PRACTICES OF MIGRATION

The term 'postcolonial' describes a political and historical situation of the state and the nation, and much theoretical work in postcolonial theory has been concerned to analyse the range of problems and possibilities that present themselves in such contexts. Equally central to postcolonial writing, theoretical and fictional, has been the experience and significance of migration, particularly the impact of migration on metropolitan societies. The migrant, whether a figure of the city or of nomadic restlessness, has come to figure not just as the typical postcolonial subject of a transcultural metropolitan modernity, but as an emblem for the experience of postcolonial modernity itself – above all, in the comfortable claim that 'we are all migrants now'. While individual narratives of migration form the subject of many fictional texts, there has been comparatively little attention within postcolonial studies of the experiences of migration within the practices of everyday life. To date, it has largely been in cinema, in films such as Michael Winterbottom's *In This World* (2003), that serious and sympathetic attention has been given to the realities of migrant lives. Innumerable acts of migrancy may be changing the world, but what hidden histories and narratives have been generated by such acts? How do migrants survive? What kind of liminal life do they often live on the borders of legality and illegality, and what role do they play while living out such lives within the free-market economies of the state? How do migrants negotiate and evade the laws that being laid down continually in an ambivalent effort to control them? What is their impact on the societies, or the cities, which they pass through or in which they find themselves stranded, their journeys forever incomplete? How do migrants themselves conceive of their remarkable agency and acts of self-empowerment?

In this and future issues, *Interventions* will be focusing on these and related questions raised by contemporary practices of migration, and we invite contributions for this ongoing series.

POLICING AND HUMANITARIANISM IN FRANCE: IMMIGRATION AND THE TURN TO LAW AS STATE OF EXCEPTION

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Immigration

rule of law

France

humanitarianism

detention centres

refugees

Taking the issue of immigration in France as the entry point to a discussion of law and order, this essay examines what this focus on law and order masks: the manner in which law, in certain critical realms, operates according to the logic of exception, rather than as a regime of normative justice based on general rules and rights. Joining the renewed debate on Carl Schmitt's political theories while rejecting his larger political project, I suggest that the significance of this point is not primarily legal, but political. I locate my argument in the context of changing notions of both sovereignty and political power, suggesting that the situation in France constitutes just one instance of a larger struggle over sovereign power by national and transnational institutions. I focus on two specific and complementary spaces of what I have called 'juridical indeterminacy', each of which illustrates the enactment of this differently configured rule of law. These are policing and humanitarianism. In particular, I examine the policing of prostitutes, the phenomenon of detention centres, the Refugee Appeals Commission, and a humanitarian clause for undocumented immigrants who are gravely ill, to suggest that policing and humanitarianism represent two sides of the same coin – two essential elements of a moral economy in which law as a regime of

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systematic justice is not central, and where a democratic political realm has been displaced in favour of a regime of sovereign exceptions. Ultimately, this essay suggests that this logic of exceptionalism creates and privileges non-rights-bearing, apolitical, non-agentive victims. The underlying goal therefore is to point instead to the need for a more radical political project, one that sees a degree of legal regularity and predictability necessary to achieve the autonomous political action of a democratic society.

Law, order, and security have become the catch phrases of military and police intervention in the post-September 11 2001 world. These terms have served to justify the United States' 'war on terror' and its actions at Guantanamo prison.[1] The same terms can be seen in France, where in April 2002 the extreme-right wing and openly racist Front National candidate, Jean-Marie Le Pen, became one of the two major presidential candidates, edging out the Socialist Prime Minister Lionel Jospin. While Jacques Chirac ultimately won the presidential elections by a landslide, the terms that Le Pen so successfully used to help structure the election debates – namely, 'law and order', 'security', and 'immigration' – remain absolutely central to French and European public discourse.

In this essay, I examine what this focus on law and order masks: the manner in which law, in certain critical realms, operates according to the logic of exception, rather than as a regime of normative justice based on general rules and rights. I suggest that the significance of this point is not primarily legal, but political: it demonstrates a move away from the logic of democratic politics to a different logic of political belonging where law does not function to put limitations on the state.[2]

I take the issue of immigration in France as my entry point to a discussion of law and order, and I locate my argument in the context of changing notions of both sovereignty and political power. Indeed, I suggest that the situation in France constitutes just one instance of a larger struggle over sovereign power by national and transnational institutions. In bringing sovereignty to the fore, I am joining in a renewed focus on the work of German political theorist Carl Schmitt, for whom sovereignty is the power to decide on the state of exception. Historically, for Schmitt, the state of exception occurs at moments of systemic crisis when the basis and form of political authority become uncertain. It refers to the conditions in which law is not enacted as a set of rules but precisely as an exception to those rules – an act not codified in the existing legal order. What characterizes the exception is unlimited authority; sovereign power remains, as law recedes.[3] The main point here is that the power to decide on the exception entails the power to decide on what is normal as well. In the

1 The principal author of the USA Patriot Act, Georgetown law professor Viet D. Dinh, claimed to be following Edmund Burke in stating that order is a precondition of liberty, and hence the war on terrorism to defend and re-establish law and order is a means to defend liberty.

2 The debate about the place of the rule of law in liberal societies is by no means a new one; there is a long history of debate about the place of the anti-formal tendencies of regulatory law. Rather than reiterating these debates, this essay is an attempt to trace the ongoing transformations in the shape and role of law, particularly in contemporary late-capitalism, and to question the role of the rule of law in challenging inequalities and exclusions.

modern constitutional state, this is, as Balibar claims, the truly antidemocratic condition of democracy (Balibar 2004: 140). This essay suggests that we are indeed living in such a moment of uncertainty and anxiety about political authority, where the state of exception plays an increasingly important role.

This said, I want to be clear that in joining the trend towards renewed interest in Schmitt's work, I point to empirical correlates to Schmitt's legal and political theory *without* subscribing to his larger political project, which is fundamentally authoritarian. Rather, in agreeing with him that there is a crisis in political liberalism and constitutionalism exhibited by the logic of exception, I want to avoid reifying or valorizing these trends as the core of political and legal experience – as normative in any way – and argue that they exhibit regressive and authoritarian tendencies of decisionism in deformalized law, where law is reduced to little more than the means of exercising force. I do this by pointing to what this type of law sustains: capitalist-based social inequalities. My underlying goal, therefore, is to point instead to the need for a more radical political project, one that sees a degree of legal regularity and predictability necessary to achieve the autonomous political action of a democratic society.[4] While I am not suggesting that the lifelessness of legal formalism is desirable, some form of political and moral responsibility is critical – an element entirely absent from Schmitt's theory.

The predicament of immigrants grounds this inquiry, not because they undermine the rule of law (as Le Pen suggests), but because they are arguably the ones most affected by the crisis that results in exceptions to the law. Indeed, in many ways, immigrants reveal the contemporary logic of political power and domination: their situation speaks to the nature of sovereign power as well as the nature of political belonging. For Schmitt, understanding sovereignty requires one to understand who has the authority to decide on the exception, who has the power to suspend the juridical order; the borderline case is most relevant, not the routine. And sovereignty is always established upon a border and exercised in the imposition of borders; the border is precisely the site where the controls and guarantees of the 'normal' juridical order are suspended. As a result, immigrants – and undocumented immigrants in particular – mark an optimal site from which to examine the re-workings of sovereignty, because they exist at the intersection of several borders: for one, they stand at the threshold of border-free economic spaces and border control for people. Indeed, it is no accident that Le Pen focuses on immigrants in his attempt to rehabilitate a national sovereignty.

My concern in this essay, then, is of a dual nature: on the one hand, I will suggest that, in certain key sites, law is increasingly enacted through a logic of exception and used as such as an increasingly important technique of government. On the other hand, I want to identify, theorize, and ethnographically describe what occurs in this reconfigured legal regime,

3 See Schmitt's *Political Theology: Four Chapters on the Concept of Sovereignty*. In talking about the nature of the state of exception, he explains that 'the exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law' (1985: 6). It should be noted that, because the exception is different from anarchy and chaos, it is still understood as *within* the juristic order. See also Agamben (2005), in which he points to the difficulty of understanding the nature of the state of exception: it is a juridical measure that cannot be understood in legal terms, or 'the legal form of what cannot have legal form' (2005: 1). He locates it somewhere between public law and political fact – at the threshold of law itself.

where the rule of law is enacted as the state of exception. I am interested in the ongoing transformations in the shape and role of law, and its connection to justice. Who has access to law or to justice – how is exploitation or inequality addressed when the sovereignty of the nation-state is being reconfigured? What are the general features of such a society, and what kinds of subjects does it create? Ultimately, I suggest that this logic of exceptionalism creates and privileges non-rights-bearing, apolitical, non-agentive victims. The goal of a more radical political project, therefore, requires that we think about how to bring the borderline situations – these victims, dealt with as exceptional – into a democratic *political* community and, ultimately, how to have a system in which borderlines do not exist.

I have divided this essay into three sections. I will begin by laying out the context of the reconfiguration of sovereignty, which I suggest underlies the turn to law as state of exception. I will then proceed to focus on two specific, and, as I will argue, complementary, spaces of what I have called *juridical indeterminacy*, each of which illustrates the enactment of the differently configured rule of law I am describing. These are policing and humanitarianism. More specifically, in the second section, I discuss the proliferation of a discourse of security and a related practice of policing in France, where the law is suspended, and the police act as sovereign, while, in the third section, I explore a series of humanitarian exceptions, where justice is meted out through benevolence rather than law. I have not chosen these two sites randomly; my choice is grounded on the belief that policing and humanitarianism are related, that they represent two sides of the same coin – two essential elements of a moral economy in which law as a regime of systematic justice is not central, and where a democratic political realm has been displaced in favour of a regime of sovereign exceptions.

4 As one model of how to use Schmitt without subscribing to his larger theories, see Scheuerman (1997). Scheuerman argues, drawing on Frankfurt School theorists Franz Neumann and Otto Kirchheimer, that, while Schmitt accurately reveals the features of a crisis in constitutionalism, the anti-universalist theory he uses to explain this crisis must be challenged rather than accepted. This study provides an analysis of how to counter Schmitt's radical decisionism with a critical theory that involves putting his theories into historical context.

The context: the reconfiguration of sovereignty

The underlying feeling of emergency that allows for norms to be displaced by exceptions is linked here, I suggest, to a crisis in sovereignty. Changes in the nature of sovereignty have already been well-documented and analysed theoretically – in particular, the tension between national and transnational sovereignty, and a tension between state and popular sovereignty (*Balibar 2004*; Ong 1999; Sassen 1996). My goal here, therefore, is not to repeat this literature but rather to acknowledge it as the critical context for my own analysis of the logic of law as state of exception. Instead, I will point to some of the specific manifestations of the changes in sovereignty in France, and the resulting types of insecurity. Broadly speaking, these are located in the context of large migrations from former colonies, the globalization of the economy, and the formation of the European Union.[5]

5 Dale and Cole (1999) as well as Miller and Castle (1998)

I want to take as my entry point the process of European integration, which gives concrete form to the tension between sovereignty at the national and transnational levels, and to the way people actually experience this as instability. The Single European Act of 1986 first instituted a common European space without borders. This was then integrated into the Maastricht Treaty, which envisaged a common space without internal borders in which goods and capital could circulate. Creating a common space, however, raised the question of the circulation of people who were not EC nationals; in other words, the question became how to control the movement of *certain* people in a space with no borders. The tension was one of free circulation for some and not others, and the coordination of national legislation, which controls borders, with European legislation, which opens national borders.[6]

The Schengen space was created for this purpose in 1985 – to reconcile the opening of borders to capital with security concerns about people. In other words, it helped enable the movement of capital and the control of people. It is important to note that the Schengen space does not map directly onto the European Union: it includes some non-EU members such as Iceland and Norway (as associate members), while it excludes the United Kingdom (who chose not to join). The agreement was thus accompanied by a multi-tiered visa system, with different rules for a) members of the Schengen states, b) EU citizens from non-Schengen states, c) non-EU citizens who are residents in a Schengen state, and d) non-EU, non-Schengen citizens. Not only does this system of differential status challenge key aspects of the French republican ideology which refuses to distinguish between people on the basis of nationality, but it has led to a broader anxiety about how to control and patrol space. For instance, it is impossible to distinguish between citizens, residents, or Schengen members simply by looking at them – it is impossible to know who to check at borders. The uncertainty has resulted in racial profiling and, in general, increased policing, and increasingly harsh immigration policies and controls (Rodier 1997; Hollifield 1994). One example of this in France was the creation, in 1994, of a commission (DICCILEC)[7] within the Ministry of Interior with enormous police powers over entry, residence, and employment. It was the first time an institution had been created with the sole purpose of policing immigration, and it became responsible for coordinating all activities of the national police force against undocumented immigration (Samers 2003).

In this climate of insecurity, the harmonization of immigration and refugee policies in Europe was proposed to avoid the negative effects of the policies of member states on each other. This issue has taken tentative shape through the Treaty of Amsterdam (which entered into force 1 May 1999). Yet, harmonization touches on the most sensitive questions of national sovereignty: borders and policing, and few of the member states have wanted to touch these issues.[8] Thus, while the European parliament and European

6 As one publication by the European Commission stated, 'with free circulation of goods, services and capital now a reality, people are still subject to identity controls when crossing certain borders. The problem consists, in this case, of reconciling the exigencies of the mobility of people with the necessity to control international crime and reducing illegal immigration' (my translation, cf. Rodier 1997: 224).

7 Direction Centrale Contre l'Immigration et pour la Lutte contre l'Emploi des Clandestins.

8 Indeed, these issues played no small part in the 'no votes' to the European constitution in both France and the Netherlands.

Commission should, in theory, be involved in this process, their roles have proved to be largely symbolic; their positions are taken into consideration, but most often elicit antagonism. In the absence of democratic procedures at the Community or national level, it has been the governments who decide among themselves on the general contours of migration control. Thus, decisions are coded through 'resolutions' or 'recommendations' or 'position papers' yet none of these has clear legal grounding, and they do not formally link states. The European parliament has called this 'pseudo-legislation' which 'leaves much to be desired' (Rodier 1997: 229–30). The resulting policies have taken the lowest common denominator of the EU member-states, ignoring many questions related to human rights[9] and sidelining questions raised by the European Commission about the equal right to freedom of movement. Instead, uncertainty has led intergovernmental cooperation to privilege policing as the way to manage migration flows. Jurist Claire Rodier suggests that, paradoxically, not involving EU institutions has led to the increasing autonomy of the politics of immigration; while escaping democratic controls by these institutions, the 'pseudo-legislation' of immigration does not always follow the desired outcome of the member states. The situation of instability and insecurity has thus only increased.

These conflicting drives[10] to establish sovereignty at the national or transnational level illustrated by the process of European integration do not undo the rule of law, but they blur its boundaries, creating partial or what I call graduated legal regimes, which have led to legal voids for many.[11] In other words, it is no longer clear who can claim to be a subject of the law, or which law one should claim to be a subject of. This uncertainty is felt by EU citizens and residents at all levels: where and how they can travel, their status at home and abroad (and the meaning of 'abroad'), where they can find employment, where, when, and on what to vote. This same inability to ascertain one's status is particularly true for immigrants and refugees in Europe. As just one example of this, immigration law falls under European jurisdiction, while citizenship is still the prerogative of the nation-state. There is no clear or circumscribed juridical realm – there are overlapping realms, accompanied by legal voids.

To conclude this section with another example of how the feeling of instability in France is connected to sovereignty, I want to quote from a statement by interior minister at the time, Nicolas Sarkozy,[12] on *les sans papiers* (undocumented immigrants) published in January 2003 in the French national newspaper, *Le Monde*. Sarkozy explicitly blames the European Union for the problem of 'illegal immigration' in France.[13] He states that the large number of short-term visas delivered by member countries of the European Union is the origin of illegal immigration, constituting an overturning of procedure. For instance, he explains that

9 The primary human rights violations here relate to family reunification. The 'pseudo-legislation' allows member states to work around the various conventions protecting human rights, such as the European Convention for the protection of human rights (Rodier 1997: 230–1).

10 These regimes of circulation can be framed as *re*nationalizing political discourses and *de*nationalizing economic spaces (Sassen 1996). For a good discussion of the crisis of sovereignty, see Aihwa Ong's discussion of 'graduated sovereignty' (1999).

11 I have adapted Ainwa Org's term "graduated Sovereignty" here (1999) to show that transnational legal regimes have moved to fill some of these voids, including private systems of commercial arbitration and public regimes of international human rights, such as the European Court of Human Rights, yet these remain fragmentary. See Dezalay and Garth (1995), who describe international commercial arbitration as a delocalized and decentralized system of justice, based not

visas for Algerians increased from 48,000 in 1996 to 277,000 in 2001. To solve the 'problem' of illegal immigration, he claims that France needs control over its own visas, and should encourage other EU members to do the same. His statement is a call for a re-establishment of sovereign power at the national level, and, when this proves infeasible, for coordination between EU partners on a common policed border that will keep immigrants out. In other words, it admits to a reconfigured notion of sovereignty, one that leaves many gaps and uncertainties – and these gaps and uncertainties form the grounding for the practice of law as state of exception.

on a global system of law but rather a system of competing national approaches.

12 Sarkozy has subsequently begun a second term as interior minister (June 2005) after a brief hiatus while Dominique De Villepin took over the position.

Policing, detention centres, and spaces of inhumanity

With this context of sovereignty as the crucial backdrop, let me turn now to the focus on policing at the expense of legal norms. The history of the concept of the rule of law (*l'État de droit*) in France reveals that policing is not necessarily outside the rule of law, but, rather, that the rule of law both surpasses and qualifies it (Chevallier 1994). The French term *l'État de police* (rule of the police) accords a place to law, but in an instrumental fashion, in the sense that the administration is not constrained by legal norms. Instead, *l'État de police* is the condensed expression of administrative power. *L'État de droit* qualifies and changes *l'État de police* by limiting state power, in addition to serving as an instrument of action for the state. [14] It is in this sense that I speak of policing, which I suggest is an expression of power with no normative legal constraints, and a regression in the state of democracy.

Since the 2001 elections in France, a law-and-order rhetoric has taken hold, largely orchestrated by the Minister of Interior Nicolas Sarkozy, who held the position from 2002–4, and was appointed again in June 2005.[15] One example is the anti-crime law that in the name of 'security' criminalizes what he has called 'passive soliciting'. Specifically, Article 18 of the 'Projet de loi pour la securité intérieure' criminalizes '*racolage passif*' or passive soliciting, giving up to two months in prison and fines of 3750 euros. While couched as a means of protecting women from trafficking and prostitution, the law means, for instance, that any woman whose dress or attitude gives the impression that she is soliciting money for sex can face both a fine and extended jail time.[16] Gypsies, squatters, and panhandlers are equally targeted. As the law targets a poor underclass, undocumented immigrants are well represented in these categories. Crucially, the term 'passive soliciting' is defined in such a way that the police can act as sovereign – it is they who have the power to determine what behaviours constitute 'soliciting' since it is defined as passive, not active. Appearance is what is at stake, and it almost goes without saying that such policing is racially inflected. The prostitutes that form the primary target of this law are from

13 See Sarkozy (2003).

14 As Carré de Malberg states, 'L'Etat de police est celui dans lequel l'autorité administrative peut, d'une façon discrétionnaire et avec une liberté de décision plus ou moins complète, appliquer aux citoyens toutes les mesures dont elle juge utile de prendre par elle-même l'initiative, en vue de faire face aux circonstances et d'atteindre à chaque moment les fins qu'elle se propose', or, '*l'Etat de police* is that in which the administrative authority can, in a discretionary manner and with complete freedom, initiate and apply to citizens all measures it deems useful to address the circumstances, and at each moment, achieve the ends it proposes' (de Malberg 1920–2, cf. Chevallier 1994: 16).

Eastern Europe and sub-Saharan Africa – indeed, it is estimated that 75 per cent of prostitutes in Paris and 50 per cent in France overall are foreign[17] – and are for the most part undocumented. In other words, this fight against soliciting in the name of 'security' only thinly masks an anti-immigrant politics.

Rather than make forms of soliciting like prostitution disappear, this law takes them off the streets, locking them into clandestine spaces. Indeed, this does not address the causes of solicitation; it just displaces those labelled solicitors, rendering them invisible. Perhaps the most significant point here is that it mattered little that this bill passed into law;[18] the practices were in play well before the law was proposed. What is of importance is that policing happens in the *name* of law and order, not whether or not it *is* law. The police are on the front lines here; the law simply proposes to follow already extant police action – identity checks by police have multiplied, arrests and fines have increased, violence against women deemed prostitutes has increased and gone unchallenged, unauthorized deportations have increased, and arbitrary treatment has been amplified – all in the name of security, law, and order. A March 2005 evaluation of the effects of law showed that prostitutes have been pushed into isolated places like forests and parks where they are more subject to violence.[19] Policing here replaces any kind of systematic social policy or any form of normative justice. Indeed, as the head of the police union himself stated, 'with the Sarkozy laws, we will not treat the causes of delinquency, only the effects; I do not know what the social policy of the government is'.[20]

I draw on Walter Benjamin (1986) to articulate how this emphasis on policing illustrates a *suspension* of the validity of the law rather than a simple enforcement of legal norms: in 'Critique of violence', Benjamin claims that it is entirely untrue that the ends of police violence are always identical or even connected to those of general law. Rather, he states that 'the "law" of the police really marks the point at which the state, whether from impotence or because of immanent connections within any legal system, can no longer guarantee through the legal system the empirical ends that it desires at any price to attain' (Benjamin 1986: 287). In other words, he argues that the enactment of police violence to preserve the law is not distinguishable from law-making – police create the legal ends themselves. Indeed, the impotence of the state that results in a meeting of violence and right – what Balibar calls 'the impotence of the omnipotent'[21] – is perhaps most powerfully shown in France by the increasing number of immigrants and refugees who are placed by the police in detention centres without trial.

In France, these centres were initially instituted in the 1960s as a form of 'administrative internment'; the centres coincided with the first waves of labour migration from the former colonies into France, targeting Algerians. They became the subject of much debate in the late 1970s, when the left

15 Sarkozy became Minister for Economy, Finance and Industry from 2004 to 2005, being replaced by Dominique De Villepin as Minister of the Interior in 2004, but De Villepin continued the same logic of security and policing, increasing identity checks by police in neighbourhoods and shops, the number of places in detention centres, and the budget for deportations.

16 In addition, Article 28 of this law modifies the Ordonnance of 2 November 1945, in order to withdraw the residence permit (*carte de séjour*) of anyone arrested for passive soliciting – a direct attack on immigrants. The law threatens immigrants identified as prostitutes with deportation, whatever their legal status, forcing them to live in ever-more precarious situations.

17 These are estimates from the French Senate, Europol, and French research institutes. See *New York Times*, 6 November 2002, 'Streetwalking, en masse, for the right to tempt'.

pointed out that they criminalized and incarcerated people who had not committed any crime but to enter and stay in France. However, with the addition of a few limiting clauses, the practice of administrative internment was declared legal, and one could argue that existence of these detention centres has subsequently been banalized (Spire 2001). People no longer question their right to exist – they just question their limiting conditions such as how long one can be incarcerated without trial. Attention has been re-focused recently on these centres because of their growing numbers and size, and the increasingly central place they play in France's politics of immigration. There are now two types: *zones d'attente* (ZA) or 'waiting areas', where people are put immediately upon debarking from planes or trains or boats before being deported, and *centres de retention administratives* (CRA) or 'holding centres', where people are brought before being driven back across the border. In addition to these two, there are two other types of what have been called 'camps' (a term to which I will return) for foreigners: prisons, for those condemned for the criminal infraction of being without papers, or not following a deportation order; and, finally, a camp like Sangatte, outside all legal regulation, rendering its inmates invisible to French society.[22]

The category of *zones d'attentes* was introduced in July 1992 under the law Quilès, and it serves well to illustrate the turn to 'rule by the police'. *Zones d'attentes* are spaces in airports and other ports of entry – spaces of non-liberty where those refused entry to France are detained. There are 122 *zones d'attentes* in France, mostly in makeshift areas requisitioned by administrative authorities, such as police stations and hotel rooms (Rodier 2003; De Loisy 2005). The decision to detain someone is a purely administrative one, although it is supposed to be monitored by a judge after seventy-two hours – the judge can choose to prolong the detention up until twenty days (crucially, the judge does not hear or decide on detainees' cases for asylum, simply on the right to extend detention). The most important *zone d'attente* is located on the premises of Charles de Gaulle Airport (Roissy), in Paris; it was inaugurated in January 2001.[23] The law states that those detained in *zones d'attentes* must be provided with 'hotel-like service';[24] thus, the Minister of Interior rented rooms in the hotel Ibis, the well-known global chain of hotels. Unfortunately, rather than offering Michelin-guide quality, the Ibis hotel at Roissy has been transformed into a detention-centre-cum-prison, in which the law is suspended, and the police act as sovereign. Reports from extremely controlled and rare visits reveal that the windows are sealed shut, there is no air circulation or daylight, and, at one count, forty-two people had been squashed into a room of 40 square metres (approximately 400 sq. feet) – and this included pregnant women. There are no bathrooms in the immediate vicinity, leaving the refugees and immigrants to be accompanied to the bathroom by police officers who often

18 The projected law on 'sécurité intérieure' was adopted by the National Assembly on 28 January 2003, but was already being enacted, despite having to be debated and voted on in the National Assembly and the Senate in October 2003.

19 The evaluation was pushed by associations such as GISTI (for immigrant rights), Act-Up, La Cimade, and others, and they have since called for the abrogation of the law in the face of the results. See article 'La loi Sarkozy a repoussé les prostituées à la péripherie des villes' in *Le Monde*, 17 March 2005.

20 *Libération*, 24 October 2002.

21 Balibar refers here to the impotence of the state to master the phenomena of industrialization and speculative movements of capital accelerated by globalization (2004: 36). In particular, this impotence manifests itself in an excess of power against certain individuals, to ensure the state's own continuing existence in areas over which it has lost control, such as the greater issues

refused to perform this duty after a certain hour. These *zones d'attentes* have been condemned by doctors, lawyers, and activists for their insalubrious and inhumane conditions – the odours are described as suffocating and foetid, and people are crammed in 'like cattle'.[25]

Only occasionally do the abuses committed in these centres erupt into public space: NGOs have been denied regular access to *zone d'attentes*. The state allows eight associations to visit, but each is only allowed eight visits per year, in controlled time periods; they require advance notice, and the association members are accompanied by border police at all times. These, in addition to visits by members of parliament and investigations run by the European Council's Committee for the Prevention of Torture, have revealed that people's rights are regularly violated (Rodier 2003). More often, evidence of police violence shows up in the form of bumps, bruises, and torn clothes, and is further supported by cases such as that of a woman from Sierra Leone who, eight months pregnant, miscarried in the centre at Roissy, due to alleged police violence. She was en route to the US to join family members, having fled Sierra Leone after her husband disappeared. Her case became known because, with the help of an association, she decided to press charges against the police.[26]

NGOs have fought for the access of lawyers and doctors with little success. ANAFE (national association for border assistance to foreigners) spear-heads this effort, publishing reports based on rare visits and telephone interviews, and documenting repeated violations of fundamental rights. During a brief one-month trial period in May 2002 when ANAFE was permitted regular entry into zapi 3, it documented hundreds of cases of abuse and violence.[27] The reports by ANAFE and undercover journalist Anne de Loisy illustrate the fact that law has little bearing in these locales: it is practiced only as the exception. Among the violations documented are: moral and physical violence, humiliations, injuries at the hands of police, violations of the right to apply for asylum by refusal to register claims, and abuse of minors.[28] ANAFE has documented hundreds of cases that go unpunished, like the Haitian who arrived in Roissy airport in December 2001 and tried to register his claim for asylum but was stopped from doing so by the border police in the *zone d'attente*. Two days later, he was beaten with a club when he tried to resist being put on an airplane and deported.[29] A similar case was revealed in a newspaper article in March 2001, which described how a young woman from the Democratic Republic of the Congo had her legs crushed as French police attempted to drag her from a detention centre onto an airplane for deportation. She had submitted a claim for asylum which the detention centre administrators simply refused to file. There are reports of Guineans, Chinese, Malians, Sierra Leonians and so on – all of whom have been violently stopped from registering claims for asylum despite the law that refugee claimants cannot be deported without first

of economic policy, collective security, and information technology. With this, there has been an increase in the harassment of foreigners – an institutional racism that is part of an effort 'to reconstitute an imaginary sovereignty that is in fact mythical' (2004: 36).

22 See Claire Rodier's 'Les camps en France' (2003), which lists four models of 'camps' for foreigners. Rodier is both a lawyer and head of GISTI, the long-time immigrant and workers rights association in France (Groupe d'information et de soutien des immigrés). Sangatte was the refugee centre in Pas de Calais, which received 1800 asylum seekers outside all regulation. It was initially erected by the Red Cross in 1999 to help undocumented foreigners who hoped to cross the Channel and claim asylum in the UK, but were stopped by legal barriers. It functioned without any legal basis for three years. For the most comprehensive analysis and portrayal of Sangatte to date, see Laacher (2002).

having their claims reviewed. In the *zones d'attente*, violations of the law are rampant: from sadistic police officers who like to kick detainees in the genitals,[30] to children being counted as adults, separated from their parents and detained.[31] Anne de Loisy, the undercover journalist who got access to zapi 3 as a Red Cross mediator, documents a similar unfathomable brutality; she claims, 'I was prepared for the violence regularly described by associations. Unfortunately, what I observed was worse than anything I could have imagined' (De Loisy 2005: 10, my translation).[32]

The countless instances of violence that occur in these detention centres continue with impunity – the police remain, on the whole, unpunished, benefiting from law being enacted exceptionally. In this sense, they rob people of all the rights and expectations we attribute to humanity; not even biological life is exempt. The stories of death from being forced from a centre onto a plane are tragically similar and, unfortunately, all too regular: an Argentinian died in December 2002 of a heart attack after having been handcuffed by hands and feet to a seat and brutalized by the police; a 24-year-old Ethiopian suffered the same fate in January 2003. [33] In this sense, those in detention centres qualify as what Achille Mbembe calls the 'living dead', where civil death is on a close continuum with physical death. Here, sovereign power is established by engaging not only in biopolitics but in 'necropolitics' – the power over death (Mbembe 2003).

While neither these centres nor these practices can be called 'new' – indeed, the turn to law as state of exception has its roots in the French Revolution, taking on greater significance during the colonial era, when, in various places, emergency measures and martial law became a permanent state of affairs[34] – they must be located in a political environment where policing is ever-more apparent and applauded. Interior minister Sarkozy was proudly dubbed the 'top cop' in his first round as interior minister, and president Chirac garnered himself the similar title of 'First Cop of France' after he adapted an already-extant 'Council of Domestic Security' to name himself the head. Chirac and Sarkozy, and subsequently interior minister De Villepin, have supported new laws on security that extend police power, and been applauded for it by much of the French public who see themselves in a crisis of law and order.[35] For instance, the *loi Sarkozy* promises to double the number of places in the *centres de rétention* over the next five years, and the time of detention has been increased to thirty-two days from the maximum twelve that previously existed.[36] For the right and even for the French mainstream, law is now equated with policing. In these zones, the rule of law has been reduced to police rule and functions along emergency lines. The logic behind this holds that, until a normal and clear state of affairs can be re-established, exceptionality becomes the rule and force as exception is justified in the name of peace and right.

23 It is otherwise known as 'zapi 3' or 'zone d'attente pour personnes en instance'.

24 'prestations de type hôtelier'; see ANAFE's report 'Zones d'attente des ports, des aéroports et des gares ferroviaires', 1997–8.

25 'Des étrangers "comme du bétail" à Roissy', in *Libération* 24 March 2000. See also the reports by ANAFE (Association nationale d'assistance aux frontières pour les étrangers), by GISTI and, most recently, de Loisy (2005). A report by ANAFE of 10 February 2003 stated that the conditions in the zones d'attente were 'contrary to human dignity'.

26 'Une Sierra-Léonaise porte plainte après la mort de l'enfant qu'elle portait lors de sa rétention à Roissy', AP, 3 October 2000.

27 After years of further negotiations with the Ministry of Interior that drew on these reports of abuse, ANAFE signed a convention on 5 March 2004 allowing it six months of access, helping to provide legal assistance to detainees.

The increasing power of the police under the name of 'security' works here to erase particular groups of immigrants and refugees, clean the streets of prostitutes and the homeless, and basically render invisible the excesses of society. These hidden excesses illustrate what philosopher Giorgio Agamben has called the 'camp' – in the camp, life ceases to be politically relevant and can as such be eliminated. Indeed, the camp is precisely the space that opens up when the state of exception begins to become the rule. It is revealing that in her work on detention centres in France and Europe more broadly, president of GISTI (Information and Support Network for Immigrants) and immigrant-rights lawyer Claire Rodier also uses the idea of the 'camp' to describe what she sees precisely as the normalization of an exceptional situation. She suggests that camps in the form of detention centres are arising all over Europe, used as an exceptional strategy to feign a semblance of control over the flows of migration, in the absence of the state's ability actually to regulate these movements. For her, the 'camps for foreigners' share several characteristics: the absence of any criminal offence except crossing a border; indeterminacy of the juridical situation in the camp – in other words, no legal or procedural regularities or guarantees; being kept for an indeterminate amount of time; the depersonalization of the detainee, such as calling people by numbers or tattooing their skin instead of calling them by name;[37] physical violence by police; and moral violence, including humiliation, deprivation of food, property, racist insults, and so on. These camps, Rodier suggests, are not simply closed geographic spaces; there are a number of spaces that exhibit similar characteristics, including transit centres. With an increasingly significant presence throughout Europe, these camps work to ostracize immigrants and those deemed 'undesirable' even while these undesirables inhabit spaces in the heart of the territory of the European Union (Rodier and Blanchard 2003).

An account of sovereignty as the power to define a juridical realm – who is included and who is excluded – provides a means to understand the appearance of spaces of exception such as camps (Agamben 1998; Schmitt 1985). This account eschews modern liberal notions of sovereignty and focuses instead on its biopolitical dimensions: thus, sovereign power is also the power to give life political and social qualification, and the power to abandon other forms of life outside the law as bare and unqualified. When sovereignty begins to break down, the inside and outside of the juridical realm start to blur. With the inability to distinguish who is inside or outside the juridical realm, bare life and political life merge – and sovereign power operates at the level of material life. In this space, law is practised not as the rule, but as the state of exception; it works on the terrain of crisis. Detention centres are an example of the conflation of inside and outside – they constitute a territory of exception within the juridical space itself. It is here, in liminal or borderline cases, that sovereign power is played out. With the

28 A convention was signed in October 2003 allowing the Red Cross to be present in Roissy's zone d'attente (report issued 23 June 2003, zpajol listserve; see also De Loisy 2005). The convention allows 'mediators' a permanent presence in the zone d'attente to inform immigrants of their rights, give psychological counselling, and help mediate between different groups in the centre. This agreement still does not allow for lawyers or doctors to have regular access, nor any other type of association. Crucially, the Red Cross is allowed in because of its neutral, apolitical status.

29 See the ANAFE report, 'Violences policières en zone d'attente', March 2003.

30 Ibid.

31 For a full report on the increasing presence of minors in zones d'attente, see the ANAFE report, 'La zone des enfants perdus: mineurs isolés en zone d'attente de Roissy', November 2004.

32 'Je m'étais préparé aux violences décrites

régulièrement par les associations. Malheureusement, les faits que j'ai constatés sont pires que tout ce que j'aurais pu imaginer.'

suspension of laws and norms, they become a place for the abandoned, housing those who fall into legal voids, and against whom no act appears as a crime. Here, people are stripped of the qualifications that make them human. [38]

Humanitarian exceptions

Let me move now to my second site of juridical indeterminacy – the humanitarian exception. I am suggesting that the same suspension of law that has led to increased policing undergirds the growing number of humanitarian exceptions to the law. And I want to suggest that policing and humanitarianism are not unrelated – indeed, they are intimately linked. Policing is often accompanied by a gesture towards the humane, and towards the ethical; to reiterate, force is justified in the name of peace and right. The closure of Sangatte, the refugee detention centre just outside Calais, offers a good illustration of this link. During the three years of its existence, refugees increasingly gathered in this centre near the last stop on the French side of the Channel Tunnel. They came to attempt the crossing into Britain, which has a more generous history of giving asylum, often risking their lives by jumping on high-speed trains or going as stowaways on ferries. Britain complained about those trying to cross over and, bowing to heavy political pressure, France closed the centre in November 2002. The remaining refugees and migrants were left without food or shelter, and many eventually took shelter in a church in Calais. On 14 November 2002, the riot police evacuated 100 refugee claimants from this church. The mayor of Calais explained this police evacuation as a necessary move to protect the refugees' physical integrity, stating that he did not 'have the right to let people live like beasts in this country' – here he was referring to the living conditions in the church, saying they were 'sub-human'. In riot gear, with clubs poised for action, the police intervened in the name of the ethical, expelling refugees with no place else to go – all for the refugees' own good. [39] In France – as in many countries of the western world – the humanitarian state of exception is the counterpart of police technologies; moral and military are intertwined. They both enact law as state of exception.

Like policing, benevolence targets certain people, including some and excluding others. Benevolence – often justified as compassion – enacts a form of justice based on the exceptionality of an individual – it is not about systematicity, regularity, or even equality. It is justice enacted case by case, based on emotions largely structured by circulating images, narratives, and histories. The examples I draw on here are taken from two different sites: a refugee appeals commission and a state medical office. Without space here to include other examples, I intend these two sites to give an indication of the

33 See email listing on zpajol, 24 January 2003; see also de Loisy (2005: 15).

34 According to Agamben (2005: 5), the state of exception is rooted in the concept of 'state of siege' which originated in the French Constituent Assembly's decree of 8 July 1791. The specific state of 'état de siège' is distinguished from that of 'état de guerre' and 'état de paix' (state of war or of peace), authorizing a situation in which the military commander takes hold of all functions normally entrusted to the civil authority in order to maintain order. See also Mbembe's 'Necropolitics' where he argues that the sovereign right to kill is not subject to any rule in the colonies, a position stemming from the racial denial of any common bond between the conqueror and the native (2003: 24–5). Finally, see Agamben's

extensiveness of this turn to the humanitarian exception. What follow are two ethnographic accounts of the sovereign exception in action.

Refugees

The Refugee Appeals Commission[40] is located outside Paris in the suburb of Val de Fontenay. It was put in place for those whose requests for asylum had been rejected by OFPRA, the French office for the protection of refugees and stateless people.[41] The Appeals Commission is composed of various 'judges',[42] but three judges preside at each session. One judge comes from OFPRA, the refugee office; the second judge, who is also the president, comes from the Conseil d'Etat and chairs the session; and the third is a representative of the United Nations Human Rights Commission (UNHCR).[43]

During my visits to the Refugee Appeals Commission I saw that there were several rooms in which appeals were heard each day, each set up identically with many rows of chairs for people either to observe or to wait their turn. The refugee claimant approached the table, sitting in a chair opposite the judges. In addition to the refugee claimant, the claimant could have a lawyer present, and a translator, and there was a court reporter who sat with the judges. A representative from OFPRA, called the 'reporter', stood up and related the details of the case for the judges and the audience, stating why the claimant was initially denied asylum and ending by suggesting whether or not they thought the decision should be overturned. Then the refugee was given an opportunity to add to his/her story (through the lawyer or translator), and the session concluded with the judges asking the claimant questions. This process went on from Monday to Friday, from 8.45am until 6 pm. The sessions were open to the public, but the decision-making was done in private, with each of the three judges having an equal vote. There is no written report of who disagreed, no 'deciding opinion' as in the American or English models. One simply receives the answer: yes or no – one has been granted refugee status or one has not.

I was fortunate to get an 'inside' view of the process because I knew one of the judges. François, as I will call him, invited me to sit in on the public part of a session, and then said that he would give me a glimpse into the private decision-making; without revealing anything confidential, he said he would explain the decisions to me. While my research on the Appeals Commission and the granting of asylum included textual analysis, participant observation and interviews with immigration officials, academics, UNHCR representatives, and NGOs, I draw on this particular process of observing and discussing with him because it best encapsulates and illustrates my findings.

discussion of the Spanish in Cuba, where the state of emergency linked to colonial war is extended to an entire civil population (1998: 166).

35 These increased powers include people being put in prison for acts such as the failure to produce metro tickets, but, more significantly, they include a plan to construct twenty-eight new prisons, including eight for minors.

36 See Tabet (2003).

37 Here Rodier refers to the border police practice, in zone d'attentes in the early 1990s, of tattooing in indelible ink a group of Chinese immigrants, alleging that the Chinese immigrants were attempting to escape by changing their identities (Rodier and Blanchard 2003b).

38 Agamben uses the term 'bare life' or '*zoe*' to describe this stripping away of humanity, symbolized by the figure of the '*homo sacer*' (brought back from Roman law) who can be killed with impunity and whose death has no sacrificial value. In other words, the *homo sacer* stands at the very threshold of

The session started at 8.45 am. The room was nearly full, and the audience seemed to be largely composed of refugee claimants and their families. The refugee claimants were called up in turn. First, there was a Sri Lankan woman who came in with her husband and child. She had been associated with the LTTE (The Liberation Tigers of Tamil Eelam), arrested, and tortured. OFPRA's reason for not giving her asylum was that her story was too stereotypical. They said that her claims of being held and tortured in detention were invented. The questions the judges asked her revolved around her involvement with LTTE, why she was arrested, what the detention centre was called, and how she got out. Next a man from the Congo came in, with no lawyer or translator. His brother and sister had both been given asylum. He said he had been active with the Socialist Party, and arrested and tortured for no clear reason. The questions posed to him centred largely on the fact that Mobutu had now been deposed, and Kabila was also gone, so Mobutu followers were no longer in power. If he was arrested because his party was hostile to Mobutu, what would happen if he returned now? Another judge asked if he had medical certificates attesting to the torture. The judges kept expressionless faces, and even the tone of their voice was hard to decipher. They did not show any overt excitement or engagement, but they asked pointed questions.

The morning continued like this; among the cases was a man from Sierra Leone, a pregnant woman from the Congo who was part of a Christian evangelist group, and who brought her pastor to give evidence, an older Albanian man who said he had been fired from his job, harassed, and attacked because he was not part of the Communist party, and another Sri Lankan woman with a little baby, also part of LTTE. While holding and rocking her baby, she described her torture in detail, including being stripped naked and attached to a pole while they stuck needles in her fingers and chest, and put her head in a bucket of petrol.

I waited eagerly to speak with François to see to whom they would grant asylum (i.e. annul the earlier refusal). When I did speak to him later that day after their afternoon of deliberation, he told me that none of them would receive asylum. I tried to ask why – how could it be, when the majority of cases seemed so clear? He explained that the Refugee Appeals Commission was not there to admit everyone – they had to follow the stipulations of the Geneva Convention. In other conversations, he had acknowledged that France followed an extremely limited version of the Geneva Convention.[44] Indeed, it is absolutely crucial to note that the larger context is one in which refugees have been increasingly viewed as suspicious by both the French state and the French public, and conflated with economic migrants. This conflation has been made explicit in recent policies of restricting asylum to control migration flows, joining two processes that should be entirely independent. More broadly, asylum policies must be seen as part of

humanity (see Agamben 1998). While it is questionable whether people are actually reduced to 'bare life' in these situations or in any others, there is certainly an attempt to strip people of their political, social, and cultural dimensions. See Ticktin (2006) and Agier (2004) for discussions of the difficulty of separating 'bare life' from political life.

39 See Laacher, who offers another possible way of understanding what I suggest is a link between policing and humanitarianism. He writes that there is always a tension between the 'laws of hospitality' where one welcomes people unconditionally and the 'laws of containment' where people are only welcomed under certain conditions (2002:17).

40 Commission de Recours des Refugiés, or CRR.

41 'Office Français de protection des refugiés et apatrides.'

42 In France they use the term 'juge assesseur', which can also be translated as 'magistrate's assistant'.

43 France is the only country to have a mandatory

prohibitionist, restrictive immigration policies, where the State seeks to close all doors.[45] In other words, the scene I am describing is part of what I earlier described as a process of 're-nationalization' (Sassen 1996) where nation-states try to rehabilitate their sovereign power over immigrants and refugees. An exception to the rule is the only way in.

François explained that the Refugee Appeals Commission judges did not look for truth. He said that, for his part, he looked for a *good, plausible story*. This need to inhabit a particular subject position in a circumscribed legal narrative resonates with asylum procedures in many western nation-states. As Susan Coutin (2001) has argued in the case of the United States, there is a narrative incommensurability between victims' experiences of political violence and the legal subject that one must become in order to be granted asylum.[46] Yet François went further than explaining the need to inhabit a legal narrative. He explained that most decisions were made on the basis of emotion; he said the judges all pretend their decisions are grounded in law, but they rarely are, particularly when one is so restricted as to who one can accept. While law always involves interpretation and while it is always enacted in specific contexts that help determine its meaning, the difference here is that law's production and execution are indistinguishable. Indeed, this takes on even more significance in the French context, where the civil law tradition involves applying the law, not interpreting or building on it. Thus, François said that only when he feels he does not know enough about a country or a situation does he turn to the law; otherwise, he relies on his feelings and his intuition, and he claimed that other judges do too. He gave an example of a judge who did not believe a Bangladeshi man's asylum claim, stating it was clear that he was an economic immigrant. When François asked him how he knew that the Bangladeshi was an economic immigrant, the judge simply answered, 'it shows'.[47] François said to me: the judge could not explain it – it was his *feeling*. Once decisions are made, they can always be supported by the law after the fact. François said that each judge had his/her own special priorities, cases that they considered to be the 'ultimate injustice', and fought particularly hard for. François' own priorities were women and homosexuals. He went all out for them, he said, as exceptional cases, although he did not explain what had led to this emphasis.

When I asked François about the other cases I had witnessed, and why they had not been believed, he explained that the interesting thing about compassion was that not only was it evoked differently by certain factors like gender or age, but that the case had to be original – really *exceptional*. He said that the Commission had heard too many stories of torture from Sri Lankans in the LTTE. There were too many Algerians, too many from the Congo with the same story. He ruled out any truth value in these stories, attributing them to a market in asylum narratives. I asked him what kind of story he needed to hear, wondering what made a story different, worthy of

representative from the UN on its Appeals Commission; as one of the main representatives for the UNHCR in France explained to me, this procedure was instituted post-WWII, in light of the French (Vichy) government's participation in the Nazi regime. It was instituted as a measure of caution, with the understanding that an outside member would keep things from getting out of hand, as they had during the Nazi/Vichy period.

44 For instance, the French state introduced a ruling that restricts the granting of political asylum to victims of state persecution, except, initially, for one clause about 'territorial asylum', which was created for Algerian victims of Islamic terrorism, but which was an exceptional clause, for exceptional circumstances, and which existed effectively in name only (i.e. only eight refugees were allowed entry in 1998 out of 1400). It was a clause instituted – in the words of the Interior Minister – as an 'emergency humanitarian measure' and enacted at the discretion of

exception. He explained to me that the last case for which they had reversed the denial of asylum was a gay Algerian man who had been gang raped by five Algerian policemen. He said it had been an intense case, where he had asked for the session to be closed to the public. He admitted that it was difficult because rape is often used as a strategy to elicit compassion.[48] In other words, this man's rape had to be distinguished from other forms of banalized rape – presumably those of women.

Then he explained that he did not have sympathy or compassion for people who persecuted others. In other words, he said he did not have sympathy for '*persécutés persécuteurs*' – the persecuted-persecutors – i.e. people who are persecuted but have in turn persecuted others. The judges were looking for the pure victims, the innocents who were not politically motivated and who, ideally, were passive in the process, their hands not bloodied – earlier he had given me an example of an Afghani woman doctor, and now, the gay Algerian man. These are both images of innocent, apolitical victims.

Illness

The Refugee Appeals Commission demonstrates how, at the margins, the law is accessed only through the state of exception, through the benevolence of those who are imbued with sovereign power, and how this exceptionality is grounded in the idea of innocence and the apolitical. In my second example, I draw from the medical realm. I conducted research at various hospitals, clinics, and NGOs that focused on marginalized populations (in a situation of *précarité*), and, while in theory these clinics were for poor, homeless, or otherwise under-served people, in practice they tended to be almost entirely for undocumented immigrants.[49] In these clinics, social workers worked hand in hand with doctors, understanding that social and medical issues are intertwined, particularly for those designated '*les exclus*' by the French – society's excluded. Early on in my observations, I noted that the first question many social workers asked their undocumented clients was, 'Are you sick?' and, if the patient answered yes, they would ask almost too eagerly, '*how* sick?' I gradually understood that the answer they hoped for was 'very sick' because it provided the one clear means by which to apply for papers.[50]

I am referring to Article 12bis 11, the 1998 provision to the Conditions of Entry and Residence of Foreigners that grants legal permits to those in France with pathologies of life-threatening consequence if they are declared unable to receive proper treatment in their home countries. [51] The logic behind this was humanitarian, and exceptional; the French state felt it could not deport people if such a deportation had consequences of exceptional

the officials. See Delouvin (2000). This clause has now been abolished and replaced with the idea of 'subsidiary asylum' – again, a way to reduce the number of those given asylum with all the attendant rights. 'Asile subsidiaire' became effective in January 2004. It was introduced with the reform of law 52-893 of July 1952, to create the law 2003-1176 of 10 December 2003.

45 The one exception here is for immigrants with high-tech skills. To see how policies that restrict immigration lead to a perversion of the rule of law, see Lochak (2001).

46 Sherene Razack (1995) has made a similar point with respect to the Canadian context of asylum for gender persecution: the subject must present herself through a particular narrative, in this case, as a victim of a dysfunctional and patriarchal culture or state. If one cannot configure oneself in such a way, one is not granted asylum – and there are many factors that inhibit the ability of claimants to become subjects of liberal legal narratives.

47 'ça se voit.'

gravity, such as their death. It was instituted formally in 1998, after intense lobbying by medical humanitarian groups such as Médecins sans Frontières (MSF) and Médecins du Monde (MDM), along with trade unions and associations for immigrant rights. The official language says it is to 'protect human dignity'. It was intended for exceptional circumstances only, safeguarding France's claim to moral primacy as originator both of the Declaration of the Rights of Man and Citizen and of Nobel-prize winning MSF.[52]

Yet with doors increasingly closed to all immigrants and refugees, and with papers increasingly difficult to come by, the illness clause has taken on added significance. Indeed, as Didier Fassin has shown, there is an inverse correlation between the statistics on political asylum and permits for medical reasons: as the number of people admitted for political asylum have gone down, those let in under the auspices of medical humanitarianism have gone up (Fassin 2001a). Thus, with the possibility of papers effectively closed to immigrants and refugees – who are now seen as either criminal or economically burdensome[53] – those already in France without papers have turned to the illness clause as a means to ease the exploitation that is a regular part of being undocumented, believing, rightly or wrongly, that papers will solve all their problems. Medical officials who worked in one of the state medical offices told me about cases of people who purposely did not treat their illnesses in order to prolong them, to keep their legal status – this is because the visa for illness is given on a temporary basis unless the illness is chronic or terminal, and it must therefore be constantly renewed. With the humanitarian exception as one of the clearest hopes for papers and basic rights, legal and political recognition comes at the expense of biological integrity.

Here, instead of policemen or judges, state medical officials act as the gatekeepers, having the power to decide who is recognized by the law, and who is not – they enact sovereign power, having the ability to make exceptions to the law. My point – an absolutely critical one – is that state medical officials have been thrust into this position by the feeling of anxiety and instability in political authority. In other words, the crisis in sovereignty and the inability of states to control their borders is revealed here by prioritizing a humanitarian logic and the recognition of only exceptional cases.[54] Being exceptional here requires one to be understood as an apolitical, suffering body. As part of his 'loi sécuritaire' in his first term, interior minister Sarkozy proposed to alter this illness clause, suggesting that those claiming papers through Article 12 bis 11 were acting fraudulently. He also condemned doctors for being too lax.[55] In a subsequent circular, dated 7 May 2003, Sarkozy states: 'It is necessary to preserve the exceptional character of the right to residency provided for in *Article 12 bis 11*.' What I am describing in this essay can be understood only as part of a larger context

48 'stratégie compassionnel.'

49 For instance, at one hospital clinic where I observed, 90 per cent of their patients were 'étrangers' or foreigners (meaning undocumented immigrants, or those with unclear or unstable legal status); another clinic gave 99 per cent as their figure for foreign patients.

50 Please see Ticktin (2006) for further discussion of the illness clause, as well as Fassin (2001b), where he demonstrates this point, suggesting that, because illness is devoid of the suspicion associated with economic migrants, it has become a source of social recognition.

51 This is the 1998 amendment to the Edict ('Ordonnance') of 2 November 1945 no. 45-2658 on Conditions of Entry and Residence of Foreigners. Article 12bis is the right to 'private and family life', which is itself a direct reference to Article 8 of the European Convention on Human Rights (CEDH). There are eleven categories, of which the 'Autorisation Provisoire pour soins' or 'APS' (temporary

where social and political exclusion has been reconfigured as illness, and biological life conflated with political life. As Fassin notes, where illness was once used to exclude people from entry, it now works as a claim to political recognition (2001b). To be given social and political existence – indeed, to be recognized as *human* in a broad sense – *sans papiers* must barter their physical integrity. Furthermore, to maintain their social and political existence, they must *remain* ill. What Sarkozy describes as 'fraudulent' is more accurately seen as violence on the part of the French state towards people whose basic humanity is recognized only when they are life-threateningly sick.

To return to illness as humanitarian exception, this illness clause itself is considered a special exception; but, furthermore, medical diagnoses always involve interpretation, which can in turn lead to the making of exceptions. In cases when the definition of 'serious illness' is ambiguous because the illness is not HIV or cancer, compassion is the driving force in deciding who qualifies for exceptional treatment. There are no state guidelines for what constitutes '*life*-threatening illness' – indeed, this implies a clear definition of 'life' itself.[56] In these borderline cases, the state nurses and doctors saw suffering and reacted for what they called 'humanitarian reasons'.

Thus, for instance, undocumented pregnant women are an example of cases made exceptions for. One of the state medical officials raised the question of such women: what if the pregnant women are deported away from their husbands or partners? Could being pregnant alone be considered an illness with life-threatening consequences? The answer has occasionally been yes. Similarly, there have been cases of African women in polygamous marriages who are infertile or unable to conceive, and yet whose marriages supposedly depend on them bearing children. They have come to ask for papers for sterility treatment because their husbands would otherwise divorce them, leaving them alone in a foreign country. Such women, too, have occasionally received papers for treatment.

It is clear from this that the health officials' decisions are not always based on laws or rules or rights; the judgment is ultimately within the discretion of the person who receives the case. This clause enters into a break in the law – into what I have called a space of juridical indeterminacy; the humanitarian clause is by nature exceptional, where the law is enacted as state of exception. Within this, the state medical officials' decisions are based on a notion of humanitarianism and compassion, or, as it may happen, the lack thereof. I found that the result depended on the way the *sans papiers*' story was told, the emotions evoked, and that compassion is elicited differently according to race and gender.[57] Furthermore, it seems to be most consistently evoked in cases revolving around sexuality or sexual violence. One of the only men I saw enter through this enigmatic socio-medical door had been a victim of prostitution ring in Eastern Europe.

authorization for medical care) is the eleventh. In November 2004, this article was changed to Article L. 313-11-11 (sub-section 6), part of Ordonnance no. 2004-1248 of 24 November2004, 'relative à la partie législative du code de l'entrée et du séjour des étrangers et du droit d'asile'.

52 Obviously, this clause can be contrasted to the situation in the United States, where one is turned away or deported if one is HIV+ rather than given papers and access to health care. The American context is different from the French on several fundamental levels, including the fact that, in the US, one may have the right to work without having the right to health care, while in France, one may have the right to health care without having the right to work.

53 See Ticktin (2002) for a more detailed discussion of the criminalization of immigrants and *sans papiers*, as well as Fassin (2001a, 2001b). Also, see Delouvin (2000) for a discussion of how, in a pre-election (1997) campaign policy paper, the Socialists recognized

Socialists recognized the need to distinguish between immigration policy and asylum, thereby stopping the conflation of economic immigrants with asylum seekers. However, the Socialists abandoned their promise once elected, and have done nothing to help the asylum process.

Three key points emerge about these two humanitarian exceptions – in other words, about how access to the law is determined, which in this case also implies access to French citizenship: the role of compassion, the state of exception, and the apolitical, innocent, suffering body. At the outer limits, in these spaces of juridical indeterminacy, sovereignty is determined on and through individual bodies, where the process of claiming a place in the juridical realm involves evoking compassion, being exceptional, and inhabiting the subject position of victim. These criteria demonstrate why gender plays a crucial role in determining who will be accepted. Gender configurations suggest that women are more easily understood as victims, as apolitical. That said, I want to conclude by suggesting that not only is gender at play here, but sexuality and, even more specifically, sexual violence.

Conclusions: victims of the state of exception

I have been arguing that the manner in which law operates on the logic of exception is exemplified by extended police powers and practices and by an increase in humanitarian exceptions within the law. In the first case, the precedence given to policing over legal norms in France has led immigrants to fall into legal voids – voids which are essentially spaces of inhumanity, devoid of all the rights and expectations we attribute to humanity, except biological life (and, occasionally, not even that). In the face of this reality, an increase in humanitarian exceptions to the law has allowed certain, exceptional individuals to access basic rights. So what are the characteristics of these individuals who benefit from the humanitarian exception? What kind of juridical space does this dynamic open up? Looking at the examples I have given, women who can be configured as 'Third World Women' are overwhelmingly 'privileged' – here I refer to Chandra Mohanty's (1988) term connoting the stereotype of suffering victims of oppressive and patriarchal cultures, women who are often equated with innocence, passivity, and apolitical corporeal existence, and saved in the name of a superior moral order. But I want to suggest that it further privileges issues around sexuality or sexual violence as the most basic form of suffering – that most worthy of exception within the law. From the gay Algerian who was gang-raped, to the sterility of African women in polygamous marriages, to the male victim of a prostitution ring – these all create an image of life in its most basic, innocent form as sexual life. In these spaces of exception, the humanity that is both protected and constructed by the law looks like a victim of sexual violence.

Although this framework gives certain individuals access to the law through the humanitarian state of exception, i.e. while this construct may indeed lead to papers or asylum on an exceptional basis, it enacts a form of

54 Furthermore, as Lochak argues (2001), the role of the humanitarian exceptions is the result of a politics of immigration founded on the idea of closure of borders – the strategy the state came up with to control the flows of people that escape it.

55 See the circular of 19 December 2002.

56 See Ticktin (2006) for a more detailed discussion of how 'life' gets defined in this context.

57 See Ticktin (2002).

violence all its own: it perpetuates both gender and racial hierarchies, conceiving, for instance, of Third World women as helpless while men are criminalized; it excludes other types of violence, suffering, and injustice as well as other types of agentive individuals such as economic migrants or political refugees; and it frames sexual violence as apolitical. In other words, it privileges forms of life or humanity not constituted as rights-bearing individuals, but as corporeal victims of sexual violence, innocent, non-agentive, and apolitical. Indeed, in creating a category of *victim* as the absolute space of exception within the law, I want to suggest that this moral economy reveals the opening of another 'camp' – a space like a detention centre where socially and politically qualified life is reduced to bare existence, and yet where bare existence is never quite bare; it remains inflected by racial, gender, and class hierarchies. Here, the space of exception is not territorially inscribed, but, rather, an intangible space in the heart of the polis, inhabited by a different understanding of human life – one that enables extreme forms of inequality and discrimination.

In this moral economy, the threat is one of law as the permanent state of exception, where justice depends on the civility of those acting as sovereign, be they police, doctors, or judges. This is a symptom of a more global pattern, where detention centres are cropping up from Australia to Guantanamo Bay – and where humanitarian interventions necessarily follow. Schmitt's political theory might describe this situation as inevitable, suggesting that situation-specific emergency law must always play a key role, and the exception always take precedence over the norm. Yet, accepting his theory as normative, rather than simply as a current empirical reality, means accepting a circumscribed, anti-universalist, and atomized vision of humanity, with victims at its very core. I think, rather, that we must look beyond the reality of law as exception to see what it enables: for instance, is it accidental that a system that works through policing and humanitarian exceptions also produces a pool of undocumented, unprotected, flexible labour, which the French automotive, garment, and construction industries benefit from? Understanding the place of the state of exception must also involve an examination of how arbitrary and irregular discretionary law relates to the imperatives of the capitalist labour market.[58]

Rather than accept the exception as the a priori grounding of sovereignty, therefore, we can take this as a challenge to imagine new forms of sovereignty and law that do not depend upon establishing and controlling borders in a discretionary manner or on sustaining regimes of exploitation. We can take this as a challenge to incorporate all those excluded into political communities, where their lives are not determined by exceptional or extra-legal measures. And a first step in this process must be the critical evaluation, not only of police practices, but of the underlying premises of humanitarian intervention.

58 For an excellent analysis of the connection between capitalist political economy and the state of exception, see Scheuerman (1997).

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