

## **Undocumented Migrants and Resistance in the State of Exception**

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This paper examines the relationship between the state and the undocumented migrant by building on Giorgio's Agamben concepts of "bare life" and "state of exception." In particular, the paper explores the possibility of resistance by migrants in the state of exception, and the implications of noncompliance for the exercise of state sovereignty. Agamben's notion of "state of exception" describes the augmentation of government powers during times of emergency when state sovereignty is perceived to be under threat. In states of emergency, governments suspend elements of the normal legal order and strip individuals of rights, even their legal identity. Whereas Agamben treats the state's denial of a legal identity to migrants as the sine qua non of state power, this paper will examine what might be called the "reverse state of exception": instances where migrants strip themselves of their legal identity in order to evade state control. Whereas Agamben treats legal status as the basis for individual rights, this paper will consider the circumstance where the possession of a legal identity constitutes a liability to the illegal migrant. The paper argues that in instances where migrants have lost all claims against the state and are confronted with expulsion, many will resort to an extreme act of resistance against the state: the destruction of their identity documents. By rendering themselves unclassifiable, illegal migrants oftentimes succeed in tying the hands of the sovereign who is forced to operate within the constraints of the international legal order that requires the possession of identity documents for repatriation. The paper concludes with the paradoxical finding that, under certain extreme conditions, the fewer claims migrants can make against the state, the more constrained the power of the liberal state to secure the obedience of the individual.

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Whereas Agamben treats the state's denial of a legal identity to migrants as the sine qua non of state power, this paper examines what might be called the "reverse state of exception": instances where migrants strip themselves of their legal identity in order to evade state control. Whereas Agamben treats legal status as the basis for individual rights, this paper will consider the circumstance where the possession of a legal identity constitutes a liability for the migrant. The paper argues that in instances where migrants have lost all claims against the state—as is the case with individuals under deportation orders—many will resort to an extreme act of resistance against the state: the destruction of their identity documents. By rendering themselves "unclassifiable" or, in James Scott's words, "illegible", migrants can oftentimes succeed in tying the hands of the sovereign who is forced to operate within the constraints of the international legal order that requires the possession of identity documents for

repatriation. The paper concludes with the paradoxical finding that, under certain extreme conditions, the fewer claims migrants can make against the state, the more constrained the power of the liberal state to secure the obedience of the individual.

### **Homo Sacer and the State of Exception**

Giorgio Agamben's seminal work on the relationship between the individual and the sovereign state is anchored in the concepts of "homo sacer" and "state of exception." Homo sacer, a figure of Roman law, embodies what Agamben terms "bare" or "depolitized" life (1998). Under Roman law, a man convicted of certain crimes was banished from society and stripped of his rights as a citizen. Drawing on Hannah Arendt's description of the "naked life" of the refugee (Arendt 1973), Agamben juxtaposes the bare life of homo sacer who subsists in zones of exclusion and rightlessness with the citizen's "politicized" and rights-based life. The existence of homo sacer is central to Agamben's understanding of sovereign power because the possibility of rights-stripping reveals a schism between the individual's biological existence, on the one hand, and her political life, on the other. Reduced to bare, or biological, life, the refugee is rendered politically insignificant.

Agamben elaborates on this relationship between sovereign power and bare life in his historical treatise *State of Exception* (2005). The notion of state of exception reflects the augmentation of government powers during times of emergency when state sovereignty is perceived to be under threat. In states of emergency, governments suspend elements of the normal legal order and strip individuals of the rights that mark politicized life. The state of

exception is thus the ultimate expression of state sovereignty as the power to proclaim the emergency and suspend the operation of law.

Agamben's understanding of life in the state of exception reflects a conception of rights as fundamentally grounded in the institution of national citizenship. Following Arendt, Agamben rejects the notion that human rights are viable outside the confines of membership in the nation-state. Instead, "the so-called sacred and inalienable human rights are revealed to be without any protection precisely when it is no longer possible to conceive of them as rights of the citizens of a state" (1998, 126). Accordingly, it is those excluded from citizenship—the refugee, the stateless person, the illegal migrant—who most fundamentally represent bare life in the exception.

In Agamben's work, the zone of exception is most clearly embodied in the detention center and (concentration) camp. In *State of Exception*, Agamben treats the detention center at Guantanamo Bay not only as the exception's incarnation, but also as a case whose exceptionalism surpasses that of comparable zones of exclusion:

"What is new about President Bush's order [of November 13, 2001] is that it radically erases any legal status of the individual, thus producing a legally unnamable and unclassifiable being. Not only do the Taliban captured in Afghanistan not enjoy the status of POWs as defined by the Geneva Convention, they do not even have the status of persons charged with a crime according to American law. Neither prisoners nor persons accused, but simply "detainees," they are the object of a pure de facto rule, of a detention that is indefinite not only in the temporal sense but in its very nature as well, since it is entirely removed from the law and from judicial oversight." (2005, 4-5)

Agamben's description of bare life in Guantanamo thus suggests that the denial of citizenship rights not only deprives individuals of the prospect of ever leaving behind bare life, but the

related denial of a legal identity completely strips homo sacer of any state protection whatsoever.

In *Homo sacer* and *State of Exception*, Agamben focuses his theoretical lens on the sovereign's power over the individual. Sovereign power in the state of exception appears totalitarian in nature: not only does it hold complete sway over the individual, but, in contemporary societies, the state of exception is permanent, rather than temporary (2005, 2). While Agamben's notion of sovereign power does not explicitly rule out the possibility of resistance against the state, there does not appear to be much scope for acts or disobedience.

To borrow from Rajaram and Grundy-Warr (2007),

"bare life is, in extremis, that condition of abjection from which no thought of resistance is possible. Power and resistance are separated by the decisionist sovereign who identifies the space of the law and its limits. .... Sovereign power is the decisive exercise of control over subjects, including the confinement of subjects to a position of bare abjection." (2007, xxi)

### **Resistance and Non-Compliance**

What is the nature of resistance in the state of exception? Rarely do acts of noncompliance by those reduced to bare life amount to collective acts of civil disobedience. *Homo sacer* exists in a state of abjection where the scope of resistance falls far short of the resource-demanding standard of organized political action. Instead, the cases of resistance explored in this paper constitute individual acts of desperation that resemble what James Scott aptly termed the "weapons of the weak." These everyday forms of resistance include acts of "passive noncompliance, sabotage, subtle evasion, and deception" (1985, 31). By contrast to institutionalized politics, then, everyday resistance distinguishes itself by its "implicit disavowal of public and symbolic goals" and is concerned "with immediate, de facto gains" (1985, 33). In

other words, the nature of resistance in the state of exception is individualized, rather than collective, oriented toward short-term, rather than systemic change, and fought by means that present an indirect, rather than direct, challenge to sovereign power. For illegal migrants, acts of resistance range from the extreme of hunger strikes and suicide attempts to acts of physical resistance and escape, to the destruction of identity documents.

Resistance as an act of desperation only constitutes a viable course of action once the individual has nothing left to lose. In the state of exception, resistance arises from the circumstance that the individual already has lost all claims against the state and thus has little to fear from defying state orders. In other words, the power of resistance lies in the freedom from constraints that limit the scope of noncompliance for those who still have sufficient standing to fear the loss of rights. Ironically, then, it is homo sacer's extreme political powerlessness that is at the root of resistance and thereby presents a potential threat to sovereign power.

Another way of conceiving of the basic position of homo sacer is to think of bare life as existing outside of the social contract. As the illegal migrant is not party to the contract between the citizen and the state, she is both deprived of citizenship rights and freed from the obligations that tie the citizen to the state. In the words of John Locke,

"It is certain their laws, by virtue of any sanction they receive from the promulgated will of the legislative, reach not a stranger: they speak not to him, nor, if they did, is he bound to hearken to them. The legislative authority, by which they are in force over the subjects of that common-wealth, hath no power over him. ... I see not how the magistrates of any community can punish an alien of another country; since, in reference to him, they can have no more power than what every man naturally may have over another." (1764, Chapter II, Of the State of Nature, Paragraph 421)

While today few would dispute the legitimate authority of states to extend their control to non-citizens within their territory—nor is it the case that the stranger may do as she pleases and escape punishment—Locke’s basic notion that the state-alien relationship operates outside of the social contract remains valid. Its significance for our understanding of the role of resistance in the state of exception is the contract’s nexus of rights and obligations. The social contract is constituted as a fundamentally reciprocal relationship: the state’s granting of rights is contingent upon the individuals’s compliance with certain rules. Before returning to the notion of life outside the social contract I will examine how states ensure the obedience of their citizens.

When it comes to enforcing the social contract, the state faces two basic choices: it can either coerce individuals into obedience or it can seek to secure voluntary compliance. Max Weber reminds us that all state regulation is underpinned by the threat of coercion. And yet, the state rarely employs coercion as a strategy of first choice. Not only is it a resource-extensive use of state power, coercion also risks to unleash social opposition and resistance (Levi 1988). There is much at stake for states to find ways to elicit compliance that does not require the direct use of coercion. Fortunately for states (and their citizens), compliance is regularly forthcoming even in the absence of coercion. Regardless of how we conceive of human motivation, voluntary compliance rests upon the reality of reciprocity, or “exchange” (Fjeldstat 2001).

For those who conceive of individual action as driven by instrumental calculus, compliance occurs where individuals consider the benefits of compliance to outweigh its costs (Stover and Brown 1975; Meier and Morgan 1982). Individuals comply because they do not

want to incur the costs of punishment, or because they value the gains accruing from regulation. In a similar vein, Margaret Levi's concept of "quasi-voluntary compliance" denotes behavior that is shaped by the deterrence effect of sanctions, on the one hand, and the trust that others will equally comply, on the other. To use the common example of taxation, taxpayers comply either because they consider the likelihood of being audited and the punishment associated with tax evasion as sufficiently high to compensate for its fiscal costs, or because they recognize that their tax payments will provide them with the benefits of public goods and services.

A second approach to the study of compliance conceives of individual behavior as essentially norm-driven. Whether or not individuals comply with a state order depends upon what they consider moral and appropriate, rather than whether its expected utility exceeds the expected utility of noncompliance. To the extent that individuals consider laws and their enforcement legitimate, they will comply with state orders (Tyler 1990; Kuperan and Sutinen 1998). A related approach which has been advanced by historical institutionalist scholars focuses on the behavioral implications of rules and routines. These scholars emphasize the power of routines in shaping individual behavior. Accordingly, compliance can be captured in the image of citizens "running on a treadmill to create viable strategies of survival" (Migdal 2001, 255).

Instrumental and norms-driven approaches are not mutually exclusive, of course. Odd-Helge Fjeldstad's (2001) study of taxation in Tanzania, for instance, shows that individual compliance depends both on normative judgments about the perceived fairness of taxes, and on instrumental calculations about the potential tangible benefits of compliance. Despite their

conceptual differences, both interest-based and norms-driven approaches would lead us to expect that individuals in the state of exception will be unlikely to voluntarily comply with state orders. Instrumental cost-benefit explanations hinge on the assumption that individuals face positive incentives for compliance. The state of exception, by contrast, distinguishes itself by a dearth of claims the individual can bring against the state. Regardless of what course of action homo sacer chooses to pursue, she stands little chance of improving her standing vis-à-vis the state. In other words, because the state already has revoked all rights and benefits from homo sacer, the sovereign no longer can offer positive incentives to secure compliance. Significantly, the absence of positive incentives also renders problematic the threat of sanctions as a way of enticing individuals into compliance. The deterrence effect of sanctions relies upon the imposition of costs that can outweigh the benefits of non-compliance. This condition is unlikely to be met where compliance does not stand to be rewarded.

In a similar vein, individuals in the state of exception are unlikely to comply with state orders out of normative principle. The very notion of norms-driven compliance presupposes membership in a community that is bound by shared norms. Thus, citizens who comply with tax laws for normative reasons do so because of a commitment to the welfare of their subnational and national communities. By contrast, bare life in the state of exception represents the individual's expulsion from the national community. Banished from society and stripped of the rights of membership, homo sacer is unlikely to let her behavior be guided by concern for the community's welfare or respect for its legal order.

## **Limits to Sovereign Power**

Individuals in the state of exception, I have argued, have little reason to voluntarily submit themselves to the sovereign will. Because the sovereign cannot count on homo sacer to comply voluntarily, we should expect the state to resort to coercion instead. In *State of Exception*, for instance, the scope of the state's coercive power appears to be unbounded precisely because it is constitutive of sovereignty.

Yet, looking at the coercive acts performed by liberal states against homo sacer, it is evident that, even in the state of exception, state power is not free of constraint. As Christian Joppke has argued in the context of judicial constraints on immigration control, the sovereignty of liberal states is "self-limited" (1998). Most fundamentally, liberal states are bound by the duty to preserve life. Michel Foucault captured the life-preserving quality of contemporary state regulation in the concept of "biopower" which he contrasts with traditional modes of power that were based on the threat of death (1976). Thus, even when confronted with the depoliticized life of homo sacer – a life stripped of all membership rights – the sovereign is not free to act on the individual's body as he pleases. Human rights norms such as the right to life and the prohibition of torture constrain the sovereign's scope of action over those within his custody. While the state may be deprive the individual of physical freedom, it may not deprive her of food and basic shelter nor may the state violate her physical integrity.

The power of these fundamental norms are apparent even in situations where they are violated, as is evident in the U.S. government's treatment of detainees in Guantanamo Bay. Responding to international concerns about the Administration's decision to force-feed hunger

strikers in violation of international law, assistant secretary of defense for health affairs William Winkenwerder responded:

“There is a moral question. Do you allow a person to commit suicide? Or do you take steps to protect their health and preserve their life? ... The objective in any circumstance is to protect and sustain a person’s life.” (The New York Times February 9, 2006)

Thus, when violating medical ethics and engaging in what the Declaration of Malta on Hunger Strikers condemns as “inhuman and degrading treatment” (Article 21), the American state sought to justify its coercive interventions by pointing to its moral obligation to preserve life. In doing so, the Administration inadvertently recognized a limit to state action.

While the treatment of “enemy combatants” in Guantanamo Bay presents us with the outer confines of sovereign power, the limits of state coercion become even more apparent when we examine contexts where sovereignty hinges upon the willingness of homo sacer to cooperate with the sovereign. Whether officers seek to determine a deportee’s nationality or elicit a confession from a criminal suspect, the state’s use of physical coercion is limited by liberal norms, statutes, and conventions. Whereas the use of torture to elicit confessions was once widespread and widely condoned, under the influence of liberalism it lost its status as a legitimate form of state violence. More recently, research on policing practices has shown a gradual evolution of information gathering techniques from relying on direct coercion to resting on manipulation and deception instead (Leo 1992).

While the effective use of state power in society firmly rests upon voluntary compliance, the sovereign in the state of exception finds himself deprived of its soft coercive powers. Unable to offer meaningful incentives to those who have been deprived of the rights of membership, the sovereign is powerless to elicit the compliance of homo sacer. Having backed

himself into a corner where soft coercion is no longer a viable option, the sovereign's use of physical violence is equally limited. Having nothing left to lose, homo sacer is no stranger to denial and may withhold her cooperation even when deprived of physical freedom. By contrast, the state is constrained from employing its full arsenal of coercive powers.

The paper will now empirically examine the scope for resistance in the state of exception by exploring the relationship between illegal migrants, on the one hand, and the liberal state, on the other. Specifically, we will consider the destruction of identity documents by migrants as a strategy for evading state control. Agamben describes the state's obliteration of an individual's legal identity as the ultimate act of rights-stripping: in depriving homo sacer of any legal status, Agamben argues, the sovereign has produced a "legally unnamable and unclassifiable being" (2005, 3). The following will turn Agamben's claim on its head and conceive of the case of identity "self-stripping" as a critical act of individual resistance.

### **Identity Stripping: Resistance by Illegal Migrants**

The exercise of sovereignty over homo sacer is ultimately contingent on the state's knowledge of the individual's identity. As John Torpey argued, "individuals who remain beyond the embrace of the state necessarily represent a limit on its penetration" (1997, 224). In contemporary states, identity is the authoritative marker of exclusion and inclusion, and, in the case of illegal migrants, a necessary condition for expulsion from the national territory. Migrants whose name and nationality is unknown to the state cannot be issued the identity and travel documents on which lawful deportation to another's state's territory hinges. In other

words, “unidentifiable migrants are constitutionally rather invulnerable to expulsion” (van der Leun 2003, 108).

As liberal states have stepped up their deportation efforts, migrants, in particular unsuccessful asylum seekers, have sought to escape the state’s reach by destroying or hiding their identity documents. This act of resistance is far from exceptional. While the following figures and illustrations all refer to immigration enforcement in Germany, they could easily apply to control contexts elsewhere in the advanced democratic world. German interior officials estimate that, in the mid-1980s, immigration authorities had to obtain travel documents for about 30 to 40 percent of all asylum seekers. By the year 2000, the population of “undocumented” asylum applicants is estimated to have increased to 85 percent (Böhling 2001).

The dilemma that an unknown identity poses to the state is aptly captured by a deportation officer’s account of the resistance strategies of illegal migrants: “People have started to realize, ‘if they don’t know who I am, they can’t touch me.’<sup>1</sup> What is important to note is that homo sacer’s ability to render herself unidentifiable is ultimately contingent on bare life. The lives of illegal migrants and refugees in many ways exemplify the condition of rightlessness that marks bare life.

“The territorialization of life means that the refugee is put in a position where she lacks apportioned rights but depends on the charity or goodwill of aid workers or the police. The refugee is outside the law. Levels of innuendo and violence unthinkable to regular human beings, citizens, are regularly perpetrated against the refugee or asylum seeker. The refugee as homo sacer describes the condition of exclusion that those exempt from the normal sovereignty are subject to.” (Rajaram and Grundy-Warr 2004, 41)

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<sup>1</sup> Author interview, senior civil servant, interior ministry Baden-Württemberg, Stuttgart, 7 January 2002.

While much has been written on the dehumanizing consequences of the denial of membership, the absence of rights at the same time makes possible acts of resistance such as identity-stripping. The vast majority of those who lead “politicized lives” have entered into too many bureaucratic relationships with the state to have the choice to render themselves unknowable. Liberal states infrastructurally penetrate their societies far too deeply (Mann 1984) to allow for a pervasive “creation of fog” (Broeders and Engbersen 2007, 1593) by their citizens. Thus, it is the rightlessness of the illegal migrant that is the source of her capacity for resistance by means of identity-stripping. These self-stripping strategies clearly exemplify the possibility of resistance in the state of exception. In the words of Broeders and Engbersen, “[t]he strategy of noncooperation shows that many immigrants are not docile persons who fully cooperate with the authorities. Many of them are difficult to manage by state officials, and they are able to very effectively frustrate the administrative processing of return programs.” (2007, 1603)

We will now return our focus on the state and explore how its officers handle these acts of identity-stripping. In particular, we will examine whether these forms of resistance can succeed in curtailing the state’s sovereign powers.

### **Identity-Stripping and the State**

What are the implications of identity-stripping for the exercise of state sovereignty? Confronted with the challenge of expelling an unidentifiable non-citizen across international borders, the hands of the liberal state are tied. International law only obliges states to readmit their own nationals while recognizing the right of states to refuse entry to any non-national. Unless a state seeks to transport individuals surreptitiously to a foreign territory, it simply cannot expel individuals with unknown identities. For the state, the inability to “render legible”

those within its custody presents a significant threat to sovereignty. Moreover, as I have argued elsewhere, from the perspective of immigration officers, the inability to execute deportation orders because of missing documents is particularly frustrating because it presents the last in a lengthy chain of administrative actions. “Being unable to bring deportees across the border turns the administrative successes of identifying, locating, apprehending, prosecuting, and detaining deportable immigrants into sunk costs.”(2008, 172).

It is important to recognize that the state’s inability to secure travel documents is directly linked to the individual’s refusal to cooperate. Presumably the only effective way for states to induce voluntary compliance would be to grant the migrant residence rights—in which case travel documents would of course no longer be needed. Unable to secure voluntary compliance, state officers are forced to go “embassy-shopping” in the vague hope of identifying the migrant’s nationality.

“We need to get papers for a Sudanese national. ... we apply for an interview with the Sudanese embassy. ... Finally we get an interview. The embassy employee tells us, ‘he’s not from Sudan, he’s from Liberia.’ Then we go to the Liberian embassy, they tell us, ‘he’s not Liberian, he’s from the Gambia.’ The Gambians, in turn, argue, ‘if he is Gambian he’ll have to confirm that he’s applying for papers voluntarily. But maybe he’s not Gambian, he could be from Nigeria.’ We go to the Nigerian embassy, and they say, ‘there is a good chance that he’s from Nigeria. However, you need to provide us with clear evidence.’”  
(Author interview, deportation officer, district Ostprignitz-Ruppin, Brandenburg, November 27, 2001)

Significantly, the diplomatic representatives of the countries of origin of most “undocumented” migrants face few incentives to actively cooperate with the identification efforts of deporting states because they only stand to lose from the return of their nationals. Not only does return migration represent the loss of vital remittances, it often is accompanied by enormous problems in the area of social and economic reintegration. While the deporting states of the

Global North have pursued various diplomatic strategies to improve bilateral cooperation to facilitate the issuing of documents—most prominently the conclusion of readmission agreements—success has rarely been forthcoming (Ellermann, 2008). The paper will now examine a number of identification strategies pursued by the German state that target the undocumented migrant herself. These strategies can be distinguished both by the extent to which they rely on the migrant’s cooperation and by the degree of coercion involved.

#### *Circumventing Cooperation: Biometric Data*

In the absence of official identity documents, state officers are forced to seek out alternative “objective” means of documenting identity. One potential source of identification is to secure a match between a migrant’s fingerprints and a law enforcement database. This strategy, of course, is contingent upon the individual having been apprehended in the past and data having been entered into a system that immigration officers are authorized to access. Moreover, all of this must have taken place in the not too distant past, as data protection regulations prohibit the indefinite storage of biometric data. To use the example of Eurodac, the EU-wide database that collects fingerprints of asylum seekers and illegal entrants: fingerprints of asylum seekers can be stored for up to ten years, while the fingerprints of migrants apprehended at the border are erased after two years.

Still, even if these conditions are met, the availability of biometric data is not always sufficient for authoritative identification. Writing in the context of identity-stripping, Broeders and Engbersen caution that “with more and more new methods of identification being employed, it will become difficult for irregular migrants who have gone through a formal

asylum procedure or who were registered through their tourist visas to keep evading detection and identification by the state" (2007, 1603). I partially disagree with this assessment. Where, as is often the case, migrants cross the border without identifying papers and subsequently file for asylum, state officers will struggle to convince diplomatic personnel to issue documents should the individual contest the name and nationality they provided for their (unsuccessful) asylum application. On the other hand, Broeders and Engbersen are correct to point out that where migrants entered the country with authorization such as a tourist visa, state officers are in a position to establish their identity because the data are based on official documentation.

These limits to the use of biometric data illustrate two important aspects that shape the relationship between the state and homo sacer. First, even in the state of exception, the state relies upon the cooperation of those under its control in order to exercise its full sovereign powers. Second, the denial of rights begets resistance and, ultimately, constrains state power. States have the capacity to establish the identity of individuals to whom they have granted certain benefits—such as a tourist and work visas. Those who have always been forced to live in the realm of illegality, by contrast, often succeed in frustrating state efforts of control.

#### *Circumventing Cooperation: Speech Analysis*

In the late 1990s, German authorities started to conduct speech analyses as a new strategy of identification. Asylum offices used linguistic experts to identify the accents and dialects of migrants—to determine, for instance, from which African country an individual originated on the basis of her tribal language or pronunciation of English or French. In tandem with these efforts officers have also sought to determine that a migrant does *not* originate from

her claimed country of nationality—usually a politically unstable country under a temporary deportation stop—by subjecting the individual to detailed country-specific questioning on political, geographical and cultural facts.

According to state officers, the use of speech analysis can often succeed in identifying an individual's country of origin. In the program's first two years, officers claimed to have identified the likely country of origin in 52 percent (1998/99) and 62 percent (2000) of cases. At the same time, however, these efforts are hampered by the fact there is no impartial authority to confirm these findings—a constraint migrants are certainly aware of. In the vast majority of cases, the foreign embassies in charge of issuing travel documents do not recognize these analyses.

"In our district, we have about 350 to 370 deportable asylum seekers. I'd say that maybe 30 end up leaving out of their own volition, and an additional 30 or 35 we manage to deport. The rest remains here, because we are unable to secure identity documents. Everybody claims to be from Somalia because we cannot deport to Somalia. The asylum office conducts linguistic analyses. Their reports say that it is "probable" or "highly probable" that a migrant is from, say, Togo, or from Sudan. But foreign embassies don't want probabilities—they want 100% certainty."

(Author interview, deportation officer, district Potsdam-Mittelmark, November 14, 2001)

What counts as authoritative proof of nationality beyond a valid passport is within the discretion of each individual state—international law only stipulates that valid passports be accepted as proof of identity. It follows that, in the absence of generally recognized biometric evidence (such as fingerprints linked to a previous passport), it is a tricky question to decide what counts as authoritative proof of identity and not. In many cases where there is any doubt as to the accuracy of an individual's purported identity, migrants can succeed in thwarting deportation simply by refusing to cooperate with the state's identification efforts.

### *Coerced Cooperation: Departure Centers*

Once the previously discussed strategies have been exhausted, the state may further tighten its screws and compel the individual to reside in so-called “departure centers” (*Ausreisezentren*). In Germany, these centers tend to be situated in remote geographic locations and are designed to coerce individuals into disclosing their identity and applying for travel documents. While the centers are open in the sense that their residents can freely enter and leave—an important constitutional constraint—a vast array of administrative measures aim at eliminating any viable alternatives to deportation. Residents are neither allowed to leave the municipality surrounding the centers nor take up employment; they are denied social assistance payments and housing benefits and only have access to center-provided food and shelter, and to emergency medical care.

Staff at these centers pursue a strategy of systematic “wearing down” of deportees’ resistance to cooperation. Migrants have to regularly report to immigration authorities and subject themselves to intensive interviews with deportation officers several times a week.

“Departure centers are a critical tool. They are intended for migrants who refuse to cooperate with our efforts to secure identity documents. We have to remain firm. ... We have to figure out where they are from. We got to make people realize that they have no future here.”

(Author interview, director, Clearing House for the Procurement of Travel Documents, Rhineland Palatine, February 26, 2006)

However, the founders of these centers have generally underestimated the resilience and resolve of migrants to do what ever is in their power to evade deportation.

“It is rare that people cooperate. ... Their stay with us can last years. They have two options: either they stay with us or they run away.”

(Author interview, director, departure center Braunschweig, Lower Saxony, January 31, 2002)

Some preliminary data about the success of these pilot centers reveals mixed findings. In the case of the Braunschweig departure center, the director reported that of a total of 123 residents, officials had succeeded in establishing identity in 34 percent of cases. Of the remainder, 35 percent escaped, 5 percent were released without resolution, and 34 percent remained unresolved at the center. Even in cases of eventual administrative success, the process is very much drawn out, however. Data on another center show that the average length of stay at the center is 309 days, with the longest stay amounting to 2 ¼ years (res publica 2002).

Similar schemes are in place in other European countries. Matthew Gibney's discussion of deportation strategies in Britain (2008) describes the practice to deprive migrants of even the most rudimentary means for survival by cutting off all welfare benefits for asylum seekers whose opportunities for appeal have been exhausted. In some instances, state officers even have gone as far as to remove children from their parents and place them in state custody because the family lacked the basic material necessities (2008, 165). What is remarkable in all of these cases is how thin the line is that "separates compliance from violation of liberal norms" (Gibney 2008, 166). The degree of coercion that underpin these administrative practices clearly speak of the threat that the resistance strategies of undocumented migrants pose to state sovereignty.

### *Coerced Cooperation: Detention*

Detention is the liberal state's most coercive of weapons for pursuing the cooperation of undocumented migrants. It is a legal option where migrants are either considered a risk to public safety or a flight risk. The German state is authorized to detain migrants who refuse to cooperate with deportation orders for up to six months, in exceptional cases for up to 18 months. However, in the case of migrants who are able to stand the pressures of life in detention, if authorities are not able to obtain travel documents within the legal window, there is little the state can do from preventing the individual from returning to her community or from disappearing into illegality.

"There are some who surrender their passport after having spent some time in detention, when they've had enough. But that's rarely the case with people from sub-Saharan Africa, or India, or Pakistan. They simply do not want to return."

(Author interview, social worker, detention center Köpenick, Berlin, December 13, 2001)

Joanne van der Leun's research on illegal migrants in the Netherlands has confirmed the limited effectiveness of detention in securing cooperation. According to a Dutch police officer:

"It costs them six to nine months, but then they are free. Some of the Moroccans are prepared to sit it out. I wonder what's wrong with them, it is seven months of your life but maybe they have nothing left in their own country. The underlying idea is to stay here. And those that are released ..., they are out in the streets again and disappear into illegality again so that they can manage a few more years." (2003, 108)

Officials are even more constrained in jurisdictions with stricter detention limits, such as Spain, where authorities can only detain migrants for up to 40 days. As Jorgen Carling argues:

"If their nationality remains unknown to the country of origin or transit does not readmit them during the 40 day period, they are released. They are issued an expulsion order that makes their stay illegal and prevents them from taking up

legal employment, but the authorities cannot send them out of the country, i.e., carry out ‘removal.’” (2007, 323)

There is no doubt that holding a person in detention for months at a time is a highly coercive intervention. At the same time, migrants know that there is an absolute limit beyond which they cannot be deprived of their freedom. As long as they are able to endure life in detention until that limit, they will be returned to “freedom.” The significance of these limits on detention for the exercise of sovereignty is even more apparent when we look at one of the few liberal jurisdictions where the state has the authority, subject to certain conditions, to detain individuals indefinitely. In the United States, immigration law provides for the provision of “stopping the clock”—which halts the accumulation of time in detention that is counted toward some upper time limit—in cases where detainees do not cooperate with applications for travel documents. In these instances, state officers can use the option of indefinite detention to exert pressure on migrants to cooperate in securing identity documents. A U.S. deportation officers explains:

“Section 241 states that the refusal to cooperate stops the clock. And we make good use of this. If someone does not cooperate in filling in forms we just let them sit. We have someone who’s been in detention for over 2 years. If someone doesn’t help me, I don’t help him, it’s that easy.”

(Author interview, deportation officer “H”, INS San Diego, July 2002)

Anna Pratt in her study of immigrant detention in Canada likens the act of cooperating with the state’s demand for identification and the signing of the application for corresponding travel documents to Foucault’s conception of the relationship between the confession and punishment by the sovereign.

“Both legitimize and expedite the sanction. Both render the subject of the sanction complicit in their own subjectification. And the withholding of both results in a more onerous challenge for the authorities, who must work harder to

achieve their desired objective. Moreover, the refusal to sign is often the only bit of leverage left to some detainees in their efforts to avoid deportation. For all of these reasons, the signing, like the confession, is a key regulatory technique and guiding preoccupation of authorities." (2005, 49)

Thus, we can conceive of identity-stripping not only as an example of resistance that is aimed at the prevention of forced expulsion, but also as an act of "self" preservation that counters the inhumanity of bare life. Even in the state of exception, then, there is some scope for autonomous action by the individual. In fact, it is the very fact of rightlessness that places homo sacer in a position where extreme acts of resistance are possible, as nothing remains to be lost.

### **Conclusion**

This paper explored the possibility for resistance under conditions of extreme state power. I examined the strategies of illegal migrants under deportation orders whose existence closely corresponds to Agamben's notion of bare life in the state of exception. Threatened with one of the most awesome powers of the sovereign—expulsion—many migrants strategically shed their legal identity in order to escape the reach of the state. Remarkably, in doing so they often succeed in preventing the state from exercising its sovereign powers.

As Scott has argued, these strategies of resistance do not amount to acts of empowerment, but are better understood as acts of desperation. In his study of poor villagers in Malaysia, the wielders of the "weapons of the weak" were able to defy social sanctioning because their poverty had already robbed them of their dignity. They, like the migrants in this study, had nothing left to lose. Life in the state of exception does not give rise to acts of political emancipation for the simple reason that homo sacer cannot make any rights claims

against the state. And yet, the significance of homo sacer's act of rendering herself unclassifiable, unnamable, and illegible rests exactly on the very powerlessness of bare life. Unlike the sovereign, homo sacer has nothing left to lose and can act unconstrained by the fear of the consequences of resistance.

Often, these acts of desperation succeed in thwarting social control. Without a legal identity, migrants cannot be forcefully removed from the territory. Despite the enormity of sovereign power over those in the state of exception, the state's hands are tied by its own liberal constitution. Thus, as Foucault's concept of biopower indicates, liberal states no longer direct their power toward the destruction, but rather the preservation of life. Even when confronted with acts of resistance that threaten its sovereignty, the state cannot resort to the unchecked use of physical force or indefinitely deprive individuals of their freedom.

We could refer to this scenario as a "reverse state of exception<sup>2</sup>," at the danger of overstating the force of individual resistance and underplaying the scope of state power. This discussion of the identity-stripping strategies of illegal migrants describes a situation where homo sacer suspends the routine state-individual relationship by withholding her cooperation and compliance. The state, by contrast, is constrained in countering these acts of resistance and is oftentimes powerless to secure the individuals' obedience. Because in liberal democracies order so pervasively rests on voluntary compliance, sovereign power reaches an impasse where the state can no longer offer meaningful incentives to secure compliance. Ironically, then, it is those who hold no claims against the state that are most able to frustrate state control.

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<sup>2</sup> I owe this term to Dietmar Schirmer.

## References

- Agamben, G. (1998). Homo Sacer: Sovereign Power and Bare Life. Stanford, CA, Stanford University Press.
- Agamben, G. (2005). State of Exception. Chicago, IL, University of Chicago Press.
- Arendt, H. (1973). The Origins of Totalitarianism. Fort Washington, PA, Harvest Books.
- Böhling, T. (2001). Abschiebungshindernisse heute: Bürokratie, Zuständigkeiten und Desinteresse! 10. Migrationspolitisches Forum, Berlin.
- Broeders, D. and G. Engbersen (2007). "The Fight Against Illegal Migration: Identification Policies and Immigrants' Counterstrategies." American Behavioral Scientist 50(12): 1592-1609.
- Carling, J. (2007). "Migration Control and Migrant Fatalities at the Spanish-African Borders." International Migration Review 41(2).
- Ellermann, A. (2008). "The Limits of Unilateral Migration Control: Deportation and Interstate Cooperation." Government and Opposition 43(2): 168-189.
- Fjeldstat, O.-H. (2001). "Taxation, Coercion, and Donors: Local Government Tax Enforcement in Tanzania." Journal of Modern African Studies 39(2): 289-306.
- Foucault, M. (1976). The History of Sexuality Vol. 1: The Will to Knowledge. London, Penguin.
- Gibney, M. J. (2008). "Asylum and the Expansion of Deportation in the United Kingdom." Government and Opposition 43(2): 146-167.
- Joppke, C. (1998). "Why Liberal States Accept Unwanted Immigration." World Politics 50: 266-293.
- Kuperan, K. and J. K. Sutinen (1998). "Blue Water Crime: Deterrence, Legitimacy, and Compliance in Fisheries." Law & Society Review 32(2): 309-338.
- Leo, R. A. (1992). "From Coercion to Deception: The Changing Nature of Police Interrogation in America." Crime, Law and Social Change 18: 35-59.
- Levi, M. (1988). Of Rule and Revenue. Berkeley, California, University of California Press.
- Locke, J. (1764). Two Treatises of Government. London, UK, A. Millar et al.
- Mann, M. (1984). The Autonomous Power of the State: Its Origins, Mechanisms and Results. Archives Européennes de Sociologie. 25.
- Meier, K. and D. R. Morgan (1982). "Citizen Compliance with Public Policy: The National Maximum Speed Law." The Western Political Quarterly 35(2): 258-273.
- Migdal, J. S. (2001). State In Society: Studying How States and Societies Transform and Constitute One Another. New York, NY, Cambridge University Press.
- Pratt, A. (2005). Securing Borders: Detention and Deportation in Canada. Vancouver, BC, UBC Press.
- Rajaram, P. K. and C. Grundy-Warr (2004). "The Irregular Migrant as Homo Sacer: Migration and Detention in Australia, Malaysia, and Thailand." International Migration 42(1): 33-63.
- Rajaram, P. K. and C. Grundy-Warr (2007). Introduction. Borderscapes: Hidden Geographies and Politics at Territory's Edge. P. K. Rajaram and C. Grundy-Warr. Minneapolis, University of Minnesota Press.
- res publica (2002). Ausreisezentren: Der Reader. München, res publica.,

- Scott, J. C. (1985). Weapons of the Weak: Everyday Forms of Peasant Resistance. New Haven, CT, Yale University Press.
- Stover, R. V. and D. W. Brown (1975). "Understanding Compliance and Non-Compliance with the Law." Social Science Quarterly **56**: 363-375.
- The New York Times (February 9, 2006). Tough U.S. Steps in Hunger Strike at Camp in Cuba: 1.
- Torpey, J. (1997). "Coming and Going: On the State Monopolization of the Legitimate "Means of Movement"." Sociological Theory, **16**(3): 239-259.
- Tyler, T. R. (1990). "The Social Psychology of Authority: Why Do People Obey an Order to Harm Others?" Law & Society Review **24**: 1089-1102.
- van der Leun, J. (2003). Looking for Loopholes: Processes of Incorporation of Illegal Immigrants in the Netherlands. Amsterdam, Amsterdam University Press.