



## UvA-DARE (Digital Academic Repository)

### The Right not to Have Rights: A New Perspective on Irregular Immigration

Oudejans, N.

**DOI**

[10.1177/0090591718824071](https://doi.org/10.1177/0090591718824071)

**Publication date**

2019

**Document Version**

Final published version

**Published in**

Political Theory

**License**

CC BY-NC

[Link to publication](#)

**Citation for published version (APA):**

Oudejans, N. (2019). The Right not to Have Rights: A New Perspective on Irregular Immigration. *Political Theory*, 47(4), 447-474. <https://doi.org/10.1177/0090591718824071>

**General rights**

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

**Disclaimer/Complaints regulations**

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

# The Right not to Have Rights: A New Perspective on Irregular Immigration

Political Theory  
2019, Vol. 47(4) 447–474  
© The Author(s) 2019



Article reuse guidelines:  
[sagepub.com/journals-permissions](http://sagepub.com/journals-permissions)  
DOI: 10.1177/0090591718824071  
[journals.sagepub.com/home/ptx](http://journals.sagepub.com/home/ptx)



Nanda Oudejans<sup>1</sup>

## Abstract

In recent years irregular immigration has attracted increasing scholarly attention. Current academic debate casts the irregular immigrant in the role of the new political subject who acts out a right to have rights and/or as the rightless victim who is subjected to violence and abuse. However, the conception of the irregular immigrant as harbinger of political change and/or victim reifies the persistent dichotomy between inclusion and exclusion. It ignores that irregular immigrants are not by definition excluded from a normal life and that numerous immigrants live in the interstices between full legal inclusion and exclusion without democratic legal order being cast to ruin. The question that underlies this essay is: What concept of law can accommodate the unauthorized presence of immigrants (i) without reducing them to bare life, struggling to survive and/or assigning them a political agency and (ii) without taking recourse to the use of force and violence in a zero-tolerance policy? To answer this question, this article draws on what Agamben has coined the potentiality of the law and unpacks Judith Shklar's idea of different degrees of legalism.

## Keywords

irregular immigration, potentiality, legalism, Agamben, Shklar

---

<sup>1</sup>Utrecht University, Utrecht, The Netherlands

### Corresponding Author:

Nanda Oudejans, Utrecht University, Newtonlaan 201, Room 3C.23, Utrecht, 3584 BH, The Netherlands.

Email: [n.oudejans@uu.nl](mailto:n.oudejans@uu.nl)

## Introduction: The Age of Irregular Immigration

A vast number of irregular immigrants live and work in our societies. Scholars across the disciplines diagnose that the exercise of migration control over the lives of irregular immigrants severely curtails them in their opportunities and infringes upon their human rights. Irregular immigrants are commonly conceived either as victims of a current system of law who need to be emancipated into that system of law or as the new political subject that changes the law. Alexander Somek rightly argues that “[t]he post-proletarian left has increasingly cast *the* paradigmatically excluded group, namely people across the borders who wish to be submitted to society, in the dual role of the victim and harbinger of change.”<sup>1</sup> The first perspective, the victim perspective,<sup>2</sup> seems strongly informed by the political thoughts of Giorgio Agamben, as it depicts the irregular immigrant as deprived of human rights and reduced to bare life, struggling to survive; the second perspective is formed along the lines of Hannah Arendt’s alluring phrase “the right to have rights.”

Yet the focus on the irregular immigrant’s suffering and/or political agency accepts the inside/outside divide that is constitutive of democratic legal order and its corresponding mechanisms of inclusion and exclusion. In *The Citizen and the Alien*, Linda Bosniak argued that immigration largely shatters this dichotomy and disrupts the common view that citizenship is “*hard on the outside and soft on the inside*.”<sup>3</sup> In this view, there is little contradiction found in the jurisdictional division between bounded membership at the border, where the immigration powers of the state reign, and universal citizenship for all within a community’s boundaries. The one is committed to exclusion, the other to inclusion. Bosniak asserts, however, that it is in the nature of immigration to bring a state’s borders to bear on the inside<sup>4</sup> such that a clear separation between inside and outside, inclusion and exclusion becomes elusive. This is clearest when the focus is on the situation of unauthorized immigrants.<sup>5</sup> On one level, their territorial presence puts pressure on the idea that the border coincides with a geographical line that separates one territory from the other, as the immigration powers of the state to detect, arrest, and detain immigrants penetrate deeply within a state’s interior. On another level, what Bosniak calls the “*intgression of the border*”<sup>6</sup> does not prevent irregular immigrants from living in our societies.

Indeed, without denying the deplorable predicament of many unauthorized immigrants (particularly rejected asylum seekers or displaced persons in a refugee context), it should also be noted that irregular immigrants are not always struggling to survive and are not by definition excluded from a normal life. On the understanding that unlawful immigrants do not constitute a homogenous group, the movement of some irregular immigrants and their

techniques of existence might well be seen as what James Scott calls state-evading immigration.<sup>7</sup> Immigrants who build fairly decent lives outside the law<sup>8</sup> or even willingly reject a subject position within the state do not, of course, represent the whole story about immigrants without legal status. But it is an untold story that calls into question the main presuppositions of the academic debate that casts the irregular immigrant in the dual role of an unprotected naked life exposed to sovereign violence and/or a new political subject that acts out the right to have rights. In between these two options a third possibility emerges: that of living in a state's territory free of the threat of violent removal but without being regularized in its legal order. The wager of this article is that irregular immigration does not simply point to a broken immigration system. Nor does it simply reveal what Nicholas de Genova calls the shadowy "obscene" of the "large-scale recruitment of illegalized migrants as legally vulnerable, precarious and thus tractable labour."<sup>9</sup> Rather, it will be argued that the large-scale presence of "illegal" immigrants reveals something about the law that hitherto remained hidden or out of sight. The question this article tries to answer is: What concept of law can accommodate the presence of irregular immigrants (i) without necessarily reducing them to a naked life struggling to survive or assigning them a political agency and (ii) without taking recourse to force and violence to restrain the movement and presence of irregular immigrants?

This article takes its point of departure in the reality of immigration outside the law.<sup>10</sup> Section II explores this reality from the limited number of immigrants who do not aspire for legalization even if they do want to settle down in the destination country. State-evading immigration and the larger conflicts it stands for challenges the state's power to enforce its immigration laws. The powerlessness of states to embrace and control immigrants is not confined to those immigrants for whom avoiding the state is a real choice. The immigration powers of the state are also tested by the activism of both private and public actors that create spaces where irregular immigrants are able to live. For example, public authorities sometimes engage in practices of under-enforcement of immigration law, as in sanctuary cities in California, Oregon, and Vermont where local authorities refuse to offer assistance to federal immigration enforcement and keep irregular immigrants safe under their jurisdiction.<sup>11</sup>

Section III analyses why, from the perspective of states, irregular immigration is believed to constitute a security threat that disrupts and threatens the normal run of things and considers the normative implications thereof. In order to prevent the chaos and disorder stemming from people trespassing immigration laws there are, at the end of the day, only two options: either irregular immigrants are legalized, for example, by general or individual amnesty, or

they are excluded from the polity that requires they be removed from the territory. However, the reality of irregular immigration calls into question the main axiom of immigration law and policies that there is either inclusion or exclusion. Indeed, despite ever-restrictive measures of immigration control, states simply fail to round up and remove all irregular immigrants from their territories.<sup>12</sup> Importantly, this subverts governance and challenges the regulative power of the law. Moreover, the “either inclusion or exclusion” logic is bound to derail in violence.<sup>13</sup> In recent decades we have witnessed an increasing criminalization of illegal immigration, rising numbers of border police deployed inside the territories of states, and a militarization of external borders to prevent immigrants from crossing borders without prior authorization to do so.<sup>14</sup>

This sets the normative background of this article: If Western democracies want to maintain their democratic identity under the rule of law, they face the challenge to suspend the use of force and violence in what is officially called the fight against illegal immigration. Section IV therefore unpacks what Agamben has coined the potentiality of the law, by which he seeks to rethink the relation between law and life. Following Walter Benjamin’s core insight in *Zur Kritik der Gewalt* that the legal order’s intention “of preserving the law itself” [*die Absicht ... das Recht selbst zu wahren*]<sup>15</sup> explains the passage from law to violence as is manifested in the sovereign decision on the exception, Agamben argues that suspending the legal order’s validity to restore order reveals the potentiality of the law. The potentiality of the law reflects a law that applies (power) in no longer applying (powerlessness). But as already noted by Jessica Whyte, Agamben’s work harbours a second and different meaning of the potentiality of the law that is used to conceptualize a life that wards off the juridification of all human relations.<sup>16</sup> Law’s potentiality enables law to recognize a life that is external to it beyond the sovereign exception that holds bare life in its ban. Against the victim perspective, it is argued that the irregular immigrant’s status of bare life does not necessarily turn him into a vulnerable body and a helpless victim but instead contains the possibility of what Agamben calls form-of-life, in which it is not possible to isolate bare life and separate it from human life. It will be argued that the potentiality of the law illuminates the paradoxical situation in which immigrants are not legally included—hence they lack law’s protection—but are at the same time not effectively removed from the polity that has excluded them. Indeed, if the law’s intention is to preserve itself, as Benjamin has it, then it might well be decided to refuse the enforcement of immigration laws on irregular immigrants by means of repression, detention, deportation, and even violence for law’s own sake. The law then applies to irregular immigrants in no longer applying, as they are safe from a repressive law that haunts them down to remove them.

Between inclusion and exclusion, this article argues that a right *not* to have rights emerges as the mirror image of the potentiality of the law. In *The Highest Poverty*, Agamben explores the relationship between form-of-life and law's potentiality through the lens of the Franciscan thesis "have only this right, not to have any rights." As it seeks to legitimize a life outside the law in negative terms with respect to the law, the thesis is paradoxically formulated.<sup>17</sup> Yet, it is precisely this paradoxical formulation that pushes the relation of ban to the extreme such that what has been excepted appears in free form. The right not to have rights enables us to consider a different relationship of the ban that transforms it into something positive.<sup>18</sup> The right not to have rights does not call for a renouncement or destruction of law altogether. Rather, it directs our attention to the need for a destituent power that neither makes nor destroys the law but that neutralizes and renders inoperative the work of the law. According to Agamben, the challenge is to look for such a destituent power within a constitutional political system.<sup>19</sup>

Section V takes up this suggestion by turning to Judith Shklar's argument for different degrees of legalism in *Legalism: Law, Morals, and Political Trials* from 1964. The idea of varying degrees of legalism is Shklar's response to "the extremity of rule-oriented thinking"<sup>20</sup> that characterizes what she critically calls the ideology of legalism and that causes the juridification of human life. Shklar's suggestion to think differently about the law hinges on the difference between more and less legalistic institutions that helps us "to understand the conditions under which law operates as a form of social control, *or fails to do so*"<sup>21</sup> without our legal institutions being immediately cast to ruin. Her subsequent claim that this leaves the question as to the scope of law, and what should and should not be enforced open to political preference,<sup>22</sup> seems particularly apt to understand the successes *or failures* to control illegal immigration. The idea of different degrees of legalism allows for an under-enforcement of immigration laws in which the law applies in no longer applying. As such, it offers an in-route to the potentiality of the law.

A range of scholars retain a normative commitment to the legal inclusion of irregular immigrants. Bosniak fleshes out a territorial conception of rights. She makes the normative claim that the territorial presence of irregular immigrants "often trumps the irregularity of their status for purposes of allocating rights and recognition."<sup>23</sup> Elizabeth Cohen presents a complementary claim by exploring the normative significance of temporality in the conferral of membership rights.<sup>24</sup> I am sympathetic to what Bosniak calls "an ethic of inclusiveness."<sup>25</sup> Nevertheless, this article proposes a different thread of thought. The normative horizon of this article is not inclusion. Nor is it simply seeking to expose exclusion as the blind spot of normative theories on inclusion. Rather, this article links up with what Agamben has set as the

political task of our time, namely, to refuse the separation between bare life and human life. From the vantage point of the potentiality of the law, I offer an alternative framework in which to conceptualize a legal order's response to irregular immigration. The argument is normative in the sense that it alters our self-understanding of the practices we are engaged in and hopes to attenuate the harsh and violent effects of the fight against illegal immigration. Following Shklar, the aim is to mobilize awareness that there is a choice between an uncompromising enforcement of immigration law in a zero-tolerance policy and a diligent enforcement that decriminalizes the irregular immigrant. What emerges is a right not to have rights, as the right of the irregular immigrant who is not legally included but who does not, for that reason, have to fear the violent enforcement of the law.

### Avoiding the State

Two views on irregular immigration dominate in academic debate. First, the issue of irregular immigration is framed within a survival or victim perspective. Here, the irregular immigrant appears as a subject deprived of human rights and reduced to bare life, struggling to survive. Subjected to the constant threat of removal, it is said that the irregular immigrant only appears in democratic legal order as a removable body. The diagnosis suggests that the irregular immigrant epitomizes Agamben's *homo sacer*, whose naked life is exposed to the threat of sovereign violence.<sup>26</sup> Additionally, the irregular immigrant's exclusion from the legal order is said to be inextricably linked with "the public secret of [his] abject inclusion as 'illegal' labour."<sup>27</sup> As Étienne Balibar puts it, the immigration powers of the state preserve "a world apartheid."<sup>28</sup> The victim perspective stresses the "excessive misery"<sup>29</sup> that irregular immigrants suffer. This perspective mainly predominates in legal scholarship where the irregular immigrant appears as the victim of a current system of law that needs to be emancipated into that system of law, for example, by exploring vulnerability as a ground for state protection.<sup>30</sup>

The second perspective does not necessarily reject the victim view but complements it by raising the irregular immigrant to the level of the new political subject. Whereas the notion of the right to have rights was coined by Arendt in her reflections on the mass displacement of refugees and stateless persons after World War I, it is now the guiding term in studies on irregular immigration.<sup>31</sup> Rather than the embodiment of bare life, the irregular immigrant's deprivation of human rights makes him the subject *par excellence* of an emancipatory politics that challenges the current distribution of rights and contests the distinction between insiders and outsiders. The right to have rights is understood as the right to politics that is rallied to the call of Another

We and a better world. The irregular immigrant here appears as a political actor “whose public appearance can be explosive and liberating,” since he “embodies the contradictions of the arrangements that exclude him.”<sup>32</sup>

The literature on the right to have rights is abundant. Although there is a wide variety of divergent theories, generally speaking it can be said that the right to have rights is conceptualized as a double gesture.<sup>33</sup> It is a demand that everyone belongs to a political community willing and able to guarantee rights, and at the same time, it installs awareness that this requires a bounded community of members who among themselves distribute rights,<sup>34</sup> making exclusion inevitable. But interestingly, although there is general agreement that the right to have rights draws our attention to exclusion, it is believed to do so with a view to inclusion. Or, more modestly, to remind us of the constant need to critically inquire and renegotiate the civic borders of the state.<sup>35</sup> Informed by the dire predicament of rightless immigrants, amplified by Agamben’s bleak notion of bare life that is tormented by a law that no longer protects it, academic studies seem haunted by the normative need of inclusion. Referring to *isonomia* in Greek cities, Balibar pledges that what is needed is “an active transformation of exclusion processes into processes of inclusion of the discriminated categories into the ‘city’ or the ‘polity.’”<sup>36</sup>

Expanding the legal scope of immigrants in need of protection on the basis of vulnerability, or refusing to see irregular immigrants as voiceless subjects and attributing them political agency, is certainly important. But it is also important to ask what the two dominant perspectives on irregular immigration fail to see. Empirically, both the fact that irregular immigrants are simply there and the self-understanding of some irregular immigrants call into question the normative horizon of legal inclusion. Legal-empirical research by Van Meeteren, Engsbergen, and Van San demonstrates that the victim perspective cannot bear the full weight of irregular immigration if only because some irregular immigrants are able “to live a decent and tranquil life.”<sup>37</sup> As one of the respondents of their study makes clear about his illegal residence in Belgium: “So far I haven’t experienced any real difficulties; I lead a better life than people with residence permit. I even make more money.”<sup>38</sup> Further research by Van Meeteren on irregular immigrants in the Netherlands and Belgium has shown that some economic migrants do not aspire for legalization, because they only want to make money to invest in their home country to which they soon wish to return. This might well be the reason why they are prepared to live in low-quality accommodation and work many hours in low-paid jobs. Other irregular immigrants do want to settle down in the destination country but nevertheless do not aim for legalization.<sup>39</sup> Legal-empirical research by Düvell and Jordan also suggests that a lack of legal status does not necessarily deliver immigrants over to abuse and criminal power: “while

clandestine immigrants' living and working conditions are usually associated with some harshness, it is also found that others manage relatively well and display some upward mobility."<sup>40</sup> In addition to immigrants who do not aspire for legalization, Düvell observes that "clandestine migration exists because authorities are unable, or even unwilling to efficiently and fully prevent this from happening."<sup>41</sup> The powerlessness of states to fully control the movement and presence of immigrants illuminates why people can live outside the confines of the state in whose territory they reside. According to John Torpey, administrative laxity is as old as the state's monopolization of the legitimate means of movement and "the well-meaning assistance of a variety of benefactors frequently made a mockery of the state's use of documentary controls as means of regulating movement."<sup>42</sup>

If we take into account the self-understanding of irregular immigrants who do not aspire for legalization and recognize that authorities, employers, benefactors, and activists may respond to this by creating possibilities to live outside the law, we must take seriously the idea that avoiding the state is a real choice. Indeed, unauthorized immigrants might have something to gain by remaining under the radar and keeping the arm of the (fiscal) state at length, not only because they fear detection, arrest, detention, and removal but also because a life in the periphery gives a certain sense of freedom, autonomy, and economic prosperity. Immigrants who refuse a subject position within the state exercise a freedom that depends, to use Hobbes's phrase, on the silence of the law.<sup>43</sup> If irregular immigrants chose to be ungoverned, they are not by definition deplorable remnants of inclusion and exclusion but can also be seen as what James Scott calls runaways that evade state incorporation.<sup>44</sup> Moreover, if the presence of irregular immigrants who live fairly decent lives does not result in a diminution of public order and a destruction of law, the question arises what concept of law can account for the presence of immigrants beyond the inclusion-exclusion divide.

More theoretical objections also hold against the victim-agent perspective. The concern here is that a focus on vulnerability and rights, or on agency and empowerment, reinforces the exclusionary powers of the state it seeks to oppose. As pointed out by Agamben, agency on behalf of democratic alternatives and political change is always thought by means of the concept of constituent power that lies at the origins of democratic legal order.<sup>45</sup> To the extent that constituent power is the power that founds or makes new law, it is indeed a good candidate to think the contestation of a current legal order with a view to bringing about a different legal order on behalf of those who do not belong to the current system of law. But constituent power that makes the law anew promotes its own conception of a just juridico-political order over other conceptions and thus produces its own exclusions and remainders. Put differently,

the principal addressee of constituent power is the legal order and its institutions that are challenged in the name of another and more just law and a different distribution of rights and freedoms. Ultimately, it reinforces the state. But the irregular immigrant who willingly avoids the state or manages to build a normal life outside the state preserves the memory of a life that is not annexed by law and that is not reducible to a legal status. Indeed, if, as Agamben reminds us in *The Use of Bodies*, clandestine life is the most political life,<sup>46</sup> this might well be because clandestine life—in all the different meanings it holds—reminds us that the state cannot exhaust human life. Agamben, therefore, proposes to think of human agency no longer by means of the concept of constituent power with its emphasis on founding, making, and changing but by what he calls a destituent power that renders the work of law inoperative. Section IV returns to this notion and its relevance to thinking about irregular immigration.

The victim-agent perspective fails to see that the irregular immigrant, simply by being there, implicitly claims that no state gets to decide where he has to live. Obviously, this claim conflicts with the claimed right of sovereign states to create and enforce immigration laws that regulate the entry and presence of non-nationals. From the perspective of states, unauthorized presence saps sovereignty and subverts the regulative power of the law. In order to rethink the issue of irregular immigration afresh and anew, it is apposite to consider the dilemma that irregular immigrants and states face in facing each other. The next section discusses how irregular immigration is constructed as illegal immigration and as a security issue that necessitates a fight against it. It will be argued that the fight against illegal migration deeply compromises law as a coherent and consistent body of rules that orders a polity's daily practices and institutions.

## Fighting Illegal Immigration

There are two important reasons why irregular migration is perceived to constitute a security threat. First, as argued by Hans Lindahl, insecurity prevails as the large-scale presence of immigrants illegally staying in the territory implies that the borders of the state, which secure and guarantee an inside over against an outside so as to preserve unity and order, are constantly being crossed without authorization.<sup>47</sup> The presence of irregular immigrants damages democratic legal order precisely because the entry and stay of the immigrants concerned is not authorized by the members of the polity in whose territory they remain. Their entry and presence induces disorder, because the people “reject attributing to themselves the immigrant's stay as an act that they have jointly authorized as an act in which they have a joint interest.”<sup>48</sup>

Second, insecurity also prevails because irregular immigrants are out of place (i.e., not where they are supposed to be). It is a visceral assumption of contemporary immigration policies that each and every individual is a national and that everyone has his proper place within the state of origin. This interpretation plays on the role of nationality in international law as an element of order that emplaces the individual within a state.<sup>49</sup> The fact that nationality is generally accepted as an “element of order”<sup>50</sup> also explains why irregular immigrants represent disorder. The irregular immigrant is considered to be out of place or to be misplaced as he ought to be elsewhere, (i.e., the country of origin), by virtue of his nationality. On the understanding that the irregular immigrant is properly located elsewhere, he is reduced to a removable body with barely any rights in the receiving state. Indeed, as Gregor Noll observes, from the viewpoint of states the issue is not whether irregular immigrants have or do not have basic human rights. The point is rather that they are denied access to those rights “here” and “now,” as they are supposed to vindicate those rights “there” and “later,” that is, in the country of origin.<sup>51</sup>

Our legal and political institutions do not operate well when surrounded by disorder, or so it seems. What is called the fight against illegal immigration is, therefore, another way of saying that states aim to reinstate and guarantee the normal run of things and maintain the normal framework of everyday life in which legal order can actually function. If, as Benjamin has it, the legal order intends to preserve itself, this explains why, in situations of emergencies, the validity of the law is suspended to secure and preserve the unity of legal order with all means necessary. In *Immigration Outside the Law*, Hiroshi Motomura drives the point home: If unlawful presence of immigrants is seen to induce disorder, law and policy will centre on a zero-tolerance enforcement<sup>52</sup> that prosecutes and punishes immigration law violations as crimes.<sup>53</sup>

Clearly, the criminalization of illegal immigration deeply penetrates into the daily lives of the immigrants concerned. According to Motomura, the effect is often that “unauthorized migrants then lack access to the autonomous spheres created by private actors in which they might otherwise be able to live.”<sup>54</sup> The annexation of daily life is accompanied by “aggressive detention and deportation policies.”<sup>55</sup> Balibar even views the securitization of borders and the ensuing social segregation and unequal access to means of existence as the “corner stone of institutional violence.”<sup>56</sup>

However, this rationale for the fight against illegal immigration does not hold water. First, the fight against illegal immigration is inadvertently limited in the extent to which it can meet the requirements of preserving law and order. In *Zur Kritik der Gewalt*, Benjamin argues that the police who are

called upon in emergency situations ultimately act against the law, as “the ‘law’ of the police really marks the point at which the state . . . can no longer guarantee through the legal system the empirical ends that it desires at any price to attain.”<sup>57</sup> In a similar vein, it can be argued that the state’s immigration powers called upon to secure legal order threatened by illegal immigrants ultimately lose sight of this aim. If the aim of immigration and border control is to maintain the normal course of things such that law can function, it is never simply an administrative function of law enforcement but opens up a space of indistinction between law, force, and violence. Proceeding from the assumption that illegal migration causes disorder, immigration-law enforcement all too often comes down to stretching law to its limits in that, as Agamben says, “a minimum of formal being-in-force coincides with a maximum of its application, and vice versa.”<sup>58</sup> The effect is that “what had been a legal power now comes to stand, as naked power, over against [the] abstract nakedness” of the immigrant who has been divested of his/her status as a legal subject.<sup>59</sup> No longer legal acts, the acts of the border police become acts of violence. This deeply damages and compromises the inside they claim to preserve and secure.

Second, the stubborn assumption that irregular immigration induces disorder is disproven by the fact that irregular immigrants are not fully outlawed but are in many liberal democratic countries entitled to due process rights; court, contract, and property rights; and educational rights for minors. Bosniak uses this fact to assert the ambivalence of the law with respect to the allocation of rights and benefits to irregular immigrants.<sup>60</sup> She argues that even if the state is allowed to decide who is allowed to enter and become a member, it does not normatively follow that the state has the power to regulate the irregular immigrant’s life in the social and economic sphere: “Power in one sphere does not necessarily entail power in the other.”<sup>61</sup> According to Bosniak, this proves liberal democracy’s commitment to a territorial conception of rights that she then explores as a basic principle that membership rights ought to be open to all.<sup>62</sup> Yet, law’s ambivalence with respect to the allocation of rights might also explain why some irregular immigrants succeed to build up fairly decent lives in spite of their unlawful status. As observed by the Immigrant Legal Resource Centre, irregular immigrants are perfectly capable of integrating into existing communities without subverting order, particularly if they “know that their local law enforcement agents are not involved in deportations, they are better integrated, more secure, and more involved in our communities.”<sup>63</sup> Indeed, as will be discussed in Section V, one of Shklar’s key insights is that not all forms of behaviour that resist the regulative powers of the state bring about chaos.

The images of “crisis,” “emergency,” and “threat” loom large in public discourses and policies on illegal migration. But even though the use of naked force, repression, and violence is not fortuitous, it does not have to be necessary. The fight against illegal immigration can be said to bring about a state (or space) of exception that, according to Agamben, reveals the potentiality of the law. But importantly, the potentiality of the law is also the way in which Agamben imagines a way out of the state of exception and sovereign violence. The next section discusses the potentiality of the law so as to enhance our understanding of undoing violence in our activities that target irregular immigrants.

### The (Im)potentiality of the Law

Much of Agamben’s work is relevant to a discussion of irregular immigration. The key concepts of bare life, *homo sacer*, and the state of exception repay consideration in understanding the powers that be. This section expands on a less obvious relevant concept that undergirds Agamben’s work: the potentiality of the law that reflects the idea that the law applies in no longer applying. The potentiality of the law is a double-sided weapon. It describes the suspension of the validity of the law from the force of law in the state of exception and thus sheds light on the passage from law to violence. But the potentiality of the law is also the way in which Agamben imagines a way out of the state of exception. As Jessica Whyte notes, there is a redemptive moment in the potentiality of the law that can be traced back to Agamben’s diagnosis that our time makes possible a new form of life that frees humanity from sovereign violence.<sup>64</sup> Indeed, what is at stake in Agamben’s work is to open up a “*nonstatal and nonjuridical* politics and human life.”<sup>65</sup> It will be argued that law’s potentiality opens up the possibility of a right not to have rights.

It is important to first consider that the concept of the potentiality of the law is closely related to the concept of contingency. Both potentiality and contingency can be articulated in a weak sense and in a strong sense. Whereas the victim-agent perspective plays on the former, it will become clear that only the latter helps us grasp irregular immigration beyond the inclusion-exclusion divide.

Contingency and potentiality in the weak sense are related to the powerlessness of the legal order to ever fully consolidate itself. Every legal order is provisional and questionable in that it fails possibilities to which it relates as possibilities it did not choose.<sup>66</sup> Contingency in the weak sense derives from those failed possibilities and plays on the tensions between the actual order and a possible order, that is, to “an alternative ordering of legal space.”<sup>67</sup>

Contingency thus understood allows for a contestation of the legitimacy of the current legal order in the name of another possible order in which there ought to be place, for example, for the irregular immigrant. Constituent power as the paradigm for political agency and change plays on contingency in the weak sense. It is the presupposition of theories that understand the presence of irregular immigrants within our societies as a radical contestation of the current legal order that transgresses the established boundaries between legality and illegality. For example, drawing on Agamben's notion of potentiality, Ayten Gündoğdu argues that potentiality comes to the fore "in the *sans papiers* invocation of human rights in order to contest the clandestinity imposed on them due to the lack of documentation."<sup>68</sup> Whyte also argues that taking potentiality seriously requires embracing that we are always other than we are and that every attempt to found state power on the representation of a fixed substantive identity is bound to fail.<sup>69</sup>

But contingency and potentiality in the weak sense do not explain, for example, why some irregular immigrants choose to avoid the state instead of challenging the legal order that has excluded them. A more radical sense of potentiality seems required. Whereas the weak sense of potentiality and contingency plays on the tensions between the actual and possible, the strong sense brings into view the tension between the *possible* and the *impossible*, between potentiality and impotentiality. As Agamben argues, to be potential is also always the potential not to: "[I]f potentiality is to have its own consistency and not always immediately disappear into actuality, it is necessary that potentiality be able *not* to pass over into actuality, that potentiality constitutively be the *potentiality not to* (do or be), or as Aristotle says, that potentiality be also im-potentiality (*adynamia*)."<sup>70</sup>

In Agamben there are two manifestations of the (im)potentiality of the law. The first one was already implicit in the previous discussion of the fight against illegal immigration and concerns the state of exception. In the state of exception, the validity of the legal order is suspended to avert the threat of future disorder and lawlessness. In the state of exception, the intricate interplay between *Setzung* and *Erhaltung* is suspended. As suspension is a condition in which we can neither posit nor enforce, accept nor refuse,<sup>71</sup> the law is not made nor enforced but maintains itself in no longer applying. According to Agamben, the sovereign decision to suspend the validity of the law reveals the potentiality of the law, that is, the ability "of the law to maintain itself in its own privation, to apply in no longer applying."<sup>72</sup> Indeed, according to Agamben, potentiality is the "paradigm of sovereignty": "For the sovereign ban, which applies to the exception in no longer applying, corresponds to the structure of potentiality, which maintains itself in relation to actuality precisely through its ability not to be."<sup>73</sup>

So a first manifestation of the potentiality of the law is the violent separation of the force of law from the law. What is implied in the sovereign decision that disorder threatens, and that law must be suspended, is the life that is to be excepted from the protection of the law. The life that is no longer deserving of protection is not without relation to the law: "The relation of exception," he explains, "is a relation of ban. He who has been banned is not, in fact, simply set outside the law and made indifferent to it but rather *abandoned* by it, that is exposed and threatened on the threshold in which life and law, outside and inside become indistinguishable."<sup>74</sup> The life that is excepted from the law is at the same time in a continuous relationship to the power that excepted him insofar as his bare life, stripped of rights, is constantly exposed to the violence or force of law. Through the state of exception the legal order, therefore, maintains a relation with what is outside and ensures that there is no realm of life without relation to law.<sup>75</sup> In this reading, the potentiality of the law allows for the annexation of human life by law. As Agamben puts it, the "empty potentiality of law is so much in force as to become indistinguishable from life."<sup>76</sup>

The victim perspective that predominates in current debates on illegal immigration plays on this. But the victim perspective overlooks the fact that, for Agamben, the state of exception and bare life also contain the possibility of a form-of-life that is indifferent to the law. Drawing again on Benjamin, Agamben argues that form-of-life "can be attested only in places that, under present circumstances, necessarily appear unedifying. In any case, it is a matter of an application of the Benjaminian principle according to which the elements of the final state are hidden in the present, not in the tendencies that appear progressive but in the most insignificant and contemptible."<sup>77</sup>

Indeed, as said, the potentiality of the law harbours a second meaning that is intimately bound up with its first manifestation in the state of exception. In order to fully grasp the second manifestation of law's potentiality, it pays to closely consider the difference between exclusion and exception. This difference is crucial in understanding the displacement of the sovereign ban that makes visible the possibility of a human life that is excepted from the law and set free.

Consider again the argument that constituent power founds or makes the law by promoting its own conception of a just distribution of rights, freedoms, and goods over against other conceptions of a just legal order. Democratic legal order is brought about by the selection of what is worthy of legal protection, and the exclusion of what is discarded as such. In contradistinction to what is included, which is always determined and identified, what is excluded is relatively undetermined. Generally speaking, what is excluded is pushed to the margins where the light does not reach; it is what is veiled in

darkness and what is not articulated with respect to what is inside. If it does get articulated, this articulation comes by way of a contestation of current legal order. As Lindahl argues, “[t]his indeterminacy comes to the fore in cries such as ‘Another [We] is possible.’”<sup>78</sup> What is excluded, in other words, is a latent possibility of Another We. Exclusion and contingency in the weak sense are ontologically bound together.

But whereas what is excluded is relatively undetermined and indifferent (until such time as it manifests itself by claiming Another We), the exception, by contrast, is relatively determined and not indifferent. Law, after all, has explicitly concerned itself with it in the decision not to apply. But as argued above, what is excepted nevertheless maintains itself in a relation to the law, precisely because the law withdraws itself from it and applies to it in no longer applying. What is excepted from law is, therefore, not simply excluded and diverted back to the other side of law but, rather, is included by means of its very exclusion. For this reason, Agamben understands the exception as a kind of “inclusive exclusion.”<sup>79</sup> The exception shatters the distinction between inside and outside. It signals that what is inside and present does not simply coincide with what is selected and included as properly belonging. In the same blow, the exception reminds us that what does not belong cannot be properly located outside. The exception, Agamben says, is the “principle of infinite dislocation”<sup>80</sup> and as such causes the noncoincidence between “inside,” “inclusion,” “belonging,” and “membership.”<sup>81</sup> If what is excluded is a latent possibility that is not yet included or realized, the exception, which is neither included nor excluded, is what persistently slips away. The exception is not simply a failed possibility of legal order that can be claimed by a political agent that seeks to alter that legal order. The exception exposes democratic legal order to a more persistent “not,” a more intrusive negativity. The exception is a possibility that cannot be realized, intimating, that is, a possibility of impossibility.

As such, the exception calls attention to a strong sense of contingency and a redemptive meaning of law’s potentiality. The basic thought here is that a law that applies in no longer applying opens up the possibility of “a life over which sovereignty and right no longer have any hold.”<sup>82</sup> A law that applies in no longer applying can also be taken to maintain itself in its own privation and embraces its own potentiality: “This potentiality maintains itself in relation to actuality in the form of its suspension: it *is capable* of the act in not realizing it, it is sovereignly capable of its own im-potentiality.”<sup>83</sup> Again no law is made; no law is enforced. But this time, law maintains itself not by means of violence but by opening up the possibility of a world that cannot be annexed by law. A legal order that is sovereignly capable of its own impotence carries, to borrow from Jean-Luc Nancy, “in itself of necessity, its own

emptying.”<sup>84</sup> In maintaining itself in its own privation, the legal order still demonstrates its concern for its own being by relating back to its own powerlessness, its own impotentiality. The powerlessness, for example, to get a hold on the irregular immigrant in order to exclude and remove him but also the powerlessness to include and incorporate him; in short, the powerlessness to reaffirm itself and bolster the rule of law.

The first manifestation of law’s potentiality in the state of exception brings into view the figure of *homo sacer* and the *Muselman*—the near-dead inhabitant of the camp as described in *Remnants of Auschwitz*. In the state of exception, the power relation between the state and bare life is total and inescapable. Contemporary debate often makes the irregular immigrant visible through the lens of bare life that is exposed to sovereign violence. But the idea that the irregular immigrant embodies bare life itself in a way cements the vexed political situation of irregular immigrants rather than penetrating the evasive relation between the immigrant and the state. The fact that he lives in a state where he, according to that same state, should not live, not only reveals the violence of an exclusionary sovereign power, but also points to the limits of law to control the lives of its subjects. Emphasizing the second manifestation of the potentiality of law calls us to attend to something that is irreducible and external to law. The challenge is to see the situation of irregular immigrants in its full ambiguity: The irregular immigrant is not simply the embodiment of bare life but also preserves the memory of a life not annexed by law and that is irreducible to a legal status. The fact that he lacks basic rights does not have to mean that he is a victim, per se, or that he should be included under the remit of law. The irregular immigrant can maintain a different stance toward the law that entails having more options than feeling victimized by being excluded from it or needing to be emancipated by becoming part of it. In so doing, the irregular immigrant reminds us that we have a choice as well. We can either view the irregular immigrant as a violator of laws who calls for an uncompromising enforcement of immigration laws in a zero-tolerance policy that penetrates into every aspect of the immigrant’s life—making it impossible for him to find a house, go to work, and go to school—and force him out of our communities. Or we can view the unauthorized immigrant as the mirror image of a law that is sovereignly capable of its own impotence and that neither includes nor excludes but that lets life be in the interstices between inclusion and exclusion. In this sense, the potentiality of the law opens up to the possibility of a right not to have rights.

Obviously, the right not to have rights is not a subjective right that belongs to the sphere of positive law. Rather, it bears similarity with the Franciscan refusal of private property and their vindication of a natural right of use without ownership that Agamben discusses in *The Highest Poverty* as an example

of form-of-life outside the law. Agamben shows that the preoccupation with asserting the legitimacy of the refusal of property rights entangled Franciscan theorists in a purely juridical discussion with the effect that the refusal of ownership was stated in negative terms with respect to the law. The ambiguity appeared in all clarity in “the wilfully paradoxical thesis of Hugh of Digne, according to whom the Franciscans ‘have only this right, not to have any rights.’”<sup>85</sup> Agamben argues that the strategy to assert a life outside the law in relation to the sphere of law explains “both the novelty and the inadequacy of the Franciscan movement - its extraordinary success and its foreseeable failure.”<sup>86</sup> A failure and inadequacy, Agamben’s critique seems to be that the very formulation of the right not to have rights undercuts the movement’s anti-juridical potential. However, unlike Agamben, the paradoxical formulation can also be taken as a cipher of the ban that, like Agamben, also contains the possibility of a form-of-life and new relationship to the law. Put differently, the right not to have rights calls us to attend a new figure that transforms the sovereign ban into something positive in that what is excepted from it appears in a free form. The right not to have rights does not promote a revolutionary power to change and improve the law by including ever more marginalized groups into its network, nor does it seek to ignore or overthrow existing legal order. Rather, it pushes to the extreme the idea that law can never exhaust human life. As Agamben argues with respect to the exception in the closing pages of his *homo sacer* cycle: “While the modern State pretends through the state of exception to include within itself the anomic and anarchic element it cannot do without, it is rather a question of displaying its radical heterogeneity in order to let it act as a purely destituent potential.”<sup>87</sup> A destituent potential neither makes new law nor enforces existing law. From the vantage point of a destituent potential, the irregular immigrant can rather be seen as *playing the law*.

## Judith Shklar’s Defence of Different Degrees of Legalism

Playing the law, the irregular immigrant brings to awareness that there is a choice between violently repressing the law and letting them be. That the one alternative is no less possible than the other implies that a political decision is required. That politics is required no doubt implies a high level of insecurity for the irregular immigrant who is left to the whims of those in power. But that politics is involved can only be an objection if it is assumed that law is isolated from the social context and political realities in which it functions. It is against this assumption of a “pure law” and a “pure politics” that Shklar argues in her critique of a rigid legalism that marks the liberal state.

Admittedly, Shklar is a staunch defender of the very liberal state that Agamben's work seems dedicated to overturning. Her rejection of a legalistic ideology therefore seems more modest than Agamben's evocation of a life that has shed its relation to the law. But Shklar shares with Agamben a concern about the juridification of all human relationships and law's annexation of human life. It is the wager of this section that the idea of different degrees of legalism that Shklar develops illuminates the work of inoperation within a constitutional system that Agamben tries to think so as to render decisions destitute and suspend them.<sup>88</sup> The underenforcement of immigration laws that becomes intelligible with Shklar's core notion of degrees of legalism might well be taken as an example of Agamben's promotion of "a destituent strategy that is neither destructive nor constituent" but that rather "deactivates something and render it inoperative – a power, a function, a human operation – without simply destroying it."<sup>89</sup>

The specific contribution of Shklar's *Legalism. Law, Morals and Political Trials* from 1964 is generally considered to consist in her critical analysis of the postwar international political trials in Tokyo and Nuremberg. The reception of the book seems limited to the field of international criminal law and victimological perspectives on injustice.<sup>90</sup> If the book is discussed in political and legal philosophy, it is mainly in comparison with Arendt's report on the Eichmann trial in Jerusalem.<sup>91</sup> Overall, the reception of the book has been marginal. As Samuel Moyn observes, it never went mainstream and is mainly valued "by an underground cult."<sup>92</sup>

Shklar provides a sharp critique of the ideology of legalism that finds law to be above and beyond politics and that is marked by an excessive rule-oriented thinking. She does not elaborate any connection of her perspective to the phenomenon of irregular immigration. But there is much to be gained by drawing on the resources provided in this perspective to understand the institutional responses to irregular immigration. In addition, Shklar's perspective also allows for a critical analysis of the normative horizon of legal inclusion that undergirds the victim-agent perspective. The implications of her critique of legalism offers a new in-route to understand the relevance of the concept of destituent power to the phenomenon of irregular immigration.

To start with, Shklar does not devalue legalism per se, which she understands as an ethos of rule following.<sup>93</sup> In fact, she argues that legalism is the ethical attitude that undergirds the liberal democratic state she defends. But legalism becomes doubtful if lifted to the level of an ideology. For then it is ignored that different ethical attitudes prevail in society, such as solidarity, neighbourly love, or *caritas* that might be better suited to respond to certain social needs.<sup>94</sup> On Shklar's account, then, legalism can either be a value or an absurdity.<sup>95</sup> That legalism "gives rise to the political climate in which judicial

and other institutions flourish” should not blind us to the fact that its ideology—that predominates both in legal thinking and practice—explains the penetration of law in our society. Similar to Agamben, Shklar seeks to disentangle life from a suffocating law. Her claim that the limits of legalism become readily apparent once issues of race or poverty emerge<sup>96</sup> equally rings true for the issue of irregular immigration. As will be explained below, the three elements that distinctively mark the ideology of legalism make intelligible why in contemporary legal and political theory it is so difficult to understand irregular migration beyond the victim-agent perspective.

The first defining element that makes up legalism is the Aristotelian idea of justice as the predisposition to give each his or her due. Importantly, distributive justice is at the origin of law encompassing all human relationships. As Shklar explains, we cannot possibly expect to agree on who owes what to whom and what we deserve ourselves. Due to this lack of agreement, we cannot escape the feeling that injustice is being done.<sup>97</sup> If we wish to repair this injustice, this requires “the possibility to effectively press social claims and interests.”<sup>98</sup> Due to the unavoidable disagreement as to who owes what to whom and the subsequent claim to a more just distribution and more equal treatment, legalism structures “human relations into the form of claims and counterclaims under established rules.”<sup>99</sup>

That human relations in the ideology of legalism consist of rights and duties that can be claimed and challenged under already accepted rules informs us of a second cardinal feature of legalism: the assumption that, despite disagreement as to their content, rules are just “there” and already accepted.<sup>100</sup> Shklar’s point is not to deny that the law cannot be challenged, be it in the name of a higher law or a different ideology that seeks to bring about a better and more just world or for purposes of a more rigorous, more impartial, and more just application of existing rules. Rather, the core of her argument is that eventually all social struggles and political issues are solved by courtlike procedures.<sup>101</sup> In highly legalistic societies that value rule following, Shklar observes, it is taught in the nursery to demand one’s rights, which is only a “first step in a continuum of social attitudes, of which bring suit in court is merely one expression.”<sup>102</sup> In legalistic societies, laws can certainly be unjust. But if the system fails, law is the means to change and repair it.

The assumption that law is just there as a system of already established and accepted rules brings us to the third and final defining element of legalism. The corollary of taking law for granted is the belief that law is isolated from politics. Legalism not only seeks to preserve law from politics, it also expresses a clear preference by picturing a sharp contrast between legal order and unity on the one hand and political chaos and disorder on the other:

Thus to maintain the contrast between legal order and political chaos and to preserve the former from any taint of the latter it is not just necessary to define law out of politics; an entirely extravagant image of politics as essentially a species of war has to be maintained. Only thus can the sanctioning of rule following as a social policy be kept from compromising associations.<sup>103</sup>

Structuring human relations in terms of claims and counterclaims, the emphasis on rule following and rule acceptance, and the distaste for politics that make up the ideology of legalism, can also be discerned in a variety of theories that advocate the irregular immigrant's right to have rights over against the state's claimed right to select and exclude non-nationals in its own interest. Structuring the dilemma that states and irregular immigrants face in facing each other in terms of claimed rights presupposes that law is the answer to irregular immigration. In this respect Seyla Benhabib provides an illuminating discussion of the relation between states and irregular migrants in *The Rights of Others*. For Benhabib, human rights and moral universalism undergird the normative framework in which to understand and evaluate the immigrant's claim to be admitted to the targeted polity, and the state's counterclaim to select and exclude on its own terms. On the understanding that in Western democracies the people's right to sovereignly rule itself is derived from and directed towards human rights, Benhabib maintains we never merely acts as citizens in our own interest, but are perceptive of the rights of others as well. The unavoidable tension that derives from the rights and obligations we have as citizens on the one hand and the moral obligations we owe to humanity on the other is to be resolved in the moral dialogue between us and the other on the latter's inclusion/exclusion.<sup>104</sup> Benhabib imagines the dialogue as follows:

[I] must be able to show you with good grounds, with grounds that would be acceptable to each of us equally, why you can never join our association and become one of us. These must be grounds that you would accept if you were in my situation and I were in yours. Our reasons must be reciprocally acceptable; they must apply to us equally.<sup>105</sup>

A student of Habermas, Benhabib holds the assumption dear that communicative freedom, which is the immigrant's ability to agree or disagree with us on the basis of reasons, should be at the core of membership regulations. What sharpens the debate on immigration is, of course, the latter possibility: the immigrant's disagreement with our decision not to grant him leave to entry and/or to remain. But Benhabib, although committed to the view that no human is illegal, does not discuss this possibility anywhere. As Aleinikoff rightly observes, if access to membership depends on a dialogue of mutual

reason giving, it is hard to think of any reason that the undocumented immigrant can bring into play to convince the members of the polity that he has a right to be within their polity.<sup>106</sup> What is even more difficult to imagine is the possibility that the irregular immigrant does not even strive for legal inclusion at all. Indeed, the unthought in these theories that structure the issue of migration in terms of the state's claimed right to inclusion and exclusion and the immigrant's counterclaim to a right to have rights is the possibility of state-evading migration. Immigration outside the law is viewed either as an injustice that must be repaired or as inducing total chaos and disorder that needs to be prevented.

Structuring the relationship between people and states in terms of claims and counterclaims, Shklar notes the similarity of law to games. Referring to Hart, who sees games as a paradigm of legal activity, she argues that "[l]aw is thus pictured as a matter of combat, but one in which both 'teams' accept the rules as a matter of self-evidence. Otherwise it would not be a game."<sup>107</sup> Games are rule bound. They have a clear beginning and end, and make explicit who is a player and who is not. Law as a game cannot include the possibility that "one player lifts the chessboard and hurls it at his opponent."<sup>108</sup> Shklar's core insight is that the ideology of legalism cannot come to terms with the possibility that humans can *play* the law and nullify the work of law. If humans can play the law it is because "the individual may not find law the chief source of restraint. It may not even be a clearly distinguishable source of restraint in its effects upon his daily life."<sup>109</sup>

The irregular immigrant who refuses a subject position within the state or the public official who is looking the other way to prevent the irregular immigrant from detention and deportation are the ones who pick up and throw around the chessboard. Unthinkable in the ideology of legalism, their refusal might be better understood as different *degrees of legalism*.<sup>110</sup> According to Shklar, the real and relevant distinction for legal philosophy is not between law and morality or between law and politics that has set the terms for the age-old debate between natural law theory and legal positivism. Rather, the divide is between "legalistic and non-legalistic modes of behavior."<sup>111</sup> Importantly, instead of sharply distinguishing the one from the other, Shklar maintains that it is more fruitful to cast them in the mould of different degrees of legalism. The idea of varying degrees of legalism purports to express that not everything is or can be regulated by the law and that forms of behaviour that play or avoid the law do not necessarily challenge the regulative powers of the law nor bring about chaos and disorder. Moreover, it helps to clarify that law enforcement is not only a matter of preserving the law but is also always a matter of political decision that takes place in varying contexts that require different levels of enforcement. As Shklar explains: "Enforcement is

not a reified entity that has a tangible structure. It is a series of events and actions taking place under various circumstances which alone can define its character."<sup>112</sup>

Shklar's idea of varying degrees of legalism thus offers an in-route for understanding the potentiality of the law in terms of an underenforcement of immigration laws in which the law maintains itself in no longer applying. Accepting the idea of different degrees of legalism is to accept that law is limited in what it can do and is not always the answer to every social need. Shklar's perspective affirms the value of law and acknowledges that human life cannot be reduced to it. It calls us to attend that human relationships are not only structured under the law but also by friendship, love, and solidarity. And these, as Bonnie Honig masterfully argues, might be far better safeguards for a dignified life for irregular immigrants than the law itself.<sup>113</sup>

## Conclusion

The irregular immigrant shatters the dichotomy between inclusion and exclusion. Following Agamben, it can be argued that the irregular immigrant is neither included nor excluded but is rather excepted from legal order. This article has attempted to construct the irregular immigrant as the embodiment of the exception that not only represents bare life exposed to sovereign violence but also marks a radical heterogeneity that cannot be captured by the law. The fact that the irregular immigrant lacks basic rights does not necessarily mean that he is a victim who should be included under the remit of law or that he becomes a political activist for migrant rights. The potentiality of the law suggests that there is a third option in which the irregular immigrant plays the law. Not a brazen breaker of laws who deserves punishment, the irregular immigrant appears at the threshold of legal order where law is sovereignly capable of its own impotence. At the threshold of legal order, this article has discovered a right not to have rights for the irregular immigrant who is not legally included but who does not for that reason have to fear the enforcement of a law that violently haunts him down with a view to arresting, detaining, and deporting him. Nonremoval without inclusion most certainly is an affront to democratic legal order in general and the Arendtian notion of the right to have rights in particular. But the idea of the right not to have rights alters our understanding of the unauthorized presence of immigrants in our societies. Their presence is not simply a consequence of an egregious trespass of immigration laws. Rather their continued unlawful presence is the corollary of a "de facto policy of discretionary enforcement and partial tolerance of unlawful immigration"<sup>114</sup> that is characterized by a "chronic and *intentional* under enforcement of immigration laws."<sup>115</sup>

In spite of a rhetoric to the opposite, this *de facto* policy has been in place for decades in many Western countries and is sometimes even explicitly advocated by the legislative branches of government. In the speech to the nation in 2014 in which then-president Barack Obama announced his immigration reform plans, he emphasized that more than a million immigrants were living illegally in the United States and that it was not realistic that millions of people were going to be deported. To be sure, Obama was not preparing the ground for a general amnesty nor was he arguing for more restrictive policies. The Immigration Reform Plan Obama announced was not about granting citizenship. It was not about conferring immigration status, and it was not even about granting some basic rights or benefits. Instead, Obama made a political promise: “All we’re saying is we’re not going to deport you.”

From the perspective of the potentiality of the law and different degrees of legalism, irregular immigration does not necessarily appear as a crack in the immigration system, and Obama’s promise can be valued as good and commendable. It makes us aware that there is a choice and that this choice is necessarily tainted by politics and preference. If there is a range of degrees in which the law operates as a force of social control, we might look for law-enforcement agencies that are willing to look the other way, for mayors who keep irregular immigrants safe in their cities by not hunting them down, and for citizens who shelter and employ them. Taking the idea of degrees of legalism seriously makes visible that irregular immigrants are not necessarily dependent on the law and its institutions. This implies that, as Honig observes, they “will not have to wait for their time to come, and a good thing too – because it won’t.”<sup>116</sup>

### **Acknowledgments**

This article greatly benefited from the scrupulous comments of two anonymous reviewers. An early draft of this article was presented at the Annual Conference of Philosophy and the Social Sciences in Prague, May 2015. The author wishes to thank James Ingram, Sofia Näsström, Andrew Schaap, Jeffrey Isaac, and the other participants of this conference. Special thanks go to Sarah van Walsum† and Antony Pemberton for their encouraging and useful comments to earlier drafts of this essay.

### **Declaration of Conflicting Interests**

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

### **Funding**

The author(s) received no financial support for the research, authorship, and/or publication of this article.

## Notes

1. Alexander Somek, "From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social-Democratic Imagination," *European Law Journal* 18, no. 5 (2012): 718.
2. See Masja van Meeteren, *Irregular Immigrants in Belgium and the Netherlands. Aspirations and Incorporation* (Amsterdam: Amsterdam University Press, 2014), 25.
3. Linda Bosniak, *The Citizen and the Alien. Dilemmas of Contemporary Membership* (Princeton: Princeton University Press, 2006), 4.
4. See *ibid.*, 5.
5. See *ibid.*, 63.
6. See *ibid.*, 5.
7. See James Scott, *The Art of Not Being Governed. An Anarchist History of Upland Southeast Asia* (New Haven/London: Yale University Press, 2009), 128.
8. See Frank Düvell, "Clandestine Migration in Europe," *Social Science Information* 47, no. 4 (2008): 493.
9. Nicholas P. de Genova, "Spectacles of Migrant 'Illegality': The Scene of Exclusion, the Obscene of Inclusion," *Ethnic and Racial Studies* 36, no. 7 (2013): 1181.
10. The phrase "immigration outside the law" is borrowed from Hioshi Motomura. See Hioshi Motomura, "Immigration Outside the Law," *Columbia Law Review* 108, no. 8 (2008): 2037–97.
11. See Immigrant Legal Resource Center, *Searching for Sanctuary. An Analysis of America's Counties & Their Voluntary Assistance with Deportations* (December 2016), <https://www.ilrc.org/searching-sanctuary>.
12. See Nicholas P. De Genova, "Migrant 'Illegality' and Deportability in Everyday Life," *Annual Review Anthropology* 31, no. 1 (2002): 438.
13. See Hagar Kotef, *Movement and the Ordering of Freedom. On Liberal Governances of Mobility* (Durham/London: Duke University Press, 2015), 27–51.
14. See Thomas Spijkerboer, "The Human Costs of Border Control," *European Journal of Migration and Law* 9, no.1 (2007): 127. See also Andreas Fischer-Lescano, Tillmann Löhr, and Timo Tohidipur, "Border Controls at Sea. Requirements under International Human Rights and Refugee Law," *International Journal of Refugee Law* 21, no. 2 (2009): 257; and Daniel Stageman, "'These Illegals': Personhood, Profit, and the Political Economy in Federal-Local Immigration Enforcement Partnerships," in *Outside Justice: Immigration and the Criminalizing Impact of Changing Policy and Practice*, eds. David Brotherton, Daniel Stageman, and Shirley Leyro (New York: Springer, 2013), 22.
15. Walter Benjamin, "Critique of Violence," in *Selected Writings, Volume 1: 1913-1926*, trans. and eds. Marcus Bullock and Micael W. Jennings (Cambridge/London: The Belknap Press of Harvard University Press, 1996), 239 (translation slightly altered).

16. See Jessica Whyte, *Catastrophe and Redemption. The Political Thought of Giorgio Agamben* (New York: SUNY Press, 2013), 59.
17. See Giorgio Agamben, *The Use of Bodies*, trans. Adam Kotsko (Stanford: Stanford University Press, 2016), 80.
18. Compare *ibid.*, 236.
19. See *ibid.*, 278.
20. Judith Shklar, *Legalism: Law, Morals, and Political Trial* (Cambridge/London: Harvard University Press, 1986), viii.
21. *Ibid.*, 62; italics added.
22. See *ibid.*, 63.
23. Linda Bosniak, "Being Here: Ethical Territoriality and the Rights of Immigrants," *Theoretical Inquiries in Law* 8, no. 2 (2007): 392.
24. See Elizabeth Cohen, "Reconsidering U.S. Immigration Reform. The Temporal Principle of Citizenship," *Perspectives on Politics* 9, no. 3 (2011): 579–80.
25. Bosniak, "Being Here," 393.
26. See Didier Fassin, "The Biopolitics of Otherness: Undocumented Foreigners and Racial Discrimination in French Public Debate," *Anthropology Today* 17, no. 1 (2001): 5. See also Didier Fassin, "Compassion and Repression: the Moral Economy of Immigration Policies in France," *Cultural Anthropology* 20, no. 3 (2005): 371; and Willem Schinkel, "Illegal Aliens and the State, or: Bare Bodies vs the Zombies," *International Sociology* 24, no. 6 (2009): 787.
27. De Genova, "Spectacles of Migrant 'Illegality,'" 1189.
28. Etienne Balibar as cited in *ibid.*, 1192.
29. *Ibid.*, 1193.
30. See Alexander Betts, "Towards a 'Soft Law' Framework for the Protection of Vulnerable Irregular Immigrants," *International Journal of Refugee Law* 22, no. 2 (2010): 209–36.
31. See Etienne Balibar, "Violence, Power, Democracy - Outlines of a Topography of Cruelty. Citizenship and Civility in the Era of Global Violence," *Constellations. An International Journal of Critical and Democratic Theory* 8, no. 1 (2001): 18. See also Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004); Cristina Beltrán, "Going Public: Hannah Arendt, Immigrant Action, and the Space of Appearance," *Political Theory* 37, no. 5 (2009): 595–622; Monika Krause, "Undocumented Migrants: An Arendtian Perspective," *European Journal of Political Theory* 7 (2008): 331–48; Alison Kesby, *The Right to Have Rights: Citizenship, Humanity and International Law* (Oxford: Oxford University Press, 2012); and Ayten Gündoğdu, *Rightlessness in an Age of Rights: Hannah Arendt and Contemporary Struggles of Migrants* (Oxford: Oxford University Press, 2015).
32. Krause, "Undocumented Migrants," 336.
33. See Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton/Oxford: Princeton University Press, 2009), 117.
34. See Hannah Arendt, *The Origins of Totalitarianism* (San Diego/New York/London: Harcourt Inc., 1969), 301.

35. See Benhabib, *The Rights of Others*, 123–24.
36. Balibar, “Outlines of a Topography of Cruelty,” 17.
37. Masja Van Meeteren, Godfried Engelsbergen, and Marion Van San, “Striving for a Better Position: Aspirations and the Role for Cultural, Economic, and Social Capital for Irregular Immigrants in Belgium,” *International Migration Review* 43, no. 4, (2009): 897. See also Frank Düvell & Bill Jordan, *Irregular Migration: The Dilemmas of Transnational Mobility* (Cheltenham: Edward Elgar, 2002).
38. Van Meeteren, Engelsbergen, and Van San, “Striving for a Better Position,” 896.
39. See Van Meeteren, *Irregular Immigrants*, 81–96.
40. See Düvell, “Clandestine Migration,” 492–93.
41. See *ibid.*, 486.
42. John Torpey, *The Invention of the Passport. Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000), 22.
43. See Kotef, *Movement and the Ordering of Freedom*, 67.
44. See Scott, *The Art of Not Being Governed*, 24.
45. See Agamben, *The Use of Bodies*, 266.
46. See *ibid.*, 5.
47. See Hans K. Lindahl, “Border Crossings by Immigrants: Legality, Illegality and Alegality,” *Res Publica* 14, no. 2 (2008): 120.
48. *Ibid.*, 127.
49. See Haro F. Van Panhuys, *The Rôle of Nationality in International Law* (Leiden: Sijthoff’s Uitgeversmaatschappij, 1959), 44.
50. Paul Weis, *Nationality and Statelessness in International Law* (Alphen a/d Rijn: Sijthoff & Noordhoff International Publishers, 1979), 53.
51. See Gregor Noll, “Why Human Rights Fail to Protect Undocumented Migrants,” *European Journal of Migration and Law* 12, no. 2 (2010): 204.
52. See Motomura, “Immigration Outside the Law,” 2092.
53. *Ibid.*, 2087.
54. *Ibid.*, 2079.
55. Stageman, “These Illegals,” 241.
56. Balibar, “Topography of Cruelty,” 16.
57. Benjamin, “Critique of Violence,” 243.
58. See Giorgio Agamben, *The State of Exception*, trans. Kevin Attell (Chicago/London: The University of Chicago Press, 2005), 36.
59. Hans Lindahl, “Finding Place for Freedom, Security and Justice. The European Union’s Claim to Territorial Unity,” *European Law Review* 29, no. 1 (2004): 483.
60. See Bosniak, *The Citizen and the Alien*, 37–38.
61. *Ibid.*, 54.
62. See Bosniak, “Being Here,” 393.
63. Immigration Legal Resource Center, “National Map of Local Entanglement with ICE,” p. 2, <https://www.ilrc.org/local-enforcement-map>.
64. See Whyte, *Catastrophe and Redemption*, 3.
65. Giorgio Agamben, *Means without End: Notes on Politics*, trans. Vincenzo Binetti and Cesare Casarino (Minneapolis/London: University of Minnesota Press, 2000), 112.

66. See also Lindahl, "Border Crossings by Immigrants," 126.
67. Hans Lindahl, "A-Legality: Postnationalism and the Question of Legal Boundaries," *The Modern Law Review* 73, no. 1 (2010): 43.
68. Ayten Gündoğdu, "Potentialities of Human Rights: Agamben and the Narrative of Fated Necessity," *Contemporary Political Theory* 11, no. 1 (2012): 17.
69. See Whyte, *Catastrophe and Redemption*, 112.
70. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), 45.
71. See Giorgio Agamben, *Potentialities: Collected Essays in Philosophy*, ed. and trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1999), 257.
72. Agamben, *Homo Sacer*, 28.
73. *Ibid.*, 46.
74. *Ibid.*, 28.
75. See also Whyte, *Catastrophe and Redemption*, 51.
76. Agamben, *Homo Sacer*, 53.
77. Agamben, *The Use of Bodies*, 227.
78. Lindahl, "Border Crossings by Immigrants," 128.
79. Agamben, *Homo Sacer*, 21.
80. *Ibid.*, 19, 20.
81. See *ibid.*, 24.
82. Agamben, *Means without End*, 115.
83. Agamben, *Homo Sacer*, 45.
84. Jean Luc Nancy, *The Creation of the World: Or Globalization*, trans. Francois Raffoul and David Pettigrew (Albany: State University of New York Press, 2007), 107.
85. Giorgio Agamben, *The Use of Bodies*, 80.
86. Giorgio Agamben, *The Highest Poverty: Monastic Rules and Form-of-Life*, trans. Adam Kotsko (Stanford: Stanford University Press, 2013), 109.
87. Agamben, *The Use of Bodies*, 279.
88. See *ibid.*, 278.
89. *Ibid.*, 273.
90. See, for example, Antony Pemberton, *Victimology with a Hammer: The Challenge of Victimology* (Tilburg: Tilburg University Press, 2015), 42–48.
91. See Samantha Ashenden and Andreas Hess, "Totalitarianism and Justice: Hannah Arendt's and Judith N. Shklar's Political Reflections in Historical and Theoretical Perspective," *Economy and Society* 45, no. 4 (2016): 505–529.
92. Samuel Moyn, "Judith Shklar versus the International Criminal Court," *Humanity* 4, no. 3 (2013): 493.
93. See Shklar, *Legalism*, 1.
94. See Judith Shklar, "In Defense of Legalism," *Journal of Legal Education* 19, no. 1 (1966): 51–52.
95. *Ibid.*, p. 51.
96. See *ibid.*, p. 56.
97. See Shklar, *Legalism*, 116–17.

98. Ibid., 119.
99. Ibid., 10.
100. See *ibid.*, 104.
101. See *ibid.*, 118.
102. Ibid., 58–59.
103. Ibid., 122.
104. See Benhabib, *The Rights of Others*, 14–15.
105. Ibid., 138.
106. See Alexander Aleinikoff, “Comments on the Rights of Others,” *European Journal of Political Theory* 6, no. 4 (2007): 426.
107. Shklar, *Legalism*, 105.
108. Ibid., 105.
109. Ibid., 55.
110. Shklar, “In Defense of Legalism,” 55.
111. Shklar, *Legalism*, 55.
112. Ibid., 53–54.
113. See Honig, *Emergency Politics*, 128–29.
114. Motomura, “Immigration Outside the Law,” 2015.
115. Ibid., 2049.
116. Honig, *Emergency Politics*, 131.

### Author Biography

**Nanda Oudejans** teaches philosophy of law at Utrecht University and is affiliated to the Montaigne Centre for Rule of Law and Administration of Justice. She has worked as a senior advisor on statelessness at the Dutch Ministry of Security and Justice. Her dissertation, *Asylum. A Philosophical Inquiry into the International Protection of Refugees* (Tilburg University, 2011), was in the field of legal and political philosophy. Oudejans’s publications on refugees and migration include “The Right to Have Rights as the Right to Asylum” (*Netherlands Journal of Legal Philosophy*, 2014) and “Protecting the EU External Borders and the Prohibition of Refoulement” (*Melbourne Journal of International Law*, 2019, coauthored with Rijken and Pijnenburg).