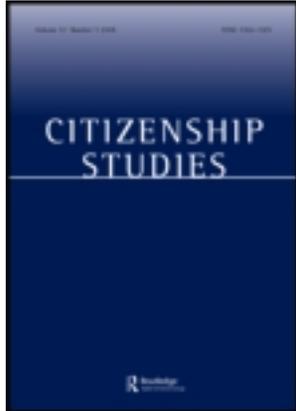


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### When the exception becomes the rule: borders, sovereignty, and citizenship

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## When the exception becomes the rule: borders, sovereignty, and citizenship

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Borders are a unique political space, in which both sovereignty and citizenship are performed by individuals and sovereigns. Using the work of Agamben and Foucault, this article examines how decisions made at the border alienate each and every traveler crossing the frontier, not simply the ‘*sans papiers*’ or refugees. The governmentality at play in the border examination relies on an embedded confessionary complex and the ‘neurotic citizen’, as well as structures of identity, documentation, and data management. The state border is a permanent state of exception that clearly demonstrates the importance of biopolitics to the smooth operation of sovereign power.

**Keywords:** borders; state of exception; citizenship; sovereignty

### Introduction

Citizenship exists through its alterity and strategies, and technologies of citizenship are about the dialogical constitution of these identities via *games of conduct*. (Isin 2002, p. 36, emphasis added)

Giorgio Agamben’s provocative description of the ‘state of exception’ has provided fertile territory for critical scholarship on the meanings of torture, the accrual of emergency powers to the executive, and the camp. He argues that ‘The state of exception, which was essentially a temporary suspension of the rule of law on the basis of a factual state of danger, is now given a permanent spatial arrangement, which as such nevertheless remains outside the normal order’ (1995, p. 169). The border is a permanent state of exception, which makes the ‘normal’ biopolitical control of government inside the territorial frontier of the state possible. This paper argues that governmental procedures of examination at the border institutionalize a continual state of exception at the frontier that in turn performs the spatio-legal fiction of territorial sovereign and the sovereign subject in each admission/exclusion decision. This argument is made not from extraordinary cases or even from the consideration of the adjudication of asylum claims, but rather from the mundane, ordinary evidence of the everyday passage of millions of normal travelers across the border. Rather than view the border as a simple line indicating the limits of sovereign jurisdiction, this article adopts the performative view of borders. Following Butler’s analysis of the performativity of identity, Wonders argues that ‘although states attempt to choreograph national borders, often in response to global pressures, these state policies have little meaning until they are “performed” by state agents or by border crossers . . . Border agents and state bureaucrats play a critical role in determining where, how, and on whose body a border will be performed’ (2006, p. 66). There are lessons to be learned about the politics of the sovereign state and citizenship in general from the specific and longstanding example of the



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institutionalization of the state of exception at the borders. Isin provocatively argues that the dominant motif of contemporary state policies is anxiety, and the production of the neurotic citizen (2004). I want to push this analysis of the circulation of anxiety and neurosis further, and to suggest that the (momentary) reduction of all travelers to *homo sacer* as they traverse the border can provide the ground for an empathetic, cosmopolitan ethic – based not on citizenship, but precisely on alienation.

Though not a specific topic of their work, the border touches on a number of interests for both Foucault and Agamben, notably, security, law, sovereignty, population, and territory. In terms of policing the population, the border is crucial both in terms of constituting the population through the decision to admit or exclude and in terms of measuring and manipulating the quantities and qualities of the population through citizenship, immigration, and refugee claim adjudication. In addition, though unaddressed by either author, the border also represents the distinction between inside and outside, domestic politics and international anarchy (Walker 1993). Foucault argued strongly for a multifaceted analysis of power: ‘sovereign and disciplinary mechanisms are two absolutely integral constituents of the general mechanisms of power in our society’ (1980, p. 108). The border represents a critical case of both of these kinds of power: the sovereign power to ban or exclude; the disciplinary effect of the border examination on sovereign subjects. Prozorov argues that the twin concepts of sovereignty and governmentality ‘are permanently at work in mutual deconstruction’ (2005, p. 82). As Honig argues, the dynamic play of power/law is continually in flux: ‘the to and fro between administrative and judicial governance is most visible in exceptional settings that are least domesticated (emergency, national security, immigration politics, border policing, colonial governance)’ (2005, p. 211). **In particular, this bordered state of exception is not a suspension of the law (where there is no law), but rather the expression of the threshold of law. Wherever the border is located, however it is administered, the border has been and continues to be an ongoing state of exception.** Though borders may be at airports, rail stations, cruise line terminals, prescreening points, or the physical frontier, the process I am concerned remains the same: an individual requests entry to a country, a claim which is adjudicated by a government official and granted or refused. This is not to say that crossing the biometric border of the US-VISIT program is experientially similar to crossing a remote post between two developing countries. Rather, it is to say that the spatio-legal performance of that claim, adjudication, and admission/expulsion is a ‘deep structure’ of sovereign politics. Crossings are experienced differently by the ‘kinetic elite’ and ‘deportation class’ (Walters 2002) – but the fundamental sovereign performance remains similar. Foucault does not examine the border specifically, but it is plain that mobility and in particular international mobility is an axis of deviance equal to others he examines: sexual, criminal, psychological and epistemological deviance. While Packer argues that ‘the governance of mobility then needs to be understood in terms of this *new* problematic, mobility as immanent threat’ (2006, p. 381, emphasis added), I would argue that mobility has long been understood as a source of threat (Torpey 2000).

This article will gloss Agamben’s discussion of the state of exception, highlight the importance of discretion to the border examination, and connect these two concepts through an analysis of border performativity. I conclude by suggesting that a cosmopolitan ethics of alienation can be recovered from this analysis.

### Agamben and state of exception

Provocatively argued by Agamben in *Homo Sacer* and *The State of Exception*, the foundational power of the sovereign is the ability to decide if the law applies to a situation or if the law is held in abeyance due to an emergency or crisis. Since the sovereign power to decide is itself prior to

and outside of the law, Agamben is anxious about the expansion of executive powers since the inauguration of the 'war on terror'. The state of exception is a 'zone of indistinction, between inside and outside' where there is no difference between law and force, wherein individuals are subject to the law but not subjects in the law (1995, p. 181). The use of emergency powers and the use of 'all means necessary' in the war on terror support Agamben's claim that 'the state of exception tends increasingly to appear as the dominant paradigm of government in contemporary politics' (2005, p. 2). But, in this article, I will not be examining the role of the USA PATRIOT Act, Guantanamo Bay, Camp X-Ray, Abu Ghraib prison, the 'black sites' in Eastern Europe, extraordinary rendition, domestic surveillance programs, or other clear indications of the rise of executive power. Nor will I be engaging the 'abject spaces' 'in which the intention is to treat people neither as subjects (of discipline) nor objects (of elimination) but as those without presence, without existence . . . ' (Isin and Rygiel 2007, p. 184). Instead, I argue that the state of exception is always already fundamental to sovereign power, and in particular that the sovereign ability to define and limit the population is a longstanding institution of the state, intimately tied into the notion of sovereign territoriality and the imaginary of borders implied in this conception of bounded space. The state of exception at the border is not new. The border is a permanent state of exception. Agamben gestures towards this: 'the question of borders becomes all the more urgent' (2005, p. 1). But, rather than the metaphorical border between normal and exceptional, I argue that we take the sovereign border seriously. The concretization of this kind of bordering practice is concurrent with the modern, bureaucratic state, demonstrated for this case in the development of the contemporary passport, visa, and frontier formalities that make up the global mobility regime (2003).

Agamben analyzes the founding social contract as an example of the sovereign power of decision. The decision to enter into a sovereign compact cannot take place within that contract – the state of nature is prior to normal politics. Rather than reason or deliberation, relations in the state of nature are determined by fear and cunning. Agamben claims that the foundation of the *polis* in Hobbes' *Leviathan* reveals this essential political arrangement: in the first social contract, the sovereign does not renounce all rights, rather all other citizens renounce their rights to everything (1995, p. 106). All the citizens agree to give up their rights and allow only the sovereign to retain the natural right to everything – but the sovereign does not promise anything in return about how the contract will be defined or upheld. And yet, to naturalize and make seamless the claim of the sovereign to rule, in order to have a clear contract with a population, that 'decision' to define the sovereign must be obscured and hidden from view. If this decision were not seen to be arbitrary and external, prior to the law, every administrative decision becomes an issue of the founding contract.

We see this conundrum illustrated in debates over Québec sovereignty. A province of Canada with a distinct, Francophone culture, since long before Federation in 1867 or the repatriation of the Constitution in 1982, Quebecers have insisted on its status as a 'nation' that in turn demands sovereignty. Prime Minister Pierre Trudeau, during the negotiations for the constitution, said, 'si le Canada est divisible, le Québec doit être aussi divisible' [if Canada is divisible, so too should Quebec be divisible].<sup>1</sup> In the more recent 1995 referendum, some public figures argued that each municipality and community must hold a referendum, and that First Nations claims must be separately adjudicated. When the essential social contract to create Canada from different provinces including Québec is questioned, the founding contract of Québec is questioned, and the founding contract of every constituent community is also put under examination (Manning 2003, p. 123). I would add that this is not only connected to ideas about community and homogeneity (and the ability of the sovereign to create, police, and protect that identity), but also about the ability of the sovereign to inscribe a founding moment which shuts down the past and renders primary decision out of politics (a politics of forgetting).<sup>2</sup>

All communities are essentially undemocratic, arbitrary, and in this sense pre-political. It is the performance of the sovereign as protector against the collapse of all community that hides the inherent violence in this primary contract. As Agamben avers, ‘sovereign is . . . the guardian who prevents the undecidable threshold between violence and right, nature and language, from coming to light’ (2000, p. 113).

The decision to allow entry into the political community, and to become a citizen-subject of the sovereign, must be a decision without recourse, without appeal, and without debate. Recourse, appeal, debate gives lie to the claim to fixity and stability, upon which the claim to sovereign power is built. The population cannot be counted democratically. In its application to the border, we would say that the citizen gives up his/her right to freely enter the state while the sovereign does not renounce his/her right to ban individuals from entry into the state. It is true that the sovereign does not accept any obligation to accept (even) citizens back into the territory – especially if the sovereign decides that the citizen constitutes a danger to the sovereign. Higgins is clear: ‘there is no general right for an alien to obtain entry into another country. If he is escaping persecution, he has the right to seek asylum; but no state is obliged to give it to him . . . it is wholly exceptional – and contrary to international law – for a resident national to be refused re-entry to his country on political grounds. But clearly that does not dispose of the matter’ (1973, p. 344). In each of these cases, it is the administrative, discretionary determination of status that precedes any legal claim.

In the concrete case of Canadian border regulations, a Canadian citizen has a right of entry only ever after that citizenship status is determined by a Canada Border Services Agency (CBSA) Officer. At the actual place of the border, the determination of status precedes the grant of ‘leave to enter’. This administrative, discretionary decision is precisely at the exceptional threshold of law: even within the over-coded manuals of port-of-entry border examinations, discretion, ‘tact’, ‘common sense’, ‘belief’ and ‘experience’ are set as the standard for the officer’s ‘reasonable’ belief (CIC 2006, 2007). The legal standard for inadmissibility at the Canadian border is weaker than similar civil or criminal standards: “‘reasonable grounds’ means more than mere suspicion but less than the civil test of balance of probabilities. It is a lower threshold than the criminal standard of “beyond a reasonable doubt”. It is a *bona fide* belief in a serious possibility based on credible evidence’ (CIC 2006, p. 6). At the border, the ‘serious possibility’ of threat to Canada’s security enjoys a lower threshold of belief than administrative, civil, or criminal tests. Before that status has been accorded, the CBSA officer may ‘arrest and detain without a warrant, a foreign national, other than a protected person . . . if the officer is not satisfied of the identity of the foreign national in the course of any procedure under the Act’ (CIC 2007, pp. 12–13). Until that identity is certified and the claim of citizenship judged satisfactory, every border crosser is at the threshold of law.

The sovereign contract is redrawn each time a citizen requests entry to a state, either his/her own state or another state: ‘the foundation is not an event achieved once and for all but is continually operative in the civil state in the form of the sovereign decision’ (Agamben 2000, p. 109). Recall the passport, which the state also accepts no obligation to issue even to citizens and in particular to citizens which it considers dangerous.<sup>3</sup> The issuance of a passport themselves as the marker of citizenship has often also been a discretionary matter. The role of Ruth B. Shipley, Chief of the Passport Office, in the refusal of American passport to individuals consider that she personally a security risk is well known (Higgins and Leps 1998). Passports are issued under sovereign prerogative, but the monopoly of administrative discretion within the passport office is well documented (Kutler 1982, p. 97). The inscription on the passport itself is a statement by a representative of the citizen’s sovereign ‘to request and require in the name of the [insert sovereign] all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him/her every assistance and protection of which he/she may stand in

need' (Salter 2003, pp. 3–5). Entry into a foreign state is representative of the interaction of two sovereigns – not the traveler and any sovereign. In essence, entry into another the jurisdiction of one's own or another sovereign territory is a reaffirmation that the sovereign is the seat of authority (and not the citizen). This is the raw decision to admit or expel an individual at the border takes place both inside a normal bureaucracy and outside the normal condition of politics. Butler's argument that the state of exception is normalized through the governmentality of bureaucracy is particularly persuasive for everyday decisions in the issuance of passports and at the border, as well as sites such as Guantanamo Bay (2004).

Part of the design of the modern and neoliberal state in all its apparatus is to hide the functioning of raw power and the internal surveillant gaze of the state – but the border renders this potential more visible. The possibility of refusal and exile at the border makes clear the bordering practices of the state. We must ask the sovereign for admittance and in doing so confess all manner of personal information – including economic, social, and psychological factors for our travel and our return home. Even if we have a previous contract, or can claim that we are subject to no other contract and thus suppliant ourselves, there is no right of entry (only a right to ask). 'Whether a passport entitles the holder to claim a right of entry under *international law* is debated' (Higgins, p. 346) – and there is no external appeal of the sovereign decision. The law is always at its limit at the border, because the decision of entrance to the territory and correspondent membership in the community is the equivalent to force. There is not an absence of regulation or procedures at the border; as Johns argues from another context, 'the interactions of the [border crosser] and [border guard] are experienced as almost entirely pre-codified by the dictates of legal status' (2005, p. 627), however the particular outcome is at the threshold of administrative, public, and international law. As Schmitt argues, 'the essence of the state's sovereignty [is] not the monopoly to coerce or rule, but the monopoly to decide' (1985, p. 13). Despite the over-coding of the border in terms of customs, immigration, and entry regulations, the mission of border security itself is the preservation of the threshold between law and anarchy.

Agamben links the state of exception with the decision to include or exclude from the law. In the construction of the inside/outside, state/anarchy universe of political meaning, the decision to admit to the safe haven of the domestic or expel into the dangerous world is precisely a decision to include the subject to the law or exclude the subject from the law. Agamben says, 'the relation of the exception is the 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' (1995, p. 28).<sup>4</sup> In his writings on the ban, Agamben describes the figure of the exile as 'more original than the Schmittian opposition between friend and enemy, fellow citizen and foreigner. The "estrarity" of the person held in the sovereign ban is more intimate and primary than the extraneousness of the foreigner' (1995, p. 110). This is the crux of the utility of Agamben for the study of the border: the frontier examination which polices, subjectifies, performs both the sovereign and the citizen to him/herself, is more primary than the political relation of the citizen/foreigner. More than the exclusion of the other, the primary political relationship is the anxiety, the uncertainty, the constant uncertainty that pertains at the border because there is no inside: there is no right of entry. The citizen is undone and the sovereign to ban reinscribed at every border, in every decision. Johns makes an interesting argument that the structure of regulations, procedures, and statements surrounding Guantánamo Bay are, in effect, an attempt 'to construct a series of normatively airtight spaces in which the prospect of agonizing over an impossible decision may be delimited and, wherever possible, avoided' (2005, p. 631). This model of an over-determination of the exceptional through the presentation of multiple legal frameworks expresses the kernel of exception at the border: sovereign decisionism that is expressed through a bureaucratic governmentality of discretion.

There are two weaknesses in Agamben's analysis that the case of the border resolves. First, Agamben fails to recognize that the border is a place where this sovereign power to decide is exercised every day – that every decision of the border guards is a decision to ban or to include in the law. Whether those decisions are guided by bureaucratic procedures or administrative 'thought-work', they are at the threshold of law (Heyman 2001).<sup>5</sup> The legal recognition of administrative discretion is the bureaucratic fig leaf of this executive power. Honig argues that there is an intimate connection between the exception and the increase of discretion: 'emergency politics occasion the creation of new administrative powers and the redistribution of existing powers of governance from procedural processes to discretionary decision, from the more proceduralized domains of courts to the more discretionary domains of administrative agency' (2005, p. 210). This discretionary admit/expel decision is entirely at the limits of law.

At the border, however, the exception becomes the rule. At the border, the Australian government conduct is mostly ungoverned by statute and, therefore, almost ungovernable by the courts. Our willingness to accept this situation reflects our understanding of the 'state' as our *only* defence against 'the state of nature'. (Taylor 2005, pp. 75–76)

No law or set of policies can possibly describe all the individuals or cases that can be admitted or grounds for expulsion. This is not to dispute the contention that the front-line workers perceive themselves to be constrained by risk categories and security algorithms (Amoore 2006, Bigo and Guild 2006). There are also bureaucratic and political pressures on the way that individual decisions are made (Gilboy 1995). Rather, it is to say these policies, procedures, and practices rely on *discretion*: the moment of interpretation of a personal narrative by an agent of the state (Bouchard and Carroll 2002). This is explained further in the next section on the performativity of borders. There is no way to adjudicate the truth claims of the traveler that can be described: the border guard relies on his/her judgment and experience (which has been supported by court decisions in US, Canada, and Australia).<sup>6</sup> While this is called administrative discretion within the bureaucracy and public administration literature, it is a decision that is not grounded in fact, but solely in the power to decide. The decision of exile is irreducible – it is the decision that the sovereign owes that individual no hospitality, no protection, no law, only violence. And all travelers pass through that moment of sovereign isolation, when, during the border examination, we perform both our citizenship and the state's sovereignty.

Second, worse than simply neglecting the border as a productive example, Agamben imagines away the space of the border in this formulation of the spacelessness of the limit of the community. The limit is not simply the metaphorical 'wolf-man', and this distracts from the material practices of exclusion at the border. The border is a space of indistinction in which citizens, foreigners, exiles, refugee and asylum seekers are all held in an extra-political nowhere while the sovereign exercises a decision. I want to argue strongly that the space of decision is not 'no-place'. At the Canadian border, it is not the accordance of status, or even the stamp in the passport, but rather the spatial reality of the border zone that confers admission: 'the Regulations provide that an examination is not final until the person has left the controlled area of a port of entry... if the person's passport has been stamped or even if the person has been granted permanent resident status, this decision is not final and may be revisited as long as the person has not left the controlled area of the port of entry' (CIC 2007, p. 15). Borders, even when they are virtual or delocalized, take place within a particular space. Löfgren uses the term 'pedagogy of space' to direct our attention to

the ways in which the borderscape is arranged against a background of monumental buildings or nondescript barracks with endless corridors, warning signs and surveillance techniques, the manners in which movements across borders are dramatized into rituals of passage, stages and shops, and finally the actual choreographing of bodies and their modes of movements. (1999, p. 25)

There is something unique about the border, which marks it as different from the 'borderland'. As Rumford argues, 'the networking of borders and their diffusion throughout society have led to a renewed importance for the land border, at least in particular instances' (2006, p. 158). When the power to admit/exclude is exercised, that place becomes the limit of politics. While I am not denying that dispersed and preemptive techniques of border policing are important (Walters 2006, Salter 2007, Wilson and Weber 2008), I would argue that the state of exception at the border exists only at that examination (indeed wherever and whenever that examination takes place). Thus, we must take Balibar's injunction seriously that borders are 'polysemic' – that they are experienced differently by different classes of people (2002, p. 81). However, it is my core argument that the moment of examination/alienation is inherent in the border. It is true that the examination is experienced differently: some who are secure in their nationality, status, or social position may feel no terror and merely irritation – or might be amused in fooling the border guards. In some senses the degree to which the border is polysemic is the degree to which the nature of the border crossing is recognized as exceptional: refugees and asylum claimants need no explanation of the border as a state of exception, whereas those 'kinetic elite' that pass across borders easily may need more.<sup>7</sup> However, my argument is that all who cross frontier pass through this biopolitical filter: the moment of decision. It is important to analyze the moment of decision at the border, even as the border and the decision are becoming more diffuse and dispersed. In the next section, I want to engage this nexus of decision and borders.

### Where is the border/decision?

It is important to place borders within their spatio-historical context because of two prevailing hypotheses about the 'bounding of the bordering process' prevalent in both critical geography and international relations theories. Newman argues, 'It is the process of bordering, rather than the border line per se, that has universal significance in the ordering of society. All borders share a common function to the extent that they include some and exclude many others' (2003, p. 15). This focus on the bordering process resists both the vapid suggestions that borders are disappearing or that borders are hardening or 'rebordering'. But the largesse of Newman's claim, productive as it may be for border studies in casting a wide net to all bordering processes, fails to differentiate between sovereign borders and other types of borders. Exclusion from a cultural, economic, or social space may have important and political consequences. For this reason, it is important to differentiate borders and checkpoints (such as those in the Occupied Palestinian Territories): **borders represent a legal admission by a sovereign into the domain of his/her authority and protection;** checkpoints are not (Parsons and Salter forthcoming).<sup>8</sup> I would argue that the exclusion from the protection of the sovereign state (including the failure to protect refugees), is of a different quality. Entry is a moment of crisis – a moment of absolute surrender to the sovereign power of the state, within a particular governmental machinery of border, customs, and immigration officers. The decision by the state is fundamentally an admission into the legal contract of the state, which differentiates it from other kinds of decisions (such as admission to a club, a corporation, an organization, or a space). Or, to put it another way, all decisions to exclude are political, but the decision to exclude from the state is the domain of sovereign politics.

Similarly, Balibar has argued that 'the border is everywhere' (2002, p. 80).<sup>9</sup> But border functions occur at specific sites. It is analytically important to separate processes of social sorting, surveillance, self-policing from the bordering process of suppliance in the face an admission/expulsion decision (Lyon 2002). In other words, I want to retain something specific about the border – and in particular the border inspection (see Lugo 2000, Salter 2006). At the border, there is no ethic of hospitality which precedes the examination of citizenship, unlike at other institutions. This is an important supplement to Foucauldian analyses of institutions – even

if the function of the clinic, the prison, the military hospital, is control, there is an ethic of care or and ethic of hospitality in whose name those managerial/punitive functions are administered. At the clinic, there is an ethic of care that precedes the citizenship test; in the courts, there is an ethic of truth that precedes the citizenship test; at the prison, there is an ethic of rehabilitation that coincides with punishment. The only ‘ethic’ which governs the border is the Machiavellian ‘virtue’ of security – which is a narrative of sovereign protection that obscures the running state of exception at the border.<sup>10</sup>

In short, I agree with Rumford that debordering/rebordering is the wrong dichotomy: displacement of border functions in time and space (in other words, delocalization and preemption) is the wrong set of metaphors (2006, pp. 157–159). What we should be distinguishing is the *kind* of decision that occurs at the border. This is why, though supportive of the main point, I want to take a slightly different tack than Doty concerning the dispersion of decisions along the Mexico–US border. Doty argues that contemporary analyses of Agamben and Schmitt have focused too exclusively on high politics, rather than the complicated, material circumstances of border politics. She argues:

There have been many dispersed decisions that have had real consequences for the lives of those migrants who are affected by them. These ‘smaller’ decisions are just as much ‘the political’ as are the more attention-generating decisions the discipline of international relations generally judges worthy of scholarly attention. (2007, p. 124)

Focusing on ‘civilian border patrol groups’, Doty argues that their ‘decision to patrol the Mexico–U.S border constitutes a decision in the Schmittian sense [because] the participants arguably *do* perceive themselves as involved in a life and death struggle’ (p. 125, emphasis in original). This is a productive and useful intervention in the debates in securitization theory concerning the construction of existential threats and ‘the possibility that securitization practices may originate from actors/agents who are not necessarily strategically positioned politically or institutionally’ (p. 130). This is an important point, well made. Building on Doty’s contention that the moments/spaces of decision are not simply at the border and not simply with the border guards, I agree that border is delocalized as is political agency. However, there remains value in examining the ghost of sovereignty, which also has very material consequences.

There is a difference between a political decision – such as that by citizen groups to patrol the border themselves, which does involve definitions of security, perceptions of friend/enemy, self/other, and the condition of ‘emergency’ – and a sovereign decision to exclude from the protection of the law. These decisions by the citizen groups operate within a general condition of abandonment. Both sovereign states (Mexico and US) have abandoned those migrants – and it is this abandonment that grants the decisions of those dispersed actors greater consequence. The citizen border patrol groups are acting politically, and acting as security actors, but they are not acting as sovereigns. To take the inverse argument, even those civil society groups that act to protect migrants by placing water in the deserts – though the effect of their actions is the protection of life – cannot be called sovereign actors, since they cannot claim the authority to invoke law. Thus, it is important in my view to differentiate border and identity politics from the spatio-legal processes of admission/exclusion that make up the state of exception at the border. This is why I focus on the routinization of exceptional politics in the judgment and (re)performance of identity, citizenship, and law at the border and not exceptional moments such as the adjudication of the abject, the *homo sacer*, the *sans papiers*, the asylum seeker.

### **Border performativity, sovereignty, citizen**

Performance of sovereignty as protector from anarchy. Following Ashley and Walker (1990) and Edkins *et al.* more recently (1999), sovereignty and subjectivity cannot be examined in isolation.

Contemporary political subjectivity is expressed primarily in relation to sovereignty, with all of the attendant limits and exclusions that entails. Persram insists that ‘the state is truly one of the most powerful instruments for mediating social and political processes, for constituting “concrete” individuals as subjects, the very subjects through whom the state – even the one of “power politics” – come to be identified as subject’ (Persram 1999, p. 172). In the border interrogation, what is a natural right – mobility – is presented as deviant, as abnormal, as requiring explanation. What is invented – state sovereignty – becomes unquestionable. The right of mobility of is always mediated through the intentions of the traveler, discretion, and the nation. As Hindess argues:

citizenship is an important component of a dispersed system of governing a large, culturally diverse, and interdependent world population and that it operates by dividing that population into a series of discrete subpopulations and setting them against each other. Within that larger population, citizenship serves to facilitate or promote certain kinds of movement and interaction between its members and to inhibit or penalize others. (2000, p. 1495)

As I have argued elsewhere (Salter 2006, 2007), mobility, and particularly international mobility, represents a fundamental challenge to the presumed equivalence between security–territory–population on which the promise of sovereignty relies. The mobility of population has to be depoliticized by the state – interpreted to be a sign of individual freedom rather than resistance or rejection of the state contract (thus the paranoia about the monopoly on the legitimate means of *identification*). Routine performance of the border (on both citizens and foreigners) creates the subject and the sovereign through the submission of the traveler and the recognition of the sovereign. As Parsley argues, ‘as a judgment is performed on an interviewee, so the border is augured into being’ (2003, p. 55). Wonders has defined a key term:

border performativity takes as its theoretical starting point the idea that borders are not only geographically constituted, but are socially constructed via the performance of various state actors in an elaborate dance with ordinary people who seek freedom of movement and identification. (2006, p. 64)

The bureaucracies of admission/exclusion are characterized by administrative decisions, appeals that operate totally within system, ‘rights’ denied due to lack of citizenship, standing, or extraterritoriality. Again, one need not examine the case of Mahar Arar, who was subject to an American ‘extraordinary rendition’ that placed him in a Syrian jail for two years.<sup>11</sup> The system of visa issuance practices, forward placement of border officials in foreign countries, carrier sanctions, immigration requirements, and the rules and regulations regarding the decision of admission/exclusion construct a field in which every traveler must identify and justify themselves. As above, this is because a successful discursive connection between the practices of border/control and the ethic of security (Walters 2006). Pratt supports the contention that ‘judicial noninterference is particularly pronounced in the area of immigration decision making... in practice, the courts have long been loathe to interfere with administrative decision making in all issues respecting immigration, national security, public order, and defence’ (2005, pp. 60–61). In short, border policing creates securitized subjects.

As I have argued elsewhere, a dominant mood of this border examination is anxiety. The border operates (to the extent it operates) as a confessional machine for producing the categories of insider/outsider, citizen/foreigner. Isin makes the argument that:

the figure that also occupies a central role in our times is the neurotic citizen who governs itself through responses to anxieties and uncertainties... [and] is incited to make social and cultural investments to eliminate various dangers by calibrating its conduct on the basis of anxieties and insecurities rather than rationalities. (2004, p. 223)

The figure of the ‘neurotic citizen’ was in fact a response by Isin to ‘the anxiety about the Other that has been articulating itself through various discourses about the border and which

has gathered strength and reassembled itself since the events named after a month and a day' (p. 231). I would argue that, not only have these discourses of anxiety and neurosis been dominant since 9/11, but also these affective politics have been in play to some degree or other since the consolidation of the territorial-sovereign state. The pressure to produce a truth for a representative of the sovereign – a truth which only that representative may authorize – has been essential to the construction of borders.

There is something pressing here about the connection of psychoanalytic and confessional dynamics that has gone unexplored. Foucault states that 'we are a confessional society' (Salter 2006) and points to the ethic of producing truth to others as a primary arrangement of contemporary power/knowledge structures. Elden sketches a planned Foucauldian genealogy of the confession which was never realized (2005). Foucault's work on sexuality, the clinic, and the production of politico-medical authority are all informed by psychoanalysis. There is a very productive interface, indicated by Isin, Elden, Butler, and Papastergiadis, between psychoanalytic conceptions of power and identity and modern state apparatus of sovereignty and citizenship. The latter combines Agamben's analysis of the refugee with psychoanalytic readings of the abject to put forward an extremely provocative 'invasion complex' (2006, p. 431). However, in this article, I want to build distinctions between Isin's circulation of neurosis and Foucault's disciplinary society. Foucault argues that within disciplinary societies, there is a pressure to appear normal, which is internalized in the panopticon, and that confession is the outward 'technology of the self' that verifies our normalization to the agents of power. What Isin adds to this understanding is something we see in later Foucault: abnormality becomes the dominant mode of subjectivity through which power operates. In Foucault, power and discipline normalize. In Isin, power makes use of abnormality, takes neurosis as a resource. Bigo argues that 'the "management of unease" in contemporary policing, is a symptom of the lowering of the level of the acceptability of the other' (2001, p. 111). What is important about this management is precisely that the unease, the fear of the self as potential other, then makes possible the decision at the border. There is also a marshalling of pleasure as a political resource in the correct presentation of authentic documents, and the telling of an acceptable story. Fast-tracks, frequent-traveler streams, and biometric borders are all presented as conveniences, privileges, and rewards for docility and obedience. Thus, we have an affective and effective dialectic of pleasure and anxiety at the border post.

Sovereignty is performed dialogically and reconstituted through the continual expression of decisions about its constitutive members: citizen/foreign. Within the dominant imaginary of the nation-state, the ability to define admission/exclusion of both citizens and foreigners depends upon the presumption that mobility is an occasion for normality/abnormality that requires adjudication. Just as criminal guilt or sexual deviance is defined externally by experts, so too at the border the moral quality of mobility is decided by external 'experts' of citizenship, security, and hospitality. **The border inspection is a primary institution of citizenship which contains, disciplines, and normalizes the passage from the anarchic, dangerous international to the political, safe domestic.** As Foucault argues, 'the examination is the technique by which power, instead of emitting the signs of its potency, instead of imposing its mark on its subjects, holds them in a mechanism of objectification . . .' (1977, p. 187). In doing so, the border examination represents a site where citizens, foreigners, and refugees come to recognize themselves and the sovereign power of the state to define them.

Sovereignty/dominion and citizenship/foreigner are the dominant tropes of this performance. It is not the foreigner who is the constitutive outside of the sovereign population, but rather it is the examination of the citizen at the border which is the supplement to sovereign order, the constitutive outside (Salter 2006, p. 171). The foreign and the refugee are simply surplus categories. The decision to exclude the foreigner or refugee is political in the sense that it admits

to or expels from the polis. But this foreign decision is secondary, derivative of the primary ability/force to admit or expel *citizens* from the polis. The cases of Padilla and Hamdi in America or Khadr in Canada are citizens that have been excised from the community – despite their legitimate claim to citizenship. It is the decision to admit or expel the citizen – who already has a claim on the sovereign – which is the real limit of the population and thus the performance of sovereignty. The performance of sovereignty comes in the need for the citizen to repeatedly ask for recognition from the sovereign. This is mindful of Nyers' argument that all agents of the state may present the potential for deportation for the non-status migrant (2003), and consequently that the recognition of citizen/sovereign occurs not exclusively at the border but rather in the kind of admission/exclusion decision. Thus, the decision of the sovereign to constitute a population is 'simultaneously inside the space of order as the source of its foundational principles and outside it' (Prozorov 2005, p. 87): the citizen is always already and never fully inscribed as part of the population.

In the moment of examination, we are made 'strangers to ourselves' – not exclusively in the psychoanalytic sense, but in the political sense (Kristeva 1991). More precisely, we are all strangers to the sovereign. As multiple writers have termed it, 'we are all exiles' – or to use Schmittian terminology, at the border we are all enemies. At the border, each claimant is a stranger:

every new arrival, therefore, raises a profound and inescapable question, that of the provenance of the native (so-called sovereign subject at home with and within herself) as well as the provenance of the stranger. The strangers, by his or her very nature, is outside the settled modes of questioning, the received understandings of truth and identity, and the sovereign will and law of which the sovereign subject is comprised. (Dillon 1999, pp. 120–121)

And, yet, every new arrival is a stranger, even the identity/knowledge granted by admission is temporary, arbitrary, and able to be reversed. The state may choose to revisit its friend/enemy identification at any point. The sovereign retains the absolute right to refuse any claim of citizenship and belonging, and exercises that right at each and every border examination. Balibar makes this point in terms of converging politics of 'anti-citizenship' (p. 78). In this, I disagree with Dillon: the foundation of the political community is not solely in the enemy, but in the potential for defining any subject as potential enemy – in this sense, a friend (the status of being a citizen) is only ever temporary. In this, I want to distinguish my argument from that of the usual critical argument: I am not saying that the 'other' is always already part of the self, and thus the performance of sovereign identity concerns the continual representation of a false homogeneity. Rather, I am saying that the sovereign subject, the citizen, is always available to the potential for exclusion – and it is the representation of this threat that is crucial to the smooth operation of sovereignty. In order for the sovereign state to maintain its monopoly on spatio-temporal authority, as argued most persuasively by Walker (1993), it is not enough to 'defend' against the potential danger of the international anarchy. The state must always be ready attack its own citizens. One can see this in the cases of Padillia, Hamdi, and Arar. The state is not only forever defining the enemy thereby defining the friend, but rather the sovereign subject is always defined as a potential enemy and a temporary friend permitting the 'peace' of the state to exist within a general condition of war. This allows us to escape the binary self/other theorizations of much critical thought to understand the radical uncertainty of all identity or citizenship claims grounded in capricious sovereignty.

Experientially, this is demonstrated in the 'pedagogy of space and the ritualization of borders... they are black holes, attracting a lot of energy and anxiety' (Löfgren 1999, p. 6). He continues to stress the importance of 'the actual crossing as a critical movement of identity-fixation, the conflation of the national and the personal' (p. 25). This anxiety/identity is crucial to understanding the performance of sovereign power and the construction of mobility as deviance

(Salter 2003, 2006, Isin 2004, Epstein 2007). Part of the reason that this anxiety is institutionalized in the border is that there is no way of adjudicating the truth claims of the entrant that can be described.<sup>12</sup> This works in two ways. First, we find that the bureaucracies of admission/expulsion attempt to systematize this discretionary power. As a consequence, ‘the encounter with “arrival” is never a fresh encounter; it contains the institutional reference to those who have arrived before’; in essence, a kind of decision has ‘always already made/calculated in advance and never made at all’ (Parsley 2003, pp. 65, 75). Thus, the essentially discretionary, sovereign decision to admit/exclude is folded into administrative functions, which obscure and elide the power at work/play.<sup>13</sup> The state of exception where law and force are indivisible remains the heart of the examination – and even if there are policies, procedures, and risk algorithms that structure the representation of those decisions, the interpretation of the claimant’s narrative is entirely discretionary.

Second, there is no way for the border bureaucracies to investigate the truth claims of travelers. Foucault has examined in detail the ways in which confession comes to play a crucial role in modern governmentality (1997, p. 84, Salter 2006, pp. 57–60). What occurs within this 30 second examination? Identity, documents, and narrative must align – according to the expectations of the border agent. In the performance of sovereign power, we play the roles of ‘safe’ travelers. We tell the story of ourselves which represents ourselves as docile, obedient subjects (Curry 2004). We know that border agents share their experience amongst themselves to generate risk profiles, in some cases supported by statistical data compiled by border agencies. Given the time and bureaucratic, border agents must rely on ‘gut’ feelings. The monopoly of administrative discretion hides the sovereign power of decision. Gilboy describes the ways that narratives affect decisions: ‘discretion exists in part because of the vagueness in the law specifying the particular grounds for exclusion. This discretion is expanded because of case disposition choices as well as difficulties in fact finding. For instance, what type of evidence and how much is necessary to conclude . . . ?’ (1995, pp. 276–277). Passports and visas are based on birth certificates, which are entirely unconnected to other documents, except through the discretion of passport and visa issuers. Each of these documents is supported by other documents, all of which situate us within the apparatus of the state: the birth certificate, the pardon, the social insurance card, the driver’s license, the proof of employment, and so on. All of those correlations between body, dossier, and identity are ‘verified’ by an agent of the state. In short, nation/identity is discretionary all the way down. As Lugo argues, ‘at the border, at the inspection station, there is no “third element”, no tolerance for ambiguity: you either have papers or you do not; you either convince the INS officer that you are “American” or you do not. At the border inspection state, there is not much room for the ambiguity of the borderlands – cultural or otherwise’ (2000, p. 358). Again, this is not to say that there is not profit and pleasure in evading the truth machine of the border examination. There is always resistance inherent in every structure of power – every mechanism of oppression requires our collaboration. The crucial critical act is to demonstrate the politics inherent in this border examination, which we have largely forgotten.

We have come to accept the state of exception which underpins the border examination. We forget the crisis of identity until we are faced with the inspection – an examination for which there is no answer, no truth, no story that is complete, no history that is convincing. As Amoore argues,

the border becomes a condition of being that is always in the act of becoming, it is never entirely crossed but appears instead as a constant demand for proof of status and legitimacy . . . The establishment of verifiable identity at the biometric border thus becomes a condition of being, in the sense of living within a particular society or way of life, if not indeed a condition of life itself. (2006, p. 348)

Answers at the border are acts of performative citizenship. There are any number of normalizing moments in the life of a political subject – but few combing the governmental power of bureaucratic normalization with the sovereign power to ban. And, in part, it is the triumph of the sovereign that border anxiety is seen as mundane and ordinary in everyday life.

Let me go further to say that ‘the border’ is a better metaphor of contemporary political life than ‘the camp’. Agamben describes “*zones d’attentes*” in France international airports in which foreigners asking for refugee status are detained will then all equally be camps’ (1995, p. 174). The denationalization of American or Canadian citizens, for example, has not happened exclusively in Afghanistan or Guantanamo Bay, but in the carceral complex of military prisons and floating trials in America itself. In Agamben’s analysis of the camp, the *homo sacer* or *musulman* is created in the camp. But the decision, the sovereign decision to send an individual to the camp – where he/she loses their humanity – is made elsewhere (Burleigh and Wipperman 1991, Isin and Rygiel 2007). I would argue that the racial courts represent a border, although in this case it is a border which looks inwards. The racial court, however, is precisely an example of how the state might always expel the citizen, that ‘friend’ is not a permanent category. The border is not a camp – an interior exception to the state which makes the smooth operation of sovereignty possible elsewhere. Rather, the border is a permanent state of exception which renders the limit of sovereign power both visible and invisible. While this is legally codified in the complex of citizenship, immigration, and refugee laws, there are bureaucratic fig leaves which conceal the raw power of the sovereign to ‘denaturalize’ citizens.

### **Borders of life/death**

We have already seen this ‘spillover securitization’ border policing to encompass new areas of interrogation such as travel, health, religion, and international finance. What practical strategies and tactics of resistance can we propose? In short, I argue that the politicization of the border is always already clear to the marginal, the excluded, the asylum seeker. Tactically, what is needed is a way to politicize the border for the ‘kinetic elite’, precisely those for whom the border does not seem problematic. What Enns and Agamben miss about the border is that *all* travelers pass through a moment of disappearance and examination when citizenship (being a friend) becomes *our* burden to prove. Might we not infer some awareness of this in Agamben’s refusal to enter the US as long as ‘biopolitical tattooing’ is a requisite? Crossing the border is to become a refugee (*a sans-papiers* if or until those documents, narratives, and claims to status are authenticated) – if only for a moment, if only in the imagination. Agamben argues that ‘only in a world in which the spaces of states have been thus perforated and topologically deformed and in which the citizen has been able to recognize the refugee that he or she is – only in such a world is the political survival of humankind today thinkable’ (2000, p. 26). It is to take seriously the translocality of the modern identity and the spaces in between modern sovereign states without the romanticism of Augé who wishes to imagine away state power in supermodern non-spaces (1995). This anxiety may be productive, prompting not only an empathetic consideration of the position of the refugee or exile but also a critical awareness of the raw power of the sovereign to ban anyone from the political community. Within postcolonialism, there are some scholars who privilege this position of exile: Said, Bhabha, and Iyer quite differently paint the contrapuntal position of the exile as somehow super-critical. As Said argues, ‘the state of never being fully adjusted, always feeling outside the chatty, familiar world inhabited by natives . . . Exile for the intellectual in this metaphysical sense is restlessness, movement, constantly being unsettled, and unsettling others’ (1994, p. 39). Without going this far to argue that the exile and the subject of sovereign power are the same, I would argue that there is a critical moment as we cross the border that draws all traveler’s attention to the irreducible power of the sovereign to ban. In that moment when the decision to ban or to grant a subjected subjectivity,

we are all made objects of the decision of the sovereign and there may be some value in the recognition of our shared position as objects of sovereign power. Spivak responds to an Air Canada employee when refused a flight: 'Don't say "we can't accept you", that sounds very bad from one human to another; next time you should say "the regulations are against it"; then we are both victims' (1990, p. 65). As we prepare to perform our belonging, we are both 'strangers to ourselves' and strangers to our sovereign.<sup>14</sup> Travelers are reduced from citizens, foreigners, and refugees, with complex identities and claims to belonging into objects of danger or benefit. As Kristeva suggests, 'the foreigner is within me, hence we are all foreigners. If I am a foreigner, there are no foreigners' (1991, p. 192). It could be that this cold experience of the international space of power without law might provide a moment of sympathy or solidarity with those for whom this position is permanent and question the basis on which those community boundaries are maintained.

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### Notes

1. This quote has also been attributed to Prime Minister Jean Chretien during the 1995 referendum, and indeed constituted an important part of the Liberal, 'pro-federalism' campaign against sovereignty association.
2. Walker has urged a historical investigation of the origins of sovereignty (1993, p. 163) – but my argument takes a slightly different path. This is not to claim that sovereignty is a 'permanent principle of political order', and not a materially, historically constructed set of practices and discourses.
3. See Balibar's work on 'anticitizenship' (2002, p. 78) and William Walters' current work on 'anti' policies (2006).
4. Bigo disagrees with Agamben's description of the ban (2007).
5. My thanks to the reviewer who suggested that the border is not so much 'outside' the law, but rather at the law's threshold.
6. See the *Fang* case, discussed in Dauvergne: 'Thus a court can conclude that the migration legislation had negated the common law requirements of natural justice and of procedural fairness in some dealings with non-citizens and that it did not accord with international commitments that Australia had made, and that it was nonetheless valid' (1999, p. 27)
7. 'Kinetic elite' is used by Bauman, Adey, Koolhaus, and others.
8. Vivienne Jabri points out that checkpoints in failed or failing states may have a similar function.
9. This reflection was prompted by discussions with William Walters and Peter Nyers.
10. Following Walker (1993, Chapter 2).
11. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006).
12. It is interesting to note the degree to which anxiety is corporealized in ways that would be completely familiar to Foucault (both as 'gut' feelings and common sense, and as technologies of confession). Biometric technologies are used to measure the body so that officers can judge the story – in terms of lie detectors, body-heat sensors, and so on.
13. I am grateful for comments by Andreas Behnke, Didier Bigo, and Elspeth Guild.
14. This is not to say that empathy alone is sufficient for an ethics of action or resistance, but it is necessary for such a program.

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