, or xenophobically as ‘taker’, parasite on the nation’s resources and one who places democracy at risk by adding cultural elements to the social mix that prevent it from acquiring the level of homogeneity demanded by the *demos*. In either case he or she is pressed into service as an element in the nation’s ‘iconic economy’. ‘Indeed,’ she remarks, ‘the xenophilic insistence that immigrants are givers to the nation itself feeds the xenophobic anxiety that they might really be takers from it’ (Honig 2001, 99).

To counter this pattern, Honig suggests that we begin to think about immigrants in relation to *democracy*, rather than the *nation*, and to think about ‘taking’ as the very thing that immigrants have to *give* us. For the birth of democracies such as that of America cannot be characterised by a people having rights *bestowed* upon them (by a sovereign power); they are, rather, established through the polemical appropriation or *seizing* of rights. Here, I want to suggest, we have an approximation to the ‘politics of pure means’ called for by both Benjamin and Agamben. The new myth of an immigrant America that Honig proposes is characterised by a ‘democratic activism whose heroes are not nationals of the regime but insist, nonetheless, on exercising national citizen rights’. The peculiarly democratic aspect of this myth ‘lies not in its aspiration to tell a story of ever broadening national inclusion’ but rather in relating a ‘history and a continuing present of empowerment, frame shifting, and world building’. ‘We have here,’ she writes, ‘a story of illegitimate demands made by people with no right to make them, a story of people so far outside the circle of who “counts” that they cannot make claims within the existing frames of claim-making. Their democratic action simply consists in the staging of “non-existing” rights, by means of which the chance at least exists that new rights will come into being (Honig 2001, 101).

Is this, perhaps, the form of demand we have heard from those incarcerated at Woomera and at other detention centres around Australia? And if we rely solely upon extending the rule of law to offer equitable treatment to such people, without at the same time profoundly calling into question the political contexts in which the decision integral to all application of the law is irreducibly bound up, do we do justice to their claim? If the analysis I have elaborated here holds at all, the persistent, ongoing political exclusion and *holding exposed to violence* of precisely those at whom humanitarian concern is directed is not merely a side effect of the given global order but is constitutive of powers of sovereignty and thus, in turn, inseparable from a certain rotten ambiguity of the law. My suggestion here, then, is that if we are to imagine a democracy adequate to the suffering inhabiting the margins of our global order, we must seek to transform the very context in which it is claimed as the modern form of legitimation and do so in contestation of the logic of sovereignty exercised no less in the camps in our midst than at the borders of our nations.

Our challenge, perhaps, is this — to find a way to cast the protests of those incarcerated at Woomera as political protests, as the speech concerning justice and injustice upon which Aristotle held political community to be properly based. Can we allow the demand for justice we encounter in the claims of refugees to play a critical role in reconceiving our own entitlements and the entitlements of others, not only as speaking to the principle of the equity of modern law, but also as the problematic claims of the members of a democracy to come? The demand is ambitious. But the challenge it addresses is indeed
posed by refugees, the challenge in our time to begin to conceive the global and deeply problematic terms of our belonging and displacement in a common world.

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